# DECISION ON ADMISSIBILITY AND MERITS
**(delivered on 8 March 2002)**

**Cases nos. CH/00/5134, CH/00/5136, CH/00/5138 and CH/01/7668**

**Muhamed ŠKRGIĆ, Raska ĆERIMOVIĆ, Fikret MURTIĆ and THE ASSOCIATION FOR THE PROTECTION OF UNEMPLOYED SHAREHOLDERS OF AGROKOMERC**

**against**

**THE FEDERATION OF BOSNIA AND HERZEGOVINA**

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 8 February 2002 with the following members present:

Mr. Giovanni GRASSO, President
Mr. Viktor MASENKO-MAVI, Vice-President
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Vitomir POPOVIĆ
Mr. Mato TADIĆ

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

Having considered the aforementioned applications introduced pursuant to Article VIII(1) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

Adopts the following decision pursuant to Articles VIII(2) and XI of the Agreement and Rules 52, 57 and 58 of the Chamber's Rules of Procedure:

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## I. INTRODUCTION

1. These cases concern the applicants' failed attempts to have their status and rights recognised as shareholders of the Agrokomerc joint stock company–Agrokomerc dd ("Agrokomerc").

2. The applicants Muhamed Škrgić, Raska Ćerimović and Fikret Murtić and the members of the Association for the Protection of Unemployed Shareholders of Agrokomerc ("the Shareholders Association") were employed by Agrokomerc in Velika Kladuša. All of them claim to own private shares in Agrokomerc which they allegedly acquired during the period of 1991 through 1994 under the so-called "Marković scheme" for privatisation. Primarily the applicants allege that they acquired such shares as partial payments for salaries, although they also allege to have acquired shares by other means.

3. The applicants complain that they have been denied their rights to take part in the decision-making process of Agrokomerc and to exercise other shareholder rights from 1994 until the present day. In addition, on 17 July 1997 the Assembly of the Una-Sana Canton issued a decision that "establishes the list of enterprises in the area of the Una-Sana Canton over which the powers and obligations of the owner on the basis of state capital are performed by the Government of the Canton". Agrokomerc was included on that list. The applicants seem to interpret this decision as stripping them of their shareholder rights and declaring Agrokomerc to be exclusively state owned. Based upon a conclusion of approval by the Agency of Privatisation of the Federation of Bosnia and Herzegovina, on 7 March 2001 Revsar, a company for auditing and business consulting in Sarajevo, issued a procedural decision on the results of its renewed audit regarding the previously transformed ownership of Agrokomerc. In the renewed audit, Revsar concluded that registered internal share capital in Agrokomerc was not properly and effectively formed; therefore, Revsar completely cancelled it on behalf of state capital in the auditing process. The applicants challenge the validity of both of these decisions, and any other official acts aiming to deprive them of their rights as shareholders of Agrokomerc.

4. These cases raise issues under Article 1 of Protocol No. 1 to the European Convention on Human Rights ("the Convention") and Article 6 of the Convention.

## II. PROCEEDINGS BEFORE THE CHAMBER

5. The applicants Muhamed Škrgić, Raska Ćerimović and Fikret Murtić have lodged identical applications. They were signed on 14 June 2000 and forwarded to the Chamber by the Human Rights Department of the Organisation for Security and Co-operation in Europe ("OSCE") on 20 June 2000.

6. These three initial applicants requested that the Chamber order the respondent Party, as a provisional measure, to suspend all transactions concerning alienation and transfer of property of Agrokomerc. In particular, the applicants requested that the Chamber prohibit implementation of the contract on establishing the new company "Perutnina – Agrokomerc" until the general assembly of shareholders of Agrokomerc issues a decision in favour of such joint venture.

7. On 22 June 2000 the Acting President of the Second Panel issued an order requiring the Federation of Bosnia and Herzegovina ("the Federation" or the respondent Party), as a provisional measure, to refrain from taking any steps aimed at changing the present status of "Agrokomerc", in particular the registration of the new company "Perutnina – Agrokomerc". Under the terms of this order, it remained in force for 90 days.

8. On 23 June 2000 the three initial applications were transmitted to the respondent Party for its observations. On the same day, the Agent of the Federation confirmed the receipt of the order for provisional measures and stated that the Cantonal Court of Bihać would not proceed with the registration of the new company.

9. On 15 September 2000 the Chamber issued an order to maintain in force the order for provisional measures of 22 June 2000 until it renders its final decision in the cases.

10. On 8 March 2001 the Chamber decided to appoint a three-person expert team to assist it with technical aspects of the cases. Accordingly, on 17 April 2001 the Chamber commissioned Prof. Dragoljub Stojanov, an economist from the Faculty of Economic Science at Sarajevo University, Prof. Milić Simić, a lawyer from the same Faculty, and Prof. Jozo Sović from the Chamber of Commerce of Bosnia and Herzegovina, to investigate the cases and to prepare a written opinion on specific questions regarding the privatisation process of Agrokomerc. The Chamber issued an order for provisional measures authorising the three appointed experts to have access to all documents necessary for the requested report.

11. On the same day, 8 March 2001, the Chamber decided to invite the OSCE to participate as *amicus curiae* in the proceedings.

12. On 12 March 2001 the Chamber issued another order for provisional measures, aimed at suspending "the adaptation and realisation of the so-called process of small-scale privatisation of objects of 'Agrokomerc' [...] Velika Kladuša to buyers and to prevent any other steps aimed at changing the ownership of any and all business premises or real or movable property other than articles produced during an industrial, biological, chemical or manufacturing process with a view to their sale for commercial profit".

13. On 9 April 2001 the OSCE joined the proceedings before the Chamber as *amicus curiae* and submitted a report on its findings on the cases.

14. On 6 June 2001 the Chamber received the written opinion of the three appointed experts and decided, on 8 June 2001, to hold a public hearing in the cases in September 2001.

15. On 3 July 2001 the Shareholders Association, representing its members who are 3,024 unemployed shareholders of Agrokomerc, submitted an application to the Chamber. The Chamber decided on 4 September 2001 to transmit the application to the respondent Party.

16. On 5 September 2001 the Chamber conducted a public hearing in the cases of the three initial applicants. The experts, Messrs. Jozo Sović and Milić Simić, answered questions put to them by the members of the Panel and representatives of the respondent Party. The following witnesses, proposed by the applicants, were heard during the public hearing: Prof. Gojko Stanić and Prof. Viljem Rupnik, former members of the management board of Agrokomerc, and Ibrahim Mujić, the first chairman of the general assembly of shareholders. Messrs. Gojko Stanić and Viljem Rupnik submitted additional written documents at the public hearing.

17. On 6 September 2001 the Chamber continued the public hearing and heard the following witnesses, proposed by the applicants: Ms. Senada Murtić-Pajazetović, Chief Accountant of Agrokomerc from 1989 through 1994; Mr. Hajrudin Alijanović, Finance Officer of Agrokomerc until 1994; and Mr. Hasib Huremagić, Inspector of the Social Audit Service (Institute for Payment Transactions). Ms. Senada Murtić-Pajazetović and Mr. Hasib Huremagić submitted additional written documents at the public hearing. Thereafter, the following witnesses, proposed by the respondent Party, were heard: Mr. Damir Sokolović, from Revsar; Ms. Enisa Dervišević, from the Financial Police; Mr. Enes Demirović, the former President of the Association for the Protection of the Rights of Shareholders and a current employee of Agrokomerc; and Mr. Besim Mujčin, a lawyer of Agrokomerc. Members of the Panel, the applicants, and representatives of the respondent Party each had an opportunity to question the witnesses.

18. The respondent Party submitted observations on 21 July, 24 July, 28 September and 29 September 2000, 9 April, 21 May, 25 May, 1 June, 28 June, 23 July, 31 July, 24 September, 8 October and 23 October 2001. These observations were transmitted to the applicants.

19. The applicants submitted observations on 15 August 2000, 4 January, 26 February, 28 February, 7 March, 19 April, 23 May, 30 May, 4 June, 15 June, 27 June, 16 July, 27 September, 31 October, and 12 and 19 November 2001. These observations were transmitted to the respondent Party.

20. The Chamber considered the admissibility and merits of the applications on 6 July, 12 October, 9 December 2000, and 10 and 12 January, 9 February, 8 and 9 March, 6 April, 9 May,

8 June, 3 July, 4 and 8 September and 12 October 2001. The Chamber further considered the cases on 7 November, 4, 5, and 6 December 2001, 11 January and 7 and 8 February 2002. It decided to join the applications on 7 November 2001, and it adopted the present decision on 8 February 2002.

## III. FACTS

### A. Particular facts of the cases

21. In the pre-war Federal Socialist Republic of Yugoslavia ("SFRY"), Agrokomerc was the largest producer of agricultural goods in the country. The company, which is based in Velika Kladuša in north-western Bosnia and Herzegovina, was previously headed by its director Fikret Abdić.

22. In 1987, Fikret Abdić was tried for embezzlement at the company. It emerged that he had abused a bank bond system by issuing promissory notes endorsed with the official stamp of the local bank without the backing of any collateral. This scheme threatened to collapse the economy of north-western Bosnia and Herzegovina. Mr. Abdić was convicted of this criminal offence and sentenced to a prison term. In the 1990 elections in Bosnia and Herzegovina, Mr. Abdić re-emerged and won more votes than any other candidate. On 27 September 1993, he proclaimed the "Autonomous Province of Western Bosnia", which included the town of Velika Kladuša. Another armed conflict commenced in Bosnia and Herzegovina, this time between the predominantly Bosniak forces of this region and the Army of the Republic of Bosnia and Herzegovina. This armed conflict resulted in the loss of thousands of lives. In August 1994, the Fifth Corps of the Army of the Republic of Bosnia and Herzegovina took over the town of Velika Kladuša from the armed forces of the "Autonomous Province of Western Bosnia".

#### 1. Transformation of Agrokomerc under the Marković regulations

23. In 1990 Prime Minister Ante Marković proposed legislation in SFRY under which socially-owned companies could be privatised through the sale of internal shares, under favourable conditions, to employees, former employees, and pensioners of the company. These regulations remained effective for the period of 1990 through 1994/1995 (see paragraphs 148-151, 153 below).

24. In July 1991 the Workers' Council of Agrokomerc held public hearings announcing and discussing with employees its intention to transform the company from a socially-owned company into a joint stock company under the applicable Marković regulations. At a session held on 27 August 1991, the Workers' Council accepted the decision on issuance of internal shares and the decision on the organisation and change of status, thereby deciding to change the ownership structure of Agrokomerc and taking the requisite legal actions to commence the transformation process.

25. Under the accepted privatisation programme, employees received one-third of their salaries in cash (in an amount roughly equal to their previous salaries before the ownership transformation), one-third was allocated toward instalment payments of the registered but unpaid internal shares in the company, and the remaining third was given to them in discounts or vouchers for Agrokomerc products. It appears from the documentation in the case files that one third of the salaries of the applicants were allocated to internal shares throughout the period of August 1991 to 1994.

26. On 31 October 1991, Court of Associated Labour of Bihać registered Agrokomerc as a joint stock company of mixed ownership, consisting of 53% internal shares (privately owned shares of employees and pensioners) and 47% state capital. The Court made this registration based upon required documentation, including the two decisions of the Workers' Council issued on 27 August 1991 and the list of registered internal shareholders.

27. On 3 February 1992 the first general assembly of shareholders was held. At this meeting, the shareholders appointed the management board of the Agrokomerc.

28. On 2 April 1992, based upon the balance sheet of Agrokomerc of 31 December 1991, the management board issued three decisions which they applied to increase the internal share capital

of the company. The first decision entered into the business books compensation for employees for reduced salaries paid during the period of 1 August 1987 to 31 July 1991 by converting those compensation claims into internal shares amounting to 120,880,000 *Deutsche Mark* ("DEM"). The second decision entered the difference between accrued and distributed salaries for the period of 1 January 1992 to 31 December 1992 amounting to 3,046,657 DEM. The third decision entered the value of inventory goods of Agrokomerc as of 31 March 1992 as payment for internal shares amounting to 243,000,000 DEM.

29. On 30 March 1993, the management board issued another decision to distribute profits in favour of share capital in the amount of 1,166,468 DEM based upon the annual balance sheet of 1992. According to that decision, the realised profits of Agrokomerc for year-end 1992 (amounting to a total of 3,031,363 DEM) were distributed in proportion to the capital structure of the company at that time, which was indicated to be 61.5% state capital and 38.5% share capital. The profits distributed to share capital were based upon the proportion of paid shares in the company. Of the profits distributed to share capital, 50% was allocated for the payment of internal shares and the remainder was invested in reserves and expansion of resources of the company. As a result of these decisions by the management board and after their application to the capital structure of the company, the internal share capital amounted to 80.9% of the total capital of Agrokomerc.

### 2. Governance of Agrokomerc after the armed conflict

30. On 21 August 1994, after the Fifth Corps of the Army of the Republic of Bosnia and Herzegovina regained control over Velika Kladuša, a group of people representing the Government of the Republic of Bosnia and Herzegovina, assisted by the police, entered the premises of Agrokomerc by force and appointed themselves as the heads of the company. These persons managed the company until 1997. Since 21 August 1994, the applicants have been denied the possibility to take part in the management and decision-making process of the company, and they have not participated in the distribution of profits of the company.

31. On 7 August 1995 the three initial applicants, along with the other members of the Shareholders Association, had their employment suspended and they were placed on a waiting list for potential future employment by the new management board of Agrokomerc. Since that time, they have not been offered the opportunity to resume their employment positions at Agrokomerc.

32. Since 1995, numerous transactions of Agrokomerc's property have occurred, including auctions, tender sales, a so-called small-scale privatisation of objects and premises of the company in 1999 and 2000, and other kinds of property transfers.

33. On 4 March 1996, the management board of Agrokomerc issued a decision that the book value of the company's capital, which was stated as a lump sum on the balance sheet of 31 December 1995, should be divided proportionally into 80% state capital and 20% share capital.

34. On 17 July 1997, the Assembly of the Una-Sana Canton issued a decision in accordance with the Law on Enterprises. That "decision establishes the list of enterprises in the area of the Una-Sana Canton over which the powers and obligations of the owner on the basis of state capital are performed by the Government of the Canton". Agrokomerc was included on that list as one company in the field of food industry. In their applications, the applicants inaccurately interpret this decision as "nationalising" their company by "placing Agrokomerc on a list of state companies according to which the Government of the Canton performs the functions of the owner of the capital".

35. In May 1999 the three initial applicants and other former employees of Agrokomerc formed the Shareholders Association, which has 3,024 members who are unemployed shareholders of Agrokomerc.

36. On 28 February 2000, Agrokomerc, represented by its director, and Perutnina Ptuj, a company from Slovenia, entered into a contract to establish a new limited liability company named "Perutnina – Agrokomerc". Agrokomerc did not invite the applicants to hold a shareholders meeting regarding this joint venture, nor did it include any holders of internal shares in the decision-making process. It was planned that the new company would comprise capital of both companies: 45% contributed by Agrokomerc and 55% contributed by Perutnina Ptuj.

37. On 13 March 2000 the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina approved the contract on establishment of 28 February 2000 and its registration with the Cantonal Court of Bihać. The following day, the Ministry of Trade of the Federation also approved the contract on establishment. The registration of the new company was scheduled for 23 June 2000 before the Cantonal Court of Bihać. However, the Cantonal Court decided not to proceed with the registration in compliance with the Chamber's order for provisional measures of 22 June 2000 (see paragraphs 7 and 9 above).

38. On 31 July 2001, the Government of the Federation issued a decree, which entered into force on 5 August 2001, adding Agrokomerc to "the list of business companies over which the powers and obligations on the basis of state capital are performed by the bodies of the Federation of Bosnia and Herzegovina" (Official Gazette of the Federation of Bosnia and Herzegovina— hereinafter "OG FBiH"— no. 4/01).

39. On 7 August 2001 the Ministry of Energy, Mining and Industry of the Federation issued a procedural decision, which became effective on the same day, in which it appointed the president (director) and six members (executive directors) of the management board of Agrokomerc (OG FBiH no. 36/01). In accordance with Article 7 of the decree on performing powers and obligations by the bodies of the Federation of Bosnia and Herzegovina in business companies on the basis of state capital (OG FBiH no. 8/00), which was the legal basis for the procedural decision of 7 August 2001, the Ministry of Energy, Mining and Industry was competent to "appoint and dismiss members of the management board in the number corresponding to the ratio of participation of the state capital in the total capital of the company".

### 3. Action for protection of shareholder rights before the Municipal Court of Velika Kladuša and Cantonal Court of Bihać

40. On 8 June 1999 the Shareholders Association instituted proceedings before the Cantonal Court of Bihać against the Una-Sana Canton and Agrokomerc in regard to the decision of the Assembly of the Una-Sana Canton of 17 July 1997, which, according to the Shareholders Association, declared Agrokomerc exclusively state owned. Later the plaintiff also initiated these proceedings against the Federation. The plaintiff intended to re-establish control by the internal shareholders over the company and to prevent any further transactions without their prior approval. The plaintiff requested that the Court issue a provisional measure in this respect.

41. On 15 June 1999 the Cantonal Court of Bihać referred the case to the Municipal Court of Velika Kladuša because it considered the latter to have original territorial and subject-matter jurisdiction over the case.

42. On 28 June 1999 the Municipal Court of Velika Kladuša returned the case to the Cantonal Court on the ground that the Cantonal Court was competent territorially and as to the subject matter. The Cantonal Court again denied its competence and returned the case to the Municipal Court on 13 July 1999.

43. On 25 May 2000 the Shareholders Association withdrew its action against one of the defendants, the Federation, in the lawsuit for the protection of shareholder rights in Agrokomerc. The preliminary hearing scheduled for the same day before the Municipal Court of Velika Kladuša was postponed at the request of the Shareholders Association to permit it to commission a lawyer to represent it in this dispute.

44. The first hearing in the civil dispute before the Municipal Court of Velika Kladuša was held on 8 June 2000. The Court did not respond to the request for provisional measures.

45. At a hearing on 3 July 2000 in the dispute of the Shareholders Association against the Una-Sana Canton and Agrokomerc, the Municipal Court of Velika Kladuša issued a decision rejecting as ill-founded the objections of the Una-Sana Canton as to the plaintiff's standing to sue. Furthermore, the Court sustained the Una-Sana Canton's objection as to its standing to be sued. The Shareholders Association withdrew its lawsuit against the Canton because the Court declared itself not competent to annul the decision of the Una-Sana Canton of 17 July 1997. The Court also

rejected as ill-founded the request of the second defendant, Agrokomerc, for the establishment of the value in dispute.

46. The defendant Agrokomerc filed an appeal against the Municipal Court's decision on the establishment of the value in dispute. On 2 October 2000 the Cantonal Court of Bihać rejected the appellant's request and confirmed the first instance decision.

47. On 25 December 2000 the Municipal Court of Velika Kladuša declared itself "not at all competent" to decide upon the dispute of the Shareholders Association against Agrokomerc. Accordingly, the Municipal Court rejected the suit filed by the Shareholders Association. The Municipal Court explained in its reasoning that the plaintiff filed this suit asking that Agrokomerc be established as a joint stock company with a capital structure based upon the balance sheet of 1992. However, "the effective ownership structure of the company's capital is established by an audit" which examines both the private and state capital of the company. The Institute for Accounting and Auditing of the Federation is the authorised and competent to perform such audits and to resolve disputes concerning audits. The Municipal Court noted that the plaintiff had already initiated an administrative dispute challenging the results of the Revsar audit of the ownership transformation of Agrokomerc (see paragraphs 50-53 and 55-57 below). It reasoned that two bodies cannot decide upon the same claim, and in this case, the competent body to decide upon the plaintiff's dispute was the Institute for Accounting and Auditing of the Federation. On 26 January 2001 the Shareholders Association appealed the Municipal Court decision to the Cantonal Court of Bihać.

48. On 25 September 2001 the Cantonal Court of Bihać upheld the first instance decision declaring the courts not competent to decide upon the dispute.

### 4. Audits, accounting and related litigation

49. Until 30 June 1999, Agrokomerc continued to state on its annual balance sheets the privately-held internal share capital of its employees, as well as the state-owned capital.

50. On 21 October 1999, Revsar, an auditing and business consulting company in Sarajevo, issued a procedural decision on the results of its audit of the ownership transformation of Agrokomerc. It opined that the measures taken in the years 1991 through 1993 to establish internal share capital had not been in accordance with the law; therefore, such internal share capital was not effectively formed. In the auditing process Revsar cancelled the internal share capital in favour of state capital, the result being that Agrokomerc was established to be 100% state owned.

51. The Shareholders Association filed an appeal against the procedural decision of Revsar of 21 October 1999. On 20 April 2000 the Ministry of Finance of the Federation issued a decision rejecting the plaintiff's appeal.

52. On 3 June 2000 the Shareholders Association instituted an administrative dispute before the Supreme Court of the Federation against the procedural decision of the Ministry of Finance of the Federation of 20 April 2000 which rejected its appeal of the procedural decision on the results of the Revsar audit of 21 October 1999.

53. On 28 September 2000 the Supreme Court of the Federation issued a judgment in the administrative dispute initiated by the Shareholders Association against the procedural decision of 20 April 2000 of the Ministry of Finance of the Federation concerning Revsar's audit of the ownership transformation of Agrokomerc. The Supreme Court accepted the plaintiff's complaint, annulled the procedural decision of 20 April 2000, and returned the case to the first instance organ for reconsideration. The Supreme Court explained that the plaintiff contested the legality of the procedural decision of the results of the Revsar audit of 21 October 1999 as violating the rules of procedure, incorrectly and partially establishing the facts, and wrongfully applying the law. In its reasoning, the Supreme Court noted two primary flaws with the decision on the Revsar audit. Firstly, in accordance with applicable law, an application for auditing was required to initiate the audit process as the audit confirms the accuracy of all data included in that application. However, based upon its review of the case file, the Supreme Court found that the existence of the application for auditing was "doubtful", which in turn called into question the "validity of the performed audit". Therefore, "an official objection in relation to wrongful and incomplete establishment of the factual

background has been shown to be well founded". Secondly, the applicable law required that if necessary documentation for the audit was missing due to destruction during the war or other reasons, then the company must provide a certificate issued by the competent municipal organ. However, in this case, although the audit expressly stated that some documentation and data had been destroyed during the war, the company failed to provide the required certificate. Therefore, the audit was not performed in accordance with the law.

54. On 4 October 2000 the Financial Police of the Ministry of Finance of the Federation issued a report on a partial investigation into the financial transactions and ownership transformation of Agrokomerc for the period of 1991 through 2000 (see paragraphs 79-93 below). The Financial Police concluded that the manner of paying for internal shares of Agrokomerc was contrary to applicable law, and share capital in 1991, 1992, and 1993 was therefore not properly formed. The Financial Police report repeatedly notes that the records of the company were not kept in accordance with the law, appear deficient, and were missing or not made available for the inspection.

55. On 8 November 2000 the Ministry of Finance of the Federation complied with the terms of the decision of the Supreme Court of 28 September 2000 by issuing a procedural decision annulling the decision on the results of the audit of the ownership transformation of Agrokomerc by Revsar of 21 October 1999. In addition, the Ministry returned the case to the first instance body for reconsideration.

56. In compliance with the judgment of the Supreme Court of 28 September 2000 and the decision of the Ministry of Finance of 8 November 2000, Revsar carried out a new audit of the ownership transformation of Agrokomerc. Revsar prepared a proposed procedural decision on the results of its renewed audit, and on 28 February 2001 the Agency of Privatisation of the Federation issued a conclusion approving the proposed procedural decision of 5 February 2001 by Revsar. Based upon that conclusion on approval, Revsar issued on 7 March 2001 a procedural decision on the results of its renewed audit (see paragraphs 98-103 below). In the renewed audit, as in the initial audit, Revsar concluded "that the registered share capital was not formed by cash instalment payments for internal shares or in any other means prescribed by the provisions applicable at that time; therefore, it was completely cancelled on behalf of state capital in the auditing process."

57. The procedural decision of Revsar of 7 March 2001 was transmitted to Agrokomerc and the Agency of Privatisation of the Federation, but it was not transmitted to any of the applicants by the authorities of the Federation, Revsar, or Agrokomerc. The Chamber made the Revsar audit available to the applicants on 3 August 2001. On 8 August 2001 the Shareholders Association filed an appeal with the Ministry of Finance of the Federation against the procedural decision on the results of the renewed audit by Revsar of 7 March 2001. These proceedings are still pending.

### 5. Other developments

58. On 24 April 2000 representatives of the Democratic National Union ("DNZ"– *Demokratska narodna zajednica*), as the opposition faction, proposed a motion in the Assembly of the Una-Sana Canton to annul the decision of 17 July 1997. The motion was rejected. On 9 and 10 May 2000 the Assembly of the Una-Sana Canton again rejected the applicants' request, which was supported by a motion of a deputy in the Assembly, to return authority to manage Agrokomerc to the shareholders.

59. On 2 August 2000 the Office of the High Representative ("OHR") requested that the Privatisation Agency of the Federation freeze the transfer property of Agrokomerc until further notice.

60. On 26 September 2000 the Shareholders Association applied to the President of the Una-Sana Canton to submit a request to the Constitutional Court of the Federation to evaluate the legality of the decision of the Assembly of the Una-Sana Canton placing Agrokomerc on the list of companies "over which the powers and obligations of the owner on the basis of state capital are performed by the Government of the Canton". Acting on the request of the Shareholders Association, the President of the Una-Sana Canton lodged such "request for the assessment of legality" with the Constitutional Court of the Federation on 19 October 2000. These proceedings are still pending before the Constitutional Court.

61. On 12 November 2001, the management board of the Agency for Privatisation of the Federation of Bosnia and Herzegovina issued a decision on the revised list of companies for sale through tenders in the large scale privatisation in co-operation with the International Advisory Group for Privatisation (IAGP), which establishes the participation of the listed companies in the IAGP privatisation programme. Agrokomerc is included on that list of companies. The Agency for Privatisation of the Federation is listed as the competent agency, and the World Bank is listed as the responsible member of the IAGP. Agrokomerc's total capital and state capital are listed as the same amount, 368,648,134 Convertible Marks (*Konvertibilnih Maraka*, "KM"); however, the decision further states that "the date on capital stated in this decision may be changed by adoption of corrected initial balance sheets at the end of the accounting period for the business year".

## B. Written Reports and Audits

62. The written submissions and documentary evidence contained within the Chamber's case files are numerous and extensive. As a result, the Chamber has selected key documents that provide the factual context of the cases and offer expert opinions on the relevance and meaning of these facts within the applicable legal framework in Bosnia and Herzegovina. The Chamber makes no comment on the accuracy, relevance, or legal validity of these submissions and documents, but as they outline the essential underlying facts, they are summarised below.

### 1. Report of 6 June 2001 by the expert team appointed by the Chamber

63. On 17 April 2001, the Chamber appointed a three-person expert team to assist it with these cases. The appointed experts were Prof. Draguljub Stojanov, Prof. Jozo Sović, and Prof. Milić Simić. On 6 June 2001, the experts submitted their report containing opinions and findings with respect to specific questions presented to them by the Chamber. The report was expressly based upon documents made available to the experts by the Chamber and Agrokomerc. The following briefly summarises the extensive report.

#### a) Legal framework of privatisations of companies

64. In their report, the experts first outline the domestic legal framework for the transformation and privatisation of Agrokomerc. The domestic legal framework governing privatisations splits into three distinct time periods: 1990 through 1994/1995 (the Marković privatisation period), 1994 through 1997, and 1997 through the present date (see paragraphs 146-176 below for the respective relevant domestic legislation). The experts explain that there were three main goals of the Marković privatisation regulations, under which the privatisation of Agrokomerc was commenced. Firstly, gradually to carry out the ownership transformation of socially-owned property into private property through the purchase of internal shares by the employees and pensioners of the company. Secondly, to establish joint stock companies and limited liability companies to operate for profit in a market economy. Thirdly, to establish organs of corporate governance to promote efficient business management. Thus, the Marković regulations intended to transform the ownership of companies within the whole context of political and economic reform in the former SFRY and to bring the socialist country into a modern market economy.

65. The experts explain that the Marković regulations created a relatively simple procedure for the transformation of socially-owned companies into privately-owned companies. Through this procedure, employees could become shareholders and participate in the management and distribution of profits of their company. The procedure commenced when the management body of the company, the Workers' Council, issued two procedural decisions at a single session: the decision on issuance of internal shares and the decision on the organisation and change of status of the company. The company publicly announced the privatisation of the company and informed employees, pensioners, and other persons entitled to participate in the privatisation of their rights. Then the company registered the internal shares with the competent court by presenting the two requisite procedural decisions, the list of subscribers of internal shares, and confirmations from the Social Audit Service (Institute for Payment Transactions) concerning the book value of the social capital and amount of certain salary payments to employees. Upon registration with the court, the company was granted the status of joint stock company or limited liability company, respectively, and was entitled to establish organs of corporate governance, that is, the general assembly of shareholders, the management board, and the supervisory board. In addition, subscribers of internal shares became

shareholders of internal shares with rights including: a) the right to participate in the management of the company in proportion to the nominal value of their registered (but not necessarily paid) internal shares; and b) the right to participate in the distribution of profits of the company in proportion to the paid part of internal shares plus the proportional amount of approved discounts. Thereafter, the payroll department of the company allocated payments toward the internal shares.

66. The experts point out that internal shares under the Marković regulations were a unique form of hybrid security interest. The holders of internal shares were registered as shareholders. However, at the time of registration most shareholders had not made any payments toward their shares. Rather, in most cases the company set up a system to allow shareholders to pay for their internal shares in instalments over a maximum period of ten years. Thus, internal shares established a kind of "loan management" for the company because shareholders were immediately entitled to participate in the management of the company, despite the fact that they paid for their shares in instalments over time. This was the only possible means to transform and privatise socially-owned companies taking into account the lack of capital and private savings of persons living in the former Yugoslavia. The common practice was not to issue temporary share certificates, but rather to issue to the holder of internal shares a confirmation, which was a non-transferrable document that proved the amount of registered shares and paid instalments. Internal shares could not be traded on the stock market, but they could be traded within the internal market of the company. Upon complete payment of the entire amount of the nominal value of the internal shares and satisfaction of other conditions required by law, the shareholder was to be granted a permanent share, that is, a regular market security interest in the company.

67. The experts report that on 1 January 1995 the Law on Transformation of Socially-Owned Property (see paragraphs 154-158 below) became applicable. This Law retroactively changed the legal framework of privatisations in the Federation of Bosnia and Herzegovina, in particular it retroactively changed the Marković regulations. The Law stated that the amount of share capital listed on the balance sheet of the company as of 31 December 1991 would be considered privately-owned capital based upon the purchase (not registration) of internal shares. Under Article 5 of the Law, amounts paid by shareholders towards the purchase of internal shares after 31 December 1991 became claims of the shareholders against the company. Those claims were in turn re-evaluated and either returned to the payers or registered as share capital in accordance with the Law. The Law required an audit of the ownership transformation carried out under the Marković regulations in order to determine the "effective amount of share capital" and "effective ownership structure" of the company undergoing privatisation. An audit of the ownership transformation carried out under the Marković regulations was further required by the amended legal framework that took effect in 1998 (see paragraphs 169-170 below). The currently applicable laws take over the retroactively applied changes, as described in this paragraph, to the privatisations commenced under the Marković regulations as of 31 December 1991. In addition, the audit should further establish, among other things, changes to the ownership structure and relative participation between state and share capital in the company between 1 January 1992 and 31 December 1997 (see paragraph 170 below).

68. On 1 January 1995 the Law on Enterprises also became applicable in the Federation of Bosnia and Herzegovina. This Law confirmed that joint stock companies of mixed ownership previously registered under the Marković regulations would continue without any change in status or new registration of capital structure. The Law did, however, make changes to the management of joint stock companies, including that: the state shall manage companies in proportion to the amount of state capital in the total capital structure of the company; during the state of war or immediate threat of war, the management board of the company shall perform the functions of the general assembly of shareholders; and a list of companies shall be created providing which companies shall be managed by which levels of state authorities in accordance to the amount of state capital (see paragraph 164 below).

69. Consequently, the experts conclude that the war in Bosnia and Herzegovina led to the re-nationalisation of companies and to the elimination of share capital by a simple "stroke of the pen". The payment process for the internal shares and their transformation into regular stocks ceased. Employees ceased to be recognised as shareholders; they were no longer entitled to participate in the management of their companies or in the distribution of profits.

### b) Status and ownership transformation of Agrokomerc

70. On the basis of the procedural decision of the Court of Associated Labour of Bihać of 31 October 1991 and an excerpt of the Register of the Court of 9 July 1999 of the former Cantonal Court of Bihać, the experts conclude that Agrokomerc changed its legal status from a socially-owned company into a joint stock company of mixed ownership under the Marković regulations. The Court listed in a column "the amount of capital of the founders" socially-owned capital in the amount of 6,912,050,000 *Yugoslav dinars* ("YUD") and internal shares in the amount of 7,899,944,180 YUD. Thus, at the time of registration, internal shares amounted to 53% of the company while socially-owned capital amounted to 47% of the company. According to regulations on registration into the Court Register, recording in the Court Register must have been based upon documents presented to the Court. In this case, these documents are: a) the decision on issuance of internal shares of 27 August 1991; b) the decision on the organisation and change of status of Agrokomerc into a joint stock company of mixed ownership of the same date; c) the list of internal shareholders who had registered (but not paid) internal shares; and d) two certifications issued by the Social Audit Service (Institute for Payment Transactions)— a certification on the amount of social capital of Agrokomerc and a certificate on salaries of employees of Agrokomerc. In reaching their conclusion, the experts assumed that the Court of Bihać would have refused to register the status and ownership changes of Agrokomerc if the required conditions and procedures (*e.g.*, the decision on issuance of internal shares, decision on the organisation and change of status, *etc.*,) had been contrary to the applicable regulations.

71. The experts further conclude that the employees of Agrokomerc registered internal shares on the basis of the Marković regulations. This conclusion was based upon a "list of registered shares" which contains the names of 7,327 persons, salary data for each person, the percent of discount, the amount of registered internal shares, and the monthly payment for shares. The experts note, however, that this conclusion was based upon incomplete documentation. None the less, the experts found that "it is clear that the employees set aside a part of their personal incomes for the payment of internal shares". The experts found data stating that in 1992 employees of Agrokomerc received an average salary of 271.85 DEM per month, which means that on average a monthly amount of 90.62 DEM per employee was allocated for the payment of internal shares.

72. The experts point out that on 27 August 1991, when the decision on issuance of internal shares was rendered, Agrokomerc was not 100% socially-owned. At that time, an amount of 100,000 YUD was not social capital. The experts assume that this amount (equivalent to 1000 shares at 100 YUD per share) had been purchased by employees of Agrokomerc prior to adoption of the decision on issuance of internal shares, especially considering that employees had been familiar with the contents of the decision since the public hearing of the Workers' Council in July 1991.

73. The experts report that the inaugural assembly of shareholders of Agrokomerc was held on 3 February 1992. Representation at the meeting included internal shareholders, representatives of socially-owned capital, and outside experts of the company. The management board was in turn composed of employed shareholders of Agrokomerc and outside experts. It was within the competence of the assembly of shareholders to decide upon the distribution and use of profits of Agrokomerc. Under the decision on issuance of internal shares of 27 August 1991, the assembly of shareholders could decide to apply profits toward the payment of internal shares in order to shorten the time period for the repayment of "loans" granted for the purchase of internal shares, or in other words, the assembly could decide to credit profits toward the payment of internal shares. On 27 March 1993, the general assembly of shareholders decided to distribute profits in the total amount of 3,031,363 DEM based upon the annual financial statement of 1992. These profits were distributed in accordance with the ratio of the capital structure of Agrokomerc, which at that time was 61.5% state capital and 38.5% share capital (representing paid shares in the company). The profits distributed to share capital were in turn divided 50% to the payment of registered internal shares according to the amount of previously paid internal shares and the remainder to reserves and expansion of resources.

74. The experts explain that during the war, the management of Agrokomerc should have been re-organised so that the management board assumed the responsibilities of the assembly of shareholders during the state of war and imminent threat of war in Bosnia and Herzegovina. The experts do not state whether this re-organisation actually occurred. Later, on 17 July 1997, the

Assembly of the Una-Sana Canton issued a decision in accordance with the Law on Enterprises. That "decision establishes the list of enterprises in the area of the Una-Sana Canton over which the powers and obligations of the owner on the basis of state capital are performed by the Government of the Canton". Agrokomerc was included on that list. In order to apply that decision pursuant to the Law on Transformation of Socially-Owned Property (see paragraphs 154-158 below), the experts explain that the Canton should have reviewed the privatisation performed under the Marković regulations to determine the ownership structure of the capital of the company, including the percent of socially-owned capital and the percent of internal share capital, and to determine the composition of the management board in relation to the owners of the capital. Such review was later effectuated through the procedural decision of the Revsar audit of 21 October 1999 (which was later annulled by the Supreme Court judgment of 28 September 2000 and renewed by the procedural decision of 7 March 2001) (see paragraphs 98-103 below) and the investigative report of the Financial Police of the Federation of 10 July 2000 (see paragraphs 79-97 below). Both of those reports, as explained more fully below, concluded that no private share capital was effectively formed in Agrokomerc, and consequently, the state remains the exclusive owner of Agrokomerc.

75. As explained below (see paragraphs 98-103), the Revsar audit concluded that Agrokomerc was composed of 100% state capital because internal shares were not effectively formed due to the company's failure to calculate taxes and contributions on the part of employee salaries allocated for payment of internal shares and the company's failure to charge such allocations against its operating costs. In response, the experts point out that the Revsar audit does not dispute that employees could pay for internal shares by allocating a part of their salaries. Moreover, the employees are not "responsible for the failures of the company's management, if any, particularly from the moment of its registration as a joint stock company. The non-compliance of the company's management with the law is more of an economic infraction than anything else". The experts further emphasise the retroactive effect of the domestic laws applied by the Revsar auditors in reaching their conclusion that the internal shares were not effectively formed as of 31 December 1991.

76. In addition, the experts mention certain "indications" that the calculations for taxes and contributions were performed for the registered internal shares: calculations of employees' salaries with calculated contributions for the period of August to December 1991 and the period of January to December 1992, completed order forms for contribution payments for 1991 and 1992, and a partial payroll list for employees noting amounts of instalment payments for shares. The experts also note the existence of two lists of persons indicating exact payments for internal shares. According to the experts, Agrokomerc's balance sheet of 1992 further confirms the payment of internal shares and the payment of taxes and contributions. Moreover, an account statement verified by the Social Audit Service (Institute for Payment Transactions) of Veluka Kladuša shows that profits for year-end 1992 were decreased by taxes and contributions. The experts point out another incongruency regarding taxes and contributions: according to the record made by the Pension and Disability Fund, Branch Office of Bihać, dated 5 May 2000, Agrokomerc is in debt for the entire period of 1 January 1992 through 31 December 1999 in the amount of 40,725 KM. However, according to the decision of the same Pension and Disability Fund, Branch Office of Bihać, dated 28 April 2000, Agrokomerc was ordered to fulfil its obligations to pay its unpaid contributions in the amount of 13,558,856 KM. The experts state that they could not establish whether Agrokomerc in fact paid the calculated contributions. In addition, the experts question the authenticity of the documents upon which they base their analysis with respect to the payment of contributions in 1991, 1992, and 1993.

77. In conclusion, the experts propose that a forensic audit should be carried out to establish all relevant transactions at the Payment Bureaux. It is suggested that such an investigation could determine the amount of internal shares paid for by the employees of Agrokomerc and whether Agrokomerc properly met its obligations to pay taxes and contributions. The experts indicate that it is possible that Agrokomerc could still be a joint stock company and the employees could be recognized as shareholders.

### 2. *Amicus Curiae* Report of the OSCE of 3 April 2001

78. The report of the OSCE dated 3 April 2001, submitted in connection with the OSCE's participation in these cases as *amicus curiae*, provides a concise summary of the partial privatisation of Agrokomerc under the Marković regulations and of the actions taken by the three initial applicants to protect their alleged shareholder rights in the company. Based upon available annual reports, the

OSCE report states that the initial internal shares in Agrokomerc in 1991 amounted to 53%, which increased to 75.9% in March 1993. The OSCE opines that various acts by the management board of Agrokomerc and by the competent authorities contradict applicable domestic law. Under these circumstances, the OSCE expresses its concern that the applicants' alleged rights acquired through the partial privatisation of Agrokomerc have most likely been violated by the management board of Agrokomerc, apparently acting under political influence. The OSCE states that such acts have occurred in particular since 1995 and continue to the present date, despite interventions by the Chamber and OHR to prevent them. In addition, the competent authorities have not acted to protect the alleged shareholder rights of the three initial applicants. The OSCE highlights the political context of these cases as a cause of friction between different groups of Bosniaks and the political parties representing them.

### 3. Report of the Financial Police of 4 October 2000

#### a) Report on the Financial Status of Agrokomerc

79. On 10 July 2000 the Financial Police of the Federation conducted a partial investigation into the financial transactions, the value and structure of the capital of Agrokomerc, and the decisions on ownership transformation from 1991 to 2000. Repeatedly the Financial Police noted that the documents produced for their inspection were insufficient or not properly authenticated. They issued their findings on the partial investigation on 4 October 2000, which could be appealed within seven days from receipt of the report. The Chamber acknowledges that this investigative report is somewhat technical, but since it contains important factual information, it is summarised below.

80. According to the Financial Police Report, on 27 August 1991 two decisions (decision on the organisation and change of status and decision on the issuance of internal shares) required by the Law on Social Capital (see paragraph 149 below) were issued, the effect of which was to transform Agrokomerc into a joint stock company of mixed ownership. Based upon public discussions among employees between 17 and 31 July 1991, the Workers' Council accepted these decisions on 27 August 1991 at its session.

81. The decision on the issuance of internal shares provided that the value of initial social capital of Agrokomerc, amounting to 6,912,050,000 dinars, was based on the balance sheet of 31 December 1990. Internal shares were first issued in the amount of 7,899,944,180 dinars, which were divided into 78,999,442 shares, each with a nominal value of 100 dinars. All employees, former employees, and pensioners of Agrokomerc had the right to register internal shares at a general discount of 30% plus an additional discount of 1% for each year of seniority. The amount of registered internal shares was calculated based upon individual salaries paid during the previous six-month period. Given that the decision was accepted on 27 August 1991, the applicable six-month period was February through July 1991, during which time Agrokomerc was paying guaranteed minimum salaries (see paragraph 152 below). However, the Financial Police could not establish through their investigation the individual amount of internal shares registered for each shareholder.

82. The decision on the organisation and change of status of Agrokomerc into "a joint stock company for primary production, industry, tertiary and quarterly activities" was registered with the First Instance Court of Associated Labour of Bihać on 31 October 1991. According to the Financial Police, the requisite preconditions for registration of the ownership transformation of Agrokomerc, as set forth in Article 1a of the Law on Social Capital (see paragraph 149 below), were satisfied by the decision on the organisation and change of status and the decision on the issuance of internal shares.

83. In their investigation, the Financial Police reviewed certain documentation to determine the state of the capital of Agrokomerc as of 31 December 1991. The balance sheet of 31 December 1991 of Agrokomerc showed following ownership structure: 589,591,000 dinars of share capital, 20,560,612,000 dinars of social capital, and 24,230,000 dinars of permanent deposits, for a total of 21,174,433,000 dinars. However, the Financial Police concluded that Agrokomerc did not pay any taxes or contributions on the parts of employee salaries registered as internal shares between August and December 1991. Instead, Agrokomerc only paid taxes and contributions for the parts of salaries paid out to employees between August and December 1991. Moreover, the amount of

share capital in 1991 was increased by large amounts of dinars not corresponding to the payment of salaries, but the Financial Police could not establish the reason for these increases because they were provided with no corresponding documentation.

84. With respect to the state of the capital of Agrokomerc as of 31 December 1992, the Financial Police explained that Agrokomerc accounted for the salaries of its employees in three parts: one part designated for internal shares, another part paid out to employees, and a final part paid out to employees in discounts or vouchers. The Financial Police found that the following amounts, corresponding to one-third of monthly employee salaries, were designated on account no. 910 for registered and paid internal share capital: 780,864,825 dinars for the period of January through September 1992, and 792,850 DEM for the period of October through December 1992. However, according to the Financial Police, taxes and contributions were not paid by Agrokomerc for the parts of salaries paid to employees as internal shares or as discounts or vouchers. In addition, these amounts did not burden the business expenses of the company. The Financial Police concluded that, "share capital formed in this way cannot be treated as effective share capital because it was not formed pursuant to applicable regulations on ownership transformation."

85. In addition, the management board of Agrokomerc rendered the following four decisions which they applied to increase the share capital, as reflected in the balance sheet of 31 December 1992. The first three decisions were issued on 2 April 1992, and the fourth decision was issued on 30 March 1993:

(1) Decision on the entry of compensation for the employees of Agrokomerc for reduced salaries paid during the period of 1 August 1987 to 31 July 1991 and conversion of that compensation claim into shares amounting to 120,880,000 DEM.
(2) Decision on the entry of the difference between accrued and distributed salaries for the period of 1 January 1992 to 31 December 1992 amounting to 3,046,657 DEM.
(3) Decision on the entry of the value of inventory of goods of Agrokomerc as of 31 March 1992 to the benefit of registered and paid internal shares amounting to 243,000,000 DEM. The management board also adopted criteria for the distribution of internal shares issued to employees of Agrokomerc based on the value of inventory of goods as of 31 March 1992 in an amount corresponding to "the quality of the employees' labour and the value of the company". However, the Financial Police Report states that neither the decision nor the criteria explain the manner to establish the value of inventory of goods or the reason to enter the value of inventory of goods in favour of internal share capital.
(4) Decision on the distribution of profits based upon the annual balance sheet of 1992 in favour of paid share capital in the amount of 1,166,468 DEM. The Financial Police noted that applicable provisions in the Law on Social Capital and the Law on Salaries provide no legal basis for this decision.

86. As a result of the allocations on the basis of the decisions of the management board, the share capital expressed in the balance sheet of 31 December 1992 amounted to 80.9% of the total capital of Agrokomerc. The Financial Police Report concludes, without elaboration, that the three decisions of 2 April 1992 described above and the corresponding increases of share capital had no basis in applicable law because taxes and contributions were not accounted for or paid on these amounts. Moreover, the Financial Police Report states that Agrokomerc failed to save valid documentation to support any of the four decisions described above.

87. The state of the capital of Agrokomerc after 31 March 1992, as set forth in the Financial Police Report, is less clear. The Financial Police found no documentation for the time period of 1993 to 1994, including no annual balance sheets for those years. Only the financial card for account no. 910, recording share capital, was produced for inspection by the Financial Police, but this document was not signed or certified. For the period of January through June 1993, shares amounting to 1,367,880 DEM were recorded on account no. 910. According to the Financial Police Report, the Social Accounting and Auditing Service (Institute for Payment Transactions) in Bihać inspected the accounts related to Agrokomerc's registered internal shares for fiscal year 1992 and January to June 1993. It calculated that 1,178,477 DEM was due for taxes and contributions on those registered internal shares. However, during the inspection, it could not establish whether such payment was in fact made by Agrokomerc.

88. In the Report, the Financial Police opine that manner of paying for internal shares in Agrokomerc was contrary to the applicable Law on Securities and Law on Social Capital (see paragraphs 148-149 below) because according to those laws, issued internal shares may be paid for by the shareholder at one time or in instalments. "Therefore, the internal shares may not be issued instead of a part of the salary, and previously issued shares may not be paid for by encumbering the company or that part of the salary to which no taxes or contributions have been calculated."

89. The Financial Police Report states that in 1991, 1992, and 1993, 10,635,816 DEM was separated from employee salaries, without the corresponding payment of taxes or contributions, and recorded as share capital in Agrokomerc. However, in the opinion of the Financial Police, that share capital formed in 1991, 1992, and 1993 based upon the allocation of a portion of employee salaries for which no taxes or contributions had been paid and based upon the decision of the management board of Agrokomerc was not in accordance with the applicable Law on Social Capital.

90. In 1995 the business records of Agrokomerc, with no supporting documentation, state the registered amount of 286,852,488 DEM for state capital and 71,713,110 DEM for internal share capital. The Financial Police Report states that the Head of the Accounting Office explained that this capital was registered based upon the balance sheet of 1991, the balance sheet of 1994, an assessment of certain property and war damage, and revalorization, in part relating to the conversion from Yugoslavia dinars to Bosnia and Herzegovina dinars. Such registration of capital, without proper documentation, does not, in the opinion of the Financial Police, comply with applicable accounting principles and standards.

91. On 4 March 1996, the management board of Agrokomerc rendered a decision that the book value of the company's capital, which was stated as a lump sum on the balance sheet of 31 December 1995, should be divided proportionally into 80% state capital and 20% share capital. The corresponding amount of share capital stated as the book value was 70,923,223 DEM. Once again the Financial Police note that they found no documentation to support these entries.

92. According to the Financial Police Report, in 1997, with no supporting documentation, the book value of the state capital of Agrokomerc was additionally increased by the amount of 4,098,523 KM based upon the value of the goods that were still in the storage room. Thus, the balance sheet of 31 December 1997 of Agrokomerc showed state capital in the amount of 287,791,432 KM and share capital in the amount of 70,923,323 KM.

93. Based on business books as of 31 December 1999, the capital of Agrokomerc amounted to 70,923,223 KM share capital and 290,960,659 KM state capital. Thereafter, the Financial Police Report notes that according to the procedural decision of the auditor Revsar of 21 October 1999 (which was later succeeded by the second Revsar audit of 7 March 2001 of similar content), the value of the private share capital of Agrokomerc was cancelled and entered in favour of the state capital. However, the Financial Police could not determine the exact value of the nominal capital of Agrokomerc on 31 December 1999 due to lack of documentation.

### b) Report on the Joint Venture "Perutnina— Agrokomerc"

94. The Financial Police Report records that on 28 February 2000, the Slovenian company Perutnina and Agrokomerc concluded a contract on establishment to form the limited liability company "Perutnina – Agrokomerc" for the production and sale of chicken meat and products. Perutnina pledged to invest currency in the amount of 7,200,000 KM, which would represent 55% of the capital investment of the joint venture. Agrokomerc agreed to invest currency and assets valued at 5,905,000 KM, which would represent 45% of the capital investment of the joint venture. The investors agreed to participate in the joint venture in proportion to their capital investments.

95. In connection with the joint venture, a financial expert appointed by Agrokomerc assessed the value of real estate, constructed facilities and equipment of "Perutnina – Agrokomerc" as of 1 February 2000. These assets were part of Agrokomerc's contribution to the joint venture. According to this assessment, the total value of the assets amounted to 5.9 million KM.

96. At the same time, in February 2000, the Faculty of Economics of the Sarajevo University prepared a privatisation programme for Agrokomerc and assessed the value of the property Agrokomerc intended to contribute to the joint venture with Perutnina. The Faculty of Economics concluded that Agrokomerc's real estate, constructed facilities, and equipment designated for the joint venture had a value of more than 47.2 million KM, *i.e.*, an amount almost eight times higher than the amount assessed by the financial expert appointed by Agrokomerc.

97. The Financial Police highlighted that both financial assessments evaluated the same fixed assets of Agrokomerc and both were performed at the same time. The Financial Police concluded that the financial assessment of the value of Agrokomerc's property, land, constructed facilities, and equipment, which was the basis for the contract on establishment of the joint venture with Perutnina, was intentionally performed to underestimate the value of Agrokomerc's fixed assets.

#### 4. Second Revsar Audit of 7 March 2001

98. On 7 March 2001 Revsar, a company for auditing and business consulting in Sarajevo, issued a procedural decision on the results of its renewed audit regarding the previously transformed ownership of Agrokomerc. On 28 February 2001 the Agency of Privatisation of the Federation issued a conclusion approving the proposed procedural decision of 5 February 2001 by Revsar, and Revsar's final procedural decision of 7 March 2001 was based upon that conclusion on approval.

99. In the operative section of the procedural decision of 7 March 2001, Revsar established that Agrokomerc undertook legal actions to transform its ownership status under the Law on Social Capital. Based on this, in 1991 Agrokomerc registered its change of ownership status from a socially-owned company into a joint stock company of mixed ownership. Although the business records and balance sheets of Agrokomerc for the period of 1991 through 1999 showed share capital, Revsar concluded in its audit "that the registered share capital was not formed by cash instalment payments for internal shares or in any other means prescribed by the provisions applicable at that time; therefore, it was completely cancelled on behalf of state capital in the auditing process." Accordingly, the decision orders Agrokomerc to make certain specific changes to the book value of its capital, including increasing the book value of state capital by 70,923,223 KM to reverse the previous entry of share capital in the same amount.

100. In the section of the decision setting forth the reasoning, Revsar explained that the majority of bookkeeping and other documentation of Agrokomerc for the previous period was destroyed during the armed conflict. As a result, Revsar applied the method of partial reconstruction in its audit to establish the book value and capital structure of the company prior to 1995.

101. In addition, the reasoning of the decision explains the following findings of the audit upon which the decision was based: In 1991, the previously socially-owned Agrokomerc was registered as a joint stock company by the competent court. The management board of Agrokomerc issued the decision on the issuance of internal shares and the decision on the organisation and change of status, as prescribed by the Law on Social Capital. However, Revsar could not establish the registered amount of internal shares or the number of shareholders due to lack of documentation. From 1991 through 30 June 1999, Agrokomerc showed on its books both state capital and share capital. The book value of the share capital as of 30 June 1999 amounted to 70,923,223 KM. However, Revsar concluded in its audit that the share capital was not effectively registered and the listed instalment payments for internal shares were not properly made in accordance with applicable laws. Revsar explained that no private share capital of Agrokomerc was formed within the meaning of Article 5 of the Law on Privatisation of Companies. Therefore, in the auditing process, Revsar cancelled the sum of share capital included in the total capital as of 30 June 1999, as well as other additional deductions, results of revalorization, and changes to the book value of the company.

102. Revsar further elaborated upon its reasons for cancelling the private share capital: During 1991 and 1992, Agrokomerc registered share capital at the same time it calculated salaries, but in amounts for which it did not calculate or pay prescribed taxes and contributions. It further attributed discounts and revalorizations to these amounts. Then in 1992 Agrokomerc increased the share capital for differences in salaries for the period of 1987 through 1992 and for the value of inventory of goods. However, Revsar opined that these increases were made without proper basis. Therefore,

Revsar ordered that the book values of assets of Agrokomerc be harmonised with the results of the audit.

103. The procedural decision of 7 March 2001 was transmitted to Agrokomerc and to the Agency for Privatisation of the Federation, but it was not transmitted to any of the applicants by the authorities of the Federation, Revsar, or Agrokomerc. The decision provides that an appeal may be filed within 15 days from the date of transmittal, submitted to the Ministry of Finance of the Federation in Sarajevo through Revsar.

## C. Oral testimony

104. Twelve witnesses were heard at the public hearing on 5 and 6 September 2001 (see paragraphs 16-17 above). The testimony given by them is partially summarised as follows:

### 1. Prof. Sović and Prof. Simić, experts appointed by the Chamber

105. The expert witnesses stated that they had found several facts showing the registration of payment of internal shares by the employees and the calculation of contributions and taxes, *e.g.*, payment order-slips. The experts opined that this proves that during the privatisation process internal shares of Agrokomerc were actually issued to the employees. The experts could not verify whether these payments and contributions were actually made, however, but they stated that it would be possible to check this fact since the procedure for payment during the SFRY period is retraceable in the Payment Bureaux.

106. Mr. Simić stated that based on the decision of the management board of the company of 2 April 1992, a part of salaries was not paid to employees, and this part corresponded to the increase of share capital. This means that when a salary was paid, part of it was held in the office to be paid into the budget account before the next salary payment. However, the experts could not establish whether this actually occurred.

107. The experts recalled Article 14 of the Law on Social Capital, which was effective from 1990 through 1994 (see paragraph 149 below). This Law stated that transformations should be carried out within one year from the entry into force of the amended law. The experts stated that *stricto sensu* the decisions transforming Agrokomerc into a joint stock company and issuing internal shares were issued out of time, that is, they were made nine days after the applicable time period expired. However, since the privatisation process was complicated and time-consuming, and preparatory steps occurred before the deadline, the Court of Bihać assessed the legality of the procedures for issuing internal shares and later registered the company. Many other courts in Bosnia and Herzegovina registered transformations of companies after the one-year time period as well. Furthermore, the registration of Agrokomerc was not contested before the Court of Bihać.

108. From the available documents, the experts concluded that the constituent general meeting of the assembly of shareholders was held on 3 February 1992. 158 internal shareholders were present, 18 representatives of holders of social capital, and four external experts. On the basis of registered capital, the holders of internal shares had the majority. The available documentation did not, however, provide precise information as to the composition of the management board during the years 1992 through 1994.

109. The experts questioned why Agrokomerc should have been required to pay taxes in 1990 and 1991 on the part of salaries allocated to the payment of internal shares. They noted that the Law on Privatisation of 1997 explicitly states that no taxes are paid in the current privatisation process. Since the goal behind the 1997 privatisation process and the earlier Marković regulations was the same — to change the capital structure of economic entities — it makes sense that no taxes should have been required under the Marković regulations as well.

110. As to the payment of contributions, the experts pointed out that the Social Pension and Disability Insurance Fund, Branch Office of Bihać, has a record dated 5 May 2000 which states that Agrokomerc owes money for the period of 1 January 1992 until 31 December 1999 in the amount of 40,725.92 KM. There is, however, also a record of the same office dated 28 April 2000 according to which Agrokomerc owes the amount of 13,558,856 KM.

111. In the provided documents, the experts found payroll lists. These lists recorded when salaries were calculated and paid. There is one item on the lists stating "internal shares". Neither the 1988 nor the 1995 Law on Enterprises explicitly obligated companies to keep a book of shareholders. Through systematic interpretation, however, one can conclude that the legislature presumed from the start that there would be a book of shareholders. In the documents there was a list of approximately 7,300 names, with serial numbers. These names corresponded to registered shares. Therefore, the experts submit that this document could be viewed as the book of shareholders.

### 2. Prof. Gojko Stanić, former member of the management board of Agrokomerc

112. The witness stated that he had presented his expertise on Agrokomerc to the deputies of the Yugoslav Parliament and the SFRY Government under Prime Minister Ante Marković. Agrokomerc thereby became the model for accepting the laws relating to the issuance of internal shares, the so-called "Marković shares". The employees of Agrokomerc enthusiastically welcomed the announced reforms when they heard that they would become the shareholders of the company.

113. Prof. Stanić stated that he drafted the decisions on changing the status of Agrokomerc into a joint stock company and on the issuance of internal shares. These decisions were accepted by the Workers' Council on 27 August 1991 and registered by the Court of Bihać on 3 October 1991 on the basis of complete documentation, including the list of internal shareholders. The preparation of the decisions to the Workers' Council took some time because Agrokomerc was a large company which, moreover, was partly destroyed. The witness also stated that he prepared the constituent general meeting of the assembly of shareholders, which was held on 3 February 1992, and he drafted the bylaws and articles of association which were accepted by the assembly of shareholders. He testified that every employee of Agrokomerc gave one third of his salary to benefit the company as payment for his internal shares and everybody was registered as a shareholder of Agrokomerc. The payment for internal shares continued until April 1994.

114. The witness conceded that transforming employees' compensation claims for unpaid salaries between 1987 and 31 December 1991 into payment of internal shares was simply done without considering the legal basis. However, he argued that the employees were entitled to compensation for these unpaid salaries because the state was responsible for compensating all damages that occurred as a result of the scandal in 1987, *i.e.*, while the management of Agrokomerc was in prison.

115. He further stated that for a certain period of time, Agrokomerc was under no obligation to pay taxes and contributions for the part of salaries which was allocated to the payment of internal shares. Accordingly, during that period no contributions and taxes were paid for internal shares. Later on, when the applicable law changed, all taxes and contributions were paid.

### 3. Prof. Viljem Rupnik, former member of the management board of Agrokomerc

116. Prof. Rupnik testified at the public hearing and submitted a written opinion dated 1 September 2001. He explained that based on his expertise, in 1991 the management of Agrokomerc invited him to conceive the economic and operational strategy for privatisation of the company. To guarantee his faithful performance of his duties, he agreed to become a shareholder of the company by investing his personal income in shares. Thereafter, at the constituent meeting of the assembly of shareholders held on 3 February 1992, he was also elected to the management board. In his written opinion, Prof. Rupnik stated that the aims of Agrokomerc's privatisation were a) "the gradual transformation of socially-owned capital into private capital by involving internal share ownership", b) "the increase of efficiency of the vertical and horizontal management of the company", c) "the establishment of profit centres", and d) "the increase of common motivation of the employees". Certain specific actions and operations were performed in order to meet these aims, including, for example, conducting an inventory of assets and calculating the real market value of the company. According to Prof. Rupnik, the company's privatisation programme "was in compliance with the Law on Social Capital from 1989 and 1990", and as such, "it served as the basis for the constituent meeting of shareholders of the joint stock company held on 3 February 1992". Prof. Rupnik briefly opined on the quality and findings of the Revsar audit, concluding that the report lacked sufficient foundation to understand the claims and that significant information was

omitted, without which an accurate economic picture of the privatisation of the company was impossible. Prof. Rupnik offered six specific suggestions for corrections to the balance sheets of 1992 and successive years. One such suggestion was to increase the share capital in the balance sheet of 1992 to include 125,000 DEM in identifiable "permanent deposits" (which may include cash deposits and other valuable assets) of particular depositors. In conclusion he stated that the shareholders' "management board is ready and willing to continue the initiated privatisation."

#### 4. Dr. Ibrahim Mujić, first chairman of the general assembly of shareholders

117. The witness recalled that after the Agrokomerc scandal of 1987, the management of Agrokomerc, including the witness, was held in prison from August 1987 until October 1989. Before this scandal in 1987, Agrokomerc was a very successful company. There were 13,689 persons working for Agrokomerc. Agrokomerc exported in that year products worth 97 million US dollars to 42 countries around the world. However, when the managers were released from prison, they found the company ruined. Production had been reduced to some ten percent of its former capacity. Employees did not receive their salaries on a regular basis. Only a couple of thousand employees remained, and the company exported nothing. In order to resume production, the managers unsuccessfully applied for loans from banks in SFRY. They also travelled to Austria, Germany and Switzerland and sought investment from the expatriate community, promising those who invested money in Agrokomerc that they would be remunerated or their investments transformed into shares once the enterprise became a joint stock company. The witness stated that the managers collected around two million DEM, which was used to buy raw materials and restart production. In 1991, production increased to 70% of the pre-scandal capacity. Agrokomerc again had some 7,340 employees.

118. The witness stated that at the meeting of the Workers' Council held on 27 August 1991, the decisions on issuance of internal shares and on the organisation and change of status of Agrokomerc into a joint stock company of mixed ownership were adopted. Preparations to transform Agrokomerc had started one year before the Workers' Council rendered its decisions. The matter was discussed for months. At the session of 27 August 1991, it was decided to introduce the system whereby one third of employees' salaries would be allocated to the payment of internal shares, one third paid in cash, and one third paid in vouchers. The payment of internal shares was scheduled to last for ten years. Subsequently, the internal share programme was also adopted at the constituent general meeting of the assembly of shareholders and was entered into the bylaws of the joint stock company. Agrokomerc commenced the allocation of one third of salaries for internal shares in August or September 1991. The last payment to internal shares was made in April 1994.

119. All employees of Agrokomerc accepted the internal share programme. The employees' investments were used to invest in highly profitable productions. The goal of transforming Agrokomerc into a joint stock company of mixed ownership was to increase the value of the company. All the employees saw their chance for prosperity in these investments.

120. Agrokomerc paid guaranteed minimum salaries in 1991. Later the company created conditions to function without guaranteed minimum salaries and switched back to paying normal salaries. After the issuance of internal shares, as registered with the Court of Bihać, salaries remained as they had been before, *i.e.*, the employees received in cash only one third of their previous salaries. Later salaries were increased in relation to the annual increase in production and growth of exports. In this manner, the management board intended to stimulate employees to further increase production.

121. The witness confirmed that he chaired the constituent general meeting of the assembly of shareholders held on 3 February 1992. The agenda was the following: consideration of draft rules of procedure of the assembly of shareholders; discussion on the report on transforming Agrokomerc into a joint stock company of mixed ownership and key guidelines for its development; consideration of the draft articles of association and bylaws of the joint stock company; and the appointment of members of the management board. Another agenda item for the meeting was the employees' claim for compensation for the damage they sustained by receiving reduced salaries and the conversion of these claims into payments for internal shares. Since the managers had been in prison and consequently damages occurred during that time, the company's experts calculated that the company's employees were entitled to compensation in the amount of 120 million DEM. At the

constituent general meeting of shareholders, the shareholders considered and accepted this compensation amount for their claims. The management board then transformed this compensation for the employees' claims into payments for internal shares intended to benefit all the former 14,000 employees of Agrokomerc.

122. The state authorities offered no objections concerning taxes and contributions. The witness asserted that, had there been such objections, he would have heard about them. He concluded that Agrokomerc calculated and paid taxes and contributions for the part of salaries allocated to the payment of internal shares.

123. As to why none of the applicants possessed share certificates, the witness pointed out that the employees had to leave the territory around 20 August 1994 to save their lives during the armed conflict. Everything was left behind in the premises of Agrokomerc and in the employees' houses. Their homes were then plundered. As displaced persons, they were not able to re-enter their homes for years and had no access to documentation.

#### 5. Senada Murtić-Pajazetović, Chief accountant of Agrokomerc from 1989 until 1994

124. The witness claimed that Agrokomerc kept a book with the signatures of all employees establishing that each employee agreed to the allocation of one third of his salary as payment for internal shares. The payments for shares started on 1 August 1991 and ceased on 20 April 1994. Each employee received payment slips on which the exact amount of the part of his salary allocated to the payment of internal shares was stated.

125. The witness maintained that a complete calculation was made relating to the taxes and contributions payable for the whole amount of salaries as of 31 December 1992. The company met all its obligations. She presented a certificate to the Chamber to confirm her statement.

#### 6. Hajrudin Alijanović, Finance Officer of Agrokomerc until 1994

126. Mr. Alijanović stated that the part of salaries allocated to the payment of internal shares was separately registered on the payment slip of each employee. The payment slips of the employees indicated the salary, including the total earnings of the employees, and its division into cash payment, vouchers, and payment for internal shares. At the end of each year, each employee had the possibility to review the total amount of income and the amount allocated to payment for internal shares. Agrokomerc kept records of all transactions made for employees.

127. Taxes and contributions were paid after the management and accountants learned through a financial control in 1993 that the company was obliged to calculate taxes and contributions for salaries allocated to the payment of internal shares. After the financial control by the Financial Police, all contributions were paid on the part of the salaries allocated to the payment of shares. As long as the payment system functioned, all payments went through the Social Audit Service (Institute for Payment Transactions). The payment of taxes and contributions was later interrupted due to the armed conflict. Agrokomerc then gave loans to the district administration and other local institutions. Agrokomerc felt obliged to support all institutions and businesses in the region which were not in a position to pay their employees.

128. The witness further explained that through July 1991, Agrokomerc paid its employees guaranteed minimum salaries. As of 1 August 1991, it no longer paid guaranteed minimum salaries, and the range of salaries was from 250 to 800 DEM, depending on the employee's position. As of August 1991, the amount of cash plus vouchers received by employees (not including the part of salaries allocated to the payment of internal shares) was approximately the same as the employees' previous salaries received in July 1991.

#### 7. Hasib Huremagić, Inspector of the Social Audit Service

129. The witness stated that he worked for the Social Audit Service (Institute for Payment Transactions) until 20 August 1994. Agrokomerc submitted its annual balance sheet for 1992 to the Social Audit Service. This annual balance sheet contained all necessary statements in accordance

with the applicable provisions of the Social Audit Service. The annual financial statement of Agrokomerc for 1992 was neither disputed nor returned.

130. Mr. Huremagić contended that he was presented with the record dated 25 December 1992 of a control performed on the payment of taxes for salaries at Agrokomerc. According to that record, taxes and contributions related to salaries in the amount of 630,112,590.50 YUD for the period of 1 January 1992 to 30 August 1992 were paid by 25 December 1992. For the period of October to December 1992, it was established that taxes and contributions in relation to salaries were due in the amount of 102,385,925 *Bosnia Herzegovina dinars* ("BHD"). Agrokomerc also met this obligation by December 1992 by submitting payment orders to the Social Audit Service.

131. The witness stated that he could establish that in December 1992 Agrokomerc paid taxes and contributions for the year of 1992 from its giro account to the Municipality Velika Kladuša. By these payments Agrokomerc met all its obligations regarding taxes and contributions for salaries. He also checked the taxes and contributions for salaries concerning the period of January to June 1993. According to payroll sheets, of the total salaries, which amounted to 3,085,671.10 DEM, two thirds were paid to employees and one third was used for the payment of internal shares. In the period of 1 January to 30 June 1993, Agrokomerc also calculated and paid taxes and contributions for the payments to internal shares. In the period of 1 January 1992 to 30 April 1993, Agrokomerc transferred these payments to government institutions in the Bihać District. The funds were given as loans from Agrokomerc "due to the blockade of the unique payment system".

### 8. Damir Sokolović, Revsar

132. The witness is a professional accountant employed with the Revsar auditing firm. He carried out the audit of Agrokomerc (see paragraphs 98-103 above). By examining the financial books, the audit established "that the company increased the shareholders' capital on the basis of salaries". The witness stated that one third of salaries were allocated to the payment of internal shares, but no evidence was found that all costs and contributions were calculated and paid as provided by the law for that part of salaries. Pursuant to the applicable law, these amounts could not therefore be considered to be salaries in bookkeeping terms. If the parts of salaries allocated to the payment of internal shares were not properly encumbered with all costs and contributions, then they could not be considered as payment for internal shares. As a result, in the audit procedure, the shareholders' capital was reversed for the benefit of state capital.

133. The application to perform an audit was submitted by Agrokomerc to Revsar on 24 March 1999. The witness also stated that the documentation for the audit was not complete.

134. The witness explained that the audit of a previously performed privatisation was not a regular audit (which is an examination of financial records) because the legislature stipulated both the form and elements of such an audit. Moreover, an audit of a previously performed privatisation results in a procedural decision. Accordingly, such an audit does not look like a regular examination of the financial books. Audits of a previously performed privatisation are always conducted in the same manner and have an identical form unlike ordinary audits.

135. The purpose of the audit was to establish the ownership structure of the company's capital on the basis of certain regulations, which were in force during the time of the privatisation. The audit was supposed to establish two facts: firstly, the total value of the company's capital, and secondly, the proportion between the share capital and the state capital. The part established as private capital, the internal share capital, was not subject to the process of privatisation. In the event it found during its audit that entries in the books were not in accordance with the laws or bookkeeping standards, Revsar's task was to make orders to correct these bookkeeping errors. Revsar's findings and audit of Agrokomerc did not confirm as "realistic and objective" the entry of certain amounts and items.

136. The procedural decision on the results of the Revsar audit dated 7 March 2001 was transmitted to Agrokomerc, which had requested the audit. Moreover, as provided by law, all such audits performed in the territory of the Federation of Bosnia and Herzegovina had to be delivered to the competent Agency for Privatisation. The Revsar audit was therefore delivered to Agrokomerc and

the Agency for Privatisation. An appeal against Revsar's procedural decision could be submitted by the competent Agency for Privatisation, by the company subject to the audit, or by its shareholders.

### 9. Enisa Dervišević, Financial Police

137. The witness confirmed that she carried out an inspection of Agrokomerc pursuant to an order on partial control of material and financial business with special retrospection of the capital structure (see paragraphs 79-97 above). During the inspection she examined the payroll lists presented to her, and she observed that the salaries consisted of three parts: one part paid to employees in cash, the second part allocated to vouchers issued by Agrokomerc, and the third part allocated to internal shares. In preparing the Financial Police Report, Ms. Dervišević had no documents relating to 1994 available.

138. The inspectors found a record referring to the calculation of taxes and contributions for the period of January to June 1993. Besides that record, the Financial Police found a copy of payment statements in an amount over 1,203,000 DEM. In the control procedure the inspectors attempted to establish to whom that payment was made. They requested the Social Audit Service (Institute for Payment Transactions) in Velika Kladuša to check the payment amount for them, but did not receive any reply.

139. On the basis of examining the financial books relating to the years 1991 and 1992, the witness concluded that the allocation for internal shares was not performed in accordance with applicable legal provisions. For that period of time, payments of taxes and contributions were made only for the part of the salary paid to employees in cash.

140. In her report, Ms. Dervišević reviewed the contract concluded by Agrokomerc with the Slovenian company Perutnina. The value of Agrokomerc's assets calculated for the purpose of forming the new company with Perutnina differed considerably from the estimation done by the Faculty of Economics of Sarajevo University. The two evaluations were made at almost the same time. The experts engaged by Agrokomerc estimated a much lower value for the company. According to the witness, only the responsible persons at Agrokomerc who worked on this project could give an explanation for the underrating of the company. The Financial Police Report only pointed out the missing justification and damage that could have occurred by undervaluing the company's assets.

141. The witness contended that Agrokomerc's experts probably carried out the undervaluation in order to reach an agreement with Perutnina on the structure of participation in the joint venture which suited Perutnina. Asked whether this drastic undervaluation, as compared to the estimation made by the Faculty of Economics, was subject to criminal prosecution, the witness explained that in her opinion, since the merger was not realised due to the Chamber's order for provisional measure, no criminal offence was completed.

142. Furthermore, Ms. Dervišević mentioned that in the Bihać region, the payment system was functioning until September 1993. Therefore, Agrokomerc should have transmitted all payments to the District (now the Una-Sana Canton), and not to the Municipality of Velika Kladuša.

### 10. Enes Demirović, former President of the Association for the Protection of the Rights of Shareholders

143. The witness stated that he worked for Agrokomerc in 1991, when the internal share programme started. Activities with a view to issuing internal shares commenced in August 1991, and Agrokomerc was registered as a joint stock company in October 1991. Mr. Demirović claimed that he was elected President of the Association for the Protection of the Rights of Shareholders in mid-1992, and he held that office until he was dismissed on 7 March 1993.

144. According to Mr. Demirović, all employees of Agrokomerc allocated one third of their salaries to the payment of internal shares. He stated that he has no written document referring to that part of the salary except the payroll lists at Agrokomerc, which he signed when he received his salary. The tripartied system was visible from the payroll lists, which reflected that one third of salaries was paid in cash, one third was paid in vouchers valid on the business premises, *i.e.*, in the shops of Agrokomerc, and one third was allocated to the payment of internal shares. The witness stated that

he feels that he is the owner of the part of his salary allocated for internal shares because it was taken from his salary for his work. If shares were formed through the allocation of part of his salary, he claimed to be entitled to them.

#### 11. Besim Mujčin, lawyer of Agrokomerc

145. The witness stated that he is the head of the Department for General and Legal Issues of Agrokomerc, and he has been working for the company since 1997. He alleged that during the Marković privatisation process, Agrokomerc did not calculate taxes and contributions on the total amount of salaries, but only on the one third part paid in cash. He claimed that he has decisions in his possession which prove that the management converted capital into share capital at the expense of social capital. One such decision concerns the payment of compensation for reduced salaries in the amount of 120,880,000 DEM for employees who worked for Agrokomerc from 1987 until 1991. Moreover, there was a decision stating that on 31 March 1992 the value of inventory goods in the amount of 243 million DEM shall be registered as share capital. In 1992, a decision was rendered on the distribution of profit in the proportion "some 60:40 in favour of the social capital".

## IV. RELEVANT LEGAL PROVISIONS

### A. Legislation of the Socialist Federal Republic of Yugoslavia and the Socialist Republic of Bosnia and Herzegovina

#### 1. Law on the Procedure of Court Registration

146. The Law on the Procedure of Court Registration was published in the Official Gazette of the Socialist Federal Republic of Yugoslavia— hereinafter "OG SFRY" (OG SFRY no. 13/83) on 25 March 1983, and its amendments (OG SFRY no. 17/90). The relevant provisions provide as follows:

Article 5:

"The Court shall be obliged to perform registration in the Court Register if the application with prescribed contents is submitted by the authorised person, if the application has certain documents appended with prescribed contents proving the facts of importance for registration in the Court register, and if the request for registration is in accordance with the Law.

"The Registration Court shall be obliged to assess whether prescribed conditions for registration exist."

Article 10: "The procedural decision on registration in the Court Register shall be enforced with the date of issuance if not prescribed otherwise by this Law."

Article 32: "Before issuing the procedural decision on the request for registration in the Court Register, the Registration Court shall examine whether formal and material conditions for the registration are met."

Article 33:

"Formal conditions referred to in Article 32 of this Law are the following:
"1) The authorised person should submit the application;
"2) The application should be submitted on the prescribed form with the defined contents and in necessary number of copies;
"3) All prescribed documents in original or certified copy or photocopy should be enclosed;
"4) Documents should be issued in the prescribed procedure;
"5) Documents should contain the prescribed contents;
"6) Other formal conditions prescribed by this Law should be met."

Article 34:

"Material conditions referred to in Article 32 of this Law are the following:
"1) The request for registration shall be in accordance with the Law;
"2) The request for registration shall be in accordance with provisions of … general acts determining data or changes that shall be registered in the Court Register;
"3) Other material conditions prescribed by this Law should be met."

Article 45: "After the Registration Court has previously established determining facts, it shall issue the procedural decision upon each request for registration in the Court Register."

147. The Law was amended on 23 March 1990 (OG SFRY no. 17/90) and provides the following relevant provision in Article 3:

"Registration in the Court Register shall have legal effect against third persons starting with the date of registration.

"Anyone who, acting conscientiously, relies on the data registered in the Court Register in legal transactions, shall not bear harmful legal consequences that may arise from it."

### 2. Law on Securities

148. The Law on Securities was published in the Official Gazette of the Socialist Federal Republic of Yugoslavia (OG SFRY no. 64/89) on 20 October 1989 and amended on 8 June 1990 (OG SFRY no. 29/90). The relevant provisions provide as follows:

Article 2: "Securities may be issued by a company, a bank and some other financial organisation, an insurance organisation, a social and political community, and other legal persons (hereinafter "the issuer")."

Article 8: "Pursuant to this Law a security is a public instrument made out to a name or a bearer."

Article 9:

"The issuer of securities shall be obliged to carry out all obligations referred to in the securities within the time-limits and in the manner provided by the law or decision on their issuance.

"Rights and obligations from securities shall appear when the issuer of securities hands them over to the buyer or to its authorised representative."

Article 13:

"A share is a document of ownership over the assets invested in a company, a bank, another financial organisation, an organisation for insurance, or other legal person that may acquire the profits.

"The bearer of a share shall acquire the right to take part in the profits and, depending on the kind of share, the bearer may have the right to take part in the management."

Article 15: "A share shall be paid in cash, or in goods and rights expressed in money amounts, in accordance with the decision referred to in Article 20 of this Law."

Article 16:

"The purchase price of a share may be paid at once or in instalments.

"If the payment is made in instalments, the purchaser of a share shall receive an interim certificate and every next payment shall be entered into and certified on the interim certificate.

"An interim certificate shall be withdrawn and changed with a permanent share when the holder of the interim certificate pays the full amount of his/her part.

"If the full amount for which the shares are issued has not been realised in accordance with the decision referred to in Article 20 of this Law, the issuer may forego the issuance of shares and shall be obliged to return to the payers the invested money plus interest determined by the decision referred to in Article 20 of this Law, which shall accrue from the date of payment to the date of return.

Article 17:

"The holder of a share shall have the right to a share of the realised profit (the dividend)....

"The holder of a share, depending on the kind of share, may have the right to vote at the general meeting of shareholders of the issuer during the election of the organs of management and supervision, as well as the right to supervise and determine business policies."

Article 20:

"The decision on the issuance of shares in a company, an insurance organisation, and other legal persons shall be taken by the Workers' Council, a corresponding management body of the issuer or the founder of the company.

"The decision on the issuance of shares establishes in particular: the name of the issuer of shares; a mark signifying that a share is made out to the bearer or to a name; the total amount for which the shares are being issued and the number of shares, the nominal value of the shares, the number of votes given by the share, if any rights to management are gained pursuant to Article 13 of this Law; the manner of dividend disbursement; the time when shares were registered; the manner of registering shares; to whom and within what time limit shall the funds for purchasing shares be paid; within what time limit shall the funds paid for shares be returned in case the issuer forgoes the issuance of shares; the kind of shares; the rank order of establishing priority when preferential shares are being issued in several batches; the manner of making public the issuance of shares; the procedure for allocation and distribution of shares; the manner of payment for shares; determining the conditions for disbursement of cumulative dividends; the incurrence of risk; the manner of disposal of shares; the possibility to exchange— convert shares; the rights exercised by the holder of a preferential share; the priority purchase right of shareholders when new shares are being issued and other issues related to the issuance of shares.

"The decision on the issuance of shares may also anticipate the issuance of the certificate certifying that a shareholder is in possession of the number of shares marked in the certificate.

"The certificate referred to in paragraph 3 of this Article may only be used as an identification paper for participating in the general meeting of shareholders with a certain number of votes."

Article 21:

"A share shall contain the following basic elements: a mark signifying that it is a share; a mark signifying the kind of share; the company or the headquarters of the issuer of shares; the company or the name of the buyer of a share or to whom the share is made out; the total money amount for which shares are issued and the number of shares; the time-limits for payment of dividends; the place, date of issuance and serial number with a control number of the share; a signature stamp of persons authorised by the issuer of shares and rights stemming from the shares.

"A talon for payment of a dividend shall contain the following basic elements: the ordinal number of the talon for payment of a dividend; the number of shares according to which the dividend is payable; the name of the issuer of the dividend; the year in which the dividend is payable and the signature stamp of authorised persons – the issuer."

Article 22:

"Pursuant to the order of issuance, the share may be the founder's share – the share of the first issuance or the share of a subsequent issuance.

"Pursuant to the contents of rights, the share referred to in paragraph 1 of this Article may be an ordinary or a preferential one.

"The founder's share referred to in paragraph 1 of this Article may be an ordinary share and also a preferential share."

### 3. Law on Social Capital

149. The Law on Social Capital was published in the SFRY Official Gazette (OG SFRY nos. 84/89, 46/90) and was later taken over by the Republic of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina— hereinafter "OG RBiH" (OG RBiH no. 2/92). The Law as stated below was in force between 18 August 1990 and 25 November 1994 with the following relevant provisions:

Article 1:

"(1) Any socially-owned enterprise (hereinafter: the Enterprise) may procure additional capital on the basis of social capital, by issuing shares and/or selling interest in the Enterprise.
"(2) The Enterprise and social capital may be the subject matter of sale.
"(3) For the purpose of this Law, the following shall be regarded as social capital: operating capital fund less a proportional part of non-covered losses, as well as a proportional part of the reserves and non-operating funds."

Article 1a:

"(1) The Enterprise may issue shares in conformity with the federal law that governs the issuing of securities.
"(2) For the purpose of procuring additional capital or selling the Enterprise, the Enterprise may issue at a discount rate such shares which cannot be circulated in the security market (hereinafter: internal shares).

"(3) The internal shares may be sold to:
/1/ employees employed in the Enterprise;
/2/ persons who have been employed in the Enterprise..., and retired employees of the Enterprise, who have been employed in the Enterprise for at least two years;
/3/ other domestic natural persons;
/4/ pension and disability insurance organisations (hereinafter the "pension funds").
"(4) The decision to issue internal shares shall be made by the managing body of the Enterprise.
"(5) Concurrently with the internal-share issuing decision, the managing body shall also make a decision for setting up the Enterprise as a mixed-ownership joint stock company or a limited liability company."

Article 1b:

"(1) The provisions of the Law on Securities shall be applicable to the contents and manner of rendering the internal-share issuing decision, the basic elements of the internal shares, and the rights of the holders of internal shares in the event of bankruptcy of the Enterprise.
"(2) The internal shares shall acquire the character of the shares referred to in the Law on Securities, provided that they have been fully paid and that other requirements provided by the said law have been met."

Article 1c:

"(1) The Enterprise may issue internal shares in a value which is no greater than 6 annual net personal earnings paid out in the Enterprise.
"(2) The Enterprise shall sell internal shares to employees employed in the Enterprise at a discount amounting to 30% of the nominal value of the internal shares plus 1% of the nominal value of the internal shares for each year of work in the Enterprise, provided that the total discount is not greater than 70% of the nominal value of such internal shares...."

Article 1d:

"(1) When the Enterprise sells internal shares for the purpose of procuring additional capital, the total discount shall not be greater than the value of the social capital.
"(2) The value of the social capital in the Enterprise shall be decreased proportionally to the value of the discount granted on internal shares...."

Article 1f: "The Enterprise may offer any unpurchased internal shares for sale again to the persons referred to in Article 1a, paragraph 3 of this Law, ..."

Article 1g:

"(1) Any holder of internal shares shall be entitled to a share of the Enterprise's profits, proportionally to the paid part of such shares, plus the proportional amount of the discount granted.
"(2) The holders of internal shares shall have the right to participate in the management of the Enterprise, proportionally to the nominal value of such shares."

Article 1h:

"(1) The internal shares shall be denominated in dinars.
"(2) The internal shares shall be payable for in money.
"(3) The internal shares shall be paid for all at once, on several occasions, or in instalments.
"(4) If a purchaser is paying for internal shares in instalments, he shall meet his commitments no later than ten years from the date of the internal-share issuing decision, and in conformity with the latter.
"(5) When the internal shares are being paid for in instalments, the Enterprise shall revalue the unpaid part of the internal shares each year, in accordance with the retail price growth rate.
"(6) Should a holder of internal shares fail to pay their full value within the term specified in paragraph 4 of this Article, he shall lose his right to the part of the internal shares for which he has not paid and a corresponding portion of discount."

Article 1l:

"(1) The internal shares shall be made out to a name.
"(2) The internal shares may be transferred, unless otherwise provided by the internal-share issuing decision.
"(3) The internal shares are transferable through full endorsement by the Enterprise."

Article 1j:

"(1) The value of the social capital shall be determined in the internal share issuing procedure in accordance with the Enterprise's latest annual balance sheet.
"(2) The body managing the Enterprise or the composite form of organisation, as applicable, may decide in the internal-share issuing procedure the value of the social capital to be determined on the basis of its estimated value."

Article 1k: "The Enterprise may issue certificates of interest in the Enterprise on the basis of the social capital at its disposal, in the manner and under the conditions provided by this Law for the issuance of internal shares."

Article 2:

"(1) The Enterprise and social capital may be sold either wholly or partly to any domestic or foreign legal or natural person....
"(2) The proceeds from the sale of a section of the Enterprise, which is being set up as a new legal person, shall belong to the enterprise which had sold such a section....
"(5) If a socially-owned joint stock company ... is selling its own shares or parts of its own capital in the Enterprise based on invested social capital, the decision to sell such shares and/or interests shall be made by the managing body of the Enterprise...."

Article 14:

"The Enterprise may issue internal shares, under the conditions provided by this law, within one year from the effective date of this Law.
"The procedure for the sale and payment for the internal shares shall be completely terminated within ten years from the date of the internal-share issuing decision at the latest."

Article 17: "The Law shall come into force on the eighth day upon its publication in the Official Gazette of the SFRY." [The Law was published in the Official Gazette on 10 August 1990.]

### 4. Laws on Payment of Salaries

150. The Law on Payment of Salaries until the End of the First Half-Year of 1990 was published on 27 December 1989 (OG SFRY no. 87/89). The relevant provisions provide as follows:

Article 5:

"Legal persons who carry out the activities classified according to the Decision on Unique Classification of Activities in the Field as follows: 02 Agriculture ..., may pay monthly advanced payments for salaries up to the amount they establish as corresponding to the amount of an average paid net salary per employee for October 1989 in the economy of the Republic ... increased by the number of employees in November 1989 and increased by the percentage of growth in living expenses in November 1989 as compared to October 1989 in the Republic ... if this shall be more favourable for them.
"The legal person who shall start to work after this Law enters into force and the legal person who did not pay their net salaries before this Law enters into force, respectively, shall pay net salaries not larger than the amount established in accordance with its bylaws...."

Article 6:

"Legal persons referred to in Articles 2 to 5 of this Law may increase the amount of an average salary established in accordance with the provisions in Articles 2 to 5 of this Law for the percentage of change in the exchange rate of the dinar to DEM on the date of payment after this Law enters into force as compared to the exchange rate established on 18 December 1989 and in accordance with the mean rate of exchange established in the foreign currency market.
"There shall be an exception to this provision for those legal persons who realise a profit according to the annual balance sheet for 1989, and they may, in accordance with their bylaws, distribute a part of that profit by issuing shares and/or bonds. By a decision on issuance of shares and/or bonds, respectively, the rights and obligations of the issuer and a holder shall be established, but the payments covered by issued bonds may not be carried out before 30 June 1990."

151. The Law on Payment of Salaries to the End of the First Half-Year of 1990 was amended by the Law on Payment of Salaries, Assets for Direct Joint Consumption, and Assets for Employees' Meals During Work (OG SFRY nos. 37/90, 84/90). It stipulates in Article 4 the following relevant provisions:

> "The legal person ... whose index of accounted monthly net salary per employee is between 90 and 110 as compared to an average monthly salary per employee paid for the period of July-November 1990..., shall issue internal shares to its employees or allocate funds to the operative fund in the amount of no less than 25% of the amount of increase of the monthly net salary advance payment per employee as compared to the average monthly amount of salaries per employee paid for that period.
>
> "....
>
> "Shares and funds allocated to the operative fund ... shall encumber the non-material expenses in the amount of a net salary increased by the corresponding amount of taxes and contributions....
>
> "Funds for the salaries, after the amounts referred to in paragraphs 1 and 2 of this Article were decreased, shall be disbursed by the legal person as employees' salaries. ..."

### 5. Law on the Guaranteed Salary of an Employee

152. The Law on the Guaranteed Salary of an Employee (Official Gazette of the Socialist Republic of Bosnia and Herzegovina no. 38/91) regulated the payment of guaranteed minimum salaries for employees. The relevant provisions of that Law provides as follows:

> Article 1: "This law establishes the amount of the guaranteed salary and the conditions under which an employee in his organisation, *i.e.* with his employer in terms of Article 2 of the Law on Basic Labour Related Rights ("Official Gazette of SFRY", nos. 60/89 and 42/90), exercises his right to a guaranteed salary."
>
> Article 2: ...
>
> "The guaranteed salary established in the previous paragraph may not be lower than 70% of the average monthly net salary per employee in the economy of the Socialist Republic of Bosnia and Herzegovina (hereinafter: the Republic) earned in the previous three-month period.
>
> "The guaranteed employee salary may not exceed the amount of a triple guaranteed salary as established in the previous paragraph."
>
> Article 3: "Based on his work, an employee is entitled to a guaranteed salary in an amount proportionate to the time spent on work and it shall be paid to him within the time limit established in the bylaws and/or by the collective work agreement."
>
> Article 4: "If, by applying the grounds and criteria established in the bylaws and/or by the collective work agreement, an employee earns a salary lower than the guaranteed salary as established in Article 2 paragraph 2 of this law, such an employee shall be paid a guaranteed salary in the amount of 60% of the average monthly net salary per employee in the economy of the Republic, earned in the previous three-month period."
>
> Article 5: "A guaranteed salary referred to in Articles 2 and 4 of this law may be paid to individual employees consecutively for no longer than three months, within which period the organisation, *i.e.* the employer, is under obligation to initiate procedures and to take steps to examine and eliminate the causes which lead to the payment of guaranteed salaries in accordance with the regulations concerning labour relations."
>
> Article 6: "The guaranteed salary shall be paid by organisations, *i.e.* employers, from their own or other sources, in accordance with law."
>
> Article 7:
>
> If an organisation, *i.e.* an employer, has been paying guaranteed salaries from its own sources for more than three months consecutively, then guaranteed salaries for the forthcoming months shall be paid in the amount of the average monthly advance pay of the net salary, which will serve as the basis for establishing the guaranteed salary referred to in Article 2 paragraph 1 of this law.

The guaranteed salary referred to in the previous paragraph may not be lower that the guaranteed salary established in Article 2 paragraph 2 of this law.

Article 8: "If the organisation, *i.e.* the employer, pays employees the entire guaranteed salary, the compensation which shall be paid by the organisation, *i.e.* the employer, to an employee for his salary in case he is on leave, may not exceed the amount of the guaranteed salary established in Article 2 of this law.

### 6. Law on Enterprises

153. The Law on Enterprises was published on 31 December 1988 (SFRY no. 77/88) and amended thereafter on 7 July 1989 and 10 August 1990 (OG SFRY nos. 40/89, 46/90). The relevant provisions provide as follows:

Article 81:

"Domestic and foreign legal and physical persons may establish a mixed company.
"Mixed companies may be established as a joint stock company, limited liability company,..."

Article 83: "By court registration of the contract on establishment of a mixed company and/or the decision of the constituent shareholders meeting, the company shall acquire legal and business capability."

Article 96: "The bank shall issue the certificate on subscription of shares. If the shareholders do not make the payment of shares within the time-limit they agreed to when they acquired the obligation on the date of subscription, they shall be obliged to pay interest determined by the articles of association or the bylaws or other rules of the company."

Article 97: "If within the time-limit provided for by the articles of association, the bylaws, and/or other rules of the joint stock company, the shareholders do not pay for the shares, it shall be considered that the joint stock company has not been established, and the shareholders who paid for shares shall have the right to reimbursement of the amounts paid."

Article 101:

"The articles of association, the bylaws, and/or other rules of a joint stock company must contain provisions on:
"1) the company and the headquarters of the joint stock company....
"3) the amount of the initial capital, the nominal value of shares, their number and time-limit for subscription and payment of shares, the amount of interest payable when the time-limit for payment is exceeded, the kinds of shares and the manner of their transfer...."

"The articles of association, the bylaws, and/or other rules of the company, may also contain provisions on:
"1) investments and objects and rights when the joint stock company is established, with the exact marking of the objects, number and kind of shares paid by investment in objects and rights ....
"3) issuance of different kinds and types of shares, the possibility of transformation of one type into another and the possibility of withdrawal of shares, *etc.*,. "

Article 103:

"....
"Shareholders may not resolve their claims against the company by offsetting them against their obligation to pay for shares.
"After registration of shareholders into the shareholders book, the joint stock company may not postpone the payment of shares or relieve them of payment of shares."

Article 120: "The bodies of a joint stock company ... shall be as follows: the general meeting of shareholders, the management board, the Workers' Council, and the supervisory board."

Article 121: "The general meeting of shareholders of a mixed company shall be composed of delegates of the employees of the mixed company and the investors and/or their representatives."

Article 186: "On the date of entry in the court register, the registration shall have legal effect against third persons...."

## B. Legislation of the Republic of Bosnia and Herzegovina

### 1. Law on Transformation of Socially-Owned Property

154. The Law on Transformation of Socially-Owned Property was published in the Official Gazette of the Republic of Bosnia and Herzegovina on 25 November 1994 (OG RBiH no. 33/94). According to Article 12 of this Law, it entered into force on the date of publication in the Official Gazette and it was applied from 1 January 1995. On the day this Law entered into force, the Law on Social Capital ceased to be applied.

155. Article 1 provides as follows:

> "On the date this law enters into force, the Republic of Bosnia and Herzegovina (hereinafter: the Republic) becomes the holder of the right of ownership over socially-owned property for which the Federation of Bosnia and Herzegovina has no right of disposal, and that is: ...
> "2. social capital expressed in balance sheets of legal persons as of 31 December 1991;...."

156. Article 4 provides as follows:

> "Powers and obligations stemming from the property referred to in Article 1 of this Law shall be exercised by competent bodies in accordance with valid regulations until the issuance of the law referred to in paragraph 1 of this Article."

157. Article 5 provides as follows:

> "The effective amount of share capital expressed in the balance sheet as of 31 December 1991 is considered to be the privately-owned capital based upon paid internal shares or parts of capital.
> "Amounts paid for the purchase of internal shares or parts of capital after 31 December 1991 until the date this law entered into force, shall become claims of the employees against the company which shall be revalorized and returned to the payers or shall be registered as share capital in accordance with the law."

158. Article 6 reads as follows:

> "Based on the Law on Social Capital, the conducted procedures and activities for the transformation of socially-owned property into private property shall be reconsidered in an auditing procedure in accordance with special regulations no later than the time of establishment of the initial balance sheet in the procedure of further ownership transformation of companies.
> "If the audit establishes that the procedures and activities referred to in paragraph 1 of this Article have not been carried out in accordance with the regulations, the auditing body shall issue a decision on elimination of established irregularities and defects or on reinstatement into previous status and/or pecuniary compensation, respectively."

### 2. Ordinance on the Audit of Ownership Transformation Performed in Accordance with the Law on Social Property

159. The Ordinance (OG RBiH no. 41/95) was in force from 24 December 1995 until 15 January 1998 when the Ordinance on the Audit of Previously Performed Ownership Transformation entered into force in the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina—hereinafter "OG FBiH"—no. 1/98). The Ordinance regulated the procedure of auditing the ownership transformation based on the Law on Socially-Owned Property. It provided in Article 6 that in case documentation was destroyed or inaccessible, the company was obliged to carry out a reconstruction procedure based on data from the balance sheets located at the Bureau for Payment Transactions of the Republic of Bosnia and Herzegovina and from the court register, as well as other documentation pursuant to the instructions of the Bureau.

### 3. Law on Enterprises

160. The Law on Enterprises was published on 25 November 1994 in the Official Gazette of the Republic of Bosnia and Herzegovina (OG RBiH no. 33/94) and on 11 February 1995 in the Official Gazette of the Federation of Bosnia and Herzegovina (OG FBiH no. 2/95). It was in force between 1 January 1995 and 29 August 1999. The relevant general provisions are the following:

> Article 3: "All forms of Enterprises are registered in the Court Register of Enterprises."
>
> Article 8: "The capital owners manage the Enterprise."
>
> Article 9: "An Enterprise has a management board appointed by the supervisory board or Enterprise owners, in accordance with the contract or decision on establishment and/or the articles of association of the company."

161. The relevant general provisions of the Law on Enterprises on joint stock companies are the following:

> Article 11: "A joint stock company is an Enterprise whose capital stock is divided into shares...."
>
> Article 12: "Capital stock of a joint stock company is expressed in money. Investments in the joint stock company may be paid for in money, objects and rights."
>
> Article 13: "Shareholders have rights and obligations established by the law and the articles of association of the joint stock company."

162. The relevant provisions with regard to shares are the following:

> Article 21: "Investments made in objects and rights shall be incorporated in their entirety into the company before the registration of the joint stock company in the Court Register of Enterprises. It is considered that the objects and rights are incorporated into the company if the company can use them in their entirety and have them at its disposal freely and permanently...."
>
> Article 22: "Evaluation of investments in objects and rights is conducted by experts or specialised organisations - authorised evaluators."

163. The relevant provisions concerning the general meeting of shareholders, the management board and the supervisory board are the following:

> Article 32:
>
> "A joint stock company shall be managed by the owners of invested capital, through the general meeting of shareholders, the management board and the supervisory board.
> "A shareholder has the right to manage the company through the shareholders meeting, in proportion to the nominal value of his shares in the capital stock.
> "The number of votes for each shareholder at the shareholders meeting is determined in percentages, in proportion to his share in the capital stock."
>
> Article 33: "The shareholders meeting of a joint stock company is made up of shareholders or their representatives, depending on the managerial rights determined by the articles of association."

164. Special provisions with regard to state-held capital provide as follows:

> Article 154: "In Enterprises in which the state owns all or the majority of the capital, the provisions of this law are to be implemented, unless determined otherwise by provisions of this chapter or by Republic* law."
>
> Article 155: "Enterprises under Article 154 of this law are managed by the state in proportion to participation of state-owned capital in the capital stock of an Enterprise."
>
> Article 156: "In Enterprises under Article 154 of this law during a period of the state of war or immediate threat of war, the supervisory board conducts the functions of the shareholders meeting."

* The Official Gazette of the Federation replaces the reference to the "Republic" with the "Federation".

Article 157: "The responsible Republic, Cantonal or Municipal bodies conduct, in accordance with the law, the powers and obligations of the state as the owner of an Enterprise on the basis of the state-owned capital."

Article 158:

"The Parliament of the Republic* of Bosnia and Herzegovina, in accordance with the provisions of Article 157 of this Law, shall make a list of companies in relation to which powers and obligations of the owner on the basis of state capital shall be exercised by the organs of the Republic.

"Concerning other Enterprises, the Cantons and Municipalities, on whose territory the company is located, shall exercise the powers and obligations if the capital is totally or partly state-owned.

"Members of the management board of the company referred to in paragraph 1 of this Article shall be appointed and dismissed by the Government or competent Ministry of the Republic–the Federation of Bosnia and Herzegovina.

"Members of the management board of the company referred to in paragraph 2 of this Article shall be appointed and dismissed by the competent Cantonal or Municipal organs...."

Article 159:

"In joint stock companies in which the state possesses all or a majority of capital, the managing director of the Enterprise shall be appointed by the management board with the prior approval of the competent body as referred to in Article 158.

"In Enterprises referred to in the previous paragraph, the managing director cannot be a member of the management board."

Article 160: "In Enterprises in which in addition to state-owned capital, private capital is also present, the competent body referred to in Article 158 of this law appoints the members of the management board in proportion to the participation of state-owned capital in the total capital of the Enterprise."

Article 161: "Enterprises in which the state owns all or a part of the capital are obliged to bring their articles of association into accordance with provisions of this law within the period of three months from the date this law enters into force."

## C. Constitution of Bosnia and Herzegovina

165. The Constitution of Bosnia and Herzegovina was signed in Paris on 14 December 1995 as part of the General Framework Agreement for Peace in Bosnia and Herzegovina, set out in Annex 4 to the General Framework Agreement. It contains transitional arrangements in Annex II, including the following provision relevant to the present applications:

"2. Continuation of Laws

"All laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina."

## D. Constitution of the Federation of Bosnia and Herzegovina

166. The Constitution of the Federation entered into force on 30 March 1994 at midnight. Section C of Chapter IV contains the provisions concerning the judiciary. Article 10 of this section, as amended on 5 June 1996, provides as follows:

"(2) The Constitutional Court shall:...

"(d) At the request ... of the Cantonal President concerned, determine whether any proposed law that has been adopted by a body of the Canton ... is in accord with the Constitution.

"(3) The Constitutional Court shall also decide constitutional questions presented by the Supreme Court ... or a Cantonal Court that arise in the course of a proceeding currently pending before that Court."

167. Article 11 of section C provides as follows:

"Whenever a Supreme Court ... or a Cantonal Court should consider, in the course of a proceeding currently pending before such court, that an applicable law is not in accord with this Constitution, it

shall stay the proceeding and present the question to the Constitutional Court in accordance with Article 10(3)."

168. Article 5 of Chapter IX, concerning transitional arrangements, provides as follows:

"(1) All laws, regulations, and judicial rules of procedure in effect within the Federation on the day on which this Constitution enters into force shall remain in effect to the extent not inconsistent with this Constitution, until otherwise determined by the competent governmental body."

## E. Legislation of the Federation of Bosnia and Herzegovina

### 1. Law on Privatisation of Enterprises

169. The Law on Privatisation of Enterprises was promulgated on 28 November 1997 (OG FBiH no. 27/97), entered into force on 6 December 1997, and started to apply on 27 February 1998. It was amended several times (OG FBiH nos. 8/99, 32/00, 45/00 and 54/00). It regulates the privatisation of enterprises that, according to their opening balance sheets, are solvent. It also contains provisions on the determination of "general claims" of individuals. The relevant provisions, as amended, state the following:

Article 4 paragraph 1: "As part of the privatisation preparations, enterprises shall prepare their privatisation programme and opening balance sheet, and submit them for approval to the competent Agency for Privatisation."

Article 5:

"The authorised body is obliged to perform an audit of the enterprise privatisation conducted according to the Law on Social Capital ("Official Gazette of SFRY", Nos. 84/89 and 46/90), and in accordance with a separate Regulation, within the period of 12 months from the day the Regulation enters into force.

"Within 30 days from the day this Law enters into force, the Federation Government will pass an Ordinance that determines more closely the competencies and audit procedures with regard to previously conducted privatisations."

Article 6:

"The findings of the audit in terms of Article 5 of this Law are an integral part of the opening balance sheet of an enterprise that is being privatised.

"Share capital, which was indisputably paid in and obtained through the internal shares programme, is nominal and shall not be subject to privatisation.

"In the opening balance sheet, the equity capital from the previous paragraph is expressed in DEM, according to the mean rate of exchange valid on the day of payment."

Article 9:

"The authorised Agency for Privatisation is obliged to make a decision on the privatisation programme and privatisation opening balance sheet submitted by an enterprise within three months from the day the deadline for the privatisation programme and opening balance sheet submissions expire.

"The Privatisation Agency is entitled to approve, return for correction or addition, or reject an enterprise privatisation programme and opening balance sheet.

"If the authorised Agency does not make its decision on the submitted privatisation programme and opening balance sheet within the time limit stated in paragraph 1 of this Article, the enterprise privatisation programme and privatisation opening balance sheet are deemed to be approved."

### 2. Ordinance on the Audit of Previously Performed Ownership Transformation

170. Based on Article 5 of the Law on Privatisation of Enterprises (OG FBiH no. 27/97), the Government of the Federation of Bosnia and Herzegovina promulgated this Ordinance (OG FBiH nos. 1/98, 16/99) with the following relevant provisions:

Article 1:

"This Ordinance regulates the procedure and competencies in the audit procedure concerning the previously transformed ownership of companies whose balance sheets, as of 31 December 1991, showed the shareholders' capital or a share of capital, *i.e.*, companies which transformed their ownership structure on the basis of the Law on Social Capital ("Official Gazette of RBiH", no. 2/92) and the Law on Payment of Salaries, Assets for Direct Joint Consumption, and Assets for Employees' Meals During Work ("Official Gazette of SFRY", nos. 37/90 and 84/90)."

Article 2:

"The audit, in terms of this Ordinance, involves the determination of the regularity and legality of the transformation of ownership in the companies mentioned in Article 1 of this Ordinance, with respect to legal, financial and accounting aspects.

"The audit shall establish actual ownership structure of the company' capital, *i.e.* the relative participation of the state and private capital in the company's capital as of 31 December 1991, changes based on the law in the amount and structure of the capital during the period 1 January 1992 through 31 December 1997, as well as the book value and relative participation of state and private capital in the company's capital as of 31 December 1997.

"Instalment payments of internal shares or parts of capital as mentioned in Article 5 paragraph 2 of the Law on Transformation of Socially-Owned Property ("Official Gazette of RBiH", no. 33/94) are regarded as claims of the person who made the payments against the company. The company shall decide, when completing the opening balance sheet, whether it shall return those claims to the persons who made them, or enter them as share capital pursuant to the law."

Article 3:

"The legal aspect of the audit mentioned in Article 2 of this Ordinance involves the verification of the regularity of the legal procedure of the company's ownership transformation.

"The financial aspect of the audit mentioned in Article 2 of this Ordinance involves the verification of the regularity of the flow of capital that occurred on the basis of the ownership transformation.

"The accounting aspect of the audit mentioned in Article 2 of this Ordinance involves the verification of the regularity in determining and declaring the book value of the social and private capital, as well as the calculation and recording of business changes that occurred in the procedure of the ownership transformation."

Article 4:

"The audit shall be performed by authorised persons of the companies registered for auditing pursuant to the law, and also of the Institute for Accounting and Auditing of the Federation of Bosnia and Herzegovina (hereinafter: the Auditor).

"A company mentioned in Article 1 of this Ordinance is under obligation to submit a written application to the Auditor of its choice to conduct an audit within 30 days from the day the instructions mentioned in Article 14 of this Ordinance enter into force.

"An auditor is under obligation to conduct the audit, prepare a written report and issue a procedural decision on the results of the audit within 60 days from the day the written application mentioned in paragraph 2 of this Article was submitted.

"In the event the Auditor is not able to accept the company's application, it is under obligation to inform the company about it within three days from the day the application was received, whereupon the company submits a written application to another Auditor within the next seven days.

"The company simultaneously submits a copy of the application mentioned in paragraphs 2 and 4 of this Article is to the competent agency for privatisation (hereinafter: the Agency).

"In the event the company does not submit an application for auditing within the time limit as provided in paragraphs 2 and 4, and/or a copy of the application mentioned in paragraph [5] of this Article, the application shall be submitted by the Agency within the next 15 days."

Article 6:

"In the audit procedure, according to its legal aspect, the Auditor performs the following activities:

1) determines the legality of the performed transformation of ownership and verifies its lawfulness;
2) reviews decisions and procedural decisions on the registration of changes in the Court Register;
3) verifies whether the registration of changes concerning the ownership transformation have been entered into the Court Register;

4) establishes the types of securities issued;…

"In the audit procedure, according to its accounting aspect, the Auditor verifies:

1) whether the book entries have been made pursuant to the regulations and on the basis of credible bookkeeping documentation into the social and share, *i.e.* private, capital;
2) whether the entire transformation procedure has been registered in the business books in the manner determined by the bylaws; and
3) whether the revalorization and organising of re-valued reserves, profits, losses, war damage and other items with respect to the social (state) and shareholder (private) capital have been carried out;
4) other actions deemed necessary in the audit procedure.

"In the audit procedure, according to the financial aspect, the Auditor verifies: …

2) in case of purchase and re-capitalisation by the proceeds from realised profits, determines the manner and relations in profit distribution depending on the capital structure, or in other words, whether the part of profits distributed for the benefit of social capital is proportional to its participation in the overall nominal capital of the company; …
4) in case of issuing shares and bonds stemming from unpaid salaries and other grounds, determines whether the company has been issuing shares and bonds in gross or net amounts, whether it calculated and paid prescribed taxes and contributions, whether the issuance of shares has caused the increased or decreased of losses, as well as whether the issuance of shares and bonds was within the framework of the collective agreement on salaries;…."

Article 8:

"The record on the performed audit must contain:

1) the Auditor's findings from the legal, financial and accounting aspects;
2) the assessment of the regularity of the ownership transformation procedure;
3) the corrections of the books on the basis of established irregularities in the privatisation process, ending on the day the audit is completed;
4) ownership structure, *i.e.*, amounts and relative participation of state capital and shareholders' equity, or private capital, as of 31 December 1991 and 31 December 1997.

"The procedural decision on the audit results confirms the regularity of the ownership transformation procedure, or determines the corrections in the company's balance sheet based on established irregularities in the ownership transformation procedure. The procedural decision on the audit results must contain the elements mentioned in subparagraphs 2 to 4 of paragraph 1 of this Article.

"The contents and the form of the records on the completed audit and the procedural decision on the audit results are incorporated into the instructions given in Article 14 of this Ordinance."

Article 9:

"The Auditor shall provide the company and the Agency with the record of the performed audit and the procedural decision on the audit results within 15 days from completion of the audit.

"The company, the Agency and the shareholders may file an appeal in writing against the procedural decision mentioned in paragraph 1 of this Article to the Federation Ministry of Finance (hereinafter: the Ministry of Finance) within 15 days from the day of receipt of the procedural decision.

"The shareholders' right to appeal is exercised through the company. If the company's management bodies decide not to appeal, then the shareholders may file the appeal directly, under the condition that the appeal is submitted on behalf of no less than 1/4 of the shareholders.

"The Ministry of Finance is obliged to issue a procedural decision on the appeal mentioned in paragraph 2 of this Article within 30 days from the day the appeal is received."

Article 13:

"The findings of the performed audit established by the procedural decision issued in accordance with the Ordinance on the Audit of Ownership Transformation Performed in Accordance with the Law on Social Capital ("Official Gazette of RBiH", No. 41/95), are the basis for establishing the ownership structure as of 31 December 1997 in accordance with this Ordinance. …"

### 3. Law on Business Companies

171. The Law on Business Companies (OG FBiH nos. 23/99, 45/00, 2/02) has been in force since 29 August 1999. It supersedes the old "Law on Enterprises", with the exception of Articles 157 and 158, which, according to Article 386, are applied at most for six months after the entry into force of the new Law.

172. The relevant provision on the decrease of original capital is Article 169:

"In order to decrease the original capital, a decision shall be taken at the general meeting of shareholders by a two-thirds majority of the represented shares with voting rights...."

173. The relevant provisions with regard to shareholders' rights and obligations provide as follows:

Article 199:

"Shareholders shall have the right to participate in person or through an authorised representative in the work and decision-making of the company at the general meeting of shareholders.

"Shareholders shall have the right to one vote for each ordinary share...."

Article 201: "Shareholders shall pay the amount of the nominal value of a share or the price of a share after its issuance...."

Article 202:

"The management of a joint stock company shall invite the shareholders who fail to fulfil their obligation to pay the price of a share after its issuance, to return the interim certificates without the right to replace them with shares, in the manner and within the time limit determined by the shareholders at the general meeting of shareholders in a decision on foregoing the issuance of shares.

"The joint stock company shall reimburse owners of interim certificates for the paid part of the price of a share after its issuance, reduced by claims of the joint stock company, no later than eight days after the day of entry of the original capital into the Registry of Issuers.

"The invitation referred to in paragraph 1 of this Article shall contain a warning that, in case the shareholder and owner of interim certificates fails to fulfil their obligation, their respective shares and interim certificates shall be publicly declared null and void.

"The joint stock company shall publicly declare shares and interim certificates null and void no later than 15 days from the day of expiry of the published deadline referred to in paragraph 1 of this Article, and it shall inform the shareholders and owners of interim certificates, in a manner and within the deadline determined by the decision of the shareholders at the general meeting of shareholders."

Article 205: "Shareholders and owners of interim certificates referred to in Article 202 of this Law shall have the right to request reimbursement by the company for the amounts paid by them for shares and obligations referred to in interim certificates, even if the joint stock company does not issue new shares and interim certificates."

Article 206:

"Shareholders shall have right to participate in the profit of the joint stock company by being paid dividends or acquiring new shares, in accordance with the law and articles of association.

"The dividend shall be paid in proportion to the nominal value of shares, whereas for the shares that were not paid in full, the dividend shall be paid in proportion to payments already made, and the time period from the day of payment until the end of the business year for which the dividend is being paid.

"The dividend shall be paid to the shareholder that was on the list of shareholders on the day the decision on payment of the dividend was made."

Article 208:

"Rights of shareholders based on a new class of shares shall be determined by a decision on issuance and in accordance with the law.

"The person entered into the register of shareholders or a person authorised by him/her shall exercise the rights belonging to the share."

Article 216:

"Shareholders and their authorised representatives shall have the right to access the following documents:

1. The contract on establishment, with all its amendments;
2. The balance sheets, income statements and reports on paid taxes for the last three business years and other documents that the company must submit to the general meeting of shareholders or to institutions other than the joint stock company.
3. Minutes of the general meeting of shareholders and auditing board;
4. The list of persons authorised to represent the joint stock company, and

5. The list of members of the supervisory board and management board, with data on addresses, dates of election or appointment and the periods for which they had been elected or appointed, and on the duties that they perform within other legal persons.

"Requests of shareholders to access the documents referred to in paragraph 1 of this Article must be complied with without delay during working hours at the premises of the joint stock company.

"Data and documents on business operations designated as confidential shall be preserved as business secrets by shareholders."

Article 217:

"The articles of association of the joint stock company may provide for the possibility of issuing a special class of shares for employees.

"The sum of the nominal values of all the shares for employees may not be higher than 5% of the original capital of the joint stock company.

"Shares for employees shall contain the same rights as ordinary shares, except for the cases determined by this law."

174. The provisions on corporate governance provide as follows:

Article 239:

"Bodies of the joint stock company are:
1) the general meeting of shareholders;
2) the supervisory board;
3) the management board."

Article 240:

"The general meeting of shareholders of the joint stock company shall be composed of shareholders.

"The general meeting of shareholders shall normally be held in the place of the head office of the joint stock company.

"The general meeting of shareholders shall be chaired by its chairman, who shall be elected at the beginning of the session of the general meeting of shareholders....

"The president and members of the supervisory board, the director and member (executive directors) of the management board shall be present during the session of the general meeting of shareholders.

"In a joint stock company with a sole shareholder, the powers of the general meeting of shareholders will be carried out by the sole shareholder."

Article 241:

"The general meeting of shareholders shall be held at least once a year.

"The supervisory board, except for cases otherwise provided by this law, shall convene the general meeting of shareholders.

"A shareholder who was placed on the list of shareholders at the Registry 45 days before the date of the session of the general meeting of shareholders shall have voting rights at the general meeting of shareholders...."

Article 242:

"Notification on the agenda, place, date and time of the general meeting of shareholders shall be published in at least one of the daily newspapers published within the Federation, no later than 30 days before the date determined for the general meeting of shareholders...."

Article 243:

"A shareholder or group of shareholders with at least 5% of the total number of shares with voting rights, shall have the right to propose in writing amendments to the agenda and the proposal of decisions of the general meeting of shareholders no later than eight days from the day of publication of the notification provided by Article 242 paragraph 1 of this law.

"The supervisory board shall publish notification of a shareholder's proposal provided by paragraph 1 of this Article in the same manner as notification on convening the general meeting of shareholders....."

Article 246:

"The general meeting of shareholders of a joint stock company shall decide about:

"1) any increase and decrease of the original capital; ...
"4) the annual financial report, along with the reports of auditors, the supervisory board and the Audit Board;
"5) the distribution of profits and payment of dividends;...
"7) any merger, acquisition or consolidation with other enterprises by the joint stock company, with the exception of mergers or consolidations with a subsidiary company;...
"10) any purchase, sale, exchange, lease and other property transaction, directly or through subsidiary companies, during the business year, to an extent that exceeds one third of the bookkeeping value of the property of the joint stock company;
"11) any sale or purchase of property with an accounting value between 15% and 33% of the book value of the total existing property of the joint stock company, if such a transaction was not previously approved by unanimous decision of supervisory board;
"12) the election and removal of individual members of the supervisory board;
"13) the selection of an outside auditor and election and removal of members of the audit board; ...
"16) any amendments to the articles of association;
"17) any other issues important for business operation of the joint stock company, in accordance with the law and the articles of association of the joint stock company.

Article 247:

"Shareholders shall have the right, from the day the notice to convene the general meeting of shareholders is published, to access at the premises of the joint stock company the financial statement, along with reports of the auditors, supervisory board and auditors board, as well as other documents that concern proposals for decisions placed on the agenda of the general meeting of shareholders."

Article 248:

"The shareholders at the general meeting of shareholders shall make decisions by a majority of shares with voting rights, except on matters referred to in Article 246, paragraphs 8, 9 and 16 of this Law, for which decisions must be made by a two-thirds majority of represented shares with voting rights.

"On the reports referred to in Article 246 paragraph 4 of this Article, the shareholders at the general meeting of shareholders shall give an opinion no later than six months after the end of the business year.

Article 259: "The supervisory board shall be composed of a president and at least two members, appointed and removed by the shareholders at the general meeting of shareholders, provided that the total number of members of the supervisory board is odd...."

Article 261: "A shareholder or a group of shareholders with at least 5% of the shares with voting rights may nominate candidates to become a member of the supervisory board...."

Article 266:

"A session of the supervisory board shall be held at least once every three months.

"The president of the supervisory board shall convene the session of the supervisory board.

"The president of the supervisory board shall convene the session upon the request of the director of the joint stock company or two members of the supervisory board, no later than 14 days from the day of submission of the request, otherwise the person who submitted the request shall be authorised to convene the session."

Article 267:

"A written invitation for the session of the supervisory board, including the place and date of the session, the time of its commencement and the agenda of the session, shall be delivered to the members of the supervisory board no later than 14 days before the date of holding of the session.

"The invitation for the session shall be accompanied by the materials for each of the items on the agenda."

Article 268:

"For holding a session of the supervisory board, a quorum of two-thirds of the total number of members is required.

"The supervisory board shall issue its decisions by a majority of votes of the members present….."

Article 269: "The supervisory board of the joint stock company shall be competent to:

"1) supervise business operations of the joint stock company;
"2) supervise administrative work;
"3) adopt the administrative report on business operations based upon a semi-annual and annual balance sheet, income statement and the audit report;
"4) submit an annual report to the general meeting of shareholders on business operations of the joint stock company, which shall include an audit report, report on work of the supervisory board and the audit board, as well as a plan of business operations for the following business year;
"5) appoint management of the joint stock company;
"6) propose distribution and manner of use of profits and manner of covering losses;
"7) approve purchase, sale, exchange, leasing and other property transactions, directly or through subsidiary companies during the business year to the extent ranging from 15% to 33% of the accounting value of the entire property of the joint stock company;…
"10) convene the general meeting of shareholders…."

Article 270:

"The president and members of the supervisory board shall carry out their commitments and responsibilities in accordance with the interests of the shareholders and the joint stock company and may not perform activity that would compete with the activities of the joint stock company without informing and obtaining the consent of the other members of the supervisory board…."

Article 275:

"The management board shall organise the work and direct business operations, represent the joint stock company, and shall be responsible for the legality of business operations.

"The management board of the joint stock company shall consist of the director and executive directors.

"Provisions of Article 260 of this Law shall also apply to members of the joint stock company management board."

Article 276:

"A Director shall preside over the management board, direct business operations, represent the joint stock company, and be responsible for the legality of business operations….

"The position, powers, responsibilities and rights of the Director shall be regulated by a contract between the supervisory board and the Director."

Article 277:

"The Executive Directors shall organise the work, represent the joint stock company, and shall be responsible for the legality of business operations and their scope, as defined by a written document of the Director.

"The Executive Directors shall be appointed and removed by the supervisory board on a proposal by the Director during period for which the Director was appointed…."

### 4. Decree on Performing Powers and Obligations by Bodies of the Federation of Bosnia and Herzegovina in Business Companies on the Basis of State Capital

175. The Decree on Performing Powers and Obligations by Bodies of the Federation on the Basis of State Capital (OG FBiH nos. 8/00, 40/00, 43/00, 4/01, 5/00, 26/01 and 35/01), which entered into force on 16 March 2000, contains the following relevant provisions:

Article 1:

"This decree regulates the competence, conditions and manner of giving authorisation to the authorised representative of state capital (hereinafter "the authorised representative") in the assembly

of shareholders of business companies and for proposing candidates for the members of the supervisory boards of business companies, as well as for the rights, obligations and responsibilities of the authorised representative and the members of the supervisory board in companies where the powers and obligations of the owner on the basis of state capital are performed by the bodies of the Federation of Bosnia and Herzegovina."

Article 2:

"In business companies where the powers and obligations of the owner of capital on the basis of state capital are performed by the bodies of the Federation of Bosnia and Herzegovina, the competence of the Federation administrative bodies is established for:

- giving authorisation to the authorised representative in the assembly of shareholders of a business company containing state capital,
- proposing candidates for members of supervisory boards of business companies in which the state is a shareholder with no less than 5% of shares with voting rights.

"The list of business companies as well as Federation administrative bodies competent to give authorisation and/or to propose the candidates referred to in paragraph 1 of this Article is integrated into this decree.

"The authorisation to a person referred to in paragraph 1 of this Article is specifically issued for each assembly of shareholders of the company...."

Article 7:

"Until the completion of the privatisation process and the issuance of the procedural decision referred to in Article 38 of the Law on Privatisation of Enterprises ("Official Gazette of the Federation BiH", nos. 27/97 and 8/99), the Federation body established in the list contained in Article 2 of this decree shall appoint and dismiss the members of the management board in the number corresponding to the ratio of participation of the state capital in the total capital of the company."

176. In its amendment published on 12 February 2001 (OG FBiH no. 4/01), the decree provides as follows:

"In the Decree ... Article 7 is amended to read as follows:

"Until the completion of the privatisation process ... the Federation body established in the list contained in Article 2 of this decree shall, in proportion to the participation of the state capital in the total capital of the company:

- appoint and dismiss the members of the assembly of shareholders, as well as the members of the management/supervisory boards,
- give preliminary approval for the appointment of the manager of the company,
- give preliminary approval for the articles of association of the company,
- give preliminary approval for any change in the status of the company."

## V. COMPLAINTS

177. The three initial applicants allege a violation of the right to peaceful enjoyment of their possessions because their alleged rights as shareholders of Agrokomerc have not been recognised by the respondent Party. In particular, the initial applicants allege the following deprivations of their shareholder rights: 1) "to participate as shareholders in the functioning of the administrative organs of the joint stock company and in taking part in decisions in [their] interest through the assembly of shareholders, supervisory board, and other organs" of the company as provided by applicable law and governing instruments of the company; 2) "to decide about joining assets and establishing the joint venture company "Perutnina — Agrokomerc"", to which significant assets of Agrokomerc have been transferred; and 3) with respect to their alleged acquired shares in the company, "to take care of and protect their property, to organise, commence production, and dispose of property according to the law".

178. The initial applicants also allege that the Municipal Court of Velika Kladuša violated their rights due to its initial refusal to order provisional measures to prevent the unlawful alienation of Agrokomerc property and assets until their dispute was settled. As a result, it remained possible to unlawfully sell, dispose of, or otherwise alienate the property of Agrokomerc. They complain of lack of fairness in the proceedings before the Municipal Court and Cantonal Court. Furthermore, the initial applicants claim that since 7 August 1995, they have been deprived of their right to work, of

their right to earn salaries, and of other related labour rights. As a consequence, the applicants allege they do not have work and cannot provide for themselves or their families.

179. On 3 July 2001 the Shareholders Association, representing 3,024 members who are unemployed shareholders of Agrokomerc, filed an additional application. In this application, the Shareholders Association appears to attempt to make its claims on behalf of all alleged shareholders of Agrokomerc (approximately 7,340 persons), only part of whom are members of the Shareholders Association. This fourth application arises from the same facts and circumstances as the original three applications, and it contains similar allegations and claims. The Shareholders Association alleges that by a decision of 17 July 1997, the Assembly of the Una-Sana Canton "nationalised", that is, declared its authority to govern as an owner on the basis of state capital, the joint stock company Agrokomerc. In so doing, the Shareholders Association claims that the 7,430 alleged shareholders of Agrokomerc were unlawfully deprived of their property, that is, their shares in the company. They were also deprived of their shareholder rights to participate in the assembly of shareholders and to manage and dispose of their property. The Shareholders Association further alleges that its members were terminated from their employment and deprived of their right to work. Lastly, the Shareholders Association complains that even though three years have lapsed since the filing of the complaint, the Municipal Court and Cantonal Court have failed to decide upon the request for provisional measures to prohibit any change in Agrokomerc's status until the dispute over ownership of the company has been resolved.

## VII. SUBMISSIONS OF THE PARTIES

### A. The respondent Party

#### 1. As to the admissibility

180. The respondent Party objects to the admissibility of the applications on several grounds. Firstly, it claims that the applicants have not exhausted domestic remedies because there are still proceedings pending. Furthermore, the applicants could have initiated domestic court proceedings against the registration of the joint venture of Perutnina and Agrokomerc. In this respect, the applicants had an available effective remedy, which should have been exhausted before applying to the Chamber for the issuance of an order for provisional measures to prevent the registration of the joint venture.

181. The respondent Party contends that the applicants could not and cannot initiate ordinary proceedings against the decision of the Una-Sana Canton of 17 July 1997, due to the fact that the decision was issued in a regular parliamentary procedure and published in the Official Gazette of the Una-Sana Canton. As such, the legality of the decision may only be questioned before the Constitutional Court of the Federation.

182. As to the six-month time limit, the Federation claims that the decision of the Assembly of the Una-Sana Canton became final on the day it was issued, 17 July 1997, and could only be contested before the Chamber within six months thereafter.

183. The Federation further claims that the applications are inadmissible *ratione temporis* because the Law on Transformation of Socially-Owned Property entered into force on 1 January 1995.

184. Finally, the Federation states that it is not within the Chamber's competence to examine the establishment of facts by the domestic courts. Therefore, it objects to the appointment of the experts who were given authority to access documents concerning the privatisation process of Agrokomerc.

#### 2. As to the merits

185. As to the complaint regarding the court proceedings, the Federation claims that the criteria imposed by Article 6 of the Convention were respected in the present cases. As to the criterion of "reasonable time", the respondent Party argues that the Shareholders Association contributed to the delay in the proceedings. It took a whole series of wrong steps, initiating lawsuits before an incompetent court, amending their action and withdrawing the suit concerning some of the

defendants. The courts of the Federation observed the criterion of "reasonable time", particularly in view of the complexity of the case and the actions taken by the applicants.

186. The respondent Party claims not to have violated the applicants' property rights. It contends that it maintained a fair balance between the interests of the community and the fundamental rights of the individuals. The Federation asserts that it enabled the applicants by its laws and regulations to use domestic legal remedies to protect their property. The actions of the organs of the respondent Party were in accordance with the law, and the applicable laws were passed in regular procedures in accordance with the public interest and general principles of international law.

187. The Federation contends that the facts submitted by the applicants as to the capital structure of Agrokomerc are wrong. The Federation claims that 100% of Agrokomerc's capital is state-owned and, therefore, the decision of the Assembly of the Una-Sana Canton of 17 July 1997 and all subsequent decisions made by the management board of the company were in accordance with the law. The Federation claims that private share capital was not effectively formed in Agrokomerc. Therefore, a management take-over by the authorities of the Federation has never occurred, because Agrokomerc remained an entirely socially-owned enterprise until it was transformed into a state-owned company.

188. The Federation concedes that the registration of Agrokomerc as a joint stock company by the Court of Bihać on 31 October 1991, which shows the amount of internal shares, was performed in accordance with the law. None the less, the Federation denies that this registration may serve as proof of ownership by the persons registering their internal shares because, according to the Federation, payment of the internal shares was not required before their registration.

189. The respondent Party further refers to the report of the Ministry of Finance of the Federation – Financial Police, dated 4 October 2000, which examined the financial records and capital structure of Agrokomerc for the period between 1991 and 1999. The report states that the method of allocation of employees' salaries as capital was not in accordance with the relevant legal provisions and also that specific amounts of shares were not allocated to individual employees. The Federation further asserts that the sums allocated for shares were fictitiously added to the personal incomes of the employees and no contributions and taxes were paid on these sums. The respondent Party stated during the public hearing that the applicants, first through the Workers' Council and then through the assembly of shareholders, influenced the management policies and are therefore also responsible for Agrokomerc's acts. Thus, the decision to put Agrokomerc on a list of companies over which the Government of the Una-Sana Canton may exercise rights and duties as an owner, was issued in accordance with Article 158 paragraph 2 of the Law on Enterprises and Article 4 of the Law on Transformation of Socially-Owned Property.

190. The respondent Party contends that the financial obligation of Agrokomerc to pay compensation for its employees' reduced personal incomes for the time period of 1 August 1987 through 31 July 1991 did not exist because the amount of wages was lawfully restricted in companies which operated with a loss or were unable to pay their debts. The respondent Party further argues that such compensation claims cannot be converted into shares because these claims are not in accordance with regulations then in force. Furthermore, such shares could not be allotted to the employees since no additional capital was transferred to the company. The allocation of profits also could not be considered as paid share capital since this could only be done proportionally to the paid part of internal shares.

191. Further, the respondent Party points out that political tensions between the DNZ, on the one hand, and other political organisations, on the other hand, are present in the territory where the headquarters of Agrokomerc are located. The Federation claims that the applicants, whom it regards as leaders and members of the DNZ, initiated these political tensions. The respondent Party asserts that the applicants only want to cause political and economic damage to the authorities and directors of Agrokomerc in order to raise pre-election sympathy for the DNZ.

192. As to the OSCE report, the Federation calls into question the OSCE's objectivity and in particular the author's impartiality. It maintains that it is not up to the respondent Party to prove that Agrokomerc is a 100% Federation-owned company. Instead, the applicants are required to prove that the ownership transformation was performed in accordance with the law.

### B. The applicants

193. The applicants maintain their complaints that they have been deprived of rights attached to their shares in the company and claim that the domestic remedies identified by the respondent Party cannot be considered effective.

194. The applicants aver that by the end of 1992, the company's capital was held to a lesser extent by the state, but mostly it consisted of privately-held equity capital. According to the applicants, internal shares accounted for 75.9% of Agrokomerc's capital. The numbers are based on the company's balance sheet as of 31 December 1992, which was delivered to the Payment Bureau.

195. The applicants contend that the share capital was determined and entered into the company books on 31 December 1992 in the amount of 378,577,015 DEM. During 1993 payment of wages was interrupted and started again only on 30 June 1993, including the part allocated for shares. The total share capital of Agrokomerc on 30 June 1993 amounted to 380,146,597 DEM.

196. By the decision of the Assembly of the Una-Sana Canton of 17 July 1997, the applicants allege that Agrokomerc was illegally taken away from the shareholders and re-nationalised.

197. The applicants maintain that various transactions and "re-allocations" of the assets of Agrokomerc have taken place without consulting them or other shareholders. They consider these acts as an ongoing process of misappropriation of the company's assets.

198. As to the joint venture between the companies Agrokomerc and Perutnina Ptuj, which was approved by the Cantonal Government and the Cantonal Assembly, the applicants state that the assets of the new company were grossly undervalued and that the shareholders through the general assembly of shareholders were not included in the decision-making process, contrary to domestic law.

199. The applicants contend that the audit of Agrokomerc's assets was carried out only as a formality and that the company's property was grossly undervalued. They rely on the fact that the Revsar audit, which allegedly establishes that the company is 100% state-owned, was issued in 1999 but the decision on "nationalisation" already had been rendered on 17 July 1997.

200. They further allege that Agrokomerc is being sacrificed in the final dispute between the current authorities and the political supporters of Fikret Abdić.

201. As to the decision of the Municipal Court of Velika Kladuša of 25 December 2000, which declared itself "not at all competent" to decide upon the dispute of the Shareholders Association against Agrokomerc over the protection of ownership rights, the applicants point out that they could not have initiated proceedings to review the existing audits before the Institute for Accounting and Auditing of the Federation because they did not have access to Agrokomerc's documentation.

202. Finally, they point out that until 3 August 2001, they had not received copies of the procedural decision on the results of the renewed Revsar audit of 7 March 2001 nor the conclusion on approval of the Agency of Privatisation of the Federation of 28 February 2001. They heard about the existence of these decisions for the first time in the respondent Party's observations. Thereafter, they were provided with copies by the Chamber.

## VII. OPINION OF THE CHAMBER

### A. Admissibility

203. Before considering the merits of these cases, the Chamber must decide whether to accept them. In accordance with Article VIII(2) of the Agreement, the Chamber shall take into account whether it has competence *ratione personae* over the parties and *ratione temporis* over the subject-matters, whether the applicants have exhausted effective remedies, and whether the applications have been filed with the Chamber within six months from the date of the final domestic decision.

### 1. Incompatibility *ratione personae*

#### a) As to the Federation as respondent Party

204. The situation, act, omission or decision complained of must be imputable to a contracting Party of the Agreement by reason of the exercise of official power on the part of one of its authorities. As the Federation claims to be the 100% owner of Agrokomerc, controls the governing bodies of the company, and does not recognise the applicants' alleged shareholder rights, the Chamber considers the applications properly directed against the Federation as the respondent Party.

#### b) As to the standing of the Shareholders Association

205. Under Article VIII(1) of the Agreement, the Chamber shall receive, from any Party or person, non-governmental organisation, or group of individuals claiming to be the "victim" of a violation by any Party, applications concerning alleged or apparent violations of human rights within the scope of Article II(2) of the Agreement. The question may arise as to whether the Shareholders Association has standing before the Chamber.

206. The Chamber has previously found that, for the purposes of Article VIII(1) of the Agreement, an association can have standing on its own behalf or on behalf of its members (see cases nos. CH/96/29, CH/98/1062, CH/99/2177, CH/99/2656, CH/00/4889, *The Islamic Community in Bosnia and Herzegovina*, decisions on admissibility and merits, delivered on 11 June 1999 and 9 November, 11 February and 6 December 2000 and 12 October 2001, respectively).

207. The Shareholders Association is a party to proceedings pending before the courts of the respondent Party. It may therefore be concluded that the Shareholders Association, as a legal person and plaintiff in the domestic proceedings, could be deprived of its rights protected under Article 6 of the Convention and therefore could be considered a "victim" in this respect.

208. In the Federation of Bosnia and Herzegovina, the three initial applicants, as holders of minority capital shares, lack standing to pursue their claims before the domestic courts. According to Article 9 paragraph 3 of the Ordinance on the Audit of Previously Performed Ownership Transformation (see paragraph 170 above), the shareholders' right to appeal the decision on the results of the audit on ownership transformations of enterprises may be exercised in two ways: firstly, through the enterprise, and secondly, in the event the management of the enterprise opts not to appeal, directly by the shareholders, provided the appeal is filed on behalf of at least one-fourth of the shareholders. Given that Agrokomerc does not recognise the rights of the shareholders, they could not appeal through the company. Moreover, since the three initial applicants collectively own less than one-fourth of the shares, they could not appeal directly. Subsequently, the Shareholders Association was recognised by the domestic courts to fulfil this minority status requirement, and it undertook all previous proceedings before domestic organs.

209. The Chamber notes that in respect of Article 1 of Protocol No. 1 to the Convention, it is not necessary to decide whether the Shareholders Association itself may be considered a "victim" because the application was filed in its name on behalf of its members. The Shareholders Association represents 3,024 members who were once employees of Agrokomerc. The members are represented by the Association's organs without restriction, namely, the chairman of the members' assembly and the president of the executive board, determined in accordance with the procedural decision on registration of the Association issued by the Ministry of Justice of the Federation in Sarajevo. The Shareholders Association submitted documents supporting its statements and appended copies of the signatures of its members and the official registration of the Association. Under its articles of association, the Association is authorised to represent its members and to protect their rights as shareholders in all kinds of proceedings before national and international institutions.

210. The Chamber therefore considers that the Shareholders Association may legitimately claim status as a "victim" on behalf of its members since it submitted documentation of authorisation in support of its application. The grievances to be examined relate to the rights of all alleged shareholders who are members of the Shareholders Association.

211. Consequently, the Shareholders Association has standing before the Chamber and its application may therefore be considered compatible *ratione personae* with the Agreement within the meaning of Article VIII(2)(c), on behalf of its members with regard to the complaints concerning property rights and the right to work, and as a "victim" in its own right with regard to the complaint under Article 6 of the Convention.

### 2. Incompatibility *ratione temporis*

212. The respondent Party raises the objection that the Chamber has no competence *ratione temporis* because the Law on Transformation of Socially-Owned Property entered into force on 1 January 1995, that is, before the Agreement entered into force on 14 December 1995. The Chamber notes preliminarily that the applicants do not directly challenge the Law on Transformation of Socially-Owned Property, but rather, they challenge the application of that Law and other relevant laws insofar as they deprive them of their alleged shareholder rights. As a result, the date the Law entered into force is not the operative date for the Chamber's analysis of its competence *ratione temporis*. The question for the Chamber is whether the applicants had protected possessions on 14 December 1995 and whether thereafter the respondent Party deprived them of their possessions in contravention to the protections guaranteed by Article 1 of Protocol No. 1 to the Convention.

213. Article 5 of the Law on Transformation of Socially-Owned Property (see paragraph 157 above) provides that the "effective amount of share capital expressed in the balance sheet as of 31 December 1991 is considered to be the privately-owned capital based upon paid internal shares or parts of capital". Amounts paid for the purchase of internal shares after 31 December 1991 until 1 January 1995, the date the Law entered into force, "shall become claims of the employees against the company which shall be revalorized and returned to the payers or shall be registered as share capital in accordance with the law." Thus, the Law provided the company with a choice: it could compensate employees for their investment in internal shares between 31 December 1991 and 1 January 1995, or it could register internal shares purchased during that time period as share capital of the company. Article 2 paragraph 3 of the Ordinance on the Audit of Previously Performed Ownership Transformation (see paragraph 170 above) confirms that "instalment payments of internal shares or parts of capital as mentioned in Article 5 paragraph 2 of the Law on Transformation of Socially-Owned Property ... are regarded as claims of the person who made the payments against the company. The company shall decide, when completing the opening balance sheet, whether it shall return those claims to the persons who made them, or enter them as share capital pursuant to the law."

214. Neither the respondent Party nor the witnesses or applicants allege that Agrokomerc decided to repay employees for the portion of their salaries allocated for the purchase of internal shares. To the contrary, shareholders' internal capital is listed on Agrokomerc's balance sheets for 1995 (dated 31 December 1995) and 1996 (dated 31 December 1996). Thus, according to the balance sheets of Agrokomerc, the shareholders had not been deprived of their property in 1995 or 1996. The first decision which clearly purported to deprive the applicants of their shareholder rights and property was the procedural decision of Revsar of 21 October 1999 on the results of its audit of the ownership transformation of Agrokomerc. In that procedural decision, Revsar opined that the measures taken in the years 1991 through 1993 to establish internal share capital had not been in accordance with the law; therefore, such internal share capital was not effectively formed. In the auditing process Revsar cancelled the internal share capital in favour of state capital, the result being that Agrokomerc was established to be 100% state owned. This decision was later annulled by the Supreme Court judgment of 28 September 2000 and renewed by the procedural decision of 7 March 2001, in which Revsar once again concluded that no private share capital was effectively formed in Agrokomerc, and consequently, the state remains the exclusive owner of Agrokomerc. Thus, the operative acts which purportedly deprived the applicants of their shareholder rights and property occurred after 14 December 1995, within the Chamber's competence *ratione temporis*.

215. The same reasoning applies to the proceedings before the courts of the Federation; they were all initiated after the Agreement entered into force. The Shareholders Association initiated its domestic proceedings before the Cantonal Court of Bihać on 8 June 1999 with respect to the decision of the Assembly of the Una-Sana Canton of 17 July 1997.

216. The Chamber, thus, has competence *ratione temporis* to examine the alleged violations of procedural guarantees protected by Article 6 of the Convention and the alleged deprivation of shareholder rights and property protected by Article 1 of Protocol No. 1 of the Convention.

### 3. Exhaustion of domestic remedies

217. According to Article VIII(2)(a) of the Agreement, the Chamber must further consider whether effective remedies exist and whether the applicants have demonstrated that they have been exhausted. In the *Blentić* case (case no. CH/96/17, decision on admissibility and merits of 5 November 1997, paragraphs 19-21, Decisions on Admissibility and Merits March 1996 – December 1997), the Chamber considered this admissibility criterion in light of the corresponding requirement to exhaust domestic remedies in the former Article 26 of the Convention (now Article 35(1) of the Convention). The Chamber found that such remedies must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. The Chamber, moreover, considered that in applying the rule on exhaustion, it is necessary to take realistic account not only of the existence of formal remedies in the legal system of the respondent Party concerned, but also of the general legal and political context in which they operate, as well as of the personal circumstances of the applicant.

218. In the present cases, the Federation objects to the admissibility of the applications on the ground that the domestic remedies have not been exhausted. The domestic laws afford remedies which might, in principle, qualify as effective within the meaning of Article VIII(2)(a) of the Agreement. Insofar as the applicants are seeking the recognition of their shareholder status, the Chamber must, however, ascertain whether, in the cases now before it, the domestic remedies can also be considered effective in practice.

219. The Chamber notes that on 8 June 1999, the Shareholders Association initiated proceedings before the Cantonal Court of Bihać against the Una-Sana Canton and Agrokomerc in regard to the decision of the Assembly of the Una-Sana Canton of 17 July 1997. The Association intended to re-establish control of the internal shareholders over the company and to prevent any further transactions without their prior approval. In connection with these proceedings, the Association sought to prevent any transaction of property of Agrokomerc without its prior approval, and moreover, it unsuccessfully requested that the Court issue a provisional measure to this effect. In repeated proceedings back and forth between the Municipal and Cantonal Courts, both courts declared themselves not competent to decide upon the dispute. No ordinary remedies are available to the applicants to contest the final decision of the Cantonal Court of Bihać of 25 September 2001, in which the Cantonal Court upheld the first instance decision declaring the courts not competent to decide upon the dispute.

220. On 3 June 2000 the Shareholders Association instituted an administrative dispute before the Supreme Court of the Federation against the procedural decision of the Ministry of Finance of the Federation of 20 April 2000, which rejected its appeal of the procedural decision on the results of the Revsar audit of 21 October 1999, which cancelled the share capital in favour of state capital and declared the capital structure of Agrokomerc to be 100% owned by the Federation.

221. The applicants received a favourable decision from the Supreme Court in their administrative dispute against the Federation Ministry of Finance regarding the first Revsar audit of the ownership transformation of Agrokomerc. On 28 September 2000 the Supreme Court of the Federation issued a judgment accepting the plaintiff's complaint, annulling the procedural decision of the Ministry of Finance of 20 April 2000, and returning the case to the first instance organ for reconsideration. The Supreme Court did not, in its decision, comment upon the rights of the shareholders to internal shares in Agrokomerc. Rather, the Supreme Court noted two primary flaws in the decision on the Revsar audit of 21 October 1999, which called into question the validity of the audit under domestic law.

222. On 8 November 2000 the Ministry of Finance of the Federation complied with the terms of the decision of the Supreme Court of 28 September 2000 by issuing a procedural decision annulling the decision on the results of the audit of the ownership transformation of Agrokomerc by Revsar of 21 October 1999. In addition, the Ministry returned the case to the first instance body for reconsideration. Thereafter, Revsar carried out a new audit of the ownership transformation of

Agrokomerc. Revsar issued on 7 March 2001 a procedural decision on the results of its renewed audit (see paragraphs 98-103 above). In the renewed audit, as in the initial audit, Revsar concluded "that the registered share capital was not formed by cash instalment payments for internal shares or in any other means prescribed by the provisions applicable at that time; therefore, it was completely cancelled on behalf of state capital in the auditing process."

223. The procedural decision of Revsar of 7 March 2001 was transmitted to Agrokomerc and the Agency of Privatisation of the Federation, but it was not transmitted to any of the applicants by the authorities of the Federation, Revsar, or Agrokomerc. This delayed the subsequent proceedings considerably. The Chamber made the renewed Revsar audit available to the applicants on 3 August 2001. On 8 August 2001 the Shareholders Association filed an appeal with the Ministry of Finance of the Federation against the procedural decision on the results of the renewed Revsar audit of 7 March 2001. These proceedings are still pending.

224. The Chamber notes that since 8 June 1999, when the applicants initiated their first proceedings before the Cantonal Court of Bihać with the intention to re-establish their rights as shareholders of Agrokomerc, they have tried various domestic remedies. They have exhausted their rights with respect to this action, as explained above, as there are no further ordinary remedies available to challenge the final decision of the Cantonal Court of Bihać of 25 September 2001. The applicants have also been challenging the results of the Revsar audits since before 20 April 2000 (when the Ministry of Finance of the Federation rejected the initial appeal on the first audit). They succeeded in having the first Revsar audit annulled, and the proceedings against the renewed Revsar audit, which made nearly identical conclusions, are still pending. However, even if the competent bodies were to once again annul the renewed Revsar audit, the case would still not be over. The applicants' primary purpose in all their actions before the domestic courts has been to re-establish their shareholder rights. In the context of these cases, this requires the performance of a properly executed forensic audit by an independent, impartial, and competent auditor into the ownership transformation of Agrokomerc. It does not appear to the Chamber that such a result will follow from continued proceedings over the validity of the renewed Revsar audit. Therefore, the Chamber does not consider these proceedings effective to resolve the primary claims of the applicants.

225. The Chamber further recognises that the applicants also unsuccessfully tried to use extrajudicial domestic remedies, which the Chamber does not consider obligatory to comply with the requirement of exhaustion of domestic remedies. The applicants requested that the Assembly of the Una-Sana Canton return the authority to manage Agrokomerc to the shareholders. Members of the Una-Sana Cantonal Assembly, supporting the applicants, proposed motions to the Assembly to annul its decision of 17 July 1997. Furthermore, the President of the Una-Sana Canton, at the urging of the applicants, filed a request to the Constitutional Court of the Federation to annul the Cantonal Assembly's decision of 17 July 1997. All these attempts to remedy their situation have remained unsuccessful.

226. Thus, the Chamber considers all available and effective remedies to have been exhausted, and it rejects this basis to declare the applications inadmissible.

#### 4. Six month time-limit

227. In accordance with Article VIII(2)(a) of the Agreement, applications should be filed with the Chamber "within six months from such date on which the final decision was taken", that is, six months from the final domestic decision rejecting the applicants' claim. The time-limit starts to run from the final decision resulting in the exhaustion of remedies which are adequate and effective to provide redress. The applicants instituted proceedings before the Chamber in June 2000 and July 2001, respectively.

228. The Chamber notes that the proceedings initiated by the Shareholders Association to re-establish their control over Agrokomerc was completed on 25 September 2001, when the Cantonal Court of Bihać upheld the decision of the first instance court declaring itself not competent to decide the dispute. In addition, the procedural decision on the results of the renewed Revsar audit on the ownership structure of Agrokomerc was issued on 7 March 2001, and proceedings against it are still pending. Thus, the six-month time limit could not have started to run until after the applicants

applied to the Chamber. Accordingly, the applications cannot be inadmissible under the six-month rule.

### 5. Admissibility as to claims for the right to work

229. The initial applicants claim that since 7 August 1995 they have been deprived of their right to work as employees of Agrokomerc. The Shareholders Association also alleges that its members were terminated from their employment as of 27 September 1993 and deprived of their right to work.

230. Assuming that it could be established that either the termination of the applicants' working relations or the suspension of their employment and their placement on a waiting list for potential future employment was unlawful and discriminatory, the Chamber considers that it does not have competence *ratione temporis* to examine these acts because they occurred before the Agreement entered into force.

231. In the event the alleged denial of the applicants' right to work can be considered to have continued after 14 December 1995, thereby falling within the Chamber's competence *ratione temporis*, the Chamber notes that the applicants have failed to demonstrate that they used any domestic remedies to attempt to regain their right to work. The applicants' attempts to establish their rights as shareholders of Agrokomerc cannot be considered efforts to obtain re-employment with the company.

232. Accordingly, the complaints of violations of the applicants' right to work are inadmissible as not within the Chamber's competence *ratione temporis* for all acts that occurred before 14 December 1995 and for non-exhaustion of effective remedies after that date.

### 6. Conclusion on Admissibility

233. The Chamber concludes that, with regard to alleged violations of the applicants' right to a fair hearing and the right to peaceful enjoyment of possessions, as guaranteed by Article 6 of the Convention and by Article 1 of Protocol No. 1 to the Convention, respectively, the applications are admissible. The allegations of violations of the applicants' right to work, however, are inadmissible.

## B. Procedural Objection to the Chamber's appointment of experts

234. The respondent Party objects to the Chamber's appointment of experts to examine documents concerning the privatisation process of Agrokomerc and to render an opinion. The respondent Party argues that it is not within the Chamber's province to examine the establishment of facts by the domestic courts.

235. Article X(1) of the Agreement provides that: "The Chamber shall have the power … to appoint experts, and to compel the production of witnesses and evidence." Such power ensures the Chamber's development of "fair and effective procedures for the adjudication of applications" (Article X(1) of the Agreement). The Chamber agrees that as a general rule it is not within its competence to substitute its own assessment of the facts for that of the national courts (*see, e.g.*, case no. CH/99/2565, *Banović*, decision on admissibility of 8 December 1999, paragraphs 10-11, Decisions August-December 1999). However, the national courts have not conclusively decided key facts at issue in these cases: namely, the precise amount of investment contributed by each employee to Agrokomerc and the precise number of and rights in internal shares resulting from those investments. They have also not decided whether the applicants have protected "possessions", within the meaning of Article 1 of Protocol No. 1 to the Convention, in their investments in internal shares in Agrokomerc. As a result, the Chamber exercised its power to appoint experts to assist it in resolving facts necessary for its decision.

## C. Merits

236. Under Article XI of the Agreement, the Chamber must next address whether the facts established disclose a breach by the respondent Party of its obligations under the Agreement. Under Article I of the Agreement, the parties are obliged to "secure to all persons within their jurisdiction

the highest level of internationally recognised human rights and fundamental freedoms" including the rights and freedoms provided for in the Convention.

### 1. Scope of the decision

237. The Chamber notes that the Shareholders Association consists of 3,024 members, including the three initial applicants, who all claim to be shareholders of Agrokomerc. The Chamber will examine the cases before it only with regard to the applicants' allegations and rights. That being so, the rights of other alleged shareholders of Agrokomerc who did not participate in the proceedings before the Chamber are neither confirmed nor denied by this decision; none the less, the remedies ordered may inevitably affect the rights of other alleged shareholders of Agrokomerc (see paragraphs 306-310, 315, and 318 below). Moreover, with respect to the applicants' claims under Article 1 of Protocol No. 1 to the Convention, the Chamber understands the applications to exclusively concern the applicants' alleged rights to internal shares in Agrokomerc acquired during the period of 1991 through 1994 under the Marković regulations and decisions of the management organs of Agrokomerc. Therefore, the Chamber will not consider in this decision whether the applicants may have acquired any other shareholder rights in or claims against Agrokomerc.

### 2. Article 1 of Protocol No. 1 to the Convention

238. The applicants complain of a violation of their right to peaceful enjoyment of their possessions, as guaranteed by Article 1 of Protocol No. 1 to the Convention. This provision reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

239. Article 1 of Protocol No. 1 comprises three distinct rules. The first rule, which is of a general nature, enshrines the principle of peaceful enjoyment of property. It is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to the condition that the deprivation must be in the public interest and subject to conditions provided for by law and by the general principles of international law. It appears in the second sentence of the same paragraph. The third rule recognises that States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for that purpose. It is contained in the second paragraph (see, *e.g.*, case no. CH/96/29, *Islamic Community*, decision on admissibility and merits of 11 June 1999, paragraph 190, Decisions January-July 1999).

#### a) Existence of "possessions"

240. In the *Marckx v. Belgium* case, the European Court of Human Rights observed that Article 1 of Protocol No. 1 "does no more than enshrine the right of everyone to the peaceful enjoyment of 'his' possessions, that consequently it applies only to a person's existing possessions and that it does not guarantee the right to acquire possessions whether on intestacy or through voluntary dispositions" (Eur. Court HR, *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, page 23, paragraph 50). The applicants can therefore only invoke Article 1 of Protocol No. 1 if they have pre-existing possessions which they allege have been adversely interfered with by the authorities of the Federation.

241. The Convention institutions have recognised a wide variety of intangible assets as falling within the concept of "possessions". With regard to shares, the European Commission of Human Rights has stated: "A company share is a complex thing: certifying that the holder possesses a share in the company, together with the corresponding rights (especially voting rights), it also constitutes, as it were, an indirect claim on company assets. In the present case, there is no doubt that the … shares had an economic value. The Commission is therefore of the opinion that, with respect to

Article 1 of the First Protocol, the … shares held by the applicants were indeed 'possessions' giving rise to a right of ownership." (Eur. Commission HR, *Bramelid and Malmström v. Sweden*, nos. 8588/79 and 8589/79, decision on admissibility of 12 October 1982, Decisions and Reports 29, page 64, at page 81, paragraph 1(b)).

242. The Chamber shall first examine whether the applicants were holders of shares which constitute "possessions" within the meaning of Article 1 of Protocol No. 1 to the Convention as of 14 December 1995.

243. The applicants seek recognition of their internal shares acquired under the Marković regulations and decisions of the management organs of Agrokomerc as "possessions" protected by Article 1 of Protocol No. 1. In the applications, they specifically highlight the amount of shareholder capital listed on the annual balance sheet of Agrokomerc for year-end 1992. That amount, according to the documentation before the Chamber, amounts to 80.9% of the total capital of Agrokomerc, which is the highest amount of share capital listed in any of the available relevant documents. That amount, in summary, was achieved as follows: firstly by the initial registration of the company in 1991 as containing 53% share capital; and secondly by the application of four decisions by the management board of Agrokomerc which increased the share capital to the amount of 80.9%—one which converted into internal shares employee claims for reduced salaries paid from 1 August 1987 to 31 July 1991, a second which entered as payment for internal shares the difference between accrued and distributed salaries for the year 1992, a third which entered as payment for internal shares the value of inventory goods as of 31 March 1992, and a fourth which distributed profits based upon the annual balance sheet of 1992 in favour of internal shares (see paragraphs 28-29 above). The Chamber must therefore separately examine whether each of these categories of internal shares constitutes protected "possessions" of the applicants.

**i) Registered internal share capital as of 31 October 1991**

244. As explained above, in 1990, under Prime Minister Ante Marković, the Government proposed legislation in SFRY under which socially-owned companies could be privatised primarily through the sale of internal shares, under favourable conditions, to employees, former employees, and pensioners of the company (see paragraphs 148-151, 153 above). It was concluded that because of the country's tradition of employees' self-management, employees of a company ought to be the main beneficiaries of the privatisation process (see Milica Uvalić, *Privatisation Surprises in Transition Economies*, 1997). Under the Marković regulations, employees, former employees, and pensioners could become holders of internal shares of the company, and thereby acquire the right to participate in the management of the company, immediately upon registration of the company as a joint stock company by the court under the applicable laws. Employees, former employees, and pensioners paid for their internal shares in instalments over a maximum period of ten years. Holders of registered internal shares were also entitled to participate in the distribution of company profits in proportion to the amount of their paid (as opposed to registered) internal shares (Article 1g of the Law on Social Capital, see paragraph 149 above). In accordance with the Marković regulations, Agrokomerc was registered on 31 October 1991 as a joint stock company of mixed ownership consisting of 53% internal shares and 47% state capital. This registration was based in part upon the decision on issuance of internal shares issued by the management board of Agrokomerc on 27 August 1991.

245. However, pursuant to Article 14 of the Law on Social Capital of 1990, "the enterprise may issue internal shares, under the conditions provided by this law, within one year from the effective date of this Law" (see paragraph 149 above). The Law entered into force on 18 August 1990. The decision on issuance of internal shares was accepted by the Workers' Council of Agrokomerc on 27 August 1991, nine days after the applicable time period expired. According to testimony from the Chamber's experts, the procedure for ownership transformation under the Law on Social Capital was complicated and time consuming, and Agrokomerc undertook preparatory actions related to the transformation during the applicable time period. Moreover, the courts competent for registering ownership transformations continued to accept many such registrations even after the expiry of the time limit stated in the Law, as the Court of Bihać did in this case when it registered Agrokomerc as a joint stock company on 31 October 1991. According to the experts, "entry into the court register [had] a constitutive effect and not a declarative effect." Considering all of these factors, the Chamber finds that the nine-day delay in Agrokomerc's issuance of the decision on issuance of internal shares was a technical irregularity which does not affect the legal validity of the registration

of the ownership transformation of the company. Effectively, the registration of the company cured any such prior technical irregularity. The Chamber further notes that the nine-day delay was not contested before the court performing the registration; such an objection can only be reasonably raised within a short period of time after the registration and not for the first time ten years later in proceedings before the Chamber.

246. As explained above, on 1 January 1995 the Marković regulations were essentially put out of force by new laws which significantly altered the privatisation process of formerly socially-owned companies (see paragraphs 154-164 above). Under these new laws, in particular the Law on Transformation of Socially-Owned Property and the Law on Enterprises, and the later 1997 Law on Privatisation of Enterprises and 1999 Law on Business Companies (see paragraphs 169-174 above), the amount of effective and recognised internal share capital of companies undergoing privatisation as of the balance sheet of 31 December 1991 was considered to be the amount of paid, rather than merely registered, internal share capital. Amounts paid by holders of internal shares after 31 December 1991 became claims of the shareholders against the company, which could be repaid or registered as share capital. Moreover, the state would manage joint stock companies in proportion to the amount of state capital in the total reformulated capital structure of the company. The law further required an audit of the ownership transformation of companies under the Marković regulations to determine the newly formulated capital structure of companies undergoing privatisation. Thus, commencing on 1 January 1995, employees, former employees, and pensioners of a company undergoing privatisation were considered to have acquired internal shares in the company (unless the company chose to refund their earlier payments toward internal shares) in proportion to the amount they in fact paid for their shares as of the year-end annual balance sheets of 1991 and thereafter (Article 5 of the 1994 Law on Transformation of Socially-Owned Property and Article 6 of the 1997 Law on Privatisation of Enterprises).

247. As the Chamber is not competent *ratione temporis* to consider matters occurring prior to 14 December 1995, it must determine whether as of that date the applicants had internal shares which constitute protected possessions in Agrokomerc. It has been argued in some of the submissions in the case files that the new privatisation laws of 1 January 1995 and thereafter impermissibly and retroactively cancelled some shareholder rights of employees, former employees, and pensioners participating in the privatisation of their companies under the Marković regulations. However, this is not a question within the Chamber's competence *ratione temporis*. Moreover, the Chamber observes that the 1995 and subsequent privatisation laws appear to be properly enacted and their validity has not been directly challenged in these applications.

248. In these applications, there has been no claim that Agrokomerc offered to repay the applicants for payments they made toward internal shares after 31 December 1991. Consequently, domestic law in force on 14 December 1995 provides that employees, former employees, and pensioners acquired internal shares based upon their payment for those shares. As the registration of share capital in Agrokomerc on 31 October 1991 was based upon registered but unpaid internal shares, the Chamber cannot rely upon the registration as establishing protected possessions of the applicants. Rather, the Chamber considers that the applicants acquired protected possessions in the form of internal shares in Agrokomerc only in relation to the amount of their paid internal shares.

#### ii) Permanent deposits

249. The decision on issuance of internal shares of 27 August 1991 provides in Article 20 that "internal shares may be issued … for paid permanent deposits. The paid credits deposited by natural persons may be converted into the payment for internal shares if decided by the person offering the credits." In addition, Article 39 of the same decision states that "depositors of permanent deposits or credits are entitled to convert their permanent deposits or credits into ordinary internal registered shares". On the balance sheets of Agrokomerc for the years 1991 and 1992, permanent deposits were indicated as a part of share capital of the company. Such permanent deposits, by their very nature, must correspond to cash payments or credits, which if converted into internal shares, should necessarily be considered paid internal shares. Under the applicable privatisation regulations, they should be recognised as effectively formed and paid internal shares. However, the renewed Revsar audit of 7 March 2001 does not specifically explain in its reasoning the basis for which the share capital formed from these permanent deposits was cancelled. Presumably, it was cancelled for lack of supporting documentation.

250. The Chamber has not been able to determine whether the applicants converted permanent deposits into paid internal shares of Agrokomerc. However, if it can be established in the course of subsequent proceedings that they did, such paid internal shares would constitute valid possessions of the applicants.

**iii) Allocation of salaries to payment of registered internal shares**

251. The case files contain an abundance of evidence establishing that a portion of employee monthly salaries was allocated toward instalment payments of registered internal shares in Agrokomerc. Witnesses proposed by both the applicants and the respondent Party testified that they performed their work not only for the part of their salary they took home in cash, but also for the part allocated to the payment of their internal shares. At the time of its registration in 1991, Agrokomerc had been paying its employees guaranteed minimum salaries. Based in particular on the testimony at the public hearing, the Chamber accepts that in order to carry out the privatisation, it was decided that employee salaries would be increased and divided as follows: one-third would be paid to employees in cash (in an amount roughly equal to their previous guaranteed minimum salary), one-third would be allocated to the payment of internal shares (with applicable discounts), and one-third would be paid to employees in vouchers for company products. It was thus envisioned that internal shares would be paid for through the allocation of one-third of salaries over a period of ten years, plus applicable discounts. This form of privatisation was "meant to compensate employees for the limits on wage increases introduced by the December 1989 stabilisation programme" (see Milica Uvalić, *Privatisation Surprises in Transition Economies*, 1997). From available documentation it appears that between 1991 and 1994, Agrokomerc allocated one-third of employee salaries toward the payment of their respective registered internal shares.

252. The decision on issuance of internal shares of 27 August 1991 provides in Article 29 that "the payment for registered internal shares will be carried out by the payment of salaries in the form of internal shares for all employees of the Company". Article 32 further states that "internal shares are paid in one or several instalments within 10 years at the latest from the moment of the acceptance of this decision and, as a rule, in 120 equal payments in the share packages". In addition, Article 23 provides that a minimum discount of 30% plus 1% per year of service with the company, was applied to the payment of internal shares so that "employees with longer lengths of service [would] pay their subscribed shares more quickly". This decision comports with Article 4 of the Law on Payment of Salaries of 1990 (see paragraph 151 above) which authorises a company to allocate funds for the payment of internal shares in an amount corresponding to an increase of monthly net salaries, or in other words, a company could pay off internal shares of its employees with a part of their salaries. The decision further complies with the Law on Social Capital which provides in Article 1c that "the enterprise shall sell internal shares to employees employed in the enterprise at a discount amounting to 30% of the nominal value of the internal shares plus 1% of the nominal value of the internal shares for each year of work in the enterprise, provided that the total discount is not greater than 70% of the nominal value of such internal shares" (see paragraph 149 above).

253. The Federation submits that allocating a portion of salaries to the payment of registered internal shares without paying corresponding taxes and contributions on this amount was not in accordance with the law; consequently, this share capital was not effectively formed. The report of the Financial Police of the Federation of 4 October 2000 also states that taxes and contributions were not paid by Agrokomerc for the parts of salaries allocated to the payment of internal shares and that these amounts did not burden the business expenses of the company. The Financial Police concluded that, "share capital formed in this way cannot be treated as effective share capital because it was not formed pursuant to applicable regulations on ownership transformation" (see paragraph 84 above). In the decision on the results of the renewed audit of 7 March 2001 (similar to the decision on the results of the first audit of 21 October 1999), Revsar further argued that Agrokomerc wrongfully failed to calculate and pay prescribed taxes and contributions for the portion of salaries allocated to the payment of internal shares, and for this reason, Revsar cancelled such share capital in favour of state capital (see paragraph 99 above).

254. The Chamber fails to understand how, after more than eight years since Agrokomerc's transformation into a joint stock company, the respondent Party can base its cancellation of share

capital on the company's alleged failure to pay past taxes and contributions. The respondent Party did not present reliable data on this tax delinquency. Rather, the Agent of the respondent Party essentially argued during the public hearing that the employees/shareholders influenced the management decisions first through the Workers' Council and then through the general assembly of shareholders. The Agent opined that the employees, as alleged shareholders, *i.e.* owners of part of the company, bear some responsibility for the failure of Agrokomerc to pay taxes and contributions, but she also stated that she is "convinced that no one asked them whether they wished to register shares and how much shall be taken from their salaries to pay for them [because] … they would have lost their jobs if they acted differently." Therefore, applying the "principle of fairness", the Agent proposed as a remedy that share capital for which taxes and contributions had been paid should be recognised as effective share capital, and share capital for which taxes and contributions had not been paid should be reduced by the amount owed for taxes and contributions and the remainder should be recognised as effective share capital. The Chamber considers, however, that the party responsible for the payment of taxes and contributions is Agrokomerc, a distinct legal entity, and not its individual shareholders. Individual employees and shareholders are not generally liable for alleged omissions of the company.

255. As a factual matter, considering all the submissions and testimony during the public hearing, the Chamber finds that there is evidence to support some payments of taxes and contributions for the parts of employee salaries allocated to the payment of internal shares. The experts found several indications that such payments were made, including calculations and completed order forms for contribution payments and an account statement verified by the Social Audit Service (Institute for Payment Transactions) showing that profits for year-end 1992 were decreased by taxes and contributions (see paragraph 76 above). The Chamber recognises that there is also evidence in the record that some taxes and contributions may not have been paid, but nothing has been conclusively established. Regardless, the responsible party for any alleged delinquency in the payment of taxes and contributions is Agrokomerc and not the applicants, who, it has been established, are individual shareholders in the company.

256. Moreover, the Chamber considers that it is to the disadvantage of the employee when the employer fails to pay contributions. The Chamber recently concluded that if no payments were made by the employer for the employee's benefit, employment relations could not be effectively terminated by the employer on this basis (*Softić*, case no. CH/97/76, decision on admissibility and merits of 8 October 2001, paragraph 90, Decisions July-December 2001). Similar reasoning applies to the present cases. The Federation cannot cancel paid internal shares in Agrokomerc on the ground that employees claiming to be shareholders did not receive certain employment benefits from their employer and the issuer of the shares in question.

257. In addition, the alleged non-payment of taxes and contributions is not found among the enumerated possible reasons contained in the relevant legislation to annul or render void internal shares. During the public hearing, the respondent Party stated that, under Article 6, paragraph 3, of the Ordinance on the Audit of Previously Performed Ownership Transformation, the auditor was obliged to establish whether prescribed taxes and contributions were actually paid (see paragraph 170 above). However, the Agent of the respondent Party conceded at the public hearing that although the law requires that taxes and contributions be paid on salaries allocated to the payment of internal shares, the law does not state the sanctions for a failure to do this. Even assuming that taxes and contributions had to be paid on the part of salaries allocated to the payment of internal shares, a legal premise not convincingly established by the respondent Party, this provision cannot be read to imply that a failure to pay taxes and contributions on these payments results in the nullification of the respective paid internal shares. The Chamber therefore rejects this argument presented by Revsar and subsequently endorsed by the respondent Party in the proceedings.

258. The Chamber concludes that the part of salaries allocated to the payment of internal shares, taking into account the applicable respective discounts, should be considered effective payment for those internal shares. Consequently, the applicants acquired protected possessions in all registered internal shares paid by an allocation of a part of their respective salaries plus discounts during the time period of 1991 through 1994.

#### iv) Claims for compensation for the difference between accrued and distributed salaries from 1992

259. On 2 April 1992, the management board of Agrokomerc issued a decision which entered as payment for internal shares the difference between accrued and distributed salaries for the year 1992. Both the Financial Police of the Federation and Revsar appear to consider this entry for the benefit of internal shares to be ineffective because of the alleged lack of corresponding payments of taxes and contributions on this amount.

260. The Chamber notes that the applicable provisions in the decision on issuance of internal shares and the Law on Payment of Salaries of 1990 which are quoted above (see paragraph 252) seem to apply broadly to any allocations of parts of salaries toward the payment of internal shares. Moreover, the decision on issuance of internal shares at Article 32 clearly permits both lump sum payments and instalment payments of internal shares.

261. The Chamber sees no analytic difference between the allocation on a monthly basis of a part of salaries and the allocation on a yearly basis of a part of salaries toward the payment of internal shares. Both means of payment for internal shares appear to be permissible under the applicable law. Accordingly, for all the reasons discussed above, the Chamber also concludes that the applicants acquired protected possessions in all registered internal shares paid by the allocation of the difference between their accrued and distributed salaries for the year 1992.

#### v) Claims for compensation for reduced salaries from 1987-1991

262. On 2 April 1992, the management board of Agrokomerc issued a decision converting employee claims for reduced salaries paid from 1 August 1987 to 31 July 1991 into internal shares.

263. The respondent Party contends that Agrokomerc was in a state of financial crisis during the period of 1987 to 1991. Therefore, only guaranteed salaries could be paid to employees. The Federation refers to laws on payment of salaries which were applied to restrict salaries to certain guaranteed minimum amounts in companies which operated with a loss or were unable to pay their debts. The applicants do not contest the Federation's assertion. Instead, they assert that it is the fault of the respondent Party that Fikret Abdić and his supporters were taken away from managing Agrokomerc (due to their criminal convictions and imprisonment, see paragraph 22 above) and that this caused the company to suffer a financial crisis, which in turn led to the payment of guaranteed minimum salaries to employees.

264. The decision on issuance of internal shares contains no provision which would authorise the decision to convert employee claims for previously reduced salaries. Such a decision is substantially different than the decision on allocation of a part of salaries from 1992, discussed above, because here the amount in question was not part of the salaries of the employees of Agrokomerc. Rather, it represents an alleged equitable claim the employees might have against the company. The Chamber is further unaware of any provision in domestic law, in particular in the Law on the Guaranteed Salary of an Employee or the Law on Payment of Salaries (see paragraphs 150-152 above), which would allow an employee to later reclaim the amount of reduction of his salary during times when his employer was forced to pay guaranteed minimum salaries. Moreover, such a practice seems questionable since the payment of guaranteed minimum salaries appears to constitute a regulated compromise between the payment of debts of the company and the payment of salaries to employees during times of financial crisis. The possible protection of creditors' rights in this manner has some merit.

265. Since the Chamber is unable to establish any legal basis for the decision to convert employee claims for reduced salaries from 1 August 1987 to 31 July 1991 into internal shares, the Chamber cannot consider that the applicants acquired any protected possessions in the corresponding internal shares in Agrokomerc.

#### vi) Value of inventory goods

266. On 2 April 1992, the management board of Agrokomerc decided to enter the value of inventory goods of the company as of 31 March 1992 to the benefit of paid internal shares. The

Chamber has not been able to determine on what legal basis such inventory goods were converted into internal shares. Such form of payment for internal shares was not recognised in the decision on issuance of internal shares of 27 August 1991. The applicants alleged only that the employees created the inventory goods without having received anything of value in return for them. The applicants have not further elaborated upon the circumstances and reasons for the decision.

267. The Chamber, in the absence of sufficient information and evidence, and being unable to locate any provision in applicable domestic law which would recognise the value of inventory goods as payment for internal shares, concludes that this conversion was *prima facie* illegal. Therefore, the applicants do not have protected "possessions" for any internal shares created or paid for by the conversion of inventory goods of Agrokomerc.

#### vii) Distribution of profits from year-end 1992

268. On 30 March 1993 the management board of Agrokomerc issued a decision distributing profits based upon the annual balance sheet of 1992. According to that decision, the realised profits of Agrokomerc for year-end 1992 were distributed in proportion to the capital structure of the company at that time, which was indicated to be 61.5% state capital and 38.5% share capital. The profits distributed to share capital were based upon the proportion of paid shares in the company. Of the profits distributed to share capital, 50% was allocated for the payment of internal shares and the remainder was invested in reserves and expansion of resources.

269. The Chamber observes that this decision on distribution of profits appears to be in conformity with the decision on issuance of internal shares. That decision provides at Article 58 that the director of Agrokomerc will prepare a proposal on distribution of profits, taking into account the auditor's report, and will present this proposal to the assembly of shareholders at their regular annual meeting convened within four months after the completion of the previous business year. Article 59 further states that "50% of the profits purposefully will be given to internal shareholders for the payment of registered internal shares for five years in accordance with the number of already paid internal shares." Moreover, the Law on Social Capital, which was in effect between 18 August 1990 and 25 November 1994, provides in Article 1g that "any holder of internal shares shall be entitled to a share of the Enterprise's profits, proportionally to the paid part of such shares, plus the proportional amount of the discount granted" (see paragraph 149 above).

270. Since the profits of the company appear to have been applied in accordance with the law to the payment of registered internal shares of Agrokomerc, the Chamber considers that payment to be valid. However, as the profits from 1992 were distributed based upon a ratio of capital that included conversions not recognised as valid by the Chamber (*i.e.*, the conversion of employee claims for reduced salaries from 1987 to 1991 and the conversion of the value of inventory goods), the amount of distributed profits should be adjusted. Therefore, the Chamber considers that internal shares of the applicants paid for by the distribution of profits of the company from 1992, in proportion to the adjusted amount of their recognised paid internal shares, constitute their protected possessions.

#### viii) Conclusion with respect to protected "possessions"

271. In conclusion, the Chamber, as a general matter, concludes that the applicants acquired protected possessions in the form of internal shares in Agrokomerc only in relation to the amount of their paid (as opposed to registered and unpaid) internal shares. More specifically, the Chamber concludes that the applicants acquired protected possessions in internal shares of Agrokomerc for which payment was made on the basis of: a) permanent deposits; b) allocations of parts of salaries, either on a monthly basis during the period of 1991 to 1994, or on an annual basis for 1992; and c) distribution of profits for 1992 in proportion to the amount of paid internal shares. However, the Chamber does not recognise any protected possessions of the applicants for internal shares resulting from the conversion of employee claims for reduced salaries from 1987 to 1991 or the conversion of the value of inventory goods.

272. The Chamber will now consider whether the respondent Party interfered with or deprived the applicants of their protected possessions without justification.

**b) Interference and deprivation of protected possessions**

**i) Cancellation of paid internal shares in Agrokomerc**

273. The Chamber notes that the respondent Party does not recognise that it interfered with or deprived the applicants of their rights as holders of internal shares because it denies any effective formation of share capital in Agrokomerc. Nevertheless, the Chamber has already recognised that the applicants acquired protected possessions in paid internal shares of Agrokomerc, as explained above. Furthermore, it is undisputed that through the application of the decision on the results of the renewed Revsar audit of 7 March 2001, which was based upon a conclusion of approval of the Agency of Privatisation of the Federation of 28 February 2001, those possessions were completely cancelled in favour of state capital controlled by the authorities of the respondent Party. Moreover, the respondent Party has not in any way compensated the applicants for their loss of financial investment in their paid internal shares of Agrokomerc. The Chamber therefore concludes that the respondent Party has deprived the applicants of their protected possessions in paid internal shares of Agrokomerc, within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1 to the Convention.

274. In their applications, the applicants complain about the decision of the Una-Sana Canton of 17 July 1997 which placed Agrokomerc on a list of companies "over which the powers and obligations of the owner on the basis of state capital are performed by the Government of the Canton". The applicants further complain about the decree of the Government of the Federation of 31 July 2001 which placed Agrokomerc on a list of companies "over which the powers and obligations of the owner on the basis of state capital are performed by the bodies of the Federation of Bosnia and Herzegovina" (OG FBiH no. 4/01). The applicants interpret these decisions, in particular the first decision by the Una-Sana Canton, as carrying out a "nationalisation" of their company, Agrokomerc, that is, as declaring Agrokomerc to be exclusively state owned and composed of 100% state capital.

275. However, the Chamber observes that the parties' interpretation of these decisions does not comport with the precise language of the decisions. The decisions merely assign a body of the government to control the state capital portion of the company. No where in the decisions is Agrokomerc declared exclusively state owned. In addition, the Law on Enterprises, which was in force from 1 January 1995 through 29 August 1999, provides in Article 157 that, "the responsible Federation, Cantonal or Municipal bodies conduct, in accordance with the law, the powers and obligations of the state as the owner of an enterprise on the basis of the state-owned capital". Article 158 further states that the Parliament, "in accordance with the provisions of Article 157 of this Law, shall make a list of companies in relation to which the powers and obligations of the owner on the basis of state capital shall be exercised by the organs of the Federation. Concerning other enterprises, the Cantons and Municipalities, on whose territory the company is located, shall exercise the powers and obligations if the capital is totally or partly state-owned" (see paragraph 164 above). These are the specific provisions under which the decision of the Una-Sana Canton was issued. The later decision of the Federation of 31 July 2001 was issued pursuant to similar provisions in the Decree on performing powers and obligations by the bodies of the Federation of 16 March 2000 (see paragraph 175 above). As it is undisputed that a part of the capital of Agrokomerc is state-owned, there is nothing contrary to the law or the facts in the challenged decisions of the Una-Sana Canton or the Federation. Thus, the Chamber concludes that it was neither the decision of the Una-Sana Canton of 17 July 1997, nor the decision of the Government of the Federation of 31 July 2001, which deprived the applicants of their protected possessions in paid internal shares of Agrokomerc. Rather, it was the decision on the results of the renewed Revsar audit of 7 March 2001, which cancelled all internal shares in favour of state capital, as explained above, that deprived the applicants of these protected possessions.

**ii) Failure to allow applicants to exercise their management and participation rights in Agrokomerc**

276. In addition, the applicants complain that, since August 1994, they have been unable to exercise their rights to participate in the management of Agrokomerc through the assembly of shareholders and similarly to share in any dividends or distributed profits of the company in relation to the amount of their paid internal share capital.

277. The Chamber observes that the assembly of shareholders is an integral and fundamental part of the governing organs of a joint stock company. One of the key goals in the Marković regulations for the privatisation of socially-owned companies was to provide employees, former employees, and pensioners with an opportunity to participate in the management of the company undergoing an ownership transformation (see paragraph 64 above). This was accomplished by providing the holders of internal shares with the right immediately to participate in the assembly of shareholders in proportion to the amount of their registered internal shares, rather than their paid internal shares (see Article 1g(2) of the Law on Social Capital of 1989, at paragraph 149 above). The decision on issuance of internal shares of 27 August 1991 indicates that Agrokomerc adopted these principles of governance reflected in the Marković regulations when it became a joint stock company. Article 7 of the decision states that "as a rule and in proportion to the number of registered shares, the internal shareholders have the right to control the company in such a way that 1 share represents 1 vote." Article 44 of the decision similarly states that a vote of the assembly of shareholders "is realised in accordance with the amount of registered internal shares". Moreover, Article 45 of the decision provides that an employee must possess at least a minimum number of internal shares "as a guarantee for responsible work performance during his entire employment period with this joint stock company".

278. These management rights later changed when the Law on Enterprises entered into force on 1 January 1995. That Law provides in Article 32 that "a shareholder has the right to manage the [joint stock] company through the shareholders meeting, in proportion to the nominal value of his shares in the capital stock" (see also Article 199 of the Law on Business Companies, effective since 29 August 1999, at paragraphs 163 and 173 above). Thus, although shareholders retained after 1 January 1995, and still retain today, the right to participate in the management of the joint stock company through the general assembly of shareholders, this right is, for the period within the competence of the Chamber *ratione temporis*, in proportion to the amount of their paid, as opposed to registered, internal shares in Agrokomerc.

279. Under the Marković regulations, holders of internal shares were also granted the right to participate in the profits of the joint stock company, but only in relation to the amount of the paid internal shares (see Article 1g(1) of the Law on Social Capital of 1989, at paragraph 149 above). Articles 7 and 44 of the decision on issuance of internal shares state that registered internal share holders realise their rights to participate in a dividend and the profits in relation to the amount of their paid internal shares. The laws in effect after 1 January 1995 did not change this right of the shareholders to participate in the profits and dividends of the company in relation to the amount of their paid shares (see Article 206 of the Law on Business Companies of 1999, at paragraph 173 above).

280. On 21 August 1994 a group of people representing the government of the Republic of Bosnia and Herzegovina entered the premises of Agrokomerc by force and took control of the company without giving any consideration to the mixed ownership structure of the company. It appears from the evidence before the Chamber that the applicants have had no opportunity whatsoever to exercise their rights to manage Agrokomerc through participation in the assembly of shareholders since that time. The last meeting of the assembly of shareholders appears to have taken place on 27 March 1993. Furthermore, it seems that since 1995, numerous transactions have occurred with respect to the property of Agrokomerc, including so-called small-scale privatisations of objects and property. In addition, on 28 February 2000, Agrokomerc concluded a contract on the establishment of "Perutnina—Agrokomerc", a joint venture in which Agrokomerc agreed to invest 45% of the capital and Perutnina agreed to invest 55% of the capital. The shareholders were not consulted in any way, nor was any meeting of the assembly of shareholders called with respect to any of these property transactions. Moreover, on 7 August 2001, the Ministry of Energy, Mining and Industry of the Federation issued a procedural decision appointing the entire management board of Agrokomerc, including the president (OG FBiH no. 36/01), again, with no consultation with or meeting of the assembly of shareholders. Lastly, no dividends or profits have been distributed in favour of paid internal shares in Agrokomerc since the August 1994 take-over of the company.

281. Taking all of these facts into consideration, it is clear that the applicants' rights, as holders of paid internal shares, to participate in the management of Agrokomerc and to share in dividends and profits of the company, have been interfered with. Since 21 August 1994, Agrokomerc has been

in effect exclusively under the control of the authorities of the Republic of Bosnia and Herzegovina and then the authorities of the Federation of Bosnia and Herzegovina. The Chamber considers these acts as from 14 December 1995. Therefore, the Chamber concludes that the respondent Party is responsible for interfering with the rights of applicants which are part of their peaceful enjoyment of their protected possessions in paid internal shares of Agrokomerc, within the meaning of the first sentence of the first paragraph of Article 1 of Protocol No. 1 to the Convention. This interference has been ongoing since 1994 and continues today.

**c) Subject to the conditions provided by law**

282. The second sentence of the first paragraph of Article 1 of Protocol No. 1 to the Convention provides that "no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law". The law concerned must be accessible, sufficiently precise, and the consequences foreseeable. Accordingly, the Chamber will now consider whether the acts of deprivation and interference found above were conducted "subject to the conditions provided by law".

283. The Chamber has concluded that the decision on the results of the audit by Revsar of 7 March 2001, which was issued on the basis of the conclusion on approval by the Agency of Privatisation of the Federation of 28 February 2001, insofar as it cancelled all the applicants' paid internal shares in Agrokomerc, constituted a deprivation of their protected possessions. The Law on Transformation of Socially-Owned Property, which entered into force on 1 January 1995, provides in Article 5 that "the effective amount of share capital expressed in the balance sheet as of 31 December 1991 is considered to be the privately-owned capital based upon paid internal shares or parts of capital." Article 5 further states that "amounts paid for the purchase of internal shares or parts of capital after 31 December 1991 until the date this law entered into force, shall become claims of the employees against the company which shall be revalorized and returned to the payers or shall be registered as share capital in accordance with the law". Similarly, the Law on Privatisation of Enterprises which became applicable on 27 February 1998, states in Article 6 that "share capital, which was indisputably paid in and obtained through the internal shares programme, is nominal and shall not be subject to privatisation" (see paragraphs 157 and 169 above). Thus, the applicable law provides that internal share capital formed as of 31 December 1991 through 1 January 1995 is effective insofar as it was based upon paid internal shares.

284. As the Chamber has found that the applicants acquired protected possessions in their paid internal shares, Revsar's cancellation of these protected possessions was not subject to the conditions provided by law. Consequently, Revsar and the Agency for Privatisation of the Federation could not lawfully cancel the applicants' paid internal share capital and increase the book value of the state capital in the amount of that cancelled share capital.

285. With respect to the respondent Party's interference with the applicants' rights to participate in the management of the company and to share in the profits of the company in relation to their paid internal shares, the Chamber observes that the respondent Party has in effect, since August 1994 and continuing after 14 December 1995, completely controlled the management of Agrokomerc. The respondent Party has argued that the decision of the Una-Sana Canton of 17 July 1997 granted it the authority to appoint the entire management board of Agrokomerc. As has been previously explained, the decision of the Una-Sana Canton of 17 July 1997 and the decree of the Government of the Federation of 31 July 2001, which placed Agrokomerc on lists of companies "over which the powers and obligations of the owner on the basis of state capital are performed by" the respective authorities, in no way declared Agrokomerc to be exclusively state-owned. These decisions, in accordance with the law, assigned responsibility for managing state capital to specific competent bodies of the Government (see Article 158 of the Law on Enterprises of 1995 and the Decree on performing powers and obligations by bodies of the Federation on the basis of state capital, at paragraphs 164 and 175 above). None the less, both the applicants and the respondent Party appear to have interpreted these decisions as granting the Federation 100% control and ownership over the capital of Agrokomerc. However, Agrokomerc is not exclusively a state-owned company. Rather, the Chamber has confirmed that it is a company of mixed ownership and the applicants acquired privately-owned shares in the company in relation to the amount of their paid internal shares.

286. Article 8 of the Law on Enterprises of 1995 concisely states that "the capital owners manage the enterprise". Article 32 elaborates that "a shareholder has the right to manage the company through the shareholders meeting, in proportion to the nominal value of his shares in the capital stock". Article 160 of the same Law further states that "in enterprises in which in addition to state-owned capital, private capital is also present, the competent body referred to in Article 158 of this law [that is, the body assigned the responsibility to manage state-owned capital] appoints the members of the management board in proportion to the participation of state-owned capital in the total capital of the enterprise". During a period of the state of war or the immediate threat of war, "the supervisory board conducts the functions of the shareholders meeting", but during other times, the joint stock company is managed in proportion to its capital ownership (Articles 32, 156 and 160 of the Law on Enterprises of 1995, at paragraphs 160, 163 and 164 above).

287. The Decree on performing the powers and obligations by the bodies of the Federation of Bosnia and Herzegovina in business companies on the basis of state capital "regulates the competence, conditions and manner of giving authorisation to the authorised representative of the state capital ... where the powers and obligations of the owner on the basis of state capital are performed by the bodies of the Federation of Bosnia and Herzegovina" (OG FBiH no. 8/00, at Article 1). Article 7 of that Decree provides that, for the purpose of giving such authorisation, the competent body of the Federation "shall appoint and dismiss the members of the managing board in the number corresponding to the ratio of participation of the state capital in the total capital of the company". However, on the basis of Article 7 of the aforementioned Decree, the Ministry of Energy, Mining and Industry of the Federation on 7 August 2001 appointed the entire management board of Agrokomerc, including the president (OG FBiH no. 36/01). Thus, the Ministry acted as if Agrokomerc was exclusively state-owned. Since Agrokomerc is not exclusively state-owned, and since the Federation only has the right to participate in the management of Agrokomerc in proportion to its ownership of state capital in the company, the Federation acted contrary to the law in taking complete control over the management board, and thus the management, of the company.

288. By illegally exercising all the management rights over Agrokomerc, the Federation also illegally interfered with the protected rights of the applicants to participate in the management of the company in relation to the amount of their paid internal shares. It follows that every decision taken by the improperly constituted management board of Agrokomerc was not subject to the conditions provided by law. Similarly, every decision which should have been put before the assembly of shareholders in accordance with the decision on issuance of internal shares (*e.g.*, the decision to conclude the contract on establishment of the joint venture "Perutnina—Agrokomerc", other small-scale privatisations of the property of Agrokomerc, and any distribution of dividends or profits of the company), has also not been subject to the conditions provided by law.

289. Since the acts of the Federation which deprived the applicants' of their protected possessions in their paid internal shares and which interfered with the applicants' rights to participate in the management and any distribution of profits in Agrokomerc were not "subject to the conditions provided by law", it is not necessary for the Chamber to further consider whether these illegal actions were also "in the public interest".

### d) Conclusion on Article 1 of Protocol No. 1 to the Convention

290. In summary, the Chamber has concluded that the applicants acquired protected "possessions" in their paid internal shares in Agrokomerc for which payment was made on the basis of: a) permanent deposits; b) allocations of parts of salaries, either on a monthly basis during the period of 1991 to 1994, or on an annual basis for 1992; and c) distribution of profits for 1992 in proportion to the amount of paid internal shares. The decision on the results of the renewed Revsar audit of 7 March 2001, which cancelled all internal shares in favour of state capital in Agrokomerc, deprived the applicants of these protected possessions. In addition, by exercising effective exclusive control over the management of Agrokomerc, the authorities of the Federation further interfered with the rights of the applicants to participate in the management and to share in the profits of Agrokomerc in relation to their paid internal shares. In these respects the Federation did not act "subject to the conditions provided by law". Consequently, the Chamber concludes that the Federation has violated the rights of the applicants protected by Article 1 of Protocol No. 1 to the Convention.

### 3. Article 6 of the Convention

291. The Chamber will now consider the allegation that there has been a violation of Article 6 of the Convention. Article 6 of the Convention provides in relevant part:

> "In the determination of his civil rights and obligations. . ., everyone is entitled to a fair and public hearing … by an independent and impartial tribunal established by law. …"

#### a) As to the complaint about the declined response to the request for provisional measures

292. It may not be reasonable that the domestic courts did not come to any conclusions concerning the request for provisional measures. However, provisional measures do not determine civil rights. Accordingly, Article 6 of the Convention does not enshrine the right to obtain a decision on requests for provisional measures. The Chamber cannot establish a violation of Article 6 of the Convention in this regard.

#### b) As to the criterion of "access to court"

293. The Chamber must examine whether there has been a violation of the applicants' right of access to a court. Already in the case of *Golder v. U.K.*, the European Court of Human Rights held that Article 6 "embodies the 'right to a court'" (Eur. Court HR, *Golder v. U.K.*, judgment of 21 February 1975, Series A no. 18, page 18, paragraph 36). In reaching this conclusion, the Court noted the importance given to the concept of the "rule of law" throughout the European Convention on Human Rights (*id.* at pages 16-18, paragraphs 34-35). In the preamble of the Convention the signatory governments declare that they are "resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration" of Human Rights of 10 December 1948. Further, citing the reasoning of the European Commission of Human Rights, the Court in *Golder* quoted the Commission's argument that "Article 6(1)… is intended to protect 'in itself' the 'right to a good administration of justice', of which 'the right that justice should be administered' constitutes 'an essential and inherent element'" (*Golder*, page 15, paragraph 33). The Court stated that, "the principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice." The Court then found that Article 6(1) "must be read in the light of these principles" (*id.* at page 17, paragraph 35).

294. The right of access to court enshrined in Article 6 is not absolute; it may be subject to limitations. However, these limitations cannot reduce or restrict the access left to the individual in such a way that "the very essence of the right is impaired" (Eur. Court HR, *Guerin v. France*, judgment of 29 July 1998, Reports of Judgments and Decisions no. 82 (1998-V), page 1867, paragraph 37). "Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (Eur. Court HR, *Bellet v. France*, judgment of 4 December 1995, Series A no. 333, page 41, paragraph 31 (*quoting Fayed v. U.K.,* judgment of 21 September 1994, Series A no. 294-B, pages 49-50, paragraph 50)).

295. In the case of *de Geouffre de la Pradelle v. France* (Eur. Court HR, judgment of 16 December 1992, Series A no. 253-B), the European Court of Human Rights held that the degree of access afforded to an individual must be sufficient to afford individuals the "right to a court" (*see id.* at pages 41 and 43, paragraphs 28 and 35). Specifically, the Court stated that "the applicant was entitled to expect a coherent system that would achieve a fair balance between the authorities' interests and his own; in particular, he should have had a clear, practical and effective opportunity to challenge an administrative act that was a direct interference with his right of property" (*id.* at page 43, paragraph 34). In that case the Court found that the complexity of certain legislation regulating the designation of conservation of places of interest and the attendant complexity regarding how to calculate the time-limit for bringing an appeal against such designation created a level of legal uncertainty that was incompatible with Article 6(1) (*id.* at page 42, paragraph 33).

296. In the present cases, the Shareholders Association initiated lawsuits before the Municipal Court of Velika Kladuša and the Cantonal Court of Bihać attempting to obtain recognition of their rights as shareholders in the joint stock company based upon the capital structure of the company indicated on the annual balance sheet of 1992. On 25 December 2000 the Municipal Court of Velika Kladuša declared itself "not at all competent" to decide upon the dispute of the Shareholders Association against Agrokomerc. The Municipal Court explained in its reasoning that "the effective ownership structure of the company's capital is established by an audit" which examines both the private and state capital of the company. The Institute for Accounting and Auditing of the Federation is authorised and competent to perform such audits and to resolve disputes concerning audits. The Municipal Court noted that the plaintiff had already initiated an administrative dispute challenging the results of the Revsar audit of the ownership transformation of Agrokomerc. It reasoned that two bodies cannot decide upon the same claim, and in this case, the competent body to decide upon the plaintiff's dispute was the Institute for Accounting and Auditing of the Federation. On 25 September 2001 the Cantonal Court of Bihać upheld the first instance decision declaring the courts not competent to decide upon the dispute.

297. The litigation regarding the rights of the applicants as shareholders is a dispute concerning civil rights and obligations. Regardless of whether it is really the Ordinance on the Audit of Previously Performed Ownership Transformation, referred to in the decision of the Municipal Court of 25 December 2000, that prevents the courts from hearing the applicants' case, it is a fact that the courts denied jurisdiction. In theory, the applicants have challenged the ownership structure of Agrokomerc in their administrative dispute against the results of the Revsar audit. The first time their administrative dispute was considered by the Supreme Court, the Court in its judgment of 28 September 2000, annulled the decision on the results of the first Revsar audit, based on procedural defects in the performance of the audit. The Court returned the case to the first instance organ for reconsideration. The renewed audit by Revsar, however, reached the same substantive conclusions on the ownership structure of Agrokomerc as the first audit. Therefore, the applicants filed another administrative dispute challenging the results of the renewed Revsar audit before the Supreme Court of the Federation. This second administrative dispute is still pending. Under the applicable law, the Supreme Court in the proceedings currently pending may examine both the procedural and substantive aspects of the second Revsar audit and annul it if the audit fails once again to comply with the law, but the Supreme Court will not on its own establish the ownership structure of Agrokomerc (see Article 13 of the Law on Administrative Disputes, OG FBiH nos. 2/98, 8/00). That task is assigned to the auditors under the law (see paragraph 170 above).

298. The applicants are correct that they have had no real and effective means to participate in the establishment of the ownership structure of Agrokomerc, as that has been established through the performance of the audit, which was conducted exclusively by the auditor Revsar. As far as the Chamber is aware, neither Revsar, nor the Institute for Accounting and Auditing of the Federation, nor the Ministry of Finance of the Federation have offered the applicants any real opportunity to present documents, testimony, or legal argument in writing or in person during the process of the performance of the audit. There have been no actual or effective proceedings in which the applicants have been invited to participate. Under the law, the only way for the applicants to participate in the establishment of the ownership structure of the company in which they are shareholders has been to challenge the appointment of the auditor and to challenge the results of the audit (see paragraph 170 above). This has not proven effective in this case. Moreover, the Chamber considers that this type of process has not been adequate properly to allow the applicants to have access to courts for the determination of their civil rights, as guaranteed by Article 6 of the Convention.

299. The Municipal Court of Velika Kladuša and the Cantonal Court of Bihać applied provisions on the tasks of the Institute for Accounting and Auditing of the Federation, which they interpreted to bar the applicants' access to the courts. The ordinary courts thereby denied competence to decide the ownership structure of Agrokomerc and to recognise the applicants' rights as shareholders. Thus, the failure of the respondent Party to provide the applicants with an opportunity to resolve their dispute in regular proceedings before its courts has made it practically impossible for the applicants to have their rights properly determined and has thereby created uncertainty for them concerning their rights as shareholders.

300. The Chamber therefore concludes that the applicants have not had access to fair court proceedings in which they can have their civil rights determined. Having regard to the circumstances

of these cases as a whole, the Chamber finds that the applicants do not have an effective right of access to court in the Federation for the resolution of their claim of ownership of shares of Agrokomerc, a "civil right" within the meaning of Article 6, paragraph 1. The respondent Party therefore has violated Article 6(1) of the Convention.

#### 4. Conclusion on the merits

301. The Chamber therefore concludes that the applicants property rights protected by Article 1 of Protocol No. 1 to the Convention, as well as their right to access to court guaranteed by Article 6 of the Convention, have been violated.

## VIII. REMEDIES

302. Under Article XI(1)(b) of the Agreement, the Chamber must address the question of what steps shall be taken by the respondent Party to remedy the established breaches of the Agreement. In this regard the Chamber shall, *inter alia*, consider issuing "orders to cease and desist" and monetary relief, as well as provisional measures.

303. The applicants request the Chamber to annul the decision of the Una-Sana Canton of 17 July 1997 which placed Agrokomerc on a list of enterprises "over which the powers and obligations of the owner on the basis of state capital are performed by the Government of the Canton" and to annul the similar decree of the Government of the Federation of 31 July 2001. Further, they request the Chamber to require the Federation and the Una-Sana Canton to recognise them as shareholders of Agrokomerc and to ensure their rights as shareholders to participate in the management in relation to their share capital as registered in the Court of Bihać on 31 October 1991 and as increased by the payments indicated on the annual balance sheet of 31 December 1992. The applicants claim compensation in an unspecified amount for pecuniary damages they have suffered since 1 January 1996 as a result of the denial of their property rights and the manner in which the business of Agrokomerc has been conducted under the management appointed by organs of the respondent Party.

304. The Chamber has established that the applicants acquired protected possessions in paid internal shares of Agrokomerc and that the respondent Party has violated their property rights under Article 1 of Protocol No. 1 to the Convention by depriving them of these protected possessions and the rights associated with them. As a general matter, the Chamber will fashion a remedy that allows the applicants to regain ownership over their paid internal shares and to exercise the management and participation rights that naturally and legally flow from these shares.

### A. Evidentiary matters with respect to the business records of Agrokomerc

305. In the Chamber's view, the applicants have met their burden of proof to establish the violations of the Convention found by the Chamber. However, in the context of ordering a remedy, the Chamber is unable, at this time, to precisely state the amount of paid internal shares owned by each of the 3,024 individual applicants. The Chamber notes that both its experts and the Financial Police of the Federation opine that Agrokomerc did not properly maintain its business records in accordance with the law (see, *e.g.*, paragraphs 54, 76, and 79 above). Many important records appear to be missing, deficient, or not properly authenticated or signed. This failure on the part of Agrokomerc has significantly contributed to the lack of specific and precise information on the amount of paid internal shares acquired by each individual applicant. The Chamber considers that the failure to properly maintain business records engages the responsibility of the Federation, which effectively and actually controlled the management of the company for the entire time period under consideration in these cases.

### B. Orders to perform a forensic audit of the ownership structure of Agrokomerc

306. In order to cure the lack of specific and precise information on the amount of paid internal shares acquired by each individual applicant, the Chamber concludes that it is necessary to order a forensic (or investigative) audit to determine the complete ownership structure of Agrokomerc, in accordance with the Chamber's decision, by an independent, impartial, and competent auditor.

Therefore, the Chamber requires the respondent Party, at its own expense, to undertake a forensic audit of the financial statements and accounting records of Agrokomerc to determine the present ownership structure of the company in compliance with the terms of this decision and the applicable law. The audit must be undertaken by an internationally recognised firm of auditors in compliance with the International Accounting Standards and International Auditing Standards.

307. The Chamber notes that according to the decision of the management board of the Agency for Privatisation of the Federation of 12 November 2001, the privatisation of Agrokomerc is to be undertaken with the assistance of the World Bank (see paragraph 61 above). The Chamber understands that in accordance with that decision, funds are available to the Federation from the proceeds of the Privatisation Technical Assistance Credit (PTAC) from the World Bank. Therefore, the Chamber recommends that the respondent Party approach the World Bank with a request to fund a part or all of the forensic audit ordered herein from that credit, as an integral part of the privatisation process of Agrokomerc. Regardless, however, of whether the respondent Party follows this recommendation for the financing of the forensic audit, the Chamber requires that the selection of the internationally recognised auditors to perform the forensic audit ordered herein must be undertaken in strict compliance with best practice procurement rules for international tenders.

308. The forensic audit must comply with the Chamber's decision and with the law. It must determine the precise amount, percentage, and present value of paid internal shares acquired by all the shareholders who are applicants in these cases, including the 3,024 shareholders who are members of the Shareholders Association. More precisely, the audit must take into account that valid payments for internal shares were made on the basis of permanent deposits; allocations of parts of salaries from 1991 to 1994; and distribution of profits for 1992, adjusted to represent the legally recognised capital structure of the company at year-end 1992 (see paragraphs 249-261 and 268-270 above). It must not, however, consider valid internal shares resulting from the conversion of employee claims for reduced salaries from 1987 to 1991 or the conversion of the value of inventory goods (see paragraphs 262-267 above). The auditors should further take into consideration that in accordance with Article 23 of the decision on issuance of internal shares of 27 August 1991 and Articles 1c and 1d of the Law on Social Capital (see paragraph 149 above), employees were granted discounts for the payment of internal shares. Therefore, when determining the precise amount of paid internal shares, the auditors shall take into account the respective individual discounts as well.

309. The Chamber orders the respondent Party to fully co-operate with the auditors in the performance of the forensic audit to determine the ownership structure of Agrokomerc. The respondent Party must provide the auditors with unrestricted access to all applicable documentation concerning Agrokomerc within the possession or control of Agrokomerc and within the possession or control of any organ of the respondent Party, including in particular the Payment Bureaux of the Federation in Bihać and Sarajevo, where all relevant financial transactions were required to be documented.

310. After the completion of the forensic audit, the Chamber orders the respondent Party to take all necessary actions to ensure that the results of the audit ordered herein are properly implemented. The respondent Party shall cause the new ownership structure of Agrokomerc to be properly registered in accordance with the applicable law and shall ensure that the applicants are issued individual share certificates in accordance with the applicable law.

### C. Orders to secure the applicants' participation in management of Agrokomerc during the interim period until the ownership structure is established

311. Article XI(3) of the Agreement provides: "subject to review as provided in paragraph 2 of Article X, the decisions of the Chamber shall be final and binding". Thus, a decision of the Chamber does not become final and binding until the provision in Article XI(3) of the Agreement has been met, that is, in particular, until after the Chamber decides upon any motions for request for review filed in accordance with the Chamber's Rules of Procedure.

312. However, Article XI(1) of the Agreement states that "the Chamber shall promptly issue a decision, which shall address: … (b) what steps shall be taken by the Party to remedy such breach, including … provisional measures." The Chamber interprets this provision in the sense that it is

authorised to order the respondent Party to take certain steps without further delay, that is, before the decision becomes final and binding pursuant to Article XI(3) of the Agreement, in order to remedy breaches of the Agreement.

313. The Chamber has determined that the respondent Party illegally interfered with the applicants' exercise of their rights to participate in the management of Agrokomerc in proportion to the amount of their paid internal shares. Moreover, during this time, the value of the company has decreased and its assets have most likely been squandered. In order to remedy this interference, it is essential that the applicants be granted an opportunity to exercise their rights to participate in the management of the company as soon as possible. As explained above, it is impossible for the Chamber at this stage to determine the precise amount of internal shares owned by each individual applicant as a result of the inadequate business records of Agrokomerc; none the less, there is no question that each applicant does privately own some amount of shares. Therefore, in the interim period during the performance of the forensic audit to establish the ownership structure of the company, the Chamber decides that the applicants should be allowed immediately to participate in the management of the company. In this respect, the Chamber finds it appropriate to exercise its powers granted under Article XI(1)(b) of the Agreement to order the respondent Party during the interim period to take certain actions described below without further delay, regardless of whether either party files a request for review of the decision under Article X(2) of the Agreement.

314. During the interim period until the ownership structure of Agrokomerc has been finally established by the forensic audit ordered herein, the Chamber will recognise, for the sake of the exercise of management rights, the capital structure of Agrokomerc registered by the Court of Bihać on 31 October 1991, that is, 53% share capital and 47% state capital. Accordingly, as an interim measure, the Chamber recognises that all holders of privately-owned shares as a collective group, including the applicants, constitute a majority of shareholders in Agrokomerc.

315. It follows that in the interim period until the ownership structure of Agrokomerc has been finally established by the forensic audit ordered herein and until convening of the general meeting of the assembly of shareholders (as set out in paragraph 320 below), the Chamber decides that the supervisory board of Agrokomerc shall be composed of 7 (seven) members, including the president. Of these 7 (seven) members, the Federation shall appoint 3 (three) members and the applicants, through the Shareholders Association and on behalf of all private shareholders, shall appoint the remaining 4 (four) members. The Chamber recognises that this interim arrangement may affect the rights of shareholders who are not applicants in these cases, but such an order is necessary to protect the rights of the applicants and it is intended to provide for the best interests of all shareholders (see paragraph 237 above). Each member of the interim supervisory board shall be entitled to one equal vote and members may not abstain from decisive votes on management issues. The newly appointed members of the interim supervisory board may vote amongst themselves to appoint 1 (one) member as their president, based upon a simple majority vote of all members (*i.e.*, 4 (four) members in agreement). The interim supervisory board shall be competent to decide upon all issues within the general competence of the assembly of shareholders, as that competence is defined in the decision on issuance of internal shares and the currently applicable laws (in particular Article 246 of the Law on Business Companies of 1999, with the exception of item 12 of Article 246). In the event that the interim supervisory board decides upon any issue within the general competence of the assembly of shareholders, then such a decision must be taken on the basis of a two-thirds majority vote of all members of the interim supervisory board (*i.e.*, 5 (five) members in agreement). Similarly, if the interim supervisory board decides to change any or all of the members of the management board of Agrokomerc during the interim period, then this vote must also be taken on the basis of a two-thirds majority vote of all members of the interim supervisory board (*i.e.*, 5 (five) members in agreement).

316. As a matter of clarification, the Chamber is not making any order that changes or directly affects the composition or competence of the current management board of Agrokomerc during the interim period. However, as stated above, the supervisory board may change the members of the management board during the interim period, provided a two-thirds majority of all members agree upon that decision.

317. The Chamber notes that the Law on Business Companies (OG FBiH nos. 23/99, 45/00, 2/02) provides in Article 268 that to hold "a session of the supervisory board, a quorum of two-thirds

of the total number of members is required" and to issue a decision, "a majority of votes of the members present" is required (see paragraph 174 above). With the exception of the decisions specifically identified in paragraph 315 above, the Chamber shall require the interim supervisory board to comply with the applicable domestic law with respect to quorum requirements for convening sessions and for making decisions.

318. The parties shall appoint their respective interim members of the supervisory board, as ordered above, as quickly as practicable, and at the latest by 8 April 2002, regardless of whether either party files a request for review of the decision pursuant to Article X(2) of the Agreement. The parties shall inform each other and the Chamber of these appointments, including contact information for each appointee, respectively, at the latest by 8 April 2002. Moreover, as quickly as practicable after the appointments, and at the latest by 29 April 2002, the respondent Party shall cause the members it has appointed to convene a session of the newly constituted supervisory board, after providing proper notice of such session to the members appointed by the Shareholders Association, as required by Article 267 of the Law on Business Companies of 1999. The newly constituted interim supervisory board shall commence the performance of its legal duties and responsibilities to manage Agrokomerc in accordance with the law, in particular the Law on Business Companies of 1999. Unless otherwise explicitly stated in this decision, the interim supervisory board shall fully comply with the applicable law as it conducts its business and performs its legal duties.

319. The Chamber will withdraw its previous orders for provisional measures in effect in these cases after receiving a fully executed and signed copy of the minutes from the first session of the newly constituted interim supervisory board of Agrokomerc, as ordered above, together with any resolutions or decisions decided at that session. Either party may submit these minutes, resolutions, and decisions to the Chamber.

### D. Subsequent and general orders

320. After completion of the forensic audit ordered herein and an establishment of the complete ownership structure of Agrokomerc, the Chamber orders the parties through their respective members on the interim supervisory board, to convene in accordance with the law a general meeting of the assembly of shareholders. This meeting of the assembly of shareholders shall take place at the latest within three months from the delivery of the results of the forensic audit ordered herein, and it shall act in accordance with the applicable law, in particular the Law on Business Companies of 1999. The Chamber will withdraw its orders for the interim supervisory board after receiving a fully executed and signed copy of the minutes from the first meeting of the newly constituted assembly of shareholders of Agrokomerc, together with any resolutions or decisions decided at that meeting. Either party may submit these minutes, resolutions, and decisions to the Chamber.

321. The Chamber is of the opinion that by recognising the applicants as holders of paid internal shares in Agrokomerc under the conditions described in this decision, the orders described herein are adequate and capable of ensuring respect for the applicants' protected human rights and of remedying the established violations of the Convention by the respondent Party. The Chamber therefore will not award any compensation to the applicants on account of their unspecified claims for compensation for pecuniary damages.

322. The Chamber reserves the right to make additional orders for further remedies, as it deems necessary in the future, to protect the human rights of the applicants and remedy violations thereof. In particular, the Chamber reserves the right to make additional orders based upon the results of the forensic audit ordered herein.

## IX. CONCLUSIONS

323. For these reasons, the Chamber decides,

1. unanimously, to declare admissible the applicants' complaints under Article 1 of Protocol No. 1 to the European Convention on Human Rights and Article 6 of the Convention;

2. unanimously, to declare inadmissible the applicants' complaints of violations of their right to work;

3. unanimously, that the Federation of Bosnia and Herzegovina violated the applicants' right to peaceful enjoyment of their possessions within the meaning of Article 1 of Protocol No. 1 to the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement;

4. unanimously, that the Federation of Bosnia and Herzegovina violated the applicants' right to access to court for the determination of their civil rights as guaranteed by Article 6 paragraph 1 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

5. unanimously, to order the Federation of Bosnia and Herzegovina to take all necessary steps, including the steps envisioned in conclusions nos. 6 through 11 below, to recognise the applicants as holders of internal shares in relation to the amount of their paid internal shares in Agrokomerc and to enable the applicants to exercise the management rights connected to these shares, as described in this decision;

6. unanimously, to order the Federation of Bosnia and Herzegovina, at its own expense, to employ internationally recognised auditors, in strict compliance with best practice procurement rules for international tenders, to undertake a forensic audit to determine the complete present ownership structure of Agrokomerc, in accordance with the Chamber's decision and in compliance with International Accounting Standards and International Auditing Standards;

7. unanimously, to order the Federation of Bosnia and Herzegovina to fully co-operate with the auditors employed in accordance with conclusion no. 6 above, and in this respect to provide the auditors with unrestricted access to all applicable documentation concerning Agrokomerc within the possession or control of Agrokomerc and within the possession or control of any organ of the respondent Party;

8. unanimously, to order the Federation of Bosnia and Herzegovina, upon completion of the forensic audit ordered in accordance with conclusion no. 6 above, to take all necessary action to ensure that the results of the audit are properly and speedily implemented, including causing the new ownership structure of Agrokomerc to be properly registered, causing individual share certificates to be issued to each applicant in accordance with the Law on Securities of the Federation, and causing a general meeting of the assembly of shareholders to be convened in accordance with the law and at the latest within three months from the delivery of the results of the forensic audit;

9. unanimously, to order the Federation of Bosnia and Herzegovina, as an interim measure until the forensic audit ordered in conclusion no. 6 above is complete, to recognise the capital structure of Agrokomerc registered by the Court of Bihać on 31 October 1991, that is, 53% share capital and 47% state capital;

10. by 6 votes to 1, to order the Federation of Bosnia and Herzegovina, as an interim measure until the forensic audit ordered in conclusion no. 6 above is complete, and at the latest by 8 April 2002, to appoint 3 (three) members to a newly constituted supervisory board of Agrokomerc, and to allow the applicants, through the Shareholders Association, to appoint 4 (four) members to this interim supervisory board, which shall be composed of 7 (seven) members total, each of whom shall perform his or her duties in full compliance with this decision, in particular paragraphs 315, 317 and 318 above, and with the applicable law.

11. by 6 votes to 1, to order the Federation of Bosnia and Herzegovina, as an interim measure until the forensic audit ordered in conclusion no. 6 above is complete, and at the latest by 29 April 2002, to cause the members it has appointed to the interim supervisory board in accordance with conclusion no. 10 above, to convene a session of the newly constituted supervisory board, after providing proper notice of such session to the members appointed by the Shareholders Association, as required by Article 267 of the Law on Business Companies of 1999;

12. by 6 votes to 1, that the Chamber's previous orders for provisional measures in these cases shall remain in effect until the Chamber receives a fully executed and signed copy of the minutes from the first session of the newly constituted interim supervisory board ordered in conclusion no. 11, together with any resolutions and decisions decided at that session;

13. by 6 votes to 1, that the interim measures ordered in conclusions nos. 9, 10, and 11 shall remain in effect until the Chamber receives a fully executed and signed copy of the minutes from the first meeting of the newly constituted assembly of shareholders ordered in conclusion no. 8, together with any resolutions and decisions decided at that meeting;

14. unanimously, to reject the applicants' claims for compensation for pecuniary damages;

15. unanimously, to reserve the right to make additional orders for further remedies, as it deems necessary in the future, to protect the human rights of the applicants and remedy violations thereof, including, in particular, additional orders based upon the results of the forensic audit ordered in conclusion no. 6; and

16. unanimously, to order the Federation of Bosnia and Herzegovina to report to it for the first time within one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedures, and thereafter periodically every two months until full implementation of the Chamber's decision is achieved, on the steps taken by the respondent Party to comply with the orders.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Second Panel

Annex I Dissenting opinion of Mr. Viktor Masenko-Mavi

## ANNEX I

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mr. Viktor Masenko-Mavi.

## DISSENTING OPINION OF MR. VICTOR MASENKO-MAVI

I have voted against conclusions nos. 10, 11, 12, and 13 of the decision on admissibility and merits for reasons explained in some of my previous dissenting opinions attached to other cases. I am still of the opinion that it is not appropriate for the Chamber to deal extensively with consequential orders in its decisions. The Chamber is neither mandated nor in a position to judge cases like ordinary domestic courts do. The steps to be taken following the finding of a breach should be formulated more cautiously in order to leave the respondent Party with the possibility to find the most appropriate course of action to remedy the breach. The more specific and detailed the consequential orders are, the more difficult it may be for the Chamber to define the limits of reasonableness of its orders. This may in turn open a Pandora's box, releasing incalculable consequences. The orders I have voted against might have horrendous consequences for the Agrokomerc joint stock company, because the Association for the Protection of Unemployed Shareholders of Agrokomerc ("the Shareholders Association") will acquire a privileged position in the management of the company, which in light of the facts of the case is not warranted. The Chamber clearly recognised that it was not possible to establish precisely the present ownership structure of Agrokomerc and the amount of paid internal shares owned by the applicants, who are members of the Shareholders Association. It is not clear why the members of the Shareholders Association (without knowing the exact amount of their shares) should be put into such a privileged position before establishing the amount of their shares through an independent forensic audit. The Chamber in its conclusion no. 6 has ordered the Federation of Bosnia and Herzegovina to undertake such an audit; however, the orders in conclusions nos. 10, 11, 12, and 13, prejudge the results of this audit. The majority, on the basis of a general and rather vague presumption that "each applicant does privately own some amount of shares" (see paragraph 313 above), empowers the Shareholders Association to play a leading role in the management of the company for an interim period. This might have far-reaching consequences for the fate of the company.

(signed)
Viktor Masenko-Mavi