

## AWARD

issued in Stockholm, Sweden, on 13 February 2003 in an Arbitration

between

**Claimant**

Petrobart Limited, Suites 7b-8b, 50 Town Range, Gibraltar  
(hereinafter referred to as "Petrobart") represented by: Richard D. Hill  
and Stewart Shackleton, Baker McKenzie, 100 New Bridge Street,  
London EC4V 6JA, England

and

**Respondent**

The Kyrgyz Republic, Bishkek 720000 DOM PRAVITELSTVA, The  
Republic of Kyrgyzia (hereinafter the "Republic") represented by:  
Etienne R. Claes and John T. Corrigan, Leboeuf, Lamb, Greene and  
Macrae, Kunstlaan/Avenue des Arts 19H, B – 1000 Brussels, Belgium

**before**

Professor Kaj Hobér, Chairman  
Dr. Ahmed S. El-Kosheri, Arbitrator  
Professor Albert Jan van den Berg, Arbitrator

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## **I BACKGROUND**

Petrobart is a company incorporated under the laws of Gibraltar. Kyrgyzgazmunaizat Joint Stock Company ("KGM") is a state-owned company incorporated under the laws of the Kyrgyz Republic.

On 23 February 1998 Petrobart and KGM signed a Goods Supply Contract No. 1/98-PB (the "Agreement") whereby Petrobart undertook to supply and transfer the ownership of 200,000 tons of gas condensate to KGM, and KGM agreed to accept the supplied goods and pay for them in accordance with the terms set out in the Agreement. Petrobart fulfilled its obligation under the Agreement. KGM, however, failed to fulfil its obligation, i.e. to pay for the supplied goods. As a consequence, Petrobart filed a claim with the Bishkek City Court of Arbitration (the "Bishkek City Court") requesting payment for the supplied goods.

On 9 December 1998 the Bishkek City Court granted a freezing order with respect to KGM's account with the Mercury Bank and on 15 December 1998 the Court granted an order for the seizure of KGM's moveable and immovable property. Finally, on 25 December 1998 the Bishkek City Court rendered a ruling in favour of Petrobart. Moreover, on 10 February 1999 the Bishkek City Court decided that Petrobart could execute its judgment against the stock and property of KGM.

On 11 February 1999 the Vice Prime Minister of the Kyrgyz Republic wrote a letter to the Chairman of the Bishkek City Court asking the court to "assist in granting a deferral for the enforcement of the decisions taken by the Arbitration Court of Bishkek City". In an order dated 16 February 1999 the Bishkek City Court granted a three-month stay of the execution of Petrobart's judgment. KGM was declared bankrupt on 15 April 1999.

In an Arbitration Notice submitted on 2 March 2000 Petrobart initiated arbitration against the Republic proposing that there be a sole arbitrator. In its Arbitration Notice, Petrobart relied on the Kyrgyz Foreign Investment Law and the arbitration clause found in Articles 23.2 and 23.3 of such law, which read as follows.

“2. When such agreement is absent an investment dispute between the authorized governmental bodies of the Kyrgyz Republic and a foreign investor shall be settled, if possible through consultations between the parties thereto. If the parties thereto cannot come to a peaceful settlement of the dispute during three months from the first written application for such consultations the dispute shall be settled through arbitration in accordance with one of the following procedures:

Regulation of Arbitration Court under the Chamber of Industry and Commerce of the Kyrgyz Republic;

Convention for the settlement of investment disputes between the states and citizens of any other states, (“Convention ICSID” signed in Washington DC on March 19, 1965) if applicable;

Arbitration (Auxiliary) regulations of the International Center for the settlement of the investment disputes (ICSID), if applicable;

Arbitration regulations of the Commission of the United Nations Organizations on International Trade Law (UNCITRAL Regulation); in this case the appointing body shall be General Secretary of ICSID.

3. The Kyrgyz Republic in the person authorized governmental body shall consent to the transfer of the investment dispute for the arbitration settlement by virtue of this law. A foreign investor’s agreement may be given at any time through a written application to the State Body effectuating the attraction of investments or at the moment of application to the arbitration.”

In a letter to Petrobart dated 20 March 2000 the Republic stated firstly that the Kyrgyz Foreign Investment Law was not applicable and secondly that the Republic was not the correct respondent.

In a letter dated 5 April 2000 Petrobart once again asked the Republic to consent to a sole arbitrator. Petrobart also informed the Republic that should it not consent to a sole arbitrator, three arbitrators would be appointed.

In a letter dated 17 April 2000 the Republic informed Petrobart that the Republic had requested the Zhogorku Kenesh (the Supreme Council of the Republic) to interpret the meaning of a foreign investment pursuant to the Foreign Investment Law. Moreover, the Republic stated that it was willing to reconsider the matter once the interpretation was done.

In a letter dated 11 May 2000 Petrobart appointed Professor Albert Jan van den Berg as arbitrator.

In a letter dated 8 June 2000 the Republic once again stated that the dispute could not be referred to arbitration.

In a letter dated 4 July 2000 Petrobart requested the International Centre for the Settlement of Investment Disputes ("ICSID"), in its capacity as appointing authority, to appoint a second arbitrator. The letter was received by ICSID on 7 July 2000.

On 3 November 2000, using the procedure prescribed by Article 7.2 (a) of the UNCITRAL Arbitration Rules, ICSID, appointed Dr. Ahmed S. El-Kosheri as the second arbitrator. He accepted the appointment on 9 November 2000.

Professor van den Berg and Dr. El-Kosheri appointed Professor Kaj Hobér as Chairman of the Arbitral Tribunal. Professor Hobér accepted the appointment on 24 January 2001.

## II PRAYERS FOR RELIEF

### 2.1 Petrobart

Petrobart has requested that the Arbitral Tribunal issue an award:

- (i) finding that the Arbitral Tribunal has jurisdiction over the Republic;
- (ii) ordering the Republic to pay to Petrobart the principal debt owing under the contract amounting to USD 1,499,143.00;
- (iii) ordering the Republic to pay to Petrobart the accrued legal costs for the proceedings in Kyrgyzstan amounting to USD 83,020.00;
- (iv) ordering the Republic to pay interest on the above amounts during the following time periods, and at the following rates:

• 15 Feb 99 – 15 Feb 00	8.125%
• 16 Feb 00 – 15 Feb 01	9.167%
• 16 Feb 01 – 15 Feb 02	6.386%
• 16 Feb 02 – 30 Jun 02	4.75%
- (v) ordering the Republic to pay Petrobart's legal fees for the court actions in Kyrgyzstan and these arbitral proceedings in an amount of USD 672,746.00;
- (vi) ordering the Republic to pay post-award interest on any amount awarded at an annual rate of 9 per cent.

## **2.2 The Republic**

The Republic has requested that the Arbitral Tribunal issue an award:

- (i) finding that it has no jurisdiction over the dispute between Petrobart and the Republic; or
- (ii) finding that Petrobart suffered no compensable damages; or
- (iii) finding that the Republic is indebted to Petrobart in no amount; and
- (iv) ordering that Petrobart take nothing and that Petrobart reimburse the Republic for its costs herein expended, amounting to USD 373,527.00.

### III PROCEDURAL EVENTS

#### 3.1 The Jurisdiction of the Arbitral Tribunal

- (i) The Arbitral Tribunal issued its First Procedural Order on 21 February 2001 requesting the parties to submit the Statement of Claim, the Statement of Defence, the Reply to the Statement of Defence and the Rejoinder to the Reply to the Statement of Defence.
- (ii) In its First Procedural Order the Arbitral Tribunal determined, pursuant to UNCITRAL Rule 16.1, that the place of arbitration should be Stockholm.
- (iii) In a letter dated 9 March 2001 the Republic advised the Arbitral Tribunal that the Bishkek Court, in its ruling dated 26 December 2000, ruled that Petrobart's claim did not constitute a foreign investment dispute according to the Foreign Investment Law and that, as a consequence, this dispute could not be resolved by arbitration. Consequently, the Republic stated that the Arbitral Tribunal, in accordance with the ruling of the Bishkek Court, did not have jurisdiction to try Petrobart's claim. Moreover, the Republic stated that it wished to submit a plea pursuant to UNCITRAL Rule 21 and that the Arbitral Tribunal should rule on the issue of jurisdiction as a preliminary question.
- (iv) In a letter dated 15 March 2001 Petrobart stated that since the issue of jurisdiction is closely connected with the question of whether Petrobart has a cause of action against the Republic under the Foreign Investment Law, it would be inappropriate for the Tribunal to determine the issue of jurisdiction until the parties have submitted their statements pursuant to the Arbitral Tribunal's First Procedural Order.

- (v) In a letter dated 16 March 2001 the Republic again stated that the issue of jurisdiction was a separate question and that the Arbitral Tribunal therefore should consider the issue as a preliminary matter.
- (vi) In a letter dated 19 March 2001 Petrobart requested that the parties be asked to argue the case both on the merits and with respect to the issue of jurisdiction.
- (vii) On 23 March 2001 the Arbitral Tribunal decided that the parties were to submit the Statement of Claim, the Statement of Defence, the Reply to the Statement of Defence and the Rejoinder to the Reply to the Statement of Defence and that the Arbitral Tribunal would, on the basis of the submissions, decide whether it was to rule on the issue of jurisdiction as a preliminary and separate question or in its final award.
- (viii) On 23 May 2001 the Republic submitted its Plea Pursuant to UNCITRAL Rule 21.
- (ix) On 27 June 2001 Petrobart submitted its answer to the Republic's Plea Pursuant to UNCITRAL Rule 21.
- (x) On 17 September 2001 the Republic submitted its Rejoinder to Petrobart's answer to the Republic's Plea regarding jurisdiction.
- (xi) In a letter dated 24 September 2001 Petrobart requested the Arbitral Tribunal to rule on the jurisdictional issue as a preliminary question and that such a ruling could be based on the pleadings submitted to the Arbitral Tribunal. Petrobart also advised the Arbitral Tribunal that no hearing was required.
- (xii) In a letter dated 5 October 2001 the Republic advised the Arbitral Tribunal that it did not object to the Arbitral Tribunal ruling on the issue of jurisdiction as a preliminary question and that it did not formally request that the Arbitral Tribunal

hold a hearing, but deferred this decision to the Arbitral Tribunal's discretion according to UNCITRAL Rule 15.2.

- (xiii) On 26 October 2001 the Arbitral Tribunal decided that it would rule on the Republic's objection to the jurisdiction of the Arbitral Tribunal as a preliminary and separate question and that it would hold a hearing on 10 – 13 December 2001 devoted to the issue of jurisdiction only.
- (xiv) In a letter dated 14 November 2001 both parties agreed that it would not be cost effective to have two hearings and that, since it was not possible to complete a hearing on both the jurisdiction and the merits at the dates set by the Arbitral Tribunal, the hearing should be re-scheduled.
- (xv) On 21 November 2001 the Arbitral Tribunal cancelled the hearing scheduled for 10 – 13 December 2001.
- (xvi) On 5 December 2001 the Arbitral Tribunal decided to hold a hearing on 6 – 9 May 2002 at which both the issue of jurisdiction and the merits of the case were to be dealt with.
- (xvii) The hearing was held in Stockholm on 7 – 8 May 2002.
- (xviii) On 3 July 2002 Petrobart submitted its post-hearing memorial in which it also addressed the issue of jurisdiction.
- (xix) On 12 August 2002 the Republic submitted its post-hearing memorial in which it also addressed the issue of jurisdiction.

### **3.2 The case on the merits**

With respect to the merits of the case, the following main procedural events have occurred:

- (i) Petrobart submitted its Notice of Arbitration, dated 2 March 2000
- (ii) Petrobart submitted its Statement of Claim, dated 26 March 2001 ✓
- × (iii) The Republic submitted its Statement of Defence, dated 23 May 2001
- (iv) Petrobart submitted its Reply to the Statement of Defence, dated 27 June 2001 ✓
- (v) The Republic submitted its Rejoinder to the Reply to the Statement of Defence, ✓<sup>?</sup>  
dated 17 September 2001
- (vi) Petrobart submitted written witness statements and expert reports, dated 19 March 2002
- (vii) The Republic submitted written witness statements, dated 12 April 2002, 15 April 2002, 3 May 2002 and 5 May 2002
- × (viii) Petrobart submitted a supplementary brief, dated 1 May 2002
- (ix) On 7 – 8 May 2002, the final hearing was held in Stockholm (the “Hearing”). At the Hearing, the parties referred to documentary evidence and relied on testimonies of the following persons:

in the case of Petrobart:

Mr. Ratko Zatezalo, Mr. Josif Todorovski, Mr. Akhmal Saipov

in the case of the Republic:

Mr. Sagynbek Kochetov

At the Hearing the services of court reporters were employed, resulting in daily transcripts from the Hearing (the “Transcripts”);

- (x) The Republic submitted its Post-Hearing Witness Statements, dated 13 May 2002
- (xi) Petrobart submitted its Post-Hearing Exhibits, dated 12 June 2002
- (xii) Petrobart submitted its Post-Hearing Brief and Statement of Cost, dated 3 July 2002
- (xiii) The Republic submitted its Post-Hearing Brief and Statement of Cost, dated 12 August 2002

Both Parties have had the opportunity to present their respective cases. Such presentations have been made in the written submissions of the Parties and in their oral submissions at the hearing.

## **IV SUMMARY OF THE CIRCUMSTANCES RELIED ON BY THE PARTIES**

### **4.1 Petrobart**

Petrobart has essentially relied on the following facts, circumstances and arguments.

#### **4.1.1 Introduction**

Petrobart is a foreign investor and has made a foreign investment within the terms of the Foreign Investment Law. Petrobart is therefore entitled to protection of its investment pursuant to that law. The Arbitral Tribunal is vested with jurisdiction pursuant to Article 23 of the Foreign Investment Law.

The Republic has breached the Foreign Investment Law (a) by unlawfully interfering in the judicial process by which Petrobart tried to enforce its judgment of 25 December 1998, (b) by adversely modifying the Foreign Investment Law, (c) by initiating a sham bankruptcy of KGM; and (d) by wrongfully transferring the assets of KGM to other state-owned corporations just prior to the bankruptcy.

The Republic's breaches of the Foreign Investment Law deprived Petrobart of its rights to enforce its judgment and thereby to recover its judgment debt. Due to the Republic's breaches Petrobart has suffered damages amounting to USD 1,499,143.

Petrobart is entitled to the principal amount of debt, interest, post-award interest and all costs of this arbitration, as well as all legal costs incurred in Kyrgyzstan.

#### 4.1.2 Background

In February 1998 Petrobart and KGM entered into an investment arrangement under which the parties agreed to work more closely together and under which Petrobart was, *inter alia*, to supply gas condensate to KGM on preferential terms. Both parties were to reinvest their profits from these contracts into the refinery in Kant and KGM's network of petrol stations. The investment arrangement aimed at a joint equity participation in the refinery in Kant.

The Agreement, which was the first contract to be signed by the parties under the investment arrangement, differed from the previous sales- and purchase contracts entered into by Petrobart and KGM since it was very beneficial to KGM. The agreed supply of gas condensate was for an unusually large quantity and the financial terms of the Agreement were very preferential to KGM, including the open account with no advance payments, no security and a fixed price. Furthermore, Petrobart had agreed to supply raw materials instead of finished products, thereby allowing KGM to increase its own profit margins by processing the products itself in the Kant refinery. Pursuant to the Agreement Petrobart not only made a significant contribution to KGM's operation, but it also assumed the financial risk of the Agreement.

KGM failed to pay for the goods supplied by Petrobart under the Agreement and Petrobart therefore filed a claim with the Bishkek City Court. The Bishkek City Court, on 9 December 1998, granted a freezing order against KGM and, on 15 December 1998, granted an order for the seizure of KGM's movable and immovable property. Furthermore, on 25 December 1998 the Bishkek City Court ruled in favour of Petrobart awarding Petrobart USD 1,499,143 in principal. Finally, the Bishkek City Court decided on 10 February 1999 that Petrobart was permitted to execute its judgment against KGM. Consequently, two auctions were scheduled to take place in mid-February 1999. The value of the assets, which were to be sold at the auctions, was more than sufficient to satisfy Petrobart's claim.

On 16 February 1998 the Bishkek City Court stayed the execution of Petrobart's judgment debt for a three-month period. The stay of execution was made in compliance with a request from the Vice Prime Minister of the Kyrgyz Republic. In a letter dated 11 February 1999 (Exhibit C9 to the Claimant's Statement of Claim), the Vice Prime Minister wrote to the Bishkek Court stating that:

"Taking into account the critical financial situation of Kyrgyz Gazmunaizat State JSC and in order to give it a chance to reach an operational stability, I kindly request you to show understanding for the current situation and assist in granting a deferral for the enforcement of the decision taken by the Arbitration Court of Bishkek City."

The Republic had, however, when writing the letter of 11 February 1999 no intention to stabilize KGM. Its intentions were rather to bankrupt KGM and transfer all of its assets to other state-owned companies, thereby being able to continue the business.

During the stay of the execution, the Republic transferred the assets of KGM to two state-owned companies, Kyrgyz Munai and KyrgyzGas. The transfers were made for no, or nominal, consideration and left the debts which had been incurred prior to the creation of KyrgyzGas with KGM.

KGM was declared bankrupt on 15 April 1999.

#### **4.1.3 The Jurisdiction of the Arbitral Tribunal**

##### **4.1.3.1 Introduction**

The Arbitral Tribunal is vested with jurisdiction pursuant to Articles 23.2 and 23.3 of the Foreign Investment Law. Article 23.2 provides that an investment dispute may be settled through arbitration in accordance with; *inter alia*, the UNCITRAL Rules. The Kyrgyz Republic has, pursuant to Article 23.3, consented to an investment dispute being referred to arbitration under the UNCITRAL Rules.

#### **4.1.3.2 The Arbitral Tribunal's power to rule on its own jurisdiction**

The Arbitral Tribunal has the power to rule on its own jurisdiction. Petrobart relies on Article 23.2 of the Foreign Investment Law in which the Republic has agreed to arbitrate investment disputes under the UNCITRAL Rules. The applicability of Article 21 of the UNCITRAL Rules does not require that there is a valid arbitration agreement between the parties. Article 21 of the UNCITRAL Rules is a codification of the doctrine of *Kompetenz-Kompetenz* and permits an Arbitral Tribunal to rule on its own jurisdiction and thereby on the validity of the arbitration agreement. The doctrine of *Kompetenz-Kompetenz* has also been codified in Article 2 of the Swedish Arbitration Act.

#### **4.1.3.3 Petrobart is a Foreign Investor**

Petrobart is, pursuant to Article 1.3 of the Foreign Investment Law, a foreign investor. It is a legal entity, which is registered in Gibraltar. Its only link to Kyrgyzstan is the business it is conducting with KGM. It has also been confirmed by the Bishkek Court in a ruling dated 25 December 1998 that the plaintiff, i.e. Petrobart, was a foreign investor.

#### **4.1.3.4 Petrobart has made a Foreign Investment**

Petrobart has made a foreign investment in accordance with Article 1.2 of the Foreign Investment Law on either of the following four grounds: (i) the Agreement was part of a broader investment scheme; (ii) the Agreement involved the extension of a line of credit to the Republic; (iii) the Republic's failure to perform under the Agreement gave rise to a "claim for money"; and (iv) Petrobart transformed its claim for money into a judgment debt.

To begin with, the finding of the Bishkek Court in its ruling of 25 December 1998, i.e. that Petrobart was a foreign investor, was made in a ruling by which Petrobart was awarded damages for KGM's breach of the Agreement. Being made in this context it may also be extended to the Agreement itself.

Pursuant to Article 1.1 of the Foreign Investment Law an investment means tangible or intangible assets including rights to money, goods, services and other claims to performance under a contract. Moreover, a foreign investment is, pursuant to Article 1.2 of the Foreign Investment Law, an investment appearing as contributions of foreign investors into objects of economic activity within the territory of the Kyrgyz Republic to derive profit.

When deciding whether an investment, in accordance with Article 1.1 of the Foreign Investment Law, appears as a contribution into an object of economic activity, as set out in Article 1.2 of the Foreign Investment Law, consideration must be taken of all circumstances of the transaction, i.e., *inter alia*, the intentions of the parties and the economic circumstances of the agreement, and not only to the wording of an agreement.

It is stated in the witness statement of Anthony Shea that:

“An investment can be either the asset that one invests (or “contributes”) or the asset that one obtains by making such a contribution. Money, for example, which is an investment under the FIL, is an asset that is itself invested, whereas property rights, rights under contracts and rights to activity based on State licenses, which are also investments under the FIL, are not assets that are “contributed” into Kyrgyz entities but rather are assets that are acquired through investment in Kyrgyzstan, and which are to be protected by the FIL”.

The definitions of investment and foreign investment, in the Foreign Investment Law are very broad in their scope of application. The definitions of investment in the Foreign Investment Law are not exhaustive and no restrictions or exclusions are made in the Foreign Investment Law. The intention of the Kyrgyz legislator was to adopt a favourable framework for the protection of foreign investors. The Foreign Investment Law thus covers all activities associated with, or incidental to, an investment.

It is stated in the witness statement of Tom Dimitroff that:

“...the only limitation sought in defining what would constitute a “Foreign Investment” under the New FIL was to ensure that the category of protected investments was limited to contributions in the Kyrgyz Republic, i.e. assets properly within the territory of the Kyrgyz Republic.”

In May 2000 the Republic adopted the Law on the Interpretation of the Foreign Investment Law (the "Foreign Investment Interpretation Law") thereby trying to limit the scope of application of the term foreign investment in the Foreign Investment Law. The Foreign Investment Interpretation Law is, however, not applicable in this dispute since the law was adopted after this dispute arose and thereby worsened the investment regime of Petrobart's investment.

There is no requirement that a foreign investment must be evidenced in written form. The writing requirement that is found in Article 1190 of the Kyrgyz Civil Code, i.e. that "foreign economic transactions" must be made in writing does not apply to the arrangement between KGM and Petrobart since it is not a "foreign economic transaction". The word "vneshneekonomichskaya" which is used in the Civil Code is wrongly translated as "foreign economic". A more appropriate translation would be "external-economic", i.e. transactions made outside the Kyrgyz Republic. The arrangement between KGM and Petrobart was made in the Kyrgyz Republic.

Article 9.2 of the Agreement does not render agreements or negotiations within the wider arrangement null and void. Nor does it have any impact on agreements and negotiations that took place after the signing of the Agreement. Article 9.2 of the Agreement states as follows.

"Upon the signing of this Contract, all previous relations and correspondence between the Parties in relation to this matter shall be null and void."

The parties' possibility to rely on witness evidence in this arbitration is governed by the UNCITRAL Rules. Petrobart is therefore not precluded from relying on witness evidence relating to the investment arrangement.

(a) The Broad Investment Scheme

The investment arrangement between KGM and Petrobart, taking into account all circumstances associated with the arrangement, is a foreign investment within the meaning of the Foreign Investment Law.

In 1996 and 1997 Petrobart was expanding its business in Central Asia and was looking for a business partner in the Kyrgyz Republic. In order to improve its standing on the Kyrgyz market Petrobart was seeking opportunities to engage in the processing sector thereby being able to sell not only raw material but also processed material. In early 1998 Petrobart entered into negotiations with KGM, the largest and most powerful company in the Kyrgyz oil and gas sector, discussing the supply of large quantities of gas condensate. The Kyrgyz Republic was in an energy crisis thereby experiencing, *inter alia*, difficulties in supplying its consumers with energy. KGM also searched for a partner who could invest in the refinery in Kant and its network of petrol stations and oil terminals. In February 1998 KGM and Petrobart met in order to continue their negotiations. KGM informed Petrobart that it wanted not only a partner who could supply large quantities of gas condensate but also a partner who could provide money and technical support in order to solve the problems it was experiencing at the refinery in Kant.

Petrobart was able and willing to supply large quantities of gas condensate to KGM to invest in the refinery in Kant and also to take an active part in the day-to-day business of the refinery. The negotiations were thus the basis for a long-term partnership between Petrobart and KGM. The signing of the Agreement, which aimed at putting an end to KGM's and the Republic's shortage of energy, was the start of this co-operation.

This is evidenced, *inter alia*, by a letter from Petrobart to KGM dated 28 May 1998 (C24 to Petrobart's Statement of Defence) in which it is stated:

“[...] your difficulties for payments for gas condensate will not effect our plans for long term cooperation. [...] With this letter we would like to confirm our readiness to continue our business relations in the directions which we already agreed on our meetings in Tashkent in

February.[...]When your payments will be effected we are ready to step further and buy shares from your Refinery in Kant as you proposed to us in Tashkent.”

Furthermore, the Agreement was entered into on very preferential terms for KGM. It provided for a fixed price for the entire contract period and allowed KGM to increase its profit margins by processing the raw material itself, thereby being able to sell the processed material itself. At the time when the Agreement was signed the oil and gas prices were increasing and the fixed price was consequently beneficial to KGM. During the negotiations in early 1998 the parties had also agreed to re-invest their profit from the Agreement in, *inter alia*, the Refinery in Kant. The parties had, however, not yet agreed upon all the details of this arrangement when the Agreement was entered into. Petrobart was not aware of the fact that KGM only leased the refinery in Kant.

The Agreement was thus part of a broader investment arrangement between Petrobart and KGM. This arrangement constitutes a foreign investment under the Foreign Investment Law.

(b) Credit Line

Even if the broader investment arrangement is not taken into account, Petrobart's rights under the Agreement would constitute a foreign investment under the Foreign Investment Law. The Republic argues that the Agreement was a simple sales contract and therefore not a foreign investment. This is, however, not true. The Agreement also included a line of credit extended to KGM by Petrobart. This loan is an investment on its own and therefore falls within the meaning of a foreign investment in the Foreign Investment Law. This opinion has been recognized by several international arbitral tribunals.

(c) Claim for money

The Republic's refusal to perform under the Agreement gives rise to a claim for money. Pursuant to Article 1 of the Foreign Investment Law money, property rights and rights to

money constitutes an investment and Petrobart's claim for money is thus an investment within the meaning of the Foreign Investment Law.

#### (d) Judgment Debt

The judgment, which Petrobart obtained against KGM in December 1998 constitutes a foreign investment pursuant to the Foreign Investment Law in and of itself. Article 1 of the Foreign Investment Law stipulates that both "claims to money" and "property rights" are included within the scope of the Foreign Investment Law.

#### **4.1.3.5 The applicability of Public International Law**

The applicable laws when considering the relations between Petrobart and the Republic, i.e. both the issue of jurisdiction and the merits of the case, are Kyrgyz law and public international law. This is clear since this arbitration involves, *inter alia*, the Republic's international responsibility and international law is therefore inevitably relevant to the issues that may arise in the arbitration. Moreover, international law and general principles of law forming part of international law are parts of the law to be applied in arbitrations between States and private parties.

Notwithstanding the fact that the parties have agreed that Kyrgyz law is applicable, international law is applicable and relevant in this dispute. This opinion has been recognized by several international arbitral tribunals.

Kyrgyz law itself incorporates principles of international law into the national legal system. Pursuant to Article 9 (4) of the Kyrgyz Constitution, the Republic is obliged to "*observe the universally recognised principles of international law*". In cases where there are allegations of wrongful acts by governmental officials, municipal law alone cannot be applied. Rather the principles of international law, including those addressing state responsibility must be applied. Nothing in the UNCITRAL Rules prevent the Arbitral Tribunal from applying general principles of international law.

Petrobart thus relies on Kyrgyz law as well as public international law and general principles of international law.

#### **4.1.4 The Republic has breached the Foreign Investment Law**

The Republic has interfered with the rights and interests of Petrobart. Such interferences constitute breaches of Articles 3.1 and 24 of the Foreign Investment Law. Moreover, the Republic's interferences constitute measures equivalent to expropriation and consequently a breach of Article 5.1 of the Foreign Investment Law.

##### **4.1.4.1 Denial of Justice**

The Republic has, when interfering in the enforcement of Petrobart's judgment of 25 December 1998, breached the Foreign Investment Law. The Vice Prime Minister's letter of 11 February 1999, which was sent to the Bishkek Court, effectively denied Petrobart its right to procedural justice. The Republic did not ever intend to restructure KGM, as was stated in the letter. The letter of 11 February 1999 stated the opinion of the Government, not the personal opinion of the Vice Prime Minister. This is evidenced by the facts of the case. The letter is signed by B Silayev, i.e. the Vice-Prime Minister, and contains a statement of official government policy. Most importantly, the Bishkek City Court interpreted the letter as an official government communication and relied on it when granting the stay of execution. The Republic is, in accordance with public international law, responsible for the acts of its ministers, officials and employees.

During the stay of execution the Government transferred the assets of KGM to another state-owned company and KGM was declared bankrupt.

This interference effectively deprived Petrobart of its possibilities to enforce its judgment against KGM. It constitutes a breach of the Foreign Investment Law.

#### 4.1.4.2 Modification of the Foreign Investment Law

In May 2000 the Republic passed the Foreign Investment Interpretation Law. Article 1 of the Foreign Investment Interpretation Law states that a sales contract is not a foreign investment. By enacting the Foreign Investment Interpretation Law the Republic breached Article 24 of the Foreign Investment Law since it worsened the legal position of Petrobart. Article 24 of the Foreign Investment Law reads as follows:

“No legislative act of the Kyrgyz Republic worsening the legal regime of foreign investors established by this Law shall not [sic] be retroactive.”

The main reason for passing the Foreign Investment Interpretation Law was Petrobart's initiation of this arbitration. The Republic has acknowledged this connection. By passing the Foreign Investment Interpretation Law and by giving it a retroactive effect the Republic adversely changed the protection of Petrobart's investment. The Republic thus failed to provide Petrobart with adequate protection of its foreign investment and has breached the Foreign Investment Law.

#### 4.1.4.3 Sham Bankruptcy

In the beginning of 1999 the Republic created two new state-owned companies, i.e. Munai and KyrgyzGaz. The Republic subsequently transferred the assets of KGM to KyrgyzGaz and Munai but left the liabilities with KGM. On 17 March 1999, i.e. just before the commencement of the bankruptcy, the Republic transferred USD 23 million to KyrgyzGaz. This transaction was unlawful. Prior to this, i.e. on 13 March 1999, the Republic had leased between 30 and 40 per cent of KGM's assets to Munai.

A month prior to the transfers and two months prior to the bankruptcy the Republic, in its letter to the Bishkek Court, stated that it was to restructure KGM, implement a stabilisation program and repay the outstanding debts of KGM. Rather than stabilizing KGM, the Republic, however, transferred its assets to other state-owned companies. The transfer of assets to companies, which are under the control of the state is a measure, which is

equivalent to expropriation and thus constitutes a breach of Article 5.1 of the Foreign Investment Law.

The bankruptcy of KGM appears to be nothing more than an attempt to cover the unlawful expropriation of the rights and interests of Petrobart. It is a general principle of international law that a State cannot rely on its own laws to avoid its international obligations. In other words, the Republic cannot rely on its bankruptcy law to avoid its obligations under the Foreign Investment Law.

#### **4.1.4.4 KGM Bankruptcy proceedings**

The bankruptcy proceedings of KGM were, and still are, unfair to foreign creditors. The Republic's interference in the bankruptcy proceedings has deprived Petrobart of all possibilities to recover its debts.

The wrongful transfer of assets from KGM to KyrgyzGaz just prior to the bankruptcy was neither investigated nor challenged by the special administrator. Moreover, a few major creditors such as Central Asia Bank, received payment of its debt and has thereby disappeared from the creditors' list. There is no legal reason for paying Central Asia Bank and not Petrobart. Both of them had secured judgments in their favour from the Bishkek Court. The only entity with an interest in paying Central Asia Bank and no other creditors is the Republic. At no time of the bankruptcy proceeding has an internal or independent audit been completed.

#### **4.1.5 Claim for compensation**

##### **4.1.5.1 Petrobart's right to compensation**

Petrobart relies on Article 6.2 of the Foreign Investment Law, which reads as follows:

“If a foreign investor has incurred losses as a result of activity or inactivity of the Kyrgyz Republic’s officials and such activities contradict the legislation of the Kyrgyz Republic or norms of international law, the foreign investor has the right to compensation in accordance with the provisions of Article 5 of this Law.”

The Republic has breached the Foreign Investment Law by unlawfully interfering with Petrobart’s judicial process, the decision to bankrupt KGM and the unlawful transfer of assets from KGM to Kyrgyzgas. Petrobart has, due to the Republic’s breaches, suffered losses amounting to the claimed amounts. Petrobart is thus entitled to compensation for its losses pursuant to Article 6.2 of the Foreign Investment Law.

Had the Bishkek Court not decided to stay Petrobart’s execution, Petrobart would have been able to enforce its judgment in full against the assets of KGM. On 15 April 1999 KGM was declared bankrupt. Petrobart was thereby deprived of its possibility to recover the debt, which was owed to it by KGM.

The Republic argues that Petrobart has not suffered any losses because the enforcement of a judgment debt is a voidable preference, i.e. the administrator could have retained the judgment debt for the benefit of all creditors of KGM. Moreover, the Republic argues that Petrobart could not have enforced the judgment debt since Central Asia Bank had already commenced enforcement proceedings.

Neither of these allegations is correct. Petrobart had a judgment debt and it would have been able to enforce it, had the Bishkek Court not stayed the proceedings and the Republic transferred the assets of KGM to another company. It is stated in the witness statement of Anthony Shea that:

“...execution of a court judgment is permitted up until the moment that the specific moratorium in the Civil Code Article 103 (or LOB Article 22) applies on “commencement”. I understand that the parties do not dispute that the commencement of bankruptcy occurred only after the asset transfers.”

Moreover it is stipulated in Article 422 of the Kyrgyz Civil Procedural Code that two judgment creditors must share proportionately the assets to be sold at an auction. Petrobart

would thus not have been hindered to enforce its judgment debt notwithstanding the fact that there was another judgment creditor, i.e. Central Asia Bank.

#### **4.1.5.2 The claimed amounts**

The principal debt amounts to USD 1,499,143. The existence of the debt and the amount are uncontested.

The Republic's interference with the judicial process deprived Petrobart of the possibility to enforce the judgment it obtained in the Kyrgyz courts. Petrobart is therefore entitled to recover the amounts expended for its efforts in the Kyrgyz courts. The amounts are claimed as damages and total USD 83,020.00.

Petrobart is entitled to interest in accordance with the UNIDROIT principle 7.4.9, as from 16 February 1999, i.e. the day of the decision of the Bishkek City Court, until the day of the issuance of the award. The following rates apply:

- |                         |        |
|-------------------------|--------|
| • 15 Feb 99 – 15 Feb 00 | 8.125% |
| • 16 Feb 00 – 15 Feb 01 | 9.167% |
| • 16 Feb 01 – 15 Feb 02 | 6.386% |
| • 16 Feb 02 – 30 Jun 02 | 4.75%  |

Petrobart is furthermore entitled to post-award interest at an annual rate of 9% from the date of the issued award until actual payment.

## **4.2 The Republic**

The Republic has essentially relied on the following facts, circumstances and arguments.

#### **4.2.1 Introduction**

In this dispute, Petrobart is seeking to transform its claims against KGM – an insolvent company – into an arbitrable claim against the Republic. Moreover, Petrobart is trying to circumvent the Kyrgyz Bankruptcy Law and to use the arbitration clause in the Foreign Investment Law despite the fact that it is not applicable. Petrobart has not made a foreign investment within the meaning of the Foreign Investment Law. The Foreign Investment Law is thus not applicable to this dispute. KGM was insolvent before the actions by the different government officials were taken in late 1998 and early 1999. The Republic can therefore not be liable for any losses that Petrobart may have suffered due to the bankruptcy of KGM.

#### **4.2.2 The Jurisdiction of the Arbitral Tribunal**

##### **4.2.2.1 Introduction**

The Arbitral Tribunal lacks the competence to even try the issue of jurisdiction. The Bishkek Court found in a ruling dated 26 December 2000 that Petrobart did not make a foreign investment, that there is no investment dispute and that Petrobart's claims are not arbitrable. This finding should be fully respected by the Arbitral Tribunal as conclusive on the issue of jurisdiction.

Should the Arbitral Tribunal find that it is competent to try the issue of jurisdiction, which is denied, it will nevertheless find that it does not have jurisdiction to try this dispute since there is no arbitration clause between the parties. The Republic has, pursuant to Article 23 of the Foreign Investment Law, only agreed to arbitrate investment disputes, i.e. disputes that concern a foreign investment. Petrobart did not make a foreign investment within the meaning of the Foreign Investment Law. Consequently, this dispute is not an investment dispute.

#### **4.2.2.2 The Arbitral Tribunal's power to rule on its own jurisdiction**

The Arbitral Tribunal does not have power to rule on its own jurisdiction. The Republic relies on the ruling of the Bishkek Court of 26 December 2000, which states that Petrobart did not make a foreign investment and that the dispute does not constitute an investment dispute pursuant to the Foreign Investment Law. The issue of jurisdiction was thus decided by the Kyrgyz courts prior to the constitution of the Tribunal and it would therefore be beyond the power of the Tribunal to retry the issue. Moreover, Article 2 of the Swedish Arbitration Act stipulates that the fact that the arbitrators can rule on their own jurisdiction does not prevent a court from determining such a question at the request of a party. Consequently, the Swedish Arbitration Act does not give the arbitrators the right to rule on their jurisdiction first. The Arbitral Tribunal is neither, on the basis of the doctrine of *Kompetenz-Kompetenz*, empowered to contravene the ruling from the Kyrgyz courts. The parties can, pursuant to the doctrine of *Kompetenz-Kompetenz*, agree that the arbitrators are empowered to rule on their own jurisdiction. It is, however, not, pursuant to the doctrine of *Kompetenz-Kompetenz*, possible to divest the courts of the ability to rule on the arbitrator's jurisdiction. The Republic has not agreed to have the issue of jurisdiction decided by the Arbitral Tribunal. Such an agreement can be found in Article 21 of the UNCITRAL Rules. Such rules, however, requires a valid arbitration agreement. The Republic has never agreed to arbitrate this issue and the UNCITRAL Rules are thus not applicable. Based on the above, the Arbitral Tribunal has no power to retry the issue of jurisdiction.

#### **4.2.2.3 The Foreign Investment Interpretation Law**

On 25 May 2000 the legislative assembly of the Zhokorku Kenesh adopted the Foreign Investment Interpretation Law. The Supreme council's interpretation of Kyrgyz law is authoritative since it has the power to render formal interpretations of the normative acts adopted by it. Pursuant to Article 1 of the Foreign Investment Interpretation Law, the term foreign investment should be understood to mean:

“Foreign Investment – a long-term tangible or intangible investment into objects of economic activity to realize a profit in the forms of envisaged by the legislation of the Kyrgyz Republic: money, movable and immovable property, property rights, shares and other forms of participation in a legal entity, profits or revenues derived from foreign investments, [and] concessions based on the law; that is a contribution with the aim of gaining income into any enterprise into socioeconomic programs, into innovation projects etc.”

Moreover, Article 1 of the Foreign Investment Interpretation Law stipulates that certain transactions are not foreign investments, *viz.*,

“A civil law transaction between two business entities in respect of supplying goods (services) where the purchaser is obliged to pay for the supplied goods (services) does not fall under the definition of foreign investment.”

Petrobart argues that the Foreign Investment Interpretation Law harmed its ability to arbitrate this claim and has influenced the Bishkek Court when rendering its ruling of 26 December 2000. This is not true since the Agreement never constituted a foreign investment. Moreover, it is the opinion of the Republic that it follows directly from the Foreign Investment Law, i.e. notwithstanding the Foreign Investment Interpretation Law, that Petrobart has not made a foreign investment.

#### **4.2.2.4 Petrobart is not a foreign investor**

Petrobart is not a foreign investor pursuant to Article 1.3 of the Foreign Investment Law. Petrobart relies on a sentence in the Bishkek City Court’s ruling of 25 December 1998, which states, “ [...] the plaintiff is a foreign investor”. This ruling was neither final nor binding on the parties. The Bishkek Court overturned this ruling in its decision dated 26 December 2000. In the latter ruling the Bishkek Court found that Petrobart had not made a foreign investment. Consequently, Petrobart cannot be a foreign investor. The Bishkek Court’s ruling of 26 December 2000 is binding on the parties and cannot be overturned by this Arbitral Tribunal.

#### **4.2.2.5 Petrobart has not made a foreign investment within the meaning of the Foreign Investment Law**

##### The Foreign Investment Law

Petrobart has not made a foreign investment within the meaning of the Foreign Investment Law. Pursuant to Article 1 section 2 of the Foreign Investment Law a foreign investment is: "Investment(s) appearing as contributions of foreign investors into objects of economic activity in the territory of the Kyrgyz Republic to derive profit." Pursuant to Kyrgyz law "contribution" is understood to mean "the provisions of charter capital to a company". This understanding of the term "contribution" is laid down in Article 144 of the Kyrgyz Civil Code and Article 44 of the Kyrgyz Company Law. Contributions are thus a *quid pro quo* for the acquisition of shares in a company. Thus, in order to acquire the status of a foreign investment within the meaning of the Foreign Investment Law the contributions must be documented as contributions to the capital of "the object of economic activity". In other words, the contribution has to be documented in the company's founding documents and in its balance sheet in order to constitute a foreign investment.

##### The Agreement

The Agreement is not a foreign investment. The Agreement is, pursuant to Article 415 of the Kyrgyz Civil Code, a simple contract for the sale of goods. Such a contract is pursuant to Article 469 of the Kyrgyz Civil Code a sales contract. The Foreign Investment Interpretation Law stipulates that a sales contract is not a foreign investment. Consequently, there is a clear distinction between a foreign investment and a sales contract.

Pursuant to Article 470 of the Kyrgyz Civil Code supply contracts which are entered into for more than one year are considered to be long-term contracts. Should the Agreement not specify the contract period it is deemed to be a one-year contract. The Agreement is thus a short-term supply contract under Kyrgyz law.

Petrobart did not bear the financial risk of the Agreement. The fixed price clause in the Agreement is not more beneficial to KGM than it is to Petrobart since each party bears the risk that the price will increase or decrease, respectively.

KGM was established as a joint stock company in 1997 in order to create a single infrastructure for the supply of oil and gas products. KGM was established through the three state companies Kyrgyzgas, Kyrgyzmunaizat and Chuigasmunaizat. The Republic, through the State Property Fund, was the majority shareholder in KGM. The Republic was, however, pursuant to Article 2.4.24 of the Charter of KGM and Article 139 of the Kyrgyz Civil Code, not generally liable for KGM's obligations.

On 23 February 1998 KGM and Petrobart signed the Agreement. The Republic is not a party to the Agreement. The Agreement is a Goods Supply Contract in which Petrobart agreed to supply gas condensate, i.e. the goods, to KGM and the latter agreed to pay for it. The parties had not entered into an investment agreement prior to the signing of the Agreement. The Agreement is thus not part of, or executed pursuant to, such an investment agreement. Prior to the signing of the Agreement, the parties had signed Contract No. 48/97. This contract is a supply contract. Pursuant to Kyrgyz law a supply contract is merely a type of sales contract. It is moreover denied that the Agreement substantially differed from the previous contract, i.e. from Contract No. 48/97 signed by KGM and Petrobart. Also this contract is not part of an alleged investment arrangement.

Petrobart did not, by signing the Agreement, make a significant contribution to KGM's operations. The Agreement was a *quid pro quo* agreement, meaning that neither party was making a contribution of any kind to the other party. Petrobart did not assume the financial risk of the Agreement. Either party assumed the risk that the market price would change unfavourably.

Contract No. 48/97, which was entered into prior to the signing of the Agreement, cannot be compared to the Agreement since the two contracts are for the sale of different products. Moreover, Contract No. 48/97 was entered into for a much shorter period of

time. The correspondence, which was exchanged between Petrobart and KGM does not fulfil the requirements set out in the Company Law, i.e. to be documented in the company's founding documents and in its balance sheet, and can therefore not be interpreted as evidence of an investment. The wording of the Foreign Investment Law is not ambiguous in this respect and can therefore not be given any other meaning than its words.

The Foreign Investment Law thus requires that in order for an investment to be characterized as a "foreign investment" such investment must be documented as a contribution to capital. It is in this respect immaterial if this requirement is prudent or imprudent since this is not an issue in this proceeding.

In order for the Arbitral Tribunal to find that the Agreement constitutes a foreign investment within the meaning of the Foreign Investment Law it will be necessary to disregard the express and unambiguous language of the Foreign Investment Law. In this respect it is not decisive what other arbitral tribunals or authorities have understood to be a foreign investment.

Based on the above, none of Petrobart's allegations, i.e. that the Agreement is a foreign investment since it was a broad investment scheme, a line of credit, a claim for money or a judgment debt, is correct. On the basis of the Foreign Investment Law none of them are properly documented as a foreign investment. Moreover, the fact that Petrobart sought and received a judgment debt due to KGM's breach of the Agreement does not transform the Agreement into a foreign investment within the meaning of the Foreign Investment Law.

#### Formal requirements

The so-called "broad investment scheme" cannot transform the Agreement into a foreign investment, since it is not properly documented as is required under the Foreign Investment Law. Notwithstanding the above, the Republic denies that the broad investment scheme exists and can be proven. Pursuant to Articles 177 and 178 of the Kyrgyz Civil

Code, the investment scheme must be a written agreement, which is signed by both parties, i.e. Petrobart and KGM. This never occurred.

The writing requirement set out in the Civil Code applies to the investment scheme. Article 177 of the Civil Code states that any transaction between legal entities must be in writing and Article 178.3 of the Civil Code states that a foreign economic transaction that is not in writing is invalid. Moreover, Article 176 of the Civil Code states that the substance of the transaction must be expressed in a written agreement and must be signed by both parties. Pursuant to Article 172 of the Civil Code a transaction is an action of a legal entity or citizen, which is undertaken for purposes of establishing, changing or terminating rights and obligations under Civil Law. Pursuant to Article 1190 of the Civil Code a foreign economic transaction must be made in writing. The alleged investment scheme is not a foreign economic transaction. Since it was not made in writing it does not exist.

The correspondence between KGM and Petrobart in May and July 1998 does not rise to the level of a written transaction as is required in Article 176.1 of the Civil Code. Pursuant to Article 395 of the Civil Code the parties to a bilateral contract may exchange "duplicate originals" of contracts or expressing consent to a single written contract via e.g. letters. Since the correspondence of May and June 1998 is not a single document, nor refers to a single document, Article 395 of the Civil Code is not applicable.

#### Exhaustion of Local Remedies

Petrobart's allegation of a denial of justice claim does not make this dispute arbitrable. Even if the Arbitral Tribunal were to find that the dispute as such was possible to arbitrate, Petrobart has not exhausted its legal remedies in the Kyrgyz Republic. Petrobart has not pursued the appellate or other remedies available to it under Kyrgyz civil procedure after the alleged interferences in 1999. Petrobart's recourse to the Arbitral Tribunal is therefore premature.

The alleged "sham bankruptcy of KGM" is not to be decided by the Arbitral Tribunal. These allegations have not been presented in the Kyrgyz bankruptcy court nor in the Creditor's Committee. Should Petrobart disapprove the decisions of the Creditor's Committee the appropriate remedy would, in accordance with the Kyrgyz Bankruptcy Law, be the Kyrgyz courts.

Finally, the parties had agreed in Article 8.3 and 8.4 of the Agreement that the relations of the parties were to be governed by the substantive laws of the Kyrgyz Republic including, *inter alia*, the Kyrgyz Civil Code. Moreover, the parties had agreed in Article 8.1 of the Agreement that any disputes that could not be amicably settled were to be resolved by the High Arbitration Court of the Kyrgyz Republic in accordance with the rules and procedures of that court.

#### **4.2.2.6 Public International Law is not applicable**

It is generally accepted that public international law is applicable only to inter-state disputes as opposed to disputes between individuals and foreign states. This general principle should be upheld, notwithstanding the fact that public international law is part of Kyrgyz law. The main reason for this being that KGM and Petrobart in Article 8.4 of the Agreement explicitly stated their choice of law to be Kyrgyz law. The choice of law clause neither contemplates nor permits any deviation. This fact distinguishes the present dispute from the authorities relied on by Petrobart. The Republic acknowledges that public international law may be applicable to commercial contracts as a matter of principle. This is, however, not the case when the parties' choice of law is local law. Based on the above, the jurisdictional issue, as well as the merits of the case, is to be governed by the substantive laws of the Kyrgyz Republic as set forth in Article 8 of the Agreement.

### **4.2.3 The Republic has not breached the Foreign Investment Law**

#### **4.2.3.1 No interference**

The Republic denies that it has breached Article 3.1 of the Foreign Investment Law by interfering in the enforcement of Petrobart's judgment of 25 December 1998. When writing the letter to the Bishkek Court the Vice Prime Minister acted within his duties as Vice Prime Minister. The purpose of the letter was, however, simply to point out that the government was trying to fulfil its duties toward KGM and its creditors. The letter was no interference and it did not in any way mislead the Bishkek Court when granting a three-month stay of the execution. The subsequent failure to actually reconstruct the company does not constitute interference within the meaning of the Foreign Investment Law.

#### **4.2.3.2 The Transfer of Assets**

The Republic denies that it has breached Article 5.1 of the Foreign Investment Law. The Republic has not committed any unlawful transfers of assets or any other activities that amount to measures equivalent to expropriation. The Republic never took possession of the assets of KGM, nor did it conceal any information regarding KGM from Petrobart, or any other creditor. Moreover, the Republic never withdrew its contribution from KGM, nor did it derive any benefit from the alleged transfer of assets. The Republic has thus not violated the Bankruptcy Law.

It was possible for the Republic to pay Central Asia Bank and no other creditor since there is an international financial agreement between Central Asia Bank and the Republic and such agreements take precedence over the Bankruptcy Law and the Civil Code.

#### **4.2.4 Claimed Compensation**

##### **4.2.4.1 Petrobart has not suffered any losses**

Even if the Arbitral Tribunal finds that the Republic has breached the Foreign Investment Law, which is denied, Petrobart has not suffered any compensable damages. The reason for this being that the governmental interference did not affect Petrobart's position and it is in no worse position today.

Petrobart's judgment debt was a voidable preference and could thus have been pursued by the special administrator pursuant to Article 21 of the Bankruptcy Law. In its witness statement Nurdin T. Kumushbekov states that:

"This is so because the Claimant knew that KGM was insolvent at the time Claimant effected its seizure of KGM's assets [...] and as such, the seizure of KGM's assets as of that time was subject to avoidance by a Special Administrator. Rule 6.3.2 of the Bankruptcy Rules [...] unambiguously sets forth the degree of knowledge of insolvency on the part of a creditor such as Claimant that activates the prohibition set forth in Article 21 of the Bankruptcy Law."

The insolvency starts the preference period during which no creditor may seize or arrest the assets of the debtor. The preference period was activated notwithstanding the absence of an announcement of KGM, since Petrobart, pursuant to Article 9.1 or 9.2 of the Bankruptcy Law, knew that KGM was insolvent. Should a creditor seize or arrest assets during the preference period the special administrator is entitled to recover such assets. Petrobart thus had no possibility to enforce its judgment debt at the time when the Bishkek Court ordered its three-month stay of execution. It was therefore not put in a worse situation as a result of the bankruptcy of KGM. Petrobart has thus not suffered any compensable losses under Kyrgyz law.

##### **4.2.4.2 Calculations**

The Republic concedes that the claimed amount is the amount that KGM owes to Petrobart and which Petrobart was awarded in the ruling of 25 December 1998. The Republic also

concedes that the claimed interest should be calculated in accordance with UNIDROIT principle 7.4.9.

The claimed amount is, however, not an accurate assessment of Petrobart's losses. Petrobart argues that it is entitled to compensation pursuant to Article 5.2 of the Foreign Investment Law. Article 5.2 stipulates that "*Compensation must be equivalent to the objective market value of the expropriated investment as of the day when the decision to expropriate was made.*" Petrobart has not proved that the claimed compensation is the objective market value of the judgment debt. On the contrary, a judgment debt rarely produces sales proceeds sufficient to fully satisfy the judgment creditor. It will not be possible for the Arbitral Tribunal to make an assessment of the market value of the judgment debt. Consequently, if the Arbitral Tribunal finds that Petrobart is entitled to damages it is left with no alternative than to issue an order requesting the Republic to make the assets that Petrobart seized available to Petrobart and permit Petrobart to conduct a judgment execution sale of those assets. This will be the only possible way for the Arbitral Tribunal to ensure that the award is rendered in compliance with the Foreign Investment Law.

## V REASONS OF THE ARBITRAL TRIBUNAL

### 5.1 Introduction

The Republic has challenged the Arbitral Tribunal's power to rule on its own jurisdiction, as well as the jurisdiction *per se* of the Arbitral Tribunal. In its order dated 5 December 2001, the Arbitral Tribunal noted that the parties had agreed, *inter alia*, that the issues of jurisdiction were to be determined in the final award. Consequently, the Arbitral Tribunal must first decide if it has the power to rule on its own jurisdiction (Section 5.2), and, if so, whether it has jurisdiction to try this dispute (Section 5.3). The Arbitral Tribunal will thus begin by addressing these two issues. Having ruled on the issues of jurisdiction the Arbitral Tribunal will, on the assumption that it finds that it has jurisdiction to try the dispute, turn its attention to the merits of the case.

The first issue falling for consideration is thus the question of the Tribunal's power to rule on its own jurisdiction.

### 5.2 The Arbitral Tribunal's power to rule on its own jurisdiction

As explained in Section 4.2.2.2 above, the Republic has objected against the jurisdiction of the Arbitral Tribunal primarily on two grounds, *viz.*, (i) that the issue of jurisdiction has been decided by the courts of Kyrgyzstan and that such rulings are binding, and (ii) that Section 2 of the Swedish Arbitration Act does not empower arbitrators to determine their own jurisdiction, but that this is a matter for courts of law. Petrobart, on the other hand, has relied on Article 21 of the UNCITRAL Rules, as well as on Section 2 of the Swedish Arbitration Act, in support of its position that the Arbitral Tribunal does have the power to determine its own jurisdiction.

The Arbitral Tribunal takes the following view.

It is undisputed between the Parties that Stockholm, Sweden is the place of arbitration. Consequently, Swedish arbitration law constitutes the *lex arbitri* of this arbitration. Swedish arbitration law is primarily embodied in the 1999 Swedish Arbitration Act. While the concept of *lex arbitri* is generally accepted, its precise meaning and scope are not. It is, however, without risk to say that the law of the place of arbitration comes into play when parties to an arbitration have not agreed on procedural matters, such as whether, and if so how, the jurisdiction of the Arbitral Tribunal can be dealt with by the latter.

Section 2 of the Swedish Arbitration Act clearly endorses the principle of *Kompetenz-Kompetenz*. The relevant passage is the first sentence of the first paragraph. It reads: "The arbitrators may rule on their own jurisdiction to decide the dispute."

The second sentence, in the first paragraph of Section 2 – "[t]he aforesaid shall not prevent a court from determining such a question at the request of a party" – does not negate the application of the principle of *Kompetenz-Kompetenz*. The quoted language in the second sentence refers to the right to turn to a *Swedish* court of law to have the validity of an arbitration agreement tested. Put differently: even if parties to an arbitration have not agreed on how jurisdictional issues are to be resolved, Swedish arbitration law entitles arbitrators to rule on their own jurisdiction subject to subsequent control by Swedish courts (and, possibly, foreign courts under the New York Convention on the Recognition and Enforcement of foreign Arbitral Awards, Article V(1)(a)). Strictly speaking, the Arbitral Tribunal need not analyze the matter further.

With respect to the dispute before the Tribunal, however, the Republic and Petrobart have referred to the UNCITRAL Rules, Article 21 of which also endorses the principle of *Kompetenz-Kompetenz*. The Parties have thus agreed to apply said Rules. This agreement is derived from the combined effect of Article 23:2 of the Foreign Investment Law – which lists arbitration under the UNCITRAL Rules as one of the alternatives for settling disputes in the sphere of foreign investments – and Petrobart's Arbitration Notice of 2 March 2000 in which Petrobart requested arbitration under the UNCITRAL Rules. This procedure for

concluding an arbitration agreement is laid down in Article 23:3 of the Foreign Investment Law. Both Parties are bound by such agreement. The Arbitral Tribunal takes note of the fact that none of the Parties has argued that the agreement *per se* is invalid. It is quite a different matter to determine the scope of application of the arbitration agreement, i.e. whether the dispute presently before the Tribunal is covered by the agreement. The Tribunal will turn its attention to this issue in the subsequent section of this Award. Before doing so, however, it is appropriate to summarize, by way of conclusion, that it follows from the foregoing that the Arbitral Tribunal does have the power to rule on its own jurisdiction.

### **5.3 The jurisdiction of the Arbitral Tribunal**

#### **5.3.1 Introduction**

The Republic has argued that the Arbitral Tribunal lacks jurisdiction to try this dispute on two grounds, *viz.*, (i) that the Arbitral Tribunal is bound by the ruling of the Bishkek Court of 26 December 2000 which states, in essence, that Petrobart did not make a foreign investment, and (ii) that the dispute is not an investment dispute since Petrobart did not make a foreign investment within the meaning of the Foreign Investment Law.

Petrobart, on the other hand, takes the view that the Arbitral Tribunal does indeed have jurisdiction to try this dispute. The Kyrgyz court did not have jurisdiction to try this dispute, since it was an investment dispute and as such subject to arbitration. The ruling of the Kyrgyz court must thus be disregarded by the Tribunal. Furthermore, Petrobart has argued that it has in fact made a foreign investment within the meaning of the Foreign Investment Law and that this dispute thus constitutes an investment dispute which is to be settled by arbitration pursuant to the Foreign Investment Law.

The Tribunal will first address the Kyrgyz court ruling.

### **5.3.2 Is the Kyrgyz court ruling binding on the Arbitral Tribunal?**

As mentioned above, the first objection raised by the Republic is that the Arbitral Tribunal is bound by the ruling of the Bishkek City Court dated 26 December 2000 and that this ruling prevents the Tribunal from trying the dispute before it. In its ruling the Bishkek City Court found that Petrobart had not made a foreign investment. On the Republic's case, this would be the end of the story, assuming that the ruling is binding on the Tribunal.

For the reasons set out below, the Arbitral Tribunal finds that the ruling of the Bishkek City Court dated 26 December is *not* binding on the Arbitral Tribunal.

As explained above, the *lex arbitri* of this arbitration is Swedish arbitration law, since the place of arbitration is Stockholm, Sweden. As a matter of general principle, a judgment rendered by a foreign court of law is binding on an arbitral tribunal sitting in Sweden only if, and to the extent that, the foreign judgment may be recognized and enforced in Sweden. Under Swedish law such recognition and enforcement may be granted only on the basis of explicit statutory or treaty support. With respect to the Kyrgyz Republic there is no such statutory or treaty support. Consequently, a judgment rendered by a court in the Kyrgyz Republic is not binding on any arbitral tribunal sitting in Sweden, nor indeed on any Swedish court of law. Having so concluded, the Arbitral Tribunal is mindful of the fact that a judgment rendered by a foreign court of law may well become relevant as evidence in the arbitration in question. The weight, if any, to be attributed to such evidence will depend on the facts and the legal issues involved in the individual case.

### **5.3.3 Is the dispute an "investment dispute"?**

#### **5.3.3.1 Introduction**

As mentioned above, Petrobart and the Republic have entered into an arbitration agreement on the basis of Article 23 of the Foreign Investment Law. While the Arbitral

Tribunal has little doubt that the arbitration agreement is valid *per se*, the crux of the matter in this dispute is to determine its scope of application.

Petrobart has brought its claim against the Republic under the Foreign Investment Law. The jurisdiction of the Arbitral Tribunal is thus limited to, and by the provisions on arbitration set forth in the Law, i.e. Article 23 of the same. Sections 1, 2 and 3 of Article 23 of the Law, all speak of “investment disputes”. The jurisdiction of the Arbitral Tribunal is consequently limited to “investment disputes” under the Foreign Investment Law.

The Foreign Investment Law defines the term “investment dispute” in Article 1.5. Pursuant to this provision, an “investment dispute” is “any dispute between a foreign investor and the Kyrgyz Republic in respect of a foreign investment”.

Article 1.5 of the Foreign Investment Law thus identifies two key terms which the Arbitral Tribunal must address with respect to Petrobart, *viz.*, (i) “foreign investor”, and (ii) “foreign investment”.

### 5.3.3.2 Is Petrobart a “foreign investor”?

The logical starting point for the Arbitral Tribunal is Article 1.3 of the Foreign Investment Law which sets forth a definition of a “foreign investor”. It reads in part:

“FOREIGN INVESTOR means: [...] any legal entity which is either: founded or registered in accordance with the legislation of a foreign state; or [...]”

Both Parties have relied on decisions of courts in Bishkek dated 25 December 1998 and 26 December 2000, respectively. Petrobart has relied on the first decision in which the court stated, *inter alia*, that “the plaintiff [i.e. Petrobart] is a foreign investor”. In the second decision, the court concluded that Petrobart had made no foreign investment in the Kyrgyz Republic. In the view of the Republic, the latter decision must be understood to mean that the court concluded that Petrobart was not a foreign investor.

In the view of the Arbitral Tribunal, neither decision can serve as a basis for conclusions in this respect. The Tribunal must rather interpret Article 1.3 of the Foreign Investment Law against the background of the facts and circumstances presented to it within the framework of the pending dispute. In its Notice of Arbitration dated 2 March 2000 Petrobart stated that it was a company registered in Gibraltar. In all its submissions in this arbitration Petrobart has stated its address as being in Gibraltar. Indeed, throughout this arbitration Petrobart has held itself out as a company registered in Gibraltar. It is also noteworthy that in the Agreement, Petrobart is identified as a company incorporated under the laws of Gibraltar. The Republic has not taken issue with such statements, or otherwise questioned Petrobart's status as a Gibraltar company. At any rate it is clear that Petrobart is not a legal entity founded or registered under the laws of the Republic of Kyrgyzstan. The Arbitral Tribunal thus finds that Petrobart is a "foreign investor" within the meaning of the Foreign Investment Law.

### **5.3.3.3 Has Petrobart made a foreign investment?**

#### **(i) Introduction**

It follows from what has been said in the foregoing that the issue of a "foreign investment" represents a watershed as far as the jurisdiction of the Arbitral Tribunal is concerned. If Petrobart has made a "foreign investment" within the meaning of the Foreign Investment Law, the Arbitral Tribunal has jurisdiction to try this dispute, if it has not, the Tribunal lacks jurisdiction.

When addressing the issue whether Petrobart has made a foreign investment within the meaning of the Foreign Investment Law, the Arbitral Tribunal must perform the analysis in two stages, viz., first a factual determination of what activities, measures and/or transactions of a commercial, economic and/or financial nature that Petrobart has performed with respect to the Republic of Kyrgyzstan, and second a legal characterization of such activities, measures and/or transactions.

As to the first stage of the analysis, an important distinction is to be made between what Petrobart has referred to as “a broader investment scheme”, on the one hand, and the Agreement, with the rights and consequences flowing from it, on the other. With a view to narrowing down the remaining issues, and since the result of the aforementioned distinction will in all likelihood determine the scope and direction of the further analysis, the Arbitral Tribunal will first turn its attention to the so-called “broader investment scheme”.

(ii) Does the Agreement form part of a “broader investment scheme”?

Petrobart has argued that the signing of the Agreement was the starting point of a long-term co-operation between it, KGM and the Republic, the goal of which was to secure supply of large quantities of gas condensate by Petrobart, as well as to provide money and technical support with a view to solving the problems that KGM was experiencing at the refinery in Kant. Petrobart has also argued that the Agreement was entered into on very preferential terms for KGM and that the parties had agreed to re-invest the profits from the Agreement in, *inter alia*, the refinery in Kant. In Petrobart’s view this investment scheme constitutes an investment under the Foreign Investment Law. In support of this investment scheme, Petrobart has relied on certain correspondence between it and KGM as well as on witness testimonies by Messrs. Zatezalo and Todorovski.

The Republic has denied the existence of any such investment scheme. In addition it has argued that any agreement on such an investment scheme must be in writing, and that under Kyrgyz law Petrobart is precluded from relying on witness testimony to prove such an agreement in writing. The latter objection voiced by the Republic raises a preliminary issue of a procedural nature, *viz.*, is Petrobart precluded from relying on witness testimony, in an arbitration conducted in Sweden, to prove an agreement in writing? The Arbitral Tribunal must first address this question before turning its attention to the merits with respect to the “broader investment scheme”.

(a) Is Petrobart precluded from relying on witness testimony?

The position of the Republic in this respect is based on certain provisions of the Kyrgyz Civil Code, in particular on Article 177 thereof. These provisions stipulate, *inter alia*, that transactions – such as contracts – must be in writing. It also stipulates that a party to a transaction where the requirement for written form has not been observed is not entitled to rely on witness testimony to confirm, or prove, the transaction and its provisions.

As the Arbitral Tribunal has explained in the foregoing, Swedish arbitration law is the *lex arbitri* of this arbitration. Under Swedish arbitration law there is no restriction on relying on witness testimony to prove an agreement. Nor is there any such restriction under the UNCITRAL Rules. Since the question of presenting evidence is clearly procedural in nature, it must be determined on the basis of the *lex arbitri* and/or the arbitration rules agreed by the parties. Consequently, Petrobart is not precluded from relying on witness testimony to prove the so-called broader investment scheme.

(b) Did the Parties agree on “a broader investment scheme”?

As mentioned above, Petrobart has relied on correspondence between it and KGM as well as on witness testimony relating to discussions and negotiations which took place between the parties in early 1998. Based on the evidence presented to the Arbitral Tribunal, it would seem clear that Petrobart strived towards a long-term co-operation with KGM and that Petrobart indeed expected the parties to agree on such co-operation in the future. It is equally clear to the Arbitral Tribunal, however, that it has not been shown to the satisfaction of the Arbitral Tribunal that there was in fact a meeting of the minds of the parties on this point. Put differently: Petrobart has not convincingly shown to the Tribunal that it and KGM actually agreed on such long-term co-operation, or on “a broader investment scheme”. Consequently, the Agreement does not constitute part of any such scheme. This means that any legal characterization of Petrobart’s activities, measures and/or transactions with respect to the Kyrgyz Republic must focus on the Agreement *per se*, and the rights and consequences flowing from it.

The Arbitral Tribunal is able to reach the foregoing conclusion without the need to analyze Kyrgyz law in this respect since the evidence shows that, as a matter of fact, there was no meeting of the minds of the parties.

(iii) Does the Agreement constitute a “foreign investment”?

Petrobart has argued that the Agreement constitutes a “foreign investment” within the meaning of the Foreign Investment Law on either of the following grounds: (i) the Agreement involved an extension of a credit to KGM which constitutes an investment, (ii) KGM’s refusal to perform under the Agreement gave rise to a claim for money, and (iii) Petrobart has transformed its claim for money into a judgment debt.

Petrobart has based its claims on the Foreign Investment Law. The logical starting point for the Arbitral Tribunal in analysing the concept of a “foreign investment” is thus the Law itself. For the time being, the Tribunal will not address questions of public international law, nor the Foreign Investment Interpretation Law, but will revert to these issues later on; see section (d) below.

Article 1.2 of the Foreign Investment Law defines a “foreign investment” as follows:

“FOREIGN INVESTMENTS are investments appearing as contributions of foreign investors into objects of economic activity in the territory of the Kyrgyz Republic.”

The Arbitral Tribunal has already discussed the term “foreign investor”, in Section 5.3.3.2 above. There is no dispute between the parties as to the territorial aspect of the definition.

For present purposes, Article 1.2 thus leaves three concepts for the Arbitral Tribunal to disentangle, viz., (a) “investments”, (b) “appearing as contributions” [of foreign investors], and (c) “objects of economic activity”.

(a) What constitutes an “investment”?

Article 1 of the Foreign Investment Law defines the term “investment” as follows:

“INVESTMENTS mean tangible and non tangible assets, in particular; money; moveable and immovable property; property rights (mortgages, liens, pledges and others); stock and other forms of participation in a legal entity; bonds and other debenture liabilities; rights (claims) to money, goods services and any other claims to performance under a contract; right to intellectual property including goodwill, copyrights, patents. Trade marks, industrial designs, technological processes, trade names, and know-how; any right to activity based on a license or in other form given by State agencies; concessions based on Law including concessions for search, development, mining or exploitation of natural resources; profit from investment and re-invested on the territory of the Kyrgyz Republic.

A form in which a property is invested, or change of this form does not influence its nature as investments.”

Reading Article 1 together with Article 1.2 it would seem clear that under the Foreign Investment Law an “investment” needs to be further qualified before it can constitute a “foreign investment”; to wit, it must “appear as a contribution” of a foreign investor into “objects of economic activity”. The Arbitral Tribunal will discuss these two aspects in the reversed order, i.e. starting with “objects of economic activity”.

(b) What is an “object of economic activity”?

The Foreign Investment Law does not set forth any definition of an “object of economic activity”. The Republic has relied on the second expert opinion on Kyrgyz law prepared by Mr. Nurdin T. Kumushbekov on 2 May 2002. At page 7 of the aforementioned opinion, he states that the term in question means “a company”. Mr. Anthony M. Shea in his expert opinion dated 11 March 2002, at page 9, to which Petrobart has referred, seems to take a similar view in that he states that the term is often used in Kyrgyz legislation “to mean simply a ‘business’”.

The Arbitral Tribunal has come to the conclusion that an “object of economic activity” means a business and/or business activity which is carried out in an organized form, for

example, as a joint stock company (open or closed), partnership or limited liability company.

This leaves the Tribunal with the third element referred to above, *viz.*, the significance of the words “appearing as contributions”.

(c) What amounts to a “contribution”?

The Republic has argued, referring to Mr. Kumushbekov’s second expert opinion dated 2 May 2002, that in Kyrgyz legislation and jurisprudence the term “contribution” is understood to mean provision of charter capital to a company. In support of this position, the Republic has relied on the way in which the term “contribution” is used in the Kyrgyz Civil Code (Article 144) and in the Law On Business Partnerships and Companies (Article 55).

Article 144 of the Civil Code reads:

“A joint stock company’s charter capital is comprised of the value of the shareholders’ contributions made in exchange for the acquisition of shares.”

Article 55 of the Law On Business Partnerships and Companies reads:

“The charter capital of a joint stock company is comprised of the contributions of shareholder in exchange for the acquisition of shares of the company.”

On the basis of the materials and arguments presented by the Parties on this issue, the Arbitral Tribunal has come to the conclusion that the term “contribution” as used in Kyrgyz legislation has a more legal-technical meaning than would – perhaps – generally be expected. The Tribunal has found that “contribution” means provision of capital to a company, or partnership, in exchange for stock or shares in the company or partnership in question. This is also the meaning which must be given to the term within the framework of the Foreign Investment Law.

Having so concluded, the Arbitral Tribunal hastens to add that it is mindful of the arguments relied on, and the consequences pointed out, by Petrobart. For example, it has been suggested by Petrobart that the Foreign Investment Law would have a very narrow scope of application if the term "contribution" were to be given the legal-technical meaning explained above. This, Petrobart has continued, was not the intention of the legislator, who intended to give the Foreign Investment Law the broadest possible scope of application, limited only by the geographical borders of the Republic. In the view of the Arbitral Tribunal, however, it is not possible, nor permissible, to ascribe a different intention to a legislator than the intention following from the actual language of the statutory text, unless there is unambiguous evidence to the effect that the intention was clearly different. No such evidence has been presented to the Tribunal.

It is undisputed between the Parties that Petrobart has not made a "contribution" as such term has been defined above.

It remains for the Arbitral Tribunal to determine the meaning and significance of the word "appearing" in "appearing as contributions".

Generally speaking, the word "appearing" in the present context must be taken to mean that a "contribution" must be recorded and documented as such in the relevant documents of the company or partnership in question. Such documentation would typically be the founding documents of a company, e.g. the foundation agreement and the charter, and/or the balance sheet of the entity in question. Given the meaning of "contribution" explained above and given the fact that Petrobart has *de facto* made no such "contribution", the meaning of the word "appearing" is not dispositive of the issue whether Petrobart has made a foreign investment within the meaning of the Foreign Investment Law.

(d) The Foreign Investment Interpretation Law and Public International Law

In this arbitration the Parties have presented their respective arguments with respect to the significance of the Foreign Investment Interpretation Law which was enacted by the

Republic on 25 May 2000. As mentioned above, at sub-section (iii), in its analysis of the Foreign Investment Law, the Arbitral Tribunal has not taken the Foreign Investment Interpretation Law into account, but rather stated that it would revert to it. Given the result of the Tribunal's analysis of the Foreign Investment Law there is, however, no need for the Tribunal to address the Foreign Investment Interpretation Law. It has been possible for the Arbitral Tribunal to dispose of the issues before it without doing so.

In presenting its arguments with respect to the meaning of the term "foreign investment" in the Foreign Investment Law, Petrobart has taken the view that such term must be interpreted in the light of public international law, rather than other Kyrgyz legislation. In support of this argument Petrobart has, *inter alia*, relied on Article 9(4) of the Constitution of the Kyrgyz Republic which states in relevant part that the Republic must "observe the universally recognized principles of international law".

Petrobart has commenced this arbitration on the basis of the Kyrgyz Foreign Investment Law and argued that this law bestows jurisdiction on the Arbitral Tribunal to try its claims against the Republic. Against this background, the primary starting point for the Arbitral Tribunal must be to analyze and interpret the Foreign Investment Law as such, to wit, as forming part of Kyrgyz municipal law. In addition, however, the Tribunal has reviewed and analysed those "universally recognized principles of international law", referred to in Article 9(4) of the Constitution of the Kyrgyz Republic, and relied on by Petrobart, in so far as they have a bearing on the concept of a "foreign investment" employed as a jurisdictional determinant. The result of the Arbitral Tribunal's review and analysis does not cause it to change the conclusions arrived at in the foregoing. In fact, despite the well-known formula, the actual contents of "the universally recognised principles of international law" is uncertain, indeed frequently contentious. Suffice it for present purposes to note the following. "Foreign investment" is mostly defined as a transfer of tangible or intangible property from one country to another for the purpose of use in that country with a view to generating profit, or at least wealth, under the control of the owner of the property. Such transfers are to be distinguished from the much more frequent export transactions where goods are sold by manufacturers, or owners, in one state to traders or

users in another state. Foreign investment involves a more permanent relationship between the foreign investor and the host state than is involved in the transitory international sales transaction. The Agreement falls unquestionably into this latter category.

(iv) Conclusion

For the reasons explained in the foregoing, the Arbitral Tribunal finds that Petrobart has not made a foreign investment within the meaning of the Foreign Investment Law. Consequently, the Arbitral Tribunal does not have jurisdiction to try Petrobart's claims against the Republic in this arbitration. The Arbitral Tribunal must therefore dismiss Petrobart's claims for lack of jurisdiction.

#### 5.4 Fees and costs

Under Articles 38–40 of the UNCITRAL Rules, the Arbitral Tribunal shall fix the costs of arbitration in the award and may make an order for the distribution of costs between the parties, if either party so requests, it being understood that the costs of arbitration shall in principle be borne by the unsuccessful party. Both parties have put forward requests for the allocation of the arbitration costs.

Given the Arbitral Tribunal's decision to decline jurisdiction, Section 37, first paragraph, of the Swedish Arbitration Act must also be taken into account. It reads:

“The parties shall be jointly and severally liable to pay reasonable compensation to the arbitrators for work and expenses. However, where the arbitrators have stated in the arbitral award that they lack jurisdiction to try the dispute, the party that did not request arbitration shall be liable to pay only to the extent that special circumstances so require.”

Consequently, as far as the compensation to the arbitrators is concerned, it follows from the second sentence that, Petrobart only is liable therefor, unless special circumstances require otherwise. The Arbitral Tribunal finds that no such special circumstances exist. The arbitrators have, when fixing their fees, taken all relevant circumstances into account.

Consequently, Petrobart must pay the compensation to the arbitrators which totals USD 231,504, including fees and disbursements, distributed as follows:

Kaj Hober	USD 121,504
Albert Jan van den Berg	USD 55,000
Ahmed El-Kosheri	USD 55,000

The Arbitral Tribunal has received advance deposits from the Parties with a view to covering the fees and expenses of the arbitrators. The advance deposits have been made as follows:

	<b>Amount</b>	<b>Date</b>
Petrobart Limited	USD 50,000	12 March 2001
	USD 50,000	27 March 2001
	USD 50,000	4 September 2002
The Kyrgyz Republic	USD 50,000	25 October 2002
Interest	USD 31,504	

As mentioned above the total compensation to the arbitrators amounts to 231,504, i.e. the same amount as the advance deposits made by the parties. The advance deposits will consequently not be repaid to the parties.

As far as other arbitration costs are concerned, they must also be paid by Petrobart, since Petrobart must be deemed to be the losing party in this dispute. In the view of the Arbitral Tribunal there are no other circumstances in this case which warrant a different apportionment of the costs. Petrobart must pay the Republic's part of the advance deposits in the total amount of USD 50,000.00.

On 10 august 2002, the Republic specified its statement of cost such that its costs for legal representation was said to amount to USD 319,840.00 and its expenses to USD 3,687.00. Petrobart has raised no objection against these amounts and the Arbitral Tribunal finds them reasonable. Consequently, Petrobart must pay the Republic's costs and expenses for legal representation in the total amount of USD 323,527.00.

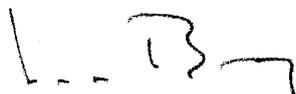
For the foregoing reasons the Arbitral Tribunal issues the following

## AWARD

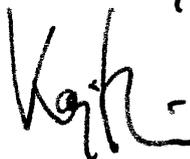
1. The Arbitral Tribunal hereby dismisses Petrobart's claims for lack of jurisdiction.
2. The fees and disbursements of the arbitrators are determined at USD 231,504.
3. Petrobart is hereby ordered to pay to the Republic USD 373,527, representing the Republic's arbitration costs.

Made in Stockholm, Sweden on

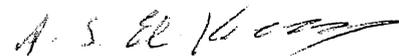
13 February 2003



Albert Jan van den Berg



Kaj Hobér



Ahmed El Kosheri

If a party is dissatisfied with the decision of the arbitrators, he may bring an action before the Svea Court of Appeals (Svea hovrätt), provided that he commences such action within three months from the time when he received this Award.

If a party is dissatisfied with the decision regarding the compensation to the arbitrators, he may bring an action before the City Court of Stockholm (Stockholms tingsrätt), provided that he commences such action within three months from the time when he received this award.