

**IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH ARTICLE 19 OF THE TREATY BETWEEN THE FRENCH REPUBLIC AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND CONCERNING THE CONSTRUCTION AND OPERATION BY PRIVATE CONCESSIONAIRES OF A CHANNEL FIXED LINK SIGNED AT CANTERBURY ON 12 FEBRUARY 1986**

**- BETWEEN -**

- 1. THE CHANNEL TUNNEL GROUP LIMITED**
- 2. FRANCE-MANCHE S.A.**

**- AND -**

- 1. THE SECRETARY OF STATE FOR TRANSPORT OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND**
- 2. LE MINISTRE DE L'ÉQUIPEMENT, DES TRANSPORTS, DE L'AMÉNAGEMENT DU TERRITOIRE, DU TOURISME ET DE LA MER DU GOUVERNEMENT DE LA RÉPUBLIQUE FRANÇAISE**

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**PARTIAL AWARD**

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**The Arbitral Tribunal:**

Professor James Crawford SC, Chairman

Maître L. Yves Fortier CC QC

H.E. Judge Gilbert Guillaume

The Rt. Hon. Lord Millett

Mr Jan Paulsson

**Registry:**

Permanent Court of Arbitration

30 January 2007

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## CHAPTER I – PROCEDURAL HISTORY

1. By a Notice of a Request for Arbitration dated 17 December 2003 (the “Request”), the Channel Tunnel Group Limited and France-Manche S.A. (hereinafter called the “Claimants” or the “Concessionaires” according to the context) commenced arbitration against the Governments of the United Kingdom of Great Britain and Northern Ireland, represented by the Secretary of State for Transport and the French Republic, represented by *le ministre de l’équipement, des transports, du logement, du tourisme et de la mer*<sup>1</sup> (hereinafter called the “Governments”, the “Principals” or the “Respondents” according to the context).
2. The Request presents a dispute which is said to have arisen between the Concessionaires and the Governments concerning:
  - (a) the Governments’ failure to protect the Fixed Link from multiple incursions and related delays; damage and expenses caused by large numbers of clandestine migrants resident in the nearby Sangatte refugee hostel; the Governments’ discrimination against the Fixed Link and in favour of other operators faced with the clandestine migrant problem, and connected therewith, a claim that the United Kingdom failed to meet its obligations in applying its civil penalty regime and in charging the costs of detention and removal of clandestine migrants arriving in the United Kingdom via the Tunnel;
  - (b) the Governments’ granting (or failure to prevent the grant) of large subsidies to SeaFrance, thereby allowing it to remain in business, to renew its fleet and to compete with the Fixed Link on an unfair basis.

These claims will be referred to, for convenience, as the Sangatte claim and the SeaFrance claim. The Claimants estimate the amount of these claims as respectively £30,003,982 for the Sangatte claim and £428.4 million for the SeaFrance claim.

3. The Claimants seek to establish jurisdiction over these claims under Clause 40 of the Concession Agreement of 14 March 1986 between them and the Respondents.<sup>2</sup> It was pursuant to the Concession Agreement that the Concessionaires constructed and now

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<sup>1</sup> At the date of this award, the Minister in charge of transportation is *le ministre des transports, de l’équipement, du tourisme et de la mer*. At the date of signature of the Concession Agreement: *le ministre de l’urbanisme, du logement et des transports*.

<sup>2</sup> For the text of the Concession Agreement in both languages see Cmnd. 9769 and *J.O.R.F.* 16 June 1987, pp. 6414 ff.

operate the fixed rail link that runs under the English Channel between France and the United Kingdom. Clause 40.1 of the Concession Agreement provides that any dispute between the Parties relating to the application of the Concession Agreement shall be submitted to arbitration in accordance with the provisions of Article 19 of the Treaty of Canterbury. The Claimants served the Request on the Respondents on the basis of these provisions and of the Arbitration Rules for the Channel Fixed Link agreed by the Parties on 29 July 1987 (the “Arbitration Rules”), which apply to disputes described in Article 19 of the Treaty.

4. The Claimants seek compensation for alleged breaches by the Governments of the Concession Agreement, the Treaty of Canterbury, the Protocol Concerning Frontier Controls and Policing, Co-operation in Criminal Justice, Public Safety and Mutual Assistance Relating to the Channel Fixed Link (the “Sangatte Protocol”) and the Special Arrangement on Security Matters Relating to the Channel Tunnel Fixed Link (the “Special Security Arrangement”), as well as of relevant rules of international law and of English and French law.
5. By agreement of the Parties, the Secretary-General of the Permanent Court of Arbitration (“PCA”) was to act as provisional registrar in accordance with Article V of the Arbitration Rules. The Claimants provided the Secretary-General of the PCA with a copy of the Request in satisfaction of the requirements of Article V.2 and Article X.1 of the Arbitration Rules.
6. In the Request, the Claimants appointed Me Yves Fortier CC QC and Mr Jan Paulsson as members of the arbitral tribunal to be constituted pursuant to Article IV.2 of the Arbitration Rules. On 11 February 2004, France appointed H.E. Judge Gilbert Guillaume and on 16 February 2004, the United Kingdom appointed the Rt. Hon. Lord Millett.
7. Subsequently the two arbitrators appointed by the Governments, with the agreement of the other two Party-appointed arbitrators, appointed Professor James Crawford SC, an Australian national, as the Chairman of the Tribunal. On 29 April 2004, the PCA acknowledged this appointment.

8. On 21 July 2004, the Tribunal appointed Mr Brooks W. Daly of the PCA as Registrar for the proceedings.
9. On 14 September 2004, the Tribunal confirmed the dates for oral hearings to be the weeks of 8 and 15 May 2006.
10. On 11 October 2004, the Parties submitted a Common Note agreeing to a schedule for written pleadings. It provided for a Memorial to be submitted by 31 December 2004, for each Respondent to submit a Counter-Memorial by 30 June 2005 or (at their election) 31 August 2005, and for a subsequent pleading schedule to be agreed for Reply and Rejoinders.
11. On 31 December 2004, the Claimants filed their Memorial.
12. On 18 January 2005, the Tribunal issued Procedural Order No. 1, which provided for the submission of English or French translations of pleadings and laid down deadlines for this. Translations of annexes and witness statements were not required unless by specific request.
13. On 19 January 2005, the Claimants filed their witness statements and expert reports.
14. On 25 January 2005, the Terms of Appointment were agreed, recording the terms of Tribunal remuneration and PCA Registry support.
15. On 15 February 2005, the Respondents filed an “Application to Hive Off Issues of Quantum to a Subsequent Phase of the Proceedings”. The Respondents requested the Tribunal to order that issues relating to the quantum of damages be reserved for a separate phase of the proceedings. An official French translation of this document was filed by France on 17 March 2005.
16. On 23 February 2005, the Claimants requested an extension of one month to submit a French translation of their Memorial. On 28 February 2005, the Registrar informed the Parties that the Chairman had granted the Claimants the requested extension.

17. On 24 February 2005, France informed the Parties and the Registrar that it intended to use the further two months available to it under the Common Note, and would be filing its Counter-Memorial by 31 August 2005.
18. On 4 March 2005, the Claimants filed a Response, objecting to bifurcation of the proceedings.
19. On 15 March 2005, France and the United Kingdom each filed comments to the Response, maintaining their request to reserve issues of quantum for a later stage of the proceedings. Courtesy translations of these comments were submitted on 18 and 21 March 2005, by the United Kingdom and France respectively.
20. On 18 March 2005, the United Kingdom, referencing France's letter of 24 February 2005, stated that it would also use the additional two months available to it under the Common Note and would submit its Counter-Memorial by 31 August 2005.
21. On 22 March 2005, the Claimants filed a Reply, maintaining their objection to any bifurcation of the proceedings.
22. On 31 March 2005, Mr Paulsson informed the Parties that in the past week he had learnt that a partner at his law firm had been working on a refinancing operation for Eurotunnel and that another partner had worked on a different securitisation project; both assignments were received following Mr Paulsson's appointment to the Tribunal. Mr Paulsson stated that he did not believe that these facts affected his impartiality in the proceedings, but left it to the Parties to determine whether he should be replaced.
23. On 1 April 2005, the Claimants stated that they had no objection to Mr Paulsson continuing to serve as a member of the Tribunal.
24. In a letter dated 12 April 2005, the Registrar informed the Parties of the Tribunal's decision that it

will be more efficient to proceed first to a determination of the merits of the claim before dealing, as may be required, with issues of quantification. Different claims are maintained against the two Respondents, and liability may be established to a different extent, or not at all, in respect of these. Accordingly, the Tribunal grants the [Respondents'] request. [...] The Tribunal notes that what is hereby reserved is

the issue of quantification of compensable damages. The Parties should discuss in the present phase, as they may be advised, principles concerning the categories of compensable loss and issues of causation.

25. On 15 April 2005, the Respondents stated that they had no objection to Mr Paulsson continuing to serve as a member of the Tribunal.
26. On 26 April 2005, the Claimants wrote to the Registrar to stress that pursuant to the Registrar's letter of 12 April 2005, "only the arithmetical calculation of the quantification of compensable damages [would] be postponed to the second hearing." The Claimants suggested that the Tribunal fix a date for the second hearing on quantification of damages without delay, preferably to take place before the end of 2006. The Claimants also referenced the Tribunal's statement that "liability may be established to a different extent" in respect of the two Respondents and reiterated that both France and the United Kingdom were "liable in respect of all claims, either on the basis of their own acts or omissions and/or on the basis [of] their failure to protect the Claimants from the acts or omissions of the other [g]overnment."
27. In a letter from the Registrar, dated 4 May 2005, the Tribunal responded to the Claimants' letter of 26 April 2005 stating that:

[It] has nothing to add to what is set out in [the] letter of 12 April 2005. [It] agrees that, in the event that liability is established, the quantum phase should be conducted as expeditiously as possible. However it doubts that – given the hearing date in May 2006 – it would be possible to complete such a second phase by the end of 2006. [It] reiterates that different claims are maintained against the two Respondents, and liability may be established to a different extent, or not at all, in respect of these.

28. On 31 August 2005, France and the United Kingdom each submitted its Counter-Memorial.<sup>3</sup>
29. On 5 October 2005, the Claimants informed the Registrar that the Parties had failed to agree on a pleading schedule for the Claimants' Reply and the Respondents' Rejoinders as required by the Common Note and requested that the Tribunal issue a procedural order deciding the matter. On 6 and 7 October respectively, the Respondents separately commented on this issue and likewise requested that the Tribunal issue a procedural

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<sup>3</sup> Revised versions of certain Annexes were subsequently submitted by United Kingdom.

order deciding the matter. On 11 October 2005 the Claimants wrote to the Registrar further commenting on the scheduling issue.

30. On 13 October 2005, the Tribunal issued Procedural Order No. 2, laying down deadlines for submission of Reply and Rejoinders and translations thereof. It further requested that each Party submit a list of witnesses whom it intended to call at the hearing no later than 21 April 2006, specified that the cut-off date for any additional documents shall be 21 April 2006, and called for the preparation of consolidated bundles of documentary evidence.
31. On 6 January 2006, the Claimants filed their Reply.
32. On 25 January 2006, the Registrar wrote to the Parties, requesting their comments on the issue (which had been raised in paragraph 3.77 of the United Kingdom's Counter-Memorial) concerning the interpretation of Article 19(2)(f) of the Treaty of Canterbury. The Claimants were requested to submit their comments by 24 February 2006. The Respondents' comments were to be submitted in their Rejoinders.
33. On 7 February 2006, the Registrar sought confirmation from the Parties that the Peace Palace in The Hague would be acceptable as a venue for the hearings scheduled for May 2006, with Brussels remaining the seat of arbitration. On 8 February 2006, France and the United Kingdom separately agreed to this proposal; on 9 February 2006, the Claimants did likewise.
34. On 10 February 2006, the United Kingdom requested that the Claimants supply it with a copy of the complete version of John Noulton's manuscript notes of a visit made to Dover in April 1991, referenced in the Claimants' second witness statement from John Noulton.
35. On 24 February 2006, the Claimants filed their written pleading regarding Article 19(2)(f) of the Treaty.
36. On 6 March 2006, the Claimants provided the United Kingdom with (i) a copy of John Noulton's manuscript notes and (ii) a transcription of the part of the notes referred to in paragraph 8 of John Noulton's second witness statement.

37. On 7 April 2006, the United Kingdom and France each filed its Rejoinder.
38. On 20 April 2006 the Claimants requested an extension of the deadline for the submission of additional documents. On 21 April 2006, France confirmed that it had no objection to the request.
39. On 21 April 2006, the Claimants filed four additional documents and a DVD with video footage.
40. On 21 April 2006, the Claimants confirmed that they had no objection to the United Kingdom's request for an extension of the time-limit set out in paragraph 3 of Procedural Order No. 2, and suggested an extension until 26 April 2006.
41. On 26 April 2006, the Chairman of the Tribunal held a telephone conference with the Parties. It was agreed, *inter alia*, that the deadline for the submission of additional documents would be extended until 2 May 2006, and that the question of examination of three witnesses identified by the Claimants would be addressed in a letter to the Parties following consultation by the Chairman with the other members of the Tribunal. Minutes of the telephone conference were circulated to the Parties and the Tribunal by the Registrar.
42. On 2 May 2006, the Registrar informed the Parties that: "pursuant to Article XIII(1)(b) of the Rules, the Tribunal regards it as appropriate to allow the Claimants to question the three French witnesses they have identified."
43. From 8 to 13 and 15 to 18 May 2006, hearings for oral argument and witness examination were held at the Peace Palace in The Hague.
44. On 15 May 2006, the following three witnesses testified before the Tribunal: Yannick Imbert, Sub-Prefect of Calais from July 1998 to September 2000; Michel Heuzé, Sub-Prefect of Calais from October 2000 to August 2004; and Daniel Dubois, Regional Director of the Border Police from January 2001 to May 2003.
45. On 16 May 2006, Mr Paulsson informed the Parties and the Tribunal that one of the partners at his law firm had been consulted by the French Ministry for Transportation on

a labour law issue which had no relation to the present case. He assured the Parties that this would not affect his independence. This was accepted by all Parties.

## CHAPTER II – BACKGROUND OF THE DISPUTE

### A. THE PARTIES

46. The Claimants in this matter are the Channel Tunnel Group Ltd and France-Manche S.A. The Channel Tunnel Group is a wholly-owned subsidiary of Eurotunnel plc. Both companies are organised under English law. France-Manche S.A. is a wholly-owned subsidiary of Eurotunnel S.A. Both companies are organised under French law. Pursuant to an agreement signed on 31 August 1996 France-Manche S.A. and The Channel Tunnel Group Ltd. formed a *société en participation* under French law and a partnership under English law. Eurotunnel plc and Eurotunnel S.A. are listed on the London Stock Exchange and the Euronext in Paris and Brussels, and are traded on all three exchanges as twinned units, whereby Eurotunnel S.A. shares are twinned through a unit subscription with Eurotunnel plc shares.
47. The Respondents are the Government of the United Kingdom of Great Britain and Northern Ireland, represented by the Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic, represented by *le ministre de l'urbanisme, du logement et des transports* of the Government of the French Republic.

### B. THE FIXED LINK PROJECT

48. In 1985, the Governments issued an invitation launching the tendering process for the development of the Channel Tunnel. An Invitation to Promoters, dated 20 March 1985, was published in the *Official Journal of the European Union*: it called for tenders to develop, finance, construct and operate a fixed link across the Channel between France and the United Kingdom (the “Fixed Link”), to be financed entirely by private investment.
49. A joint response was submitted by the Claimants and on 20 January 1986, the French President and the British Prime Minister announced in Lille that the Claimants had been selected as the concessionaires of the Fixed Link in accordance with the terms of the Invitation.

50. The Treaty concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link was signed at Canterbury on 12 February 1986.<sup>4</sup> Following ratification by both States it entered into force on 24 July 1987. The Treaty of Canterbury lays down the international legal framework “to permit the construction and operation of a Channel fixed link by private enterprise in accordance with the criteria laid down by the Government of the United Kingdom and the French Government” (preamble, paragraph 3). In accordance with Article 1:

- (1) The High Contracting Parties undertake to permit the construction and operation by private concessionaires (hereinafter referred to as “the Concessionaires”) of a Channel fixed link in accordance with the provision of this Treaty, of its supplementary Protocols and arrangements and of a concession between the two Governments and the Concessionaires (hereinafter referred to as “the Concession”). The Channel fixed link shall be financed without recourse to government funds or to government guarantees of a financial or commercial nature.

Article 1(2) defines the Fixed Link to include the tunnels themselves and associated terminal areas and freight facilities.

51. Pursuant to the Treaty of Canterbury, an Intergovernmental Commission (the “IGC”) was created “to supervise, in the name and on behalf of the two Governments, all matters concerning the construction and operation of the Fixed Link” (Article 10(1)). In accordance with Article 10(2):

- (2) With regard to the Concessionaires, the two Governments shall exercise through the Intergovernmental Commission their rights and obligations under the Concession, other than those relating to the amendment, extension, suspension, termination or assignment of the latter.

Decisions of the IGC are taken “by agreement between the heads of the British and French delegations”.

52. The Treaty of Canterbury was supplemented by a number of later agreements between the two States, as follows:

- Exchange of letters constituting an agreement relating to the arbitration rules for the implementation of the Treaty of 12 February 1986 concerning a channel fixed

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<sup>4</sup> France-United Kingdom, Treaty concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link, Canterbury, 12 February 1986, 1497 United Nations Treaty Series 334.

link (with Annex), Paris, 29 July 1987;<sup>5</sup>

- Protocol concerning frontier controls and policing, cooperation in criminal justice, public safety and mutual assistance relating to the Channel fixed link, Sangatte, 25 November 1991 (“Sangatte Protocol”);<sup>6</sup>
- Special Arrangement on Security Matters relating to the Channel Fixed Link, London, 15 December 1993 (“Special Security Arrangement”);<sup>7</sup>
- Exchange of letters constituting an agreement concerning the use of files and the protection of personal information and computerised data in the control zones of the Channel Tunnel Fixed Link, Paris, 10 June 1994;<sup>8</sup>
- Additional Protocol to the Sangatte Protocol on the establishment of bureaux responsible for controls on persons travelling by train between the United Kingdom and France, Brussels, 29 May 2000;<sup>9</sup> and
- Exchange of letters concerning the Additional Protocol to the Sangatte Protocol, Paris, 28 January 2002/London, 31 January 2002.<sup>10</sup>

53. The Concession Agreement was signed on 14 March 1986 by the *ministre de l'équipement, du transport et de l'habitat* for France and the Secretary for Transport for the United Kingdom, on the one hand, and France-Manche S.A. and The Channel Tunnel Group Ltd., on the other. The Concession Agreement granted the Claimants a concession to develop, finance, construct and operate the Fixed Link for a term of 55 years, a period subsequently extended to 99 years by the Concession Extension Agreement of 13 February 1998.

54. Relevant provisions of the Treaty of Canterbury, the other interstate agreements and the Concession Agreement will be set out as necessary in considering the arguments of the Parties.

55. The Channel Fixed Link was opened in 1994. According to some estimates, it constituted at that time the largest privately-financed infrastructure project in history. It was made clear from the outset that the Tunnel was to be “financed without recourse to

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<sup>5</sup> 1509 United Nations Treaty Series 199.

<sup>6</sup> 1747 United Nations Treaty Series 109.

<sup>7</sup> Request, Annex 5. Unlike the other agreements referred to here, the Special Security Agreement was not published as a treaty.

<sup>8</sup> 1892 United Nations Treaty Series 335.

<sup>9</sup> 2226 United Nations Treaty Series 197.

<sup>10</sup> 2226 United Nations Treaty Series 203.

government funds or to government guarantees of a financial or commercial nature” – a principle said to have been encapsulated by the then British Prime Minister, Mrs Thatcher, in the phrase “not a penny for the tunnel”.<sup>11</sup> Instead it was financed by bank lending and equity in an amount in excess of £10 billion (ca €16 billion).

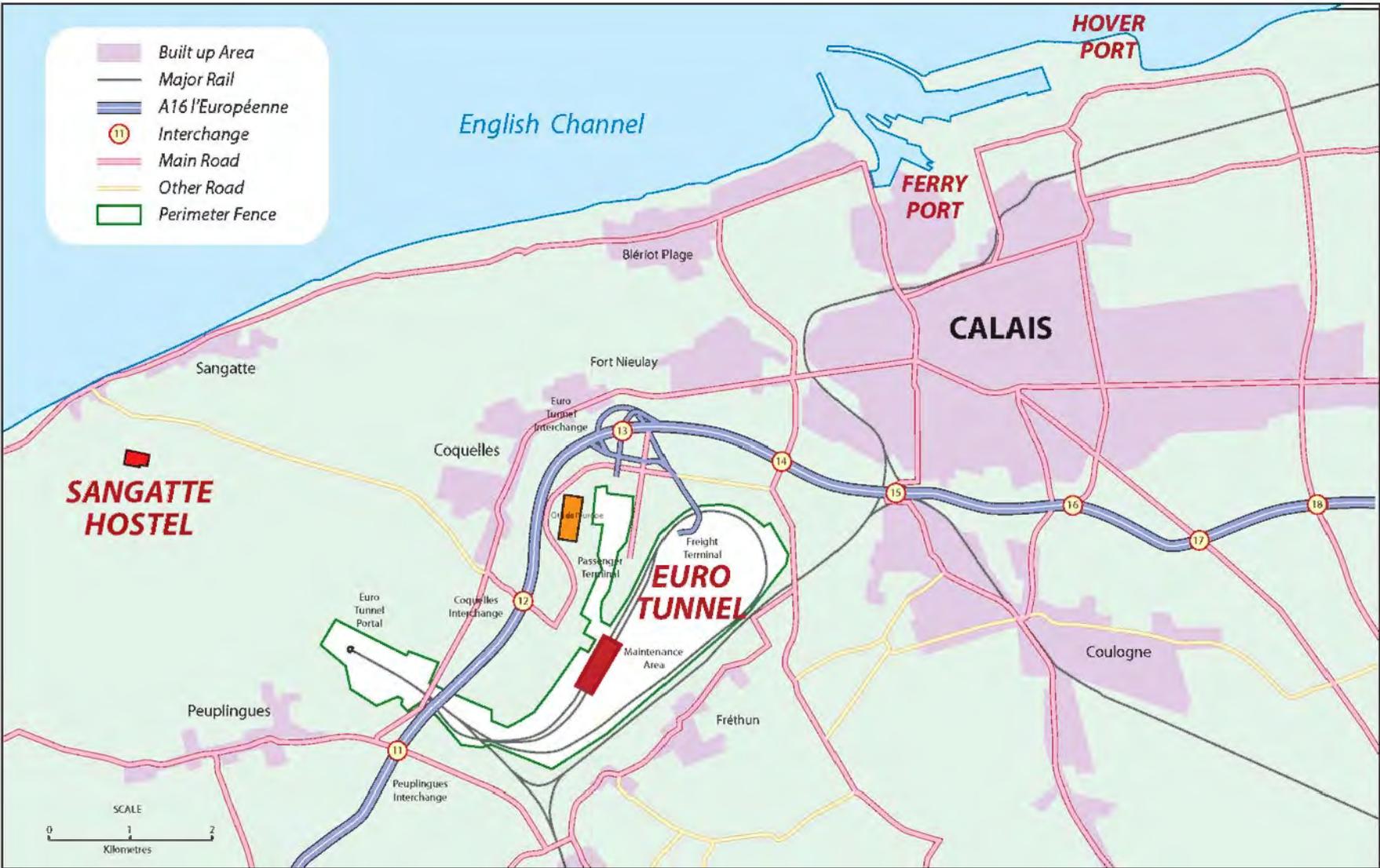
56. The Fixed Link is designed to accommodate through trains and shuttles for road vehicles and consists of a fixed twin-bored tunnel rail link under the English Channel, a service tunnel and terminal areas at Coquelles in the French *Département du Pas de Calais* and Cheriton in the County of Kent.
57. The terminal at Coquelles comprises a 700-hectare site and is protected with a perimeter fence and additional fencing (including inner cordons) which together total many kilometres in length. The terminal is situated in a rural area surrounded by open countryside and farmland, approximately three kilometres from the centre of the port town of Calais. A sketch map of the region showing relevant locations is **Figure 1**, below.

### **C. ASPECTS OF THE CLANDESTINE MIGRANT PROBLEM**

58. The Claimants’ first principal claim concerns the adequacy of protection afforded to the Fixed Link by the Respondents from disruptions caused by clandestine migrants based at the Sangatte Hostel.
59. Especially in the period from 1999 to 2003, clandestine migration to the Pas-de-Calais region in Northern France was a serious problem. Clandestine migrants in the region aspired to reach the United Kingdom, whether via the Port of Calais or the Fixed Link, and they came in their thousands. Most were Kosovars, Afghans, Iraqis and Somalis displaced by the conflicts in their own countries, but the flow was exacerbated by organised people-smuggling gangs and fed by perceptions (whether justified or not) of Great Britain as a haven for refugees.

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<sup>11</sup> The nearest version to these words that can be located in the Thatcher archive was in a speech to the Manchester Chamber of Commerce, Thursday, 11 December 1986, when the Prime Minister said: “You spoke about the Channel Tunnel – every penny piece of investment from the private sector” (online: <<http://www.margareththatcher.org/speeches/displaydocument.asp?docid=106537>> (visited 6 June 2006)). President Mitterrand rendered it slightly differently: according to him, “*la soudure au continent ne coûtera pas un kopeck à la Couronne.*” Quoted in Ali Magoudi, *Rendez-Vous: La psychanalyse de François Mitterrand* (Paris, Maren Sell Éditeurs, 2005) pp. 50-51.



**Figure 1**  
Relevant location in the Calais Area

60. From towards the end of 1999, increasing numbers of clandestine migrants who were residents of the Sangatte Hostel made attempts to reach the United Kingdom by breaking into the perimeter of the terminal site at Coquelles, and seeking to smuggle themselves into shuttle trains bound for the United Kingdom. According to the Claimants, this caused significant disruption to the operation of the Fixed Link and cost a great deal in additional protective measures.<sup>12</sup>

### **1. Opening of the Sangatte Hostel**

61. On 29 September 1999, the Prefect of Pas-de-Calais requisitioned the former pre-cast concrete segment factory belonging to the Claimants at Sangatte for the purpose of establishing a reception and accommodation centre for immigrants.<sup>13</sup> The Sangatte Hostel was financed by the French Government and managed by the French Red Cross. As shown on **Figure 1**, it was situated approximately 2.5 kilometres away from the Channel Tunnel entrance at the Coquelles terminal.

62. By the end of 2001, the Sangatte Hostel was accommodating up to 2,000 clandestine migrants at any time. The Claimants suggest that between September 1999 and December 2002 “around 67,000 migrants were accommodated at the Sangatte Hostel”.<sup>14</sup>

63. On 13 September 2000, the Claimants made their first written request to the French Government for closure of the Sangatte Hostel.<sup>15</sup> Requests for cooperation in procuring the closure of the Sangatte Hostel were also made to the United Kingdom.<sup>16</sup>

64. On 12 July 2002 the responsible French and British Ministers, Messrs Sarkozy and Blunkett, agreed in principle to the closure of the Hostel. There followed extensive discussions between the two Governments and an agreement by the United Kingdom to allow the entry of many of its remaining residents. The Hostel was eventually closed on 30 December 2002.

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<sup>12</sup> Claimants’ Memorial, paras. 77-84.

<sup>13</sup> This was not the first centre opened for this purpose. A centre operated in Calais itself earlier in 1999: it was closed by the Sub-Prefect in June 1999 for hygiene and security reasons, following which some hundreds were sleeping rough in the public parks of Calais.

<sup>14</sup> Claimants’ Memorial, para. 75, referring to Claimants’ Memorial, Appendix 225.

<sup>15</sup> Claimants’ Memorial, Appendix 94.

<sup>16</sup> Claimants’ Memorial, Appendices 106 and 133.

65. That there was a significant relation between numbers of would-be clandestine migrants at the Sangatte Hostel and incursions at Coquelles and the nearby terminal belonging to the Société Nationale des Chemins de Fer Français (“SNCF”) can be seen from **Figure 2** below. This shows on a month-by-month basis from January 2000 to April 2003 the numbers of incursions at Coquelles and at the adjacent SNCF freight terminal, plotted against occupancy levels at the Hostel. Incursions at Coquelles reached a peak in summer 2001 and again at the turn of the year. Incursions into both sites plummeted after October 2002, following the announcement (in September 2002) of the closure of the Hostel.

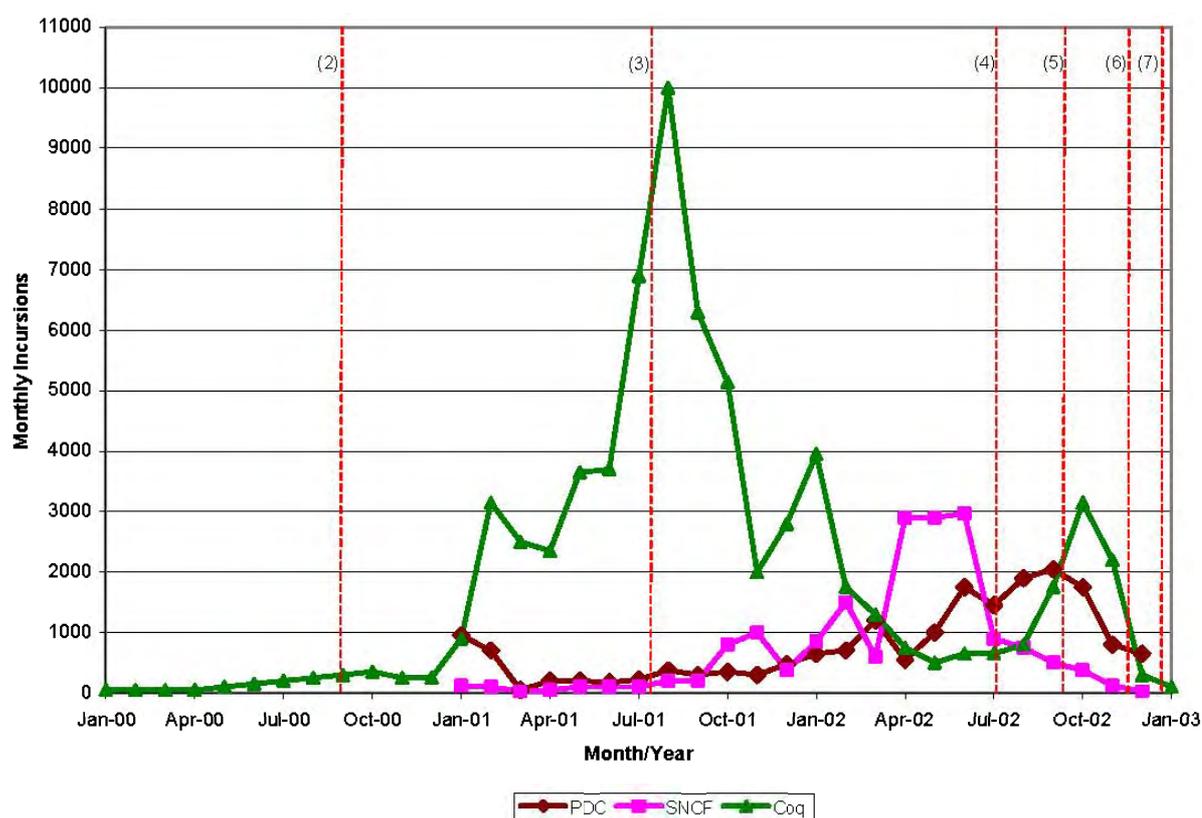
## **2. The United Kingdom’s civil penalty regime**

66. Linked with the continuing controversy about clandestine migrants and the Sangatte Hostel was the extension to the Claimants of the UK’s civil penalty regime. The civil penalty regime was introduced in April 2000 pursuant to Part II of the Immigration and Asylum Act 1999 (UK) (the “1999 Act”) with the stated aim of tackling the problem of clandestine migrants. It involved a system of penalties in respect of those responsible for transporting clandestine migrants to the United Kingdom. Carriers held to be responsible were liable to a penalty of £2,000 for every clandestine migrant transported to the United Kingdom. Initially the civil penalty regime applied only to road transport vehicles, but on 1 October 2001 it was extended to the Claimants. Its extension became a source of conflict between the two Governments. The Claimants also protested, seeking the cooperation of both Governments in controlling the clandestine migrant problem rather than what they saw as unilateral punitive measures against them.

67. From October 2001 until February 2002, penalty charges totalling £388,000 were imposed on the Concessionaires, although these were all eventually remitted. On 4 February 2002, the United Kingdom announced the withdrawal of the civil penalty regime so far as the Claimants were concerned.

**Figure 2**

**Summary of Monthly Incursions:  
Port de Calais, SNCF Zone and Coquelles Terminal <sup>(1)</sup>**



**Notes:**

- (1) Consolidated presentation of three graphs set forth in Annex 149 to the France Rejoinder;
- (2) 13 September 2000: First written request by Claimants for closure of Sangatte Hostel (Claimants' Memorial, para. 116);
- (3) 15 July 2001: commencement of "Zero Tolerance" policy by Claimants (Letter from Philippe Lazarre to the Prefect of Pas-de-Calais dated 3 July 2001, Bundle E, p. 3353);
- (4) 12 July 2002: agreement between David Blunkett and Nicolas Sarkozy regarding closure of Sangatte Hostel (United Kingdom Counter-Memorial, Annex 14, p. 258);
- (5) 26 September 2002: Announcement of proposed closure of Sangatte Hostel (Press release "Sangatte to close its doors to new residents", United Kingdom Counter-Memorial, Annex 14, p. 264);
- (6) 5 November 2002: New residents no longer admitted to Sangatte Hostel (Press release "UK borders 'extended' – Sangatte to close on 30 December", United Kingdom Counter-Memorial, Annex 14, p. 273);
- (7) 20 December 2002: closure of Sangatte Hostel (Claimants' Memorial, para. 123; Second Witness Statement of Jean-Paul Lingrand, Bundle C, Tab 8, para. 7).

68. In 2002, the United Kingdom amended the 1999 Act to impose liability upon the Concessionaires as operators of freight shuttle trains carrying clandestine entrants to the United Kingdom. However, no penalties have yet been imposed upon the Concessionaires under the amended provisions of the 1999 Act.

### **3. Costs of detention and removal of clandestine migrants arriving in the United Kingdom via the Fixed Link**

69. Parallel to the civil penalty regime, the United Kingdom also rendered the Claimants liable under the Immigration Act 1971 (UK), as modified by the Channel Tunnel (International Arrangement) Order 1993 (the “1993 Order”) which incorporates the relevant provisions of the Sangatte Protocol into English law, for the costs of detention and removal of certain clandestine migrants arriving in the United Kingdom via the Fixed Link. It appears that an amount of approximately £117,000 was paid by the Claimants on this account.<sup>17</sup>

#### **D. ASSISTANCE TO SEA FRANCE**

70. The Claimants’ second claim is that the Respondents gave improper financial support to the SeaFrance sea link. SeaFrance, a French company, was set up on 1 January 1996: it is one of a number of companies operating ferry services in the cross-Channel transport market between the United Kingdom and France. Until December 1999 SeaFrance was a wholly-owned subsidiary of Transmanche EIG; Transmanche EIG was in turn a subsidiary of SNCF.
71. Due to its economic difficulties, a recapitalisation of SeaFrance was organised in December 1999 with the approval of the French Government. As part of the recapitalisation plan, SNCF provided SeaFrance with two new ships, the *Nord-Pas-de-Calais* and the *Manet*, valued at €24.4 million, in return for 1,600,000 new SeaFrance shares.
72. SeaFrance also purchased two further new ships, the *Rodin* and the *Berlioz*, which were financed taking advantage of a tax exemption scheme administered by the French

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<sup>17</sup> Removal costs were imposed on a discretionary basis by the UK authorities: see First Witness Statement of John Noulton, Bundle C, Tab 4, para. 47. The power to do so derives from the Immigration Act 1971, Schedule 2 as extended to the Concessionaires by the Channel Tunnel (International Arrangements) Order (S1 1993/11813), Schedule 4, para. 1.

Government and, in the case of the latter ship, a guarantee and advance payment from SNCF. SeaFrance has also availed itself of other benefits, which included a scheme for refunds in respect of employers' contributions to social security, pension and work accident funds between 1998 and 2000 and latterly for employers' contributions to family and employment benefits.

73. The Claimants allege that these benefits amount to unlawful assistance from the French Government, given in breach of express and implied undertakings under the relevant agreements and otherwise in breach of the applicable law.

### CHAPTER III – PRELIMINARY ISSUES

74. Before turning to the arguments of the Parties concerning these claims, two preliminary issues need to be mentioned. The first concerns the manner in which the Tribunal is directed to decide questions concerning the interpretation of the Treaty; the second concerns the difficulties raised for the interpretation of the Concession Agreement by the marked divergence between its French and English texts.

#### A. THE CONSTITUTION OF THE TRIBUNAL FOR THE PURPOSE OF INTERPRETING THE TREATY OF CANTERBURY: ARTICLE 19(2)(F)

75. As noted already, by letter dated 25 January 2006, the Registrar, referring to positions taken in the United Kingdom's Counter-Memorial,<sup>18</sup> asked the Parties to submit their comments on the scope and application of Article 19(2)(f) of the Treaty.

76. Article 19(2)(f) of the Treaty so far as material provides as follows:

(2) The arbitral tribunal shall be constituted for each case in the following manner:

...

(f) In any case to which the Concessionaires are parties they shall be entitled to appoint two additional arbitrators. The two arbitrators appointed by the Governments shall appoint the chairman of the tribunal by agreement with the two arbitrators appointed by the Concessionaires. In default of agreement within the time limit specified in subparagraph (b), the chairman shall be appointed in accordance with the procedure prescribed in sub-paragraphs (c), (d) and (e) of this paragraph. *The arbitrators appointed by the Concessionaires shall not participate in that part of any decision relating to the interpretation or application of the Treaty.*

(Emphasis added)

77. This must be read in conjunction with Clause 40.1 of the Concession Agreement which is the basis of the Tribunal's jurisdiction. It provides that:

40.1 Any dispute between the Concessionaires or either of them and the Principals or either of them relating to this Agreement shall be submitted to arbitration in accordance with the provisions of Article 19 of the Treaty at the request of any party.

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<sup>18</sup> United Kingdom Counter-Memorial, para. 3.77.

78. It is evident from Article 19(2)(f) of the Treaty of Canterbury (as applied by Clause 40.1 of the Concession Agreement) that if and to the extent that it falls to the Tribunal to interpret and apply the Treaty, the arbitrators appointed by the Concessionaires shall not “participate” in that part of the decision. This unusual provision raises a number of questions: what is it to “participate” in a decision (does it cover deliberation or only voting?); what if the issue is the implications for the meaning of the Concession Agreement of specific provisions of the Treaty; and above all, is the Tribunal in its plenary composition to decide on the application of Article 19(2)(f) itself?
79. These questions were clarified to some extent in the submissions of the Parties.
80. The Claimants argue that the last sentence of Article 19(2)(f) is applicable only where the Tribunal is engaged in interpreting or applying the Treaty as such – as distinct from the Concession Agreement, any other treaty or any other provision of the applicable law. Moreover it would not apply in cases where the Tribunal needs to examine the Treaty “as an aid to the construction of the Concession Agreement”.<sup>19</sup> In such a case, the Tribunal’s consideration of the meaning of the Treaty would not involve a decision on the interpretation or application of the Treaty, but would merely be part of the “reasoning”<sup>20</sup> on which the decision regarding the Concession Agreement was based. According to the Claimants, this construction is confirmed by a statement of a representative of the United Kingdom Government contemporaneous to the conclusion of the Treaty.<sup>21</sup>
81. According to the Claimants, a narrow interpretation of Article 19(2)(f) is warranted on grounds of equality of arms: “it cannot seriously be envisaged that the Parties would have elaborated a dispute resolution mechanism excluding the Concessionaires’ arbitrators from decisions having a direct impact on the Concessionaires.”<sup>22</sup> In their view:

the arbitrators can appreciate, on a case by case basis, whether the issue[s] at stake involve questions strictly concerning the reciprocal rights and obligations of the two States, with no direct impact on the Concessionaires’ interests (in which case there may be a principled basis for the exclusion of the arbitrators appointed by the

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<sup>19</sup> Claimants’ Submission on Treaty Article 19(2)(f), para. 4.

<sup>20</sup> Claimants’ Submission on Treaty Article 19(2)(f), para. 4.

<sup>21</sup> Claimants’ Submission on Treaty Article 19(2)(f), para. 8(3).

<sup>22</sup> Claimants’ Submission on Treaty Article 19(2)(f), para. 12.

Concessionaires) or whether they involve questions having a direct impact on the Concessionaires' interests (such that the arbitrators appointed by the Concessionaires should take part in the decision).<sup>23</sup>

82. On the question of what amounts to participation, the Claimants argue that:

[T]he arbitrators appointed by the Concessionaires are excluded only from the decisional part of the proceedings ... They must, however, attend and participate in all discussions and reflections leading to the decisional state and assist the other arbitrators with their view on the issue. They are also entitled to participate in those parts of the hearing relating to the interpretation and application of the Treaty alone.<sup>24</sup>

83. According to the United Kingdom, the last sentence of Article 19(2)(f) is applicable in cases where the Tribunal is engaged in interpreting or applying the Treaty alone as well as where the Tribunal needs to examine the Treaty as an aid to the construction of the Concession Agreement.<sup>25</sup> But it notes that it “certainly has no objection to all arbitrators taking part in any decision as to the scope and application of Article 19(2)(f) itself.” It further notes that the Claimants' suggestion that arbitrators appointed by the Concessionaires should participate in the deliberations, but not in the actual making of a decision, “appears inconsistent” with the wording of Article 19(2)(f). Nonetheless, in its view, this is a “highly experienced and eminent Tribunal” and it leaves to the Tribunal “to regulate as it sees fit the application (as appropriate) of Article 19(2)(f) in its deliberations.”<sup>26</sup>

84. France likewise rejects the Claimants' interpretation of Article 19(2)(f) of the Treaty and argues that this provision is applicable in all decisions of the Tribunal “that could concern the interpretation or application of the Treaty”.<sup>27</sup> The only limitations concern those Treaty provisions that are “formally included”<sup>28</sup> in the Concession Agreement. In such a case, Article 19(2)(f) of the Treaty would not be applicable.

85. France also contends that the exclusion referred to in Article 19(2)(f) deals with the entire decision-making process of the Tribunal, and not only (as argued by the

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<sup>23</sup> Claimants' Submission on Treaty Article 19(2)(f), para. 12.

<sup>24</sup> Claimants' Submission on Treaty Article 19(2)(f), para. 14.

<sup>25</sup> United Kingdom Rejoinder, paras. 2.16 ff.

<sup>26</sup> United Kingdom Rejoinder, para. 2.21.

<sup>27</sup> France Rejoinder, para. 2.1.86.

<sup>28</sup> France Rejoinder, para. 2.1.90.

Claimants) with the “decisional part” of the proceedings.<sup>29</sup> It rejects the Claimants’ view that the Concessionaires-appointed arbitrators should take part in any decision of the Tribunal dealing with the interpretation of the Treaty, arguing that it would be contrary to the principle of “*effet utile*”.<sup>30</sup> But it accepts that the Tribunal as a whole is the judge of when and in what way the provision should be applied in a concrete case.<sup>31</sup>

86. For its part the Tribunal would stress that Article 19(2)(f) operates in the framework of a jurisdiction to resolve disputes “relating to” the Concession Agreement, and that this jurisdiction is plainly vested in the Tribunal as a whole. The case contemplated by Article 19(2)(f) is that of an identifiable part of a decision which itself relates to the interpretation or application of the Treaty as distinct from the Concession Agreement. Clauses 40.4 and 41.1 of the Concession Agreement confirm the distinction between the application of the Concession Agreement and of the Treaty. Clause 40.4, under the rubric of “Settlement of Disputes”, reads:

In accordance with Article 19(6) of the Treaty, in order to resolve any disputes regarding the application of this Agreement, the relevant provisions of the Treaty and of this Agreement shall be applied. The rules of English law or the rules of the French law may, as appropriate, be applied when recourse to those rules is necessary for the implementation of particular obligations under English law or French law. In general, recourse may also be had to the relevant principles of international law and, if the parties in dispute agree, to the principles of equity.

Clause 41 is entitled “Applicable Law”. Clause 41.1 provides:

The relationship between the Principals and the Concessionaires shall be governed by the provisions of the Treaty, as given effect to by this Agreement, and by the provisions of this Agreement.

87. It will be necessary to return to these provisions in more detail, but for present purposes what is significant is the clear implication that it may be necessary to apply the provisions of the Treaty as given effect by the Concession Agreement *and* of the Concession Agreement itself. Article 19(2)(f) applies only where the issue concerns the interpretation or application of the Treaty: its purpose is to prevent the Government-appointed arbitrators being outvoted on such an issue.

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<sup>29</sup> France Rejoinder, para. 2.1.83.

<sup>30</sup> France Rejoinder, para. 2.1.84.

<sup>31</sup> In its Rejoinder, France states that it is “incumbent upon the Arbitral Tribunal in its plenary membership to appreciate the need for the particular composition provided for in the last sentence of Article 19(2)(f) of the Treaty.” France Rejoinder, para. 2.1.88.

88. It is true that it may be necessary to interpret the Concession Agreement in light of the provisions of the Treaty. But conceptually such an exercise involves two steps, once an issue of interpretation or application has arisen. First, what does the relevant provision of the Treaty mean? Second, what in the light of that conclusion does the relevant provision of the Concession Agreement mean, and how is it to be applied? Where the language of the two texts is identical this may seem a distinction without a difference, for the decision as to the interpretation of the Treaty will in practice be determinative on the question of interpretation. Nonetheless the distinction holds. Article 19(2)(f) applies only where what is at stake is the interpretation or application of the Treaty, whereas in accordance with Clause 41.1 of the Concession Agreement it is the Agreement – including “the provisions of the Treaty, as given effect to by this Agreement” – which governs the relationship between the Principals and the Concessionaires.
89. This consideration helps to answer the Claimants’ complaint that Article 19(2)(f) is a denial of equality of arms which could work to their detriment. The main answer, however, is that the terms on which international arbitration would occur were laid down in the Treaty, to which Clause 40 of the Concession Agreement refers, and that the Concessionaires have expressly accepted them. For its part the Tribunal has no choice but to operate in accordance with the conditions laid down in Clauses 40 and 41.
90. The Tribunal considers that Article 19(2)(f) should be interpreted no more widely than is necessary to give effect to its purpose, i.e., to avoid the risk that the arbitrators appointed by the two Governments might be outvoted by their colleagues on the meaning and effect of a provision of the Treaty, which is exclusively a matter for the Contracting Parties. Accordingly, it reaches the following conclusions on the application of the Article. First, it is for the full Tribunal to determine the claims which have been submitted to it. Second, in the course of doing so it may become necessary for the Tribunal to interpret the Treaty as such – whether directly or as an aid to the interpretation of the Concession Agreement – but it will be for the full Tribunal to decide whether it is necessary to do so in any given case: it is the full Tribunal which has competence-competence. Third, in order to determine any question before it, including the question whether Article 19(2)(f) is to apply and the meaning and effect of any provision of the Treaty, the full Tribunal must be able to hear argument on and discuss the issue. Accordingly, there is no need for the arbitrators appointed by the

Claimants to withdraw from the deliberation room or to abstain from taking part in the Tribunal’s deliberations when the meaning and effect of a provision of the Treaty is under discussion. The sole effect of Article 19(2)(f) is to deprive the arbitrators appointed by the Claimants from voting on any such question.

**B. PRINCIPLES OF INTERPRETATION OF THE CONCESSION AGREEMENT AND THE PROBLEM OF DIVERGENT LANGUAGE TEXTS**

91. The Tribunal turns to another preliminary question which, in the event, occupied much more time at the hearing – the difficulties of interpreting the Concession Agreement having regard, in particular, to the many discrepancies between its two equally authoritative texts. An example is provided in Clause 40, which defines the matters within the Tribunal’s competence as follows:

Clause 40. <i>Settlement of Disputes</i>	Article 40. <i>Règlement des différends</i>
40.1. Any dispute ... <i>relating to this Agreement</i> shall be submitted to arbitration in accordance with the provisions of Article 19 of the Treaty ... (emphasis added)	40.1. ... tout différend <i>relatif à l'application de la Concession...</i> doit être soumis à un tribunal arbitral conformément aux dispositions de l'article 19 du Traité. (emphasis added)
40.4. ... in order to resolve any disputes <i>regarding the application of this Agreement</i> , the relevant provisions of the Treaty and of this Agreement shall be applied. (emphasis added)	40.4. ... pour régler les différends <i>relatifs à la Concession</i> il est fait application des dispositions pertinentes du Traité et de la Concession. (emphasis added)

In this case the linguistic discrepancy is not unhelpful. It is evident from the alternating use of the phrases “relating to this Agreement”/“regarding the application of this Agreement” that the parties to the Concession Agreement were not seeking to draw a distinction between the two for the purposes of dispute settlement. But in other cases the discrepancies are more difficult to reconcile.

92. As a general matter there was little disagreement between the Parties on the interpretative approach to be adopted, although they disagreed in many cases as to its outcome. First, it was agreed that, although the Concession Agreement is not a treaty, it is an agreement governed by international law, an “international contract”, and that

international law principles of interpretation are to be applied. Second, the English and French texts of the Concession Agreement are of equal status, “both texts being equally authoritative”. The Parties agreed that the principles of interpretation laid down in the Vienna Convention on the Law of Treaties (“Vienna Convention”) are declaratory also for agreements between States and private parties under international law and should be applied to resolve any discrepancies.

93. So far as linguistic discrepancies are concerned, the Tribunal is thus called on to apply Article 33 of the Vienna Convention, which provides that:

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

...

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

94. As to the drafting history of the Concession Agreement, there is no coherent record of the negotiations, but all Parties referred for their own purposes to correspondence and other records of the negotiations, and the Tribunal considers that they may be referred to, with due caution, by analogy with *travaux préparatoires* under Article 32 of the Vienna Convention, and for the purposes there set out.

95. One important preparatory document is the Invitation to Promoters, which was issued by the two Governments on 2 April 1985 and which set out the basis on which the Governments were proposing to grant a concession to build and operate the Fixed Link. The Invitation was merely indicative and was expressly subject to negotiation, as was made clear by paragraph 05.9 of the Invitation, which provided:

The Governments are not committed by anything in these guidelines and also reserve the right not to follow up in any way the present invitation to promoters.

96. As will be seen, in a number of respects the Concession Agreement departs from the scheme adumbrated in the Invitation. Formally, the Invitation does not constitute *travaux* of either the Treaty of Canterbury or the Concession Agreement. Still, it is mentioned in the preamble to the Concession Agreement and may thus be referred to in order to shed light on its interpretation, in particular as to provisions not included in the Concession Agreement or as to the meaning of terms used in both documents.

## CHAPTER IV – JURISDICTION AND APPLICABLE LAW

### A. RELEVANT PROVISIONS OF THE CONCESSION AGREEMENT AND THE TREATY

#### 1. Jurisdiction of the Tribunal

97. The Tribunal’s jurisdiction is founded on Clause 40.1 of the Concession Agreement, which has already been referred to. Clause 40.1 provides:

40.1 Any dispute between the Concessionaires or either of them and the Principals or either of them relating to this Agreement shall be submitted to arbitration in accordance with the provisions of Article 19 of the Treaty at the request of any party.

*40.1 À la demande de l’une quelconque des parties, tout différend relatif à l’application de la Concession survenant entre les Concessionnaires ou l’un d’entre eux, et les Concédants ou l’un d’entre eux, doit être soumis à un tribunal arbitral conformément aux dispositions de l’article 19 du Traité.*

#### 2. Source of the Parties’ rights and obligations

98. Clause 41 of the Concession Agreement is headed “Applicable Law”, but in fact Clause 41.1 is concerned with the source of the Parties’ respective rights and obligations. It provides:

41.1 The relationship between the Principals and the Concessionaires shall be governed by the provisions of the Treaty, as given effect to by this Agreement, and by the provisions of this Agreement.

#### 3. Applicable law

99. The law applicable by the Tribunal to determine issues falling within its jurisdiction is dealt with in Clause 40.4, supplemented by the remaining provisions of Clause 41. These provide:

40.4 In accordance with Article 19(6) of the Treaty, in order to resolve any disputes regarding the application of this Agreement, the relevant provisions of the Treaty and of this Agreement shall be applied. The rules of English law or the rules of the French law may, as appropriate, be applied when recourse to those rules is necessary for the implementation of particular obligations under English law or French law. In general [*En outre*], recourse may also be had to the relevant principles of international law and, if the parties in dispute agree, to the principles of equity.

...

41.2 The concessionaires undertake to comply with the laws in force from time to time in each of the two States, including Community law, to comply with those provisions of the Treaty, the supplementary Protocols and arrangements agreed pursuant to the Treaty which are applicable to them and to comply with all rules, regulations, directions and requirements binding on the Concessionaires of all relevant public bodies and authorities and all conditions relating thereto including, without limitation, those relating to the environment, safety and security.

41.3 The provisions of Clause 37 shall apply to those infringements of national or Community law which also constitute a breach of any provision of this Agreement other than Clause 41.2. As regards an infringement which is a breach of only Clause 41.2, the provisions of Clause 37 shall apply only if the relevant infringement is of an extremely serious nature.

41.4 The implementation and enforcement of the laws in force from time to time in either State shall be subject to the jurisdiction of the courts of the relevant State or, where so permitted or available under national law, any other relevant forum.

## **B. THE POSITIONS OF THE PARTIES**

100. In their pleadings and also in oral argument, the Parties devoted much effort to these provisions and to explaining the relationship between jurisdiction and applicable law and related questions of admissibility of claims. It is convenient first to set out their arguments *seriatim*. It will be seen that the arguments were complicated by a failure to appreciate that Clause 41.1 is not concerned with applicable law as such but with the source of rights and obligations of the Parties under the Concession Agreement – something which might in other contexts be covered by the rubric of “applicable law” but which is not coextensive with it.

### **1. General arguments on jurisdiction and applicable law**

101. The Claimants submit that the applicable law is

(a) first and foremost, the terms of the Concession Agreement itself, and the Treaty from which the Concession Agreement flows; (b) second, the relevant principles of international law; and (c) third, where ‘necessary for the implementation of particular obligations under English law or French law’, English or French law as appropriate.<sup>32</sup>

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<sup>32</sup> Request, para. 49; Claimants’ Memorial, para. 243.

From this they seek to derive a jurisdiction in the Tribunal to apply a range of treaties and rules of general international law going well beyond the express stipulations of the Concession Agreement or the Treaty of Canterbury and extending to certain provisions of later bilateral treaties concerning the Fixed Link (especially the Sangatte Protocol), as well as rules of general international law concerning investment protection and the provisions of the European Convention on Human Rights.

102. It is true that the Claimants also argue that the debate on the issue of applicable law is “likely to prove peripheral in any event”<sup>33</sup> since their principal claims are for breaches of the provisions of the Concession Agreement. Yet some of their principal arguments depend on other rules of international law, whether derived from bilateral or multilateral treaties to which the two States are parties or from general international law.
103. While the Claimants acknowledge that “the language employed in Article 19(1)(a) and (c) [of the Treaty, i.e. disputes ‘relating to the interpretation or application’ of the Treaty] clearly requires that any cause of action must be derived from the Treaty itself”,<sup>34</sup> they note that the broader language of Article 19(1)(b) (“relating to the Concession”) “suggests that what is required is that the claim be factually linked to the Concession but that it need not be for breach of a provision of the Concession.”<sup>35</sup>
104. The Claimants argue that Clause 40.4 of the Concession Agreement is the key provision in determining the applicable law. In this respect they refer to a document drafted by Cameron McKenna, the law firm which was assisting the Channel Tunnel Group Limited in the negotiation of the Concession Agreement, stating that “the applicable law provisions were always intended to be Clause 40.4 and that that fact had been accepted in the negotiations by the British Government.”<sup>36</sup>
105. According to the Claimants:

[T]here is no reason to read [Clause 40.1] as confined to cases where the cause of action itself is derived from the Concession Agreement. [T]he facts of the dispute have to be sufficiently closely linked to the concession, but [...] the source of the

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<sup>33</sup> Claimants’ Reply, para. 30.

<sup>34</sup> Claimants’ Reply, para. 38.

<sup>35</sup> Claimants’ Reply, para. 38.

<sup>36</sup> Transcript, Day 1, p. 100, referring to Note of Negotiations on the Concession Agreement Between 7<sup>th</sup> February and 15<sup>th</sup> March 1986, Claimant’s Reply, Appendix 268, p. 2.

rights and obligations, which the Claimants are entitled to try and enforce before this Tribunal, can be found – and sometimes will be found – outside the scope of the Concession Agreement.<sup>37</sup>

This is consistent with their view that the Concession Agreement is “a framework agreement which could be developed by the parties in the appropriate manner over the many years during which it was to be in force.”<sup>38</sup>

106. By contrast, in the Claimants’ view, Clause 41.1 is “declaratory”: “[it] can only be understood in a wide manner as if declaring that the relationship between the Principals and the Concessionaires shall be governed, *inter alia*, by the provisions of the Treaty, and that these provisions are given effect to by the Agreement.”<sup>39</sup> Thus Clause 41.1 does not preclude them from relying on other sources of rights and obligations than those embodied in the Concession Agreement and the Treaty.
107. In the Claimants’ view, the broader language of Article 19(1)(b) means that the relevant principles of international law include not only the secondary rules of interpretation and responsibility but also any primary rules imposing obligations or conferring rights related to the Concession. The last sentence of Article 19(6) also provides for the application of “the principles of equity” (provided the Parties to the dispute expressly agree to their application). This reference, reminiscent of Article 36(2) of the Statute of the International Court of Justice, suggests that principles of international law include decisional standards and are not confined to secondary rules.
108. According to the Claimants, Clause 41.1 of the Concession Agreement (which does not refer to general international law) must be read consistently with Clause 40.4 of the Concession Agreement and Article 19(6) of the Treaty. To limit decisional rules to those embodied in the Concession Agreement, in the Claimants’ view, “would go against the context, object and purpose of the Concession Agreement.”<sup>40</sup>
109. The Claimants stress that international arbitration was from the first envisaged as a guarantee of the integrity of the investment. Paragraph 11.5 of the Invitation to Promoters indicated that disputes would be settled by “arbitration based on general

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<sup>37</sup> Transcript, Day 8, p. 12.

<sup>38</sup> Claimants’ Reply, para. 65.

<sup>39</sup> Claimants’ Reply, para. 93.

<sup>40</sup> Claimants’ Reply, para. 94.

international law.”<sup>41</sup> This did not suggest the exclusion of primary rules of international law.

110. On the footing that “relevant principles of international law” may be applied, the Claimants refer essentially to four distinct sets of norms:

- The Sangatte Protocol and the Special Security Arrangement. The Claimants give three reasons in support of their position that the Sangatte Protocol and the Special Security Arrangement are directly applicable and create a source of rights. First, “reference to the Treaty in clause 40.4 should be taken to include its Protocols and supplementary arrangements”.<sup>42</sup> Otherwise, it would mean that the legal framework of the Concession is frozen as it existed in 1986, a proposition that is difficult to reconcile with the lengthy term of the Concession. Moreover the Treaty itself (Article 1(1)) envisages “supplementary Protocols and arrangements”.<sup>43</sup> Second, “the reference to international law in clause 40.4 will include other binding instruments of international law”<sup>44</sup> (such as the Sangatte Protocol and the Special Security Arrangement). Third, “the Sangatte Protocol and the Special Security Arrangement themselves provide that the Concessionaires may bring claims.”<sup>45</sup>
- The general international law of investment protection. For the Claimants, “in the context of the present case, the relevant principles of international law include the principles of international law regarding the protection of foreign investors and their investments.”<sup>46</sup> They state that “[v]is-à-vis the two Governments, the Concessionaires are ... to be treated as foreign investors and the Concession as a foreign investment.”<sup>47</sup> In particular they rely on the principles of full protection and security and fair and equitable treatment to investors (with special reference to the protection of legitimate expectations), on the guarantee against expropriation, and the principle of non-discrimination.
- The European Convention on Human Rights and its Protocol I. The Claimants also rely on Article 1 of Protocol I of the European Convention on Human Rights

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<sup>41</sup> Claimants’ Reply, para. 58, referring to Consultation for the development, financing, construction and operation of a fixed link between the United Kingdom and France, Claimant’s Reply, Appendix 6.

<sup>42</sup> Claimants’ Reply, para. 97.

<sup>43</sup> Claimants’ Reply, para. 99.

<sup>44</sup> Claimants’ Reply, para. 97.

<sup>45</sup> Claimants’ Reply, para. 97.

<sup>46</sup> Claimants’ Memorial, para. 320.

<sup>47</sup> Claimants’ Memorial, para. 325.

(peaceful enjoyment of possessions) read in conjunction with Article 14 of the Convention.<sup>48</sup>

- French principles of administrative contracts. In addition the Claimants argue that “[i]n considering a public works contract entered into by the French Government, the approach adopted by the French law of administrative contracts is relevant as a general principle of law, which falls within the international law embraced by Clause 40.4 of the Concession Agreement.”<sup>49</sup> Under French law, it is argued, a high level of protection is given to the Concessionaires in the context of administrative contracts, and in particular there is an implied term of fair protection. The Claimants also argue that the Concession Agreement should be interpreted by reference to the concept of *contrat administratif* under French law.<sup>50</sup> While the Concessionaires “do not contend that the French law of administrative contracts is applicable to the Concession Agreement ... [they argue] that its principles should be taken into account in construing the Concession Agreement’s broad terms.”<sup>51</sup>

111. By contrast the United Kingdom considers that the following claims fall outside the scope of the law applicable to these proceedings and either fall outside the jurisdiction of the Tribunal or are inadmissible:

- claims relating to the interpretation or application of the Treaty *per se*, as opposed to claims relating to provisions of the Treaty given effect to by the Concession Agreement;
- claims relating to the interpretation or application of the Sangatte Protocol;
- claims relating to the interpretation or application of the Special Security Arrangement;
- claims relating to rules of English law other than in circumstances in which recourse to such rules is necessary for the implementation of particular obligations;
- claims arising under primary rules of international law which are not expressly given effect to by the Concession Agreement. These include in particular claims advanced by the Concessionaires relating to the purported “duty of the host State”

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<sup>48</sup> Claimants’ Memorial, paras. 367-376.

<sup>49</sup> Claimants’ Reply, para. 108.

<sup>50</sup> Claimants’ Reply, paras. 109 ff.

<sup>51</sup> Claimants’ Reply, para. 129. See also Transcript, Day 1, p. 65.

(to accord to the foreign investor and his investment fair and equitable treatment, to accord to the foreign investor and his investment full protection and security, not to discriminate against the foreign investor and/or his investment on grounds of nationality or for any other arbitrary reason, and not to expropriate the investment, or to engage in conduct tantamount to an expropriation, save in the public interest, on a non-discriminatory basis and on payment of prompt, adequate and effective compensation);

- claims arising under primary rules of international law which are not expressly given effect to by the Concession Agreement; thereby excluded, in particular, are the claims advanced by the Concessionaires relating to the interpretation or application of the European Convention on Human Rights and its Protocol I.<sup>52</sup>

112. In particular the United Kingdom argues that Clause 40.1 of the Concession Agreement and Article 19(1) of the Treaty contemplate arbitral proceedings between the Concessionaires and the Governments only in respect of disputes relating to the Concession Agreement. “Pursuant to Clause 40.1 the type of dispute that may be submitted is a dispute relating to the Concession Agreement, not a dispute relating to the concession, and this is a key distinction ...”<sup>53</sup> Disputes between the Concessionaires and the Governments relating to the interpretation or application of the Treaty as such fall explicitly outside the scope of these proceedings and are excluded from the dispute settlement arrangements. In the United Kingdom’s view “[t]he Treaty is a facultative instrument, concerned primarily with the regulation of jurisdictional matters between the two Governments arising from the Fixed Link and the future concession”<sup>54</sup> and does not provide “a basis of jurisdiction for disputes between the Concessionaires and the Governments”,<sup>55</sup> a construction underscored by the final sentence in Article 19(2)(f) of the Treaty. The United Kingdom accepts that the Treaty may be relevant for purposes of interpretation of the Concession Agreement, but adds that “[t]he interpretative exercise cannot provide the basis for the wholesale revision of the express terms of the

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<sup>52</sup> United Kingdom Counter-Memorial, para. 3.61.

<sup>53</sup> Transcript, Day 3, p. 36.

<sup>54</sup> United Kingdom Counter-Memorial, para. 2.11.

<sup>55</sup> United Kingdom Counter-Memorial, para. 3.5.

Concession Agreement or for the elaboration of rights and obligations that do not otherwise appear from the text.”<sup>56</sup>

113. By way of summary, as far as the other primary or substantive rules of international law on which the Claimants rely, the United Kingdom concludes that

in the absence of clear evidence to this effect, it cannot be presumed that the parties to a treaty [...] intended to accept a jurisdictional regime which by operation of an expansive reading of an applicable law clause, would be transformed into an unqualified and comprehensive jurisdictional clause in respect of which there would be no limit *ratione materiae*.<sup>57</sup>

114. France’s position is similar to that of the United Kingdom. It argues that:

- (i) principally, it is the rules of the Concession Agreement which are applied, as well as those of the Treaty which are implemented in it; and the relevant principles of international law understood within the meaning of Article 38, paragraph 1, of the Statute of the International Court of Justice, but only limited to the secondary rules of international law;
- (ii) subsidiarily, national law is applied when the provisions of the Concession Agreement invoked by the parties in support of their claims expressly refer to it.<sup>58</sup>

According to France, both the Treaty and the Concession Agreement have been adopted within an international legal order and are “detached”<sup>59</sup> from the internal legal systems of both contracting States. Pursuant to Article 40.4 of the Concession Agreement, the Parties expressly agreed that the Tribunal should apply in the first place the rules of the Concession Agreement as well as those of the Treaty “which are implemented in it”<sup>60</sup> in accordance with the language used in Clause 41.1 of the Concession Agreement.

115. France argues that it was not the Parties’ intention to provide for the applicability in the present arbitration proceedings of legal instruments related to the Concession, such as the Treaty, the Sangatte Protocol, and the Special Security Arrangement. This is so because the reference to the “Treaty” in Article 40.4 of the Concession Agreement does not include these two other instruments. Similarly, France argues that the mention of “international law” cannot be interpreted as any reference to the Sangatte Protocol or

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<sup>56</sup> United Kingdom Rejoinder, para. 2.47.

<sup>57</sup> United Kingdom Counter-Memorial, para. 3.51.

<sup>58</sup> France Counter-Memorial, para. 1.2.91.

<sup>59</sup> France Counter-Memorial, para. 1.2.57.

<sup>60</sup> France Counter-Memorial, para. 1.2.63.

the Special Security Arrangement.<sup>61</sup> Article 46(1) of the Sangatte Protocol does not provide any additional right to the Claimants.<sup>62</sup>

116. Thus both Governments reject the admissibility of the other rules of international law, conventional and customary, on which the Claimants rely. But they go on to argue that, in any event, these rules do not assist the Claimants, either because (as with the Sangatte Protocol and the Special Security Arrangement) they do not establish rights in favour of the Claimants, who are not parties to them, or because (as with the rules of international law with respect to foreign investment) these are not engaged since the Concessionaires are not foreign investors with respect to their countries of origin, or simply on the grounds that there has anyway been no breach of these principles.

117. The Parties also disagree on the potential for application of rules of English and French law *en tant que telles*.

118. The Claimants note that the Tribunal may apply rules of English law or French law to the extent “necessary for the implementation of particular obligations.”<sup>63</sup> They argue that English law and French law are relevant in two different respects:

First, an examination of the pertinent legislation and legal principles in each system of law establishes that the two Governments had the *powers* necessary to enable them to protect the Concessionaires as required by the [relevant] Instruments and by the relevant principles of international law. Secondly, it establishes that the Governments had domestic *obligations* to take the requisite steps and their failure to do so entailed a breach of those domestic obligations.<sup>64</sup>

(Emphasis in the original.)

According to the Claimants, nothing in Clause 40.4 of the Concession Agreement limits the application of domestic law only to situations where the Concession Agreement specifically refers to it. Domestic law applies wherever it is relevant to the performance of obligations under the Concession Agreement.

119. According to the United Kingdom, the Tribunal has jurisdiction to interpret and apply rules of English law only insofar as “‘recourse to those rules is necessary’ for the

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<sup>61</sup> France Rejoinder, paras. 2.1.46-47.

<sup>62</sup> France Rejoinder, paras. 2.1.48 ff.

<sup>63</sup> Claimants’ Memorial, para. 377.

<sup>64</sup> Claimants’ Memorial, para. 378.

implementation of particular obligations under English law.”<sup>65</sup> The United Kingdom argues that “where the application of particular substantive rules of English law is expressly mandated by the Concession Agreement, Clause 40.4 and Article 19(6) are to be read as providing for the application of such rules.”<sup>66</sup> In all other cases, the reference to recourse to rules of English law can be “read as allowing recourse to such rules for purposes of assessing whether the United Kingdom has complied with its obligations under the Concession Agreement”, but cannot be used “for purposes of the wholesale incorporation of substantive rules of English law into the relationship between the Parties under the Concession Agreement.”<sup>67</sup>

120. Specifically as concerns the Claimants’ reliance on the concept of *contrat administratif*, the United Kingdom argues that even if there may be “certain similarities between the Concession Agreement and a *contrat administratif* ... the differences are fundamental.”<sup>68</sup> In particular, it stresses Clause 2.1 of the Concession Agreement which states that the Concessionaires exercise their rights “at their own risk”, “without recourse to government funds or to government guarantees” and “regardless of whatever hazards may be encountered.” This express provision excludes any reference to any implied principle of protection.
121. France argues that where the Concession Agreement “stipulates the application of national law, for the performance of certain specifically determined obligations, the Tribunal can have recourse to it to appreciate whether the parties’ conduct is lawful.”<sup>69</sup> According to France a “provision of the Concession Agreement invoked by a party to the dispute in support of their claims refers to national law, and the Arbitral Tribunal can, ‘as appropriate’ apply it; or the provision of the Concession Agreement in question is not expressly governed by national law, and thus is not applicable by the Tribunal.”<sup>70</sup>
122. France also rejects the Claimants’ assertions with respect to the French law of administrative contracts as irrelevant for the present dispute.<sup>71</sup> Like the United Kingdom it rejects any general obligation of “protection” in favour of the Concessionaires under

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<sup>65</sup> United Kingdom Counter-Memorial, para. 3.44.

<sup>66</sup> United Kingdom Counter-Memorial, para. 3.60.

<sup>67</sup> United Kingdom Counter-Memorial, para. 3.60. See also United Kingdom Rejoinder, para. 2.40.

<sup>68</sup> United Kingdom Rejoinder, para. 2.52.

<sup>69</sup> France Counter-Memorial, para. 1.2.84.

<sup>70</sup> France Counter-Memorial, para. 1.2.86.

<sup>71</sup> France Rejoinder, paras. 2.1.72 ff.

the Concession Agreement. According to France, Article 2.1 of the Concession Agreement does not refer to any such right to protection.<sup>72</sup> Under international law, obligations imposed upon a sovereign State cannot be presumed.

## 2. Jurisdiction over and admissibility of the SeaFrance claim

123. Over and above the general arguments concerning jurisdiction and applicable law there is a specific issue concerning the SeaFrance claim.
124. France's first objection to the Tribunal's jurisdiction over this claim is that no dispute had arisen between the Parties on the issue of its alleged assistance to SeaFrance before the filing of the Request. France states that the Tribunal's "sole function is to settle disputes between the Parties relating to [the] application of the Concession Agreement and not to adjudicate any matter raised incidentally by the Claimants."<sup>73</sup> Under international law, a dispute must already have arisen between the Parties at the time the Request was submitted.<sup>74</sup> In this regard it invokes the decision of the Permanent Court of International Justice ("PCIJ") in *Electricity Company of Sofia and Bulgaria*, where one of the claims made by Belgium was held inadmissible because it had not been communicated to Bulgaria before the Application was filed.<sup>75</sup>
125. In the present case, France argues that there was no dispute between the Parties on this issue before the Request was filed. Thus, no claim had been formally submitted and the issue was never brought to the attention of the IGC. At most, the Claimants had merely indicated their "concern" with the situation. France rejects the correspondence put forth by the Claimants in support of their claim: these documents should not be considered as "claims" under international law since they are not a "request" *per se*.<sup>76</sup> The existence of such a "claim" is deemed to exist whenever a request is made by one party and the other party rejects it,<sup>77</sup> but both elements are missing here.

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<sup>72</sup> France Rejoinder, paras. 2.2.19 ff.

<sup>73</sup> France Counter-Memorial, para. 3.1.6.

<sup>74</sup> France Rejoinder, paras. 4.1.3.-4.1.16.

<sup>75</sup> PCIJ Ser. A/B No. 77 (1939), 83. See also *Di Curzio* case (Italian-United States Conciliation Commission, 1959) 14 United Nations Reports of International Arbitral Awards 391 (1959).

<sup>76</sup> France Rejoinder, paras. 4.1.17-4.1.22.

<sup>77</sup> France Rejoinder, para. 4.1.18.

126. For its part the United Kingdom notes that in the limited correspondence concerning the SeaFrance claim there is not even an allegation that there was anything the United Kingdom could or should have done. In its view this is fatal to the admissibility of the claim at least so far as the United Kingdom is concerned.
127. According to the Claimants, there is no doubt that there was a dispute between the Parties regarding the issue of the assistance to SeaFrance before the filing of the Request. The Claimants refer to correspondence which shows that a dispute existed. They say that they also brought the issue to the attention of the IGC, although it was not formally minuted.<sup>78</sup>
128. The Claimants further submit that there is no requirement that a dispute arise before the request for arbitration is filed. Whatever position may have been taken by the PCIJ, the case law of the International Court of Justice has rejected a formalistic approach.<sup>79</sup>
129. In any event, they stress, there can be no doubt that a dispute exists at present:

Were the Tribunal to dismiss the SeaFrance claim on this basis, it would be immediately re-introduced by the Concessionaires. This would create a position whereby two arbitrations were on foot – an economically and legally senseless position which would be to no-one’s benefit.<sup>80</sup>

130. Independently of the procedural issue, France argues that the Claimants’ complaints about the distortion of competition resulting from its alleged unlawful aid or assistance given to SeaFrance are governed by European Community competition law under Article 87 of the Treaty establishing the European Community (“EC Treaty”). Pursuant to Clause 41.1 of the Concession Agreement, Community law does not apply to the relationship between the Parties, nor does Clause 40.4 of the Concession Agreement mention the rules of Community law among the rules of law applicable to the Tribunal. Indeed the EC Treaty would prevent an arbitral tribunal from adjudicating a dispute about States’ fulfilment of their obligations under European Community law.

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<sup>78</sup> According to Claimants’ Reply, para. 733, the IGC was informed of the concern about subsidies. Alain Bertrand states that he raised the issue of the financing of the additional ferries during informal meetings of the IGC, although these were not minuted: Second Witness Statement of Alain Bertrand, Bundle C, Tab 7, paras. 6, 34.

<sup>79</sup> See Claimants’ Reply, paras. 717 ff, and Transcript, Day 2, pp. 120-123.

<sup>80</sup> Claimants’ Reply, para. 735.

131. France notes that the Claimants have now changed their view and that they no longer request the Tribunal to decide on any breach of European Community competition law as such. Instead they pursue this claim by invoking alleged breaches of the Concession Agreement. France qualifies this manoeuvre as a “sleight of hand in passing off a Community law dispute as a dispute relating to the Concession Agreement.”<sup>81</sup>
132. According to the Claimants, the Tribunal’s jurisdiction “is not limited to claims based on the provisions of the Concession Agreement.”<sup>82</sup> Thus, “[c]laims can also be brought under law apart from the Concession Agreement as long as they are factually related.”<sup>83</sup> The Claimants believe that France’s restrictive reading is “fundamentally inconsistent with the context, object and purpose of the Concession Agreement.”<sup>84</sup>
133. According to the Claimants, one of the cornerstones of the Concession Agreement was that the “ability to generate the revenue flows required to finance the Concessionaires’ investment should not be prejudiced by public funding or facilitation of competing cross-Channel services, such as SeaFrance.”<sup>85</sup> The Claimants note that the obligations imposed on them under the Concession Agreement make them more vulnerable to market disturbances than ordinary economic operators since they “have only one asset and their whole survival depends on the profitability of that asset”.<sup>86</sup> They argue that the assistance given by France to SeaFrance “is not simply a question of competitive balance on the cross-channel transport market”, but that this aid “has led to a genuine upheaval of the structure of the Concession.”<sup>87</sup> In that sense, the present claim directly relates to the Concession Agreement and does not entail passing off a European Community competition law claim on an incompetent tribunal.

### C. THE TRIBUNAL’S ANALYSIS

134. In discussions on the competence of international tribunals, distinctions are made between jurisdiction in its different aspects (personal, subject-matter and temporal), admissibility and the scope of the applicable law. Such distinctions – valuable though

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<sup>81</sup> France Rejoinder, para. 4.1.28.  
<sup>82</sup> Claimants’ Reply, para. 738.  
<sup>83</sup> Claimants’ Reply, para. 738.  
<sup>84</sup> Claimants’ Reply, para. 742.  
<sup>85</sup> Claimants’ Reply, para. 743.  
<sup>86</sup> Claimants’ Reply, para. 749.  
<sup>87</sup> Claimants’ Reply, para. 747.

they are – can however lead to difficulties in particular contexts. A great deal depends on the specific language of the instruments from which the tribunal derives its authority, and the source of the rights and obligations in issue. In the present case, the principal issue is not the law to be applied by the Tribunal, but the source of the Parties’ rights and obligations. As the Tribunal has already observed, this question is expressly dealt with by Clause 41.1.

135. In the present case, three questions need to be distinguished:

- (1) Was there a “dispute” between the Claimants and either or both Respondents which existed at the time of the Request?
- (2) As to any such dispute, have the Claimants presented claims falling within the scope of Clause 40.1 of the Concession Agreement?
- (3) Does the fact that certain proceedings were or could have been brought before another forum pursuant to Clause 41.4 of the Concession Agreement affect the present Tribunal’s capacity to deal with the claims?

In answering these questions the Tribunal will apply the standard articulated in the Oil Platforms case, and since adopted by other international tribunals.<sup>88</sup> In other words it is necessary to ask whether the breaches pleaded by the Claimants do or do not fall within the provisions of the Concession Agreement from which alone the Tribunal’s jurisdiction derives.

**1. Was there a “dispute” between the Claimants and the Respondents as to each of the claims?**

136. It must first be observed that, although the Claimants put forward the Sangatte claim and the SeaFrance claim as part of a single dispute, in truth the two are entirely distinct. They involve different acts or omissions of the Respondents, as well as different provisions of the Concession Agreement and (to the extent they may be applicable) also different rules of international law. Questions of jurisdiction and admissibility have to be separately considered with regard to each of them.

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<sup>88</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, ICJ Reports 1996, 803, 810 (para. 16). See also *Case concerning Legality of Use of Force (Yugoslavia v. Belgium)*, ICJ Reports 1999, 124, 137 (para. 38); and in other tribunals, e.g. *United Parcel Service of America Inc. v. Government of Canada* (2002) 7 ICSID Reports 285, 296-7; *SGS Société Générale de Surveillance SA v. Republic of the Philippines* (2004) 8 ICSID Reports 515, 523-4.

137. Clause 40.1 of the Concession Agreement refers to “[a]ny dispute between the Concessionaires or either of them and the Principals or either of them relating to this Agreement” (*« tout différend relatif à l’application de la Concession survenant entre les Concessionnaires... et les Concédants »*). Thus it covers disputes which had arisen at the time of the Request, which is dated 17 December 2003.
138. There is no doubt that there was a subsisting dispute between the Claimants and the Respondents concerning the various aspects of the Sangatte claim. The Concessionaires wrote to the Governments and to the IGC on 17 March 2003 and on 26 March 2003 respectively seeking to commence negotiations with a view to finding a possible resolution to their claims in relation to the clandestine migrant phenomenon. The IGC replied on 11 June 2003 indicating that it was unable to respond favourably to this request.
139. No such formal step was taken with respect to the SeaFrance claim. It might be said that the actions of France or of French public sector entities were not the specific responsibility of the IGC and that a different approach to this issue might reasonably have been taken. But the IGC’s terms of reference under Article 10 of the Treaty are broad and it could certainly have considered a complaint of this kind; more particularly the IGC was the obvious forum to inform the United Kingdom of the issues and to seek its support. It is true that the Concessionaires did write twice to the relevant French Minister complaining about subsidies. The first letter, dated 17 February 1999, expressed “disquiet” at existing and proposed subsidies to P & O/Stena and SeaFrance and called for equal treatment or better still the abolition of all subsidies.<sup>89</sup> There appears to have been no follow-up. The second letter, dated 4 February 2003, referred to the State aid complaint brought by P & O to the European Commission. It explained that “Eurotunnel had not wished at the time to associate itself with such an action against the State”, but nonetheless noted that the impact of the subsidy to SeaFrance on prices in the cross-Channel market had been appreciable.<sup>90</sup> The letter referred to the Concession Agreement, without expressly alleging a breach thereof. But it expressed

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<sup>89</sup> Letter from Patrick Ponsolle to Jean-Claude Gayssot dated 17 February 1999, Bundle H, p. 4313 (translation by the Registry).

<sup>90</sup> Letter from Richard Shirrefs to Francis Mer dated 4 February 2003, Bundle H, p. 4701 (translation by the Registry).

“strong disquiet” in relation to the State aid being extended, whether directly or indirectly, to SeaFrance.

140. By contrast the record discloses no letter or communication of any kind to the United Kingdom in respect of the failures on its part to act of which the Claimants now complain.<sup>91</sup>
141. It is thus understandable that France and, *a fortiori*, the United Kingdom should argue that there was no actual dispute over the SeaFrance claim prior to the commencement of the present arbitration. Though perhaps formal the concern is not a minor one: the SeaFrance claim accounts for more than 90% of the total amount of approximately £458m claimed as damages in these proceedings. In response, the Claimants refer to the letter of 4 February 2003, but their main argument is that, even if there were some formal deficiency in this regard, international tribunals have not allowed these to prevent a decision on a claim where the deficiency could readily be cured by filing a new application. They note that the International Court has applied that principle on a number of occasions, most recently in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, where it said:

Finally, the Court will address Rwanda’s argument that the statement by its Minister of Justice could not in any event have any implications for the question of the Court’s jurisdiction in this case, since it was made nearly three years after the institution of the proceedings. In this connection, the Court recalls that it has consistently held that, while its jurisdiction must surely be assessed on the date of the filing of the act instituting proceedings ... the Court should not, however, penalize a defect in procedure which the Applicant could easily remedy (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26). In the present case, if the Rwandan Minister’s statement had somehow entailed the withdrawal of Rwanda’s reservation to Article IX of the Genocide Convention in the course of the proceedings, the DRC could on its own initiative have remedied the procedural defect in its original Application by filing a new Application.<sup>92</sup>

On the other hand the Court held that it had no jurisdiction over the Congo’s claims under a number of treaties in circumstances where the Congo had made no attempt to invoke the treaties before the commencement of the arbitration, nor any attempt to

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<sup>91</sup> Letter from Patrick Ponsolle to Jean-Claude Gayssot dated 17 February 1999, Bundle H, p. 4313, refers to another letter written by Eurotunnel to the British Minister of Transport John Prescott, protesting against exemptions from social security payments apparently granted to P & O/Stena. That letter has not been produced.

<sup>92</sup> Judgment of 3 February 2006, para. 54, online: ICJ <<http://www.icj-cij.org>>.

comply with other procedural requirements of those treaties.<sup>93</sup> Thus prerequisites to jurisdiction – which under Clause 40.1 of the Concession Agreement include the existence of a dispute – cannot simply be ignored.

142. It is established that a party to international proceedings cannot create a dispute by its request for arbitration, even if such a dispute would have been within jurisdiction had it existed and could therefore, potentially, be the subject of a new request following further exchanges between the parties.<sup>94</sup> On the other hand international tribunals have been willing to discern a dispute from general exchanges of correspondence manifesting a difference of view without requiring the claim to have been made out with any particularity. In the case of interstate disputes under the Treaty, Article 19(1)(a) requires that the dispute must not have been settled by consultations within three months. There is no equivalent provision for disputes between the Concessionaires and the Governments relating to the Concession Agreement (Article 19(1)(b)) and therefore no other procedural condition to arbitration. The present case is very close to the line but on balance the Tribunal holds that as a result of the letter of 4 February 2003 and the other steps taken by the Concessionaires, there was a dispute between them and the French Government concerning at least the issue of subsidies and that the dispute relates to the Concession Agreement for the purposes of Clause 40.1.

143. The same conclusion cannot be reached so far as the United Kingdom is concerned. There appears to have been no communication on this subject between the Concessionaires and the United Kingdom prior to the Request, no attempt to bring the matter formally before the IGC and no prior indication by any means or in any forum of what the United Kingdom might have neglected to do in relation to the SeaFrance subsidies. There was in the Tribunal's view no dispute between the Concessionaires and the United Kingdom as concerns the SeaFrance claim at the time the Request was served, and that aspect of the claim is accordingly outside its jurisdiction.

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<sup>93</sup> See *ibid.*, paras. 91-92 (Convention on the Elimination of All Forms of Discrimination Against Women), 99-100 (WHO Constitution), 108 (UNESCO Constitution), 118-119 (Montreal Convention).

<sup>94</sup> See *Electricity Company of Sofia and Bulgaria*, PCIJ Ser. A/B No. 77 (1939), 83.

## 2. Do the claims fall within Clause 40.1 of the Concession Agreement?

144. The second question is whether the claims presented in the Request fall within the subject-matter jurisdiction of the Tribunal as specified in Clause 40.1 of the Concession Agreement.
145. The Tribunal has already referred to the discrepancy between the phrases “dispute ... relating to this Agreement”/“dispute ... regarding the application of this Agreement” in the French and English texts of Clause 40. As demonstrated in paragraph 91 above, the two are used interchangeably in both language versions of Clause 40. It is true that the phrase “dispute ... relating to this Agreement” might be capable of a very broad interpretation, covering anything which has a material bearing upon the Fixed Link or its operation. But this is evidently not the meaning the Parties intended it to have. A dispute is not one regarding the application of a legal instrument such as the Concession Agreement unless that instrument is directly engaged as a source of the rights and obligations of the parties which are at stake in the dispute.
146. This interpretation is reinforced by the overall framework of the Concession Agreement and its role *vis-à-vis* other forums, especially the courts of the two Parties. The Concession Agreement is a free-standing agreement governed by international law, and there is no requirement that the Concessionaires must exhaust local remedies before having recourse to international arbitration under Clause 40. On the other hand, a tribunal constituted under Clause 40 does not have exclusive jurisdiction over matters concerning the Concession Agreement. On the contrary, Clause 41.4 expressly envisages that “the laws in force from time to time in either State shall be subject to the jurisdiction of the courts of the relevant State or, where so permitted or available under national law, any other relevant forum.”
147. Thus the Concession Agreement provides for a form of parallelism. The implementation and enforcement of State laws (including European Union law) is a matter for the ordinary courts or for other forums available under national law. But in addition there is the provision for international arbitration in accordance with Article 19 of the Treaty. In this case the governing instruments are “the provisions of the Treaty, as given effect to by this Agreement, and ... the provisions of this Agreement”. Clause 41.1 performs at the same time the functions of a stabilisation clause and an integration clause. It is a

valuable guarantee for the Concessionaires in relation to a concession originally intended to last for over half a century and whose term has been still further extended. But it is only intended to act as such a guarantee in relation to the provisions of the Concession Agreement itself (including the provisions of the Treaty to which the Concession Agreement gives effect). It is that Agreement, interpreted and applied in the context of the rules and principles referred to in Clause 40.4, which the Tribunal is called on to apply, since these are the rules which relevantly govern the relationship between the Parties.

148. The Tribunal would observe in this context that the Concession Agreement does not contain any contractual commitment by the States Parties that they will comply with their own or with European law. Whether or not they did so would be a matter for their own courts or for the European courts. This contrasts with the commitment by the Concessionaires in Clause 41.2 to comply *inter alia* with “the laws in force from time to time in each of the two States” and with binding requirements imposed under those laws, it being stipulated that only “extremely serious” breaches of this commitment could give rise to measures under Clause 37 (“Termination by reason of the Fault of the Concessionaires”). In short, national and European law claims against the States are to be the subject of proceedings before the appropriate national or European forums. By contrast it is for the Tribunal to deal with disputes involving the application of the Concession Agreement.

149. The Claimants argue that, whatever may be the case for obligations arising from sources of law extraneous to the Concession Agreement – such as the European Convention of Human Rights or the principles of the international law of investment protection – at least the various treaties and agreements concerning the Channel Fixed Link (listed in paragraph 52 above) constituted a package which the Tribunal should apply as a whole. In particular, they stress the provisions in the Sangatte Protocol and the Special Security Arrangement which specifically contemplate that the Concessionaires may bring claims.<sup>95</sup> For example the Sangatte Protocol provides:

Article 46

- (1) Without prejudice to the application of Articles 15 and 16 of the Treaty in any case covered by those two Articles, in the case of claims for

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<sup>95</sup> Claimants’ Reply, para. 97.

compensation resulting from the application of this Protocol the following provisions shall apply:

- (a) each State shall waive any claim which it may have against the other State for compensation in respect of damage caused to its officers or its property;
- (b) claims by the Concessionaires shall be dealt with in accordance with the provisions of the Concession.

...

#### Article 49

- (1) Any disputes concerning the interpretation or application of this Protocol shall be settled by negotiation between the two Governments.
- (2) However, disputes arising between the two States relating to questions of compensation shall be determined by the arbitral tribunal constituted in accordance with Article 19 of the Treaty, after consultations in accordance with Article 18 of the Treaty.<sup>96</sup>

150. The Respondents argue that the Concessionaires are not parties to the Sangatte Protocol or the Special Security Arrangement and may not rely on their terms. Moreover, they say, these agreements were intended only to deal with administrative and other matters on an *inter se* basis. But whether or not that is so, two things are clear.

- First, the application of the Sangatte Protocol, which is directly related to the operation of the Fixed Link, could give rise to issues under the Concession Agreement. The Concessionaires could have claims which relate at the same time to the application of the Concession Agreement and the Sangatte Protocol. This shows that in determining claims under Clause 40.1 of the Concession Agreement it may be necessary to take the provisions of the Sangatte Protocol into account. It does not show that claims under the latter are to be equated to claims under the former.
- Second, nowhere in the Treaty of Canterbury or the Concession Agreement is the Treaty defined to include subsequent protocols or implementing arrangements. This is not because the conclusion of later agreements was not contemplated. It is expressly envisaged in numerous articles of the Treaty as well as in Clause 41.2 itself. But in the Concession Agreement, “Treaty” is a defined term (Clause 1.1(xx)) and it is limited to the Treaty of Canterbury. That being so, the additional treaties and agreements do not even fall within the categories listed in Clause 40.4; still less are they among the governing instruments which define the relationship between the Principals and the Concessionaires. It is not necessary to

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<sup>96</sup> See also Special Security Arrangement, Art. 7(1)(b).

decide what the position would have been if the Principals had, in a separate protocol, purported to confer additional rights on the Concessionaires, since there is no indication of an intention on their part to do so in the agreements in question here. But the Tribunal would observe that if new rights, actionable under Article 19 of the Treaty, could be conferred on the Concessionaires by subsequent agreement, questions might arise whether new obligations might not also be conferred or old rights taken away. This is not contemplated by Clause 41.1.

151. The conclusion that the Tribunal lacks jurisdiction to consider claims for breaches of obligations extrinsic to the provisions of the Concession Agreement (and the Treaty as given effect by the Concession Agreement) does not mean that the rules of the applicable law identified in Clause 40.4 are without significance. They instruct the Tribunal on the law which it is to apply in determining issues within its jurisdiction. They provide the legal background for the interpretation and application of the Treaty and the Concession Agreement, and they may well be relevant in other ways. But it is the relationship between the Principals and the Concessionaires as defined in Clause 41.1 on which the Tribunal is called to pronounce.

152. This distinction between the scope of the rights and obligations which an international tribunal has jurisdiction to enforce and the law which it will have to apply in doing so is a familiar one. As a Tribunal said, in the context of the 1982 Law of the Sea Convention, in the *MOX Plant Case*:

there is a cardinal distinction between the scope of [the Tribunal's] jurisdiction under article 288, paragraph 1, of the Convention, on the one hand, and the law to be applied by the Tribunal under article 293 of the Convention, on the other hand ...

[T]o the extent that any aspects of Ireland's claims arise directly under legal instruments other than the Convention, such claims may be inadmissible.<sup>97</sup>

The Tribunal in the *OSPAR Dispute* made essentially the same point.<sup>98</sup> Nor did the International Court take any different position in the *Kasikili-Sedudu* case, where it was

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<sup>97</sup> *MOX Plant Case (Ireland v. United Kingdom)*, Order No. 3, (2003) 126 ILR 310, 318 (para. 19).

<sup>98</sup> *OSPAR Dispute (Ireland v. United Kingdom)*, (2003) 126 ILR 334, 364 (para. 85).

expressly asked to determine a boundary dispute by reference not only to the pertinent treaty but also the “rules and principles of international law”.<sup>99</sup>

153. To conclude, the Tribunal’s jurisdiction is limited to claims which implicate the rights and obligations of the Parties under the Concession Agreement as defined in Clause 41.1. Thus, the source and the only source of the Parties’ respective rights and obligations with which the Tribunal is concerned is (a) the Treaty (but only insofar as it is given effect to by the Concession Agreement) and (b) the Concession Agreement (whether or not it goes beyond merely giving effect to the Treaty).
154. Turning then to the claims before the Tribunal, the principal basis relied on in relation to the Sangatte claim is the Concession Agreement. The Sangatte claim falls within the provisions of that Agreement in the sense explained above. Accordingly the Tribunal has jurisdiction over the Sangatte claim under Article 40.1.
155. The position with respect to the SeaFrance claim is less clear, since (a) the conduct complained of was not evidently carried out by France in its capacity as a Principal, and (b) many of the sources of rights and obligations on which the Concessionaires rely in respect of the SeaFrance claim arise independently of the Concession Agreement. Nonetheless in one respect at least – that concerning Clause 34.3 – the Claimants rely, and plausibly so, on an express provision of the Concession Agreement. To this extent the Tribunal has subject-matter jurisdiction over the SeaFrance claim under Clause 40.1.

### **3. Implications for the Tribunal’s competence of actual or potential proceedings in other forums**

156. Finally it is necessary to consider what relevance, if any, proceedings taken or not taken pursuant to Clause 41.4 may have. There are two groups of proceedings in issue.
157. First is the State aid complaint launched by P & O in relation to the SeaFrance subsidies, which has already been referred to and which Eurotunnel decided not to join. In the event the European Commission declined to act on P & O’s complaint.

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<sup>99</sup> *Kasikili/Sedudu Island (Botswana v. Namibia)*, ICJ Reports 1999, 1045, 1102-3 (para. 93).

158. Second and more important were proceedings brought by Eurotunnel before the French courts in relation to the Sangatte Hostel. The course of these proceedings was as follows:
- On 14 August 2001 the Claimants submitted an application for interim relief before the *Tribunal administratif de Lille* requesting suspension of the Prefect of Pas-de-Calais' decision of 29 September 1999 to requisition the Claimants' warehouse at Sangatte. On 16 August 2001, the Claimants filed a request for annulment of that decision before the same Tribunal.
  - On 11 September 2001 the *Tribunal administratif de Lille* rejected the application for interim relief. The Claimants filed a second application for interim relief on 10 January 2002. On 1 February 2002, this second application was also rejected. The decision to reject the application was appealed by the Claimants to the *Conseil d'État* which on 5 June 2002 denied the appeal.
  - Meanwhile, the *Tribunal administratif de Lille* had, on 2 May 2002, rejected the challenge filed by the Claimants on 16 August 2001 against the Prefect's requisition decision. The Claimants appealed this judgment to the *Cour administrative d'appel de Douai* but withdrew their appeal following closure of the Sangatte Hostel.
159. Given Eurotunnel's complaint that the French authorities were failing to maintain order on and around the Coquelles site, France argued that an adverse inference should be drawn against the Claimants for not persisting with the French proceedings, and for not taking further proceedings which could have compelled the French authorities to act against the clandestines. Indeed this was pressed almost to the point of an argument of election by reference to Clause 41.4: the Claimants "could perfectly well have applied to the French Courts [since] what was involved was the application or non-application of national legislation."<sup>100</sup>
160. Having regard to the parallelism of remedies referred to in paragraph 147 above and the absence of any requirement of exhaustion of local remedies as a precondition to arbitration under Clause 40.1 of the Concession Agreement, it cannot be said that any failure on the part of the Claimants in this regard is a bar to the present proceedings.

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<sup>100</sup> Transcript, Day 9, p. 14 (translation of the original French version, Day 9, pp. 10-11).

**D. CONCLUSIONS ON JURISDICTION AND APPLICABLE LAW**

161. Accordingly the Tribunal has jurisdiction over the Sangatte claim in relation to both Respondents, and over the SeaFrance claim in relation to France, but only in so far as these claims are founded in a breach of obligations of the Respondents under the Concession Agreement or the Treaty as given effect by the Concession Agreement.

## CHAPTER V – THE CLAIMANTS’ THESIS OF “JOINT AND SEVERAL RESPONSIBILITY”

162. One contentious issue between the Parties is the question of the basis on which the Respondents may be held responsible, given that the Treaty of Canterbury, the Concession Agreement and their implementation were, in part at least, acts of the two Governments. If there has been, globally, some failure towards the Concessionaires, is it necessary for them to go further and to show precisely to what degree any such failure is specifically due to one or other of them, or may they rely on some principle of solidary or collective responsibility?

### A. THE POSITIONS OF THE PARTIES

163. According to the Claimants, the acts and omissions with respect to the clandestine migrant claim are attributable to France and the United Kingdom, individually and collectively:

Any violation caused by the Governments’ respective acts and omissions in the context of policing, security and frontier controls should, in addition to engaging the specific responsibilities of the relevant Government, also be attributable to both Governments jointly since these actions are manifestations of the Governments’ joint failure to co-operate and co-ordinate their actions in making appropriate provision in relation to policing, security and frontier controls.<sup>101</sup>

The Claimants further state that “even though the obligations owed by the Governments to the Concessionaires under the Treaty and Concession Agreement generally may not be joint, in the fields of security and frontier controls they certainly are.”<sup>102</sup>

164. In correspondence with the Tribunal, the Claimants indicated that “for the avoidance of doubt, the Claimants reiterate that both Governments are liable in respect of all claims, either on the basis of their own acts or omissions, and/or on the basis of their failure to protect the Claimants from the acts or omissions of the other Government.”<sup>103</sup>

165. The Claimants agree that, in general, there is no joint responsibility under international law, but they note that Article 47 of the International Law Commission (“ILC”) Articles on State Responsibility acknowledge the possibility of an “agreement to the contrary

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<sup>101</sup> Claimants’ Memorial, para. 262.

<sup>102</sup> Claimants’ Memorial, para. 262.

<sup>103</sup> Letter from Matthew Weiniger to Brooks Daly dated 26 April 2005, Bundle G, p. 3883 at point 3.

between the States concerned.” In the present case, “[t]he joint liability flows from the fact that the [relevant] Instruments contemplate the Governments cooperating and coordinating their actions in making appropriate provisions in those fields.”<sup>104</sup>

166. The Claimants’ position is further explained as follows:

[T]his joint liability is merely additional to the Governments’ individual liability in relation to policing, security and frontier controls ... Thus, regardless of whether the [relevant] Instruments give rise to joint liability, the Concessionaires can still assert independent claims against both Governments in those fields. The Governments’ liability arises at two levels. In the first place, there is each Government’s liability for disregarding its specific responsibilities in relation to policing, security and frontier controls. Then there is each Government’s failure to cooperate, coordinate and consult so as to prevent the other Government’s breach.<sup>105</sup>

167. Finally, the Claimants indicate that their position on joint responsibility “will not raise any complications at the subsequent stage of compensation.” Thus:

As a result both of their joint liability and their individual liabilities, each Government would be liable for the entirety of the damage to the Concessionaires. The Concessionaires would not, of course, receive the same compensation twice over. [...] The manner in which the Governments’ liabilities are apportioned between themselves is of no concern to the Concessionaires.<sup>106</sup>

168. In contrast to the positions taken by the two Governments on applicable law, on this issue their positions do not coincide.

169. In France’s view, “the two Governments not only have joint responsibilities, but have assumed them in several respects, in common ... [T]he French closed the [Sangatte] centre, but this decision was only made possible ... through unstinting cooperation of their British counterpart.”<sup>107</sup> According to France, this several liability only concerns the execution of the Agreement and it is quite clear, in addition, that each Government retains its own onus of responsibility, which is the case for any obligations relative to public order which depend upon the responsibility inherent to each State as is indicated clearly under Clause 13 of the Agreement.<sup>108</sup> In addition, in France’s view

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<sup>104</sup> Claimants’ Reply, para. 136.

<sup>105</sup> Claimants’ Reply, para. 137.

<sup>106</sup> Claimants’ Reply, para. 141.

<sup>107</sup> Transcript, Day 9, p. 34 (translation of the original French version, Day 9, p. 30).

<sup>108</sup> Transcript, Day 9, p. 34 (translation of the original French version, Day 9, pp. 30-31).

“[Clause] 41.4 of the [Concession Agreement] reserves jurisdiction to deal with these matters only to the national courts.”<sup>109</sup>

170. France argues that “if there is to be a responsibility that responsibility ... has to be accepted jointly and severally.”<sup>110</sup> It argues that it will be quite impossible for the Tribunal to “determine concretely”<sup>111</sup> the distinction between breaches of either France or the United Kingdom. In sum, according to France, “it is up to each Government to assume its own responsibility, as the case may be, ... before its own courts.”<sup>112</sup>

171. The United Kingdom qualifies the Claimants’ position as “equivocal”:

It is said that the acts and omissions in question are attributable to ‘*one or both of the Governments*’. Whether, however, this is to be understood as a plea of individual liability, joint liability, or joint and several liability, is unclear.<sup>113</sup>

The United Kingdom notes that the Claimants must establish the specific responsibility of the United Kingdom for any alleged breach. In this respect it relies on the ILC Articles and commentary,<sup>114</sup> as well as on Article 15(4) of the Treaty of Canterbury. The United Kingdom concludes that “there is no basis in international law for claims of joint liability or joint and several liability.”

172. As to arguments for joint and several responsibility based on the failure of a duty to cooperate, the United Kingdom rejects the Claimants’ affirmation that “each Government [failed] to co-operate, co-ordinate and consult so as to prevent the other Government’s breach”,<sup>115</sup> arguing that it invents an obligation of result that is not to be found either in the Concession Agreement or in any international law sources as to the meaning of these concepts.

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<sup>109</sup> Transcript, Day 9, p. 34 (translation of the original French version, Day 9, p. 31).

<sup>110</sup> Transcript, Day 5, p. 81 (translation of the original French version, Day 5, p. 86).

<sup>111</sup> Transcript, Day 5, p. 81 (translation of the original French version, Day 5, p. 86).

<sup>112</sup> Transcript, Day 9, p. 35 (translation of the original French version, Day 9, p. 31).

<sup>113</sup> United Kingdom Counter-Memorial, para. 3.81 (emphasis in the original).

<sup>114</sup> See ILC Articles on State Responsibility, Art. 47 and commentary, para. 3, and the discussion by the United Kingdom: Transcript, Day 4, pp. 122-123.

<sup>115</sup> Claimants’ Reply, para. 137.

## B. THE TRIBUNAL'S ANALYSIS

173. It is helpful to start with Article 47 of the ILC Articles on State Responsibility, to which all Parties referred in argument. Article 47 provides:

Article 47

Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.
2. Paragraph 1:
  - (a) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;
  - (b) is without prejudice to any right of recourse against the other responsible States.

174. As the commentary notes:

The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several or solidary responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.<sup>116</sup>

175. Thus it is necessary to ask whether the provisions of the Treaty of Canterbury as given effect to by the Concession Agreement and the Concession Agreement establish or imply any general principle of solidary responsibility for breaches of obligation.

176. An initial point is that when the parties to the Concession Agreement wanted to create a regime of “joint and several” obligations they knew how to do it. Clause 20 of the Concession Agreement provides:

Clause 20: Joint and Several Liability of the Concessionaires to the Principals

20.1 The obligations of the Concessionaires to the Principals under this Agreement shall be joint and several. / *Les Concessionnaires assument conjointement et solidairement vis-à-vis des Etats Concédants les engagements de la Concession.*<sup>117</sup>

There is no equivalent provision concerning the responsibility of the Principals to the Concessionaires. In fact at the time of the drafting of the Concession Agreement, the

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<sup>116</sup> Commentary to Art. 47, para 6.

<sup>117</sup> This provision gives effect to Art. 13(1) of the Treaty. See also Concession Agreement, Clause 5.1 (mutual guarantee by each Concessionaire of the performance of the other).

Concessionaires sought to include a clause providing for joint and several liability on the part of the Governments, but the proposal was rejected.<sup>118</sup>

177. In fact the question of joint and several liability was hardly an issue so far as the Principals were concerned. The main characteristic of the concept of “joint and several liability”, both in common law and in Romano-Germanic Law, is that each of the obligors may be sued alone for the full amount, leaving questions of contribution to be sorted out between them. In other words someone who is jointly and severally liable takes the risk of a partner’s insolvency, disappearance or non-amenability to suit.<sup>119</sup> But there was no risk here of the Principals’ insolvency or disappearance, and under Article 19 of the Treaty they were both amenable to suit. The question was rather whether the Concession Agreement provided or at least assumed that an obligation of the Principals was a joint obligation of both or individual obligations of each.<sup>120</sup>
178. In this respect the Claimants rely on the description of the Parties at the outset of the Concession Agreement, which refers to the French Minister for Transport and the British Secretary of State “of the one part” and to the British and French companies “of the other part.” But this time-honoured descriptor<sup>121</sup> is used in other modern treaties without any implication of joint and several responsibility as between the parties on one side of the equation.<sup>122</sup>

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<sup>118</sup> United Kingdom Rejoinder, para. 2.53, citing a letter from Paul Fifoot, FCO to John Noulton dated 27 January 1986, United Kingdom Rejoinder, Annex 17, para. 6: “The final point which we discussed was the assertion that Governments shall be jointly and severally liable. The solicitors accepted that that provision was not to be found in the invitation to promoters.”

<sup>119</sup> See e.g. Glanville Williams, *Joint obligations: A treatise on joint and several and several liability in contract, quasi-contract and trusts in England, Ireland and the common-law dominions* (London, Butterworth, 1949), 34-5, citing *King v. Hoare* (1844), 13 M & W 494, 153 ER 206 (Parke B); Ph. Malaurie, L. Aynès, *Les Obligations* (Paris, Dalloz, 2003) n°1259 and ff. For a comparative review of the forms of solidary responsibility see Weir, “Complex Liabilities” in XI International Encyclopedia of Comparative Law (Tübingen, Mohr, 1983).

<sup>120</sup> The same distinction is made in French Law. Under article 1202 of the Civil Code: “*La solidarité ne se présume point. Il faut qu’elle soit expressément stipulée*”. However, if damage has been caused by several co-authors, there may be “*responsabilité in solidum*”: Malaurie-Aynès, *Les Obligations* (Paris, Dalloz, 2003) n°1278)

<sup>121</sup> See Sweden-Empire, Treaty of Osnabruck, 14 (24) October 1648, 1 Consolidated Treaty Series 119; Spain-Netherlands, Treaty of Münster, 14 (24) October 1648, 1 Consolidated Treaty Series 271 (“*ex una ... ex altera parte*”).

<sup>122</sup> See e.g. Great Britain-Greece-Turkey-Cyprus, Treaty of Guarantee, Nicosia, 16 August 1960, 382 United Nations Treaty Series 8, a Treaty expressed to be concluded between “The Republic of Cyprus of the one part, and Greece, Turkey and the United Kingdom of Great Britain and Northern Ireland of the other part” (preamble).

179. Of more significance is the IGC itself, which is “established to supervise, *in the name and on behalf of the two Governments*, all matters concerning the construction and operation of the Fixed Link.”<sup>123</sup> The IGC is a joint organ of the two States, whose decisions require the assent of both Principals. If a breach of the Concession Agreement resulted from action taken by the IGC both States would be responsible accordingly.<sup>124</sup>
180. So much is clear. However, the Claimants complain not of actions taken by the IGC but of its failure to take action. The question is whether the failure of the IGC to take action (whether or not because the Principals were not agreed on the action to be taken) results in the joint liability of both Principals or the individual liability of each. The Tribunal will address this question later.
181. In the Invitation to Promoters, the question of the allocation of responsibility between the Principals was addressed in the context of an undertaking not to terminate the promoter’s right to operate the Fixed Link. As to the breach of that undertaking, paragraph 11.5 provided that:

The Treaty will lay down the conditions for the allocation of responsibility as between the States. Where the breach of this undertaking is the responsibility of both States or where the responsibility is disputed, the matter will be decided by arbitration on the basis of international law.

182. Apart from providing for the IGC and for a joint Safety Authority, subordinate to the IGC (Article 11), the Treaty does not as a general matter require joint action except in respect of such matters as modification of the Concession Agreement, which evidently needs the consent of both (Article 14). The one express mention of joint action is in Article 5(4) which deals with measures necessary for the defence and security of the Fixed Link. It provides:

- (4) The Concessionaires shall, if required by the two Governments, take measures necessary for the defence and security of the Fixed Link. Save in exceptional circumstances of the kind envisaged in Article 6, the two Governments shall consult each other before requiring the Concessionaires to take such measures, and shall act jointly.

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<sup>123</sup> Treaty of Canterbury, Art. 10(1) (emphasis added). See also Art. 10(3)(c) (“Taking decisions in the name of the two Governments for the implementation of the Concession”).

<sup>124</sup> The ILC Articles on State Responsibility envisage the situation of “a single entity which is a joint organ of several States”: commentary to Art. 6, para. 3; commentary to Art. 47, para. 2.

Article 6 deals with natural disasters, acts of terrorism and armed conflicts, thereby implying that the defence and security of the Fixed Link is a wider concept. Subject to the exceptions provided for in Article 6, the Governments must act jointly in requiring measures necessary for the defence and security of the Fixed Link.

183. Of some significance is Article 15, entitled “Compensation of Concessionaires”. Paragraphs (2)-(4) provide:

- (2) The two States undertake not to interrupt or terminate the construction or operation of the Fixed Link by the Concessionaires throughout the term of the Concession save on the grounds of national defence, or in the case of a failure by the Concessionaires to satisfy or comply with the terms of, and as provided in, the Concession or under the powers referred to in Article 6. Any breach by a State of this obligation would give the Concessionaires a right to compensation in accordance with the provisions of the Concession and consistent with international law.
- (3) If a State interrupts or terminates the construction or operation of the Fixed Link by the Concessionaires on grounds of national defence, the Concessionaires shall be eligible for compensation as provided under the law of the State concerned. In those cases where both States are liable under this provision and where the Concessionaires make a claim for compensation against both States, they may not receive from each State more than half of the amount of compensation payable in accordance with the law of that State.
- (4) Each State shall bear the cost of the payment of the compensation to the Concessionaires in proportion to its responsibility, if any, in accordance with international law.

These provisions are reflected in Clauses 36 and 38 of the Concession Agreement.

184. In addition the Treaty contains many provisions for consultation and cooperation between the two Governments: see Articles 2(1), 5(2), 6(2), 10(5), and especially 18.

185. In other respects the Treaty proceeds on the basis that the implementation of the Fixed Link will be a matter for one Government or the other, depending in particular on where the tasks will be carried out. The Treaty makes careful provision defining the frontier “and the respective States shall exercise jurisdiction accordingly”, subject to any contrary arrangement (Article 3(1)). The major arrangement for this purpose is that concerning juxtaposed controls (Article 4), a provision implemented in further detail in the Sangatte Protocol.

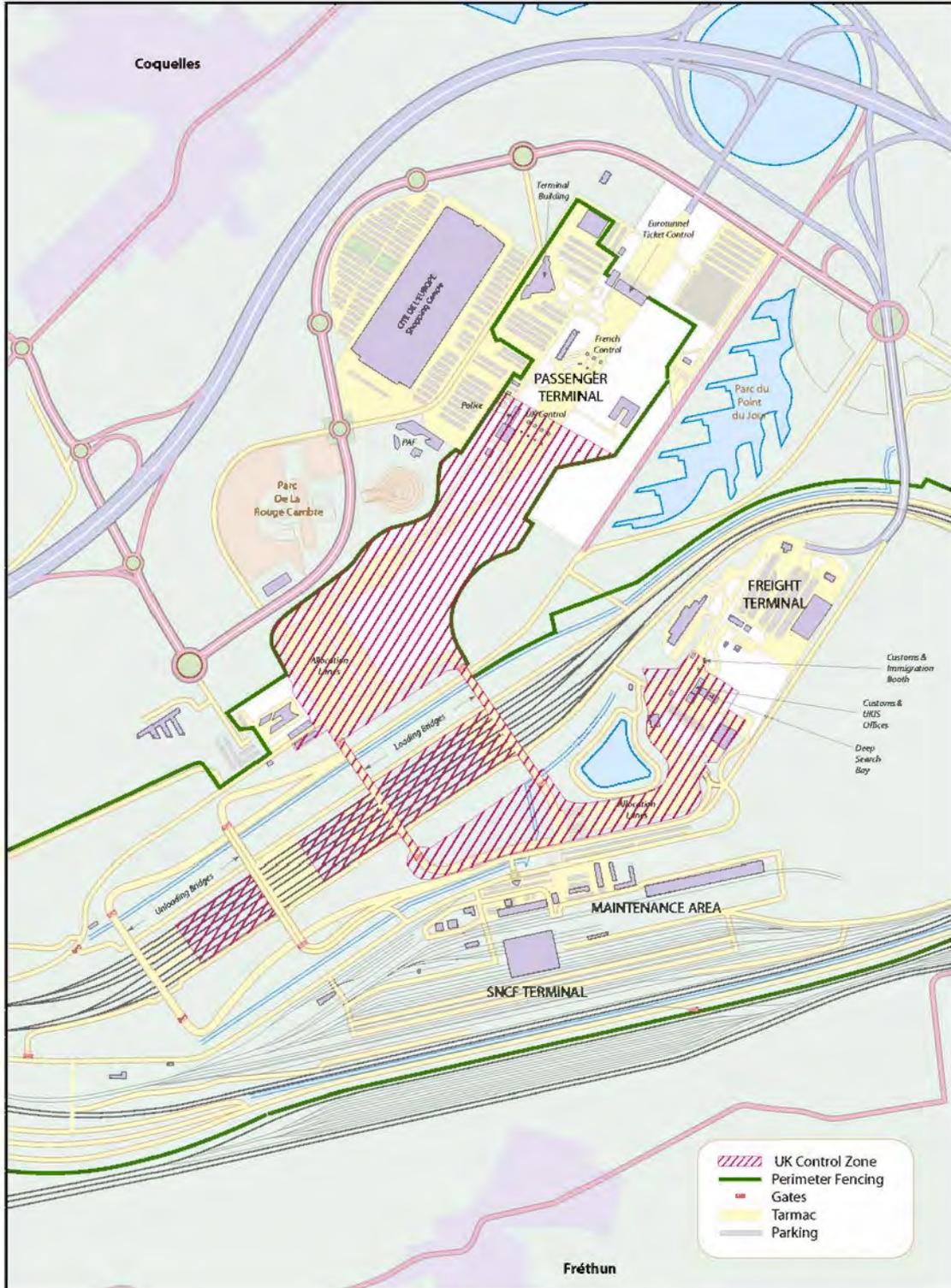
186. The Concession Agreement also envisages both joint or cooperative action by the Principals and action by each of them on their own responsibility. For example, Clauses 15.2, 27 (especially 27.7) and 34.2 envisage joint or at least coordinated action; Clause 2.1 likewise requires coordination between the Principals, and Clauses 4, 21.2, 29, 24.3, 36.1 and 38 envisage that conduct may be taken individually – with the consequence that the Principal will be liable individually to compensate for breaches (see e.g. Clauses 21.2, 38.1). It will be necessary to return to several of these provisions in more detail.
187. To summarise, there is no equivalent so far as the Principals are concerned of the joint and several responsibility and mutual guarantees exacted from the Concessionaires. To the extent that the Claimants' case depends on the thesis of joint and several responsibility, i.e. the *per se* responsibility of one State for the acts of the other, it must fail. But the Fixed Link required close cooperation between the two Governments, cooperation to be effected in particular through joint organs (the IGC and the Safety Committee). The core commitments towards the Concessionaires – in effect, to facilitate the construction and (with specified exceptions) to permit the uninterrupted operation of the Fixed Link – required the continuing cooperation of both Governments, directly and through the IGC. Whether particular breaches of the Concession Agreement result from the fault of one or the other or both States will depend on the particular obligation violated and on all the circumstances.

## CHAPTER VI – THE MERITS OF THE SANGATTE CLAIM

### A. INTRODUCTION

188. The Sangatte claim is put forward on four main grounds. The first and most important is that the Governments failed to put in place the police, security and frontier controls necessary to protect the Fixed Link from clandestine incursions, and that they manifestly failed to cooperate, coordinate or consult between themselves as to the measures that were necessary to protect the Fixed Link and to ensure the free movement of traffic through it. But in addition, the Claimants argue that the Governments, in taking certain measures or providing financial and other support to the SNCF terminal and to the Port of Calais in order to deal with the clandestine migrant problem, discriminated against the Fixed Link; that the Governments committed breaches of, respectively, French and English law made applicable under the Concession Agreement; and that the United Kingdom imposed unjustified burdens by way of the civil penalty regime and the costs of detention and removal, in breach of the Concession Agreement.
189. Before outlining the arguments of the Parties on these points, it is necessary to record certain basic facts.
190. As will be seen from **Figure 3** below, the Coquelles terminal and associated facilities are substantial in size. Immediately to the south of the maintenance area (but still within the perimeter fence) is the SNCF rail freight terminal situated at Fréthun. **Figure 3** also shows the UK control zone, which covers the waiting area for passengers and freight as well as the access routes to the platforms and the platforms themselves.
191. The threat of incursions was not limited to the Coquelles site. As **Figure 2** (as referred to in paragraph 65) shows, there were incursions affecting the Port of Calais and the SNCF terminal, though the impact on Coquelles was considerably greater, at least until the end of 2001. Moreover not all incursions were due to Sangatte Hostel residents: clandestine migrants would also seek to board lorries heading for the Channel, or to board Eurostar in Paris. Some level of stowaway activity was an inherent risk of a cross-Channel operation whether via the Fixed Link or otherwise.

Figure 3



(UK Map 3 revised)

192. Faced with the steep rise in incursions in the period from January-June 2001, the Concessionaires in July 2001 adopted what was referred to as a “zero tolerance policy”. This contributed to a steep fall in incursions in the second half of the year, although still at comparatively high levels. During most of 2002 the level of incursions at the Port, at the SNCF terminal and at Coquelles were of the same order of magnitude, although in individual months one facility rather than another would seem to be targeted – Coquelles in January 2002, the SNCF terminal in the period March-June, the Port in July-October and Coquelles again from August, peaking in October, just after the announcement of the closure of the Sangatte Hostel.
193. In February-March 2002 there was a sharp rise in incursions at the SNCF terminal. SNCF responded, in March 2002, by briefly closing its terminal to all cross-Channel freight traffic. As a result of new waves of intrusion of clandestine migrants in May 2002, SNCF decided once again to close temporarily the Fréthun terminal. According to the Claimants, the response of the Governments was swift and effective; extra personnel and equipment were provided and SNCF resumed its freight services. By contrast the Concessionaires as a private sector operator of a single route had no alternative but to continue despite the cancellation of individual missions or brief interruptions due to accidents or incursions into the tunnel itself. At no time during this period was service through the Fixed Link itself formally suspended.<sup>125</sup>

## **B. THE POSITIONS OF THE PARTIES**

### **1. Consequences of opening and maintaining the Sangatte Hostel**

194. The Claimants argue that the French Government’s decision to establish the Sangatte Hostel, and the policy of keeping it open despite repeated requests (which included requests from the United Kingdom) for closure, were unilateral measures in contravention of the Concession Agreement and the applicable law.<sup>126</sup> They stress that the phenomenon of intrusion began after the Sangatte Hostel was established, that it

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<sup>125</sup> Mention is made of one incident, an accidental fire on 18 November 1996, which led to an interruption of the operation of the Fixed Link. On 10 December 1996, the Concessionaires resumed operations using the other tunnel: Claimants’ Memorial, para. 62.

<sup>126</sup> Claimants’ Memorial, paras. 151, 235, 307.

developed and increased in proportion with the number of the migrants in the Sangatte Hostel, and that it was reduced to insignificance once the Sangatte Hostel was closed.<sup>127</sup>

195. The Claimants say that they protested about the suitability of the Sangatte site from the very beginning, i.e. the requisition by the Prefect in September 1999. But they note that they were not in a position to prevent the governmental decision to open and keep open the Hostel.<sup>128</sup>
196. The Claimants say they were led to believe by the French Government that the Sangatte Hostel would be limited to a maximum of 200 clandestine migrants and that it would be largely confined to families.<sup>129</sup> At the time it was opened, the Concessionaires had no reason to believe that the Sangatte Hostel would host a much larger number of migrants, mostly young men. But given its proximity to the Coquelles terminal and the lack of policing by the Governments, the Sangatte Hostel quickly became a “magnet” for clandestine migrants and a “launching pad” for nightly attempts to enter the United Kingdom via the Fixed Link.<sup>130</sup> During the summer of 2001, the Coquelles terminal “was under siege throughout hours of darkness.”<sup>131</sup>
197. According to the Claimants, the numbers of interceptions of clandestine migrants having breached the perimeter fence at the Coquelles terminal were: some 5,000 for the whole of 2000; 7,178 in July 2001; 9,833 in August 2001 (i.e., over 300 interceptions per night),<sup>132</sup> a mass incursion by some 450 on Christmas Eve 2001,<sup>133</sup> and 7,500 in 2002.<sup>134</sup> The total number of clandestine migrants intercepted at the Coquelles terminal increased dramatically over the years: 2,374 interceptions in 2000, 50,345 in 2001 and

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<sup>127</sup> Claimants’ Reply, para. 247.

<sup>128</sup> Claimants’ Reply, para. 213. See also Transcript, Day 1, p. 160 (translation of the original French version, Day 1, p. 160).

<sup>129</sup> Claimants’ Reply, para. 214. The Order of the Prefect Pas-de-Calais authorising the creation of a temporary reception centre at Sangatte, 25 September 1999, Bundle D, Tab 39, indicates that “a temporary hosting centre for a maximum of 200 refugees and asylum-seekers is authorised in Sangatte.” (translation by the Registry)

<sup>130</sup> The Claimants identify three different methods used by the clandestine migrants to try to get to the United Kingdom: (i) infiltration of the terminal complex at Coquelles in an attempt to board shuttle trains bound for the United Kingdom; (ii) hiding on trucks bound for the United Kingdom via the Fixed Link; and (iii) simply attempting to walk through the Channel Tunnel: Claimants’ Memorial, para. 78. See also Transcript, Day 1, pp. 157-158 (translation of the original French version, Day 1, p. 158).

<sup>131</sup> Claimants’ Memorial, para. 80.

<sup>132</sup> Claimants’ Memorial, para. 74.

<sup>133</sup> Claimants’ Memorial, para. 113.

<sup>134</sup> The numbers of clandestine migrants who were successful in reaching the United Kingdom through the Fixed Link were 580 in May 2001, 787 in June 2001 and 807 in July 2001: Claimants’ Memorial, para. 74.

17,502 in 2002.<sup>135</sup> By contrast the number of migrants intercepted dropped from 2,000 per month in November 2002 to approximately 20 or 30 per month immediately following closure of the Sangatte Hostel on 30 December 2002.

198. According to the Claimants the residents of the Hostel were not the subject of control on the part of the French authorities but were free to come and go as they wished. Clandestine migrants who were intercepted having breached security at the Coquelles terminal were allowed by the French police to return to the Sangatte Hostel from where they would launch another attempt to reach the United Kingdom the very next night. The Claimants quote an official from the International Conference on Refugees and Displaced People in Iraq who stated that “the French authorities at all levels are conscientiously and ... voluntarily absent.”<sup>136</sup> The Claimants also note the acknowledgement of the French Government that “Sangatte had negative consequences for the operation of ... Eurotunnel.”<sup>137</sup> According to the Claimants “[i]t is because the Governments created and maintained this facility for illegal migrants that they were able to carry out massive and constant intrusion attempts on the Terminal.”<sup>138</sup>

199. Moreover the activities of the clandestine migrants were said to have caused significant interruption to the Concessionaires’ operation of the Fixed Link. According to them:

- more than 1,600 train services were cancelled in 2001; 240 were cancelled in 2002;
- 4,500 shuttle services were delayed in 2001; 542 were delayed in 2002;
- the Fixed Link was closed for several hours at a time whenever clandestine migrants were detected within the Channel Tunnel in order to avert death or serious injury to staff, passengers or the clandestine migrants themselves;
- frequent serious accidents involving clandestine migrants resulted in bodily injury or death on the Fixed Link;
- serious and repeated damage was sustained to property around the Coquelles terminal and Channel Tunnel entrance; and

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<sup>135</sup> Claimants’ Reply, para. 251.

<sup>136</sup> Transcript, Day 2, p. 12 (translation of the original French version, Day 2, p. 10), citing Dominique Noguères, *Ligue des droits de l’Homme*, “Rapport d’enquête sur le Centre de Sangatte”, 4 July 2002, Claimants’ Supplemental Hearing Bundle, Tab 14, p. 2.

<sup>137</sup> Witness testimony of Michel Heuzé, Transcript, Day 7, p. 68 (translation of the original French version, Day 7, p. 66).

<sup>138</sup> Claimants’ Reply, para. 245.

- clandestine migrants acted aggressively towards the Concessionaires' employees and their security staff, resulting in psychological trauma and general damage to staff morale.
200. As a result of the Governments' failure to act, the Claimants were forced to take a wide range of measures to protect the Fixed Link from the activities of clandestine migrants:
- additional security measures were taken, including the installation of barbed wire fencing, the addition of various security fences around the terminal, and the installation of additional lighting; and
  - additional private security personnel were hired (from around 100 at the beginning of July 2001 to 370 by November 2001, 280 by January 2002 and 320 in autumn 2002).
201. In addition to the direct expenses thereby incurred, there was according to the Claimants a significant "loss in market share caused by the traffic disruptions due to the clandestine migrant activity."<sup>139</sup>
202. For its part, France states that the opening of the Sangatte Hostel "did not cause any protests from the Claimants, who ... even expressly recognized its usefulness."<sup>140</sup> Reference is made to a letter in which the Claimants took due note of the opening of the Sangatte Hostel.<sup>141</sup> Further France denies that it ever gave any assurance to the Claimants that the number of migrants in the Sangatte Hostel would be limited to 200.
203. Far from causing the increase in the clandestine population in the Pas-de-Calais area, in France's view the opening of the Sangatte Hostel was rather the consequence of that increase. The "magnet" for migrants, according to France, was not the Hostel but actual or perceived advantages to those who succeeded in reaching the United Kingdom. The decision to open the Sangatte Hostel was taken for humanitarian reasons and to maintain public order because of an increase in the number of migrants in the Calais region. That decision "helped in, if not totally eliminating, at least considerably containing the

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<sup>139</sup> Claimants' Reply, para. 254.

<sup>140</sup> France Counter-Memorial, para. 1.1.26.

<sup>141</sup> See Letter from Alain Bertrand to the sub-Prefect of Calais dated 27 September 1999, Bundle E, p. 3268, and see Transcript, Day 6, pp. 24-25, 30 (translation of the original French version, Day 6, pp. 24-26, 31).

adverse effects of the migratory phenomenon in the Calais area ...”<sup>142</sup> In France’s view “not opening Sangatte would have been the least acceptable solution.”<sup>143</sup>

204. France argues that the disruptions to Channel Tunnel traffic referred to by the Claimants are “vastly exaggerated”.<sup>144</sup> It argues that “[t]here is no correlation between the presence of clandestine migrants and the volume of traffic” since “during periods where a greater number of clandestine migrants were intercepted in the Coquelles terminal, tunnel traffic did not suffer as a result of this increase.”<sup>145</sup> In fact the Claimants’ market share was never as good as during the period when faced with the problem of clandestine migrants.<sup>146</sup> Such fluctuations in traffic volume as there may have been were “quite normal and inherent to any commercial activity.”<sup>147</sup> Moreover the Concessionaires were not more exposed to the problem of clandestine migrants than other cross-Channel operators.
205. France further argues that delays and cancellations referred to by the Claimants are “unlikely” to have been caused by clandestine migrant activities. In support of this affirmation, it quotes minutes of a meeting in which the Claimants acknowledged the negligible impact of clandestine migrants on their operations.<sup>148</sup> France further states that there is no evidence that the Fixed Link was actually “interrupted” since the service cancellations referred to by the Claimants “certainly do not constitute ‘interruptions’ to the Fixed Link as defined by Article 25.1 of the Treaty, which at the very least implies some degree of continuity in the length of time for which tunnel traffic is interrupted, a length of time which may indeed be temporary, but certainly not one-off.”<sup>149</sup> France makes reference to the fact that cancellations accounted for 0.8% of services in 2001 and 0.2% in 2002.
206. The United Kingdom, consistently with its disclaimer of any responsibility for actions taken in France or for the failure to take action there, makes no submissions on this point other than to note that it called on the French Government at intervals between

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<sup>142</sup> France Counter-Memorial, para. 2.1.32.

<sup>143</sup> Transcript, Day 6, p. 24 (translation of the original French version, Day 6, p. 25).

<sup>144</sup> France Counter-Memorial, para. 2.1.32.

<sup>145</sup> France Counter-Memorial, para. 2.1.35.

<sup>146</sup> France Rejoinder, para. 1.2.

<sup>147</sup> France Counter-Memorial, para. 2.1.35.

<sup>148</sup> Minutes of the “Stowaway Operational Group” meetings held on 12 December 2001 and 11 June 2002. See also the document quoted in France Rejoinder, pp. 131 ff.

<sup>149</sup> France Counter-Memorial, para. 2.1.44.

September 2001 and June 2002 to close the Sangatte Hostel.<sup>150</sup> As to the impact of the Sangatte Hostel, the United Kingdom regards France as better able to judge the accuracy of the Claimants' factual allegations.<sup>151</sup> It stresses, however, that there were other factors that caused a reduction in the Claimants' revenue, including the "entry of Norfolk Lines which operated a no-frills freight service [and] was able to undercut the competition", the slow recovery of the tourist market from the outbreak of foot-and-mouth disease in February 2001 and the abolition of duty-free sales on 1 July 1999.<sup>152</sup>

## 2. Adequacy of policing and security arrangements

207. According to the Claimants, the Governments failed significantly to increase levels of policing and security so as to combat effectively the activities of clandestine migrants around the Coquelles terminal. They argue that the number of French police forces on duty at and around the Coquelles terminal was consistently inadequate. This was despite the fact that the Concessionaires made various requests to the French Government for assistance to provide greater security and policing, in addition to making requests to the United Kingdom Government for assistance, particularly concerning security and policing within the United Kingdom control zone at Coquelles. Finally, the Concessionaires directed various pleas for assistance to the IGC, which, they argue, failed to provide any significant assistance.
208. According to the Claimants, documents cited by the French Government in support of its claim that the police forces provided were adequate are "cited and interpreted in an entirely misleading way."<sup>153</sup> In particular, these documents refer to police forces present in the entire Pas-de-Calais area, giving the misleading impression that the numbers of police forces deployed to protect the Fixed Link were substantial. The Claimants also dispute the number of companies of the *Compagnies républicaines de sécurité* ("CRS") in the Pas-de-Calais area: there were only two to three CRS companies and their numbers increased to five or six for only a few days on two occasions (in November 2001 and November 2002). Furthermore, only a few patrols (a fraction of the two to three CRS companies in the overall Pas-de-Calais department) were present at the

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<sup>150</sup> United Kingdom Counter-Memorial, para. 4.61.

<sup>151</sup> United Kingdom Counter-Memorial, para. 4.3.

<sup>152</sup> United Kingdom Rejoinder, para. 4.13, citing Minutes of IGC meeting of 26 April 2001, Bundle F, p. 3612, paras. 27-28.

<sup>153</sup> Claimants' Reply, paras. 337-338.

Coquelles site: “[n]o amount of finessing of the statistics can hide the fact that the French Government simply failed to deploy sufficient police personnel to protect the Coquelles site.”<sup>154</sup>

209. Moreover, despite the “extraordinary measures” the Concessionaires took to reinforce security, including increasing the number of private security personnel, the need for greater levels of police in the area remained. The private security personnel had no power to arrest or detain clandestine migrants. After intercepting them, they required constant assistance from police officers, which was effectively denied. Moreover until late 2002, the CRS officers responsible for patrolling the external perimeter of the Coquelles terminal did not, unlike the *Gendarmes Mobiles* deployed outside the perimeter of the adjacent SNCF terminal, have any power to intercept groups of clandestine migrants before they reached the Coquelles perimeter. At no time until late 2002 were the *Gendarmes Mobiles* deployed to police and protect the Coquelles terminal, despite the proven efficiency with which they had pursued clandestine migrants at the Fréthun terminal.<sup>155</sup>
210. As to France’s statement that the *Police aux frontières* (“PAF”) took in thousands of clandestine migrants for questioning, France fails to mention that the “lion’s share”<sup>156</sup> of these interceptions were carried out by the Concessionaires’ own security personnel and that the drop in intrusions in the second half of 2001 was in reality the result of the implementation of security measures taken by the Claimants at their own expense (see paragraph 192 above).
211. France argues that its border police forces in charge of conducting frontier controls “have always been present in sufficient and appropriate numbers” to cope with the migratory situation in the Calais area.<sup>157</sup> Further it “considerably increased” the resources normally allocated to maintaining public order in this region as the number of clandestine migrants trying to reach the United Kingdom increased. Thus, the presence of the CRS was increased from two companies on 1 January 2000 to six in November 2002. France also notes that the Concessionaires were provided with back up from at least one CRS company at the Coquelles terminal. The PAF increased in strength from

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<sup>154</sup> Claimants’ Reply, para. 362.

<sup>155</sup> Transcript, Day 2, p. 28 (translation of the original French version, Day 2, p. 27).

<sup>156</sup> Claimants’ Reply, para. 367.

<sup>157</sup> France Counter-Memorial, para. 2.2.86.

232 officers in August 1999 to 282 in August 2000 and reached 420 officers on 1 January 2003. Since 1999, 158 more officers were assigned as back up. Further the number of *Gendarmes Mobiles* was increased from 50 to 75 men between March 2002 and January 2003.

212. According to France, the increase in the number of police forces is reflected in the numbers of migrants taken for questioning by the PAF when attempting to enter the United Kingdom illegally: 82,901 people in 2001 (with some 6,111 people taken into custody) and 67,506 people in the first eight months of 2002 (4,259 people taken into custody).<sup>158</sup> Whether the clandestine migrants were initially intercepted by the PAF or the Concessionaires' own security personnel is irrelevant as the interceptions were a collective effort which necessarily involved the police forces.<sup>159</sup> France also rejects the Claimants' allegation that a lack of coordination existed between the different police forces.

213. The United Kingdom does not address this issue. In its view, the number and disposition of police and security forces at and around Coquelles was a matter exclusively for the French Government to decide. Even though UK immigration personnel had certain powers to act under the intergovernmental arrangements, these were limited in scope, purpose and especially location. Little or no clandestine activity took place in or near the United Kingdom control zone and combating it was not the responsibility of the United Kingdom authorities.

### **3. Prosecution policy and its implementation**

214. According to the Claimants, the Governments failed to commence prosecutions against the clandestine migrants in respect of criminal damage to the Concessionaires' property. It is true that some "human traffickers" operating at the Sangatte Hostel were prosecuted by the French authorities, but most of those prosecuted held relatively lowly positions in the illegal networks. The Claimants allege that the prosecutor of Boulogne-sur-mer adopted a policy of abandoning all prosecutions of the clandestine migrants based on

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<sup>158</sup> France provides the following numbers for the year 2001: 2,655 interceptions in January; 3,821 in February; 2,655 in March; 10,000 intrusions in August; 5,000 in October; and 3,500 in December (France Counter-Memorial, para. 1.1.30). These figures are further discussed in France Rejoinder, paras. 3.2.78-3.2.85.

<sup>159</sup> France Rejoinder, para. 3.2.55.

their illegal entry and stay in France. Thus, between 1 January 2000 and 31 August 2001, only 60 clandestine migrants were tried and sentenced at the *Tribunal de Grande instance de Boulogne-sur-mer*. This had no deterrent effect, but the mere fact that some prosecutions were brought shows that “it was entirely possible, and within the [prosecutor’s] powers, to prosecute, try, and convict the clandestine migrants based on their illegal status in France, had the French Government chosen to live up to its obligations.”<sup>160</sup> Furthermore there was only one case in which four clandestine migrants were convicted and fined for criminal damage. This reinforced the “climate of impunity” in which the clandestine migrants operated. The possible status of the clandestine migrants as asylum seekers is irrelevant for this purpose, since such status does not confer immunity for crimes and offences committed on French territory.

215. According to France, the interception of clandestine migrants (whether by the Concessionaires or the French authorities) resulted in people being taken in for questioning and in some cases placed in custody. Proceedings were instituted by the prosecutor’s office of Boulogne-sur-mer in an attempt to dismantle clandestine immigrant networks. But the work of the prosecutor was difficult in practice given the lack of documentation of most of the migrants. In addition the status of “non-expellable alien”, granted under French asylum law to nationals coming from politically unstable countries, made it impossible to institute legal proceedings against them. For these and other reasons a policy of systematic *refoulement* would have been practically impossible to carry out.

216. Consistent with its general position that this was a French responsibility, the United Kingdom does not make specific submissions on this point. It stresses that there was “no suggestion that anyone should have been taken to England to be prosecuted.”<sup>161</sup> For the United Kingdom authorities to have arrested and detained potential asylum seekers and transported them to the United Kingdom would have been to give them exactly what they wanted: presence in the United Kingdom where they could make an asylum claim.

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<sup>160</sup> Claimants’ Reply, para. 380.

<sup>161</sup> Transcript, Day 10, p. 7.

#### 4. The bases of the Sangatte Claim

217. The four main bases for the Sangatte claim have been set out in paragraph 188. The arguments of the Parties in respect of these four bases of claim may be summarised as follows.

##### (a) Responsibility for Sangatte security

218. The Claimants accept that neither Government was responsible for the migratory flow, and that handling it presented a difficult challenge. Nonetheless they submit that the real question is “whether the Governments ... who were responsible for border controls, who were responsible for standards of safety and security, who were responsible for police operations and co-operation between those police forces ... adopted efficient and appropriate measures in order to fulfil their obligations to protect the Concessionaires ...”<sup>162</sup> According to the Claimants, the Concession Agreement reflects “a recognition” that the private financing requirements of the project “are dependent upon the Fixed Link generating a sustained and uninterrupted cash flow.”<sup>163</sup> The Governments “undertook to ensure that ... the construction and operation of the Fixed Link would not be interfered with in any way that would jeopardise the flow of revenues required” to finance the cost of the private investment.<sup>164</sup> Under the Concession Agreement the Governments are required to “take such steps as are necessary for the smooth operation of the Fixed Link”, which include “putting into place suitable infrastructure and sufficient police and frontier control resources, as well as a prohibition from intervening in, or interrupting the Concessionaires’ operation of the Fixed Link.”<sup>165</sup>

219. According to the Claimants, numerous provisions in the Treaty, the Concession Agreement, the Sangatte Protocol and the Special Security Arrangement reflect the fundamental importance of policing and security to the Fixed Link project. These instruments confirm the “overriding responsibilities” of the Governments in the areas of policing and security and the importance of cooperation between the two Governments

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<sup>162</sup> Transcript, Day 1, p. 122 (translation of the original French version, Day 1, p. 121).

<sup>163</sup> Request, para. 17.

<sup>164</sup> Request, para. 17.

<sup>165</sup> Request, para. 18.

in this respect.<sup>166</sup> The Claimants refer to their “limited role”<sup>167</sup> in connection with security issues, highlighted by the requirement that any designs, plans or arrangements proposed by the Concessionaires that affect the security of the Fixed Link must be submitted to the Governments for their approval. In their view it is simply not credible to argue that defence and security, two areas which “traditionally and necessarily fall under the responsibility of governments”, primarily fall on the Concessionaires:<sup>168</sup> “[o]nly Governments can take measures necessary as to the security of the Fixed Link in the manner required against repeated massive attacks of clandestine migrants ...”<sup>169</sup>

220. As to frontier controls, the Claimants argue that the Governments failed to make the necessary arrangements to ensure a level and effectiveness of control over the Fixed Link in a manner which reconciles as far as possible the rapid flow of the traffic and the efficiency of the controls, in breach of Article 4(1) of the Treaty and Clause 15(2) of the Concession Agreement. In particular, the Governments failed to implement juxtaposed frontier controls over the Fixed Link and have failed to reinforce such controls when the activities of clandestine migrants increased. According to the Claimants this was in breach of Article A1.43 of Annex 1 to the Concession Agreement, which requires the presence of frontier control authorities to enable full-time operation of the Fixed Link, and Article 38 of the Sangatte Protocol, which imposes an obligation upon the Governments to exercise policing jurisdiction in respect of those committing offences under the laws of each State within the confines of the Fixed Link.

221. As to policing and security, the Claimants argue that the Governments failed to deploy the police or other resources necessary to protect the Fixed Link from the activities of clandestine migrants, and that their failure to do so breaches Articles 2(2) and 12(1) of the Treaty, Clauses 2.1, 13.1 and 23 of the Concession Agreement and Articles 3 and 6(1) of the Special Security Arrangement. This complaint is made severally against each of the Governments and jointly against both.

222. So far as the French Government is concerned, the Claimants emphasise a statement made in November 2002, following the announcement that the Sangatte Hostel would close, by the French Minister of the Interior, who stated that the former French

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<sup>166</sup> Claimants’ Memorial, para. 45.

<sup>167</sup> Claimants’ Memorial, para. 46.

<sup>168</sup> Claimants’ Reply, para. 311.

<sup>169</sup> Claimants’ Reply, para. 311.

administration leaders “are accomplices in [creating] a situation of complete deadlock for four years and ... have taken no action. The action of this government is an indictment of the previous failure to act.”<sup>170</sup> This admission, they say, was properly made having regard to:

- France’s failure to take the necessary steps in relation to the clandestine migrants’ interference with the operation of the Fixed Link;
- its failure to provide effective policing, security and frontier controls in and around the Coquelles terminal, or over the Fixed Link as a whole;
- its failure to act on the Concessionaires’ requests for assistance to address the problem raised by clandestine migrants;
- its failure to detain clandestine migrants found by the Concessionaires’ staff; and
- its failure to prosecute clandestine migrants.

223. So far as the UK Government is concerned, the Claimants argue that it failed to deploy police or other security resources necessary to protect the shuttle platforms within the control zone at the Coquelles terminal from the activities of clandestine migrants. They stress that the concept of juxtaposed frontier controls has the aim of applying relevant United Kingdom laws and regulations in the control zone at Coquelles. But in fact, “the UK police presence was virtually inexistent at Coquelles”<sup>171</sup> and “[t]hose few officers that were present refused to assist in the apprehension of the clandestine migrants, despite their powers and responsibilities.”<sup>172</sup> In other words, “much of what they did was simply to observe the infringements and illegality going on around them but nothing to help.”<sup>173</sup> The United Kingdom’s failures in this regard breached Article 2(2) of the Treaty and Clauses 2.1, 12.1, 25.1 and 27.7 of the Concession Agreement.

224. In response to the United Kingdom’s observation that the control zone is not fenced and that the incursions did not occur there, the Claimants argue that “[e]ven if the UK control zone itself is not ‘fenced on all sides’, the whole area comprising the French and the UK controls is secured”,<sup>174</sup> and that this should have allowed the United Kingdom to assist in policing it effectively. In addition to these individual failings, the Claimants

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<sup>170</sup> Claimants’ Reply, para. 193, citing *Le Figaro*, “*Nicolas Sarkozy: Pourquoi il fallait fermer l’accès à Sangatte*”, 12 November 2002, Claimants’ Memorial, Appendix 216.

<sup>171</sup> Claimants’ Reply, para. 395.

<sup>172</sup> Claimants’ Reply, para. 455.

<sup>173</sup> Claimants’ Reply, para. 463.

<sup>174</sup> Claimants’ Reply, para. 440.

allege that the Governments failed to cooperate or coordinate between themselves in addressing the clandestine migrant situation in and around the Coquelles terminal, and, in particular, failed to coordinate with respect to matters of policing, security and frontier controls over the Fixed Link. They argue that “the reaction of each Government was to blame the other. To France, this was Britain’s problem; it was Britain the migrants were seeking to enter ... To Britain, on the other hand, it was France’s problem; the intrusions were happening in French territory, it was for France to sort it out.”<sup>175</sup> According to the Claimants, this resulted in a “vacuum in which clandestine migrants and their traffickers [were] able to conduct their activities with relative impunity.”<sup>176</sup>

225. More specifically, the Claimants refer to the lack of cooperation and coordination at the operational level between French and British security forces in their action on the ground to counter the illegal activities of clandestine migrants. The Claimants allege that “the only significant concerted action taken between [the two] Governments was ‘Operation Ulysses’ at the end of 2002 which succeeded in reducing the number of clandestine migrants arriving in the Pas-de-Calais region in the context of the closing of the Sangatte Hostel.”<sup>177</sup>
226. Finally, the Claimants make reference to the failure of the Governments to coordinate and cooperate at the IGC in order to take any initiative to deal with the problem of clandestine migrants. The role of the IGC was limited to “taking note of the evolution of the situation” and there was “no serious attempt to provide any appropriate response to the issue or to take any active steps.”<sup>178</sup> According to the Claimants, the IGC delegations shirked their responsibilities by passing them on to the other Government or the Concessionaires. The Respondents thereby breached their obligations of cooperation under Articles 2(2), 4(1), 10(1) and 18(b) of the Treaty and Clauses 2.1, 15.2 and 27.7 of the Concession Agreement, as well as under Article 3(1) of the Sangatte Protocol. Reference is also made to Articles 2(4) and 6(4) of the Special Security Arrangement.
227. For its part, France argues that according to the terms of the Concession Agreement, the Concessionaires have primary responsibility for policing and security with the

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<sup>175</sup> Transcript, Day 1, pp. 8-9.

<sup>176</sup> Claimants’ Memorial, para. 156.

<sup>177</sup> Claimants’ Reply, para. 573 (emphasis in the original).

<sup>178</sup> Claimants’ Reply, para. 595.

Governments assuming only a “role of control and supervision.”<sup>179</sup> This is confirmed by Clause 21.1 of the Concession Agreement, which requires the Concessionaires to bear alone any liability to users or other third parties arising from the construction or operation of the Fixed Link. Further, in fulfilling their obligations to ensure the security of the Fixed Link installations and traffic safety, the Concessionaires had to comply with the requirements of the Governments and submit to their control. France can only be held responsible if it “imposed excessive charges on the Concessionaires” or “failed in [its] duty of vigilance.”<sup>180</sup> But it was the Concessionaires who failed to protect the Fixed Link: their “attempt to saddle [France] with the entire responsibility for this protection is unacceptable.”<sup>181</sup>

228. With respect to its alleged failure to provide frontier controls, France argues that Clause 15.2 of the Concession Agreement (as well as Article A.1.43 of Appendix A.I.4) does not call for specific police surveillance at the Coquelles terminal or for specific tunnel security checks. More generally with respect to security measures, at most Clause 15.2 of the Concession Agreement imposes an obligation of means, not of result, and France did not fail to take steps to address the problems.
229. As to the Concessionaires’ right to operate freely and under normal commercial conditions (Article 12(1) of the Treaty; Clauses 2.1, 12.1, 25.1 and 27.7 of the Concession Agreement), no such general obligation exists; in particular it is inadmissible for the Claimants to transform this into a positive obligation to act.
230. Finally, France maintains that it did not breach its obligation to take such steps as are necessary for the operation of the Fixed Link in accordance with the Concession (Article 2(2) of the Treaty; Clause 2.1 of the Concession Agreement). Again there is no such general obligation of protection to ensure the continuing operation of the Concessionaires. At most this provision would be relevant only in situations where measures were necessary for the very survival of the Concessionaires’ operations, which was not the case here.

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<sup>179</sup> France Counter-Memorial, para. 2.2.65, referring to the following provisions of the Concession Agreement: Clauses 14.2, 15.1, 15.3, 23; Appendix I, Arts. A.I.44, A.I.56(iv); and Art. 13(3) of the Treaty.

<sup>180</sup> France Counter-Memorial, para. 2.2.73.

<sup>181</sup> France Counter-Memorial, para. 2.2.78.

231. According to the United Kingdom, the question of responsibility for the security and policing at the Coquelles site is the key issue in the present dispute.<sup>182</sup> Primary responsibility lies with the Claimants while the Governments retain certain regulatory controls over defence and security. Thus, the United Kingdom had and has no responsibility for fencing and policing the control zone. According to the United Kingdom, “as one inevitable aspect of the principle that the Fixed Link was to be constructed and operated without public funds, and the Concessionaires’ sole risk, the costs of maintaining the security of the Fixed Link fell to be borne by the Concessionaires.”<sup>183</sup>
232. In particular the Governments accepted no positive obligation to act in such a way so as to safeguard the revenue flows of the Fixed Link. It was for the Claimants to develop, finance, construct and operate the Fixed Link “at their own risk” and “regardless of whatever hazards may be encountered” (Clause 2.1 of the Concession Agreement). The obligation in Clause 27.7 of the Concession Agreement “to give due consideration to the reasonable commercial objectives of the Concessionaires, including the avoidance of unnecessary costs and delays” cannot be equated with an obligation to act in accordance with the Concessionaires’ commercial objectives.
233. But in any case, it adds, even if the responsibility for the security of the Fixed Link was that of the two Governments as the Claimants contended, responsibility for the failure to protect its security in France was not a matter for the United Kingdom. It is for each State to maintain security in its own territory, and the position is in principle no different at Coquelles, as Article 6(1) and 6(2) of the Special Security Arrangement show. The obligation of each State in respect of incidents in the territory of the other is limited to giving assistance, e.g. by providing access and information. In particular, “[a]ny attempt by the United Kingdom authorities to police the control zone ... would have been strenuously resisted by the French Government, as a usurpation of its jurisdiction over its own territory, and would have resulted in an evident breach of the Sangatte Protocol.”<sup>184</sup> The power of UK officers in the control zone at Coquelles is limited to performing frontier controls and does not include any responsibility for

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<sup>182</sup> United Kingdom Rejoinder, para. 1.2.

<sup>183</sup> United Kingdom Counter-Memorial, para. 2.43; the United Kingdom relies on Clauses 14.1, 14.2, 15.1, 15.3, 21.1 and 23.1 of the Concession Agreement.

<sup>184</sup> United Kingdom Counter-Memorial, para. 4.8. See also Transcript, Day 3, pp. 12-14.

preventing or responding to the influx of clandestine migrants into the terminal. Even if British police had been stationed there in force, their arrest powers would have been extremely limited and would not have addressed the problem. According to the United Kingdom:

the control zone is not a secure area, but rather a demarcated area in which UK officers exercise their frontier control functions ... The control zone is not therefore fenced on all sides and, at various points, the boundary of the control zone is simply marked by small signs placed in the grass or tarmac, with no physical barrier or demarcation line whatsoever. This set-up is not designed to allow effective policing and security by the UK authorities. Had it been the case that the UK authorities were intended to be responsible for preventing incursions into the control zone, it would no doubt have been demarcated very differently.<sup>185</sup>

234. The United Kingdom also contests the allegation that its police forces were insufficient at the control zone. The UK police presence at the Coquelles terminal consisted of Special Branch officers whose primary role is counter-terrorism. Police deployment “was on a 24 hours a day, 7 days a week basis”, but “may not have been obvious to the Claimants, as Special Branch officers work in plain clothes.”<sup>186</sup> There was also a large contingent of personnel from the United Kingdom Immigration Service (“UKIS”). They often detained clandestine migrants in the control zone (pending an examination of their entitlement to enter the United Kingdom) and a substantial number of them were handed over to the PAF. According to the United Kingdom, UKIS officers also regularly reported clandestine activity to the Concessionaires and the PAF and offered to supply the Concessionaires with further advice on reinforcing its security arrangements.<sup>187</sup> Furthermore, the UKIS massively increased its freight searching and surveillance capacity at the control zone and went to “considerable expense and efforts to supply new detection technology to the Concessionaires.”<sup>188</sup>

235. But the fundamental point, according to the United Kingdom, is that the control zones “were not ... the usual route for incursions. On the contrary, clandestines were doing all they could to gain access to the [T]unnel and/or trains by evading the established frontier controls. Frequently, they breached the fence some distance away from the

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<sup>185</sup> United Kingdom Counter-Memorial, para. 4.4. See also Transcript, Day 3, pp. 11-12.

<sup>186</sup> United Kingdom Counter-Memorial para. 4.11.

<sup>187</sup> The Concessionaires accepted this offer and a detailed report was later produced and sent to Eurotunnel in April 2002.

<sup>188</sup> United Kingdom Counter-Memorial, para. 4.13.

frontier controls.”<sup>189</sup> That being so, the posting of arrest-trained officers at Coquelles (given the limited range of United Kingdom offences for which persons could have been arrested) “would not have made the slightest difference in practice to the problems of migrant incursions at Coquelles.”<sup>190</sup>

236. As to the failure to cooperate, France argues that Article 2(2) of the Treaty does not oblige the two Governments to act jointly and that the other provisions referred to by the Claimants do not create additional rights in its favour. According to France, the obligation of coordination in Clause 2.1 of the Concession Agreement “is pre-eminently an obligation of means and therefore applies only before the measures decided by the Governments are adopted ... The obligation of coordination implies that the Governments have an obligation to *endeavour* to act in common, not that they must *succeed* in doing so.”<sup>191</sup> So understood, and despite disagreements on certain points (such as the civil penalty regime), the Governments scrupulously fulfilled their obligation of coordination. They “constantly co-ordinated their action with a view to stemming the adverse consequences resulting from clandestine migration in the Pas-de-Calais so as to enable operation of the Fixed Link in accordance with the Concession Agreement.”<sup>192</sup> In particular, France refers to constant cooperation at both the operational and policy levels between the two Governments as illustrated by numerous exchanges, meetings and consultations between officials.<sup>193</sup> On a practical level, France refers to the effective coordination between the French and British security forces. One illustration of the Governments’ intention to strengthen cooperation against clandestine migration is the signing of the Additional Protocol to the Sangatte Protocol on 29 May 2000 and the institution of juxtaposed frontier controls, allowing the United Kingdom authorities to implement the United Kingdom’s own immigration laws in a specially designated area of the Coquelles terminal.

237. France also refers to the Franco-British summit held at the end of 2002, as well as the creation of the Franco-British Cross-Channel Commission, as demonstrating the two Governments’ intent to cooperate. Even before those decisions were taken, the IGC gave full consideration to the problem of clandestine migrants acting in a spirit of

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<sup>189</sup> Transcript, Day 3, p. 19, citing Witness Statement of Michael Bowron, Bundle C, Tab 15, p. 2368.

<sup>190</sup> Transcript, Day 4, p. 80.

<sup>191</sup> France Counter-Memorial, para. 2.4.162 (emphasis in original).

<sup>192</sup> France Counter-Memorial, para. 2.4.169.

<sup>193</sup> France Rejoinder, paras. 3.4.20-3.4.40.

cooperation. In this they were assisted by the Stowaway Operational Group which met weekly in order to coordinate action against clandestine migrants.

238. The United Kingdom notes that what is alleged is a failure of the Governments to cooperate or coordinate between themselves and not any failure to cooperate with the Claimants. According to the United Kingdom “there is an immediate and obvious objection to the Tribunal’s jurisdiction to decide allegations of failures to co-operate that do not directly involve the Claimants at all.”<sup>194</sup> But in any event, the provisions relied upon by the Claimants contain no obligation to cooperate or coordinate.<sup>195</sup> Thus, Clause 2.1 of the Concession Agreement provides that the Governments, in adopting legislative and regulatory measures, “will endeavour to co-ordinate”; in the United Kingdom’s view, this is very far from being a strict obligation to cooperate. Article 18(b) of the Treaty creates an obligation on the Governments only to “consult” with each other “at the request of either” Government; Article 18(b) of the Treaty does not create a freestanding obligation to consult, let alone coordinate or cooperate, on which the Claimants could rely. Clause 15.2 of the Concession Agreement only concerns an obligation to take measures in accordance with Directives of the Council of the European Communities. According to the United Kingdom, Article 3(1) of the Sangatte Protocol only applies to the two Governments *inter se* and is not intended to benefit third parties. Moreover it is limited by the requirement that cooperation be “in accordance with applicable national law.” With respect to Articles 2 and 4 of the Special Security Arrangement, the United Kingdom argues that these do not create an obligation opposable by the Concessionaires and are no more than an obligation to inform or consult if considered necessary. Finally, the United Kingdom argues that these provisions on cooperation do not exclude the possibility of unilateral action by the Governments.

239. The United Kingdom argues further that, even if there were unequivocal obligations of cooperation on which the Claimants could rely, it would be inadmissible to treat these as obligations of result rather than conduct.<sup>196</sup> As obligations of conduct, the United Kingdom complied with them, even as to matters on which the Governments could not reach agreement. The United Kingdom refers to numerous instances of cooperation and

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<sup>194</sup> United Kingdom Counter-Memorial, para. 4.50.

<sup>195</sup> Transcript, Day 4, pp. 102-103.

<sup>196</sup> United Kingdom Counter-Memorial, para. 4.53.

coordination at different levels (prime ministerial level, ministerial level, diplomatic and other official contacts and the cooperation at the Coquelles site between officers on the ground).<sup>197</sup> It also refers to the creation of the Cross Channel Commission and the work of the IGC. If the Claimants did not receive the assistance that they desired from the IGC, “this was partly because the IGC lacked the relevant powers ... but largely because the IGC correctly identified that it was for the Claimants to maintain the security of the site.”<sup>198</sup> According to the United Kingdom, the allegation that there was “ongoing disagreement between the Governments’ respective delegations” at the IGC is unfounded.

240. Furthermore “the eventual closure of the Sangatte Hostel must be regarded as a prime example of how governmental co-operation, on a complex and difficult political issue, could lead to a successful conclusion.”<sup>199</sup>

(b) Discrimination against the Fixed Link

241. A second ground of complaint is that the Governments treated other cross-Channel operators more favourably when they faced similar (or even lesser) problems. The Claimants allege that this discriminatory treatment is in breach in particular of Clause 15.3 of the Concession Agreement; reference is also made to Clause 27.5.

(i) *Favourable treatment of the SNCF terminal*

242. The Claimants note that the improved security measures put in place by the Claimants by the end of 2001 resulted in clandestine migrants focusing on an alternative means to get to the United Kingdom via the use of the SNCF terminal. The number of clandestine migrants intercepted in 2002 at the SNCF terminal increased from 2,159 in January, to 3,048 in March and 8,750 in May (see **Figure 2**, as referred to in paragraph 65). According to the Claimants, the Governments’ consistent failures in providing effective security and policing for the Fixed Link contrast with the measures promptly taken to protect the SNCF freight terminal from comparable interruptions.<sup>200</sup> This favourable treatment accorded to SNCF was disproportionate since the SNCF terminal only

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<sup>197</sup> See United Kingdom Counter-Memorial, paras. 4.56 ff, and Transcript, Day 4, pp. 108-110.

<sup>198</sup> United Kingdom Counter-Memorial, para. 4.31.

<sup>199</sup> United Kingdom Counter-Memorial, para. 4.61.

<sup>200</sup> Transcript, Day 8, pp. 141-142.

accounts for a small percentage of the total freight traffic through the Fixed Link and occupies a much smaller area, with external boundary fences, making it relatively easier to secure than the Coquelles terminal.<sup>201</sup> The assistance given by France to SNCF had the immediate effect of increasing the number of clandestine migrants intercepted at the SNCF terminal. By mid-2002, the clandestine migrants were no longer able to pass from the Fréthun site to the Coquelles site during the patrol hours of the *Gendarmes Mobiles*. The Claimants argue that as a result the clandestine migrants once more concentrated their efforts at the Coquelles site.

243. The Claimants refer in particular to two examples of more favourable treatment accorded to the SNCF terminal:

- the use of *Gendarmes Mobiles* deployed by France to protect the SNCF terminal; and
- the installation of high-tech security equipment by both Governments at the SNCF terminal.

244. According to the Claimants the number of CRS officers deployed at the Coquelles site during the last six months of 2002 was roughly half of the 50-75 deployed at the SNCF terminal. Moreover the *Gendarmes Mobiles* used their own State-funded vehicles to escort clandestine migrants away from the SNCF terminal, while the Concessionaires had to pay for a bus and driver for the same purpose.

245. When in May 2002, SNCF decided once again to close the Fréthun terminal, the Claimants allege that both Governments responded immediately by installing new high-tech fixed security installations. According to them, SNCF and the British Strategic Rail Authority (“SRA”) equally funded the new security measures at the SNCF terminal at a total cost of €7.5 million, while the Concessionaires had to pay the significant cost of repairs to the Coquelles perimeter fencing themselves.

246. France rejects the Claimants’ description of the problem of clandestine migrants in the Calais area. It argues that migration pressures were much more serious at the SNCF terminal than at the Coquelles terminal for the year 2002.<sup>202</sup> Furthermore the relative

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<sup>201</sup> The fence at the SNCF terminal is three kilometres in length, while the external boundary fence at the Concessionaires Coquelles terminal is about 12 kilometres in length.

<sup>202</sup> France Rejoinder, paras. 3.3.11 ff.

rise from August to October at the Coquelles terminal is “too isolated and specific in nature for general conclusions to be drawn as to the alleged failures of the French Republic.”<sup>203</sup> In any event “it is quite clear that protecting the Fréthun site is in itself protecting Eurotunnel.”<sup>204</sup>

247. According to France, the measures taken in 2002 to protect the SNCF site were suited to the prevailing situation and “absolutely not disproportionate” to the measures to protect the Coquelles site.<sup>205</sup> About 50 officers were assigned to secure the SNCF site, while the number of French border police assigned to protect the Coquelles site exceeded 300, with two to three CRS companies present.<sup>206</sup>

248. For its part the United Kingdom denies that it accorded more favourable treatment to SNCF by paying €3.75 million for the funding of the new high-tech security measures at Fréthun.<sup>207</sup> According to the United Kingdom, the Claimants were unable to demonstrate any intention to harm on its part; indeed the aid was of considerable benefit to the Claimants themselves as it improved security at the Coquelles terminal.<sup>208</sup> The United Kingdom notes that the Claimants never themselves sought a grant from the SRA for the security improvements that they made at the Coquelles site.

(ii) *Favourable treatment of the Port of Calais*

249. According to the Claimants, the Governments also accorded more favourable treatment to the Port of Calais in combating clandestine migrants. It cites four circumstances in particular.

250. The first is the very decision to establish the Sangatte Hostel away from the Port of Calais and considerably closer to the Coquelles site. They say the Port of Calais was less vulnerable and less exposed to the activities of clandestine migrants than the Coquelles terminal, located in open countryside.<sup>209</sup>

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<sup>203</sup> France Counter-Memorial, para. 2.3.145.

<sup>204</sup> Transcript, Day 6, p. 18 (translation of the original French version, Day 6, p. 18).

<sup>205</sup> France Counter-Memorial, para. 2.3.138. See also France Rejoinder, paras. 3.3.30-3.3.40.

<sup>206</sup> France Counter-Memorial, para. 2.3.138.

<sup>207</sup> United Kingdom Counter-Memorial, para. 4.67.

<sup>208</sup> United Kingdom Counter-Memorial, para. 4.67.

<sup>209</sup> Transcript, Day 1, p. 154 (translation of the original French version, Day 1, pp. 155-156).

251. Second, the Port of Calais benefited from proportionally larger police forces deployed by France as compared with Coquelles. According to the Claimants, France deployed as many or more policemen and PAF officers at the Port of Calais as at the Coquelles terminal despite the latter's much greater size and its physical vulnerability to intrusions of clandestine migrants in comparison with the operation of ferry companies.
252. Third, the Claimants allege that the United Kingdom treated the Port of Calais more favourably by paying for two scanners to be installed and operated there in 2002. In response to the United Kingdom's explanation of the capital costs involved, the Claimants allege that they had to bear costs of operating the scanner while the local Chamber of Commerce of Calais (and not the ferries) took over these costs at the Port of Calais.<sup>210</sup>
253. Fourth, the Claimants allege that the Frontier Controls Treaty of 4 February 2003 is more advantageous to the Port of Calais than to Coquelles.<sup>211</sup> According to the Claimants, this Treaty contains a more favourable frontier control system for the Port of Calais as compared to the one prevailing under the Sangatte Protocol. In particular the level of assistance being given by the Governments in the fields of policing and frontier control is significantly greater than that which existed at the Coquelles terminal.<sup>212</sup>
254. Responding to the first of these allegations, France rejects the Claimant's description of the problem of clandestine migrants in the Calais area. It argues that migration pressures were much more serious at the Port of Calais than at Coquelles.<sup>213</sup> In any event, it explains, "Sangatte was the only building around Calais that could be equipped ... sufficiently in order to be able to receive almost decently the refugees coming into the Pas-de-Calais area."<sup>214</sup> The hangar at Boré, closer to the Port of Calais, was not used because it "could not be decently equipped and it would not [have been] able to welcome a significantly increasing number of refugees."<sup>215</sup>

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<sup>210</sup> Claimants' Reply, para. 686.

<sup>211</sup> France-United Kingdom, Treaty concerning the implementation of frontier controls at the sea ports of both countries on the Channel and North Sea, Le Touquet, 4 February 2003 (in force, 1 February 2004), United Kingdom Treaty Series No. 18 (2004); *Journal officiel de la République française*, 13 February 2004, p. 2949.

<sup>212</sup> Request, para. 37; Claimants' Memorial, para. 173.

<sup>213</sup> France Rejoinder, paras. 3.3.3-3.3.10.

<sup>214</sup> Transcript, Day 6, p. 23 (translation of the original French version, Day 6, pp. 23-24).

<sup>215</sup> Transcript, Day 6, p. 23 (translation of the original French version, Day 6, p. 24).

255. As to the second allegation, France argues that it is quite normal to deploy at least the same number of policemen at the Port of Calais as it did at the Coquelles site because the former was the subject of many more intrusions by clandestine migrants than the latter.<sup>216</sup>
256. As to the third allegation, the United Kingdom argues that the Claimants “have the facts hopelessly wrong.”<sup>217</sup> Two scanners were offered to and eventually accepted by the Concessionaires after having been modified (the total cost of which was incurred by the UKIS). The total cost of the equipment provided to the Claimants was comparable to that provided to the Port of Calais. The United Kingdom also offered heartbeat monitoring equipment, as provided to the Port of Calais, to the Claimants who rejected it: “had Eurotunnel accepted the offer of heartbeat monitoring units, the total cost of the equipment provided to Eurotunnel would have exceeded that provided to the Port of Calais.”<sup>218</sup>
257. Both Governments reject the Claimants’ arguments with respect to the Frontier Control Treaty. France argues that the Claimants “cannot today claim to have suffered discrimination with regard to the allegedly favourable legal status granted to the Port of Calais in 2003, i.e. after the occurrence of the facts to which they object, in different circumstances.”<sup>219</sup> The United Kingdom argues that there has in any event been no more favourable treatment to the Port of Calais by virtue of the Frontier Controls Treaty: “[t]he costs of UK juxtaposed controls at ports are charged to the port operators [and] UK police at Calais do not patrol the port to deal with trespassers and they have no responsibility for port security.”<sup>220</sup>

(c) Breaches of French or English law

258. Under this rubric the Claimants argue that as a result of the Fixed Link being subject to special protection under French legislation relating to national defence the French Government had a specific obligation to protect the infrastructure of the Fixed Link “against any external acts of aggression or threats in relation to its operation.”<sup>221</sup> The

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<sup>216</sup> Transcript, Day 6, p. 19 (translation of the original French version, Day 6, p. 20).

<sup>217</sup> United Kingdom Counter-Memorial, para. 4.69.

<sup>218</sup> United Kingdom Counter-Memorial 4.69 (emphasis in original).

<sup>219</sup> France Counter-Memorial, para. 2.3.149 (emphasis in original).

<sup>220</sup> United Kingdom Counter-Memorial, para. 4.70.

<sup>221</sup> Claimants’ Memorial, para. 386.

failure by France to supply the necessary police forces to protect the Fixed Link constitutes a breach of this obligation under French law and the Concessionaires are entitled to compensation.

259. According to the Claimants, the Concession Agreement must be considered under French law as a public works and public service concession contract. Consequently the French Government has a:

particular obligation of loyalty and protection *vis-à-vis* the Concessionaires [which] is designed, in addition to and beyond the separate French law obligation of good faith in the performance of administrative law contracts, to guarantee that the public service will be performed under satisfactory conditions and that the French constitutional principle of continuity of public service will be observed.<sup>222</sup>

In the Claimants' view, the failure by France to provide adequate policing and security at the Coquelles terminal constitutes a separate breach of this obligation of loyalty and protection.<sup>223</sup> In this regard the Claimants invoke *inter alia* the second sentence of Clause 40.4, authorising the Tribunal to apply the rules of English or French law "when recourse to those rules is necessary for the implementation of particular obligations under English law or French law."

260. France argues that issues involving French law fall outside the jurisdiction of the Tribunal unless they are specifically referred to in the Concession Agreement, which is not the case here. Furthermore, it denies the existence of any general principle of protection of the Concessionaires under French law.<sup>224</sup>

261. Under this rubric the Claimants also allege that the United Kingdom breached its obligations in connection with policing over the Fixed Link (including within the United Kingdom control zone at Coquelles terminal) under a number of provisions of English law:

- Section 14(1) of the Channel Tunnel Act 1987 (the "1987 Act"), which implements the Treaty of Canterbury into English law;<sup>225</sup> and

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<sup>222</sup> Claimants' Memorial, para. 391.

<sup>223</sup> Claimants' Memorial, para. 398.

<sup>224</sup> France Counter-Memorial, paras.1.2.82-1.2.90; France Rejoinder, paras. 2.1.53-2.1.59.

<sup>225</sup> Section 14(1) of the 1987 Act reads as follows: "The policing of the tunnel system shall be undertaken by constables under the direction and control of the Chief Constable of the police force maintained for the Kent police area."

- Articles 3, 4 and 5 of the Channel Tunnel (International Arrangement) Order 1993 (the “1993 Order”), which incorporates the relevant provisions of the Sangatte Protocol into English law.

According to the Claimants these legislative acts impose a particular obligation upon the United Kingdom to police the Fixed Link and empower officers to arrest clandestine migrants seeking to enter the United Kingdom.<sup>226</sup>

262. The United Kingdom argues that such claims under English law are inadmissible and fall outside the jurisdiction of the Tribunal since the Claimants do not allege any breach of the Concession Agreement. Furthermore, the United Kingdom contests the Claimants’ interpretation of the 1987 Act according to which the Chief Constable of Kent was under the obligation to police the tunnel system in its entirety, including the control zone at Coquelles. The United Kingdom argues that the 1987 Act should not be interpreted so as to give powers to the police that go beyond the limited powers provided for in the Treaty; i.e. that it does not have greater extraterritorial effect than specifically agreed upon with France. This conclusion is said to be confirmed by the 1993 Order.

(d) The UK’s civil penalties and removal requirements

263. Reference has already been made (see above, paragraphs 66-69, 188) to UK civil penalties and removal requirements imposed on the Concessionaires.

(i) *Civil penalties*

264. As to the civil penalties, the Claimants argue that:

As a result of the extension of the civil penalty regime, the Concessionaires found themselves paying effectively double for the Governments’ abject failures to provide effective policing, security and frontier controls over the Fixed Link. First, they were paying the substantial cost of the security improvements necessitated by the Governments’ failures. Secondly, they were now being threatened with civil penalty charges by the UK Government in respect of those clandestine migrants who succeeded in evading the Governments’ police and frontier controls, as well as the Concessionaires’ security measures, at the Coquelles terminal.<sup>227</sup>

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<sup>226</sup> The Claimants also refer to similar powers under the Police and Criminal Evidence Act 1984, the Immigration Act 1971 and Section 128 of the 1999 Act: Claimants’ Reply, paras. 416-432.

<sup>227</sup> Claimants’ Memorial, para. 132.

Civil penalties were disproportionate and unnecessary, since the number of clandestine migrants was already falling prior to the imposition of civil penalties as a result of the security measures they had implemented.

265. The Claimants note that not only did they consistently object to the civil penalty regime but that France also opposed its extension to the Fixed Link on the ground that the element of extraterritoriality was contrary to the provisions of the Treaty and the Concession Agreement.<sup>228</sup>
266. According to the United Kingdom, these claims fall outside the jurisdiction of the Tribunal since, pursuant to Clause 41.4 of the Concession Agreement, questions relating to the implementation and enforcement of national measures are subject to the jurisdiction of English courts. But in any event, the imposition of civil penalties did not breach any provision of the Concession Agreement: rather it was the imposition of the civil penalty regime on the Claimants which made them focus on security issues. The civil penalty regime was successful in reducing the numbers of clandestine migrants reaching the United Kingdom, and it in no way contravened any provision of the Concession Agreement.
267. Independently of these arguments, however, the United Kingdom argues that this aspect of the claim should be dismissed for two reasons. First, the Claimants acknowledge that the civil penalties levied on them (approximately £560,000) were never paid but were remitted in full: thus no damage was suffered. Second, the civil penalty regime was the subject of judicial review proceedings in the United Kingdom, brought by third parties as well as by the Claimants. The proceedings were settled by agreement between the Claimants and the United Kingdom Government and as a result, on 4 February 2002 the United Kingdom withdrew all outstanding penalties against the Claimants. Since these proceedings were fully and finally settled by agreement between the Parties, the Claimants are precluded from resurrecting their challenge to the extension of the civil penalty regime on what are essentially the same grounds as were the subject of the 2002 settlement.

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<sup>228</sup> Claimants' Memorial, para. 138.

268. In response the Claimants reject the notion that they are asserting a claim that has already been settled. The previous judicial review claim was on “narrower grounds concerning only a challenge to the extension of the civil penalty regime.”<sup>229</sup> The Claimants also say that they are “not aware” of any settlement agreement on the terms alleged by the United Kingdom. In the English proceedings the United Kingdom agreed that if the Claimants withdrew their judicial review claim, the UK Government would pay its costs.<sup>230</sup> Such an agreement would not pre-empt subsequent proceedings for breach of the Concession Agreement.

(ii) *Detention and removal costs*

269. The Claimants object to their being made liable for detention and removal costs on the ground that it was inappropriate given the existence of juxtaposed frontier controls. Had these been implemented effectively the result would have been to reduce or eliminate the Concessionaires’ liability for detention and removal costs. Furthermore, according to the Claimants, “as a result of the extension to them of liability for detention and removal costs, [they] found themselves paying effectively double for the Governments’ failures to provide effective policing, security and frontier controls over the Fixed Link.”<sup>231</sup>

270. In particular, the Claimants argue that the imposition of detention and removal costs by the United Kingdom is in breach of Articles 2(2) and 18(b) of the Treaty and Clauses 2.1, 27.1 and, especially, 27.7 of the Concession Agreement.<sup>232</sup> They also argue that the imposition of charges for removal to “distant third countries” is in breach of Article 18 of the Sangatte Protocol and the so-called “Gentleman’s Agreement” of

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<sup>229</sup> Claimants’ Reply, para. 513.

<sup>230</sup> Claimants’ Reply, para. 514. By the consent order of 11 April 2002, United Kingdom Counter-Memorial, Annex 12, the parties to the UK proceedings agreed that certain provisions of the 2001 Regulations were *ultra vires* the 1999 Act “in so far as they enable a penalty to be imposed on the Claimants ... which is fixed and substantial”. This followed the decision of the Court of Appeal to that effect in *International Transport Roth GmbH v. Secretary of State for the Home Department* [2003] QB 728.

<sup>231</sup> Claimants’ Memorial, para. 143.

<sup>232</sup> Claimants’ Memorial, para. 308.

20 April 1995 between the United Kingdom and France (“Anglo-French Agreement”).<sup>233</sup>

271. The United Kingdom rejects the Claimants’ allegations. In its view, if clandestine migrants “are successful in avoiding juxtaposed controls, they can only be intercepted in the United Kingdom, and considerations of detention and removal arise. The elimination of detention and removal costs in relation to such migrants is therefore dependent on the security of the site. It follows that liability for detention and removal costs remains entirely appropriate where clandestine migrants are concerned.”<sup>234</sup>
272. In any event it was and remains entirely within the United Kingdom’s powers under the Immigration Act 1971, as modified by the 1993 Order, to charge the Concessionaires for the costs of removal and detention of persons brought to the United Kingdom via the Fixed Link who have been refused leave to enter or who are illegal entrants. The Claimants have failed to identify any obligations in the Concession Agreement which preclude the United Kingdom from exercising this power.
273. With respect to the Claimants’ assertion that the imposition of charges for removal to “distant third countries” is prohibited by Article 18 of the Sangatte Protocol and the 1995 Anglo-French Agreement, the United Kingdom submits that this is based on a misunderstanding of these provisions and their interaction with the Dublin Convention. Quite apart from its non-justiciability under the Concession Agreement, Article 18 of the Sangatte Protocol does not impose a duty on the United Kingdom to send clandestine migrants back to France as distinct from their home country, and it confers no rights on third parties such as the Concessionaires.

### **C. THE TRIBUNAL’S ASSESSMENT**

274. As noted, the Claimants argue that the losses suffered by them as a result of the pattern of incursions into the Coquelles site are in breach of the Concession Agreement, of

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<sup>233</sup> Claimants’ Reply, paras. 524 ff, referring to the Agreement on the taking back of passengers who are refused admission on arrival in the State of destination, Paris, 20 April 1995 (unpublished). Para. 1 of the Agreement states that “in relation to asylum seekers, it shall be superseded by the relevant provisions of the Dublin Convention once that Convention has entered into force”. The Dublin Convention entered into force on 1 September 1997: Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, Dublin, 24 November 1993, 2144 United Nations Treaty Series 492.

<sup>234</sup> United Kingdom Counter-Memorial, para. 4.49.

provisions of the Treaty of Canterbury given effect to by the Concession Agreement, as well as of other principles of international law which the Tribunal is authorised to apply pursuant to Clause 40.4 of the Concession Agreement.

275. The Tribunal has already held that it has jurisdiction only over claims which implicate the rights and obligations of the Parties under the Concession Agreement or the Treaty of Canterbury as given effect by the Concession Agreement (see above, paragraph 161). As to claims based on other treaties or other rules of international law, in particular the rules of customary international law concerning the protection of foreign investment, the Tribunal doubts whether the Fixed Link was to be regarded as a foreign investment in either country. Furthermore, even if general international law standards of investment protection are applicable, there are major difficulties in the way of holding that as a result of the clandestine migrant problem the enterprise was subject to treatment tantamount to expropriation, or even to unfair and inequitable treatment over and above the requirements and protections arising from the Treaty of Canterbury and the Concession Agreement, which constitute the *lex specialis* of the investment. For its part the Tribunal fails to see that these additional bases of claim add anything to the core complaints made by the Claimants under the Concession Agreement concerning the Sangatte claim. But however that may be it follows from what has been said already as to the interpretation of Clauses 40 and 41 of the Concession Agreement that these claims are outside the Tribunal's jurisdiction, and nothing further needs be said about them.

276. Four bases remain with respect to the Sangatte claim which have at least an arguable foundation in the Concession Agreement, and these will be dealt with as follows:

- (1) The failure to protect the Coquelles site against incursions (paragraphs 278-319);
- (2) Discrimination against the Fixed Link (paragraphs 320-335);
- (3) Breaches of French or English law (paragraphs 336-340);
- (4) The UK's civil penalties and removal requirements (paragraphs 341-350).

277. Before doing so the Tribunal observes that the Claimants have relied on contemporary statements made in various forums as amounting to a finding or admission of responsibility; likewise the Respondents have relied on statements of the Concessionaires as amounting to an acceptance of the lawfulness of the Principals'

conduct on various occasions. The Tribunal does not accept that any of the statements relied on is dispositive of any issue. The question for the Tribunal is whether the Respondents or either of them breached the Concession Agreement. Statements as to responsibility for a situation would need to be unequivocal, and unequivocally addressed to the issues before the Tribunal, before they could be seriously taken into account as admissions. There are no such statements on the record before the Tribunal.<sup>235</sup>

## **1. The failure to protect the Coquelles site against incursions**

### **(a) The legal standards**

278. In considering this core aspect of the Sangatte claim, it is necessary to analyse the provisions of the Concession Agreement which establish the balance of rights and responsibilities as between the Concessionaires and the Principals. Many provisions have been relied on by the Parties, both as a basis for establishing responsibility and as a basis for exoneration. For convenience the relevant provisions are set out in full in the Appendix.

#### *(i) Assumption of risk for security problems at Coquelles*

279. Two arguments have been made which would entirely preclude any responsibility of the Principals under the Concession Agreement and must first be dealt with.

280. The second sentence of Clause 2.1 provides that the Concessionaires shall construct and operate the Fixed Link “at their own risk, without recourse to government funds or to government guarantees of a financial or commercial nature and regardless of whatever hazards may be encountered.” The Respondents emphasise the comprehensive terms in which the Concessionaires had undertaken to construct and operate the Fixed Link, and their comprehensive assumption of risk. That being so, interruptions arising from the acts of third parties such as the clandestine migrants were among the hazards which the Concessionaires had to encounter without governmental funds or guarantees. In response, the Claimants argue that while they had accepted risks arising from the state of the economy, the acts of third parties etc., they had not assumed the risk of the Governments’ failure to comply with their own commitments under the Concession

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<sup>235</sup> See in particular paragraphs 222, 308.

Agreement. So to construe Clause 2.1 would deprive those commitments of all their substance.

281. The Tribunal agrees with this argument. Clause 2.1 itself goes on to specify the core commitment of the Principals in terms which will be analysed shortly. It cannot be right to interpret as a “hazard” the Principals’ non-compliance with the very commitments made in the Concession Agreement, notably in Clause 2.1 itself. It was in reliance on these commitments that the Concessionaires undertook to construct and operate the Fixed Link, not in spite of them.<sup>236</sup>

282. The second preclusive argument relates to Clause 21.1 of the Concession Agreement, which provides:

As between the Concessionaires and the Principals, the Concessionaires alone will bear any responsibility there may be for damage suffered by Users of the Fixed Link or by other third parties arising out of the construction or operation of the Fixed Link, without recourse to the Principals. The Concessionaires will hold the Principals fully protected and indemnified in respect of any such damage.

In the Tribunal’s view this provision is concerned with responsibilities towards third parties (including users) who suffer damage arising from the construction or operation of the Fixed Link. It has nothing to do with questions of responsibility as between the Concessionaires and the Principals for breaches of the Concession Agreement. Such questions can arise whether or not third parties are involved or suffer compensable damage.

*(ii) The Concessionaires’ freedom to carry out their commercial policy*

283. The provisions of the Concession Agreement on which the Claimants rely can be grouped under three major heads. The first head comprises several provisions in which the Principals guarantee to the Concessionaires the freedom to determine their commercial policy and undertake not to intervene in the operation of the Fixed Link.

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<sup>236</sup> Similar considerations apply to Clause 14.2 which provides that: “The Concessionaires shall ensure that all necessary steps are taken to permit the steady flow and continuity of traffic through the Fixed Link and that traffic may pass through with reasonable safety and convenience.” This is a commitment relating to the maintenance of and continuity of traffic through the Fixed Link; it does not call on the Concessionaires to go beyond their role as transport operators (cf Clause 15.1).

284. In this respect the Claimants argue that the effect of the nightly siege of the Coquelles terminal was that they were severely constrained from carrying out their operations, and even that the intrusions amounted to an intervention in the operation of the Fixed Link. In particular, the repeated cancellations, delays and closures had the “direct consequence of inhibiting the Concessionaires’ freedom to determine the type of service to be offered, particularly during the night when services were seriously disrupted.”<sup>237</sup>

285. In support of this argument the Claimants refer to Article 12(1) of the Treaty<sup>238</sup> which is given effect by the following provisions of the Concession Agreement:

- By the final sentence of the first paragraph of Clause 2.1 the Principals “shall ensure that the Concessionaires are free, within the framework of national and community laws, to determine and carry out their commercial policy.”
- By the first sentence of the second paragraph of Clause 2.1 it is provided that:

Except as expressly permitted by this Agreement, by national and Community laws and by their international engagements including the Treaty, the Principals will not intervene in the conduct or operation of the Fixed Link.

- By Clause 12.1 it is provided that:

The Concessionaires will be free to determine their tariffs and commercial policy and the type of service to be offered. In particular, laws relating to control of prices and tariffs shall not apply to the prices and tariffs of the Fixed Link.

- By Clause 25.1 it is provided that:

The Principals undertake not to interrupt the construction or operation of the Fixed Link by the Concessionaires save on grounds of National Defence or in the case of a failure by the Concessionaires to satisfy or comply with the terms of, and as provided in, this Agreement or under the powers referred to in Article 6 of the Treaty. Nevertheless the Concessionaires shall, if so required by the Principals or either of them for any reason, interrupt such construction or operation, either in whole or in part. No such interruption shall be of a duration or extent greater than is necessary having regard to the circumstances giving rise to the requirement therefor.

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<sup>237</sup> Claimants’ Memorial, para. 288(a).

<sup>238</sup> Article 12 is headed “Freedom of Management of the Concessionaires”. Article 12(1) of the Treaty of Canterbury provides: “The two Governments shall ensure that the Concessionaires are free, within the framework of national and Community laws, to determine their commercial policy, their tariffs and the type of service to be offered, during the term of the Concession.”

286. This group of clauses comprises three obligations: first, to allow the Concessionaires freely to determine their commercial policy; second, not to intervene in the operation of the Fixed Link; and third, not to interrupt its operation.
287. As to the first of these, in the Tribunal's view the crucial term in this respect is "policy", which is to be distinguished from "practice" or "operation." These safeguards for freedom of commercial policy are directed at quite different concerns than the Sangatte problem, having to do with such matters as pricing policy, discounting and the general arrangement of services.
288. As to the second, it cannot be said that the Principals themselves intervened in the operation of the Fixed Link. Even assuming that incursions of private asylum seekers could constitute "intervention", they were certainly not interventions attributable to the Respondents. Indeed on that assumption the Claimants' real complaint is not that the Respondents "intervened", it is that they abstained from preventing intervention, which is not the issue addressed by the relevant sentence of Clause 2.1. But it would be very odd indeed to describe the clandestine migrants as engaged in intervention in the operation of the Fixed Link. They wanted the Fixed Link to operate, but with them on board. This element of Clause 2.1 – like the provisions concerned with freedom of policy – is directed at ensuring that the Claimants are not told how to run their business. It has nothing to do with measures for maintaining law and order and preventing trespassers and stowaways.
289. Rather similar comments can be made as to the third argument, that the Respondents interrupted the operation of the Fixed Link contrary to Clause 25.1 of the Concession Agreement. In the Tribunal's view, Clause 25.1 is concerned, as its title ("Interruption of Construction or Operation by order of the Principals") suggests, with specific action by one or both Governments suspending the operation of the Fixed Link. It is not concerned with incidents causing cancellation or delay of individual missions.

*(iii) Arrangement of frontier controls*

290. More to the point are a number of provisions relating to the arrangement of frontier controls. Many of the Claimants' arguments here concern the Sangatte Protocol, which

the Tribunal has already held cannot constitute a basis of claim under the Concession Agreement. But a number of provisions of the Concession Agreement are also invoked:

- Clause 15.2 provides:

The two Principals will arrange frontier controls in a way which reconciles so far as possible the rapid flow of traffic with the efficiency of the controls. In accordance with the relevant Directives of the Council of the European Communities, the Principal will take measures to extend bilateral co-operation on the facilitation of controls and administrative formalities. To this end, the frontier controls which are carried out within the boundaries of the Fixed Link will be juxtaposed near to the portals to the tunnels. This does not preclude the possibility of controls on through trains.

- Clauses AI.43 and AI.44 of Appendix I further provide:

AI.43 The frontier control authorities will provide attendance to enable full-time operation of the Fixed Link.

AI.44 Those parts of the terminals situated between the frontier controls and the tunnel portals will be restricted and access controlled by the Concessionaires and/or police authorities according to national practice. Other parts of the terminal areas may be the subject of a surveillance system, as directed by the Intergovernmental Commission. Incoming and outgoing traffic will be segregated in a way that is acceptable to the relevant authorities.

291. The Tribunal does not regard the provisions of Appendix I of the Concession Agreement as bearing on the problem. They describe how the frontier controls are to operate but do not specify levels of staffing or specific outcomes. In particular a provision that the Principals will provide “attendance to enable full-time operation of the Fixed Link” means only that frontier control will be available on a 24-hour basis. It is not concerned with the adequacy of police or security measures.

292. As to Clause 15.2, the Governments argue that its language (“in a way which reconciles so far as possible” and “facilitate”) indicates that it is an obligation of means, not an obligation of result. Consequently, “if the objective is not met, the obligation will not be seen as being violated if the State has deployed all appropriate means.”<sup>239</sup>

293. In any case, in the Tribunal’s view, the problem at Coquelles was not or only marginally due to the failure of the system of juxtaposed frontier controls. It is established that

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<sup>239</sup> France Counter-Memorial, para. 2.2.59.

almost all the activities of the clandestine migrants occurred outside, sometimes well outside, the control zone. The system of juxtaposed controls was intended to speed the flow of passenger traffic. It meant that passengers went through both outward and inward controls in the territory of departure and none in the territory of destination. A passenger travelling from France to the UK would first pass through French outward controls and only then through United Kingdom inward controls, both at Coquelles. A passenger travelling in the opposite direction would first pass through United Kingdom outward controls and only then through French inward controls, both at Cheriton. Thus the function of the inward controls was to process passengers who had already passed through the outward controls. It was not their function to preserve public order in the areas outside their control zone, or to exercise outward controls on passengers who had succeeded in evading those controls.

294. It is true of course that no one would regard frontier controls as efficient if there was a steady stream of illegal immigrants readily by-passing them; the notion of frontier controls implies a system, not just a series of booths. But a power to maintain controls notwithstanding the impediment they create to the free movement of passengers is not the same thing as a duty to protect the security of the terminal and the trains.

*(iv) Measures necessary for the operation of the Fixed Link*

295. In the end, the Claimants place their primary reliance on certain systematic obligations of the Principals, acting in consultation and through the IGC, to maintain the basic conditions in which the Fixed Link could be constructed and operate. They refer in particular to the following provisions:

- Clause 2.1 provides, as far as here relevant, as follows:

The Principals shall, in a manner which they will endeavour to co-ordinate between them, adopt such legislative and regulatory measures, and take such steps, including approaches to international organisations, as are necessary for the development, financing, construction and operation of the Fixed Link in accordance with this Agreement ...

They will use reasonable endeavours to carry out the infrastructure necessary for a satisfactory flow of traffic, subject to statutory procedures.<sup>240</sup>

- In its equally authoritative French text, these elements of Clause 2.1 are rendered as follows:

*Les Concédants coordonnent autant que possible leur action afin d'adopter les dispositions législatives et réglementaires et de prendre toute mesure, y compris au niveau international, qui sont nécessaires à la conception, au financement, à la construction et l'exploitation de la Liaison Fixe par les Concessionnaires en conformité avec la Concession ...*

*Ils prennent toutes les dispositions souhaitables pour réaliser, dans le respect des procédures en la matière, les infrastructures nécessaires à un écoulement satisfaisant du trafic.*<sup>241</sup>

- Clause 27.7 provides:

The Principals shall ensure that in the performance of their functions the Intergovernmental Commission and the Safety Authority shall take the necessary steps to facilitate the implementation of this Agreement. The Principals, the Intergovernmental Commission and the Safety Authority shall give due consideration to the reasonable commercial objectives of the Concessionaires, including the avoidance of unnecessary costs and delays.

- The French text of Clause 27.7 provides:

*Les Concédants s'assurent que, dans l'exercice de leurs fonctions, la Commission intergouvernementale et le Comité de sécurité prennent les mesures appropriées pour faciliter l'exécution de la Concession. Les Concédants, la Commission intergouvernementale et le Comité de sécurité prennent en considération les préoccupations commerciales légitimes des Concessionnaires, notamment pour éviter des dépenses et des délais inutiles.*

296. An initial issue arises in terms of the English and French texts of Clause 2.1. Where the English text says “[t]he Principals shall, in a manner which they will endeavour to coordinate between them, adopt”, the French has “[l]es Concédants coordonnent autant que possible leur action afin d'adopter.” There is a difference between the two in that in the English version the Principals have an obligation to take necessary measures,

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<sup>240</sup> This provision reflects Article 2(2) of the Treaty of Canterbury, which provides: “The High Contracting Parties shall adopt such legislative and regulatory measures, and take such steps, as are necessary for the construction and operation of the Fixed Link by the Concessionaires in accordance with the Concession.”

<sup>241</sup> Article 2(2) of the Treaty of Canterbury provides in the French text: “Les Hautes Parties contractantes prennent les dispositions législatives et réglementaires, et entreprennent les actions, nécessaires à la construction et à l'exploitation de la Liaison Fixe par les Concessionnaires en conformité avec la Concession.”

whether or not they succeed in coordinating with each other, whereas in the French text their only obligation appears to be to coordinate as far as possible with a view to adopting necessary action.

297. In seeking to resolve this discrepancy the Tribunal will apply the rule of interpretation enunciated in Article 33(4) of the Vienna Convention.<sup>242</sup>
298. In the Tribunal's view it would be wrong to interpret the relevant phrase in Clause 2.1 of the Concession Agreement as imposing only an obligation of coordination, as distinct from an obligation individually and, where necessary, collectively to take necessary measures, and this for three reasons.
299. The first is that, evidently, Clause 2.1 of the Concession Agreement gives effect to Article 2(2) of the Treaty of Canterbury which both in its English and French texts corresponds to the English text of Clause 2.1 and not the weaker French version.
300. The second reason is that Clause 27.7 of the Concession Agreement in both its English and French versions reflects the English language version of Clause 2.1, not the weaker French version. It would be odd if the Principals and the IGC were obliged by Clause 27.7 to do more with regard to the implementation of the Agreement than the Principals themselves are obliged to do by the keynote Clause 2.1. To put it another way, if the most significant general obligation of the Principals with respect to the construction and operation of the Fixed Link were as stated in the French text of Clause 2.1, one would have expected Clause 27.7 to have been drafted in a corresponding manner.
301. The third reason is that the English language version of Clause 2.1 more satisfactorily reconciles the object and purpose of the Concession Agreement as a whole, which is to provide a secure basis for the construction and operation of a huge infrastructure project under a grant which was to last more than half a century. In return for the risk and hazard assumed by the Concessionaires, it was in the Tribunal's view reasonable to expect, as Article 2(2) of the Treaty of Canterbury held out, that between them the

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<sup>242</sup> See paragraph 93 above. The International Court recognized the customary character of Article 33(4) of the Vienna Convention in the *LaGrand case (Germany v. United States of America)* ICJ Reports 2001, 466, 502 (para. 101).

Principals would in fact take “the measures necessary for the construction and operation of the Fixed Link by the Concessionaires in accordance with the Concession”, and not that they would merely endeavour to agree to do so.

302. It may be argued that Clause 2.1 is qualified by the phrase “in accordance with the Concession”, and that under the Concession the Concessionaires had responsibility for security of the Fixed Link. This is not the Tribunal’s reading of the text. Under the Concession Agreement as under the Treaty – and as one would expect – the overriding prerogatives with regard to security and safety were retained by the Principals and the IGC. Clause 15.1 makes this clear. If security measures in and around the Coquelles terminal were necessary and if they required the exercise of public powers – which the Concessionaires do not possess – it was incumbent upon the Principals to take those measures themselves and to ensure that the IGC did so. No doubt there was a margin of appreciation as to what was necessary, but if a measure was really necessary Clauses 2.1 and 27.7 committed the Principals and the IGC to act.

(b) The legal standards applied

303. It falls then to determine to what extent the Respondents complied with this obligation. In doing so it is necessary to distinguish several phases of the clandestine migrant problem and its incidence for the Fixed Link.

(i) *The general situation in the Pas de Calais*

304. France’s basic position is that the cancellations and delays referred to by the Claimants are not the result of actions attributable to the French Republic. Thus, the activities of the clandestine migrants in the Calais area “are not due to the French Republic’s failure to meet its obligations under the Concession Agreement but stem from a phenomenon which far exceeds the context of the concession.”<sup>243</sup> According to France, this problem of clandestine migrants at Calais is the result of three phenomena: the unstable international situation of the late 1990s (civil wars, etc.); the favourable United Kingdom legislation towards clandestine migrants; and the malfunctioning of the Schengen space.<sup>244</sup>

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<sup>243</sup> France Counter-Memorial, para. 2.1.45.

<sup>244</sup> France Rejoinder, paras. 3.1.4 ff.

305. But States can be responsible for situations of disorder even though the immediate causes of the disorder lie elsewhere. Neither France nor the United Kingdom was responsible for the conduct of individuals who trespassed onto the Coquelles site or caused criminal damage in forcing an entry to that site. But the question is what they should have done about it in their capacity as parties to the Concession Agreement, members in the IGC and governments possessing a range of police and public powers in the affected area. No doubt all the cross-Channel operators in the Calais region had to take precautions against illegal immigrants and stowaways, and the costs associated with doing so were a normal part of their businesses. In the case of the Concessionaires they were normal risks to be borne in accordance with the basic principle stated in Clause 2.1 of the Concession Agreement. But this did not mean that under the Concession Agreement the Principals could ignore wholesale incursions on the scale which took place in 2001 and which threatened the operation of the Fixed Link.

*(ii) The opening of the Sangatte Hostel*

306. The Claimants' first complaint relates to the very opening of the Sangatte Hostel, located in a position where it posed a threat to the Fixed Link. The Tribunal does not agree. Something had to be done to address the immigrant influx. On humanitarian grounds the persons concerned could not be left sleeping rough in the streets of Calais, quite apart from the consequential social problems. Moreover in the early stages it was not envisaged that the population of residents would increase as much as it did (though no promises were made in that regard). In the circumstances, the establishment of the Sangatte Hostel was well within the margin of appreciation of the French authorities.

307. In fact for almost a year, the level of incursions at Coquelles remained low and within manageable proportions (see **Figure 2** as referred to in paragraph 65). It was only in late summer 2000 that the number of incursions began to rise, leading to Eurotunnel's initial written request for the closure of the Sangatte Hostel, on 13 September 2000; and it was only in January 2001 that the number of incursions at Coquelles rose above the number at the Port of Calais. In retrospect the location of the hostel at Sangatte may be seen to have posed a threat to the Fixed Link, but the threat was only realised at a considerably later stage.

308. For these reasons the Tribunal does not believe that the opening of the Sangatte Hostel, or its operation in the period prior to 13 September 2000, amounted to a breach of the Concession Agreement. It is not strictly necessary to decide whether – had there been such a breach – it would have been excused by reason of the consent or acquiescence of the Concessionaires. The Tribunal would only comment that faced with a decision of the French Government to requisition the premises at Sangatte the Concessionaires behaved appropriately, taking note of the decision and handing over the premises in good order. In its context their conduct did not amount to a waiver of rights.

*(iii) The situation at Coquelles after September 2000*

309. However, in the period after September 2000, and especially in the first half of 2001, the number of incursions at Coquelles rose to startling proportions, justifying the Claimants' description of the position in summer 2001 as a siege during the hours of night. In the Tribunal's view, by January 2001 at the latest it should have been sufficiently clear to the Principals and the IGC that the Sangatte Hostel was being used as a base for criminal activity. Under Clauses 2.1 and 27.1 the IGC should have taken the necessary steps to ensure the orderly operation of the Fixed Link. Yet at crucial periods, the IGC sought to shift the whole burden of security on to Eurotunnel. Thus in a letter from the Chairman of the IGC to Eurotunnel of 25 September 2000 it was stated that:

It is the company's responsibility to maintain the safety of the Channel Tunnel. This is clearly set out in Clause 14.2 of the Concession Agreement, following Article 13.3 of the Treaty of Canterbury ... Under Article 15 of the Sangatte Protocol and Annex B of the Joint Government Document issued by the French and British Governments, which set out the security measures to be taken to protect the Fixed Link, it is for Eurotunnel to guarantee the perimeter protection for the Channel Tunnel site and to ensure access to the protected zones is limited to duly authorised personnel.

Likewise at the IGC meeting on 8 November 2000 the minutes record the Head of the UK delegation as recalling that "at the end the burden was on the shipping companies and Eurotunnel."<sup>245</sup>

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<sup>245</sup> Minutes of the IGC Meeting, 8 November 2000, Bundle F, p. 3575, para. 15. See also Letter from Home Office to Eurotunnel, 1 March 2001, Bundle E, p. 3334, which states in relation to the problem of illegal immigrants: "The basis of any discussion of this subject must be the recognition that Eurotunnel is itself responsible for security in the tunnel and its terminals."

310. Of course Eurotunnel had responsibilities for the safety and security of the Fixed Link, but they were not exclusive. It is true that under Article 13(3) of the Treaty “[t]he Concessionaires shall ensure the continued flow of the traffic in the Fixed Link under satisfactory safety conditions.” It is equally true that under Clause 14.2 of the Concession Agreement “[t]he Concessionaires shall ensure that all necessary steps are taken to permit the steady flow and continuity of traffic through the Fixed Link.” Moreover under paragraph 1 of Clause 15 of the same Agreement, the Concessionaires have to comply with any requirements which are made by either Principal or by the IGC in the field of security and to bear the corresponding costs as provided in paragraph 3 of the same clause. However these requirements only concern the Fixed Link as defined in Clauses 1.1(ix) and 2.2 of the Agreement. They do not impose on the Concessionaires an exclusive obligation to ensure the external perimeters of the Coquelles site against intrusion, something which would require public powers they do not possess.<sup>246</sup>
311. In other contexts (clandestine traffic on Italian freight trains) the IGC took a different position. The IGC Minutes of 24 March 2000 stated the position correctly:

*si la Commission intergouvernementale n'est pas directement impliquée dans les problèmes de police et donc dans la mise en oeuvre des contrôles d'immigration, les risques du point de vue de la sécurité qu'engendre la présence de clandestins sont, par contre, au cœur de ses responsabilités.*<sup>247</sup>

if the Intergovernmental Commission is not directly involved in police questions and thus in the implementation of immigration controls, the risks from the point of view of security which the presence of clandestines create are, by contrast, at the heart of its responsibilities.

312. At relevant times, in the Tribunal's view, the IGC ignored this principle so far as the Concessionaires were concerned. In doing so they misconstrued and misapplied the Concession Agreement, which, as the Tribunal has already held, imposes key responsibilities for the maintenance of security on the IGC and the Principals. The events occurring during 2001, especially at night where clandestine migrants, notoriously seeking to evade the immigration laws of the United Kingdom, were causing criminal damage to and committing trespass upon Eurotunnel's terminal, called for more resolute action from the Governments than they received.

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<sup>246</sup> See above, paragraph 302.

<sup>247</sup> Minutes of the IGC Meeting, 24 March 2000, Bundle F, p. 3535, para. 4, referring to “*un trafic organisé en plein développement*”.

313. The Tribunal is reinforced in this conclusion by the contrast with events in 2002, when first at the SNCF terminal and then later at Coquelles itself the Governments did coordinate and did take effective measures against incursions through a combination of policing and other measures. In particular the joint program adopted by the two Governments through Ministers Sarkozy and Blunkett in the period from June-December 2002 showed that effective cooperation was possible and that the clandestine migrant problem could be effectively addressed.
314. It is argued by the Respondents that the relevant obligations under the Concession Agreement to cooperate and coordinate their policies were obligations of means, not result. But the general classification of obligations, useful though it may be for various purposes, is no substitute for their application in the concrete circumstances of a given case. Under the Concession Agreement the Concessionaires were not required to bear the risk of a failure of coordinated action when serious threats to the security of the Fixed Link, and of the United Kingdom's immigration controls, were occurring at times on a nightly basis.
315. France argues that although there were delayed and cancelled missions and a level of inconvenience, these did not rise to an intolerable point, threatening the very functioning of the Fixed Link. It notes that in mid-2001 the Concessionaires maintained a high share of the freight market, close to 50%. The United Kingdom likewise notes that other factors were at play which could have impaired the Claimants' market performance. But the issue was not one of market performance (as to which the Concessionaires certainly took the risk); it was one of public order and the security of a sensitive installation whose operation was immediately impaired by the presence of trespassers. It is true that a delayed or cancelled mission was not itself a catastrophe and that continuity of service was generally maintained. But it is clear that the Concessionaires suffered losses as a result of clandestine migrant incursions at Coquelles in the period after September 2000, and in the Tribunal's view this was due in significant part to the combined failure of the Respondents to meet their obligations under Clauses 2.1 and 27.7 of the Concession Agreement. To that extent the Claimants are entitled to recover damages, the incidence and quantum of which are a matter for assessment in the second phase of these proceedings.

(iv) *The role and responsibility of the United Kingdom*

316. The United Kingdom argues that, even if there were failures of security, the responsibility is exclusively that of France and that it bears no individual responsibility. In a situation where only the Concessionaires and not the Governments bore joint and several responsibility (see paragraphs 173-187 above), only the responsibility of France was engaged. It stresses that everything which should have been done and which was not done (such as the closure or securing of the Sangatte Hostel at night and the maintenance of public order and prevention of mass incursions into the Coquelles Terminal) should have been done in France, did not require the cooperation of the United Kingdom, and could only be the responsibility of the French Government. It was France, and only France, which was capable of maintaining public order and which possessed general police powers. British powers in the control zone were limited; most of the offences concerned took place well outside the control zone and only France could have effectively put an end to them (just as only the United Kingdom could have done so at Cheriton in Kent if the migratory flow had been in the other direction).
317. The Tribunal has already held that the issue is not one of joint and several responsibility, which concerns the character of a responsibility already established against both States. It is whether the conditions for international responsibility are met in the first place. Although issues of policing outside the control zone were exclusively a matter for France, the overall responsibility for the security of the Fixed Link was shared and not divided. The United Kingdom was not responsible for the security of the Fixed Link up to the boundary fixed by Article 3(1) of the Treaty, with France responsible on the continental side. Both States shared the responsibility, and under Clause 27.7 they had to ensure that the IGC took the necessary steps to facilitate the implementation of the Agreement, including Clause 2.1, and that in doing so it gave “due consideration to the reasonable commercial objectives of the Concessionaires, including the avoidance of unnecessary costs and delays.” What the IGC as a joint organ failed to do, the Principals in whose name and on whose behalf the IGC acted equally failed to do.
318. This finding is not, in the Tribunal’s view, inequitable *vis-à-vis* the United Kingdom. It was after all the principal beneficiary of all the measures taken to secure the Coquelles terminal since it was the integrity of United Kingdom immigration laws that was at

stake. As events in 2002 demonstrated, it was only through the cooperative action of the two Governments that the problem was solved. Moreover the record of the IGC, though it sometimes shows disagreement between the Principals, does not show a consistent and conscientious opposition by the United Kingdom to a unilateral French policy, such that the United Kingdom could argue that it did everything within its power to bring a clearly unsatisfactory situation promptly to an end. The United Kingdom no less than France took refuge behind the statement “[i]t is Eurotunnel’s responsibility to maintain the safety of the Channel Tunnel”<sup>248</sup> as an excuse for inaction. It is responsible, with France, for the damages thereby caused to the Claimants.<sup>249</sup>

(c) Conclusion

319. For these reasons the Tribunal concludes that in the circumstances of the clandestine migrant problem as it existed in the Calais region in the period from September 2000, it was incumbent on the Principals, acting through the IGC and otherwise, to maintain conditions of normal security and public order in and around the Coquelles terminal; that they failed to take appropriate steps in this regard, and thereby breached Clauses 2.1 and 27.7 of the Concession Agreement, and that the Claimants are entitled to recover the losses directly flowing from this breach.

**2. Favouring the SNCF Terminal and Port of Calais to the detriment of the Fixed Link**

320. The second major basis of the Sangatte claim concerns discrimination against the Fixed Link.

321. The Tribunal will need to analyse in further detail, in the context of the SeaFrance claim, the provisions of the Concession Agreement concerning equality of treatment as between the Fixed Link and other cross-Channel operators. It is sufficient to note that there is no general guarantee of equality of treatment but rather a number of provisions dealing with specific issues – for example duty-free shopping. There are only two references in the Concession Agreement to a general principle of non-discrimination binding on the Principals. The most relevant is Clause 15.3, which provides:

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<sup>248</sup> Letter from John Henes to Alain Bertrand, 25 September 2000, Bundle E, p. 3279.

<sup>249</sup> On the apportionment of responsibility as between the United Kingdom and France see below, para. 351.

- 15.3 The cost of complying with the requirements of each Principal as specified in Clauses 15.1 and 15.2 shall be borne by the Concessionaires or the relevant public authorities according to the respective national practices of the Principal concerned and respecting the principle of non-discrimination where relevant comparisons can be made with other means of transport. As far as French frontier controls are concerned, the relevant installations will be placed at the disposal of the relevant public authorities free of charge.<sup>250</sup>

Clause 15 deals with “Safety, Security and Frontier Controls”. Clause 15.1 allows the Principals or the IGC to require the implementation of requirements which are “binding on [the Concessionaires] under applicable laws and regulations concerning customs, immigration, security, police, public health, veterinary, phyto-sanitary, transport or road traffic controls, fire, ambulance or other emergency services, as far as they directly relate to the construction and operation of the Fixed Link.” Clause 15.2 has already been discussed (see paragraphs 292-294 above): it concerns the arrangement of frontier controls. Neither provision bears on operational questions concerning the deployment and use of police and security forces, and the Concessionaires were never required to bear the costs of those forces as distinct from the costs of frontier controls.

322. The Claimants also rely on Clause 27.5. which provides:

27.5 The Concessionaires shall comply with such directions of the Intergovernmental Commission and of the Safety Authority as are necessary for the performance of their functions, as provided in Clauses 27.1 and 27.2. Neither of the Principals nor the Intergovernmental Commission nor the Safety Authority shall act or take or carry out any decision in a manner which is inconsistent with the provisions of this Agreement.

323. In the Tribunal’s view Clause 27.5 does not incorporate by reference “the principle of non-discrimination where relevant comparisons can be made with other means of transport” so as to govern all conduct of the Principals, the IGC and the Safety Committee. They have of course to respect that principle in imposing charges for frontier controls and meeting other legal requirements under Clauses 15.1 and 15.2. But that is because Clause 15.3 so provides: Clause 27.5 adds nothing.

324. Thus there is no general obligation on the Principals under the Concession Agreement to observe the principle of non-discrimination between different cross-Channel operators in respect of operational requirements such as security and safety. In principle

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<sup>250</sup> The second reference to a principle of non-discrimination is in Clause 27.4. It deals with regulations to be drawn up by the IGC and is irrelevant to the present issue.

it is for the relevant authorities to decide what measures are to be taken to maintain public order and deter incursions. This does not mean that the Concession Agreement imposes no requirements at all in that regard – a matter the Tribunal has already considered. Nor does it mean that a clear and demonstrated difference in the provision of security measures for, say, the SNCF terminal might not be relevant in showing the inadequacy of measures taken to protect Coquelles from comparable threats. But the breach that would thereby be shown would not be a breach of a principle of non-discrimination; it would be a failure to maintain a minimum level of public order so as to allow the Fixed Link to operate normally. If the IGC or the Concessionaires had responded appropriately to the mass incursions of mid-2001, their conduct could not have been retrospectively questioned because they did more for SNCF in the spring of 2002. No doubt the comparative effectiveness of the response at Fréthun in 2002 casts some light on the failures of 2001 – but this is incidental and not a ground for separate complaint.

325. On this basis the Tribunal turns to deal with the Claimants' specific allegations of discrimination.

(a) Favouring SNCF?

326. The Claimants' specific complaints in relation to the SNCF terminal and the Respondents' replies were summarised above (paragraphs 242-248).

327. As to the use of *Gendarmes Mobiles* to protect the SNCF terminal, for the reasons given in paragraph 321 this has nothing to do with Clause 15.3.

328. As to the difference in funding arrangements for vehicles taking detained persons back to the Sangatte Hostel, this seems to have arisen as a matter of practice and not to have resulted from any discriminatory requirement to pay imposed on the Concessionaires under Clause 15.3. The question of recovery of costs and losses arising from clandestine incursions will arise in the quantum phase of these proceedings, but the difference in treatment referred to by the Claimants was not as such a breach of the Concession Agreement.

329. As to the installation of high-tech security equipment at the SNCF terminal, likewise this did not concern frontier controls or their costs in terms of Clause 15.3.

(b) Favouring the Port of Calais?

330. The specific complaints in relation to the Port of Calais were summarised above (paragraphs 249-257).

331. As the Tribunal has found, the establishment of the Sangatte Hostel at a location closer to Coquelles than the Port of Calais did not breach the Concession Agreement. It had nothing to do, as such, with the arrangement of frontier controls. The same is true of deployment of police and security personnel at the Port.

332. As to the purchase of the scanners, the explanations given by the United Kingdom (see paragraph 256 above) disclose no breach of the Concession Agreement. On the information available, the fact that the local Chamber of Commerce took over the operating costs of the scanners at the Port of Calais is a circumstance not attributable to the Respondents.

333. Finally there is the allegation regarding discriminatory treatment of frontier control costs under the Sangatte Protocol as compared with the Frontier Controls Treaty of 4 February 2003. The Frontier Controls Treaty only came into force on 1 February 2004, well after the Sangatte Hostel had been closed and several months after the Request. The Request refers to the Frontier Controls Treaty and to announcements made by the Home Office as to its implementation, suggesting that “[d]ue to the discriminatory treatment, the ferry companies today [*sic*] do not have to bear various frontier control costs that Concessionaires have had to support without any help from the Governments ...”<sup>251</sup> However, no additional detail is provided, even in the Claimants’ Reply, as to the costs involved either at the time of the Request or after the Treaty had come into force.<sup>252</sup>

334. Under the Request, the Claimants’ discrimination complaint focuses on the comparative treatment of the Fixed Link and its competitors, especially as concerns policing and

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<sup>251</sup> Claimants’ Reply, para. 691.

<sup>252</sup> Claimants’ Reply, paras. 689-691.

security, in the period prior to the closure of the Sangatte Hostel. It does not focus on the separate issue of liability for the costs of juxtaposed frontier controls in the period after 1 February 2004, which is a matter wholly unrelated to the clandestine migrant problem. Although issues could arise with respect to the costs of conjoined frontier controls in the two locations, in the Tribunal's view these fall outside the scope of the dispute presented by the Request.

335. For these reasons, the Tribunal concludes that such differential treatment of the Fixed Link (compared with the SNCF terminal and the Port of Calais) as there may have been in the relevant period was not in breach of the Concession Agreement.

### **3. Breaches of French or English law**

336. The Tribunal has already discussed the scope of its competence under Clauses 40 and 41.1 of the Concession Agreement, relative to that of national courts and other forums available under national law, as provided for in Clause 41.4 (see above, paragraphs 156-160). It results from that discussion that the Tribunal has no competence to enforce national or European law against the Principals.

337. The Claimants rely nonetheless on the second sentence of Clause 40.4 which provides as follows:

The rules of English law or the rules of the French law may, as appropriate, be applied when recourse to those rules is necessary for the implementation of particular obligations under English law or French law.

*Il peut, s'il y a lieu, être fait application des règles de droit français ou de droit anglais lorsque le recours à ces règles est commandé par l'exécution d'obligations spécifiques de droit français ou de droit anglais.*

338. Several points must be made about this stipulation. First, it is part of the provision dealing with the law the Tribunal may apply, not the source of the rights and obligations of the Parties to the Concession Agreement. Read in its context and having regard to Clause 41.4, it does not authorise the Tribunal to see to the "implementation and enforcement of the laws in force in either State." Second, it is a very limited mandate. It is only where, pursuant to the Concession Agreement, parties are called on to implement particular obligations arising under French or English law that the Tribunal will have to apply that law. Such situations might arise, for example, in the case of assignment

(Clause 31) or the acquisition of intellectual property rights (Clause 33.4). By contrast, as the French text of the second sentence of Clause 40.4 makes clear, it is not concerned with the situation where in order to give effect to obligations of the Principals under the Treaty or the Concession Agreement, it is necessary or desirable for them to perform acts under French or English law. Obligations under the Concession Agreement are not obligations under English law or French law; it is international law, not the law of either State, which is the proper law of the Agreement. For example, if a question arose under Clause 15 whether a given requirement in the field of immigration or public health was “binding on [the Concessionaires] under applicable laws and regulations” it would be necessary for a Tribunal to apply the relevant national law, whereas if the question was whether the principle of non-discrimination under Clause 15.3 had been respected, international law would be the applicable law.

339. It will be clear that none of the provisions of French or English law on which the Claimants rely to sustain this aspect of their claim are covered by the second sentence of Clause 40.4, so interpreted. The Sangatte claim before this Tribunal does not depend on “the implementation of particular obligations under English law or French law”; it depends upon the Concession Agreement itself. This is an aspect of the fundamental parallelism of laws and forums provided for in Clauses 40 and 41 of the Concession Agreement, to which the Tribunal has already referred (see paragraph 147).

340. Accordingly it is unnecessary to consider whether the Claimants’ interpretations of French and English law are correct.

#### **4. The UK’s civil penalties and the costs of detention and removal**

341. The Tribunal turns to the claims concerning the civil penalties and the costs of detention and removal imposed on the Concessionaires under UK law (see paragraphs 263-273 above).

##### **(a) Civil penalties**

342. It should first be noted that the Tribunal does not have before it the disagreement that arose between the two Governments over the imposition of civil penalties. The question

is whether the application of the civil penalty regime was a breach of the Concession Agreement so far as the Claimants are concerned.

343. A preliminary question is whether the Claimants are precluded from bringing this claim by the terms of their settlement of the English judicial review proceedings (as to which see paragraphs 267-268 above). It may well be that an express settlement resolving all outstanding claims, even if made in the context of domestic proceedings, would apply to individual claims pending under an international law agreement such as the Concession Agreement. But the Tribunal does not interpret the settlement agreement concluded between the Concessionaires and the United Kingdom as having this effect. The settlement agreement concerned not whether any form of civil penalty regime could be applied to the Concessionaires but the validity under English law of the particular regime which had been applied. It did not relate to the consistency of the civil penalty regime with the Concession Agreement and did not involve any claim for damages for breach of that Agreement.
344. Rather, the difficulty the Claimants face with this aspect of their claim is the fact that no penalties were ever paid. The Concession Agreement makes it clear that the operation of the Fixed Link is to take place with full regard to applicable English and French law: see Clauses 15.1, 19.2, 26.5, 41.2, 41.3, 41.4. The application of civil penalties to the Concessionaires in a given case would not have been as such a breach of the Concession Agreement. What might have engaged the obligations of the United Kingdom under the Concession Agreement would have been a significant failure of policing and security for which the Claimants were, so to speak, made to pay twice by virtue of the exaction of civil penalties. It would have been the combined impact of such a situation that was problematic – “paying effectively double”, in the Claimants’ words.<sup>253</sup> But it is fatal to this argument that no civil penalties were in fact paid, and moreover that the costs of the Concessionaires in opposing them were paid by the United Kingdom. Under these circumstances the disagreement over their liability to civil penalties under the Concession Agreement remained an abstract one.

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<sup>253</sup> Claimants’ Memorial, para. 132.

(b) Detention and removal costs

345. The Claimants make a similar argument as concerns detention and removal costs. But there is this important difference: they were in fact required to pay the costs of detention and removal of clandestine migrants (see paragraph 69 above) to their distant homelands in a number of cases.
346. Although the Parties discussed the Anglo-French Agreement of 20 April 1995 and Article 18 of the Sangatte Protocol and their relation to the Dublin Convention, these are not relevant to the present claim. Under Clause 41.1 of the Concession Agreement, the rights of the Claimants *vis-à-vis* the Principals are not determined by these Agreements, whatever their effect might be or have been. But at least it can be said that under these Agreements the United Kingdom would have been entitled to return clandestine migrants through the Fixed Link back to France (at minimal cost to the Concessionaires) and that it was not necessary to order their removal to distant home countries.
347. As noted already in dealing with civil penalties, the Claimants were subject as carriers to the immigration requirements of United Kingdom law. The powers to charge removal costs in respect of clandestine migrants applied to them. The Claimants do not contest this in principle: their complaint is that to have imposed removal costs in respect of persons whose presence in the United Kingdom resulted from the failure of that State to maintain the security of the Fixed Link is unfair and compounds the breach.
348. The Claimants refer in this context to Articles 2(2) and 18(b) of the Treaty and Clauses 2.1, 27.1 and 27.7 of the Concession Agreement. Of these the only provision which could form an independent basis of claim in respect of detention and removal costs is Clause 27.7, which states in relevant part that:

The Principals, the Intergovernmental Commission and the Safety Authority shall give due consideration to the reasonable commercial objectives of the Concessionaires, including the avoidance of unnecessary costs and delays.  
[*notamment pour éviter des dépenses et des délais inutiles*]

Clause 27.7 seems to be directed more at regard for reasonable operational requirements of the Concessionaires rather than at their liability under national law as carriers, and it

certainly does not immunise the Concessionaires from the due application of national law.

349. In the event the matter is put by the Claimants more in terms of aggravation or extension of damage than as an independent cause of action. Thus John Noulton described the imposition of detention and removal costs as “rubbing salt into the wound”,<sup>254</sup> and in their Reply the Claimants referred to detention and removal costs as a “further illustrat[ion]” of the United Kingdom’s disregard for its obligations under the Concession Agreement.<sup>255</sup>
350. In the circumstances it is appropriate to treat these costs as a possible head of damages rather than as a distinct basis for responsibility. The requirement to pay for detention and removal under the Immigration Act is imposed case-by-case and is discretionary. Independently of the clandestine migrant problem at Calais in the years 2001-2002 the Claimants could have been required to pay these costs in some cases. The Tribunal has not been asked to engage in an individualised review of those instances in which detention and removal costs were imposed, nor have details of these been provided. Instead the Tribunal will consider at the quantum stage whether some proportion of the costs of detention and removal should form part of the damages payable for the breaches of the Concession Agreement analysed above. It will do so not because these costs were not validly imposed under United Kingdom law but on the basis that, had the Respondents complied with their obligations under the Concession Agreement, at least some of them might not have been incurred.

## **5. Extent of responsibility as between the Respondents**

351. In the second phase of these proceedings it will be necessary to determine the quantum of the Claimants’ loss taking into account the conclusions reached above. In their submissions so far the three Parties adopt different positions as to whether and on what basis any damages should be apportioned as between the Respondents, but the matter has not been fully argued and it is premature for the Tribunal to express a view. This is a matter on which further submissions will be required in the context of the second phase.

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<sup>254</sup> First Witness Statement of John Noulton, Bundle C, Tab 4, para. 46.

<sup>255</sup> Claimants’ Reply, heading 2.4.4.

## **6. Conclusions as to the Sangatte claim**

352. For these reasons, the Tribunal concludes that:

- (a) In the circumstances of the clandestine migrant problem as it existed in the Calais region in the period from September 2000 until December 2002, it was incumbent on the Principals, acting through the IGC and otherwise, to maintain conditions of normal security and public order in and around the Coquelles terminal;
- (b) They failed to take appropriate steps in this regard, and thereby breached Clauses 2.1 and 27.7 of the Concession Agreement;
- (c) The Claimants are entitled to recover the losses directly flowing from this breach, to be assessed if necessary in a separate phase of these proceedings taking into account their obligations under clause 15.3 of the Concession Agreement;
- (d) The other bases of claim presented by the Claimants under this head fail and are dismissed.

## CHAPTER VII – THE MERITS OF THE SEAFRANCE CLAIM

353. The Claimants' second charge against the Respondents is that they unfairly and improperly sponsored competition with the Fixed Link by giving substantial financial support to SeaFrance. Without this support SeaFrance would in all likelihood have become insolvent; in fact, however, it was able to stay in business and even to increase its market share. The Claimants argue that in doing so the Respondents breached Clause 34.3 of the Concession Agreement, the implied obligation of loyalty and protection *vis-à-vis* the Concessionaires as well as relevant principles of international law.

### A. THE POSITIONS OF THE PARTIES

#### 1. The factual matrix

354. As to the facts, the Claimants refer to three sets of events which took place in 1999:

- (a) the recapitalisation of SeaFrance;
- (b) the use of the *GIE fiscal* mechanism for financing the purchase by SeaFrance of two new ships; and
- (c) other measures adopted by France in favour of SeaFrance.

355. As to recapitalisation, on 8 December 1999 SeaFrance purchased from SNCF the two ferries used on cross-Channel routes (the *Manet* and the *Nord-pas-de-Calais*) in consideration of the issue to SNCF of 1,600,000 new SeaFrance shares (worth €24,390,000). The Claimants allege that the French Government “authorised” the recapitalisation of SeaFrance by SNCF.<sup>256</sup>

356. Then in December 1999, SeaFrance purchased from Stena Line a 48.78% shareholding (worth €2.6 million) in a company called *Société Propriétaire des Navires* (“SPN”), which owned two ferries (the *Cezanne* and the *Renoir*). In June 2000, a subsidiary controlled by SNCF transferred the remaining 51.22% of the shares in SPN to SeaFrance (worth €23.78 million). SPN therefore became a wholly-owned subsidiary of SeaFrance, which was already the owner of two ferries used on cross-Channel routes.

357. Second, according to the Claimants, in May 2000, the French Government approved the use of a special tax mechanism (the “*GIE fiscal*”) to finance the acquisition (worth

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<sup>256</sup> Claimants' Reply, para. 709.

around £91 million) by SeaFrance of another ferry, the *Rodin* (the largest and the fastest ferry to sail on the Channel: it can carry 1,900 passengers, 700 cars and 120 lorries). France describes this *GIE fiscal* mechanism as a “general, non discriminatory mechanism, which can be used, subject to compliance with objective legal conditions, and [is] thus accessible to any entity fulfilling these conditions” and which is “not specific to the cross-Channel transport sector.”<sup>257</sup>

358. According to the Claimants, through the same *GIE fiscal* mechanism, in 2003, SNCF guaranteed payment of the purchase by SeaFrance of another large new ferry, the *Berlioz*, which has a similar capacity to the *Rodin*, and which was to enter service in 2005.

359. In both cases, the Claimants assert that the French Government approved the use of this tax mechanism.<sup>258</sup>

360. Third, the Claimants allege that the French Government provided another kind of financial assistance to SeaFrance. In particular, it says, France repaid part of SeaFrance’s employers’ contributions to the social security, pension and work accident funds for the years 1998, 1999 and 2000.

361. The Claimants allege that with the assistance of the Government of France and SNCF, SeaFrance’s balance sheet was restored to a healthy position and it was able to remain in business over cross-Channel routes. The French Government is accused of having “massively distorted free competition” in the cross-Channel market as SeaFrance became the owner of several ferries (and especially the *Rodin*).<sup>259</sup> France’s assistance to SeaFrance for the acquisition of two new state-of-the-art ferries increased its capacity by around 50% on cross-Channel routes “at a time when the market was already operating at substantial overcapacity and competitors such as the Concessionaires were reducing capacity.”<sup>260</sup> Thus “[t]he assistance given to SeaFrance has allowed it to offer lower passenger and road freight fares on cross-Channel routes than would otherwise

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<sup>257</sup> France Counter-Memorial, para. 1.1.41.

<sup>258</sup> Claimants’ Reply, para. 709.

<sup>259</sup> Claimants’ Memorial, para. 235.

<sup>260</sup> Claimants’ Memorial, para. 316.

have been the case, which has had the effect of luring passengers away from the Fixed Link and requiring the Concessionaires to lower their own fares.”<sup>261</sup>

## 2. Attribution of SNCF conduct to France

362. The Parties have debated whether the conduct of separate entities such as SNCF is attributable to France. According to the Claimants, the French Government “used SNCF as a vehicle through which it could give effect to its overriding policy”, e.g. to rescue SeaFrance by way of a recapitalisation and transform its competitiveness on the cross-Channel market by increasing the capacity of its fleet.<sup>262</sup> SNCF, a French Government-owned monopoly with special status under French domestic law, “acted under the direction and control of the French Government in providing support to SeaFrance in violation of the Governments’ obligations.”<sup>263</sup> In accordance with Article 8 of the ILC Articles, the conduct of SNCF “must engage the responsibility of the French State as a matter of international law.”<sup>264</sup> The fact that SNCF was created as an industrial and commercial public establishment (“EPIC”) under French law does not exclude attribution of its conduct to France, since this corporate form entails continued control by the French State over its activities: “the fact that 12 of 18 members of the Board of Directors are appointed by the Government suffices for an inference that the State’s influence is preponderant.”<sup>265</sup> The conclusion of the Claimants is that “[t]he degree of control in managing the company, the overriding supervision of the running of the company, the nomination of the majority of the board of directors, the authorisation over any SNCF investment in other companies are all facts that demonstrate that SNCF is a public entity controlled by the State.”<sup>266</sup> Moreover in supporting recapitalisation France was acting for a public purpose: the recapitalisation of SeaFrance was “prompted by political motives and specifically, took place in order to preserve the existence of a national operator on the trans-Channel market.”<sup>267</sup>

363. For its part France argues that “under international law the fact that a statute establishes a link between the company and the State is not sufficient to attribute the actions or

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<sup>261</sup> Request, para. 42.

<sup>262</sup> Claimants’ Memorial, para. 260.

<sup>263</sup> Claimants’ Memorial, para. 261.

<sup>264</sup> Claimants’ Memorial, para. 261.

<sup>265</sup> Claimants’ Reply, para. 774.

<sup>266</sup> Claimants’ Reply, para. 790.

<sup>267</sup> Claimants’ Reply, para. 845.

omissions of the former to the latter” and that “the conduct of companies that are not organs of the State cannot in principle be attributed to the State.”<sup>268</sup> It is for the Claimants to prove the existence of direction or effective control over the entity in the particular circumstances of each case.<sup>269</sup> It is not enough to rely on the legal status of SNCF for that purpose. In fact SNCF is a legal entity distinct from the State. Its board of directors is composed of 18 members: 6 elected by the employees of the company; 7 representatives of the State; and 5 members appointed by decree but chosen on the basis of their skills and experience: the latter “do not therefore represent the State on SNCF’s board.”<sup>270</sup> France also notes that “in French law the power of appointment has never implied per se the power to direct the conduct of the chosen person.”<sup>271</sup>

364. As to *de facto* control, France argues that there is no evidence of this in the present case. At most France had a power of veto over SNCF’s decisions. But this was not accompanied by any power of direction, still less was such a power exercised here, and SNCF remained responsible for its own decisions. At most France facilitated the recapitalisation of SeaFrance: but “‘facilitation’ is very far removed from the instructions, direction or control that the State would have had to exercise over each of these actions decided by SNCF in order for them to be attributable to the French State under the rules of international law that apply to the responsibility of States.”<sup>272</sup>

### **3. Legal bases for the SeaFrance claim**

365. As to the basis of the claim, the Claimants rely both on various provisions of the Concession Agreement and on other rules and principles of international law concerning non-discrimination, the protection of investments, etc. The Tribunal has already held that its jurisdiction is restricted to claims based on the Concession Agreement and the Treaty as given effect by the Concession Agreement (see paragraphs 150-151 above). It has also held that there was no dispute between the Claimants and the United Kingdom concerning the SeaFrance claim at the date of the commencement of the present arbitration (see paragraph 143 above). It is accordingly not necessary to consider further the arguments of the Parties on these questions.

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<sup>268</sup> France Counter-Memorial, para. 3.2.39, citing the commentary to ILC Article 8, para. 6.

<sup>269</sup> France Rejoinder, para. 4.2.10.

<sup>270</sup> France Counter-Memorial, para. 3.2.34.

<sup>271</sup> France Rejoinder, para. 4.2.22. See also Transcript, Day 5, pp. 105-106 (translation of the original French version, Day 5, pp. 113-114).

<sup>272</sup> France Counter-Memorial, para. 3.2.50.

366. In respect of the surviving aspects of the SeaFrance claim, the Claimants rely on a series of obligations expressed in or deriving from the Concession Agreement and the Treaty as given effect by the Concession Agreement.

- (a) The obligation not to finance any “link” through public funds (Concession Agreement, Clause 34.3). According to the Claimants, the SeaFrance aid package violated the obligation under Clause 34.3 not to finance any other link through public funds. Clause 34.3 is not expressly limited to the financing of a second fixed link but extends to any public support for a competing cross-Channel service. SeaFrance’s cross-Channel service is undoubtedly a “link” providing a directly substitutable service to that of the Claimants.<sup>273</sup> Any other interpretation of Clause 34.3 would allow the Governments to sponsor ruinous competition with the Fixed Link, thereby destroying the value of this huge investment. Faced with this alternative, a broad, not a narrow interpretation of Clause 34.3 must be preferred.
- (b) The fundamental obligation to protect the Concessionaires (Concession Agreement, Clause 2.1). The Claimants argue that in supporting SeaFrance, one of the Concessionaires’ principal competitors on the cross-Channel market, the French Government breached its obligation not to take harmful measures against the Claimants. Clause 2.1 should be interpreted, according to the Claimants, in light of the general principles governing *contrats administratifs* under French law and so as to ensure the financial equilibrium of the Concession Agreement.
- (c) The obligation to ensure to the Concessionaires the right to freely determine their commercial policy, their tariffs and the type of services they offer (Treaty, Article 12(1); Concession Agreement, Clauses 2.1, 12.1). The Claimants argue that by increasing capacity in a market which was already suffering from overcapacity, the French Government’s assistance to SeaFrance forced them to lower their fares and to reduce the frequency of shuttle services. They were therefore not free to determine their commercial policy and their tariffs.
- (d) The obligation to facilitate the development of rail freight traffic between their two countries (Concession Extension Agreement, Clause 7). The Claimants argue that the assistance given to SeaFrance has allowed it to increase the volume of freight carried with the inevitable result that a significant amount of rail freight traffic has been lost to ferry transport between France and the United Kingdom.

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<sup>273</sup> See also Transcript, Day 2, pp. 142-143.

367. According to France, “[n]o connection can be made between the Concessionaires’ complaints and any provision of the Concession Agreement.”<sup>274</sup> In particular:

- (a) Concession Agreement, Clause 34.3. According to France the text of Clause 34.3 shows clearly that it concerns only a second fixed link, and not cross-Channel ferry services:<sup>275</sup> “[t]he French version of [the title of Article 34] mentions the word ‘*ouvrage*’; again only a fixed link or a road link can be an ‘*ouvrage*’. The French version also talks about the extension of that *ouvrage* and that can only be understood in one way, they are talking about extending the fixed link; after all, a maritime link cannot extend a fixed link.”<sup>276</sup>
- (b) Concession Agreement, Clause 2.1. According to France, the financial transactions between SeaFrance and SNCF did not receive any kind of support from France. SeaFrance and SNCF used classic financial mechanisms which were also available to the Claimants. There was “nothing in the least unusual” about the recapitalisation of SeaFrance by SNCF, which was “acting as a prudent investor ... in order to make [SeaFrance] viable and competitive once more on the cross-Channel transport market.”<sup>277</sup> France also argues that the *GIE fiscal* mechanism used was consistent with regular commercial and financial practice in France and did not in any way deprive the Concessionaires of their right to operate the Fixed Link freely and in normal commercial conditions. The Claimants could perfectly well have used the *GIE fiscal* scheme to finance their shuttles had they wished to do so.<sup>278</sup> Thus even if Clause 2.1 were to be interpreted in the loose manner advocated by the Claimants (*quod non*), it would not have been breached here. More generally, nothing in the Concession Agreement provides that the Governments “should shield the Concessionaires from competition”.<sup>279</sup> As to the Claimant’s reliance on French administrative law principles, France states that “there is no general principle under French law granting a guarantee of non-competition to the concessionaire.”<sup>280</sup> France also asks why Eurotunnel did not refer this to internal French courts to be resolved if France was indeed in breach of its domestic law.<sup>281</sup>

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<sup>274</sup> France Counter-Memorial, para. 3.1.17.

<sup>275</sup> France Rejoinder, paras. 4.3.8-4.3.12.

<sup>276</sup> Transcript, Day 5, p. 122 (translation of the original French version, Day 5, p. 136)

<sup>277</sup> France Counter-Memorial, para. 3.3.67.

<sup>278</sup> France Counter-Memorial, para. 3.3.71.

<sup>279</sup> France Counter-Memorial, para. 3.3.79.

<sup>280</sup> Transcript, Day 5, p. 133 (translation of the original French version, Day 5, pp. 144-145).

<sup>281</sup> Transcript, Day 5, p. 133 (translation of the original French version, Day 5, p. 145).

- (c) Treaty, Article 12(1); Concession Agreement and Clauses 2.1 and 12.1. France stresses that the Claimants' freedom under Clauses 2.1 and 12.1 of the Concession Agreement to choose their commercial policy "cannot be interpreted as an absolute freedom that creates a claimed right for Eurotunnel not to confront the economic constraints arising from the competitive commercial sector in which it operates."<sup>282</sup> In other words, the rights contained in Clauses 2.1 and 12.1 of the Concession Agreement "do not give Eurotunnel any form of exclusivity on the commercial cross-Channel transport market and do not shield it from competition."<sup>283</sup>
- (d) Concession Extension Agreement, Clause 7. France denies that it breached its undertaking to facilitate the development of rail freight traffic between their two countries (Clause 7 of the Concession Extension Agreement).<sup>284</sup> In any event this Agreement does not have any application in the present arbitration and only creates rights and obligations between the Governments.<sup>285</sup>

## **B. THE SCOPE AND MEANING OF CLAUSE 34.3 OF THE CONCESSION AGREEMENT**

368. In addressing these claims it is convenient to consider first whether the assistance given to SeaFrance was capable of violating any express provision of the Concession Agreement, assuming for the purpose that all the conduct in question was attributable to France. The primary provision on which the Claimants rely is Clause 34.3, the only provision of the Concession Agreement which gives express protection to the Concessionaires from State financial support to competitors.

369. Clause 34 provides as follows:

34.1 The Concessionaires recognise that, in due course, the construction of a drive through link may become technically and financially viable. They undertake as a result to present to the Principals between now and the year 2000 a proposal for a drive through link which shall be added to the first link when technical and economic conditions for realisation of such a link shall permit it and the increase of traffic shall justify it without undermining the expected return on the first link.

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<sup>282</sup> France Counter-Memorial, para. 3.3.64.

<sup>283</sup> France Counter-Memorial, para. 3.3.64.

<sup>284</sup> France Rejoinder, paras. 4.3.64 ff.

<sup>285</sup> France Rejoinder, para. 4.3.65.

34.2 The Principals undertake not to facilitate the construction of another fixed link whose operation would commence before the end of 2020. However, after 2010, and in the absence of agreement with the Concessionaires on the implementation of their proposal for the construction of a drive through link and as to its timetable, the Principals shall be free to issue a general invitation for the construction and operation of such a link. This new link shall not enter into operation before the end of 2020.

Nevertheless, before this date, in the event of demonstrable lack of quality in the service provided, to be judged according to objective criteria, the Concessionaires shall present to the Principals a proposal to remedy such lack of quality. This proposal may go so far as to involve the construction of a new link and is to be subject to the conditions provided in Clause 34.1.

34.3 The Principals agree that throughout the Concession Period no link shall be financed with the support of public funds, either directly or by the provision of government guarantees of a financial or commercial nature.

34.4 The Concessionaires shall offer, through the Fixed Link, a service adequate to meet demand as judged by objective criteria. They shall introduce improvements in the quality of the service within the structure of the Fixed Link subject to:

- conformity with the laws and regulations in force.
- the right for the Principals to refuse to incur any consequential public expenditure, relating for example to land infrastructure.
- the conditions provided in Clause 34.1.

34.5 The period during which any Exceptional Circumstances or event or circumstance as referred to in Clause 24.1 seriously affects the operations of one or both Concessionaires for a period of at least three months shall extend by the same period the date of 2020 referred to in Clause 34.2.

370. Clause 34 as a whole is clearly concerned with a second link, in particular a drive-through link. Such a link is not to enter into operation before 2020 at the earliest, unless on the proposal of the Concessionaires. Moreover no link of any kind is to be financed or guaranteed by public funds: no public penny or kopeck is to be spent on a second link, any more than it had been on the first Fixed Link. Thus the context suggests that Clause 34.3 is concerned to maintain parity between the Fixed Link and any subsequent link and that it does not address the broader question of unfair competition as between the Fixed Link and existing cross-Channel services.

371. Nonetheless, the Claimants argue that Clause 34.3 should be interpreted in the broadest possible terms, so as to exclude public funding or guarantees to existing cross-Channel services competing with the Tunnel. In aid of this interpretation they invoke the actual language of Clause 34.3, the legitimate expectations of the Concessionaires based on the

Invitation to Promoters, and the unlikelihood that they would have committed £10 billion of private capital to a venture without appropriate guarantees against unfair competition or State aid.

372. In terms of the actual language, it is true that Clause 34.3 stipulates that “no link shall be financed” (“*aucune liaison ne soit financée*”) and that it avoids the phrases “Fixed Link”, “second link” or “new link”. Of course the existing cross-Channel ferry operations did not qualify as “fixed” or “new”, nor, since they preceded the Fixed Link by many decades could they be termed “second”. The change in language between the different paragraphs of Clause 34 must, in the Claimants’ view, carry weight.
373. In the Tribunal’s view there are compelling reasons for rejecting such an interpretation of Clause 34.3.
374. The first is linguistic. The equally authoritative French text of Clause 34 uses the term “*ouvrage*”. Thus the title to Clause 34, in the English “Exclusivity and Second Link”, in the French version is “*Extension éventuelle de l’ouvrage*”, and the term “*ouvrage*” recurs in Clauses 34.1 and 34.2. Although a cross-Channel ferry service might perhaps be described as a “link”, it is certainly not “*un ouvrage*”, nor is a subsidy to an existing ferry operator “*une extension*”.
375. Second, it is necessary to read Clause 34.3 in its context, which (as indicated by the title to Clause 34 in both languages) is that of protection for the Concessionaires against a second fixed link. There is no evidence that it was the purpose of Clause 34 to deal with the complex problem of competition and its regulation as between the Fixed Link and trans-Channel operators. Rather it was to ensure that the Concessionaires not be faced with a second link prematurely or, in a subsidised form, at all. The Fixed Link was to enjoy exclusivity until at least 2020, but exclusivity did not arise with regard to the ferry services. Any public subsidies having been denied to the Concessionaires, the Governments agreed not to allow a second link to be subsidised either, a stipulation which would endure for as long as the Concession did but which likewise had no relevance to cross-Channel services. On the face of it these were the purposes, and the only purposes, of Clause 34.

376. Third, it is doubtful whether the operations of a ferry company such as SeaFrance can be described as a “link”. If SeaFrance, why not Air France’s cargo flights between Paris and London? At any rate, there is no instance in any of the treaties and agreements, or in the Invitation to Promoters, where the cross-Channel ferry services are described as a “link”. This is not because they are not referred to: rather they are described in quite different, and differing, terms.<sup>286</sup>
377. Fourth, this is not because the competitive position of the Fixed Link *vis-à-vis* existing transport operators was ignored in the agreements providing for the Fixed Link. On the contrary, it was specifically referred to but in a manner indicating that no contractual guarantee was given. This can be seen clearly from a comparison between the varied references to the issue in the Invitation to Promoters and the sparse ones in the Treaty of Canterbury and the Concession Agreement.
378. The Invitation to Promoters made a number of references to the competitive cross-Channel transport situation and to principles of competition law. Relevant provisions included the following:
- Paragraph 16.74 recognised “that promoters may be concerned about the possibility of a second Fixed Link” and undertook that the matter “will be discussed in detail before the initial concession is granted.”
  - Paragraph 31.3 is significant. It provided as follows:

The Governments will not intervene in the conduct and operation of the Link. However, they may wish to have certain rights in the promoting company. They will ensure that it is not subject to any inequality of treatment likely to distort free competition between types of international transport, including maritime and air transport.
  - There were a large number of references to competition law rules, including special reference to European Community law: see paragraphs 01.2, 13.3, 16.9, 22.1, 22.2, 35.1.
  - Paragraph 35.13, dealing with fiscal arrangements, referred to the principle of “non-discrimination between users of competing modes of transport”, subject to

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<sup>286</sup> Various provisions refer to “transport which is in direct competition for cross-channel traffic”, “persons travelling from one State to the other by sea or air”, “the various means of crossing the Channel” and “other means of transport”.

special provision concerning duty-free sales (as to which see paragraphs 34.4-34.5).

379. By contrast the Treaty of Canterbury contains only two provisions dealing with equality of treatment with competing cross-Channel services. Article 9(2) requires the two States to “observe the principle of non-discrimination in relation to taxes on charges made to users of transport which is in direct competition for cross-channel traffic”. Article 9(4) commits them as far as possible “to allow to travellers through the Fixed Link from the mainland of one State to that of the other duty-free facilities which are comparable to those available to persons travelling from one State to the other by sea or air.”<sup>287</sup>
380. Likewise the Concession Agreement has only a few references to competition with other cross-Channel operators. Clause 12.3, dealing with Value Added Tax (“VAT”) treatment, refers to “the principle of equal fiscal treatment between the users of the various means of crossing the Channel.” Clause 15.3, dealing with costs of frontier controls, refers to “the principle of non-discrimination where relevant comparisons can be made with other means of transport.”
381. Two points are immediately obvious. First (as noted already), nowhere in the Treaty and Concession Agreement are the ferry services described as a “link”. Second, none of these provisions has any relevance to the financial aid to SeaFrance of which the Claimants complain.
382. Faced with the silence in the Treaty and Concession Agreement, the Claimants seek to make a virtue out of necessity. They stress the express provision in the Invitation to Promoters, in particular paragraph 31.3. This created, they argue, a legitimate expectation that the successful applicants would not suffer from discriminatory measures of support to their competitors, when all financial assistance or public guarantees were precluded to them for the duration of the Concession. This is a reason for interpreting Clause 34.3 in an extensive sense.
383. It is true, as noted above, that paragraph 31.3 of the Invitation to Promoters addressed the issue of equality of treatment between types of international transport. But in the

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<sup>287</sup> These provisions correspond with paras. 34.4-34.5 of the Invitation to Promoters, Bundle B, Tab 1.

Tribunal's view this makes it even less likely that the matter would have been dealt with by a side-wind in a provision of the Concession Agreement dealing with the Second Link. Paragraph 16.74 of the Invitation to Promoters expressly addressed the Second Link and invited further discussion. It is natural to regard Clause 34 of the Concession Agreement as the outcome of these discussions and as addressing that question alone.

384. Nor can there have been a legitimate expectation based on indications given in the Invitation to Promoters. The promoters must have known that their legal relationship with the Governments would be determined not by the Invitation but by the Concession Agreement to be negotiated.<sup>288</sup> Clause 41.1 of the Concession Agreement expressly so provides. That expectations may have been raised by the terms of the Invitation would have been a reason to insist on their inclusion in the Concession Agreement. But it is not a reason for reading into that Agreement stipulations which are notably absent from it.

385. Moreover the absence of contractual commitments to the Concessionaires did not mean that they lacked any remedy. European Union rules on State aid applied, and the Concession Agreement was clear as to other remedies available under national or European law. As the asymmetrical undertakings in Clauses 41.2 and 41.3 indicated, the Governments made no contractual promises to comply with European law (see paragraph 148 above). But they did allow for its enforcement in other forums, as Clause 41.4 made clear. If French Government assistance to SeaFrance constituted a prohibited measure of State aid it was always open to the Concessionaires to take action before the European Commission and eventually the Court of Justice of the European Communities. But two points must be made about these European remedies. First, even if successfully invoked they would not have given the Claimants the remedy they now seek, hundreds of millions of pounds in damages. The primary remedy for breach of State aid (where the aid is not authorised or justified before the Commission) is the return of the aid to the State, not the payment of damages to competitors. Second, when a third party, P & O, complained of subsidies to SeaFrance before the European Commission, the Claimants declined to intervene, as has been seen (see paragraph 139).

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<sup>288</sup> See para. 05.9 of the Invitation to Promoters, Bundle B, Tab 1, set out in para. 95 above.

386. It is accordingly unnecessary for the Tribunal to consider whether as a result of some or all of the measures complained of, SeaFrance was “financed with the support of public funds” within the meaning of Clause 34.3.

### **C. OTHER BASES OF CLAIM**

387. The Tribunal turns to consider the other three substantive bases for the SeaFrance claim. This can be done more briefly: if the express safeguard against public funding of competitors in Clause 34.3 did not extend to the ferry operators, that makes it *a priori* unlikely that general language in other provisions of the Concession Agreement could have produced an equivalent effect.

#### **1. Concession Agreement, Clause 2.1**

388. Clause 2.1 of the Concession Agreement has already been analysed in some detail in the context of the Sangatte claim (see paragraphs 295-302 above). The obligation to “take such steps ... as are necessary for the ... operation of the Fixed Link in accordance with this Agreement” is limited in a number of ways. First, it is focused on the Fixed Link itself, and not on the operations of competitors using other modes of transport. Second, it was intended to allow the Fixed Link to operate “in accordance with this Agreement”; it is not a substitute for express provisions dealing with such specific matters as State aid or equality of treatment between different operators, some of which are to be found elsewhere in the Agreement. Third, the freedom to operate the Fixed Link which Clause 2.1 seeks to ensure is not an absolute freedom: it is freedom “within the framework of national and Community laws” which, as Clause 41.4 makes clear, are to be enforced through existing forums. In particular the careful balances struck under national and European Community laws on matters such as competition policy can hardly be second-guessed by reference to a general obligation such as that contained in Clause 2.1. It may be that scenarios could be imagined in which one or both Governments in effect targeted Eurotunnel’s operations through specific measures with the effect of depriving it of much of the available market. Such hypothetical situations could conceivably raise issues under Clause 2.1. But the measures in question here – whether lawful or not under national or European Community laws – were not of this character. In the circumstances the assistance granted to SeaFrance was not a breach of Clause 2.1 of the Concession Agreement.

## **2. Treaty, Article 12(1); Concession Agreement, Clauses 2.1 and 12.1**

389. Similar considerations apply to the claim based on Article 12(1) of the Treaty and Clauses 2.1 and 12.1 of the Concession Agreement.

390. Article 12(1) provides:

The two Governments shall ensure that the Concessionaires are free, within the framework of national and Community laws, to determine their commercial policy, their tariffs and the type of service to be offered, during the term of the Concession.

This is given effect in Clauses 2.1 and 12.1 of the Concession Agreement. So far as relevant Clause 2.1 provides that:

The Principals shall ... ensure that the Concessionaires are free, within the framework of national and Community laws, to determine and carry out their commercial policy.

Clause 12.1 provides:

The Concessionaires will be free to determine their tariffs and commercial policy and the type of service to be offered. In particular, laws relating to control of prices and tariffs shall not apply to the prices and tariffs of the Fixed Link.

391. In principle the freedom to determine and implement a commercial policy in a market place does not entail or generate exclusive rights. Lawful measures taken by competitors, including State-owned enterprises, may impinge on the practical exercise of commercial freedoms but within very broad limits do not impair the freedom itself. If it is objected that the SeaFrance measures were not lawful under French or Community law, the answer is that in accordance with Clause 41.4 this was a matter for Eurotunnel to pursue in the available French and European forums.

392. It may be asked what precise obligations were incumbent upon France in terms of the treatment of SeaFrance? To make available equivalent opportunities for recapitalisation (something which France says was the case in any event)? To pay subsidies to Eurotunnel of equivalent amounts? Similar questions may be asked of SNCF. The general provisions concerning freedom of commercial policy in Clauses 2.1 and 12.1 are not apt to generate positive obligations of such a kind.

### **3. Concession Extension Agreement, Clause 7**

393. By the Concession Extension Agreement of 13 February 1998, Clause 7, the Governments undertook to facilitate the development of rail traffic between their two countries and to third countries. This stipulation was not directed at the issue of subsidies or financial aid to competitors. No more than the other provisions considered in this section can it be taken as a basis for the SeaFrance claim.

### **D. CONCLUSION**

394. Accordingly the SeaFrance claim fails in its entirety.

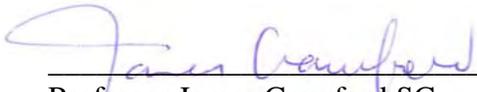
## CHAPTER VIII – DECISION

395. For these reasons, the Tribunal concludes:

- (1) That it has jurisdiction over the Sangatte claim in relation to both Respondents, and over the SeaFrance claim in relation to France, but only in so far as these claims are founded in a breach of obligations of the Respondents under the Concession Agreement or the Treaty of Canterbury as given effect by the Concession Agreement;
- (2) That in the circumstances of the clandestine migrant problem as it existed in the Calais region in the period from September 2000 until December 2002, it was incumbent on the Principals, acting through the IGC and otherwise, to maintain conditions of normal security and public order in and around the Coquelles terminal, that they failed to take appropriate steps in this regard, and thereby breached Clauses 2.1 and 27.7 of the Concession Agreement;
- (3) That the Claimants are entitled to recover the losses directly flowing from this breach, to be assessed if necessary in a separate phase of these proceedings taking into account their obligations under Clause 15.3 of the Concession Agreement;
- (4) That all other bases of claim presented by the Claimants fail and are dismissed.

396. For the reasons stated in his dissenting opinion, Lord Millett would confine the responsibility of the United Kingdom to the costs of its detention and removal requirements imposed on and collected from the Claimants.

Place of arbitration: Brussels, Belgium  
Dated: 30 January 2007

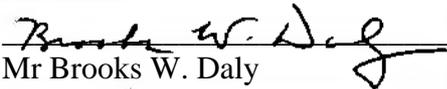
  
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Professor James Crawford SC  
Chairman

  
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Mr Jan Paulsson

  
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Mr L. Yves Fortier CC QC

  
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H.E. Judge Gilbert Guillaume

  
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The Rt. Hon. Lord Millett

  
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Mr Brooks W. Daly  
Registrar

## APPENDIX

### Key Provisions of the Concession Agreement

#### Clause 2: The Project and the Characteristics of the Fixed Link

2.1 Subject to and in accordance with the provisions of this Agreement, the Concessionaires shall jointly and severally have the right and the obligation to carry out the development, financing, construction and operation during the Concession Period of a Fixed Link under the English Channel between the Department of the Pas-de-Calais in France and the County of Kent in England. Subject as aforesaid, they shall do this at their own risk, without recourse to government funds or to government guarantees of a financial or commercial nature and regardless of whatever hazards may be encountered. The Principals shall, in a manner which they will endeavour to co-ordinate between them, adopt such legislative and regulatory measures, and take such steps, including approaches to international organisations, as are necessary for the development, financing, construction and operation of the Fixed Link in accordance with this Agreement and ensure that the Concessionaires are free, within the framework of national and Community laws, to determine and carry out their commercial policy.

Except as expressly permitted by this Agreement, by national and Community laws and by their international engagements including the Treaty, the Principals will not intervene in the conduct or operation of the Fixed Link. They will use reasonable endeavours to carry out the infrastructure necessary for a satisfactory flow of traffic, subject to statutory procedures.

#### Article 2: Objet et assiette de la Concession; caractéristiques des ouvrages

2.1 Dans les conditions prévues par la présente Concession, les Concessionnaires ont le droit et l'obligation d'assurer conjointement et solidairement la conception, le financement, la construction et l'exploitation, pendant la durée de la Concession, d'une Liaison Fixe à travers la Manche entre le département du Pas-de-Calais en France et le Comté de Kent en Grande-Bretagne. Les Concessionnaires agissent à leurs risques et périls et sans appel à des fonds gouvernementaux ou à des garanties gouvernementales de nature financière ou commerciale, quels que soient les aléas rencontrés durant la Concession. Les Concédants coordonnent autant que possible leur action afin d'adopter les dispositions législatives et réglementaires et de prendre toute mesure, y compris au niveau international, qui sont nécessaires à la conception, au financement, à la construction et l'exploitation de la Liaison Fixe par les Concessionnaires en conformité avec la Concession. Les deux Gouvernements garantissent aux Concessionnaires, dans le cadre des droits nationaux et communautaires, la liberté de fixer leurs politiques commerciales.

Sous réserve des dispositions de la présente Concession, des lois et règlements nationaux et communautaires ainsi que de leurs engagements internationaux, y compris le Traité, les Concédants n'interviennent pas dans la gestion ou dans l'exploitation de la Liaison Fixe. Ils prennent toutes les dispositions souhaitables pour réaliser, dans le respect des procédures en la matière, les infrastructures nécessaires à un écoulement satisfaisant du trafic.

**Clause 12: Commercial Policy and Tariffs**

12.1 The Concessionaires will be free to determine their tariffs and commercial policy and the type of service to be offered. In particular, laws relating to control of prices and tariffs shall not apply to the prices and tariffs of the Fixed Link.

**Clause 13: Public Order and Operating Rules**

13.1 Regulations relating to public order will be prescribed by the competent public bodies and authorities in accordance with national law.

**Clause 14: Maintenance of the Fixed Link and Continuity of Traffic**

14.1 The Fixed Link shall at all times be maintained and operated by the Concessionaires at their own cost in such a condition as is necessary for it to be used for the purpose for which it is designed.

14.2 The Concessionaires shall ensure that all necessary steps are taken to permit the steady flow and continuity of traffic through the Fixed Link and that traffic may pass through with reasonable safety and convenience.

**Article 12: Tarifs et politique commerciale**

12.1 Les Concessionnaires peuvent fixer librement leurs tarifs, leur politique commerciale et la consistance des services offerts. En particulier, les lois et règlements relatifs au contrôle des prix et des tarifs par les pouvoirs publics ne s'appliquent pas à la Liaison Fixe.

**Article 13: Mesures de police et d'exploitation**

13.1 Les mesures de police concernant l'ordre public sont prises par les autorités compétentes en vertu des législations nationales.

**Article 14: Entretien de l'ouvrage et continuité de circulation**

14.1 La Liaison Fixe est constamment entretenue en bon état et exploitée par les Concessionnaires à leurs frais, de façon à être adaptée en permanence à l'usage auquel elle est destinée.

14.2 Les Concessionnaires doivent mettre en œuvre tous les moyens nécessaires pour permettre la continuité et la fluidité de la circulation dans de bonnes conditions de sécurité et de commodité.

**Clause 15: Safety, Security and Frontier Controls**

15.1 The Concessionaires shall comply with any requirements which are made by either Principal or by the Intergovernmental Commission and which are binding on them under applicable laws and regulations concerning customs, immigration, security, police, public health, veterinary, phytosanitary, transport or road traffic controls, fire, ambulance or other emergency services, as far as they directly relate to the construction and operation of the Fixed Link.

15.2 The two Principals will arrange frontier controls in a way which reconciles so far as possible the rapid flow of traffic with the efficiency of the controls. In accordance with the relevant Directives of the Council of the European Communities, the Principal will take measures to extend bilateral co-operation on the facilitation of controls and administrative formalities. To this end, the frontier controls which are carried out within the boundaries of the Fixed Link will be juxtaposed near to the portals to the tunnels. This does not preclude the possibility of controls on through trains.

15.3 The cost of complying with the requirements of each Principal as specified in Clauses 15.1 and 15.2 shall be borne by the Concessionaires or the relevant public authorities according to the respective national practices of the Principal concerned and respecting the principle of non-discrimination where relevant comparisons can be made with other means of transport. As far as French frontier controls are concerned, the relevant installations will be placed at the disposal of the relevant public authorities free of charge.

**Article 15: Sécurité, sûreté, et contrôles frontaliers**

15.1 Les Concessionnaires, dans le cadre des lois et règlements en vigueur qui leur sont applicables, satisfont à toutes obligations édictées par les Gouvernements ou par la Commission intergouvernementale en ce qui concerne les contrôles de sûreté, de douane, de police, d'immigration, les contrôles sanitaires, phytosanitaires, routiers et vétérinaires ainsi que les services d'incendie, de secours et autres services d'urgence, dans la mesure où ils sont directement liés à la construction et à l'exploitation de la Liaison Fixe.

15.2 Les deux Gouvernements organisent les contrôles frontaliers de manière à concilier autant que possible la fluidité et la célérité du trafic avec l'efficacité de ces contrôles. Conformément aux directives communautaires, les Gouvernements facilitent les contrôles et formalités administratives aux frontières dans le cadre d'une coopération bilatérale. A cette fin, les contrôles qui doivent être effectués dans l'emprise de la Concession sont juxtaposés à l'entrée du tunnel. Cette disposition ne fait pas obstacle à l'exécution éventuelle des contrôles à bord des trains.

15.3 Les coûts engagés pour satisfaire aux obligations édictées par chaque Gouvernement en application des articles 15.1 et 15.2 sont pris en charge par les Concessionnaires ou par les administrations concernées conformément aux pratiques nationales respectives des deux États et en respectant le principe de non discrimination lorsque des comparaisons pertinentes peuvent être faites avec d'autres moyens de transport. En ce qui concerne les contrôles frontaliers français, ces installations sont mises gratuitement à la disposition des administrations auxquelles elles sont destinées.

**Clause 20: Joint and Several Liability of the Concessionaires to the Principals**

20.1 The obligations of the Concessionaires to the Principals under this Agreement shall be joint and several.

**Clause 21: Liability with respect to Users and third parties**

21.1 As between the Concessionaires and the Principals, the Concessionaires alone will bear any responsibility there may be for damage suffered by Users of the Fixed Link or by other third parties arising out of the construction or operation of the Fixed Link, without recourse to the Principals. The Concessionaires will hold the Principals fully protected and indemnified in respect of any such damage.

21.2 The provisions of Clause 21.1 shall not extend to any damage to the extent that it was caused by the serious default or recklessness of the Principals or either of them. In such a case the relevant Principal or Principals shall be liable to indemnify the Concessionaires to such extent.

21.3 The Principals and the Concessionaires shall promptly inform each other of any claim or proceedings or anticipated claim or proceedings against them and in respect of which they are entitled to be indemnified under this Clause, as soon as they become aware of the same. They shall give reasonable assistance to one another in the defence of such claims or proceedings.

21.4 No party shall permit any claim or proceedings referred to in this Clause to be settled without the prior written consent of the indemnifying parties.

**Article 20: Solidarité des Concessionnaires vis-à-vis des États**

20.1 Les Concessionnaires assument conjointement et solidairement vis-à-vis des États Concédants les engagements de la Concession.

**Article 21: Responsabilité à l'égard des Usagers et des tiers**

21.1 Les Concessionnaires sont seuls responsables vis-à-vis des Concédants des dommages causés aux Utilisateurs de la Liaison Fixe, ou à des tiers, qui pourraient résulter de sa construction ou de son exploitation. Ils ne peuvent exercer d'action contre les Concédants à raison de ces dommages. Ils doivent garantir les Concédants contre toute condamnation susceptible d'être prononcée à leur encontre pour de tels dommages.

21.2 Les dispositions du paragraphe 21.1 ne s'appliquent pas en ce qui concerne les dommages imputables à une faute grave et caractérisée des Concédants ou de l'un d'entre eux. Dans ce cas, la responsabilité du ou des Concédants peut être recherchée par les Concessionnaires.

21.3 Les Concédants et les Concessionnaires s'informent mutuellement, dès qu'ils en ont connaissance, de toute réclamation ou procédure diligentée à leur encontre, ou susceptible de l'être, et de nature à porter préjudice à l'autre partie. Ils s'accordent raisonnablement assistance dans leur défense contre de telles réclamations ou procédures.

21.4 Aucune réclamation ou procédure mentionnée dans le présent article ne peut faire l'objet d'une transaction sans l'accord préalable et écrit des parties qui pourraient être tenues à une indemnisation.

21.5 For the purposes of this Clause, references to the Principals shall be construed as references to all persons or bodies representing them or acting on their behalf including without limitation the Intergovernmental Commission and the Safety Authority, and the Principals shall procure that such other persons or bodies shall comply with this Clause as if they had been parties hereto.

**Clause 23: Defence and Security of the Fixed Link**

23.2 At the joint request of the Principals or at the request of either Principal in the circumstances contemplated by Article 6 of the Treaty, the Concessionaires shall take such action as may be required of them with respect to the defence and security of the Fixed Link.

**Clause 25: Interruption of Construction or Operation by order of the Principals**

25.1 The Principals undertake not to interrupt the construction or operation of the Fixed Link by the Concessionaires save on grounds of National Defence or in the case of a failure by the Concessionaires to satisfy or comply with the terms of, and as provided in, this Agreement or under the powers referred to in Article 6 of the Treaty. Nevertheless the Concessionaires shall, if so required by the Principals or either of them for any reason, interrupt such construction or operation, either in whole or in part. No such interruption shall be of a duration or extent greater than is necessary having regard to the circumstances giving rise to the requirement therefor.

21.5 Pour les besoins de cet article, l'expression « les Concédants » désigne toute personne ou organisme agissant pour le compte des Concédants, et notamment la Commission intergouvernementale et le Comité de sécurité.

**Article 23: Défense et sûreté de la Liaison Fixe**

23.2 A la demande des deux Gouvernements agissant conjointement ou à la demande d'un seul des Gouvernements dans les circonstances définies à l'article 6 du traité, les Concessionnaires prennent toutes mesures intéressant la défense et la sûreté de la Liaison Fixe.

**Article 25: Interruption de la construction ou de l'exploitation par ordre des Concédants**

25.1 Les Concédants s'engagent à ne pas interrompre la construction ou l'exploitation de la Liaison Fixe par les Concessionnaires sauf pour des raisons de Défense nationale ou en cas de carence des Concessionnaires dans les conditions fixées par la Concession, ou conformément aux dispositions de l'article 6 du Traité. Toutefois, si la demande leur en est faite par les Gouvernements ou l'un d'entre eux, les Concessionnaires doivent interrompre la construction ou l'exploitation, totalement ou partiellement, de la Liaison Fixe. La durée et la nature d'une telle interruption sont proportionnées à la gravité des motifs sur le fondement desquels elle est imposée.

25.2 In the case of any interruption on the grounds of Exceptional Circumstances or other event or circumstance referred to in Clause 24.1 or a failure by the Concessionaires to satisfy or comply with the terms of the Agreement, the Concessionaires will not be entitled to any compensation.

25.3 In the case of any interruption necessitated by reasons of National Defence, the Concessionaires will be eligible for compensation in accordance with the provisions of Article 15(3) of the Treaty.

25.4 Any interruption by the Principals otherwise than as referred to in Clauses 25.2 or 25.3 shall entitle the Concessionaires to compensation in accordance with the principles set out in Clause 38.2 except that no compensation shall be payable in respect of the first hour of any such interruption, up to a maximum of 12 hours in any calendar year.

#### **Clause 27: Relations with the Intergovernmental Commission**

27.1 In accordance with Article 10 of the Treaty, the Intergovernmental Commission is established to supervise, in the name and on behalf of the Principals, all matters concerning the construction and operation of the Fixed Link.

27.3 The Intergovernmental Commission shall act in the name of and on behalf of the two Principals. It shall endeavour to facilitate relations between the Principals and the Concessionaires.

27.4 The Intergovernmental Commission may, after consultation with the Concessionaires, draw up regulations applicable to the Fixed Link which shall be given full force and effect within national law. These regulations shall follow the principle of non-discrimination, subject to the necessity for harmonisation between the two States and to taking into consideration the specific characteristics of the Fixed Link.

25.2 Dans des cas de circonstances exceptionnelles ou autres événements ou circonstances visés à l'article 24.1, ou de manquement des Concessionnaires à leurs obligations au titre de la Concession, cette interruption n'ouvre pas droit à indemnité.

25.3 En cas d'interruption pour un motif de Défense nationale, les Concessionnaires peuvent prétendre à une indemnisation dans les conditions fixées à l'article 15.3 du Traité.

25.4 Toute interruption décidée par les Concédants pour d'autres raisons que celles prévues aux alinéas 2 et 3 donne droit à indemnisation en faveur des Concessionnaires dans les conditions fixées à l'article 38.2, la première heure d'interruption restant cependant à la charge des Concessionnaires dans la limite des douze heures par année calendaire.

#### **Article 27: Relations avec la Commission intergouvernementale**

27.1 Conformément à l'article 10 du Traité, la Commission intergouvernementale est chargée de superviser, au nom des Concédants, la construction et l'exploitation de la Liaison Fixe par les Concessionnaires.

27.3 La Commission intergouvernementale agit au nom et pour le compte des deux Concédants et s'efforce de faciliter les relations entre les Concédants et les Concessionnaires.

27.4 Après consultation des Concessionnaires, la Commission intergouvernementale peut élaborer des règlements applicables à la Liaison Fixe auxquels force exécutoire est donnée en droit interne. Ces règlements ne doivent pas revêtir un caractère discriminatoire, sous réserve des nécessités d'harmonisation entre les deux États et de la prise en considération des caractéristiques propres de la Liaison Fixe.

27.5 The Concessionaires shall comply with such directions of the Intergovernmental Commission and of the Safety Authority as are necessary for the performance of their functions, as provided in Clauses 27.1 and 27.2. Neither of the Principals nor the Intergovernmental Commission nor the Safety Authority shall act or take or carry out any decision in a manner which is inconsistent with the provisions of this Agreement.

27.7 The Principals shall ensure that in the performance of their functions the Intergovernmental Commission and the Safety Authority shall take the necessary steps to facilitate the implementation of this Agreement. The Principals, the Intergovernmental Commission and the Safety Authority shall give due consideration to the reasonable commercial objectives of the Concessionaires, including the avoidance of unnecessary costs and delays.

#### **Clause 34: Exclusivity and Second Link**

34.1 The Concessionaires recognise that, in due course, the construction of a drive through link may become technically and financially viable. They undertake as a result to present to the Principals between now and the year 2000 a proposal for a drive through link which shall be added to the first link when technical and economic conditions for realisation of such a link shall permit it and the increase of traffic shall justify it without undermining the expected return on the first link.

27.5 Les Concessionnaires doivent suivre les instructions données par la Commission intergouvernementale et le Comité de Sécurité dans l'exercice de leurs fonctions prévues à l'article 27.1 et 27.2 ci-dessus. Les Concédants, la Commission intergouvernementale et le Comité de sécurité ne prennent ni n'exécutent de décisions contraires à la présente Concession.

27.7 Les Concédants s'assurent que, dans l'exercice de leurs fonctions, la Commission intergouvernementale et le Comité de sécurité prennent les mesures appropriées pour faciliter l'exécution de la Concession. Les Concédants, la Commission intergouvernementale et le Comité de sécurité prennent en considération les préoccupations commerciales légitimes des Concessionnaires, notamment pour éviter des dépenses et des délais inutiles.

#### **Article 34: Extension éventuelle de l'ouvrage**

34.1 Les Concessionnaires reconnaissent que, le moment venu, la construction d'une liaison routière directe peut devenir techniquement et financièrement viable. Ils s'engagent en conséquence à présenter aux Concédants d'ici à l'an 2000 un projet de liaison routière continue sans rupture de charge qui devra compléter le premier ouvrage quand les conditions techniques et économiques de réalisation d'une telle liaison le permettront et l'augmentation du trafic le justifiera sans remettre en cause la rentabilité attendue du premier ouvrage.

34.2 The Principals undertake not to facilitate the construction of another fixed link whose operation would commence before the end of 2020. However, after 2010, and in the absence of agreement with the Concessionaires on the implementation of their proposal for the construction of a drive through link and as to its timetable, the Principals shall be free to issue a general invitation for the construction and operation of such a link. This new link shall not enter into operation before the end of 2020.

Nevertheless, before this date, in the event of demonstrable lack of quality in the service provided, to be judged according to objective criteria, the Concessionaires shall present to the Principals a proposal to remedy such lack of quality. This proposal may go so far as to involve the construction of a new link and is to be subject to the conditions provided in Clause 34.1.

34.3 The Principals agree that throughout the Concession Period no link shall be financed with the support of public funds, either directly or by the provision of government guarantees of a financial or commercial nature.

34.4 The Concessionaires shall offer, through the Fixed Link, a service adequate to meet demand as judged by objective criteria. They shall introduce improvements in the quality of the service within the structure of the Fixed Link subject to:

- conformity with the laws and regulations in force;
- the right for the Principals to refuse to incur any consequential public expenditure, relating, for example, to land infrastructure;
- the conditions provided in Clause 34.1.

34.2 Les Concédants s'engagent à ne pas faciliter la construction d'une autre liaison fixe dont l'exploitation commencerait avant 2020. Cependant, après 2010, et en l'absence d'accord avec les Concessionnaires sur la mise en œuvre de leur proposition de construction d'une liaison routière directe et sur son calendrier, les Gouvernements seront libres de lancer une consultation générale pour la construction et l'exploitation d'une telle liaison. Cette nouvelle liaison ne pourra entrer en exploitation qu'après 2020.

Toutefois, avant cette date, en cas d'insuffisance manifeste de la qualité du service rendu, à apprécier selon des critères objectifs, les Concessionnaires devront présenter aux Concédants un projet d'extension de l'ouvrage de nature à remédier à ces insuffisances. Cette extension pourra aller jusqu'à la réalisation d'une nouvelle liaison sous réserve du respect des conditions stipulées à l'article 34.1.

34.3 Les Gouvernements sont d'accord pour qu'aucune liaison ne soit financée avec le soutien de fonds publics, soit directement, soit par le biais de garanties financières et commerciales des États durant toute la durée de la Concession.

34.4 Les Concessionnaires offrent dans la Liaison Fixe un service adapté à la demande, apprécié selon des critères objectifs. Ils apportent les améliorations nécessaires à la capacité ou à la qualité des services rendus à l'intérieur des structures de la Liaison Fixe sous réserve:

- du respect des lois et règlements en vigueur;
- du droit des Concédants de refuser toutes dépenses publiques consécutives, relatives par exemple aux infrastructures terrestres;
- du respect des conditions stipulées au 34.1.

34.5 The period during which any Exceptional Circumstances or event or circumstance as referred to in Clause 24.1 seriously affects the operations of one or both Concessionaires for a period of at least three months shall extend by the same period the date of 2020 referred to in Clause 34.2.

## **CHAPTER V TERMINATION OF THE CONCESSION PERIOD**

### **Clause 36: Termination on Grounds of National Defence**

36.1 The Principals, or either of them, may terminate the construction and operation of the Fixed Link by the Concessionaires on the grounds of National Defence.

36.2 In the event of any such termination, the Concessionaires shall be eligible for compensation in accordance with the provisions of Article 15(3) of the Treaty.

### **Clause 37: Termination by reason of the Fault of the Concessionaires**

37.1 In the event of:

- particularly serious default in relation to obligations under this Agreement; or
- the Concessionaires or either of them ceasing to construct or operate the Fixed Link;

the Principals may give notice to the Concessionaires specifying the nature of the relevant circumstances and requiring the Concessionaires to remedy the same within a period of 3 months, or within such further period (not exceeding 6 months) as may be allowed by the Principals.

34.5 La durée d'une circonstance ou d'un événement au sens de l'article 24 affectant sérieusement l'exploitation d'un ou des Concessionnaires pour une période d'au moins trois mois prolongera d'autant la date limite de 2020 stipulée au 34.2 ci-dessus.

## **TITRE V FIN DE LA CONCESSION**

### **Article 36: Résiliation pour raisons de Défense nationale**

36.1 Les deux Concédants ou l'un d'entre eux peuvent mettre fin à la Concession pour des raisons de Défense nationale.

36.2 Dans ce cas, les Concessionnaires peuvent prétendre à une indemnisation dans les conditions fixées à l'article 15.3 du Traité.

### **Article 37: Déchéance des Concessionnaires**

37.1 En cas de:

- manquement d'une particulière gravité aux obligations nées de la Concession; ou
- cessation de la construction ou de l'exploitation de la Liaison Fixe;

les Concédants peuvent mettre en demeure les Concessionnaires. La mise en demeure précise la nature des griefs articulés à l'encontre des Concessionnaires et leur enjoint d'y porter remède dans un délai de trois mois, éventuellement prorogeable, sans que cette prorogation puisse excéder six mois.

This notice will be given at the same time to the Lenders (as defined in Clause 32) with a view to giving them the opportunity, should they so wish, to procure the remedy of the relevant circumstances.

37.2 During this period the Concessionaires shall remedy the specified circumstances.

37.3 If the circumstances are not remedied before the expiry of the relevant period, the Principals may thereupon terminate the Concession Period, subject to first notifying such Lenders and giving them the opportunity of exercising their right of substitution within 1 month in accordance with the procedure specified in Clause 32.1.

#### **Clause 38: Compensation for Termination**

38.1 The Principals undertake not to terminate the construction or operation of the Fixed Link other than in accordance with Clauses 29, 36 or 37. Any breach by a Principal of this obligation will give the Concessionaires a right to compensation.

38.2 Such compensation shall correspond to the aggregate net loss actually suffered by the Concessionaires which was at the date of such termination reasonably foreseeable as a direct consequence thereof. This will include both *damnum emergens* and *lucrum cessans*. Account will be taken of the mitigation of loss which the Concessionaires could have achieved by the taking of reasonable measures and the degree of responsibility of the Concessionaires (if any) for the events giving rise to such termination. The Concessionaires shall have no other rights in relation to such termination.

Cette mise en demeure est également notifiée aux Prêteurs tels que définis à l'article 32 en vue de leur permettre, s'ils y ont convenance, de remédier aux difficultés visées ci-dessus.

37.2 Dans ce délai, les Concessionnaires doivent porter remède aux griefs invoqués à leur encontre par les Concédants.

37.3 Si la mise en demeure reste sans effet, les Gouvernements peuvent résilier la Concession, à l'expiration du délai fixe ou de la période de prorogation éventuelle, sous réserve de notifier préalablement aux Prêteurs d'avoir à mettre en œuvre leur faculté de substitution dans le délai d'un mois selon la procédure visée à l'article 32.1.

#### **Article 38: Indemnisation en cas de résiliation**

38.1 Les deux Concédants s'engagent à ne pas mettre un terme à la Concession sauf dans les cas définis aux articles 29, 36 et 37. Tout manquement à cet engagement ouvre droit à une indemnité aux Concessionnaires.

38.2 Cette indemnité répare l'ensemble du préjudice direct et certain réellement subi par les Concessionnaires et imputable aux Concédants, dans la limite de ce qui pouvait être raisonnablement estimé à la date de résiliation, ce qui comprend à la fois le « *damnum emergens* » et le « *lucrum cessans* ». Il est tenu compte pour l'évaluation du préjudice de la part de responsabilité éventuelle des Concessionnaires dans les événements à l'origine de la résiliation et de l'atténuation des pertes qui aurait pu être obtenue d'une action diligente des Concessionnaires. Les Concessionnaires n'ont aucun autre droit à l'occasion d'une telle résiliation.

**CHAPTER VI  
DISPUTES, LAWS**

**TITRE VI  
RÈGLEMENT DES DIFFÉRENDS  
ET DROIT APPLICABLE**

**Clause 40: Settlement of Disputes**

**Article 40: Règlement des différends**

40.1 Any dispute between the Concessionaires or either of them and the Principals or either of them relating to this Agreement shall be submitted to arbitration in accordance with the provisions of Article 19 of the Treaty at the request of any party.

40.1 A la demande de l'une quelconque des parties, tout différend relatif à l'application de la Concession survenant entre les Concessionnaires ou l'un d'entre eux, et les Concédants ou l'un d'entre eux, doit être soumis à un tribunal arbitral conformément aux dispositions de l'article 19 du Traité.

40.2 Disputes between the Concessionaires relating to the interpretation or application of the Treaty shall be submitted to arbitration in accordance with Article 19 of the Treaty at the request of either of them.

40.2 Les différends entre les Concessionnaires relatifs à l'interprétation ou à l'application du Traité doivent, à la demande de l'un d'entre eux, être soumis à l'arbitrage, conformément aux dispositions de l'article 19 du Traité.

40.3 The arbitration referred to in this Clause will be conducted in accordance with the procedure specified in a Protocol or other agreement supplemental to the Treaty.

40.3 L'arbitrage visé dans le présent article est conduit selon la procédure définie dans un protocole ou autre accord additionnel au Traité.

40.4 In accordance with Article 19(6) of the Treaty, in order to resolve any disputes regarding the application of this Agreement, the relevant provisions of the Treaty and of this Agreement shall be applied. The rules of English law or the rules of the French law may, as appropriate, be applied when recourse to those rules is necessary for the implementation of particular obligations under English law or French law. In general, recourse may also be had to the relevant principles of international law and, if the parties in dispute agree, to the principles of equity.

40.4 Conformément à l'article 19.6 du Traité, pour régler les différends relatifs à la Concession il est fait application des dispositions pertinentes du Traité et de la Concession. Il peut, s'il y a lieu, être fait application des règles de droit français ou de droit anglais lorsque le recours à ces règles est commandé par l'exécution d'obligations spécifiques de droit français ou de droit anglais. Il peut, en outre, être fait application des principes pertinents du droit international et, si les parties en sont d'accord, du principe d'équité.

**Clause 41: Applicable Law**

**Article 41: Droit applicable**

41.1 The relationship between the Principals and the Concessionaires shall be governed by the provisions of the Treaty, as given effect to by this Agreement, and by the provisions of this Agreement.

41.1 Les relations entre les Concédants et les Concessionnaires sont soumises aux dispositions du Traité, mises en œuvre par la présente Concession, et à celles de la Concession.

41.2 The concessionaires undertake to comply with the laws in force from time to time in each of the two States, including Community law, to comply with those provisions of the Treaty, the supplementary Protocols and arrangements agreed pursuant to the Treaty which are applicable to them and to comply with all rules, regulations, directions and requirements binding on the Concessionaires of all relevant public bodies and authorities and all conditions relating thereto including, without limitation, those relating to the environment, safety and security.

41.3 The provisions of Clause 37 shall apply to those infringements of national or Community law which also constitute a breach of any provision of this Agreement other than Clause 41.2. As regards an infringement which is a breach of only clause 41.2, the provisions of Clause 37 shall apply only if the relevant infringement is of an extremely serious nature.

41.4 The implementation and enforcement of the laws in force from time to time in either State shall be subject to the jurisdiction of the courts of the relevant State or, where so permitted or available under national law, any other relevant forum.

41.5 The Concessionaires undertake not to take any action which may result in either State being in breach of its international obligations.

41.2 Les Concessionnaires s'engagent à respecter les législations et réglementations applicables à tout moment dans chacun des deux États, y compris le droit communautaire, les dispositions du Traité, les protocoles et les accords additionnels établis en application du Traité qui leur sont applicables et toutes les règles, directives et demandes de toutes autorités compétentes et toutes conditions auxquelles les autorisations auront été soumises, notamment en matière de sûreté, de sécurité et d'environnement.

41.3 Les dispositions de l'article 37 sont applicables à un manquement aux dispositions législatives et réglementaires nationales ou communautaires qui constituerait également une méconnaissance des engagements de la présente Concession. En ce qui concerne l'article 41.2, seule une très grave violation des dispositions législatives et réglementaires nationales ou communautaires pourra être sanctionnée par la déchéance.

41.4 Les litiges relatifs à l'application des législations nationales relèvent des tribunaux nationaux ou de toute autre instance éventuellement autorisée par les droits nationaux.

41.5 Les Concessionnaires s'engagent à n'entreprendre aucune action ayant pour effet un manquement de la part de l'un ou de l'autre État à ses obligations internationales.

**ANNEX I  
TO THE CONCESSION AGREEMENT  
GENERAL CHARACTERISTICS OF  
THE FIXED LINK**

**AI.4 *Frontier Controls***

AI.41 For road traffic the frontier controls shall be arranged on the principle of free exit. Accordingly procedures, in particular those relating to customs, immigration, police, veterinary and other services, will be carried out on the entry side of the tunnel: in France for traffic from France to Great Britain and in Great Britain for traffic from Great Britain to France.

...

AI.43 The frontier control authorities will provide attendance to enable full-time operation of the Fixed Link.

AI.44 Those parts of the terminals situated between the frontier controls and the tunnel portals will be restricted and access controlled by the Concessionaires and/or police authorities according to national practice. Other parts of the terminal areas may be the subject of a surveillance system, as directed by the Intergovernmental Commission. Incoming and outgoing traffic will be segregated in a way that is acceptable to the relevant authorities.

**ANNEXE 1  
CARACTERISTIQUES GÉNÉRALES  
DE LA LIAISON FIXE**

**AI.4 *Les contrôles frontaliers***

AI.41 Pour le trafic routier les contrôles frontaliers seront organisés selon le principe de la libre sortie. En conséquence, les formalités frontalières, notamment de douanes, de police et d'immigration et vétérinaires, seront effectuées sur le terminal d'entrée au tunnel: en France dans le sens France/Grande-Bretagne, en Grande-Bretagne dans le sens Grande-Bretagne/France.

...

AI.43 Les administrations chargées des contrôles frontaliers mettront en place les personnels et moyens nécessaires pour que la Liaison fonctionne de façon permanente.

AI.44 Les zones des installations terminales situées en aval des contrôles frontaliers seront d'accès réglementé et sous contrôle des concessionnaires et/ou des autorités de police suivant les usages nationaux. Les autres zones pourront être sous surveillance, selon ce qui sera prescrit par la Commission intergouvernementale. Toute possibilité de contact et de mélange entre les trafics de départ et d'arrivée sera interdite selon des dispositions agréées par les autorités compétentes.

1. **THE CHANNEL TUNNEL GROUP LTD.**

2. **FRANCE-MANCHE S.A.**

**and**

1. **UNITED KINGDOM**

2. **FRANCE**

**DISSENTING OPINION OF LORD MILLETT**

1. I am in entire agreement with the present Award save on one point only, on which I find myself reluctantly compelled to dissent. With one exception (United Kingdom removal requirements) I consider that the United Kingdom has no legal liability in respect of the Sangatte claim.

**1. Clause 2.1. of the Concession Agreement.**

2. We have held that the primary basis of liability is to be found in Clause 2.1. of the Concession Agreement. The obligation imposed by this Clause (“to take such steps as are necessary for the operation of the Fixed Link”) is a joint and several obligation of both Respondents and a breach may give rise to the liability of both or either of them. It will give rise to the liability of both where both fail to take a step which either of them could take; and to the individual liability of either one of them where it failed to take a step which only it could take. The Clause imposes a separate obligation on each Respondent to take whatever steps are necessary for the operation of the Fixed Link and are within its power and sphere of responsibility, and to do so by co-ordinating its actions with those of the other where necessary.

3. Neither Respondent is absolved from the obligation to take independent action on its own where it can do so without the assistance or co-operation of the other; nor is either Respondent under any obligation to take steps which are not necessary to enable the other to fulfil its own obligations under the Concession Agreement. I agree with the majority (para. 187) that nothing in the Concession Agreement makes either Respondent liable for the default of the other.

(a) The closure of the Sangatte Hostel

4. We have held that from September 2000 onwards the closure of the Sangatte Hostel (or at least the imposition of a curfew at night to prevent its occupants from leaving with intent to break into the Coquelles Terminal) was necessary for the operation of the Fixed Link, and that the failure to take either of these steps constituted a breach of Clause 2.1. of the Concession Agreement. The question is whether the United Kingdom bears any part of the responsibility for this failure.

5. In my opinion the question must be answered in the negative. The closure (or securing) of the Sangatte Hostel was something which the French Government, and only the French Government, could do; and for which the assistance or co-operation of the United Kingdom was not needed.

6. It is true that the United Kingdom's eventual offer to permit many of the remaining occupants of the Hostel entry into the United Kingdom facilitated its closure by making it politically easier for the French Government to accept the consequences of closure. But Clause 2.1. cannot possibly be treated as imposing an

obligation on the United Kingdom to make such an offer or as making the United Kingdom liable for its failure to do so earlier. Even if the French Government had made this a condition of closure (as to which there is no evidence), by acceding to its demand the United Kingdom would not be co-operating in closing the Hostel but merely paying the price demanded by the French Government for doing so. If the French Government had demanded, not the admission of immigrants into the United Kingdom, but payment of an appropriate sum of money to defray the costs of removing them elsewhere, Clause 2(1) would not impose an obligation on the United Kingdom to make the payment. Failure by one Respondent to comply with a requirement imposed unilaterally by the other as a condition of fulfilling its obligations under Clause 2.1. does not in itself amount to a breach of the Clause unless compliance is objectively necessary (and not merely politically convenient) to enable the other Respondent to act. Demanding something as a precondition for action does not make it “necessary” within the meaning of Clause 2.1.

7. While, therefore, it is not untrue to say that it was through the co-operative action of both Respondents that the problem was eventually solved, the statement is potentially misleading. The action which the United Kingdom took (in allowing a number of the migrants in the Sangatte Hostel to enter the United Kingdom) was not a step which the United Kingdom was obliged to take, and its failure to do so earlier was not a breach of the Concession Agreement.

8. In my opinion there was nothing which the United Kingdom was required (and failed) to do in relation to the Sangatte Hostel in order to comply with its obligations under Clause 2.1.

(b) The failure to protect the Terminal against mass incursions.

9. We have rejected the Respondents' contention that the Claimants were responsible for the defence and security of the Coquelles Terminal. This was based on a miscategorisation of what took place. The Claimants, like any other commercial undertaking (or householder), were responsible for the protection of the Fixed Link from the normal risk of occasional, sporadic and individual incursions into and damage to their property, the kind of normal risk against which they can insure. But what took place was not of this character; it represented a major breakdown of public order. The provisions of the Concession Agreement on which the Respondents relied do not make the Claimants responsible for the maintenance of public order or for securing their property against mass incursions on the scale that occurred.

10. I agree with the view of the majority (para. 319) that the overall responsibility for the maintenance of public order and the security of the Fixed Link was shared by both Respondents. But I am unable to accept their view that their responsibility was undivided. It was nowhere their joint responsibility. The maintenance of public order, like the defence of the realm, is an exercise of sovereign power and is the sole responsibility of the state within whose territory it falls to be exercised. The Respondents shared responsibility for maintaining public order, but they were not jointly responsible for the security of the entire Link from one end to the other. Each was separately and alone responsible for public order within its own territory, the United Kingdom in Kent and France in the Pas de Calais. Insofar as the security of the Fixed Link was compromised by a failure to maintain public order, liability must rest

exclusively with the Respondent responsible for (and alone capable of maintaining) public order in the territory concerned. In the case of the Coquelles Terminal that was France, which did not need the co-operation or assistance of the United Kingdom in order to comply with its obligations under Clause 2.1. of the Concession Agreement.

(c) Summary

11. The United Kingdom had no power to close the Sangatte Hostel or prevent clandestine migrants from leaving it at night in order to break into the Coquelles Terminal; and it was not responsible for the maintenance of public order in the Pas de Calais. The failure to take the necessary steps in either respect is not attributable to the United Kingdom, which accordingly was not in breach of its obligations under Clause 2.1. of the Concession Agreement.

**2. Clause 27 of the Concession Agreement**

12. The Intergovernmental Commission (“the IGC”) was established by Clause 27.1 of the Concession Agreement pursuant to Article 10 of the Treaty, but it was not made a party to the Concession Agreement. It owed no contractual obligations of its own to the Claimants and had no operational responsibilities. Its function was “to supervise, in the name and on behalf of the [Respondents] all matters concerning the.....operation of the Fixed Link.” The closure of the Sangatte Hostel and the protection of the Coquelles terminal from mass incursions were not its responsibility.

13. The IGC was established as a mechanism to enable the Respondents to facilitate the exercise of their rights and the performance of their

obligations under the Concession Agreement where they were in agreement on what needed to be done. It was unable to act where the Respondents were not in agreement; but where they were it was to act "in the name and on behalf" of both Respondents: Clause 27.3. In such a case then, in accordance with the principle *respondeat superior*, its acts and omissions are attributable to both Respondents, though it does not follow that they necessarily engage the joint liability of both. Whether they do or not depends on whether the particular acts or omissions, if committed by the Respondents directly instead of by the IGC on their behalf, would constitute a breach of the Concession Agreement by both Respondents or by only one of them.

14. Clause 27.7 by contrast imposes a direct obligation on the Respondents themselves to ensure that the IGC should "take the necessary steps to facilitate the implementation of" the Concession Agreement.

15. Although not in breach of Clause 2.1. of the Concession Agreement by failing to take any steps necessary for the operation of the Fixed Link, the United Kingdom cannot escape criticism. Like France, it misconstrued the Concession Agreement and together with France must be taken to have authorised the IGC to write the letter of 25 September. Its conduct was feeble in the extreme. It ought not to have supported the French Government's position that the security of the Coquelles Terminal was the responsibility of the Claimants. It ought to have urged the French Government, either directly (as in its belated but unsuccessful requests to close the Sangatte Hostel) or indirectly through the IGC to act more decisively to prevent the mass incursions into the Coquelles Terminal. Whether, had it done so, it would have had any effect is a matter of pure speculation. The question is whether these failings

have the effect of making the United Kingdom jointly liable with France, either vicariously under Clause 27.3 or directly under Clause 27.7, for breaches of the Concession Agreement for which France was solely responsible. In my opinion both principle and justice require this question to be answered in the negative.

(a) Clause 27.3. (vicarious responsibility)

16. It must be acknowledged that the IGC was wrong to write the letter dated 25 September 2000. It was wrong to hold the Claimants responsible for the defence and security of the Coquelles Terminal and to exonerate the French Government. The maintenance of public order in the Pas de Calais and the protection of the Coquelles Terminals against mass incursions on the scale that took place were not the responsibility of the Claimants. But neither were they the responsibility of the United Kingdom. The misunderstanding of the legal position was shared by both Respondents and caused them to authorise IGC to write the letter, for which they must take full responsibility. But it is not a breach of contract for a party to misconstrue it. The breach, if any, occurs only if and when its misunderstanding of its own responsibilities leads it to fail to perform a contractual obligation. The Respondents' conduct in authorising the IGC to write the letter was not, therefore, itself a breach of the Concession Agreement; the most that can be said is that it may have given some encouragement to France to know that its understanding of the legal position was shared by the United Kingdom. The breach of the Concession Agreement occurred when, consistently with the understanding of the legal position which it shared with the United Kingdom, France (but not the United Kingdom) failed to comply with its obligations under Clause 2.1.

(b). Clause 27.7. (direct responsibility).

17. There remains the obligation placed on both Respondents by Clause 27.7 of the Concession Agreement to “ensure that.....the IGC .....shall take the necessary steps to facilitate the implementation of this Agreement.” This is a joint obligation of both Respondents, but again it does not follow that both Respondents are jointly or equally liable for the loss occasioned by any breach. That depends on the nature of the breach.

18. In the present context the steps in question can only be the steps required by Clause 2.1., that is to say the closure or securing of the Sangatte Hostel and the maintenance of public order in the Pas de Calais, for both of which France was responsible and the United Kingdom was not. For present purposes Clause 27.7., therefore, adds nothing to Clause 2.1. Each of them imposes obligations on both Respondents to take action, in the one case directly and in the other through the medium of the IGC; and in both cases the breach consisted of the failure of France to take the necessary action.

**3. Primary and secondary liability.**

19. Although the relevant obligations are the joint obligations of both Respondents, this is not a case where they have been guilty of the same internationally wrongful act (see Article 47 of the ILC Articles on State Responsibility and para. 173 above). France’s wrongful act lay in its failure to take the steps which were necessary

for the operation of the Fixed Link. The most that can be said against the United Kingdom is that it wrongly supported France's misreading of its obligations and failed to do more to induce France to discharge them. That was not something which it had undertaken to do and did not constitute a breach of the Concession Agreement. But even if it did, it would not be the same wrong but a wrong of a very different order.

20. It is not uncommon, where two parties are subject, either jointly or severally, to the same (or as in the present case different) obligations, for the liability of one to be a primary liability and that of the other to be secondary. In such a case justice demands that as between them the liability is the liability of the former only. This is certainly the rule of the common law, and I have no reason to suppose that the civil law is different. The most obvious example is that of debtor and guarantor, but the principle extends beyond this. It applies whenever there is a primary and a secondary obligation, so that as between the obligors the obligation is the obligation of one and not of both. Should the party secondarily liable be compelled to pay, he would be entitled to be reimbursed by the party primarily liable. As we have observed, where both are nation states which are before the Tribunal and there is no doubt of the ability and willingness of the party primarily liable to meet an award, there is no point in imposing liability on the party secondarily liable with a right of full recourse to the other.

21. France was alone capable of closing or securing the Sangatte Hostel and maintaining public order in the Pas de Calais. Its failure to do so was a breach of the Concession Agreement. The United Kingdom was not responsible for France's failure to discharge its obligations, nor had it guaranteed their performance by France. But even if it had done so its responsibility would be secondary to that of

France, so that as between them the liability to compensate the Claimants ought to be borne wholly by France.

22. The present case is *a fortiori*. The United Kingdom cannot be in a worse position than if it had actually guaranteed the performance of those obligations by France. Its failings should not expose the United Kingdom to liability in damages, thereby reducing the amount of the compensation payable by France. This would transfer part of the liability in damages from the party actually responsible to a party which, however wrongfully, failed to do more to get the other to discharge its contractual obligations.

23. The key proposition on which the majority base their finding against the United Kingdom is that it did not “do everything within its power to bring an unsatisfactory situation promptly to an end” (see para. 318 above). This is, with respect, an abbreviated version of the truth, omitting as it does a crucial qualification. The true position is that the United Kingdom did not do everything within its power to bring an unsatisfactory situation promptly to an end *by getting France to perform its obligations*.

24. It is the omission of the words which I have emphasised which leads the majority to take the view that holding both Respondents liable is not inequitable *vis-vis* the United Kingdom. But the injustice does not lie in holding the United Kingdom liable to the Claimants, possibly in a very small amount. It lies in reducing the liability of France to any extent. Whatever the failings of the United

Kingdom, ultimately the cause of the United Kingdom's supposed liability is that France failed to discharge its obligations under the Concession Agreement.

25. The reasoning of the majority appears to be as follows: the IGC was more than a mere conduit pipe; it was a joint organ with its own affirmative responsibilities which adopted a wrong position for the consequences of which the Respondents are both liable as members. With respect, there are two false steps in this chain of reasoning. First, it makes the elementary mistake of equating responsibility (which is a question of fact) with liability (which is a question of law). As I have observed above, the IGC was not a party to the Concession Agreement and owed no contractual obligations to the Claimants. It could not itself possibly be under any legal liability to them. This is not, therefore, a case where an international organ has committed an international wrong for which its members may be liable by virtue of their membership. It is a true case of vicarious liability, where the acts and omissions (*not* the liability) of the agent is attributed to his principals.

26. Secondly, the only consequence (if any) of the IGC's taking a false position was that France failed to discharge its obligations under the Concession Agreement. Even if it were established that France would have honoured its obligations had the United Kingdom not supported its position, this would not diminish France's liability nor establish that of the United Kingdom.

#### **4. Procedure**

27. I understand that the majority consider that this issue should be the subject of a further hearing on quantum. This is wrong in principle. The incidence of liability as between several obligors is a question of liability not quantum. It might be right to delay the determination of the issue to the hearing on quantum if it depended on questions of causation, but in the present case it does not. It does not depend on weighing relative degrees of fault or the relative contribution of each Respondent to the cause of the loss. It depends on a proper analysis of the relationship of the Respondents and the nature of the obligation undertaken by each, and in particular whether it is a primary or a secondary obligation; and this is a question which falls to be determined as a question of liability. It is no defence for France to say that it would have complied with its obligations if only the United Kingdom had asked it to do so; nor, even if true (which is highly doubtful), would it go to reduce the extent of France's liability.

28. Practical considerations reinforce the view that the incidence of liability should be dealt with as part of the hearing on liability and not be left to a further hearing on quantum. The quantification of damages attributable to the mass incursions is likely to be difficult and may well require not only a further and more detailed enquiry into the facts, but expert evidence. It cannot be right to compel the United Kingdom to incur the considerable costs of attending and contesting such a hearing when, as a matter of principle, its liability is secondary to that of France and carries with it no liability to contribute to the payment of damages.

29. There can be no question of a determination of this question at the present stage being *ultra petita*. The Claimants seek damages against both Respondents jointly or either of them individually. France denies liability; while the United Kingdom's position is that, even if France is liable (which it denies) at least it is not. It is clearly open to the Tribunal to uphold both the Claimants' case against France and the United Kingdom's denial of its own liability. Moreover, we have dealt with joint and several liability in the present award; one would expect the incidence of liability as between the two Respondents to be dealt with at the same time. To hold both of them jointly liable without dealing with the incidence of liability as between themselves would give the wrong (and a surprising) impression.

#### **5. The United Kingdom's Removal Requirements**

30. I agree with the majority that this is best treated as a head of damage referable to the breaches of the joint obligations with which the Sangatte claim is concerned, but this does not mean that France is liable to any extent. It is a head of damage for which the United Kingdom was solely responsible. Clauses 2.1. and 27 of the Concession Agreement impose joint obligations on both Respondents, but as I have observed above it does not follow that a breach of a joint obligation must be attributed to both. There is nothing in the Concession Agreement to make either Respondent liable for a default which is solely attributable to the other. Just as, in my view, the failure to close the Sangatte Hostel or maintain public order in the Pas de Calais was a breach of the Concession Agreement for which France was solely responsible and which does not engage the liability of the United Kingdom, so the imposition by the United Kingdom of removal requirements was a breach for which

the United Kingdom was solely responsible and which does not engage the liability of France.

31. To this extent, but no further, I would hold the UK liable, and solely liable, in damages.

Millett