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External audit of the International Criminal Court: Audit report on the budget performance of the permanent premises project[*]

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I. Purpose and scope of the audit

1. In accordance with our letter of notification dated 26 November 2015, a team of five external auditors carried out an assignment at the International Criminal Court (ICC) from 11 to 22 January 2016. The purpose of the audit was to review the permanent premises budget process, the regularity, efficacy and efficiency of its budget performance and the reasons for the overrun in the initial projected cost.

2. The audit was conducted in accordance with the International Standards of Supreme Audit Institutions (ISSAI) on regularity and performance audits, as well as with the Financial Rules and Regulations of the International Criminal Court and with the additional terms of reference in annex.

3. All observations were discussed with the staff concerned. The audit closure meeting was held with Mr Ivan Alippi, Mr Gela Abesadze, Mr Kenneth Jeavons and Mr Juan Escudero on 22 January 2016. However, the audit team needed to continue collecting additional audit evidence after the end of its assignment on site before it was being able to formulate its observations. The draft observations were communicated in a provisional report to the Project Director's Office, to the management of the CPI, to the Secretariat of the Assembly of States Parties and to the Oversight Committee for the project. The Project Director's office confirmed the validity of the facts as set out. The present report takes full account of the comments by the Director's office and the Oversight Committee, as well as their responses.

II. Background

4. At its resumed thirteenth session, held in The Hague on 24 and 25 June 2015, and further to a request made by the Project Director, the Assembly of States Parties (ASP) of the International Criminal Court (ICC) approved an increase of €6 million[1] in the budget of the Permanent Premises Project (PPP). However, the ASP decided that this increase would be provided neither by States Parties' contributions nor by the reserve of the Contingency Fund, but rather by a draw-down in the reserves of the Employee Benefits Liabilities Fund and Working Capital Fund (resolution ICC/ASP/13/Res.6).

5. In that resolution, the ASP requested the External Auditor of the ICC to provide it with two reports, one on "the appropriate level of the cash reserves of the Court, and on any risks that might be attached to their reductions", and the second one providing "a detailed review of the project accounts with emphasis on the cost overruns".

6. The mandate of the external auditor of the ICC that was given to *the Cour des comptes* by the Assembly of States Parties in 2012 was to provide an audit of the accuracy of the financial statements of the ICC and of the Trust Fund for Victims, and of the management of the Permanent Premises Project. The additional audits requested by the Assembly in resolution ICC-ASP/13/Res.6 were thus beyond the scope of the external auditor's mandate. In accordance with the engagement letter of 17 January 2013, any additional audit that would incur additional costs must be "decided by the ASP after previous agreement on terms and conditions including the amount of additional fees required".

7. According to international auditing standards, in particular standards ISA (*International Standards on Auditing*) 200 and 210, any new mandate given to an auditor requires the requesting party and the auditor to agree on the terms of the engagement. Thus the ASP's requests had to be set out in a new engagement letter clarifying the expectations of States Parties and enabling the feasibility of these additional audit tasks to be assessed.

8. In an engagement letter dated 16 October 2015, the ASP and the External Auditor agreed that the audit of the accounts of the project would take place during the regular interim audit from 11 to 22 January 2016, after completion of the construction work and after the staff had moved into their new premises. In addition, on 13 November 2015, as a matter of urgency, the external auditor provided a detailed report on the appropriate level of the cash reserves of the Court and on any risk that might be attached to their reduction.

[1] Part of which is liable not to be spent in view of the application of the sharing mechanisms presented in Chapter 1.4 of this report.

9. The engagement letter specifies that the Permanent Premises Project audit deals specifically with the manner in which the budget was prepared and on the regularity of budget performance, emphasizing budget overruns. The purpose of this audit was to verify the project accounts and not the consolidated cost of the operation. A certain number of items of expenditure, which do not appear within the scope of the budget approved by the ASP, such as expenses taken into account by the subsidies from the host State or costs borne directly by the Court from its regular budget, were therefore not audited.

10. The findings and analysis set out in this report are based not only on the various meetings with staff of the International Criminal Court and on the comments obtained from the stakeholders in response to the draft report, but also on the documentation prepared by the Project Director's Office (PDO), and in particular on the financial report up to 31 December 2015 (see annex I).

III. Observations

A. Changes in the budget and budget performance

1. Budget changes

11. The budget for the Permanent Premises Project approved by the Assembly of States Parties (ASP) went from €190 million in 2007 to a maximum of €206 million in 2015, which represents a change of €16 million over that period.

12. The budget change is summarised in the table below:

Table 1. Budget change (in million Euros)

	9th session	*10th session*	*11th session*	*12th session*	*13th session*	*14th session*
Category	*12/12/2010*	*21/12/2011*	*21/11/2012*	*27/11/2013*	*17/12/2014*	*25/06/2015*
Construction Cost	114.9	136.1	147	147.7	147.7	147.7
Contingency Reserve	17.2	32.9	12.7	12.7	12.7	12.7
Permits & Dues	3.5	2.6	2.6	2.6	2.6	2.6
Fees	23.9	16.9	19.9	19.9	19.9	19.9
Other Cost	1.1	1.5	1.5	1.5	1.5	1.5
Estimated inflation	29.4					
Additional reserve			6.3			
Total construction project (I)	*190*	*190*	*190.0*	*184.4*	*184.4*	*184.4*
Construction costs				1	1	1
Fees				3.5	3.5	3.5
Equipment				6.8	6.8	6.8
Total transition project (II)				*11.3*	*11.3*	*11.3*
Increase in approved budget					*4.3*	*10.3*
Total unified project				**195.7**	**200.0**	**206.0**

Source: ASP resolutions and Project Director's Office progress reports

13. The permanent premises resolution, adopted by the ASP at its 7th plenary meeting on 14 December 2007 (ICC-ASP/6/Res.1), estimated that a budget of €190 million was needed for the project at 2014 prices. The initial project provided for 1,200 workstations and three courtrooms, with a total gross floor area of 45 552 m^2. The €190 million was an estimate of the construction costs of the project including the costs of materials, labour, fixtures, landscaping and parking and the creation of a contingency reserve[2]. This budget was

[2] The contingency reserve was called "Risk Reserve", and thereafter "Project Reserve". The external auditor uses the term contingency reserve in the rest of the report.

approved by the ASP on 12 December 2010 during its 9th session (ICC-ASP/9/20). The Assembly decided that this amount was to be funded by States Parties.

14. On 1 March 2011, the Court estimated that the other costs related to the project but not directly related to the construction would amount to €42.2 million. These costs include two components:

(a) The so called "3GV" elements, estimated at €22.1 million, which cover interior finishes and other fixed elements integrated in the design;[3] and

(b) The so called "2GV" elements and other related costs, initially estimated at €20.1 million, but later reduced to €19.8 million, and then to €11.3 million, for non-integrated user equipment and other costs such as moving, additional staff, furniture, and consultancy fees. These elements are also called the transition costs.

15. On 21 December 2011, the ASP decided that the interior finishing of the permanent premises and other integrated elements (the "3GV"), would be incorporated in the construction costs. Therefore, they would be absorbed in the €190 million budget (resolution ICC-ASP/10/Res.6).

16. In that same resolution, the ASP approved the principle of incorporating the "2GV" costs, namely the non-integrated user equipment and related costs such as moving, into the regular annual budget of the Court and approved that these costs would not exceed €19.8 million. This approach was however going to be abandoned prior to being implemented. According to the estimates presented at the twentieth session of the Committee on Budget and Finance in April 2013, the regular annual budget of the Court would have increased by €3.3 million in 2014 and by €13.5 million in 2015 if it had had to fund the transition costs.

17. In order to avoid the consequences of using the regular budget of the Court to fund the non-integrated user equipment ("2GV" costs) and cost of moving (all together renamed "Transition project"), on 27 November 2013 the ASP decided to aggregate the budgets of the construction and transition projects (ICC-ASP/12/Res.2). The total of the project amounted to €195.7 million, which represented a budget of €184.4 million for construction and €11.3 million for the transition. The AEP also decided, following a proposal by the Oversight Committee[4] that the cost of transition, reduced to €11.3 million by the Project Director[5] would be funded in part for €5.6 million with the savings obtained on the construction project budget, revised downwards following a bidding process which turned out to be lower than the initial price estimate. The rest of the financing of transition costs was due to be obtained from the future surpluses on the regular budgets for the years 2012, 2013 and 2014 (€5.7 million).

18. While this did relieve the regular budget of the ICC, the Project Director, in September 2014, projected budget overruns in the unified budget. On 17 December 2014, the ASP increased the authorised budget from €195.7 million up to a maximum of €200 million (ICC-ASP/13/Res.2).

19. But this increase was not enough to finance the project. In a new resolution dated 25 June 2015 (ICC-ASP/13/Res.6), the ASP approved a new increase in the budget envelope, to a maximum of €206 million[6].

Initially estimated at €190 million, the Permanent Premises Project budget only took into account the costs of construction. With effect from 2013, it was enlarged to include the costs of the transition programme. The overall change in the budget envelope reflects a change in the nature of the operation, with the switch from an initial project covering the construction to a second project covering the construction and transition.

[3] All construction projects carried out in the Netherlands comprise three elements: (a) Buildings and structures; (b) Non-integrated user equipment ("2GV"); and (c) Integrated user equipment ("3GV").
[4] ICC-ASP/12/43.
[5] In July 2013, the Registrar decided to transfer the management of the transition project to the Project Director. Previously, the management of the transition was managed by the Project Office Permanent Premises.
[6] The final cost at 31 December 2015 was €205 million in the worst-case scenario.

2. Project funding

20. The Assembly of States Parties adopted a number of resolutions on the financing of the budget changes:

(a) €190 million in the form of States Parties' contributions in accordance with two different methods: one-time-payments (OTP), complemented by a loan and a subsidy from the Dutch host State for the balance. As of the date of this report[7], one-time payments had been received in the amount of €93 million, the subsidy from the host State represents €21.7 million and the loan amounts to €75.3 million;

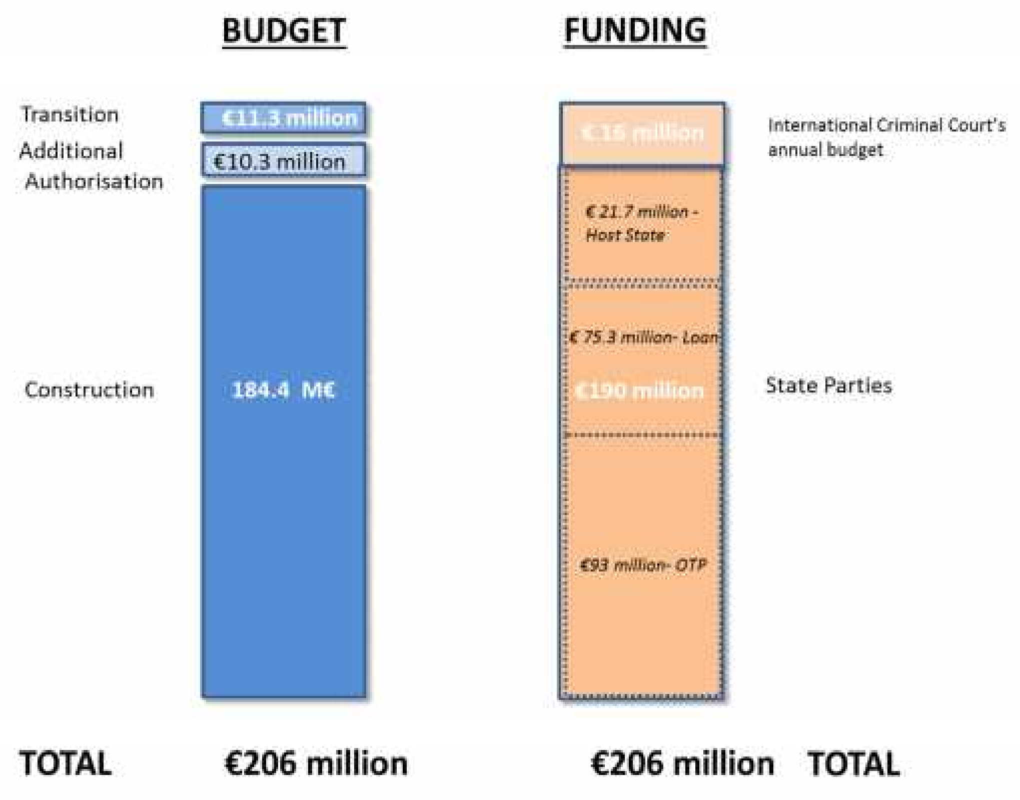
(b) €5.7 million, to be funded by the Court's cash surpluses in financial years 2012 to 2014. As at 31 December 2015, only the cash surplus of 2012 in an amount of €4.47 million had been made available to the project. Financial year 2013 did not produce any cash surplus and financial year 2014 was currently being assessed. As at the date of this report the Court's financial director estimates the surplus for 2014 at €2 million approximately;

(c) €4.3 million, to be financed from cash surplus pertaining to the 2014 and following financial periods; and

(d) €6 million[8], funded by a reduction in the authorised amount of funding set aside for the Employee Benefits Liabilities Fund (EBL) and in the reserves of the Working Capital Fund.

21. The project funding plan is ultimately composed of the following :

Graph 1. Financing plan for the Permanent Premises Project



Source: graph prepared by the external auditor based on the data provided by the finance section of the ICC.

[7] 15 February 2016.
[8] €4 million net in the event of any savings resulting from the application of the sharing mechanism.

External funding by means of States Parties' contributions has remained at the level of the initial budget envelope of €190 million, including one-time payments in the amount of €93 million, a subsidy by the Dutch host State in the amount of €21.7 million and a loan from the host State in the amount of €75.3 million.

The ASP has decided that the €16 million difference between the originally approved €190 million construction budget and the approved unified project budget of €206 million (maximum authorised amount[9]), shall be entirely funded out of the actual or potential reserves of the Court, either by using cash surpluses or the reserves of the Employee Benefits Liabilities Fund and Working Capital Fund.

3. Estimated Final Cost

22. The final cost of the project remains a provisional estimate. Its final amount will depend on the sharing mechanism and on outstanding payable balances.

23. As at 31 December 2015, the last budget overruns[10] were still being negotiated between the Court and the construction company Courtys. The final cost estimate of the project in the best-case scenario[11] amounted to €204.5 million, versus €205 million on a worst-case basis[12].

Table 2. Breakdown of cost at completion (in million Euros)

	Best case	*Worst case*
Construction project	193.7	194.2
Transition project	10.8	10.8
Total unified projet	**204.5**	**205**

Source: PDO / Brink

24. The best- and worst-case scenarios are relatively close as the project is nearing completion. The transition programme is complete; its cost will be €10.8 million, which is €500,000 less than the €11.3 million budget. The cost of the construction project has been estimated at between €193.7 million and €194.2 million, representing a maximum budget overrun of €9.8 million on the €184.4 million budget approved in 2013, or a maximum budget overrun of €4.2 million if compared to the €190-million initial budget approved by the ASP in 2010.

25. In addition, the estimate of the final cost of the project must take the level of budget implementation into account. The ASP and the Oversight Committee aimed to stay within a €204 million budget. The following shows the budget implementation as at the end of December 2015.

Table 3. Budget implementation as at 31 December 2015 (in million Euros)

	Budget (A) (06/2015)	Budget implemented (B)	To be committed (C)		Estimated cost (D)= (B) + (C)		Budget variance (E) = (A) - (D)	
			Best case scenario	Worse case scenario	Best case scenario	Worse case scenario	Best case scenario	Worse case scenario
Construction	194.7	196,8	-3,1	-2,6	193,7	194,2	1	1,5
Transition	11,3	10,6	0,2	0,2	10,8	10,8	-0,5	-0,5
Unified budget	**206**	**207,4**	**-2,9**	**-2,4**	**204,5**	**205**	**0,5**	**1**

Source: PDO / Brink

[9] At the date of the audit, an amount of €9.6 million remained to be financed out of a target implemented budget of €204 million.

[10] Explanations about the nature of the budget overruns are developed in Chapter 2.5.

[11] The best-case scenario reflects the estimates of PDO/PM, whereas the worst-case scenario is the estimate of Courtys.

[12] The financial report for the year ended 31 December 2015 refers to an estimated final amount of €205.5 million, this amount including a "reserve" of €524.8 k for the transition project. The external auditor deemed that it was not relevant to take into account this "reserve", as an incurred expenditure, for the valuation of the final amount. Indeed, the transition project being finalized, its total final cost is €10.81 million and there is no additional risk to consider for this part of the project.

26. The implemented budget consists of amounts paid, and payable balances on orders; it amounted to €207.4 million, comprising €193 million in respect of payments already made and a €14.3 million balance. The implemented obligation level was thus €1.4 million[13] higher than the initial budget; in other words, costs to date have exceeded the approved project budget.

27. The amount remaining to be committed was negative, and essentially comprised projected savings under the sharing mechanism (see below). It amounted to €-2.9 million (best-case scenario) and €-2.4 million (worst-case scenario). The budget's sustainability therefore depends on the likelihood of expected savings in applying the sharing mechanism.

The estimated final cost of the Permanent Premises Project was between €204.5 million and €205 million as at 31 December 2015. Including payable balances, the actual cost amounted to €207.4 million as at 31 December 2015, but savings were expected through the sharing mechanism in order to bring down the definitive cost at the expected level. Sustainability of the estimated cost will thus depend on achieving the anticipated savings under the sharing mechanism (see below).

4. The sharing mechanism

28. The NEC3 construction contract between the Court and the Courtys construction consortium provides for a sharing mechanism. On completion of the project, the difference between the target cost (guaranteed maximum price) and the actual cost, if lower, is shared between the two parties according to a distribution scale provided in the contract. The gain share is settled as follows.

29. It is calculated on the difference between the target cost of €170.9 million (worst-case scenario)[14], comprising the contractual price as specified in the contract signed in 2012 (€147 million), plus approved compensation events (€23.1 million) and compensation events under negotiation (€0.8 million), and an actual cost computed by Courtys at €164.8 million at the date of the audit.

30. Compensation events are events creating additional costs not attributable to fault on the part of the constructor, for which the latter may request compensation. If the Court approves the request, its costs are increased by the same amount.

Table 4. Sharing mechanism calculation (in million Euros)

Calculation of the sharing mechanism	*Best-case*	*Worst-case*
Compensation events approved	23.1	23.1
Compensation events under negotiation	0.6	0.8
Construction cost provided in the contract	147.0	147.0
Total target cost	*170.7*	*170.9*
Actual cost assessed by Courtys	**164.1**	**164.8**
Profit sharing between the Court and Courtys	*6.6*	*6.1*
- Share of the Court	2.4	2.2
- Share of Courtys	4.2	3.9

Source: PDO / Brink

31. The gain is the difference between the target cost and the actual cost (once all sub-contractors have been paid and all other Courtys costs have been processed and finalised),

[13] €3.4 million by reference to the objective of €204 million.
[14] Since the amounts of the best- and worst- case scenarios used in the sharing mechanism calculations are relatively similar, the difference between them will have little influence on the calculation of the profit-sharing. For the sake of clarity, this report will base its calculations on the worst-case scenario.

and apportionment of the gain as between the Court and the construction company is based on a sliding scale, which is defined in the contract with a view to giving the construction company an incentive to lower the target cost.

32. On 22 January 2016, the Court's share in the gain was estimated at between €2.2 million and €2.4 million, and Courtys' share at between €3.9 million and €4.2 million.

33. The calculation of the gain was checked by the External Auditor in accordance with the formula provided in the NEC3 contract. The difference between the target cost (€170.9 million) and the actual cost to the construction company (€164.8 million) is €6.1 million. However, the auditor is unable to give reasonable assurance on the final figures for the parties' respective shares, because on 31 December 2015 the accounts were not yet closed.

34. This uncertainty was mainly due to the following factors:

(a) The actual cost as determined by Courtys (€164.8 million) was not final. On 31 December 2015, negotiations between Courtys and sub-contractors on additional unpaid work were still ongoing;

(b) The actual cost as determined by Courtys has not been verified by the External Auditor: it is estimated and calculated by the construction company based on documents, and sub-contractor invoices in its own possession; and

(c) It appears that some work had been carried out or approved but not yet invoiced, because negotiations with the sub-contractors were still ongoing.

35. There was also uncertainty concerning the target cost calculation (€170.9 million), since on the reporting date the list of compensation events had not yet been finalised.

The construction contract between the Court and its builder Courtys provides for a sharing mechanism, under which, at the end of the project, the difference between the target cost and the actual cost is apportioned between the two parties. This provides an incentive to Courtys to keep down the overall cost of the project.

On 22 January 2016[15], the Court's share in this mechanism was estimated at between €2.2 million and €2.4 million, and that of Courtys at between €3.9 million and €4.2 million.

The External Auditor completed a verification of the plausibility of these amounts, on the basis of the calculation formula taken from the NEC 3 contract and data relating to costs in the best and worst-case scenarios. Without expressing any doubts about the accuracy of the estimates, the auditor was not, at the time of the audit, able to provide an assurance as to the final amount of the sharing mechanism likely to be recovered by the Court. Indeed, the amounts used as the basis for the calculation had not been finalised at the date of the present report.

5. Completion of the Project

36. Closure of the accounts and costs relating to defect identification (snagging) and maintenance are likely to result in marginal changes to the total cost of the project.

37. The foundation stone was laid on 16 April 2013 and the building was completed on 30 October 2015, whereas the time-line of the contract initially provided for completion on 17 July 2015. The deadline for the statement of late delivery penalties was postponed to 1 September 2015 by an amendment to the contract. The key handover ceremony took place on 12 November 2015. The Court's move was carried out between 30 November and 11 December 2015. The delay (1 September – 30 October 2015) resulted in a penalty of €10,000 per day, amounting to a total of €600,000.

38. The precise final cost of the work done will only be known once the accounts are closed, which will depend on: i) the exact value of the compensation events, ii) any additional costs arising prior to the final closing of the project, and iii) the outcome of

[15] End date of the external audit engagement in The Hague.

negotiations to finalize the costs between Courtys and its sub-contractors. The date foreseen by the Project Director's Office for the closure of the accounts is end of March 2016.

39. The defects liability period for the correction of defects runs for 52 weeks from the date of completion of the works, which was 30 October 2015, meaning that it ends at the end of October 2016. An amount of €800,000 will be retained from the balance owed to the construction company as security for the necessary works of rectification. This retention, or the balance thereof in the case of unrectified defects, must be paid in the course of October 2016 at the end of the defects liability period.

40. The construction company is contracted to provide the maintenance of the equipment listed in the work information annexed to the contract for a period of one year after completion of the project, namely until the end of October 2016, in consideration of a payment of €265,000. The ASP has decided to extend the maintenance contract with Courtys for a further period running up to 31 December 2017. That decision did not specify the relevant financial arrangements, but provides for the work to be remunerated at market rates. As of the date of this report, the financial arrangements were understood to be still under negotiation.

6. International comparisons

41. The External Auditor believes it to be useful to put the budget performance of the project into perspective by ending its comments with a comparison to a similar project.

42. In 2006, the General Assembly of the United Nations approved a budget of a total of $1,877 million[16] for the renovation of its Headquarters in New York. The total cost of the renovation, which included moving 10,000 UN staff into rented and furnished temporary premises, was reassessed at $2,374 million in March 2014, representing an overrun of 26.5% (see annex II).

43. The budget overrun of the construction component alone of the project was 31.1%, between the initial 2006 budget of $935 million, and the cost in January 2014 of $1,226 million. The final cost of the renovation, which was completed in June 2015, is not yet known.

44. In the private sector, a 10% budget overrun in a construction budget is considered normal by industry professionals, and cannot be regarded, therefore, as attributable to fault on the part of the project management. For example, in Belgium, an overrun of initial budget of 10%, or even 15%, cannot be described as abnormal.[17]

45. In light of these examples, the construction budget overrun of the Permanent Premises Project of the International Criminal Court, estimated at 5.3%[18] in the worst-case scenario, is not unusual and is in reasonable proportion to comparable projects and with practice in the industry.

B. Factors behind the budget overspend

46. The change in the scope of the Permanent Premises Project when the construction and transition projects were unified in 2013 does not allow for a meaningful comparison between the initial budget (€190 million), which only included the construction costs, and the final unified budget (construction and transition budgets).

47. The cost overrun has to be analysed in light of the construction and transition projects part of the unified budget (€195.7 million) adopted in 2013. The final cost of the project is estimated to be between €204.5 million (best-case) and €205 million (worst-case), in other words an increase of between 4.5% and 4.75%.Taking into account construction costs only (€184.4 million), the overrun is between €9.3 million (best-case shared scenario)

[16] US dollars.

[17] See Protect, E-Bulletin of 4 February 2013.

[18] The difference between the final cost of the construction project (worst case of €194.2 million) and the initial construction budget approved in 2013 (€184.4 million) amounts to €9.8 million, or an increase of 5.3%. On the basis of the construction budget approved in 2010, this difference amounts to 2.2% (from €190 million to €194.2 million).

and €9.8 million (worst-case shared scenario), in other words a maximum increase of 5.3%. By contrast, with regard to the transition project only, there has been no overspend since the project has achieved savings of €0.5 million. The cost overrun is therefore concentrated on the implementation of the construction project.

Table 5. Discrepancy between the budget and the estimated cost as at 31 December 2015 (in million Euros)

Construction cost	*Budget approved by ASP 13 and ASP RES1*	*Budget implementation Best case*	*Budget implementation Worst case*	*Budget discrepancy Best case*	*Budget discrepancy worst case*
Form of Agreement excluded AV	141.0	140.8	140.8	-0.2	-0.2
AV	6.0	9.4	9.4	3.4	3.4
Construction others	0.7	1.4	1.4	0.7	0.7
Risk (Compensation events)	12.0	20.5	20.7	8.4	8.7
Permit and dues	2.5	2.6	2.6	0.0	0.0
Design related	10.3	10.4	10.4	0.1	0.1
Project management	7.5	7.5	7.5	0.0	0.0
Other consultants	2.7	2.1	2.1	-0.5	-0.5
Operational fees	0.03	0.04	0.04	0.0	0.0
Other costs	1.5	1.5	1.5	-0.0	-0.0
Share part ICC NEC3 (profit and loss allocation arrangements)		-2.4	-2.2	-2.4	-2.2
Subtotal construction	*184.3*	*193.7*	*194.2*	*9.3*	*9.8*
Transition		-	-		-
Construction costs transition	1.1	3.2	3.2	2.1	2.1
Project management	1.5	1.4	1.4	-0.1	-0.1
Other consultants	2.0	1.4	1.4	-0.5	-0.5
Equipment	6.8	4.8	4.8	-2.0	-2.0
Subtotal transition	*11.4*	*10.8*	*10.8*	*-0.5*	*-0.5*
Additional budget remains	8.3	-	-	-8.3	-8.3
Total	**204.0**	**204.5**	**205.0**	**0.5**	**1.0**

Source: PDO/Brink (discrepancies calculated by the External Auditor)

48. The main causes of the construction project overspend is the "Risk (compensation events)" (+€8.4 million) and "audio-visual" (+€3.4 million) budget lines. Management of the technical factors for the overrun will be examined in this section. Two structural causes for the over-spend have also affected the cost overrun: the initial design of the budget and the project governance system.

1. Design of the budget

49. The resolution on the permanent premises adopted by the AEP at the time of its seventh plenary session on 14 December 2007 (ICC-ASP/6/Res.1) had estimated the budget necessary just for the construction of the permanent premises at €190 million, at 2014 prices.

50. On 1 March 2011, the Court estimated the other costs related to the property project, but not directly relating to the construction, at an amount of €42.2 million.

51. The interior finishing of the permanent premises and the other fittings and installations incorporated into the design ("3GV") estimated at €22.1 million at the time of the ninth plenary session of the Assembly of States Parties on 21 December 2011, was incorporated into the construction costs and therefore into the budget of €190 million. At

the time of the same session, the ASP decided however to finance the movable items ("2GV") and other related expenses from the regular annual budget of the Court.

52. The invitation to tender phase of the construction project was completed in August 2012, with the selection of the Visser & Smit / Boele Van Eesteren (Courtys) consortium, for a maximum guaranteed price of €147 million including in particular the cost of the equipment incorporated for the users ("3GV items") and the cost of the audio-visual equipment. This price was €6.3 million lower than the sum of €153.3 million initially planned in the project budget of €190 million.

53. This reduction in the price of the construction contract, combined with the fear of charging the regular budget of the ICC, led the ASP to revise its position on the financing of the transition budget.

54. The movable items and the other transition expenses (the "2GV"), reduced by the Project Director to €11.3 million, were finally incorporated in 2013 into a unified budget for the Permanent Premises Project of enlarged scope, increased to €195.7 million. The difference of €6.3 million between the sum of €153.3 million initially planned in the budget for the construction contract and the maximum guaranteed price of €147 million in the contract actually signed, was reallocated, by the ASP, at the proposal of the Oversight Committee, for an amount of €0.7 million, to the extension of the capacity of the convertible hearing room and, for the balance, namely €5.6 million, to the financing of the transition programme. The rest of the transition budget was supposed to be financed for €5.7 million out of the cash surpluses from the years 2012, 2013 and 2014.

55. The total for this merged budget dedicated to the construction project (including the reserve and fees) was therefore reduced from €190 million to €184.4 million, following an invitation to tender which was beneficial to the project owner. This reduction however resulted from a risky assessment given that the execution of the project had only just started. The Project Director should, out of prudence, have advised retention of the difference between the estimated price and the contract price obtained following the invitation to tender, in order to cover possible increases in the overall price during the course of performance of the contract.

56. Similarly, the amount of the contingency reserve which the Project Director had created in the budget should have been maintained at €17.9 million, whereas when it was reduced by the ASP to €12.7 million, namely 6.9% of the construction budget[19], it was well below the ratio commonly practised in the industry. The amount of the contingency reserve is more significant at the start of the project, when the uncertainties are numerous, and diminishes towards the end of the project, since the number of uncertain items is decreasing further. This contingency reserve had, in accordance with normal professional practice in the industry, been estimated in 2010 at 15% of the estimated final cost of construction, i.e. €17.2 million out of a total estimated cost of €114.9 million in 2007 prices. This reserve for contingencies had been re-estimated in 2011 by the Project Director at €17.9 million.

57. If this reserve had been maintained at that level, the financing of the cases for compensation other than those which resulted from program modifications would have been covered by the contingency reserve, but the transition programme should therefore have been financed on another basis.

Initially estimated at €190 million, the budget for the Permanent Premises Project was limited to the construction costs. Increased to €195.7 million in 2013, the budget was widened to include the costs relating to the transition project. The consolidation of these two budgets was based on the savings made on the price of the construction programme following the invitation to tender. The design and management of the budget have revealed various weak points:

(a) A weak point in the initial design of the Permanent Premises Project, both in terms of the tardy decision to include the costs of the transition project within the budget for the Permanent Premises Project and in partially absorbing these costs in the existing

[19] €12.7 million/€184.4 million = 6.9%.

financial envelope, through a reduction in the construction budget following the invitation to tender; and

(b) A failure of budgetary prudence, by reducing the contingency reserve to a very low prudential level which, with €12.7 million, represented 6.9% of the cost of construction[20], at a time when the construction works on the Permanent Premises Project had only just begun and by intending to reallocate savings following on the construction tender project to expenditure not included in the construction program. In the end, when the construction project revealed an increasing tendency towards a cost overrun as the construction neared completion – as is common in projects of this size – the contingency reserve, partly used to finance the transition project, was found to be insufficient to absorb the risks of the project once they had materialised.

2. System of governance

58. The ASP, in its decision dated 14 December 2007 (ICC-ASP/6/Res.1), had created three bodies for the management and supervision of the project for construction of the permanent premises - the *Oversight Committee,* tasked with the role of strategic supervision, the *Project Board,* intended to be a consultative and cooperative structure and the Project Director's Office (*PDO*), which assumed the role of ensuring that the permanent premises for the Court were constructed within the imposed deadlines, within the limits of the planned budget and in accordance with the prescribed specifications and quality standards. The Project Director's Office was run by a manager, responsible in the last resort for managing the entirety of the building project. The Project Board, of which the first meetings dealt essentially with issues of details, has not been maintained.

59. Since the Project Director's Office did not have adequate or sufficient human resources to monitor such an extensive and complex operation on a daily basis, it made use of a consultant, the Brink Groep firm, to assist it with the management of the construction project.

60. Brink Groep managed the progress of the works on a daily basis and resolved problems as and when they appeared. The *Project Manager* provided by the Brink Groep firm was the only person authorised by a provision in the NEC 3 contract to incur expenses from the contractor charged with the construction in the name of the CPI.

61. The ASP, in its decision of 21 November 2008 (ICC-ASP/7/Res.1, annex V) had however provided that "contracts or series of contracts with a total value of more than €500,000 or which require the transfer of the amount of 15% of the Contingency Fund envisaged in annex IV should be approved by the Oversight Committee". Once the contract was signed, this provision was however not always applied.

62. Since it failed to intervene upstream of the decisions, which would have been difficult to reconcile with the completion of the project in good time, the Oversight Committee should have exercised supervision of the execution of the project on the basis of clear and legible information. The Project Director's Office and Brink Groep held weekly meetings during which the decisions relating to the operational management of the construction project were made. No minutes were prepared and the details of the discussions and reasons for the decision made were not available. The External Auditor had previously noted that the "4projects" database had not been adequately completed with the meeting minutes. No details process for the feedback of information had been formalised between the Brink firm, the Project Director's Office and the Oversight Committee.

63. The Project Director's Office informed the Oversight Committee via a monthly situation report (*progress report*). Since there was no technical specification setting out with precision which essential information should be fed back to the Oversight Committee and in what form, the Project Director presented reports prepared by the project manager.

64. The processes for restitution of the information changed during the course of the project, without being adequately justified or documented. Hence, the definitions of the terms presented in the reports changed on several occasions, generating confusion in the

[20] €12.7 million / €184.4 million = 6.9%.

interpretation of financial information and difficulties in supervision. The financial supervision of the project did not initially set out, beyond the initial budget and the consumption of the budget, the monthly changes in the main expenditure headings. Furthermore, the final cost to completion, particularly sensitive information for the monitoring of this type of project, had not been presented to the Oversight Committee before July 2014, the date on which its chairman alerted it to the necessity for tools allowing for anticipation of changes in the cost at the margin, which the reports presented to the Committee did not provide.

65. In the spring of 2014, a dispute about a one-off modification to the programme,[21]which had been presented after the fact to the Oversight Committee, accentuated the latter's mistrust of the Project Director's Office. The external auditor had then recommended, without questioning the responsibility delegated to the project manager for the commitment of funds, reinforcement of the a posteriori information provided to the Oversight Committee on the details of the use of this budgetary envelope, effectively limiting recourse to the contingency reserve for the financing of minor technical adaptations. It also recommended planning if necessary for the constitution, at an appropriate level, of a specific additional reserve with a view to the financing of any substantial modifications to the functional program for which the approval and financing should, in that case, be formally submitted for the prior approval of the Oversight Committee.

66. The Oversight Committee and the project manager agreed on a new procedure for the management of the contingency reserve in June 2014. In application of that procedure, the project manager signalled all expenses which he proposed to charge to that budgetary reserve and the Oversight Committee authorised the expenses relating to promotion of the visibility of the State Parties (*representational features*), to investment expenditure which reduced maintenance costs (*total cost of ownership investment*) and those of more than €150k. The Oversight Committee could reject expenditure, having regard to strategic and political considerations. No substantial modification to the construction programme was authorised; only adjustments which were normal in such a project were authorised.

The system for governance of the project put in place suffered from the absence of a relevant mechanism for the feedback of information between the Brink firm, the Project Director's Office and the Oversight Committee. Although there was no intention, in the opinion of the External Auditor, to confuse on the part of the Project Director's Office, this context fed the growing mistrust of the Oversight Committee vis-à-vis the Director.

Up until June 2014, the decisional autonomy which the Project Director's Office had, together with the project manager, did not allow for the involvement in the project of the Oversight Committee, which limited the possibilities for raising the alert about any malfunctions. The monitoring and reporting tools were not suitable to enable the members of the Oversight Committee to carry out effective supervision.

The implementation in June 2014 of the procedure for prior validation, in order to limit the use of the contingency reserve, was a conceivable practice. The External Auditor estimates that it would have been even more efficient to put in place a procedure for prior approval of expenses based not only on a financial threshold but also on their nature - expenses intended to deal with identified events of which the occurrence was not foreseeable should have been decided by the project manager, with no prior verification, within the budgetary limit of the contingency reserve. Expenses intended to deal with an unidentified event, such as a program modification, should have been decided on by the Oversight Committee, by delegation from the ASP and not financed by recourse to the contingency reserve.

In the end, the governance was complicated by a lack of clarity about the items requiring, as a result of their nature, a specific decision by the Oversight Committee.

[21] See details below in Chapter 2.5.

3. The conception of the reserve

67. When the budget was drafted, the Project Director established a contingency reserve in order to protect the ICC from unforeseen incidents which might compromise compliance with the overall cost of a project of this size. The contingency reserve was intended to be managed on the basis of a dedicated project line, entitled “risk reserve” then “project reserve” (€12.7 million[22]) to which all expenditure not planned for in the contract between the Court and its constructor was to be allocated.

68. This reserve suffered from two design faults - on the one hand, it included expenses which were not qualified as risks, and on the other hand, it was going to be used to cover risks of a kind other than those normally covered by a contingency reserve.

69. The initial contingency reserve (€12.7 million) included budgets allocated (€5.5 million) for events such as archaeological costs, the cost of connecting to the gas network etc. Since these elements were known at the start of the project, they could not be considered to be unforeseen events. The fact that they were allocated to the “contingency reserve” line reflected a desire to manage them in-house rather than delegating management to Courtys. Once these allocated budgets were subtracted, the true total of the contingency reserve therefore stood at €7.2 million (3.9% of the construction budget).

70. Moreover, the design of the reserve turned out to be rather restrictive. In principle, a building project includes a risk reserve comprising two distinct components, a contingency reserve on the one hand and a management reserve on the other.

71. The contingency reserve is the budgetary reserve which is used to manage risks that are identified but not quantified (referred to as "known unknowns"). This contingency reserve was supposed to be controlled by the project manager; he was supposed to have full authority to utilise it any time that an identified risk occurred.

72. The reactivity with which this contingency reserve could be used was an essential element for the control of identified but unquantified risks since these were supposed to be corrected on their occurrence in order not to compromise the continuation of the project. Indeed, if these identified but unquantifiable risks were not managed rapidly after their occurrence, they would have been liable to give rise to excess costs (or additional delays) for which the amounts could have been greater than the charges to the contingency reserve.

73. The management reserve is the cost reserve which is used to manage non-identified risks (referred to as unknown unknowns). The management reserve does not constitute an estimated reserve; it is a random amount which must be defined consistently, based on the experience of the organisation in the management of similar projects.

74. The program modifications which occur during the course of the project are by definition unidentified, unknown risks. If these risks have been identified, the elements of the programme in question would have been integrated into the initial program and the corresponding costs would have been included in the initial budget for the construction project.

75. The project manager had made the implicit decision not to constitute a management reserve even though the Court had no experience in the management of building projects. Since the maximum amount of the loan granted by the host State was €200 million and the authorised budget for the construction programme was €190 million, it was possible to believe that a virtual management reserve of an amount of €10 million existed. Additional budgetary authorisations could be decided on for a maximum amount of €10 million in the event of the occurrence of unidentified risks. But it was never planned for this loan to be used for the financing of a program modification.

76. The Oversight Committee called on to decide on a programme modification could only authorise it after having found an adequate source of financing - without a budget increase or the search for an offsetting saving, difficult at the end of a project, or the use of the contingency reserve, even though that was not its intended purpose.

[22] The reserve for risks stood at €12.7 million in 2012 which was when the work began.

77. Several compensation issues which resulted from significant program modifications were not going to give rise to a budget increase when they were decided on. The same was true particularly for the revision of the occupancy plan for the premises in order to respond to the planned increase in the headcount of the Prosecutor's Office, or for the A/V equipment, with recent and sophisticated equipment, which met technical specifications, but which were much more demanding than those set out initially[23]

78. These program modifications should have been either refused, for budgetary reasons, despite the opportunities presented, or accepted but with budget modification decisions prior to their implementation, since there was no management reserve. In this case, they were accepted without being budgeted since the contingency reserve was not intended to finance them.

A misconception was made with regard to the Contingency Fund, since the actual amount available to deal with risks and unforeseen contingencies (€7.2 million) did not correspond to the amount shown in the budget (€12.7 million). Furthermore, it was used to deal with unidentified risks resulting from program modifications, despite its initial intended use.

4. The financial management of the compensation events

79. On each occurrence of a problem related to the construction works, the project manager and the constructor determined the cost of the additional incident. This approach was provided for in the NEC 3 contract. All the uncertainties associated with the construction project were allocated to the contingency reserve line and managed in accordance with the protocol for managing compensation events provided for in the NEC 3 contract.

(a) The NEC 3 contract

80. Following an invitation to tender issued in late 2011, the Dutch consortium Courtys was awarded the contract to build the Court’s permanent premises based on a proposal by the Project Director. The company signed a NEC3 type contract with the Court on 1 October 2012.

81. Conventional construction contracts raise legal issues, which NEC3 (New Engineering Contract) type contracts help to avoid. An important feature of this type of contract, compared to conventional contracts, is the procedure for managing compensation events (CE).

82. Compensation events (CE) are events which are likely to result in additional costs or delays (modification, omission or inconsistency involving the construction programme) which do not arise from the constructor’s fault. The contractual definition of a CE is set out in clauses 61 to 65 of the NEC 3 2005 model contract, to which the contract signed by the ICC and Courtys refers. Compensation events are negative events which do not arise from the Contractor’s fault. They entitle the Contractor to be compensated for any effect the event has on the Prices and the Completion Date. The compensation often takes the form of an additional payment and also an extension to the time-scale for the completion of the work.

(b) Categories of compensation events

83. Compensation events required the PDO/project manager and the constructor (Courtys) to arbitrate on uncertainties involving the construction project during the entire completion phase to establish whether the Court had to compensate the constructor. The procedure aimed to avoid any dispute between the two parties at the end of the contract.

84. At the Oversight Committee meeting of 18 June 2014, the Project Director’s Office (PDO), at the Committee's request, presented, for discussion and approval, a draft

[23] See below, Chapter 2.5 on the nature of the compensation events.

Procedure for the Management of the Project Reserve, with a classification of compensation events for easier follow-up by the Committee with the following categories:

(a) Total Cost of Ownership Investment: this category involved additional expenditures not planned for in the initial contract whose investment was justified by a future benefit for the ICC (e.g. investment in a LED lighting system costing €1.2 million which would generate savings in terms of energy use and be amortized in seven years);

(b) Changes by user: these are changes to the programme to meet user requests;

(c) Work information inconsistencies: this item involved amendments to inconsistencies in the initial construction design. Different versions of the construction project drawings might include different information for the same point (e.g. a wooden door in one drawing and an aluminium door in another) and Courtys would choose the solution which it considered to be the least expensive; if the PDO/Project Manager decided to choose a different solution it would bear the additional cost which was allocated to the CE;

(d) Work information omissions: This item involved corrections to omissions in the initial construction design. (e.g.: no doors in the drawings. Correcting this omission generated an additional cost borne by the project budget and allocated to CE); and

(e) Legislation-driven changes: this involved new safety standards and other obligations imposed by government authorities which came into force during the construction phase (e.g. 2nd entrance requested by the Ministry of Justice).

(c) Compensation event handling procedure

85. When an uncertainty occurred which required unforeseen work and which therefore generated additional costs, the process for handling the CE included the following stages to determine whether the event would result in a compensation event, involving a charge against the project budget.

(a) If the compensation event was notified by the project manager (Brink Groep), the contractor (Courtys) could directly record a compensation event or order an update of the information for the project. The contract was supposed to update the information for the project and to supply another cost estimate within the following three weeks. The project manager was supposed to respond to it within a deadline of two weeks. The contract was then supposed to send the final cost estimate to the project manager for approval; and

(b) If the compensation event was notified by the contractor, it was supposed to inform the project manager within two weeks. The latter was supposed to check the validity thereof and to notify the contractor of its decision in order that it could prepare a cost estimate. In the event that the compensation event was invalid, the project manager could refuse the request from the contractor.

86. Under the NEC3 contract, the reason for the compensation event which could result in a compensation claim was clearly specified: all incidents likely to lead to a change in situation in the contract, if they were not failures on the part of the constructor, could be considered to be compensation events. This allowed a relationship of cooperation to be established between those involved in the construction project.

87. Thus, throughout the construction phase, all the changes outside the initial contractual framework were managed were managed as follows:

(a) Courtys/Project Manager identify a CE;

(b) The project manager decides to approve or reject it; and

(c) If the CE is approved, the Project Director will negotiate the cost within the financial envelope.

88. As at 29 October 2015, out of a total 348 compensation claims, 261 had been approved by the Project Manager and the construction company, 54 had been rejected and 33 were awaiting resolution.

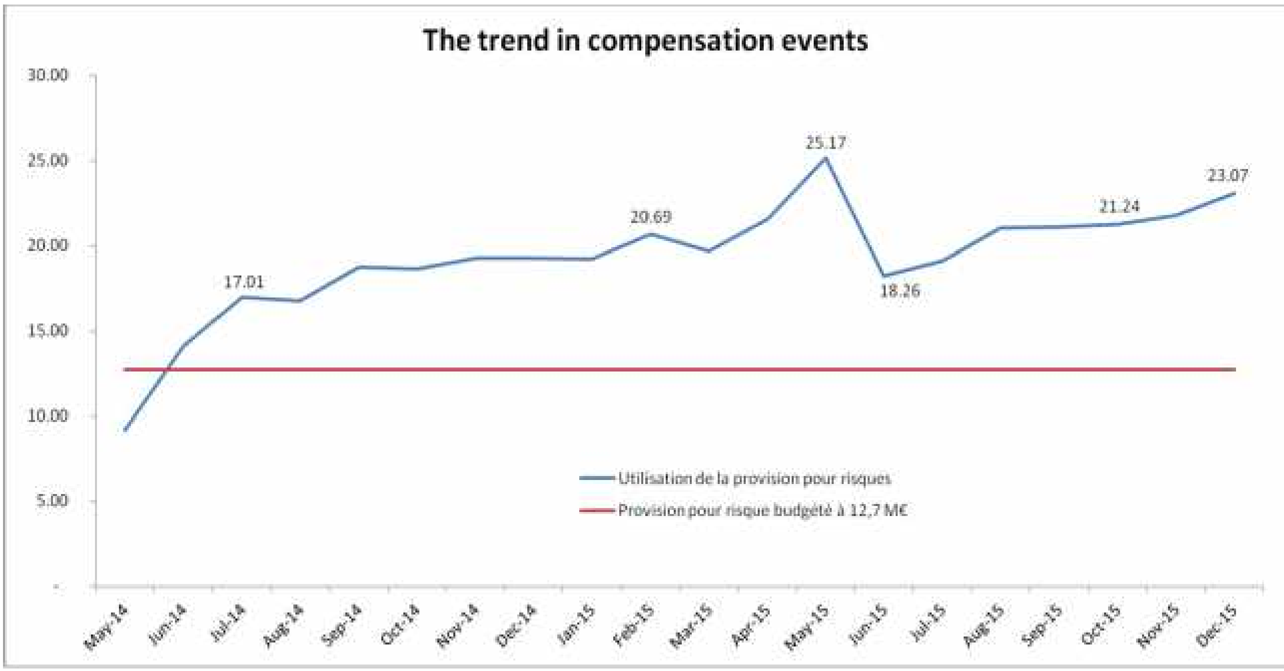
89. All uncertainties in the construction project were allocated to the "Project reserve" budget line and managed in accordance with the established protocol for compensation

events (CE) provided for in the NEC 3 contract. Changes to the contingency reserve were implicitly linked with acceptance of CEs.

(d) Changes in the use of the contingency reserve

90. The graph below shows changes to compensation events (worst-case) together with their allocation to the contingency reserve budget:

Graph 2. Changes in compensation events (in million Euros)



Source: Graph produced by the External Auditor based on monitoring reports from May 2014 to December 2015

91. The fall in June 2015 is primarily due to the withdrawal of the audio-visual budget from the construction contract with Courtys, amounting to €6 million.

92. In June 2014, an analysis of the costs highlighted compensation events (CE) estimated at €14.1 million (worst-case) including risk expenditure totalling €8.6 million and €5.5 million of expenses from the allocated budget. The 12.7 million contingency reserve was no longer sufficient to outsource the forecast budget overrun.

93. The July 2014 situation report showed for the first time that the cost to completion of the construction was estimated at between €182 million (best-case) and €187 million (worst-case). The amount of the CEs in the worst-case amounted to €17 million (or an increase of €2.9 million over one month). The construction project would end up with an overrun of €2.66 million. The Oversight Committee was concerned by this scenario and, at the time of its eighth meeting on 21 August 2014, it asked the project manager to prepare an action plan to deal with this eventuality. At that time, the project manager did not call into question, before the Oversight Committee, the possibility of complying with the budget of €195.7 million. He considered that it would be possible to remain at the best-case level, in which the cost under-run was estimated at €2 million. An expert on the Oversight Committee had recommended, on the basis of his experience, a budget increase of €5 million in order to meet additional unforeseeable costs.

94. At the time of the ninth meeting of the Oversight Committee, in September 2014, the project manager proposed an increase in the budget of €4.3 million, in order to raise it to €200 million. This decision was approved by the ASP at the time of its session on 17 December 2014 (ASP/13/Res. 2). The Oversight Committee therefore had a delegation of powers from the Assembly to decide on any increase of the budget allocated to the project, up to a maximum of €4.3 million.

95. However, the worst-case scenario had not ceased to evolve. The amount of the compensation events increased from €17 million in July 2014 to €19 million in November 2014. This increase should have been taken into account for updating the calculation of the additional requirement estimated at €4.3 million. The new authorised budget of €200 million was quickly shown to be insufficient.

96. Despite the budget increase of €4.3 million approved in December 2014, the contingency reserve was entirely used up with effect from February 2015. The main variants appeared during March 2015 in relation to the appearance of several issues (audio-visual for €1.7 million, floor plans for €1.8 million and entrances to the pavilions for €2 million). But this budget overrun could have been anticipated and presented by the project manager to the Oversight Committee with effect from the summer of 2014, taking into account the gradual overruns on compensation events appearing in the progress reports.

In June 2014, the worst-case scenario showed a budget overrun for the contingency reserve. This alert signal was dealt with by an increase in the budget, evaluated in September 2014 at €4.3 million, and authorised during the session of the ASP in December 2014.

But in the same period, the progress reports showed a gradual overrun of the compensation events (CE) from July to November 2014, in such a way that the additional budget approved in December 2014 was shown to be insufficient with effect from March 2015. The variances in the CEs were very sharply upwards. Taking them into consideration would have allowed for anticipation of the budget overrun, but the lack of clarity in the reports did not facilitate the reading thereof by the Oversight Committee.

The Project Director's Office demonstrated an excess of operational optimism, assuring the Oversight Committee at the end of 2014 of the adequacy of the newly-approved budget of €200 million, without taking account of the changes in the worst-case scenario, which presaged a new overrun in 2015.

5. The nature of the compensation events

97. As at 31 December 2015, compensation events (CE) approved stood at €23.1 million in gross value (with €2.8 million paid for by the host State, €0.6 paid by the constructor’s penalty and €0.7 paid by the Court’s annual budget to be deducted from the project budget) and were broken down as follows:

Table 6. Breakdown of compensation events (in million Euros)

	Total
MER's and SER's Plug&Play	2.5
Entrance pavilion	2.2
Floor Plan	1.4
Permit	1.3
Change to LED	1.2
Inconsistencies on resistance class	1.1
Pollution	1
Precast engineering more complex	1
DV&O route in scope	0.7
Inconsistencies internal doors	0.7
Penalties from consultants	0.6
Paging demand fire brigade PZI	0.6
Court yards	0.5
Enlargement Sport Gym 400.05	0.2

	Total
Provisions bomb blast GF	0.2
Subtotal	*15.2*
Others	7.9
Total	**23.1**

Source: PDO and Brink Groep

98. Compensation events (CE) include costs which are by nature very different and which may be broken down into two groups covering the five categories which had been established by the Project Director and the Oversight Committee in June 2014[24]:

(a) Mandatory modifications, in other words adaptations which are indispensable as a result of initial project design faults (such as omissions and inconsistencies involving the drawings of the premises) and external events imposed on the Court's project (such as security measures requested by the host State); and

(b) Program modifications resulting from an opportunity decision (such as changes requested by users or additional investments justified by a future benefit), as a result of internal decisions taken by the Project Director's Office, the Oversight Committee or the Court.

99. The classification used in the working documents of the project manager for the monitoring of the compensation events shows additional categories by reference to the classification initially used during the presentations made to the Oversight Committee by the PDO. It incorporates other categories, such as "other", "provisional sum", or "IT". Our work enables us to observe that certain classifications did not always reflect the nature of the compensation events, which made it difficult to analyse the charges to the contingency reserve.

100. The monitoring of all CEs is centralised by the Project Manager (Brink) in accordance with the provisions of the NEC3 contract, without taking into account the financing sources.

101. Furthermore, it should be noted that the "budget costs" summary in the *Progress report* dated 31 December 2015 contains a few one-off presentation anomalies which lead to an incorrect reading of the budget:

(a) The "risks" budget line incorporates a subsidy from the Dutch State for €2.8 million, intended to finance in particular the depollution system and the building permits. This recording of these subsidy in the budget for the reserve gives rise to a partial offset of the expenses which are not taken into account in the budget by the Dutch State, for an amount of €1.5 million. This subsidy should have neutralised, for an amount of €1.5 million, the "permit and dues" line relating to the building permit expenses borne by the Dutch State; and

(b) The "risks" budget line incorporates IT expenses which should have been financed by the transition budget for €2.8 million. This amount should therefore have been excluded from the construction budget and reclassified on the budget lines for the transition for an amount of €2.8 million.

102. Mandatory modifications included the following elements:

(a) Additional security enhancements required by the Dutch government (NCTV) incurred additional expenditure of €2.4 million to secure the entrance pavilion and for the use of bomb blast resistant materials; together with €0.7 million associated with creating an additional secure route for accused and detained persons and protected witnesses;

(b) The discovery of oil pollution in groundwater due to abandoned oil tanks on the site. The Dutch host State agreed to meet all the costs incurred as a result of cleaning up

[24] See above, paragraph 85.

the pollution for €1 million as well as the costs associated with knocking down the surrounding wall. This cost should therefore be assimilated with subsidy from the Dutch Ministry of Foreign Affairs;

(c) €0.7 million of the €1.3 million building permit costs involved[25] an application seeking permission for an extension from the municipality and €0.5 million incurred to make the car parks watertight;

(d) Additional consultancy costs amounting to €0.6 million for architect's fees which were incorrectly estimated at the start of the contract; and

(e) "Paging PZI" costs involved a regulatory requirement involving to ensure that the buildings would comply with fire protection standards.

103. The opportunity decisions which had an impact on the construction budget covered the following items

(a) The Court's desire to be open to outside visitors led to the setting up of a visitors' café, together with a souvenir shop, a library space and an interactive exhibition, which explains the history of the Court and its activities, and which involved an additional cost of approximately €0.7 million. These compensation events were decided by the Project Director and the Project Manager;

(b) In 2014, the Prosecutor's Office presented a forecast of an increase in the size of its staff until 2016, which involved 200 additional workstations by reference to the initial plans, for an amount of €1.1 million. An additional cost of €0.2 million was authorised for the fitting out of the offices. This modification was decided on by the Project Director in order to meet the needs expressed by the Prosecutor's Office, after informing the Oversight Committee;

(c) In December 2013, the project team examined whether it was appropriate to use LED lighting for energy efficiency reasons and it concluded that this type of lighting offered better energy recovery in the long-term (which would result in energy and maintenance savings in the long-term with investment recovery after seven years). The use of energy-saving systems such as installing LEDs amounted to €1.2 million. This change was decided by the Project Director after consulting with the Oversight Committee;

(d) In 2014, the Project Director decided to proceed with an extension to the employee gymnasium. This decision led to an additional cost of €0.2 million, presenting the Oversight Committee with a fait accompli;

(e) Compensation events associated with the MER (*Main Equipment Room*) and SER (*Supplied Equipment Room*) equipment involved expenditure incurred to install new servers in the new permanent premises, whereas the project starting point had been to re-use the old servers and racks. The €1.8 million cost involved hardware paid for out of the transition budget; expenditure of €0.4 million was for server cooling equipment and €0.3 million to change the location of the servers which were initially planned to be in the basement but were moved to the 8th floor of the Court Tower for security reasons (risk of flooding). The Project Director's Office retrospectively informed the Oversight Committee about this after the latter requested explanations about the significant increase in expenses from March to April 2014. These changes were absorbed within the transition project;

(f) Garden landscaping costs in an amount of €0. 5 million[26], following a decision by the Oversight Committee, so that each courtyard garden would represent a regional group. This decision taken by the Oversight Committee was charged to the promotional expenses for the visibility of the Court (*representational features*), which constituted resources *earmarked* in the reserve budget for unforeseen items;

(g) Adding a pattern to the perimeter wall, for a value of €0.17 million was decided by the Project Director to make the wall look less aggressive;

(h) Additional motion detection in hallway corridors, for an amount of €0.21 million, was decided by the Project Director to reduce the number of security guards needed in the premises on weekends and night shifts, thereby producing savings in personnel costs in the annual budget; and

[25] Rounded up/down.
[26] According to the table for monitoring compensation events at 31 December 2015 supplied by Brink.

(i) Changes necessary for the permanent premises to being able to host ASP meetings in an amount of €0.25 million, were decided by the Project Director approved by the Oversight Committee.

104. At the Oversight Committee meeting on 15 May 2014, the expert recruited by the Committee observed that most of the items listed in the risk register were not risks as such but rather changes to the project for various reasons such as wishes expressed by the Project Director or the Court.

Amongst the compensation events, an amount of €8.34 million was the consequence of opportunity decisions made for the majority by the Project Director, approved or not by the Oversight Committee, sometimes agreed at the request of the Court. These expenses were not the results of unforeseeable incidents characteristic of genuine incidents.

To the extent that these decisions have had the effect of modifying the project, they did not correspond to contingencies occurring in the process of implementation of the existing project, and, as such, budgetary measures should have been put in place to cover them. The additional budget of €8.3 million (decided in December 2014 and June 2015) was essentially aimed at financing these decisions.

The amount due to obligatory modifications resulting from shortcomings in the initial conception of the project and from external constraining events was equal to €14.76 million. The initial Contingency Fund (€12.7 million) and the subsidy granted by the host State (€2.8 million) would have been sufficient to absorb a substantial part of the external risks of the construction project, if the additional costs, attributable to certain informed choices, had not also served to deplete the fund.

105. The External Auditor checked the details of a sample of compensation events disclosed by the Project Director's Office, by examining those for which the amounts exceeded €200k. This sample tested represented more than 60% by value of the compensation events, or 41 files. This work should have enabled it to understand the nature of the expenses which led to budget overruns and to verify the relevance of the compensation events, as well as compliance with the decision-making circuit, in accordance with the clauses in the NEC 3 contract.

106. Article 60 and 61 of the NEC 3 contract provide that the notification for a compensation event is made either by the contractor (Courtys), or by the project manager (Brink Groep). According to Article 62, the quotations are supplied by the contractor at the request of the project manager; the latter has the option of asking the contractor for alternative quotations or of producing its own estimate. Articles 50 and 51 of the NEC 3 contract provide that the project manager shall carry out a verification of the works completed every four weeks, following which the building contractor shall forward an invoice. The project manager subsequently issues a certificate of payment enabling the Project Director's Office to approve payment of the invoice.

107. In practice, it was shown that, depending on the compensation events, the notification could also be made either by the Project Director's Office, or by the Oversight Committee.

108. The external auditor summarised below the various stages of approval of the construction expenses. Consequently, this table is also valid for the compensation events.

Table 7: Stages of approval for construction expenses

	Initiation de la dépense	Quotation	Approbation de la dépense	Réalisation de la prestation	Contrôle de la réalisation	Suivi des coûts	Mise en paiement	Paiement
Comité de contrôle	X		X					
PDO	X		X					X
Brink	X	X	X		X	X	X	
Courtys	X	X		X				

Source: External Auditor

109. The identification of the responsibility for decisions on the compensation events was not able to be systematically established for the selection tested, since the approval decisions for the compensation events, discussed during the weekly meetings between the Project Director's Office and the project manager, were not the subject of any meeting minutes enabling the approval circuit to be checked.

110. The items provided (quotations, technical documentation for the buildings, scheduling for the meetings and minutes of the Oversight Committee) also enabled the External Auditor to record that the verification of the accuracy of the expenses incurred was not possible, due to the lack of detailed invoicing. Indeed, the budgetary monitoring for the project was constructed in the form of a single, non-detailed invoice sent each month by Courtys, these invoices being themselves based on summary invoices from sub-contractors of Courtys. The monitoring of the compensation events was not the subject of isolated invoicing, enabling them to be identified individually.

111. This observation encouraged the External Auditor to recommend that the project manager should be more demanding in the future in the checking of the expenses. In accordance with Articles 52.2 and 52.3 of the NEC 3, the project manager was supposed to carry out an audit of the invoices issued by Courtys over the whole project period, by carrying out widespread and varied sampling. These works are explicitly set out in these articles of the contract, which stipulate (52.2) that the building contractor must retain supporting documents for the payments made and (52.3) that the project manager may at any time inspect the accounts and records which the building contractor holds. The External Auditor will ensure that it analyses the audit work completed by Brink, during the last phase of its annual audit assignment on the project management.

112. The platform (4projects) dedicated to the monitoring of the engineering and the project costs shared between Courtys, Brink and the Project Director was only partially completed at the time of the intervention by the external auditor. The part dedicated to the compensation events included 497 notifications of compensation events open as at 6 January 2016, then 510 notifications on 19 January 2016. Of these notifications, only 454 cases have been the subject of an estimate completed in "4projects" and only 208 notifications were annotated as implemented even though the project was finalised, the move into the new premises having officially occurred on 1 December 2015. This situation probably reflects a lack of time dedicated to the documentation for the budgetary monitoring of the project. The project management assistance (the project manager) apparently favoured making progress on the project to the detriment of the supporting documentation for the compensation events.

113. Lastly, significant cost variances were observed on 15 of the files tested (36.5% of the sample) between the initial estimates[27] of the amount of the notifications of compensation events input by the Project Director's Office, Brink or Courtys, depending on the cases, and the estimates which were finally established. These systematically negative variances represent an additional amount of €6.2 million by reference to the initial notifications. This situation reflects a lack significant lack of rigour in the initial cost estimates for the notifications.

> The tests carried out by the External Auditor show a weakness in the design and the documentation of the accounting monitoring of the payment for the compensation events, of which the purpose should be to detect and anticipate potential budgetary overruns. The External Auditor will examine the results of the verification of the invoices presented by Courtys during its final annual audit assignment of the project management. This verification should be requested by the Project Director and undertaken by the project manager (Brink) in accordance with the provisions of the NEC 3 contract and put into a report.

[27] <€10,000; €10,000 <...<€100,000; > €100,000.

6. Audio-visual equipment

114. Back in 2009, the Court produced a report on audio-visual (AV) provision. At the design stage, a preliminary study on audio-visual equipment focused on:

(a) The three courtrooms, including broadcasting and storage arrangements;

(b) The press briefing room and arrangements for the associated media centre;

(c) The main conference cluster;

(d) Meeting rooms; and

(e) Plus dedicated cabling for the audio-visual systems, separate from the IT cabling.

115. Most of the audio-visual equipment used in the old premises was obsolete and could not be re-used in the new premises.

116. For example, the new courtrooms are three times the size of the pre-existing courtrooms and the zoom function on the existing cameras was inadequate in light of this change. Wherever possible the old equipment was re-used. But since the new courtrooms are bigger, most of the old equipment was no longer suitable.

117. The aim was to equip the permanent premises with the latest technology in order for it to remain in service over a longer period.

118. Since the permanent premises were due to be completed in 2015, the decision was taken not to purchase the equipment in 2012 and to postpone the purchase for as long as possible in order to purchase equipment with the latest technology. At the time the estimated cost of purchasing the equipment and building-related provisions was €6 million (for the design and integrated activities).

119. A provision for this amount was therefore added to the contract concluded with Courtys to ensure that the cost of managing, coordinating and installing the equipment in the buildings was borne by Courtys. The constructor would henceforth be responsible for the audio-visual engineering and implementing the provisions in a timely fashion.

120. Once the construction project began, the project team became aware that neither Courtys nor the original consultant could offer the specific engineering expertise without a significant increase in cost or the Court staff taking over direct responsibility. The project team decided to entrust a Court official, an expert in the field, with the engineering. This person drafted the specifications for all the audio-visual equipment. The Court's procurement section led the procurement process. The only aspect for which Courtys was still responsible was installing the AV cabling.

121. The results of the tendering procedure (received in February 2015) were less competitive than anticipated. It would appear that there were very few tenders who could meet the requirements and specific features the Court needed, in particular those aspects involving vital witness protection. As a result, the planned savings were not achieved.

122. Cabling costs and building-related provisions were also much higher than planned because of the technical specifications.

123. The combined outcome was a total cost of €9.4 million as at 31 December 2015, compared with a planned provision of €6 million, in other words a €3.4 million overrun.

Table 8. Breakdown of audio-visuals (in million Euros)

	Total worst-case
Brahler ICS Konferenztechnik	1
Furniture Meeting rooms	0.1
Courtys v.o.f.	2.5
DB Broadcast Limited	4.1
EVS Broadcast Equipment s.a.	0.3

	Total worst-case
FX losses	0
Globecomm Systems Inc USA	0.8
NFGD	0.5
Parking list	0
Stafrosta	0
Total Budget implementation	**9.4**[28]

Source: PDO

As the audio-visual system of the Court was outdated, the Permanent Premises Project presented the Court with the opportunity to modernise its audio-visual equipment.

Given that the Courts and the Project Director's Office had decided, in order to enjoy last generation equipment, to leave it to as late a stage as possible to order its audio-visual material, this element has resulted in a more elevated cost than the amount originally envisaged in the initial budget. It should however be noted that this decision will provide equipment with, in principle, a longer service life.

Moreover, the requirements and constraints relating to the trial process, in particular those concerning witness protection, justified the acquisition of state-of-the-art equipment with highly specific technical features.

Under these circumstances, compared to the initial budget for audio-visual material (€6 million), as of the date of the present report the cost of this material now totalling €9.4 million showed an overrun of €3.4 million.

C. Conclusion

124. The final cost of the Permanent Premises Project was estimated at the time of the audit at between €204.5 million and €205 million, or an increase of between 4.5% and 4.7% by reference to the unified provisional budget of €195.7 million approved in 2013. Taking into account only the cost of construction, the budget overrun should the between €9.3 million and €9.8 million, or a maximum increase of 5.3% by reference to the approved a budget of €184.4 million. Compared with the budget of €190 million initially approved just for the construction, the estimated overrun, with a final cost for the construction of €194.2 million, would be 2.2%.

125. Regardless of the point of view taken, this level remains minor by reference to the overruns commonly observed in construction projects of this size. The majority of the overruns corresponding the end to relevant expenses, even though the program modifications should have been financed by budget increases authorised prior to their implementation.

126. The permanent premises were delivered on time to allow for moving offices, within the deadlines set in 2011, during December 2015[29]. They correspond to detailed technical specifications and no major defect in the design or completion has been identified to date. The model NEC 3 contract, despite the difficulties created by the control of the request for compensation, was shown to be very useful for ensuring compliance with tight deadlines.

127. However, the external auditor identified three types of weakness in the management of the operation:

(a) *The first weakness resides in the late decision, in 2013, to integrate the costs of the transition programme* into the budget for the Permanent Premises Project and in the attempt to partially absorb these costs in the project budget, with the intention of benefiting from the saving made on the construction cost following the invitation to tender. This

[28] Rounded up/down.
[29] Resolution ICC-ASP/10/Res.6, paragraph 10.

attempt to reallocate the budgetary saving by reference to the initially estimated construction costs reveals a lack of prudence at a time when the work on the project had just begun. Similarly, the contingency reserve was reduced from €17.2 million to €12.7 million, in other words to a level well below the prudential standards in effect. In the end, the contingency reserve, partially used to finance the transition project, was shown to be insufficient to outsource the project risks when these were completed;

(b) *The system of governance of the project suffered from the absence of prior definition of mechanisms for the feedback of information*, which brought about a climate of mistrust by the Oversight Committee with regard to the Project Director's Office and complicated the information delivered to the State Parties, giving rise to disproportionate suspicions. The decision-making autonomy of the Project Director's Office (PDO) and the Project manager did not allow the Oversight Committee to be integrated into the project management, which limited the possibilities for raising the alert. The monitoring and reporting tools were initially inadequate to allow for effective management. The stakeholders in the governance of the project should have agreed well in advance and more clearly concerning the technical specifications relating to responsibilities in terms of reporting and the nature of the expenses likely to require a decision by the Oversight Committee prior to being incurred. Furthermore, the monitoring of the payments to the building contractor, approved by the project manager, was rendered opaque by the method of invoicing which was too summary. This invoicing requires verification by the Project manager under the Project Director’s supervision; and

(c) *The design and use of the contingency reserve played a central role in the cost overruns.* Incorporated into the budget in order to avoid the budget overruns inherent in a project of this size, which always record unforeseen expenses, this reserve, which is best practice in this type of operation, was officially displayed in the budget at €12.7 million, where as its actually available amount was €7.2 million, the rest being reserved for transactions which were not unforeseen in nature. The reserve showed signs of exhaustion with effect from June 2014. Amongst the compensation events which increased the final price, an amount of €8.34 million was the consequence of opportunity decisions and not the result of unforeseeable incidents characteristic of genuine problems, which the contingency reserve should have been intended to cover. To the extent that they modified the project, these decisions did not correspond to unforeseen events in the completion of the existing project and should have been accompanied by budgetary measures for their financing. The amount of the obligatory modifications resulting from defects in the initial design of the project and external constraint events represented an amount of €14.7 million. The initial contingency reserve (€12.7 million) and the host State subsidy (€2.8 million) should have been sufficient to absorb most of the inevitable expenses caused by the execution of the construction project, if additional expenses due to opportunity decisions had not led to additional charges against the reserve.

IV. Acknowledgements

128. The External Auditor’s team would like to thank Mr Ivan Alippi, Director, Division of Management Services, together with Mr Kenneth Jeavons, Director of the Project Director’s Office and Mr Juan Escudero, Senior Legal and Policy Advisor, for their welcome, their time and the efficient support they provided to ensure the task was completed successfully.

End of audit observations.

Annex I

Financial Statement to 31 December 2015

	Budget	Best case	Worst case
Construction cost			
Form of Agreement (excluding AV)	141 040 700	140 792 613	140 792 613
AV	6 000 000	9 354 855	9 356 855
Other construction cost	719 000	1 417 699	1 417 699
Compensation Events	12 046 231	20 485 472	20 699 270
Permits& Dues	2 549 526	2 556 926	2 556 926
Fees	20 492 188	20 090 077	20 090 077
Other Cost	1 500 000	1 488 500	1 488 500
Additional budget (including expected share)	8 300 000	0	0
(1) Subtotal construction	192 647 645	196 186 141	196 401 940
Share part ICC NEC3 contract		-2 445 703	-2 238 024
(2) Subtotal construction inclusive share		193 740 438	194 163 916
Budget CP		192 647 645	192 647 645
Saldo (Budget CP -/- 2)		1 092 793	1 516 271
Transition			
Construction cost transition	1 067 355	3 207 364	3 207 364
Fees transition	3 450 820	2 784 264	2 784 264
Equipment transition	6 834 180	4 818 791	4 818 791
Reserve	0	0	524 800
Subtotal transition	11 352 355	10 810 419	11 335 219
Budget TP		11 352 355	11 352 355
Saldo (Budget -/- Subtotal)		541 936	17 136
Consolidated			
	Budget	Cost best case	Cost worst case
Construction project	192 647 645	193 740 438	194 163 916
Transition project	11 352 355	10 810 419	11 335 219
Total CP + TP	204 000 000	204 550 857	205 499 135
Budget		204 000 000	204 000 000
Saldo (Budget -/- Consolidated)		550 857	1 499 135

Source: PDO/Brink Groep

Annex II

Extract from the Report of the Board of Auditors of the UN (A/69/5, vol. V)

Table 1: Projected costs, budget and cost overrun as at March 2014[(a)] (in millions of United States dollars)[(b)]

	Project (construction) costs	*Associated costs*	*Secondary data centre*	*Total*
Approved budget	1 877			
Donations	14			
Enhanced security upgrade	100			
Contribution to secondary data centre			4	
Total consolidated budget	**1 991**	**0**	**4**	**1 995**
Anticipated final costs	2 115			
Enhanced security upgrade	100			
Associated costs[c]		140		
Secondary data centre[c]			19	
Total anticipated final cost	**2 215**	**140**	**19**	**2 374**
Variance between budget and anticipated final cost	**(224)**	**(140)**	**(15)**	**(379)**

Source: Board analysis of the Administration's data and General Assembly resolutions.
[(a)] Annex IV presents a more detailed breakdown of budget and costs.
[(b)] Values are rounded to the nearest million.
[(c)] These costs were not included in the approved capital master plan budget, and the General Assembly requested that they be absorbed from this budget.

8. **The $379 million overrun relates to issues that arose and events that occurred earlier in the project, and no new risks or significant cost increases have occurred in the period under review.** Cost overruns are common in major construction projects, particularly in a project of the size and complexity of the capital master plan. Beyond the unbudgeted associated costs and costs of the secondary data centre, the Administration has over time reported increases in construction costs as risks have materialized, and professional service fees have increased owing to changing market conditions. In addition, the decision to accelerate delivery in 2007 led to the signing of contracts before designs were complete, with the subsequent changes leading to additional work and change orders, and therefore increased costs. Some construction work will now be deferred beyond the project's closure in June 2015 and could result in additional expenditure for the United Nations.