PORTUGAL

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Part I

Question 1
Portuguese taxpayers may seek greater legal certainty by requesting (general) tax rulings ("*informações vinculativas*") and tax contracts ("*contratos fiscais*"). Moreover, particularly with regard to transfer pricing, taxpayers may also resort to Advance Pricing Agreements ("*acordos prévios de preços de transferência*"). These three mechanisms bind the tax authorities, under certain conditions. Advance Pricing Agreements play the main role when it comes to granting legal certainty in the context of transfer pricing.

Regarding the first of the abovementioned legal mechanisms, tax rulings provided in accordance with article 68 of the Portuguese General Tax Law ("*Lei Geral Tributária*") may address any of a taxpayer's tax issue, hence their general nature. The request may be presented by any taxpayer (self-interest), other stakeholders or their legal representatives (lawyers, solicitors, chartered accountants or any entities entitled to exercise the tax advice on the tax status of their costumers duly identified), electronically and in accordance with an official form.

The tax ruling request shall indicate the facts and assumptions on which the ruling is to be based on and should also be accompanied by a proposed legal

* Replied to questions 1 to 10.
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** Replied to question 13 and 14.

interpretation. Moreover, it shall contain all the necessary information and documentation for the tax authorities to decide. After submitting the tax ruling request the taxpayer is legally bound to cooperate with any further requests for clarification. If the information or documentation provided is deemed insufficient, the request may be summarily archived.

Moreover, Portugal transposed, in August 2017, Council Directive (EU) 2015/2376 amending Directive 2011/16/EU ("DAC 1") as regards mandatory automatic exchange of information in the field of taxation ("DAC 3"; Directive on Administrative Cooperation), particularly regarding tax rulings and APAs, and Council Directive (EU) 2016/881 of 25 May 2016, amending DAC 1 as regards mandatory exchange of automatic exchange of information in the field of taxation ("DAC 4"), particularly regarding Country-by-Country Reporting, consequently introducing a number of changes to the tax rulings regime.

Taxpayer requests for a tax ruling that is covered by DAC 3, namely tax rulings with a cross-border element, shall have all the elements necessary for the Portuguese tax authorities, on the one hand, to evaluate and analyze it, and on the other hand, to be able to exchange and transfer that information to other Member States (as well as other covered jurisdictions, such as other Contracting States in Double Tax Conventions entered into by Portugal and jurisdictions participating in the Multilateral Convention on Mutual Assistance in Tax Matters, as amended by the 2010 Protocol, which entered into force in Portugal in 2015, or any similar exchange of information and administrative cooperation framework). In addition, taxpayers must notify the Portuguese tax authorities of any change in the elements that were initially communicated and that are relevant for the purpose of mandatory and automatic exchange of information.

It is also interesting to mention that since the tax rulings bind the tax authorities, they cannot act differently by reference to the content of a previously issued tax ruling, except in compliance with a court decision.

In this sense, if the tax authorities act in opposition to the tax ruling, such action would be deemed illegal.

Nevertheless, the tax ruling may be revoked by the tax authorities after one year and is inapplicable if the facts and circumstances or legal provisions are altered in the future and, in any case, tax rulings shall automatically expire four years after they are issued, unless the taxpayer requests their renewal. This automatic expiration date was introduced in August 2017 and it is still unclear how the renewal procedure would develop but, presumably, it would involve a reassessment of the underlying facts and circumstance and the legal aspects.

Moreover, it is particularly unclear what is the status of previously issued tax rulings, due i) to the expiration provision referring to the date the tax rulings were issued, ii) to the lack of a transitional period, and iii) to the generally applicable rules regarding temporal application of tax procedural law ("*aplicação da lei no tempo*") that mandate the immediate application of such procedural provisions with due to regard to rights and interests acquired by the taxpayers (rights and interests that add another layer of complexity to the question).

In any case, the taxpayers may, for example, present an appeal of a tax assessment made in accordance with a tax ruling; i.e. tax rulings do not have a binding nature with respect to the taxpayer, but rather, only, with respect to the tax authorities..

According to domestic tax law, this type of tax rulings ("*informações vinculativas*") should be made publicly available within 30 days counting from of the day they are issued. However, the current Director of the tax authorities has publicly acknowledged that does not always happen, yet. Similarly, the Secretary of State for Fiscal Affairs' ministerial order ("*Despacho*") no. 7689/2017, published on the Official Public Journal ("*Diário da República*") of 1 September 2017, instructs the Portuguese tax authorities to make an inventory of unpublished tax rulings ("*informações vinculativas*"), to hasten their publication, and also to assure that future tax rulings are published in accordance with the law, insofar as the matters involved are dissimilar to previously published tax rulings.

Concerning the second of the abovementioned legal mechanisms, tax contracts ("*contratos fiscais*") concluded between the tax authorities and taxpayers may also grant a certain level of legal certainty since they result from an agreement in which the tax authorities typically grant an advantage or explain the level of incidence of a particular kind of tax or tax regime. However, the subject and content of this kind of agreements is necessarily based on legal provisions. Tax contracts are regulated in article 37 of the General Portuguese Tax Law, but the provisions about the benefits granted by this kind of legal instrument are included in the Tax Benefits Statute ("*Estatuto dos Benefícios Fiscais*").

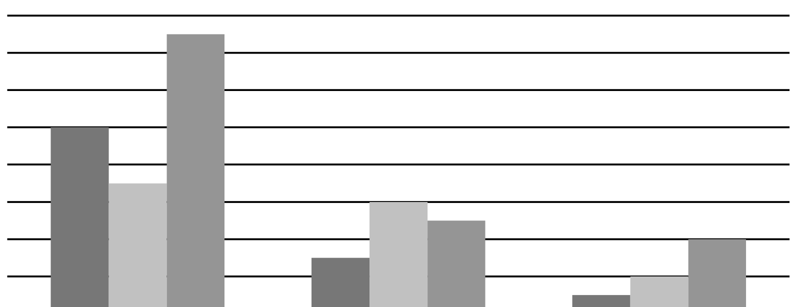
If the tax contract is unrelated to fiscal benefits, they still need to be based on an authorizing legal provision and they have to be in accordance with the following legal principles: legality, equality, good faith and the non-disposableness of tax credits by the tax authorities.

This type of rulings, in the form of tax contracts, are not expressly mentioned in Portuguese domestic tax law as being covered by the mandatory and automatic exchange of information provisions, but it may construed that some tax contracts may meet the substantial criteria of DAC 3.

About the third of the abovementioned legal mechanisms, Advance Pricing Agreements ("APA") were introduced in fiscal year 2008. They are generally regulated in article 138 of the Portuguese Corporate Income Tax Code ("*Código do Imposto sobre o Rendimento das Pessoas Colectivas*") and regulated in further detail in the Ordinance ("*Portaria*") no. 620-A/2008, of July 16th,, which is a hierarchically inferior legal instrument in relation to the CIT Code.

An APA may be unilateral, bilateral or multilateral, depending on how many States (and tax authorities) are involved in the process, and it may not be concluded for a period longer than 3 years. However, the taxpayer may request a renewal until 6 months before the agreed end for the APA. The renewal is subject to a reassessment based on the procedure applicable to the first request. The Portuguese Ministry of Finance and the tax authorities have published (on June 2017) the 2016 report regarding tax authorities' activities on the fight against fraud and tax evasion. Therein is stated that, from the tax authorities' perspective, APAs increase legal certainty not only for the taxpayer, but also on tax revenue, are a positive factor on attracting foreign investment, reduce tax litigation, increase mutual trust and proximity between parties, decrease compliance costs, and mitigate international double taxation risks.

The following figure, based on official statistics compiled by the Portuguese Tax Authorities, indicates the number of APAs that were under consideration, in force or expired between 2014 and 2016:



	Number of APAs under consideration at the end of the year	Number of APAs in force at the end of the year	Number of expired APAs during the year
2014	10	3	1
2015	7	6	2
2016	15	5	4

Figure: Portuguese Tax Authorities' Statistics regarding Advance Pricing Agreements between 2014 and 2016

Finally, there are no specific requirements to be eligible for advance certainty in the context of any of the abovementioned mechanisms. Nevertheless, regarding APAs, since transfer pricing regulations only targets taxable persons that are linked by "special relations", namely, as a general principle, entities or persons that have the power of exercising, directly or indirectly, a significant influence in the management decisions of another entity, in our understanding, only these persons would be eligible to request APAs. Facilitating the assessment about the existence of "special relations", article 63 of the Corporate Income Tax Code sets various presumptions where special relations are deemed to exist. Insofar as the abovementioned principle is not met, it may be argued that these presumptions are rebuttable according to article 73 of the Portuguese General Tax Law.

Question 2

Portuguese domestic tax law provides that the Portuguese tax authorities may verify or check the facts mentioned in an APA request, which can occur *ex-ante*, before the APA is concluded (article 7 of Ordinance no. 620-A/2008), or *ex-post*, after the APA is concluded, namely by way of a tax audit or the revision of the APA (article 13 and 14 of Ordinance no. 620-A/2008).

With regard to *ex-ante* control within the framework of the APA, the Portuguese tax authorities, namely the Large Taxpayers Unit ("*Unidade dos Grandes Contribuintes*"), upon receiving the taxpayer's request for an APA, analyses and verifies the facts mentioned therein and documentation provided with the APA request, without prejudice to seeking further information and clarifications.

If taxpayer actions do not delay the procedure and the APA is unilateral, the tax authorities should decide within 180 days after the formal acceptance of the request. However, if the APA is bilateral or multilateral, domestic tax law requires a mutual agreement procedure to be initiated and the deadline is extended to 360 days. According to the Portuguese tax authorities, the first (ever) bilateral APA involving Portugal was concluded in 2016 (see our answer to Question 6 for statistics on APAs).

Concerning *ex-post* monitoring within the framework of the APA, the tax authorities may engage in tax audits to analyze and confirm data and information supplied by the taxpayer, verify the compliance with all the reporting obligations related to the APA and confirm that the facts and circumstances are still valid and coherent with the transfer pricing methods that are applied. The audit may result in the reassessment or the termination of the APA.

The general provisions regarding tax audits (article 63 of the Portuguese General Tax Law and special regulations regarding tax audits ("*Regime Complementar do Procedimento da Inspecção Tributária*") are applicable to tax audits on transfer pricing.

One important limitation on general tax audits lies in the non-repeatability of tax audits. As a rule Portuguese domestic tax law disallows multiple tax audits regarding the same scope (the same taxpayer, the same tax, the same amount, and the same taxable period), unless new facts arise after the conclusion of the tax audit. However, the abovementioned special provisions regarding APAs provide that said limitation does not apply when the tax audit is performed in the context of an APA audit, thus, in theory, providing greater freedom to the tax authorities. Nevertheless, in our thinking, one should question whether this special (non-limiting) provision actually prevails over the general (limiting) provision, as it normally would. It may be argued that because the Ordinance is a hierarchically inferior legal instrument *vis-à-vis* the Portuguese General Tax Law, such removal of the limitation is unconstitutional pursuant to article 112 the Portuguese Constitution.

We should further remark that the taxpayer may also request a tax audit, in accordance with article 47 of the Portuguese General Tax Code and other special regulations (Law-Decree no. 6/99, from 8th of January, "*Regime Especial de Inspeção por Iniciativa do Sujeito Passivo*"). In such case, if the audit is concluded, it may not be reopened based on facts that occurred during the time and within the scope under analysis.

Question 3

There are currently no special provisions that expressly provide that the tax authorities must verify the treatment given to a particular payment or transaction by the other country (where the other related entity is deemed to be a tax resident), namely in the context of transfer pricing.

However, it may be argued that the tax authorities ought to inquire into the tax treatment granted in the other country to the transfer pricing transaction under analysis based on the inquisitorial principle ("*Princípio do Inquisitório*") and the availability of exchange of information and assistance mechanisms.

Within the Directive on Administrative Cooperation ("DAC 2") framework, the Portuguese tax authorities may spontaneously inform tax authorities from other Member States regarding tax information, namely information related to transfer pricing and unilateral APAs. They may also request tax information that may be relevant for the auditing of transfer pricing or APAs. Similar frameworks exist in several Double Tax Conventions ("DTCs") or Tax Information Exchange Agreements ("TIEAs"), as well as the Multilateral Convention on Mutual Assistance in Tax Matters, as amended by the 2010 Protocol, which entered into force in Portugal in 2015.

Question 4

Tax rulings, of a general nature, bind both the tax authorities and the taxpayer but it concedes the taxpayer the ability to challenge a non-favorable decision. Therefore and as already mentioned, while the tax authorities cannot act differently by reference to the content of a previously granted tax ruling, except in compliance with a court decision, the taxpayer may, for example, appeal a tax assessment made in accordance with the tax ruling. If the tax authorities deviate from the tax ruling, such action would be illegal and the tax authorities' act would be annullable by a tax court. Nevertheless, the tax ruling may be revoked by the tax authorities after one year and is inapplicable if the facts and circumstances or legal provisions are altered in the future.

An APA binds the tax authorities insofar as there are neither significant changes to the applicable tax law, nor in the economic and operational circumstances, and other facts and assumptions underlying the APA. In our view, it is unclear, for instance, if significant changes or additions to the OECD Transfer Pricing Guidelines would unbind the tax authorities or give legitimate cause to resolve the APA. However, while the Transfer Pricing Guidelines may be relied on (and are used by both tax authorities and tax courts) as an auxiliary basis for interpretation, they are not considered hard law.

An APA may cease to apply for other reasons, namely by decision of the tax authorities, if (i) the terms and declaratory obligations related of the APA are not complied with or (ii) the taxpayer delivered erroneous data, or omitted or concealed relevant information or made false declarations.

An APA may yet cease to apply before the determined deadline (maximum three years) if the taxpayer fails to deliver to the tax authorities a yearly report regarding the application of the agreement. The content of the report and additional documentation developed and kept by the taxpayer shall allow the tax authorities to monitor and audit the compliance with the APA.

Question 5

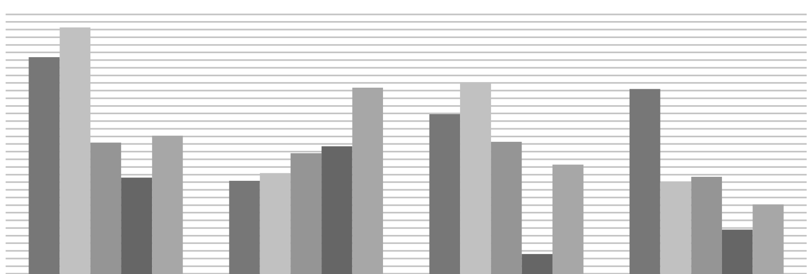
Portugal may request tax information deemed relevant for the auditing of transfer pricing or an APA within the following frameworks: the second Directive on Administrative Cooperation on tax matters ("DAC 2", Council Directive 2014/107/EU on the automatic and mandatory automatic exchange of information in the field of taxation, amending "DAC 1", Council Directive 2011/16/EU), Double Tax Conventions ("DTC"), Tax Information Exchange Agreements ("TIEA"), and Multilateral Convention on Mutual Assistance in Tax Matters, as amended by the 2010 Protocol (see last paragraph of the answer to question 3).

While Portuguese domestic tax law allows the tax authorities to perform corresponding adjustments in accordance with the applicable DTC, based on a primary adjustment made on the other Contracting State, it does not directly indicate that a check should (automatically and systematically) be performed regarding the taxation of the remainder in the other State.

Particularly with regard to the DAC 2 framework that was transposed into domestic tax law, as mentioned in question 3, Portuguese tax authorities may spontaneously inform tax authorities from other Member States regarding tax information, namely information related to the transfer pricing and unilateral APAs, and they may also exchange information they are aware and which may be useful to the competent authorities of the other Member States.

However, the Portuguese tax authorities must spontaneously exchange information with another Member State, namely, whenever: i) it has grounds for supposing that there may be a loss of tax in the other Member State, or ii) it has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises. There is no public statistics in Portugal regarding the amount of times any of the exchange of information mechanisms was triggered in the context of transfer pricing, so the question whether the tax authorities actually check the tax result in the other State may not, to that extent, be satisfactorily answered.

In practice, whereas there is no available segmented data regarding the exchange of information about transfer pricing or APAs, according to data made public by the tax authorities, the cross-border information flows (spontaneous and on request) on direct taxation regarding Portugal, between 2012 and 2016, were the following:



	On Request (Sent)	On Request (Received)	Spontaneous (Sent)	Spontaneous (Received)
2012	294	132	219	252
2013	333	142	261	130
2014	182	168	183	137
2015	136	177	36	68
2016	191	254	153	101

Figure: International exchange of information data regarding direct taxation in Portugal between 2012 and 2016

Although it cannot be stated, with certainty, that the Portuguese tax authorities systematically check whether any remaining income will be taxed by another country, case law shows that the tax authorities do inquire and seek information from tax authorities from other countries.

Furthermore, another change to the Directive on Administrative Cooperation in the field of taxation, which was introduced in Portuguese domestic tax law in August 2017, with retrospective effects to 1 January 2017, imposes the mandatory exchange of information regarding certain tax rulings and APAs ("DAC 3", Council Directive (EU) 2015/2376 amending DAC 1 as regards mandatory automatic exchange of information in the field of taxation).

In this context, DAC 3, considering that "*the efficient spontaneous exchange of information in respect of advance cross-border rulings and advance pricing arrangements is hindered by several important practical difficulties such as the discretion permitted to the issuing Member State to decide which other Member States should be informed*", introduced mandatory automatic exchange of information on advance cross-border rulings and advance pricing arrangements between EU Member States, under certain conditions and regarding certain entities.

The mechanisms underlying DAC 3 are expected to allow Portugal to more efficiently check whether any remaining income will be taxed by another country and vice-versa.

Moreover, in this context, Portugal also introduced into domestic law in August 2017 the provisions corresponding to Council Directive (EU) 2016/881 of 25 May 2016, amending DAC 1 as regards mandatory exchange of automatic exchange of information in the field of taxation ("DAC 4"), particularly regarding Country-by-Country Reporting, which is expected to further enhance the tax authorities capability to cross-check certain cross-border aspects in the context of transfer pricing and intra-group arrangements in multinational enterprises, and also within the framework of APAs.

The Portuguese tax authorities capability of exchanging such DAC 3 and DAC 4 type of information is not limited to EU Member States, as they are also legally allowed (and bound) to exchange said information with other Contracting States in Double Tax Conventions entered into by Portugal, as well as jurisdictions participating in the Multilateral Convention on Mutual Assistance in Tax Matters, as amended by the 2010 Protocol, which entered into force in Portugal in 2015, or any similar exchange of information and administrative cooperation framework.

Portugal legally allows for correction mechanisms to ensure that any remainder will still be taxed at home as to avoid international double non-taxation. In a cross-border scenario, Portuguese domestic tax law provides that the Portuguese tax authorities *may* perform a corresponding adjustment when the other Contracting State to a Double Tax Convention performed a primary transfer pricing adjustment. The corresponding adjustment may be triggered by either the foreign tax authorities or the taxpayers, and domestic administrative procedures should be followed to achieve the corresponding adjustment.

Question 6

Portuguese tax law does not expressly provide for a default allocation of profits to permanent establishments.

From a domestic standpoint, profit attributable to permanent establishments is based on the applicable accounting standards and rules, consisting also in the computation of the net profit and other positive and negative equity variations. In other words, the accounting profit (or loss) may be different from the taxable profit (or loss), as the latter is based on the former with the addition of tax and legally relevant positive and negative equity variations.

Simultaneously, in accordance with Portuguese domestic tax law, domestic transfer pricing regulations also apply to the attribution of profits to permanent establishments, thus embodying the separate entity approach set forth by the OECD. Such approach is closely linked to the arm's length principle developed in the context of the OECD Transfer Pricing Guidelines and is in line with what is indicated in the Commentaries to the OECD Model Convention and on the Reports on the Attribution of Profits to Permanent Establishments (2008 and 2010).

However, it is unclear how these may apply in practice in Portugal. Namely, how the Authorized OECD Approach and more recent Transfer Pricing Guidelines may fully apply. This is due to Portugal having presented the following reservation to Article 7 of the OECD Model Convention: "*Portugal reserves its right to continue to adopt in its convention the text of the Article as it read before 2010 until its domestic law is adapted in order to apply the new approach*". Indeed, DTCs concluded by Portugal still follow the old (pre-2010) version of article 7 of the OECD Model Convention, which, by the OECD's own assertion, does not allow the application of the Authorized OECD Approach in its entirety.

Question 7

The arm's length principle and the administrative power to correct a taxpayer's taxable base was first introduced in Portugal in 1963 ("*Código da Contribuição Industrial*"), and later confirmed in the structural Corporate Income Tax reform from 1989. However, it was only truly developed beyond the mere principle on 2001. Namely, Law 30-G/2000, from December 29th and Ordinance 1446-C/2001, from December 21st, introduced the framework that was necessary to thoroughly apply the arm's length principle, namely by mimicking (and implicitly referring to) the OECD Transfer Pricing Guidelines framework and methodologies, as well as setting related parties criteria, and compliance and documentation requirements.

On the one hand, neither Portuguese Corporate Income Tax code, nor the Ordinance that develops the transfer pricing framework, established a formal and express link to the OECD Transfer Pricing Guidelines.

On the other hand, the legal provisions introduced in 2001, by referring to comparability and the methodologies and terminology adopted in the OECD Transfer Pricing Guidelines, may be understood as implicitly referring to them. The preamble to the above-mentioned Ordinance refers abundantly to the international standards reflected in the OECD Transfer Pricing Guidelines, further advising the reader to refer to the OECD reports in cases of greater technical complexity.

However, one may argue that a broader link established by the preamble is legally weak, since no actual legal provision refers to the OECD Transfer Pricing Guidelines as a whole, and the Ordinance preamble may be said to illegitimately extend the scope of the Corporate Income Tax code (the Ordinance is a hierarchically inferior type of law). Even if legally accepted, it should be noted that the application and a potential binding nature of more recent OECD Transfer Pricing Guidelines would likely be considered undue, as the internal rules regarding the separation of State powers would likely be read as preventing it.

Nevertheless, and although the legal interpretation rationale is not yet fully clarified, domestic tax arbitration and judicial tax courts regularly make direct references to (usually generally aspects of) the OECD Transfer Pricing Guidelines (e.g. as recent as the 2010 OECD Transfer Pricing Guidelines) in some of their transfer pricing decisions. As such, from a practical standpoint, a link between domestic transfer pricing regulations and the OECD Transfer Pricing Guidelines exists, although the extent of its relevance may be debatable.

Question 8

In purely domestic situations, when both related parties are based in Portugal, Portuguese domestic tax law determines that the tax authorities *must* "*perform the necessary* [transfer pricing] *adjustments*", i.e. both primary and corresponding transfer pricing adjustments.

As mentioned in our answer to Question 5, in a cross-border scenario, Portuguese domestic tax law provides that the Portuguese tax authorities *may* perform a corresponding adjustment when the other Contracting State to a Double Tax Convention performed a primary transfer pricing adjustment. The corresponding adjustment may be triggered by either the foreign tax authorities or the taxpayers themselves. Certain formal administrative procedures should be followed to achieve the corresponding adjustment.

We should note that, in Portuguese domestic administrative and tax law, a difference between *must* and *may* is usually identified by scholars and jurisprudence. Particularly, *may* is nonetheless understood as imposing both a legal power and a legal duty upon the tax authorities.

Portuguese domestic tax law does not set forth a restriction regarding upwards or downwards adjustments by the Portuguese tax authorities.

The taxpayer also has the duty to perform upwards adjustments whenever the arm's length principle is not adhered to from a Portuguese perspective.

Question 9

The corresponding downwards adjustment may be triggered by either an official request by the foreign tax authorities or by a taxpayer request concerning the reanalysis of its tax assessment and grounded on assessments performed on the foreign entity. Such possibility is only available, according to domestic tax law, if a Double Tax Convention is in place. If a Double Tax Convention includes a provision such as article 9(2) of the OECD Model Tax Convention on Income and on Capital, it may be argued that such possibility exists nonetheless.

Domestic administrative procedures set forth in Ordinance no. 1446-C/2001 should be followed to achieve the corresponding adjustment, namely, among other procedural and documental aspects, the requesting party ought: to identify all the relevant aspects, to cooperate and provide the documentation necessary to perform the analysis, to propose a solution, to demonstrate the existence of double taxation, and the acceptance by the authorities of the other Contracting State of the initiation of the Mutual Agreement Procedure.

With regard to the conditions in which Portuguese tax authorities normally accept the transfer pricing result of the other country, there is no public and official guidance regarding the actual transfer pricing discussion that needs to take place. Given that the proceedings and outcome of the Mutual Agreement Procedures are not public, it is difficult to reach clear conclusions regarding the question.

However, for example, based mainly on transfer pricing decisions made by domestic tax courts, we take note that, historically, the tax authorities tend to argue in favor and often attempt to apply the Comparable Uncontrolled Price method, but more recent cases have also showed acceptance and application of other methods. The Portuguese tax authorities also typically take a restrictive view point regarding the scope of comparable databases, which may lead to issues related to the acceptance of pan-European comparables or the inclusion of comparables from outside the Iberian Peninsula, and also, for instance, regarding the specific result (e.g. the median or the average) that is acceptable for transfer pricing purposes within a range of results.

In light of the above, in our understanding, the kind of disputes that arise between the Portuguese tax authorities and taxpayers regarding the most appropriate method, comparables and acceptable result of the application of the methods are likely to also emerge with foreign tax authorities, as some of the positions adopted by the Portuguese tax authorities in litigation are not strictly aligned with the OECD Transfer Pricing Guidelines.

Question 10
Portuguese domestic tax law contains a General Anti Abuse Rule (GAAR) in article 38(2) of the Portuguese General Tax Law. The GAAR targets illegitimate tax planning, which consists in acts or behaviors that are deemed to be contrary to the legal order and tax rules. In contrast, a taxpayer engages in legitimate tax planning when the acts or behaviors adopted, while providing a tax benefit, are so consented, expressly or by omission, by the lawmakers. The distinction between these two kinds of tax planning is commonly referred to as tax evasion (against or abusive circumventing of the legal order) and tax avoidance (within the legal order).

Portuguese tax courts have accepted the "step transaction" doctrine and have developed and consolidated a framework for the application of this provision. The GAAR framework contains four key elements, whose cumulative fulfilment and proof is required, are identified in Portuguese case law: i) means adopted to achieve a tax advantage, ii) the result being a tax advantage, iii) intellectual intent and iv) legal intent (legislator's intent) is avoided. This framework and the analysis of these interconnected elements requires, in further detail, the analysis of:

i. the means adopted – e.g. a transaction or a set of step transactions – are such that they may provide a tax advantage to the taxpayer;

ii. the result, which should be an actual tax advantage that arises due to the adoption of said means when compared the outcome that would arise if "normal" or economically equivalent transactions were conducted. A taxpayer is considered to have a tax advantage when it obtains a better position in respect of the taxes due to pay;

iii. the intellectual intent, which encompasses the subjective character of the GAAR, meaning that the intent of the taxpayer while entering into the agreement or set of transactions must have been essentially or mainly to reduce its tax liability; and

iv. the law or its spirit, assessed in light of its object and purpose, is violated in such a way that the tax planning is deemed to be illegal (tax evasion) and not legal or legitimate (tax avoidance). This analysis should lead to the conclusion that the lawmakers intended to target a certain transaction and that the taxpayer is illegally contravening. Therefore, when a taxpayer attempts to circumvent certain tax provision with the solely aim of reducing its tax liability. States are entitled to deny the tax benefit granted under the law, by applying the GAAR, in case the four key elements are fulfilled and proven.

Once fulfilled or met, these four elements are complemented by a fifth element: the sanction, which leads to disregarding the steps or transactions deemed to be abusive and their recharacterization into another, which is then taxed accordingly.

In this context, we should note that, in our understanding, it is unclear how the GAAR contained in the Anti-Tax Avoidance Directive ("ATAD 1", Council Directive (EU) 2016/1164), which is based on the Principal Purpose Test, will be transposed into Portuguese tax law, seeing that the provision in the EU Directive is worded differently from the Portuguese GAAR, which was drafted and introduced in 1999.

EU Member States should apply ATAD 1 measures as from 1 January 2019. Following that application, the concrete application of the ATAD 1 GAAR (and potentially, the pre-existing Portuguese GAAR) will depend primarily on the interpretation by the Court of Justice of European Union.

In the context of transfer pricing litigation, the interaction between the Portuguese GAAR and the Portuguese transfer pricing regulations (and other legal provisions) may raise some difficulties. According to Portuguese domestic tax law, the tax authorities are bound by a legality principle in their actions, assessments and motivations. One of the consequences of these features is that the Portuguese tax authorities may not present a subsidiary (and second) line of reasoning and legal ground, in case a first line of reasoning and legal ground is not successful.

As such, the GAAR may not be used as a back-up within the same tax audit and tax assessment. Nevertheless, it appears that the tax authorities may opt to use the GAAR instead of the transfer pricing regulations to address a certain issue, which has happened in recent cases, namely in tax arbitration cases no. 367/2014-T (CIT 2009), no. 609/2015-T (CIT 2010), and no. 219/2106-T (CIT 2011 and 2012), which, based on direct references included in the latter case, refer to the same entity and, essentially, the identical facts and circumstances (for different taxable periods). The outcome of the second and third of these cases was successful for the tax authorities, while the first was successful for the taxpayer.

In short, in the first case, the tax authorities argued that transfer pricing regulations did not apply because the transactions in question were not "effective economic transactions", i.e. they did not, in reality, occur. The tax authorities did not, either, resort to the GAAR, but rather to a general CIT provision regarding earnings. The court ruled that the tax authorities not only did not have legal grounds but also did not prove that the "redesigned" transaction occurred – which, naturally, it did not occur.

The second case was grounded on transfer pricing regulations, particularly the need for performing a comparability and functional analysis in order to reach a range of comparable outcomes, and what the acceptable outcome for transfer pricing purposes should be. With the tax authorities having, now, proved that the transaction was not economically real, the court found that it was insufficient for a taxpayer to merely determine a (full) range of outcomes without having solid legal and factual grounds based on a comparability and functional analysis and, eventually, rejected that the taxpayer outcome, which also fell outside of the interquartile range, was acceptable, due to the unsubstantiated comparability. As a result (and due to the nature of tax procedural law), the court maintained the tax authorities assessment (even though it was based on the same comparability analysis), which resulted in the acceptance of the median result.

In a nutshell, in the third case the tax authorities opted, instead, for applying the GAAR, disregarding the taxpayer's envisioned transaction and redesigning it. While the taxpayer argued in favor of the application of transfer pricing rules, as according to the tax court ruling, was discussed in the previous cases, it did not present an argument regarding transfer pricing being a *lex specialis* vis-à-vis the Portuguese GAAR, in such a way that would prevent the application of the GAAR in such cases.

Consequently, based on the findings of the third case, it appears that the tax authorities may opt to use the GAAR instead of the transfer pricing regulations to address a certain case. However, in our understanding, the *lex specialis* issue is not yet clarified. Moreover, in our opinion, whenever the application of the GAAR results in the restructuring of a cross-border transaction, issues regarding cross-border transfer pricing adjustment and international double taxation are likely to arise if transfer pricing is not considered when issuing the tax assessment. In our view, exchange of information with the concerned tax authorities, even more so if the restructuring involves a third State, is paramount in order to avoid or mitigate double tax issues.

Furthermore, in our thinking, it may also be argued that, in Portugal, the GAAR needs to be used in combination with transfer pricing regulations whenever the tax authorities intend to not only restructure a transaction but also to adjust transfer prices. That is, it may be argued that transfer pricing regulations, alone, do not allow for such restructurings and that the structure or transaction in question needs to be redesigned by the tax authorities in the context and following the requirements set forth in the GAAR.

Lastly, it should be noted that, in some circumstances, Portuguese tax courts have controversially concluded that certain other domestic anti-abuse provisions constitute *lex specialis vis-à-vis* transfer pricing provisions and, therefore, prevail over transfer pricing rules. Namely, a domestic provision (former article 23, no. 5 and 7 of the CIT Code, in force until 2014), which determined that expenses related to the transfer of capital between related parties are never acceptable (even if the transaction occurred or may have occurred at arm's length, as it occurred in certain judicial cases, such as rulings no. 473/13 by the Supreme Administrative Court and no. 247/2014 by the Constitutional Court).

Such outcome may trigger difficulties in applying the transfer pricing provision in Double Tax Conventions as, in our understanding, appears to override Double Tax Conventions which contain a provision identical to article 9 of the OECD Model Tax Convention on Income and on Capital (and that are commonly present in Double Tax Convention concluded by Portugal).

Part II

Question 11

The rules in force in Portugal regarding the recovery of fiscal state aid are the general rules of tax law concerning additional tax assessments. There are no special rules regarding the recovery of state aid, although some exceptions in administrative law regarding expiry dates might have been enacted in order to comply with EU Law of state aid (cf. Article 168, par. 4, of the Code on Administrative Procedure – *Código do Procedimento Administrativo*).

According to Article 45, par. 1, of the Portuguese General Tax Law (*Lei Geral Tributária*), the tax assessment expiration date is 4 years (as a rule of thumb, 4 years from the year following the one in which the taxable operation occurred, for periodic taxes, and 4 years from the date on which the taxable operation occurred for non-periodic taxes).

However that expiry date applies only "*when the law does not establish another one*". Since EU regulations are "laws" and since their direct effect is recognized by the Portuguese Constitution (cf. Article 8, par. 4), the expiry date of 10 years established by Article 17, par. 1, of Council Regulation (EU) 2015/1589 of 13 July 2015 could be considered "another" expiry date established by "law".

According to Article 78 of the Portuguese General Tax Law, "*the review of tax acts by the entity that carried them out can be performed* [...] *at the initiative of the tax administration, within four years after the assessment or at all time if the tax has not yet been paid, on the basis of an error attributable to the services*". The Portuguese Supreme Administrative Court (STA) has continuously stated in its case-law that an "*error attributable to the services*" includes "*not only a lapse, a material error or an error of fact, but also an error of law*" (see STA judgment in case nº 886/14 of 19/11/2014).

The Portuguese tax authorities can therefore review previous tax acts (tax rulings, tax assessments, etc.) that have been found in breach of EU Law by the European Commission, issuing an additional tax assessment.

Although Article 78 establishes a four year time-limit since the original tax assessment, one could argue that a different result would emerge from taking into account the principle of harmonious interpretation of domestic law in accordance with EU law. On the one hand, the four year limit would have to be adequately interpreted in accordance with Article 45 (which, as we saw, allows for longer than 4 years legal expiration dates). On the other hand, Article 78 itself allows the review of acts "*at all time if the tax has not yet been paid*" and one could interpret this excerpt in accordance with EU Law on state aid. Since European Commission decisions regarding state aid in the form of tax reductions would concern "tax not yet paid", this would allow additional tax assessments at all time.

Once Portuguese tax authorities adopt additional tax assessments, the beneficiary will have to pay the amounts due. The time-limit for the payment varies according to the taxes at stake. Regarding taxes on company profits (IRC) and taxes on individual income (IRS), the time-limit is 30 days from the tax assessment (cf. Article 110, par. 1, of the Companies Tax Code – *Código do IRC* –, Article 104 of the Personal Income Tax Code – *Código do IRS* – and, also, Article 85, par. 2, of the Administrative and Judicial Procedure Code – *CPPT*). If the beneficiary of state aid fails to pay, a tax execution procedure will follow.

Question 12

We have no knowledge of such examples.

Question 13

Portugal is a party to the NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NY Convention"), which entered into force in Portugal on 16.01.1995. Portugal declared that it would apply the NY Convention only to recognition and enforcement of awards made in the territory of another contracting State.

Portugal is also a party to the 1965 Washington Convention on the Settlement of Investment Disputes ("ICSID Convention"), which entered into force in Portugal on 01.08.1984. To the extent of our knowledge no ICSID award regarding the Portuguese State was ever rendered nor has any ICSID award ever been enforced in Portuguese courts.

Recently, it has been mentioned in the news that a triggering letter had been issued regarding a dispute concerning the termination of the urban transport subconcessions. Nevertheless, the Government did not confirm that it has been notified yet.

Portugal has BIT Treaties with: Albania, since 10 June 2007, Algeria, since 8 September 2005, Angola (not into force), Argentina, since 3 May of 1996, Bosnia and Herzegovina (3 February 2009), Brazil (not into force), Bulgaria, since 20 November 2000, Cape Verde, since 4 October 1991), Chile, since 24 February 1998, China, since 26 July 2008, Congo (not into force), Congo, DR (not into force), Croatia, since 27 November 1997, Cuba, since 18 June 1999, Czech Republic, since 3 August 1994, Egypt, since 23 December 2000, Gabon, since 11 September

2013, Germany, since 23 April 1982, Guinea Bissau, since 8 April 1996, Hungary, since 8 October 1997, India since 19 July 2002, Jordan, since 6 January 2015, Republic of Korea since 11 August 1996, Kuwait since 28 May 2011, Latvia, since 17 July 1997, Libyan Arab Jamahiriya, since 19 June 2005, Lithuania, 14 August 2003, Macao, China, 2 May 2002, Mauritius, 3 January 1999, Mexico, 4 September 2000, Morocco (not into force), Mozambique, since 31 October 1998, Pakistan, 14 December 1996, Paraguay, since 4 November 2001, Peru, since 18 October 1995, Philippines, since 14 August 2003, Poland, since 9 November 1993, Qatar, since 19 July 2010, Romania, since 17 November 1994, Russian Federation (not into force), São Tomé and Principe (not into force), Senegal (not into force), Serbia, since 24 July 2010, Slovakia, since 15 May 1999, Slovenia, since 4 May 2000, Timor-Leste, since 7 April 2004, Tunisia, since 10 November 2006, Turkey, since 19 January 2004, Ukraine, since 18 July 2003, United Arab Emirates (not into force), Uruguay, since 3 November 1999, Uzbekistan, since 14 March 2010, Venezuela, since 7 October 1995 and Zimbabwe (not into force)[1].

Those BIT include a fair and equitable treatment (FET), expropriation, protection and security and most favored nation clause.

In practice, FET is usually regarded by arbitral tribunals to have been breached as a consequence of the violation of (a) the obligation to protect the basic legitimate expectations created by the host State, and (b) the obligation to provide a stable and predictable legal and business framework in order to foster foreign investments.

Some investor-State arbitral tribunals have ruled that the principal and fundamental content of the FET standard is the obligation of the host State to protect investors' reasonable and legitimate expectations.[2]

Arbitral tribunals and scholars have dealt with isolated examples on a case by case basis. The United Nations Conference on Trade and Development (UNCTAD) has compiled the following pattern of conducts under FET: violation of legitimate expectations, denial of justice and due process, manifest arbitrariness, discrimination and outright abusive treatment.[3]

The frustration of a legitimate expectation must be established based upon a previous "formal" or "highly officialised" representation made by the State with regard to the investment; about an expectation on which the investor actually

[1] Miguel Esperança Pina and Frederico Bettencourt Ferreira, GAR Know How, Investment Treaty Arbitration 2017, Portugal.

[2] *Electrabel, S.A. v. the Republic of Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, para. 7.75.

[3] See United Nations Conference on Trade and Development, *Fair and Equitable Treatment: UNCTAD Series on issues on International Investment Agreements II*, 2012, at page 62.

relied[4] to invest and had no doubt[5]; after a frustration that caused damage to the investor; and, on an expectation that was reasonable at the time of making the investment[6] –in relation to what the investor should have expected.[7]

Some of these requirements were mentioned in the ECT case of *AES Summit v. Hungary*.[8]

FET also includes stability and predictability of the legal and business framework[9] based on which the investor decided to make the investment.

In investment arbitration practice, stability and predictability are generally linked to the legitimate expectations argument and both arguments are often invoked together. As it can be drawn from the *AES Summit* ECT decision, the main discussion in this type of cases focuses on whether specific commitments were made by the host State that could limit its sovereign right to regulate, even if this regulation implies a modification of its already existing law, or that could legitimately have made investors believe that no change in the law would occur.[10]

4 Metalclad Corporation v. United Mexican States (ICSID Case No. ARB(AF)/97/1), Award, August 30, 2000, at para. 85). See also *SPP v Egypt* (par. 82); *GAMI v Mexico* (par. 91).

5 Metalpar S.A. and Buen Aire S.A. v. Argentine Republic (ICSID Case No. ARB/03/5) (para. 207); Parkerings v Lithuania (para. 323)

6 AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary (ICSID Case No. ARB/07/22); Jan de Nul v Egypt (para. 265); Duke v Peru (para. 340).

7 Metalpar S.A. and Buen Aire S.A. v. Argentine Republic (ICSID Case No. ARB/03/5) (para. 202); Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru (ICSID Case No. ARB/03/28) (para. 363).

8 In the *AES Summit* case an initial investment took place in 1996, but some years later in 2001 an agreement was reached to settle two arbitrations initiated by AES against the Government. AES invested further amounts to retrofit the plants after 2001 based on such agreement. The arbitral tribunal considered that there were no legitimate expectations in the case of AES since nowhere in the 2001 agreement the State compromised not to re-introduce administrative prices (nothing is said in the agreement) or to change the law (quite the opposite, there was a specific clause regulating the possibility of a change in law and the contractual negotiations to be followed). Any other potential document prior to 2001 (the 1995 privatization materials and the 1999 express letter sent by the Head Department of the Ministry of Economic Affairs –letter which was not explained by AES and was only introduced at the last minute during the hearing) was not able to create expectations in the Claimant since the 2001 agreement superseded any prior agreement, understanding or discussions. Furthermore, the 2001 agreement was signed by the State in its private capacity, not as sovereign so no formal assurances existed from the Government and the clause in the 2001 Agreement by which Hungary promised not to frustrate the purposes and intent of the agreement is just a common/standard provision in commercial agreements not a specific assurance. At the most, there was a breach of contractual obligations which cannot be alleged under the ECT in the case of Hungary (as a party listed in Annex IA, not giving consent to umbrella clause claims).

9 E.g: *LG&E v. Argentina* (ICSID Case No. ARB/02/1), Award, 2006, para. 124; *Occidental Exploration and Production Company v Republic of Ecuador* (LCIA No. UN 3467), Award, July 1, 2004, para. 183.

10 The *AES Summit* case the agreement signed between the investor and the State contained a specific clause regulating the potential change of the laws.

Some BIT entered into by Portugal also include and Umbrella clause. The cooling off period is usually 6 months, except with Germany that there is no period and with Bosnia and Herzegovina, where the period is 3 months[11].

The ISCID Arbitration option os provided for in all BITs except in the Cuba, Germany, Macau and Morocco BITs. The Mexico BIT limits the application of the umbrella clause to obligations assumed in writing and the Jordan BIT requires the investments to have been approved by the Host Contracting Party[12].

Most BIT have a fork on the road clause.

Also relevant to mention that Portugal is member of the Energy Charter Treaty (ECT).

The ECT is a legally-binding multilateral instrument for the promotion of international cooperation in the energy sector. The ECT was constituted with the aim of mitigating commercial and political risks associated with energy-related foreign investments and trade. The main objective of the ECT's provisions on investment issues is to ensure the creation and development of a "level playing field" for the investments made in the energy sector, by setting a code of binding rules that shall be observed by all participating governments.

The ECT and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects were signed in December 1994 and entered into legal force in April 1998. Portugal and Spain have ratified and signed the ECT, which is in force in those countries since April 16, 1998. The European Union is also a party to the ECT.[13]

Article 1(6) of the ECT defines protected "Investment" as follows:

> *"Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:*
>
> *(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;*
>
> *(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;*
>
> *(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;*
>
> *(d) Intellectual Property;*
>
> *(e) Returns;*
>
> *(f) any right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector."*

[11] Miguel Esperança Pina and Frederico Bettencourt Ferreira, *op. cit.*

[12] Miguel Esperança Pina and Frederico Bettencourt Ferreira, *op. cit.*

[13] On April 16, 1998, the Energy Charter Treaty entered into force for the European Community (now the European Union, since the Treaty of Lisbon of December 1, 2009).

"Returns" are very broadly defined as:

> "[T]*he amounts derived from or* associated *with an Investment, irrespective of the form in which they are paid, including profits, dividends, interest, capital gains, royalty payments, management, technical assistance or other fees and payments in kind.*"

Reference to an "Economic Activity in the Energy Sector" in Article 1(6)(f) has to read according to Article 1(5) as follows:

> "*«Economic Activity in the Energy Sector» means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises.*"

Article 1(7)(ii)(b), of the ECT, defines "*Investor*" as a company or other organization organized in accordance with the law applicable in one Contracting Party that directly or indirectly owns or controls an "Investment" within the definition of the ECT (ex Article 1(6) ECT) in another Contracting Party.

Pursuant to Article 26(7) of the ECT, locally incorporated companies (i.e., incorporated in Portugal) controlled by a natural or legal person of another Contracting Party to the ECT do have *ius standi* to initiate ECT arbitration proceedings.[14]

Previous cases[15] established that in case of a bilateral investment treaty having a similar definition of protected investment as in the ECT: (i) (majority/controlling or minority)[16] shareholders can recover damages for harms that were inflicted upon the companies in which they invested,[17] (ii) even if the claimants were indirect shareholders who only owned shares in the injured company through an intermediary.[18]

In order to initiate ECT arbitration proceedings any potential claimant must first formally notify the host State of the dispute and must try to engage in negotiations with the host State during three months with the aim of reaching amicable settlement of the dispute within that time period. If the dispute is not settled

[14] For instance, foreign control may be established on the basis of shareholders' agreements giving control to either companies to effectively manage the company, etc.

[15] For example, *Teinver, Transportes de Cercanías SA and Autobuses Urbanos del Sur v. Argentine Republic* (ICSID No. ARB/09/1), Decision on Jurisdiction, December 21, 2012 (under the Spain-Argentina BIT).

[16] E.g. in *Lanco International Inc. v. The Argentine Republic* (ICSID Case No. ARB/97/6), Decision on Jurisdiction, December 8, 1998, the claimant had only 18.3% of the shares of the injured company.

[17] Similarly, in *Gas Natural SDG, S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/10); Decision of the Tribunal on Preliminary Questions on Jurisdiction, June 17, 2005.

[18] *Ibidem*.

within the three months *cooling-off* period, the Investor may initiate ECT arbitration proceedings (Article 26(2), of the ECT).

The ECT has the following standards of protection: (i) host-State's obligation to provide "*Fair and Equitable Treatment*" to protected investments; (ii) host-State's obligation to provide "*Most Constant Protection and Security*"; (iii) host-State's obligation not to apply "*Unreasonable and Discriminatory Measures*"; (iv) host-State's obligation to observe obligations entered into with the Investor ("*Umbrella Clause*") and (v) protection against "*Indirect Expropriation*".

The "*Fair and Equitable Treatment*" standard (FET) is embodied in Article 10(1) ECT, alongside the standards of "*Most Constant Protection and Security*", "*The Prohibition of Unreasonable or Discriminatory Measures*" and an "*Umbrella Clause*".

As for the exact content of this standard of protection, Article 10(1) does not provide any listing of host State's conducts that would be tantamount to a breach of the FET standard.

"*The Most Constant Protection and Security*" standard (also defined as "Full Protection and Security" in other investment treaties) is also included in Article 10(1). Of the ECT.

Recent investment awards have considered that this standard not only encompasses matters of physical security; legal stability afforded by a secure investment environment has also been declared as covered.[19] Some awards have defined "legal security" as "*the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application*."[20]

Similarly, the arbitral tribunal in the *AES Summit* case accepted this approach though restricted to situations in which State's regulatory reforms were not reasonable in the circumstances and with a view to achieving objectively rational public policy goals.

The prohibition for host States of impairment of the protected investment by "*Unreasonable or Discriminatory*" measures is also included in Article 10(1), of the ECT.

Protected investments should not be subjected to regulatory measures amounting to an indirect expropriation pursuant to Article 13(1) ECT ("*measures having effect equivalent to nationalization or expropriation*[21].

[19] E.g: *Azurix v. Argentine* Republic (ICSID Case No. ARB/01/12), Award, July 14, 2006, para. 408.

[20] Siemens *A.G. v. Argentina* (ICSID Case No. ARB/02/08), Award, February 6, 2007, para. 303.

[21] An indirect expropriation is defined by UNCTAD as the "*official acts that effectuate the loss of management, use or control, or a significant depreciation in the value, of assets*". In this sense, an indirect expropriation is generally established if there is a substantial loss of control or economic value of a foreign investment without a physical taking.

Investment arbitral tribunals (e.g. *Burlington v. Ecuador*) including arbitral tribunals in arbitrations under the ECT (e.g. *Plama Consortium v. Bulgaria*) and *Electrabel v. Hungary,* require for an indirect expropriation claim to be granted that the State's interference within the investor's property be (**i**) a substantial