ARBETSEX.

ARBITRATION AWARD

rendered on July 7, 1998
at the Place of Arbitration
Stockholm, Sweden

Mr. Franz Sedelmayer

vs.

The Russian Federation
through the Procurement Department
of the President of the Russian Federation

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THE CLAIMANT

Mr. Franz J. Sedelmayer, Wendelsteinstrasse 2, 82049 PULLACH, Germany
Counsel: Mr. Kaj Hobér, Mannheimer Swartling Advokatbyrå, P.O.Box 1711, 111 87 STOCKHOLM, Sweden

THE RESPONDENT

The Russian Federation through the Procurement Department of the President of the Russian Federation
Representatives: Mr. P.P. Borodin, Mr. V.E. Savchenko, Mrs. Alla V. Kchoroshilova and Mrs. Galina M. Filatova, the Procurement Department, Nikitnikov Pereulok, D. 2, P. 5, 103132 MOSCOW, Russian Federation

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I. FACTUAL BACKGROUND

Mr. Franz J. Sedelmayer is a German citizen. He is the sole owner of the enterprise Sedelmayer Group of Companies International Inc. (hereinafter referred to as "SGC International"), incorporated in Missouri, USA.

In 1990 Mr. Sedelmayer had discussions with representatives of the Police Department in Leningrad, Russia (hereinafter referred to as "GUVD", i.e. Glavnoje Upravlenije Vnutrenich Del), concerning delivery of law enforcement equipment and training in using such equipment. On July 21, 1990, GUVD and "Sedelmayer Group

of Companies" signed a Protocol of Intent concerning future cooperation. According to this Protocol the "mutual commercial programs" were, inter alia, trading of police equipment, establishing a training facility in St. Petersburg (Leningrad) and organizing a private and armed security agency for the protection of individuals and objects.

In November 1990, GUVD sent a letter to "Sedelmayer Group of Companies" inviting Mr. Sedelmayer to use certain buildings belonging to GUVD for "mutual business collaboration". The buildings were located at Polevaya alleya 6/8 in St. Petersburg (hereinafter referred to as "the Premises").

On August 28, 1991, GUVD as "Soviet stockholder" and SGC International as "Foreign stockholder" signed a contract (hereinafter referred to as the "Shareholders Agreement") on establishing a joint stock company – Kammenij Ostrov (hereinafter referred to as "KOC"). The preamble of the Agreement and some of the articles read as follows:

Leningrad militia Department, Leningrad, USSR, a legal entity by the soviet law, hereinafter referred to as "Soviet stockholder" on one side and "SGC International inc.", Munich, FRG[1], a legal entity by the law of FRG, hereinafter referred to as "Foreign stockholder" on the other side, agreed on the following:

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1.1 Soviet stockholder and Foreign stockholder establish a joint-stock company "Kammenij Ostrov" hereinafter referred to as "Company".

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1.3 The Company location is 6, Polevaya alley, Leningrad, 197129, USSR.

1.4 The period of functioning of the Company is 25 years from the date of its legal registration, and it is spontaneously extended for the same period of time if no objections exist on the part of stockholders.

[1] In the Russian version: Missouri, USA.

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Article 2. Subject and goals of the Company.

The subject and goals of the Company are the following:

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– development, installation, production and repair service of police equipment;

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– transportation services, protection services for foreign and soviet citizens;

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– import – export operations, related with production and realization of electronic and other appliances, lighting, consumer goods, alcohol and non–alcohol drinks, vehicles, police equipment – –

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3.1 The investments of the stockholders constitute the Common stock of the Company.

3.2 The Common stock equals 1,400,000 roubles (one million four hundred thousand roubles).

3.3 The investment of the Soviet stockholder into the Common stock is 50 % – 700,000 roubles (seven hundred thousand roubles).

3.4 The investment of the Foreign stockholder into the Common stock is 50 % – 700,000 roubles (seven hundred thousand roubles).

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In an appendix (Appendix II) to the Shareholders Agreement the parties' contributions to the charter capital of KOC were determined as follows:

1. The contribution by the Soviet Shareholder (the Central Interior Directorate of Leningrad Regional and City Executive Committees) to the Charter Fund consists in the building and structures of the residence, the adjoining buildings and garden, and the land site situated at Polevaya alleya 6, Leningrad 197129, USSR. The total value – 700,000 roubles.

2. The contribution by the Foreign Shareholder (SGC International Inc., USA) to the Charter Fund consists in the following:

2.1 Office equipment (a fax machine, a telex, a typewriter, two computers, a laser printer, a colour copying machine, a standard photocopier, a video cassette recorder, a colour TV-set, a telephone system, a washing machine, a drier, a stereo system, a satellite antenna and equipment for receiving TV-programs, office furniture, necessary office supplies and materials - at prices not exceeding the average German ones, as well as three cars. The total value - 325,000 roubles.

2.2 Payment for reconstruction of the building and structures, with necessary materials at prices not exceeding the average German ones, as well as the transportation costs, customs duties and charges for the imported construction materials and equipment, and installation costs according to a cost estimate approved by the Chairman of the Board of Directors. The total value - 295,000 roubles.

2.3 Equipment for a permanent exhibition centre for advertising and selling police equipment, to a total value of 50,000 roubles.

2.4 Foreign currency assets to be entered into the Joint Venture's account, converted into the USSR roubles at the commercial exchange rate of the USSR Gosbank as of 01.09.91 - 30,000 roubles.

Altogether, the contribution by the Foreign stockholder shall amount to 700,000 roubles.

3. All the expenses incurred by the Foreign Shareholder while assembling his contribution to the Charter Fund shall be confirmed with respective documents issued by the sellers of the assets which are being contributed to the Charter Fund.

4. All the assets contributed by the Foreign Shareholder to the Charter Fund shall be handed over before 01.01.92. The above deadline may be revised by decision of a general meeting of the shareholders.

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On August 28, 1991, the shareholders of KOC also signed minutes of a founding meeting. In the minutes it was stated, inter alia, that Mr. Sedelmayer was elected Director General of KOC.

On September 15, 1991 Mr. Sedelmayer signed a Loan and Surrender of Profits Agreement with SGC International concerning SGC International's "future investment in the Soviet Union". According to this agreement, Mr. Sedelmayer was prepared to grant to SGC International USD a loan not exceeding 5 million USD. It was also

stipulated in the agreement that SGC International should surrender the net profits to Mr. Sedelmayer until the loan was paid in full and that, on the other hand, Mr. Sedelmayer should assume any loss made by SGC International.

On November 1, 1991, GUVD and KOC signed an Act of Transfer of the Premises. This act reads, inter alia, as follows:

This property is estimated at 700,000 roubles according to foundation documents of JSC "Kammenij Ostrov". The transfer of the property to the balance of JSC "Kammenij Ostrov" is executed and valid for possession and use according to the foundation documents during the period of JSC activity. If the JSC will cease its activity the above mentioned property should be assigned to the balance of GUVD with all improvements and additions made there. The transfer of the above mentioned property is made as GUVD's contribution to the JV "Kammenij Ostrov" authorised fund.

On September 23, 1991, KOC was registered with the Committee for Foreign Affairs in the City Council of St. Petersburg. A registration was also made on January 20, 1992 with the State Register for Participants in Foreign Trade in Moscow and, on February 6, 1992, with the local tax authority in St. Petersburg.

In 1992 a Federal Property Fund was established in order to, inter alia, arrange for the practical handling of all state property in connection with the privatization process in the Russian Federation, including contributions by the Russian state to joint ventures. According to the new Russian legislation the Property Fund was to take over, inter alia, any and all assets that other governmental agencies had contributed to the charter capital of joint ventures.

In a letter, dated July 14, 1992, the deputy chairman of the Property Fund in St. Petersburg ordered the chief of GUVD to transfer all of GUVD's shares in KOC to the Property Fund.

In the fall of 1992 all functions executed by the Property Fund in St. Petersburg were transferred to another governmental body – the Property Committee of the City of St. Petersburg (hereinafter referred to as "KUGI" – Komitet po Upravlenijo Gorodskim Imusjestvom Merii St. Peterburga). KUGI was subordinated to the Mayor of St.

Petersburg and the State Committee on the Management of State Property (hereinafter referred to as "GKI"), a state organ in which the power, inter alia, to decide over state property handled by the Property Fund was vested.

Despite several efforts from KUGI to get GUVD's share in KOC transferred to KUGI, GUVD did not participate in any transfer. On November 9, 1994 one of the Deputy Mayors of St. Petersburg issued an instruction ordering the replacement of GUVD by KUGI as partner in KOC. GUVD refused, however, to comply with this order.

In 1992 and 1993 litigations were initiated. On February 26, 1992, an Arbitration Court (state commercial court) in St. Petersburg issued a Ruling in which the state registration of KOC was declared null and void due to alleged faults carried out in the capital contribution to KOC. On February 8, 1996, the Civil Judicial Board of the St. Petersburg City Court decided, inter alia, that KOC should be liquidated.

The Russian name for "Procurement Department" is "Upravlenie Delami Presidenta Rossiskoj Federatsii". In the documents submitted in this case, different names in English have been used, such as "Procurement Department", "Managing Department" and "Administrative Department". Hereinafter, reference will be made to "the Procurement Department".

On December 4, 1994 the President of the Russian Federation, Mr. Boris Yeltsin, issued a Directive, designated 633-RP (hereinafter referred to as the "Directive"), ordering transfer of the Premises. The Directive reads, inter alia, as follows:

In order to provide for the reception of foreign delegations coming on invitation from the President of the Russian Federation

1. The following will be transferred to the balance of the Procurement Department of the President of the Russian Federation according to the established order:

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- the Residence "K-4" (St. Petersburg, Skvoznoy proyezd, dom 3), that is registered on the balance of

the Adminstrative Department in the City Council of St. Petersburg, together with the adjoined territory which includes house No. 6 on Polavaya alleya,

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On February 27, 1995 GKI issued an instruction, based on the Directive, requesting GUVD to transfer the Premises to the balance of the Procurement Department of the President of the Russian Federation. The instruction reads as follows:

In order to execute the Directive of the President of the Russian Federation of December 12, 1994, No. 633-rp:

The Head Department of the Internal Affairs in St. Petersburg and Leningradskaya region will transfer the buildings and constructions with the address: St. Petersburg, Polevaya alleya, d. 6-8 with the adjoined territory to the balance of the Procurement Department of the President of the Russian Federation. The assignment of the buildings stated above will be registered within one week by an act that will be presented for approval to the State Committee for State Property in Russia.

Following the instruction from GKI, representatives for GUVD, GKI and the Procurement Department of the President of the Russian Federation signed an Assignment Act on March 9, 1995, transferring the Premises from the balance of GUVD to the balance of the Procurement Department.

On September 20, 1995, the St. Petersburg City Court Collegium for Civil Cases issued a court ruling concerning arresting and sealing up buildings and structures at the Premises. On October 9, 1995, bailiffs sealed parts of the Premises. The Premises were finally seized on January 24, 1996.

On January 15, 1996, Mr. Sedelmayer submitted a Request for Arbitration to the Chairman of the Arbitration Institute of the Stockholm Chamber of Commerce in Sweden. As was stated in the Request for Arbitration, it was based on the Treaty concluded on June 13, 1989 between the Federal Republic of Germany and the Union of the Soviet Socialist Republics concerning the Promotion and Reciprocal Protection of Investments (hereinafter referred to as "the Treaty").

The Treaty contains, inter alia, the following provisions[2]:

The Contracting Parties,

Desiring to increase economic cooperation between them,

Endeavoring to create conditions favorable to investments by each party in the territory of the other,

Recognizing that promotion and protection of such investments through this Treaty will stimulate business initiatives in this area,

Have agreed as follows:

Article 1

1. For the purpose of this Treaty:

(a) the term "investment" means every kind of asset invested by an investor of one Contracting Party in the territory of the other Party in accordance with the latter's legislation, in particular:

– Property and other property rights such as usufructs, liens, and other comparable rights;

– Shares and other forms of participation in business enterprises and organizations;

– Claims to money invested to create economic value or to any performance having an economic value;

– Copyrights, industrial property rights such as inventor rights, including patents, trademarks, industrial designs, brands, design patents, trade names, as well as technical procedures and know–how;

– Rights to a commercial activity, including rights to exploration, exploitation, extraction or production of natural resources, which are based on a concession granted in accordance with the legislation of the Contracting Party in the territory of which the investments are made, or in accordance with an approval contained in an applicable agreement;

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[2] Unofficial English translation, published in International Legal Materials, Documents 1990 (Volume XXIX).

(c) The term "investor" means a natural person that has the permanent residence, or a legal entity that has its seat in the respective territories to which this Treaty applies, and that has the right to make investments.

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Article 2

1. Each Contracting Party, in accordance with its legal provisions, shall encourage investments by investors of the other Contracting Party in its territory, admit such investments and, in all cases, accord them fair and equitable treatment.

2. Investments and earnings therefrom shall be accorded the full protection of this Treaty.

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Article 4

1. Investments of investors of either Contracting Party may be subjected to measures of expropriation, including nationalization, or other measures with similar effects in the territory of the other Contracting Party only if such expropriation measures are carried out for a public purpose in accordance with procedures established in accordance with the laws of that Contracting Party, and upon payment of compensation. Such measures may not have a discriminatory effect.

2. Compensation shall be equivalent to the actual value of the expropriated investment immediately before the actual impending expropriation became public knowledge. Compensation shall be paid without unwarranted delay and shall include interest at the rate that is in effect in the territory of the respective Contracting Party, accrued until the date of payment; it shall be effectively realizable and freely transferable.

3. An investor whose investment has been expropriated shall have the right ro review, by the courts of the Contracting Party that carried out the expropriation, of all questions pertaining to the expropriation of his investment, including compensation procedures and amounts, in accordance with the laws of the latter.

In addition, he shall have the right to submit disputes concerning procedures and amount of compensation to an International Court of Arbitration as defined in Article 10 of this Treaty.

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Article 9

1. Disputes between the Contracting Parties regarding the interpretation or application of this Treaty should, if possible, be settled through negotiations.

2. If a dispute cannot this be resolved, it shall upon the request of either Contracting Party be submitted to an Arbitral Tribunal for decision.

3. The Arbitral Tribunal shall be constituted for each individual case, with each Contracting Party appointing one member and the two members, by agreement, selecting a chairman who is a national of a third country, and who shall be appointed by the two Contracting Parties. The members of the Arbitral Tribunal shall be appointed within two months and the chairman within three months from the date on which one of the Contracting Parties informed the other of its wish to submit the dispute to an Arbitral Tribunal for decision.

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5. The Arbitral Tribunal shall reach its decision by a majority of votes. Such decision shall be binding. Each Contracting Party shall bear the cost incurred by its member as well as the costs of its representation in the proceeding before the Arbitral Tribunal; the cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The Arbitral Tribunal shall determine its own procedure.

Article 10

1. Disputes concerning an investment between one of the Contracting Parties and an investor of the other Contracting Party should, if possible, be amicably settled between the parties to the dispute.

2. If a dispute concerning the scope and the procedures of compensation pursuant to Article 4 of this Treaty, or the free transfer pursuant to Article 5 of this Treaty has not been settled within six months as from the date it was raised by one of the parties to the dispute, each of such parties shall have the right to submit the dispute to an international arbitral tribunal.

3. The provisions in para. 2 of this Article shall also apply to disputes concerning matters for which the parties to a dispute have agreed to an arbitral procedure.

4. Unless otherwise agreed by the parties to the dispute, the provisions of Article 9(3) to (5) of this Treaty shall apply mutatis mutandis with the provision that the members of the arbitral tribunal shall be appointed by the parties in dispute and that, if the time limits referred to in Article 9(3) of this

Treaty are not complied with, each of the parties in dispute may, in the absence of other agreements, invite the Chairman of the International Court of Arbitration at the Chamber of Commerce in Stockholm to make the necessary appointments.

The arbitral award shall be recognized and enforced in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958.

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In signing the Treaty concerning the promotion and reciprocal protection of investments between the Federal Republic of Germany and the Union of the Soviet Socialist Republics, the Contracting Parties have agreed on the following provisions, which shall form a part of the Treaty:

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As was stated in a Protocol attached to the Treaty, the Contracting Parties, when signing the Treaty, agreed on certain provisions which should form a part of the Treaty. Among these provisions is the following:

3. Re Article 4:

An investor shall also be entitled to compensation if the other Contracting Party interferes with the economic activities of an enterprise in which he is participating, if his investment is significantly reduced by such interference. In case of dispute regarding such matters between the investor and the other Contracting Party, the provisions of Article 10 shall apply mutatis mutandis.

In his Request for Arbitration, Mr. Sedelmayer claimed compensation for, inter alia, investments in the joint stock company KOC, value of seized materials, value of improvements to the Premises and loss of use of facilities provided under the KOC Charter.

The Respondent has rejected the claims stating, in the first run, that the Tribunal lacks jurisdiction.

II. THE PROCEEDINGS

Before submitting the Request for Arbitration, the Claimant on September 27, 1995 sent an Appeal to the Supreme Court of the Russian Federation concerning the decision taken by the St. Petersburg City Court Collegium for Civil Cases on arresting and sealing up buildings and structures at the Premises. This appeal was, according to the Claimant, denied in the beginning of December 1995.

On October 10, 1995, the Claimant sent a letter to the Presidential Administration, Procurement Department, in which the Administration was requested to appoint its arbitrator and to "initiate Arbitration Proceedings concerning the dispute over the Presidential Expropriation Ukase no. 633-RP". The Claimant announced that, as arbitrator for his side, he had appointed Mr. Stanley Olchovik.

In the Request for Arbitration, the Claimant stated that the Presidential Administration had ignored his request for the appointment of an arbitrator. The Claimant requested the Chairman of the Arbitration Institute of the Stockholm Chamber of Commerce to appoint a panel of arbitrators.

On March 15 and May 3 and 4, 1996, the Claimant sent additional letters to the Arbitration Institute.

In a letter to the Arbitration Institute, dated March 20, 1996, the Procurement Department declared, inter alia, that it had not entered into a single agreement or contract with Mr. Sedelmayer or with anyone in his firms and that, furthermore, it did not constitute any "contractual party" as prescribed in the Treaty. The Procurement Departement requested that the demands presented by Mr. Sedelmayer should not be met.

In a letter to the Arbitration Institute, dated April 15, 1996, the Procurement Department stated that KOC had entered into liquidation on February 8, 1996 and that the Department had nothing to do with compensation for Mr. Sedelmayer's financial loss.

On May 15, 1996, the Procurement Department informed the Arbitration Institute that it, without prejudice to its position concerning the claim presented, had appointed Professor Ivan S. Zykin as its arbitrator.

In another letter to the Arbitration Institute, dated May 27, 1996, the Procurement Department declared, inter alia, that it was not a contractual party under the Treaty and that there was no basis upon which the Arbitration Institute could implement the appointment of an arbitrator in accordance with the Treaty.

The Claimant, in a letter dated June 28, 1996, advised the Arbitration Institute that he had appointed Dr. Jan Peter Waehler as his arbitrator.

At the request of the Claimant, the Chairman of the Arbitration Institute on September 3, 1996 appointed Justice Staffan Magnusson, the Supreme Court of Sweden, as presiding arbitrator.

The arbitrators have engaged Mr. Håkan Sandesjö as Secretary to the Tribunal.

The Tribunal issued its first procedural order on September 30, 1996, inviting the Claimant to present a Statement of Claim. The Claimant submitted a Statement of Claim, dated November 11, 1996. In the Statement of Claim, four different prayers for relief were listed, concerning (i and ii) compensation for expropriated investments and property, (iii) compensation for lost profit and (iv) compensation for arbitration costs. The Claimant also claimed interest on the compensations.

On November 15, 1996, the Tribunal invited the Respondent to present a Statement of Defence. The Tribunal received two documents in the Russian language from the Respondent. In the first document, dated September 16, 1996, the Respondent alleged that the Treaty was not applicable and stated that the Respondent had a "counterclaim" concerning compensation for damage on the Premises. The question of damages was further dealt with in the second document, attached to the first one, with the heading "Petition for damages".

At the request of the Tribunal, the Claimant on February 18, 1997 submitted comments to the Respondent's brief, dated September 16, 1996. The Claimant rejected the counterclaim.

On March 5, 1997, the Tribunal requested the Respondent to comment on the merits of the Claimant's claim and supply further particulars – including legal grounds – with respect to the counterclaim. On April 17, 1997, the Respondent submitted a response to the Tribunal's request. The Respondent declared that its counterclaim was conditional, i.e. the counterclaim should be considered by the Tribunal only if the Tribunal would find itself competent under the Treaty. The Claimant, on the other hand, had taken the position that, should the Treaty not be applicable, the parties had entered into a new arbitration agreement as a consequence of the counterclaim.

A preparatory meeting with the parties was held in Stockholm on April 25, 1997. At the meeting there was a discussion concerning, inter alia, the possibility of rendering a separate award on the Tribunal's jurisdiction. On June 26, 1997, the Tribunal decided not to render a separate award. The reason for this decision was that the issue of jurisdiction could not be settled without taking into account arguments and evidence which went to the merits of the case.

At the preparatory meeting it was decided that the Respondent should submit written comments on the merits of the Claimant's claim not later than September 1, 1997, should the Tribunal decide not to issue a separate award. On October 28, 1997, the Respondent delivered a brief concerning the issue of jurisdiction.

On November 13, 1997, the Claimant submitted a Rejoinder and a Preliminary statement of evidence. In the Rejoinder, the Claimant requested the Tribunal to render a partial award concerning (i) the Respondent's liability per se under Article 4(2) of the Treaty, or under general principles of public international law, or under Russian law, to pay compensation to the Claimant, and (ii) the Respondent's liability to pay compensation to the Claimant as detailed in the Claimant's prayers for relief (i), (ii) and (iv) in the Statement of Claim. The prayer for relief (iii), concerning compensation for lost profit, should be dealt with at a later stage of the arbitration.

In a brief, dated November 14, 1997, the Respondent submitted comments on the merits of the Claimant's claim, and on November 21, 1997, the Respondent sumitted a preliminary list of witnesses.

A final hearing took place in Stockholm on November 24 – 28, 1997. At the hearing, the following persons were heard: (1) at the request of the Claimant: Professor Ove Bring, Mr. Stanley Olchovik, Mr. Thomas Church, Mr. Jack Gosnell, Mr. Mikael Melrose, Mr. Benjamin Lehrer, Mr. Gerd Beetz, Mr. Walter Grosse, Mr. Dimitri Choulkine, Mr. Venjamin Fabritski and Mr. Franz Sedelmayer, and (2) at the request of the Respondent: Professor M. M. Boguslavskii, Mrs. Irina A. Garaburda, Mr. Igor Dubinin and Mrs. Yana V. Zolotareva.

The Tribunal, at the final hearing, decided to reject the Claimant's request for a partial award, considering that the Respondent had objected and that, in the Tribunal's opinion, the reason submitted by the Claimant in support of the request was not convincing. The Tribunal also decided that the parties should, after the hearing, have the opportunity to present their final arguments and submit the evidence needed concerning the claim for compensation for lost profit.

Before the final hearing was closed, decisions were taken concerning, inter alia, submission of additional written closing arguments and additional written comments.

In December 1997, the Respondent submitted written closing arguments, dated November 28, 1997. The Respondent also submitted certain additional documents.

On February 11, 1998, the Claimant submitted a Post Hearing Brief. In this brief, the Claimant made certain amendments to his request for compensation for costs and legal fees (prayer for relief number iv in the Statement of Claim). The Claimant also withdrew his claim for compensation for lost profit (prayer for relief number iii). In a letter, dated April 6, 1998, the Claimant underlined that this withdrawal only concerned the amount claimed under iii, and that all other prayers for relief were maintained also to the extent that they might include elements which might be characterized as a reflection of lost profit.

III. THE CLAIMS

The Claimant has, as he finally presented his claims, requested the Tribunal

(i) to order the Respondent immediately to pay to the Claimant USD 7,649,637.61, an amount equivalent to the value of certain expropriated investments and property in St. Petersburg (inter alia law enforcement equipment, office equipment, vehicles, investments in the Premises and loss of the right to use the Premises), plus interest on such amount, at a rate of 30 per cent per annum, alternatively 12.18 per cent per annum, from November 25, 1996, i.e. two weeks after the Statement of Claim was sent to the Respondent, alternatively from the date of the Arbitral Award, until full payment is made to the Claimant;

(ii) to order the Respondent immediately to pay to the Claimant DEM 494,430, an amount equivalent to the value of certain expropriated property in St. Petersburg (mostly vehicles), plus interest on such amount, at a rate of 30 per cent per annum, alternatively 12.18 per cent per annum, from November 25, 1996, alternatively from the date of the Arbitral Award, until full payment is made to the Claimant; and

(iii) to order the Respondent immediately to pay to the Claimant compensation for 50 per cent of the fees and costs incurred by the Chairman of the Tribunal and 100 per cent of the fees and costs incurred by Professor Zykin, alternatively, to compensate the Claimant for his costs in this arbitration in the amount of SEK 1,570,275 plus interest and, as between the parties, to bear responsibility for payment of the compensation to the arbitrators.

The Respondent has rejected the claims and declared that no amounts or rates of interest can be admitted as reasonable. The Respondent has not claimed compensation for arbitration costs.

The parties are at dispute to whether or not the Respondent has filed a counterclaim in this arbitration. If a counterclaim has been filed, the Claimant has rejected such claim.

IV. STATEMENTS BY THE PARTIES

The Claimant:

1. Legal grounds for the claims

The Treaty was signed by representatives of the Federal Republic of Germany and the Soviet Union. In a note issued in the fall of 1992 to the heads of diplomatic missions in Moscow, the Ministry of Foreign Affairs of the Russian Federation stated that the Russian Federation would continue to exercise the rights and honour the obligations arising from international treaties signed by the Soviet Union. Thus, the Treaty is binding for the Russian Federation.

Article 4(1) of the Treaty enumerates three mandatory criteria which must be fulfilled by the government expropriating property belonging to an investor from the other contracting country, viz., (i) the expropriation must be based on public interest, (ii) the expropriation must be conducted under the laws of the expropriating country, and (iii) compensation for the expropriated property must be paid to the foreign investor. None of these criteria have been fulfilled by the Respondent.

The Directive of December 4, 1994, issued by the President of the Russian Federation, served as the basis for the takings on October 9, 1995 and January 24, 1996, respectively. However, the order from the President of the Russian Federation does not talk about public interest at all. The concept of "public interest" is addressed in the Russian Law of Foreign Investments of July 4, 1991. Such an interest must exist and must form the basis for the decision in order for an expropriation to be legal. There must be an overriding interest of general character underlying the decision to expropriate. This was not the case with respect to the expropriation of the Claimant's property.

The Russian Law of Foreign Investments stipulates that any nationalization shall be

adopted by the RSFSR Supreme Soviet. The Directive, however, was issued by the President of the Russian Federation and not by the State Duma, which is the state organ equivalent to the former Supreme Soviet in the Russian Federation today. Furthermore, the Claimant has not received any compensation for the expropriated property, as stipulated in the Russian Law of Foreign Investment.

Consequently, the Respondent has not complied with Russian municipal law in carrying out the expropriation of the Claimant's property. The expropriation, therefore, constitutes a breach of Article 4(1) of the Treaty.

In addition, according to the Constitution of the Russian Federation of December 12, 1993, laws and normative legal enactments affecting human and civil rights must be subject to official publication. The Directive has never been published. As can be read on the first page of the Directive, the Directive was "*for internal use*". Such wording further substantiates the fact that the Directive has been an internal document only and thus never published. Hence, under the Constitution of the Russian Federation, the Directive does not have any legal effect and actions carried out under authority of the Directive are not in conformaty with Russian law. Consequently, the expropriation has not been carried out in accordance with Russian law, as required by Article 4(1) of the Treaty.

Article 4(2) of the Treaty stipulates that compensation to a foreign investor whose property has been expropriated shall be made in an amount corresponding to the real value of the confiscated investment, calculated at the moment of the official declaration of confiscation.

The Claimant's right to compensation follows not only from the Treaty, but also from the Civil Code of the Russian Federation and the Russian Law on Foreign Investments. Although representatives of the Respondent were aware of the fact that the Claimant was entitled to compensation for any expropriated property under the Treaty as well as under Russian municipal law, he has not received any compensation from the Respondent. On the contrary, the Claimant has been effectively deprived of his investments in KOC. Expropriation without proper

compensation to the foreign investor is a breach of Article 4(1) of the Treaty.

To sum up, the Claimant's property has been expropriated by the Respondent but the Claimant has not received any compensation, which he is entitled to under the Treaty as well as under Russian municipal law.

If the Tribunal should find that the Treaty is not applicable to this dispute but that the Parties have entered into a separate arbitration agreement, the Claimant has two alternative legal grounds for the prayers for relief: public international law and Russian law.

A well-known concept with respect to the legal protection of foreign property in public international law is the rule frequently referred to as the "*minimum international standard*". This means that a state is not allowed to invoke its internal legislation to avoid criticism from abroad concerning its treatment of foreigners, if such treatment falls below a certain minimum standard. Even though municipal law may allow citizens to be deprived of their property without compensation, confiscation of the property of aliens is in contravention of the minimum standard and thus constitutes a violation of public international law.

In cases of expropriation or confiscation of property, the minimum international standard is encapsulated in the phrase "*prompt, adequate and effective compensation*" with respect to any confiscated property.

The requirement of "*prompt*" compensation typically constitutes an expectation of immediate payment. The requirement of "*adequate*" compensation means that the compensation must correspond to the market value of the confiscated property. Finally, to be "*effective*", compensation must be of a de facto economic value to the foreign investor.

Thus, under public international law, the Claimant is entitled to receive prompt, adequate and effective compensation from the Respondent.

Since the expropriation took place in the Russian Federation, the Claimant submits that it is possible to use Russian law in determining the rights to, and level of, compensation due to the Claimant. Russian law stipulates – as indeed does Article 4 of the Treaty – that any expropriation shall be accompanied by full compensation to the person or entity that has had its property expropriated. The relevant Russian legal acts in this respect are Article 35(3) of the Constitution of the Russian Federation, Article 16 of the Civil Code of the Russian Federation and Article 7 of the Law on Foreign Investments.

The legal ground for the penalty interest claimed under (i) and (ii) is Article 4(2) of the Treaty. It follows from that provision that the interest rate applied in the Russian Federation is to be applied on compensation due to the Claimant under the Treaty since the expropriation took place in the Russian Federation. Proceeding from the fact that the expropriation was physically effectuated in 1996, the Russian interest rate applied in 1996 is to be applied to the Claimant's prayers for relief.

Should the Tribunal find that the Treaty is not applicable to this dispute, the Claimant's legal ground for requesting penalty interest is generally accepted principles in public international law concerning compensation for expropriated property, which principles imply that the amount of compensation – including penalty interest – due to an individual from which property has been expropriated shall be calculated in accordance with the laws of the country in which the expropriation took place, i.e. in this case Russian law. Russian law on penalty refers to the interest rate valid at the creditor's permanent residence, i.e. in this case Germany.

The legal ground for the prayer concerning costs (iii) is Article 9(5) of the Treaty. Should the Tribunal find that this arbitration rests not on the Treaty but on a separate arbitration agreement, the legal ground for the alternative prayer for relief concerning costs is generally accepted principles of public international law and international arbitration practice, including Swedish arbitration practice.

2. The Investments

KOC's business in the Russian Federation had two legs, viz. (i) direct sales to customers, and (ii) security operations.

Direct sales to customers were arranged such that KOC only acted as a middle-man. The actual sales and purchase transactions were concluded directly between the police or fire departments in different cities in the Russian Federation, as the purchasers, and SGC International as the seller. KOC received compensation from SGC International for its participation in the direct sales.

KOC's other activity was to arrange security operations (guard service, transports of valuables etc.) for customers in St. Petersburg. KOC also arranged training in emergency services (first aid etc.) and manufactured electronic surveillance equipment on the Premises. In order to arrange the security operations, KOC had to have access, inter alia, to the Premises, staff and law enforcement equipment. The equipment that was expropriated by the Respondent was mainly equipment used by KOC in its security operations, since the goods for which KOC acted as a middle-man was bought directly by and tranported to the purchaser.

The Respondent has alleged that the Claimant has conducted business during 1991 through 1995 in breach of the Russian Law on Joint Stock Companies of 1995. However, the Law of Joint Stock Companies was adopted on November 24, 1995 and entered into force on July 1, 1996, i.e. more than five months after the second invasion of the Premises.

The Claimant's business operations in the Russian Federation have been carried out partly by himself personally, partly via three companies, wholly owned and/or fully controlled by the Claimant, viz. SGC International, Belmonte Ltd and Linx Establishment. The re-routing of monies via such companies was conditioned by tax reasons, which, however, does not change the fact that the monies originated from the Claimant personally.

Compensation for investments under the Treaty made de facto and de facto expropriated must correspond to the "real value", i.e. the market value, of such investments. The Treaty does not – as the Respondent alleges – limit the term "investment" so as to protect only capital contributed as charter capital to a joint stock company. Therefore, the Claimant rejects the Respondent's idea that the only amount of compensation that can be awarded to the Claimant is an amount equivalent to the Claimant's part of the charter capital, i.e. RUR 700,000. It shall be noted that the Claimant tried to increase the charter capital. However, as from 1992 GUVD was no longer taking active part in KOC. Indeed it was blocking any decisions by the general sharholder's meeting and the board of directors. Anyway, whether or not the charter capital was increased to show the investments de facto made by the Claimant is not relevant in this arbitration. In the Claimant's opinion, all types of property valuables invested by the Claimant are covered by the Treaty. The fact that the Claimant invested equipment and cash into the operations of KOC without formally increasing the amount of the charter capital was not, and is not, in any way "illegal", as alleged by the Respondent.

According to the Respondent, the Claimant has kept away from the liquidation proceedings following the court ruling of February 8, 1996. That is not true. The fact is that the Claimant has not been notified of the proceedings. More importantly, however, is that these proceedings and any result of such activities have nothing to do per se with the compensation due to the Claimant under the Treaty and public international law.

The Claimant made substantially more investments into the operations of KOC than he was obliged to under the Shareholders Agreement. He personally brought in large amounts of USD in cash into the Russian Federation during 1992 through 1995. These amounts were used in the operations of KOC and were also entered into the books of KOC.

The Claimant's investments have been continuously confirmed by Russian officials during 1994 and 1995. Moreover, the registrations that KOC received from various governmental bodies during the fall of 1991 and the spring of 1992 show that KOC's

share capital had been fully paid at the latest on February 6, 1992.

The investments expropriated by the Respondent can be divided into four categories, viz., (i) in kind contribution of chattels to KOC's capital; (ii) vehicles and certain law enforcement equipment; (iii) investments in the Premises and loss of the right to use the Premises; and (iv) the Claimant's personal belongings.

By way of summary, the value of the investments expropriated under these categories can be described as follows:

In kind contribution of chattels to KOC's capital	USD	1,714,405.88
Vehicles and certain Law Enforcement Equipment	USD	1,003,914.43
	DEM	489,120
Investments in the Premises and loss of the right to use the Premises	USD	4,839,317.30
	DEM	5,310
Personal belongings	USD	88,000

The Claimant has, directly or indirectly, executed investments of chattels into KOC's capital during 1991 through 1996. The capital contribution was made mainly in kind as law enforcement equipment, cars, clothes, office inventory etc. at a total value of USD 1,714,405.88.

In connection with and subsequent to the physical take-over of the Premises on October 9, 1995, certain vehicles belonging to SGC International and the Claimant personally, respectively, were confiscated. Such vehicles were imported to the Russian Federation by the Claimant to be used in various KOC operations.

SGC International maintained vehicles of a value of USD 317,000 in the Russian

Federation at the time of the expropriation, which vehicles had cost approximately USD 10,340 to transport to St. Petersburg. Thus, those vehicles belonging to the Claimant at a total value of USD 327,340 was expropriated by the Respondent.

Moreover, the Claimant had purchased six vehicles from a company in USA in the amount of USD 423,990. As a consequence of the expropriation, two vehicles already delivered to St. Petersburg were confiscated by the Respondent. The remaining four vehicles in the Claimant's possession today are of no value to him, since they were specially equipped for use in St. Petersburg and had KOC logos printed on the sides.

In September 1995 the Claimant bought two vehicles at a total value of USD 119,843.38. These vehicles were also confiscated by the Respondent in March 1996, when the Claimant's assistants attempted to bring such vehicles out of the Russian Federation.

At the beginning of 1996, the Claimant also bought certain law enforcement equipment (jackets, shirts, holsters etc.) at a total value of USD 132,741.05 to be imported to St. Petersburg. This equipment, however, was never imported due to the final take-over by the Respondent of the Premises in January 1996. The equipment has become useless to the Claimant, since it has the seal of KOC embroidered on each piece of equipment.

Furthermore, the Claimant bought one truck, re-modeled into a disaster relief vehicle, and two trailers at a total value of DEM 489,120, which were transported to St.Petersburg and subsequently confiscated by the Respondent in connection with the takings in January 1996.

The Claimant continuously had renovation and reconstruction works carried out on the Premises and he paid for such works with his own personal funds. As a result of the expropriation, the Claimant has been deprived of investments in the Premises concerning these renovation and reconstruction works (USD 788,942.30) and, in additon, the value of the right to use the Premises under the Shareholders Agreement

for 22 years, 1994–2016 (USD 4,049,375). He also has had costs for evaluation of the right to use the Premises (USD 1,000) and evaluation of offered substitute real property (DEM 5,310).

According to the evaluation of the right to use the Premises until the year 2016, the right per annum is USD 372,000. Consequently, the total value of the right to use the Premises for the entire 25 year period (1994–2016) foreseen in the Shareholders Agreement, is USD 9,300,000. KOC was, however, allowed in fact to use the Premises only from September 23, 1991 through December 4, 1994, the day of the expropriation, which is 38 months and 21 days, equal to a value of USD 1,201,250. Thus, the remaining value of the right to use the Premises is USD 8,089,750. SGC International's share in KOC was 50 per cent and thus, 50 per cent of the value of the right to use the Premises has been lost, i.e. USD 4,049,375.

The Claimant bought personal belongings, such as kitchen appliances, clothes and other ordinary house accessoires, to be used in St. Petersburg during the period 1991 through 1996. All of these personal belongings were left behind by the Claimant when the remaining representatives of KOC were physically forced to leave the Premises by officers of the Respondent on January 24, 1996, without being allowed to take anything with them. The total value of these belongings is estimated to USD 88,000.

The Respondent alleges as a defence, not a counter-claim, that the Claimant ows for rent for the use of the Premises by him and his family with USD 2 million. This allegation is irrelevant for this arbitration. In the Claimant's opinion, it is interesting to note that the Respondent – without explaining how – itself assesses the leasehold value of the one room that the Claimant and his family occupied in the main building to USD 2 million for 1991 through 1995. This should be compared to the Claimant's claim for compensation for his share of the leasehold value for the entire Premises during 1994 through 2016, which amounts to just over USD 4 million.

3. The Tribunal's Jurisdiction

It has been stated by the Respondent[3] that the Arbitral Tribunal does not have jurisdiction to try this dispute, since the Treaty is not applicable and, thus, the arbitration clause in Article 10 of the Treaty does not provide the Tribunal with sufficient competence over the dispute. The Claimant rejects this allegation on the following grounds.

3.1 Mr. Sedelmayer is an Investor under the Treaty

The Treaty only covers investments made by investors from a contracting party, i.e. from Germany or Russia. According to Article 1.1(c) of the Treaty the term "investor" denotes a natural or a juridical person domiciled in the geographical area of the Treaty. The Claimant is, and was at the relevant point of time, a natural person domiciled in Germany. The Claimant has from time to time also been residing in the Russian Federation between 1991 and 1995. However, he has at all time been domiciled in Germany.

This notwithstanding, should the Tribunal find that the Claimant at some period of time was domiciled in the Russian Federation, this does not effect his possibility to appear as Claimant in this arbitration. The critical test of domicile that must be used in order to ascertain which individuals are protected by the Treaty is whether or not the individual in question has been domiciled within the geographical area of the Treaty, which is limited by the respective borders of the Federal Republic of Germany and the Russian Federation. The Claimant has never been domiciled outside of the geographical area of the Treaty, and is, thus, protected by the Treaty.

Furthermore, all the investments that the Claimant refers to in this dispute emanate from the Claimant personally. It has been clear from the beginning of the relations between the Claimant and representatives from both the Mayor's office in St. Petersburg and GUVD that it is in fact the Claimant as a natural person who has

[3] See below under Section 4.

been involved in the transactions in question and invested money in the KOC project and that such investments were to be channeled into the Russian Federation via certain companies wholly owned and/or controlled by the Claimant.

Thus, any claim that the Claimant as an individual puts forth are admissable under and protected by the Treaty. The circumstance that the Claimant has channelled certain investments through SGC International, Belmonte Ltd or Linx Establishment, does not change this situation. With respect to SGC International, the Claimant is in full control of the company, not only through his ownership of 100 per cent of the shares in SGC International, but also through the control and profit sharing agreement between the Claimant and SGC International of September 15, 1991.

Although certain investments have been made by the entity SGC International, such investments have been made as a direct result of the Claimant's actions as the sole shareholder of SGC International and with monetary means emanating directly from the Claimant. Thus, SGC International has only been the vehicle through which the Claimant has injected his own personal capital into KOC in the Russian Federation.

There can be no doubt that the Claimant is an investor as such is defined in the Treaty. In the Claimant's opinion, certain investments included in the Claimant's claim were, in fact, made directly by the Claimant as an individual. In this connection, it must be emphasized that all of the Claimant's investments made in the Russian Federation – as required in Article 1(1)a of the Treaty – were made in full compliance with any and all laws and regulations applicable from time to time in the former Soviet Union and/or the Russian Federation.

The Claimant's total control and domination of SGC International constitute two elements of utmost importance in reaching the conclusion that Claimant's investments are covered by the Treaty. In modern international law the so-called "*control theory*" is widely accepted. This theory is based on the idea that the decisive factor is who de facto controls the entity which has, for example, made investments in a foreign country. Consequently, the control theory leads to the piercing of SGC International's corporate veil and to putting the de facto investor – i.e. the Claimant – in the focus.

Nothing in the Treaty prevents application of the control theory when interpreting the Treaty.

Thus, on the basis of the text of the Treaty, Article 1(1)a and 1(1)c, read in conjunction with the control theory, the Claimant is indeed an investor in the meaning of Article 1(1)c of the Treaty.

It is, in the Claimant's opinion, of crucial importance to remember that the bilateral investment protection treaty between USA and the Russian Federation, under which SGC International, as an entity registred in USA, without doubt would enjoy protection, has not been ratified by the Russian Parliament and thus has not entered into force. Consequently, should the Treaty be deemed not to cover the Claimant's investments, he would be deprived of any neutral forum in which to seek redress from the Russian Federation for the damages suffered as a result of the expropriation of his investments in the Russian Federation. Such a situation would be wholly unacceptable and would amount to the equivalent of deni de justice.

3.2 Mr. Sedelmayer's investments constitute investments in the meaning of the Treaty

According to Article 1(1)a of the Treaty the term "investments" includes all types of property invested by an investor from one contracting party. The text intentionally gives a broad definition to this term. It is adequate to say that anything with value to be used in commercial activity is investments. Articles 2–4 of the Russian Law on Foreign Investments contains an equally broad definition. All of the Claimant's investments into the Russian Federation fall under this definition and are thus protected by the Treaty.

3.3 All of Mr. Sedelmayer's investments were made in full compliance with Russian law

Article 1(1)a of the Treaty says that investments shall be made in compliance with

the legislation in the territory of the investment. That does not mean, however, that the Treaty does not provide protection if investments were not made in full compliance with municipal law. The Treaty is an instrument of international law and must be read and interpreted accordingly. Moreover, as has been previously stated, it follows from the Russian Law on Foreign Investments that foreign investors shall be treated according to a "*minimum international standard*" meaning, inter alia, that a foreign investor has to be compensated if confiscation of property is in contravention of the minimum standard and thus constitutes a violation of public international law.

However, the Claimant submits that all investments were made in full compliance with the legislation in force in the Soviet Union and in the Russian Federation. That also goes for the establishment of KOC's charter capital. GUVD tranferred its rights to use the Premises to KOC on November 1, 1991. After that date KOC received official registration with several government authorities in St. Petersburg and in Moscow. Consequently, the government authorities recognized that KOC had been properly established and that the contributions to its charter capital had been properly made by its founders.

This notwithstanding, should any mistake have been made by GUVD in contributing its share of KOC's charter capital, this is not something that concerns the investments made by the Claimant during 1991 through 1995. The Claimant has properly executed his investments in the Russian Federation in accordance with the laws on foreign investments applicable in the Russian Federation from time to time. In addition, the execution of the Claimant's investments has never been questioned by the Respondent.

In this context, the Claimant emphasizes that the court ruling of November 26, 1992, concerning the alleged illegal registration of KOC, is simply wrong; it is an incorrect application of Soviet and Russian law. However, irrespective of the correctness of the court ruling, this judgement does not give the Russian Federation the right to seize and expropriate KOC's and the Claimant's property. The judgement does not terminate the activities of KOC nor does it order the liquidation of KOC. In order for KOC to be liquidated without the consent of the owners, a court of law must take a

decision to that effect. Such decision was taken only on February 8, 1996, i.e. after both invasions of the Premises on October 9, 1995 and on January 24, 1996 had occurred.

The Respondent is trying to argue that the Arbitral Tribunal has not the right to put the said court rulings in question. However, the Tribunal has to try a dispute under public international law, in which decisions of municipal courts are facts only; as such they cannot prevent a claim under public international law from being tried.

The Claimant declares that he has never been notified by any Soviet or Russian authority, officially or unofficially, that he is in breach of customs- or any other laws or regulations, until having been so informed by the Respondent during this arbitration. It must be emphasized that KOC was operated as a profitable and highly visible company in St. Petersburg during 1991 through 1995. Neither the Claimant, nor KOC, has breached Soviet or Russian law at any point in time. However, breach of municipal law in the Russian Federation does not deprive the Claimant of the protection that he enjoys under public international law. Thus, the question of whether or not he has breached any Russian law or regulation is irrelevant in this arbitration.

3.4 The Directive and the takings on October 9, 1995 and January 24, 1996 constitute confiscation under the Treaty

The legal ground on which the Claimant relies in support of his claim for compensation of expropriated property is Articles 4(1) and 4(2) of the Treaty concerning, among other things, an investor's right to compensation for expropriated property. The Claimant's property in the Russian Federation was de facto confiscated as a result of the Directive. The reasons behind the Directive and behind the physical take-over of the Claimant's property thereafter have no bearing on the Claimant's right to receive compensation for the value of the expropriated property.

Moreover, even if the expropriation of the Claimant's property had been the result of

the application of Russian law in the given case – which the Claimant rejects – the Claimant would still be entitled to compensation for the value of the expropriated property under Article 4(2) of the Treaty. Article 4(1) of the Treaty stipulates that expropriation, confiscation or other measures resulting in similar consequences may be carried out only in cases when those compulsory measures of confiscation pursue public interests and follow the order established in conformity with legislation of the contracting party and when compensation payments are duly made. Thus, expropriation or confiscation resulting from application of the laws of the Russian Federation does not relieve the Russian Federation from liability under the Treaty to pay compensation to an investor who has lost investments due to the application of such laws.

3.5 A case pending before a court or other governmental body in the Russian Federation does not constitute lis pendens

SGC International has brought forward a court case against the local customs committee in St. Petersburg. However, a case pending before a court or other governmental body in the Russian Federation does not constitute lis pendens with respect to the Claimant's claims as put forward in this arbitration. This is explicity pointed out in Article 4(3) of the Treaty.

The result with respect to lis pendens would be the same even if the Tribunal were to find that this arbitration rests not on the Treaty, but on the separate arbitration agreement entered into by the Claimant and the Respondent. General principles of public international law stipulate that lis pendens only occurs if both parties to the dispute and the prayers for relief to be tried by the two different bodies are identical. Neither is the case in this arbitration.

3.6 The Respondent is properly represented by the Procurement Department

It is the Russian Federation, acting through its President and through other

administrative organs of the Russian Federation, which has caused the damages to the Claimant. Therefore, the Russian Federation is responsible for its actions and cannot avoid such responsibility by not appointing representatives.

It follows from the Russian Constitution that the President of the Russian Federation represents the Russian Federation as a sovereign. Thus, the Russian Federation is liable for the actions of its president and for any actions carried out by its governmental agencies and adminstrative organs on the basis of a presidential decree such as the Directive.

The fact that the Procurement Department of the President of the Russian Federation alleges that it does not have the authority to represent the Russian Federation in this arbitration does not mean that the Russian Federation is not the proper party to this dispute. The Procurement Department is a federal organ of executive power effectively controlled by and directly subordinated to, and thus also reporting directly to the President of the Russian Federation. The Procurement Department is the ultimate representative of the Russian Federation, and, as a consequence thereof, does not have the corporate freedom normally attributed to separate legal entities.

The Request for Arbitration and the Statement of Claim have been sent to the Russian Federation, addressed to the Procurement Department. However, there has never been any doubt that the Russian Federation as a sovereign is the Respondent. In adressing the correspondence to the Procurement Department, the Claimant was guided by the fact that the Procurement Department has acted as the only federal representative of the Russian Federation in its dealings with the Claimant concerning the expropriation during 1994 and 1995. The Procurement Department has never referred the Claimant to any other governmental agency or organ for discussions concerning the expropriation.

In addition, the Procurement Department has in fact acted as the representative of the Russian Federation in this arbitration. The objection that the Procurement Department does not have such authority has been presented to the Tribunal more than one year after the arbitration was initiated by the Claimant. This is a modus operandi which is

unacceptable. In fact, the Russian Federation and the Procurement Department are estopped from asserting this objection.

Finally, it is a well-known and well-established principle of customary public international law that a country cannot rely on internal rules – for example concerning who has and who has not the authority to represent the country in arbitrations – as a defence against liability under international law.

3.7 Mr. Sedelmayer has complied with the stipulations in the Treaty concerning pre-arbitration procedure and the setting-up of the Arbitral Tribunal

The Respondent argues that the Claimant has failed to comply with Articles 9(3) and 10(2) of the Treaty and that, thus, the Treaty is not applicable.

As concerns Article 10(2), the Claimant understands the Respondent's objections to mean that the Claimant is required to exhaust local remedies in the Russian Federation before proceeding to arbitration. However, the Treaty does not contain any provision on exhaustion of local remedies as a condition precedent for applicability of the Treaty. Moreover, the Respondent has itself filed a counterclaim in this arbitration without bringing the matter before a Russian civil court.

Article 10(2) makes it clear that each party, i.e. in this case the Claimant and the Respondent, is entitled under the Treaty to apply to international arbitration with a view to seeking assistance in resolving a dispute that has arisen under the Treaty if the dispute is not settled within six months from the notification by one of the parties. The Claimant has had numerous contacts since 1995 with several different institutions representing the Respondent with a view to settling the issue of compensation in a peaceful manner. The Claimant was promised adquate compensation for his property in 1995, inter alia, by the Mayor's office in St.Petersburg, and was offered several suggestions for alternative – but worthless – real property in St. Petersburg. A meeting at the Premises in 1995 with General Shepal of the Procurement Department was held in an attempt to settle the dispute.

Several other meetings were scheduled with representatives of the Procurement Department during 1995, but those meetings never materialized.

Thus, the Respondent has been well aware of this dispute ever since it arose in December 1994, but has refused to communicate with the Claimant. The Respondent cannot now complain that measures have not been taken with a view to finding an amicable solution of the dispute.

It follows from what now has been said, that the Claimant did try to solve the dispute with the Respondent in a peaceful manner as set forth in Article 10(2) of the Treaty. However, since this path of action proved unsuccessful, the Claimant had no other option than to initiate arbitration in January, 1996, i.e. more than one year after the issuance of the Directive of expropriation on December 4, 1994.

The Respondent argues that the Arbitral Tribunal has not been properly constituted. It follows from Article 9(3) of the Treaty that the parties shall comply with certain time-limits appointing arbitrators. It is correct that this time-limits have not been met by the parties. However, by appointing its arbitrator after the time-limit had expired, the Respondent has accepted that the time-limits set forth in Article 9(3) were replaced by agreement of the parties.

Furthermore, the Tribunal has been constituted as of September 3, 1996 and the Respondent has proceeded to submit comments on the merits of the dispute without ever raising the question of irregularities in the composition of the appointment procedure. As a consequence of this, the Respondent is estopped from presenting any objections concerning the composition of the Tribunal.

3.8 The Respondent's counterclaim constitutes acceptance of the Tribunal's jurisdiction

In its brief of September 16, 1996, the Respondent clearly files an unconditional counterclaim against the Claimant. In the enclosed petition for damages, the

Respondent gives an explanation of its claim – including an amount requested as damages – detailed enough for such claim to be considered as a proper counterclaim. In addition to this, the Respondent refers to the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce concerning the right to file counterclaims in arbitrations. In addition, the Respondent does not mention that the counterclaim is conditioned upon the Tribunal's acceptance of jurisdiction over the Claimant's prayers for relief.

By filing its counterclaim, the Respondent has accepted that the Tribunal has jurisdiction to try the counterclaim. The Claimant also accepts the jurisdiction of the Tribunal in this respect. As a result of the Respondent's counterclaim and the Claimant's acceptance of the Tribunal's jurisdiction to try the counterclaim, the parties have entered into a new and separate arbitration agreement, which gives the Tribunal the jurisdiction to try the dispute between the Claimant and the Respondent in its entirety. This agreement is valid and cannot be unilaterally terminated by the Respondent.

In case the Tribunal were to conclude that the parties have not entered into a new arbitration agreement, the Claimant puts forward his claim as a counterclaim to the Respondent's claim.

Thus, even if the Tribunal were to conclude that the Treaty is not applicable, it has jurisdiction to try both the Claimant's claim and the Respondent's counterclaim.

The Respondent:

4. The Tribunal's Jurisdiction

The Respondent alleges for several reasons that the Arbitral Tribunal has not competence under the Treaty to examine the Claimant's claim.

4.1 Mr. Sedelmayer is not an Investor under the Treaty

The Shareholders Agreement was signed by the company SGC International, a juridical person under US law. In the Agreement, the Claimant is referred to as the President of SGC International. Furthermore, the Shareholders Agreement refers to the "foreign investor", SGC International. It is evident that the juridical person registered in USA intervenes as a foreign investor and not its president while the Soviet participant is GUVD and not its head or deputy.

As for the fact that SGC International is fully owned by the Claimant it is legally irrelevant since the US law on corporations admits the existence of a company fully owned by one person.

It was not the Claimant as a natural person and a German national but a juridical person that always figured in the investment relations with the Russian party. Even if the Claimant made an agreement with SGC International concerning "future investments in the Soviet Union", this does not mean that this natural person became an investor in the Russian Federation. No legal succession has taken place. SGC International remains a foreign shareholder and investor in the Russian Federation. The factual circumstances concerning delivery of goods confirm that SGC International was not merely a formal investor; it actually handled and financed the deliveries.

Both in Germany and in the Russian Federation the literature contains comments on Article 1(1)c of the Treaty, concerning the term "investor". The works of Russian authors usually point out that the domestic law of the Russian Federation traditionally defines the nationality of a juridical person proceeding either from the only criterion of the place of its establishment or from a combination of the criteria of the place of establishment and the seat of the board. In Germany and in the Russian Federation there is the same understanding of which juridical persons are regarded as "investors" under the Treaty and, therefore, to which juridical persons the Treaty is applicable. Since, in the given case, the investor is a juridical person established in USA and the board of this juridical person is located in USA and not in Germany, the provisions

of the Treaty do not apply to this juridical person.

However, even if one assumes that investments were made by the Claimant as a natural person, he cannot be regarded as an investor under the Treaty. According to Article 1(1)c the term investor means a natural person permanently residing in Germany, but since 1991 the Claimant has permanently and continuously resided in the Russian Federation.

The notion of a de facto investor – *"the control theory"* – is not mentioned in the Treaty. This principle cannot be applied only because it may be used in judicial practice or in some international treaties. It is essential that neither Germany nor the Russian Federation applies the criterion of control in their treaties in this field. If an international treaty says nothing about the principle of control one must, first and foremost, proceed from the text of the treaty.

Article 9(1) of the Treaty provides for a possibility to interpret the Treaty and even sets forth the procedure for settling disputes between the contracting states. Neither the Russian Federation nor the Federal Republic of Germany has raised the question of interpretation in connection with this dispute. However, the Treaty is sufficiently clear and specific with regard to the definition of the term investor and has not accepted the criterion of control.

The Claimant has stated that, should the Treaty be deemed not to cover the Claimant's investments, he would be deprived of any neutral forum in which to seek redress from the Russian Federation (deni de justice). This allegation cannot be accepted. At present, there are various possibilities for impartial consideration of disputes without violating the provisions of international treaties. According to the Russian Code of Arbitration Procedure, foreign investors in the Russian Federation can file two kinds of claims: claims for invalidating unlawful acts of state bodies and claims concerning compensation for damages, including cases of forcible alienation of property.

4.2 There have been no investments under the Treaty

Neither SGC International nor the Claimant made any real investments in the Russian Federation. They only supplied Russian police with special equipment. Such an activity is not covered by the Treaty. Therefore, no investment made by the Claimant can in any way be regarded as investments in the sense envisaged in Article 1(1)a of the Treaty.

4.3 The Claimant's and SGC International's activities in the Russian Federation were not made in compliance with Russian legislation

The provisions of the Treaty are intended to protect legal investments. These provisions, however, are not, and cannot be, intended to protect illegal activities. As follows from Article 1(1)a of the Treaty, protection is accorded to investments made under the laws of a contracting party. Thus, even if the Claimant is accepted as an investor under the Treaty, the investments made by him and/or SGC International are not protected by the Treaty since these investments were made in conflict with the Russian legislation.

Following the registration of KOC, the Arbitration Court (state commercial court) of St. Petersburg City and Leningrad Region on February 26, 1992 declared the state registration of KOC null and void, since GUVD was not the owner of the Premises and, thus, had not the right to transfer the Premises to KOC's charter capital.

From the moment of the issuance of the court ruling in 1992, the Claimant knew, or was supposed to know, that KOC had been etablished illegally. Notwithstanding this fact, the Claimant, in the Repondent's opinion, unilaterally continued, without consulting the second shareholder of KOC, to build up the authorized capital of KOC and to deliver machines, equipment etc. to the Russian Federation. His behaviour cannot be regarded to be conducted in good faith.

Moreover, the Claimant and SGC International have during 1993 through 1995

imported from USA to the Russian Federation vehicles and various pieces of specialized equipment illegally or on false documents.

In addition, on February 8, 1996 the City Court of St. Petersburg declared that the Shareholders Agreement and the Charter of KOC were null and void and ordered the liquidation of KOC.

In this context it shall be emphasized that the Arbitral Tribunal has no right to put the said court rulings in question either from the standpoint of their substance, or from the standpoint of the rules of procedure.

4.4 There has been no expropriation

As has been said previously, the activities of the Claimant and SGC International within the framework of KOC was declared to be illegal by two different court rulings. In fact, federal property was returned to the Russian State by order provided under Russian legislation. Consequently, there has been no expropriation or confiscation of foreign investments.

4.5 The Tribunal cannot try this dispute due to lis pendens

SGC International has brought forward a court case in St. Petersburg against the local customs committee in St. Petersburg for having detained transport facilities on ground of failure to comply with temporary import arrangements. The case is not closed.

Thus, the very case which the Claimant has referred to the Arbitral Tribunal is now being tried by a competent court in the Russian Federation. This means that there is a procedural barrier (lis pendens) to the settlement of the dispute by the Arbitral Tribunal.

4.6 The Procurement Department cannot represent the Russian Federation

The Claimant's claim has been brought before the Arbitral Tribunal against the Russian State as represented by the Procurement Department of the President of the Russian Federation. Pursuant to the statute of the Procurement Department, the Procurement Department is a legal entity having a separate balance sheet and property allocated to it for routine management.

For reasons due to its legal status, the Procurement Department cannot be regarded as the proper Respondent, because it is not a Contracting Party under the Treaty, and, in addition, it has not appropriate authority to represent the Russian State. The fact that the Procurement Department acted as claimant in the court proceedings in the City Court of St. Petersburg on February 8, 1996, does not mean that the Procurement Department can be a proper respondent in an arbitration body provided by the Treaty.

4.7 The Claimant has failed to observe the stipulations in the Treaty concerning setting-up of the Arbitral Tribunal and the pre-arbitration procedure

According to Article 9(3), the members of the arbitral tribunal are to be nominated within two months, the chairman within three months, of the date on which one party notifies the other that it wishes to bring a dispute before an arbitral tribunal. The Claimant applied for arbitration on January 15, 1996 and he appointed his arbitrator on June 28, 1996. The appointment was, therefore, made past the set deadline, a fact that infringes the prescribed procedure for tribunal constitution.

Moreover, Article 10(2) of the Treaty stipulates a certain prearbitration procedure for settlement of disputes. If a dispute is not settled within six months by way of negotiations, the parties may apply to an international court of arbitration. However, the Claimant has not taken any actions specified for prearbitration settlement, but instead requested directly for arbitration. Since no application was made and the six-month period had not expired when the Claimant applied for arbitration, the Arbitral

Tribunal is not competent to examine the claim of the Claimant.

By advancing these reasons, the Respondent does not – as has been stated by the Claimant – touch upon whether or not the Claimant has exhausted all the remedies of legal protection at his disposal by applying to a Russian court.

The allegation made by the Claimant that he had repeatedly applied to the Procurement Department for a compensation is not correct. But, even if the Claimant actually applied for settlement, he was to apply to the respective Contracting Party of the Treaty rather than to the Procurement Department.

4.8 The Procurement Department has not filed a counterclaim

It is obvious that the Procurement Department has not filed a counterclaim in these arbitration proceedings. In the letter of September 16, 1996 it was clearly stated that the claim in question was conditional. It could be examined by the Arbitral Tribunal only if the Tribunal finds itself competent under the Treaty.

Moreover, from the point of Russian law, the letter and the appendix thereto cannot be regarded as a counterclaim. A claim submitted to a foreign court or to an arbitration court must be filed in the name of the Respondent, i.e. the Russian State. By filing such a claim the State waives legal immunity. However, the Procurement Department has no authorization to file a claim in the name of the Russian state and waive immunity. The Procurement Department cannot be a proper counter–Claimant.

The letter of September 16, 1996 must be regarded merely as information that the Procurement Department has counter–demands concerning compensation for damage done to the Premises.

The Respondent denies that the parties have entered into a new and separate arbitration agreement, emanating from the letter of September 16, 1996, as well as the Claimant's alternative allegation that his claim can be qualified as counterclaim,

should the Tribunal not conclude that the parties have entered into a new arbitration agreement. In fact, the Claimant is attempting to interpret the Respondent's clear and unambiguous objections in the opposite sense, i.e., as consent to the Arbitral Tribunal's jurisdiction.

5. The Investments

The Claimant has claimed compensation for contribution to KOC's charter capital with USD 1,714,405.88. This amount exceeds significantly SGC International's contribution to the charter capital of KOC as determined in the Shareholders Agreement. No amendments to this agreement have been made. Pursuant to Article 17(3) of the Shareholders Agreement, any amendments to the agreement shall be valid only if made in writing and signed by the duly authorized representatives of the shareholders and also if approved, whenever necessary, by the appropriate state authority. Moreover, any action to increase the charter capital unilaterally is illegal and, therefore, such investments are not protected by the Treaty.

Thus, even if a compensation is due to an investor under the Treaty, this amount cannot exceed the charter capital agreed by the parties to a joint stock company, i.e. in this case RUR 700,000. In this context it shall be noted that the Claimant has kept away from the proceedings of liqudation following the court ruling of February 8, 1996. This makes it impossible to determine the amount of reimbursement.

Furthermore, the Respondent is of the opinion that the Claimant's business activities in the Russian Federation ran counter to Articles 81-84 of the Russian Law on Joint Stock Companies of 1995. Instead of seeking profit for KOC, the Claimant looked after the interests of SGC International only at the Russian shareholder's expense.

Anyhow, the Claimant has no evidence that any investments have been properly contributed to the charter capital. If any property was imported above the amount decided in the Shareholders Agreement in order to obtain some customs benefits, this would constitute an infringement of Russian laws; under the Russian Law of Foreign

Investments, contributions made by foreign investors to charter capital are exempted from custom duties.

Moreover, the contribution were to be made until January 1, 1992. According to the Claimant, investments were made in 1991 through 1995. Pursuant to the Regulations of Joint-Stock Companies, approved by the Council of Ministers in its Resolution No. 601 of December 25, 1990, at least 50 per cent of the charter capital must be paid within 30 days after the registration of the company and the remaining part within one year. These regulations have not been met by the shareholders of KOC.

As to the documents – bills, invocies etc. – that have been provided as evidence by the Claimant, they can be questioned for several reasons. There are doubts about the authenticity of these documents, as they are not signed by any authorized officer, and it is not clear whether they are related to investments or not. Furthermore, the documents do not prove that the goods have been delivered or that the goods have been seized. Nor do the documents provide proper justification of the prices of the goods.

In addition, all documents have to do with relationships between SGC International and other companies and it is not clear what the documents are made out for – freight, warehousing, costs, insurance or anything else. It can be presumed that these documents have been made out in the normal course of business unconnected with investments.

The Claimant also submits that vehicles and law enforcement equipment at a total value of USD 1,007,914.43 and DEM 489,120 were confiscated. However, the Claimant alleges that these vehicles and equipment were intended for use in the joint venture's various operations. It may be assumed, therefore, that these deliveries of vehicles and equipment were not directly related to investments. Moreover, the documents that the Claimant relies upon do not serve as proper proof that the goods have been imported to the Russian Federation.

Furthermore, it follows from the documents that the goods could not be delivered to

Russia at all. The documents record that the goods could only be delivered on a license issued by the US authorities to Germany, and a transshipment thereof was banned by US laws.

Under Russian legislation (Article 162 of the Civil Code of the Russian Federation), foreign trade deals must be made in writing. Unless this requirement is met, any deal shall be void. This rule applies, in particular, to international business deals in the field of investments, and applies to this dispute as well. Under the Treaty, the investments must comply with the laws of the respective Contracting Party. The Claimant has not submitted adequate written proof of the customs laws having been complied with, i.e. that the goods have been lawfully imported to Russia, even if they have actually been imported.

As the Claimant himself admits, some vehicles and equipment have not been imported to the Russian Federation at all. They could not, therefore, be confiscated in principle. No grounds specified in the Treaty exist for the issue of compensation for them being raised. Besides, this goods could not be depreciated completely, as the Claimant contends. Even if the vehicles and the equipment were assumed to belong to the Claimant himself, no legal ground would then exist for associating them with the investments made into the joint venture.

With respect to the claim for compensation for investments in the Premises amounting to a total value of USD 4,839,317.30, the Claimant has not submitted adequate proof of investments concerning reconstruction works or of alleged value of the right to use the Premises in the future. The same goes for evaluation costs.

When it comes to the claim for compensation for personal belongings, the Claimant has not provided any proof that the items mentioned constitute investments for which compensation is due under the Treaty. Nor is there any evidence of these items being installed in the Premises or having been confiscated.

Finally, had the Claimant used the Premises as his office in the capacity of the General Director of KOC, there would have been no objection to that. This does not

automatically entitle his family to share the Premises with him. Because there are no legal grounds for that, the Claimant has to pay a compensation for the unlawful use of the Premises for his personal needs.

In the Respondent's opinion, the rent owing for the use of the Premises from 1991 to 1996 amounts to about USD 2 million. This objection is put forward not as a counter-claim but as a defence and without prejudice to the Respondent's position on jurisdiction.

Since the Claimant has not substantiated the legality of his claims, he is not entitled to any interest. If the Tribunal chooses to proceed from Article 395 of the Civil Code of the Russian Federation, the latter specifies the interest rate as the rate accepted in the creditor's country. In this case, the SGC International alone can be a creditor, and consequently, interest should accrue at the rate effective in the USA. The interest rate allegedly effective in the Russian Federation has been put at 30 per cent, which is a gross overstatement.

V. REASONS FOR THE AWARD

The Tribunal:

1. The Investment Treaty

As has been stated before, the Federal Republic of Germany and the Union of Soviet Socialist Republics (USSR) concluded, on June 13, 1989, a Treaty concerning the Promotion and Reciprocal Protection of Investments. Article 2 of the Treaty stipulates that each Contracting Party shall, in accordance with its legal provisions, encourage investments by investors of the other Contracting Party in its territory, admit such investments and, in all cases, accord them fair and equitable treatment. It is also stated in the same article that investments and earnings therefrom shall enjoy the full protection of the Treaty.

The term *"investment"* is defined in Article 1(1)a. According to the definition, the said term covers every kind of asset invested by an investor of one Contracting Party in the territory of the other Party "in accordance with the latter's legislation". Certain examples of investments are given in Article 1. Among these are "shares and other forms of participation in business enterprises and organizations" and "claims to money invested to create economic value or to any performance having an economic value".

Article 1(1)c describes what is meant by the term *"investor"*. An investor, thus, is "a natural person that has the permanent residence, or a legal entity that has its seat in the respective territories to which the Treaty applies, and that has the right to make investments".

Article 4 deals with expropriation. According to Article 4(1), investments by investors of either Contracting Party may be subject to measures of expropriation, "including nationalisation, or other measures with similar effects" in the territory of

the other Contracting Party only if such expropriation measures "are carried out for a public purpose in accordance with procedures established in accordance with the laws of that Contracting Party, and upon payment of compensation".

Article 4(2) stipulates that compensation shall be equivalent to "the actual value of the expropriated investment immediately before the actual impending expropriation became public knowledge". As is further stated in Article 4(2), compensation shall be paid "without unwarranted delay" and shall include interest "at the rate that is in effect in the territory of the respective Contracting Party, accrued until the date of payment".

In Article 4(3) it is stated, inter alia, that the investor whose investment has been expropriated shall have the right to submit disputes concerning procedures and amount of compensation to an International Court of Arbitration as defined in Article 10.

An investor's right to compensation under Article 4 is also dealt with in the Protocol attached to the Treaty. There it is said, among other things, that an investor shall also be entitled to compensation if the other Contracting Party interferes with the economic activities of an enterprise in which he is participating, if his investment is significantly reduced by such interference.

Article 9 of the Treaty deals with "disputes between the Contracting Parties regarding the interpretation or application of the Treaty", while "disputes concerning an investment between one of the Contracting Parties and an investor of the other Contracting Party" are dealt with in Article 10.

In Article 10, subparagraphs 1 and 2, it is stipulated that disputes should, if possible, be settled amicably between the parties to the dispute and that, if a dispute concerning, inter alia, the scope and the procedures of compensation pursuant to Article 4 has not been settled within six months, each of such parties shall have the right to submit the dispute to an international arbitration court.

When it comes to the arbitral procedure, it follows from Article 10, subparagraph 4, and Article 9, subparagraphs 3 and 4, that, in the absence of any other agreement between the parties to the dispute, each party shall appoint one member of the arbitral tribunal and that the two members shall agree on a chairman who is a national of a third country. The members of the arbitral tribunal shall be appointed within two months, the chairman within three months from the date on which one of the parties informed the other of its wish to submit the dispute to an arbitral tribunal for decision. If the said time limits are not complied with, each of the parties in dispute may, in the absence of other agreements, invite the Chairman of the International Court of Arbitration at the Chamber of Commerce in Stockholm to make the necessary appointments.

2. The Tribunal's Jurisdiction

It has been argued by the Respondent that the Arbitral Tribunal does not have jurisdiction to try this dispute, since the Treaty is not applicable and, thus, the arbitration clause in Article 10 of the Treaty does not provide the Tribunal with sufficient competence over the dispute. The Claimant has rejected this allegation.

The Respondent has submitted the following grounds for its position concerning the Tribunal's jurisdiction: (1) Mr. Sedelmayer is not an investor under the Treaty, (2) There have been no investments covered by the Treaty, (3) There has been no expropriation, (4) The Tribunal cannot try this dispute due to lis pendens, (5) The Claimant has not addressed the proper Respondent, and (6) The Claimant has failed to comply with the stipulations in the Treaty concerning pre-arbitration procedure and the setting-up of the Arbitral Tribunal.

Below, the Tribunal will deal separately with the different grounds adduced by the Respondent.

2.1 Is the Claimant an Investor under the Investment Treaty?

2.1.1 Positions taken by the Parties

The Respondent's position is that the Claimant can not be considered as an investor under the Investment Treaty. Even if it would be shown that Mr. Sedelmayer has made investments as an individual he is not protected by the Treaty since he was not domiciled in Germany at the time. Most of the alleged investments were, however, made by SGC International. Being a legal entity incorporated in USA, SGC International is not an investor according to the definition in Article 1(1)c of the Treaty.

The Claimant has contended that, during the period of time now discussed, he was domiciled in Germany. All investments made by him directly as a natural person are, thus, covered by the Treaty. It is true that certain investments were channelled through SGC International, which is a company incorporated in USA. It should, however, be kept in mind that the Claimant is in full control of SGC International. The said company was only a vehicle through which he injected his own personal capital into the Russian Federation. He must, therefore, be regarded as an investor as such term is defined in the Treaty, even with respect to the investments channelled through SGC International.

According to the Claimant, some investments were also made through other companies under his control, in particular Belmonte Ltd. and Linx Establishment. These companies were used in the same way as SGC International.

2.1.2 Certain documents concerning KOC

In the contract by which the joint venture "Kamenny Ostrov" (KOC) was established (the Shareholders Agreement) it is stated that the parties were the Police Department in Leningrad (GUVD) and SGC International Inc. The Shareholders Agreement was, on behalf of SGC International, signed by Mr. Sedelmayer as "President" of the said

Company.

Certain appendices were attached to the Shareholders Agreement. Appendix II, with the heading "Composition of Shareholders Contributions", stipulated, inter alia, that the Soviet Shareholder (GUVD), as well as the Foreign Shareholder (SGC International), should make contributions to the charter capital of KOC in a total amount of 700,000 rubles.

In the Charter of KOC, as approved by the founding meeting on August 28, 1991, it is stated, inter alia, that KOC is a legal entity by the Soviet law and that the shareholders are GUVD (the Soviet Shareholder) and SGC International (the Foreign Shareholder). The Charter also states that the Soviet Shareholder's as well as the Foreign Shareholder's contribution to the authorized fund constitutes 50 % – 700,000 rubles each. The Charter has, on behalf of the Foreign Shareholder, been signed by Mr. Sedelmayer as President of SGC International.

2.1.3 Evidence submitted by the Claimant

In support of his standpoint as regards the question of domicile, the Claimant has submitted a written statement, issued on November 10, 1997 by Rechtsanwalt (Solicitor) Walter Grosse, Munich. On the basis of, inter alia, certain governmental registration papers, Mr. Grosse has in his statement drawn the conclusion that, in the years 1991 through 1996, Mr. Sedelmayer was, without interruption, domiciled with permanent residence in the Federal Republic of Germany.

When heard before the Tribunal, Mr. Grosse confirmed that he is still of the opinion that Mr. Sedelmayer was domiciled in Germany during the time period in question. Mr. Grosse pointed out that, according to the relevant German authorities, Mr. Sedelmayer was registered with permanent residence in either Munich or Berlin during the said years and that he maintained an independent trade company in Munich. Thus, Mr. Sedelmayer's center of living (Mittelpunkt) was in Germany.

In order to show that he was in full control of SGC International, the Claimant has submitted an Agreement, called "Loan and Surrender of Profits Agreement", which was concluded on September 15, 1991 by himself and SGC International. In this Agreement Mr. Sedelmayer declared that he was prepared to grant SGC International a loan up to an amount not exceeding USD 5 million for future investment in the Soviet Union. It was, furthermore, stated in the Agreement that Mr. Sedelmayer should, for the purpose of protecting his investment, have the unconditional right to give SGC International any instructions he considered appropriate, that SGC International should, as a contracting party, act solely on behalf of Mr. Sedelmayer, that SGC International undertook to surrender the net profits to Mr. Sedelmayer, or to clear them with him, until the loan was repaid in full, and that, on the other hand, Mr. Sedelmayer should assume any loss made by SGC International.

The Claimant has also submitted a Legal report by Rechtsanwalt Klaus Stolle, in which comments are made on the Agreement just mentioned. In the said Legal report it is stated, inter alia, that, pursuant to the Agreement, SGC International could not act independently, but was dependent on the instructions issued by the German investor, and that SGC International was entirely dependent on financial contributions from Mr. Sedelmayer.

The written evidence presented by the Claimant also includes another written Report by Mr. Grosse, dated November 4, 1996. As is stated in this Report, it was prepared in order the check the reasonableness of Mr. Sedelmayer's statement of his economic losses. The Report contains, inter alia, certain comments on the companies used by Mr. Sedelmayer. With regard to SGC International it is stated, inter alia, that all the shares are the property of Mr. Sedelmayer. Belmonte Ltd. is, according to the Report, a trust company, domiciled in St. Vincent, with a subsidiary in Kitzbühel, Austria, which was put under Mr. Sedelmayer's disposal for the purpose of carrying out his business transactions under issue of a full power of attorney. Linx Establishment is stationed in Vaduz, Liechtenstein, and has operated on Mr. Sedelmayer's account under a trust agreement.

In support of his position that he is an investor under the Treaty, the Claimant has,

furthermore, relied on a Legal Report by Mr. Ove Bring, Professor of Public International Law at the University of Uppsala, Sweden. In this Report, Mr. Bring has made, inter alia, the following statements: Although KOC was 50 per cent owned by SGC International, the documents available indicate that it was clear to all concerned that SGC International was not an independant actor. SGC International was merely used by the Claimant as a tool or method for the transfer of capital and for the establishing of KOC. The Claimant is the de facto investor in this matter and he possesses protected investor status under the Treaty. – Even if it should be considered that the nationality of the claim is linked to SGC International, this does not vitiate the concurrent existence of a clear German claim behind the corporate facade. Under modern international law it is possible for Germany to "pierce the corporate veil" and offer diplomatic protection to Mr. Sedelmayer under the Treaty or irrespective of the Treaty, since he as a German national owns and controls SGC International. This theory of ownership and control (*"the control theory"*) has been widely used in state practice since 1945. The control theory was disputed during the years of the Cold War and it was not used by the International Court of Justice in the Barcelona Traction Case of 1970, but since then it seems to have entered a renaissance. The control theory was in fact accepted by a chamber of the International Court of Justice in the ELSI Case of 1989 (Case concerning Elettronica Sicula S.p.A. (Elsi); USA v. Italy; Judgement of 20 July 1989).

When heard before the Tribunal, Mr. Bring has added, inter alia: He has written a thesis on investment protection and was, for 15 years, employed as an advisor by the Swedish Ministry for Foreign Affairs. – It is clear from the documents in the present case that the true nature of the claim is German, in spite of the formal link to USA. Mr. Sedelmayer's counterparts must have been aware that he was the driving force and the true and genuine actor when KOC was established. – The German–Soviet Treaty protects not only legal but also natural persons. It is not so common that individuals make investments by themselves. Instead, they might use a company as a tool. In such a case, there is a need to apply the control theory and go behind the corporate facade in order to find the true investor. The control theory has been recognized as a general international principle, even with respect to investment treaties. The principle is applicable even if it has not been stated so explicitly. In any

case, there is nothing in the German–Soviet Treaty which excludes the applicability of the control theory.

The Claimant has also referred to (i) a publication called *"Die Entwicklung der diplomatischen Protektion für juristische Personen"* by Professor Ignaz Seidl–Hohenveldern of the Institute for Public International Law of the University of Vienna, (ii) an article in Journal du droit International, 1990, 117:3–4, by Professor Brigitte Stern of the University of Paris and (iii) an article in *"Selected Problems of Private International Law"*, Académie de Droit International, Recueil de Cours 1968:3 (pages 316–317) by Professor Håkan Nial, former President of the University of Stockholm. The Claimant has, furthermore, submitted a copy of the Judgement in the Elsi Case.

Professor Seidl–Hohenveldern has, in the said publication, stated, inter alia (pages 16–17): Since the Barcelona Traction Case there have been a number of national cases where the corporate veil of legal entities has been pierced. Especially obvious were the cases where this was made to the disadvantage of the shareholder. In the case of the shipwreck of the tanker Amoco–Cadiz, the piercing of whole chains of legal entities have resulted in liability for the US parent company. In the Elsi Case, one chamber of the International Court of Justice has pierced the corporate veil of a legal entity to the benefit of the shareholder and has thereby reduced the scope of or abolished the legal position in the Barcelona Traction Case. Elsi was an Italian company, but all the shareholders were American, and the Court recognized the right of the United States to protect the shareholders.

Professor Stern has, in her article, stated, inter alia (page 935): Regardless of from which perspective one makes the analysis, it is difficult not to get the feeling that the judgement of the International Court of Justice in the Elsi Case implies a new direction – without clearly expressing the scope and actual implications of such direction – for diplomatic protection of the shareholders claiming that their rights have been violated through a violation of the rights of their company.

Professor Nial has made, inter alia, the following statements (pages 316–317 of the

afore-mentioned article): With particular regard to the question of the diplomatic right of a state to protect companies which are incorporated or domiciled abroad, but in which the subjects of the state have economic interests, the legal views seem to have changed in such a way that the idea of granting protection directly to the interests of the shareholders has gained ground. Anyway, it has been recognised in many international negotiations, arbitrations and treaties that, in principle, a state is entitled to intervene in certain cases on behalf of companies in which the subjects of the state are shareholders. Writers also have agreed that it is part of the law of nations that a state shall be able to protect in this way the interests of nationals if they have suffered injury in violation of international law.

The written evidence presented by Mr. Sedelmayer also includes a letter to himself, dated Bonn, June 20, 1997, from the Federal Ministry of Trade and Commerce in Germany. There it is said that, in the event of dispossession, Mr. Sedelmayer can claim diplomatic protection from the Federal Government. It is also stated in the said letter that, according to the German-Soviet Treaty, an investor belonging to either of the contracting parties may, in the event of dispossession, appeal to an international court of arbitration and that, consequently, Russia can not make any objection on the grounds of immunity under international law.

At the hearing before the Tribunal, Mr. Sedelmayer has, inter alia, stated as follows: In 1989, he was invited to come to Leningrad for the first time. Before the joint venture was established, he had various meetings with Soviet officials, among others chiefs of police and representatives for the Prisons department. He himself had the expertise and the experience needed, but he did not have a location. The Premises, which needed renovation, were offered to him by GUVD. - During the time period when KOC was operating, a number of investments were paid by himself personally. For that purpose, he brought in variuos amounts in cash. He also made use of legal entities, which is not an unusual practice when someone is investing abroad. SGC International was used partly for tax reasons.

2.1.4 Evidence submitted by the Respondent

In support of its view that the Claimant is not an investor under the Treaty, the Respondent has, among other documents, submitted a written report by Professor M.M. Boguslavskii, dated April 1997. In his report, Professor Boguslavskii has made, inter alia, the following statements: According to the Agreement whereby the joint venture KOC was established, the foreign investor was SGC International Inc., a juridical person under US law. The fact that SGC International is fully owned by Mr. Sedelmayer is legally irrelevant since the US law on corporations admits the existence of a company fully owned by one person. Under the law of European continental states the main criterion for the definition of the nationality is the seat (location) of the board. Since, in the given case, the investor is a juridical person established in the United States and the board of this juridical person is located in United States and not in the FRG, the provisions of the Treaty do not apply to this juridical person. – The *"theory of control"*, according to which the nationality of a juridical person is defined depending on who actually controls it, has been used for special purposes in some countries and in international treaties. However, the bilateral treaties of the Russian Federation do not make use of the *"theory of control"*. In the present case, the use of this theory is incompatible with the generally recognized principles for interpretation of international treaties because neither the text of the Treaty nor the Protocol thereto makes any mention of control. Hence, a juridical person of a third state, even if it is fully owned by an FRG national, cannot be regarded as an FRG juridical person.

The Respondent has also submitted additional written remarks by Professor Boguslavskii. There, Professor Boguslavskii has maintained that, even if the principle of control is used in judicial practice or in some international or bilateral treaties, the present case should be based on the 1989 Treaty between the USSR and the FRG. The principle of control is not provided for in this Treaty.

In his report and in his additional remarks, Professor Boguslavskii has referred to different legal articles and commentaries, e.g. a commentary on the Soviet–German Treaty by Professor Carsten–Thomas Ebenroth and Dr.jur. Birgit Bippus (*"Der*

deutsch–sowjetische Investitionsschutzvertrag, Recht der Internationalen Wirtschaft", Beilage 5 zu Heft 7/1989). There it is stated (p. 6) that the control theory has not, according to the text of the Treaty, been introduced as a precondition for the notion of investor and that it is, thus, without importance whether the members of an association has the same nationality as one of the Contracting Parties or not. In the summing–up of the same commentary (p. 11) it is stipulated that the theory of control was not included in the Treaty and that, consequently, the citizenship of the members of a company is of no importance when it comes to the notion of investor which is to be protected under the Treaty.

When heard before the Tribunal, Professor Boguslavskii has declared: Even if there might be a growing tendency to apply the control theory, as far as international treaties are concerned, the provisions of the Treaty in question must have priority. In the present Treaty, the principle of control is not provided for. Thus, a company established in a third country is not protected by the Treaty, even if the company has been set up by a German. – Mr. Sedelmayer could have been an investor under the Treaty, if he had made investments in accordance with Russian law as a physical person. However, the investments were made on behalf of a legal entity, an American company. The agreement whereby KOC was established was signed by this legal entity. The Charter of KOC also mentions the same entity as the Foreign Shareholder.

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2.1.5 The Tribunal's conclusions

In the Tribunal's opinion, it has been shown by the evidence presented by Mr. Sedelmayer, in particular the written statement issued by Mr. Grosse on November 10, 1997, Mr. Sedelmayer had permanent residence (*ständigen Wohnsitz*) in Germany during the time when the alleged investments were made. At least to the extent investments were made by him directly as a natural person, he shall, thus, be regarded as an investor under the Treaty. The Tribunal will, later on, return to the question what investments were made by Mr. Sedelmayer personally.

It remains to examine whether Mr. Sedelmayer might be regarded as an investor under the Treaty with respect to investments which were – at least formally – not made by him but by different companies, in the first place SGC International.

As far as has been shown to the Tribunal, there were numerous discussions between Mr. Sedelmayer and representatives for Soviet authorities before KOC was set up. GUVD – which was one of the parties to the joint venture – had reasons to assume that Mr. Sedelmayer himself would take an essential part in the future activities of KOC.

It has been shown by the evidence presented to the Tribunal, notably the "Loan and Surrender of Profits Agreement" of September 1991 and Mr. Stolle's legal report, not only that Mr. Sedelmayer was in full control of SGC International but also that SGC International was entirely dependant on financial contributions from him. These circumstances support Mr. Sedelmayer's allegation that SGC International was only a vehicle through which he transferred his own personal capital into Russia.

What has now been said is applicable also to Belmonte Ltd. and Linx Establishment. It follows from Mr. Grosse's report, dated November 4, 1966, that even these companies were under Mr. Sedelmayer's control. Mr. Grosse has, furthermore, confirmed that all the shares in SGC International were owned by Mr. Sedelmayer.

It is worth pointing out that, according to Mr. Bring's testimony, it is not unusual that an individual, who wants to make an investment abroad, uses a company as a tool.

The question then arises whether an individual who makes his investments through a company might be regarded as an investor – a de facto investor – under the Treaty. This question concerns the general issue to what extent the *"theory of control"* may be applied.

What has been said by the legal experts referred to in this arbitration justifies the conclusion that, during recent years, there has been a growing support of the control theory. This development is obviously to a large extent based on the judgment in the

ELSI case. Even if the ELSI case is in several respects different from the present one, the principles set down there are of interest when the present case shall be decided.

Professor Bring and Professor Boguslavskii have expressed different opinions concerning the question to what extent the control theory should be applied on international treaties and, in particular, whether this theory should be applied on the Treaty now in question.

Professor Boguslavskii's statements are, to a certain extent, focused on the question how to determine the nationality of a certain legal entity. Here, as has been pointed out by Professor Boguslavskii, the decisive factor is where the juridical person has its seat, i.e. where the board is located. The nationality or the residence of the shareholders is not relevant when assessing the nationality of a legal person. The statements made by Professor Ebenroth and Dr. Bippus seem, at least in the first place, to concern the same question.

However, in the present case the nationality of SGC International (or the other companies involved) is not in issue. Mr. Sedelmayer has admitted that SGC International shall be regarded as an American company, in spite of the fact that it is fully controlled by himself, who is resident in Germany. Consequently, Mr. Sedelmayer has not alleged that SGC International is an investor under the Treaty, and he has not put forward his claims on behalf of SGC International. Instead, he is claiming compensation as a natural person.

Professor Boguslavskii has, rightly, pointed out that, when deciding whether the control theory might be applied or not, guidance should in the first place be sought in the text of the Treaty. It is a fact that the Treaty does not contain any specific clause providing such application. On the other hand, there is nothing in the Treaty which excludes the applicability of the said theory. In the Tribunal's opinion, the mere fact that the Treaty is silent on the point now discussed should not be interpreted so that Mr. Sedelmayer can not be regarded as a de facto investor.

In this context, not only the Treaty itself but also the Protocol attached to the Treaty is of interest. The Protocol contains a statement according to which an investor shall be entitled to compensation if the other Contracting Party interferes with the economic activities of an enterprise in which he is participating. This statement can be seen as an acknowledgement of the rights of a de facto investor.

It should also be kept in mind that, as can be concluded from the text of the Treaty, the main aim of the Treaty is to promote, as far as possible, investments in the two countries concerned. Granting protection under the Treaty to the investments now discussed would be in line with the said purpose.

When taking into account all the circumstances now referred to, the Tribunal finds that the reasons speaking in favour of the Claimant's position outweigh the Respondent's objections. Mr. Sedelmayer shall, thus, be regarded as an investor under the Treaty, even with respect to investments formally made by SGC International or the other companies.

2.2 Did the Claimant make investments covered by the Treaty?

2.2.1 Positions taken by the Parties

The Respondent's position is that neither SGC International nor Mr. Sedelmayer made any real investments in the Russian Federation. According to the Respondent, SGC International and Mr. Sedelmayer only supplied Russian Police with special equipment. Such an activity is not covered by the Treaty.

The Respondent has, furthermore, pointed out that protection under the Treaty is accorded only to investments made under the laws of the country in question. This requirement has, according to the Respondent, not been fulfilled. Even if the Claimant is accepted as an investor under the Treaty, the investments made by him or SGC International are not protected by the Treaty since they were made in conflict with the Russian legislation.

In support of its view, the Respondent has referred, inter alia, to a Ruling by the Arbitration Court (state commercial court) of St. Petersburg City and Leningrad Region of February 26, 1992, whereby the state registration of KOC was declared null and void. After the said Ruling, the Claimant has, according to the Respondent, continued unilaterally, without consulting the other shareholder of KOC, to build up the authorized capital of KOC and to deliver machines, equipment etc. to the Russian Federation. The Claimant and SCG International also have imported vehicles and various pieces of specialized equipment illegally or on false documents. Furthermore, by sending goods via Germany and Finland to Russia, they evaded customs duties and taxes. The Respondent has also pointed out that, on February 8, 1996, the City Court of St. Petersburg declared that the Shareholders Agreement and the Charter of KOC were null and void and ordered the liquidation of KOC.

The Claimant has objected that the text of the Treaty gives a broad definition to the term *"investment"* and that all of the Claimant's investments into the Russian Federation fall under this definition. The Claimant has, furthermore, alleged that the Treaty provides protection even if investments are not made in full compliance with municipal law. However, all investments were, according to the Claimant, made in compliance with the legislation in force in the Soviet Union and in the Russian Federation.

2.2.2 Evidence submitted by the Respondent

The Respondent has submitted copies of the Court Rulings mentioned above. In the Arbitration Court Ruling of February 26, 1992, it is stated, inter alia, that neither the Charter of KOC, nor the agreement on the establishment of KOC, contains any reference to the real estate transfer having been approved by the relevant Property Management Committee and that, therefore, the legal guarantees of the interest of the state as the owner of the property have been violated. It is, furthermore, stated in the said Ruling that GUVD had no right to act as a legal entity in setting up a private enterprise because entrepreneurship did not fall within its special competence. In view of the circumstances referred to, the Arbitration Court ruled that the state

registration of KOC should be declared null and void.

In the Court Ruling of February 8, 1996, the Civil Judicial Board of the St. Petersburg City Court declared, inter alia, that GUVD did not have the permission of the real estate's owner or of its authorized agent to use the property in question as a contribution to the authorized fund of the joint-stock company it was setting up and that, as a consequence, the transaction was null and void. The Judicial Board also found, with reference to Article 61 of the Russian Federation Civil Code, that KOC should be liquidated. The liquidation should, according to the Court Ruling, be entrusted to a commission comprised of representatives from the founders of KOC and certain authorities. As to the Premises, the Judicial Court found that they should be evicted by KOC and transferred to the Procurement Department of the RF President, which should use these buildings and structures as prescribed by the government authorities.

The Respondent also has submitted other documents, including a Report from the State Customs Committee of the Russian Federation, dated June 27, 1996, and a letter from the State Customs Committee to the Procurement Department, dated November 26, 1997.

The Respondent has, furthermore, relied on the testimonies of Mrs. Irina A. Garaburda and Mrs. Yana V. Zolotareva. When heard before the Tribunal, they stated, inter alia:

Mrs. Garaburda: She worked as a lawyer with GUVD when KOC was set up. The first and only shareholders meeting was held in December 1991. In the beginning of 1992, it turned out that GUVD had not been entitled to assign the Premises or to establish the joint venture. GUVD proposed a shareholders meeting in April 1992 in order to liquidate KOC, but SGC International was not willing to come to a meeting. Then the matter was handled by courts, first an Arbitration Court and then the City Court of St. Petersburg. SGC International tried to get the proceedings at the City Court postponed and did not appear at the court sessions. Not until 1996 there was a court decision ordering the liquidation of KOC. – SGC International never sent any

documents to GUVD showing the actual amount of GUVD's share. GUVD never got any profit from the activity of KOC.

Mrs. Zolotareva: She has been working with KUGI (the Property Committee of St. Petersburg) as a legal specialist and participated at the hearings of the City Court in St. Petersburg which led to the decision of 1996 whereby KOC was liquidated. Following the Court's decision, a liquidation commission was set up, and she has taken part in the meetings of this commission as well. The reason for the Court decision, and for the Ruling of the Arbitration Court in 1992, was that there had been an illegal disposal of federal property. KUGI tried to help KOC to find another building instead of the Premises, but KUGI's proposals were not accepted by Mr. Sedelmayer. Until the Court decision of 1996, KOC existed as a legal entity, but it had not any right to carry out activities. – In order to finalize its work, the liquidation commission needs to have access to all documents reflecting the activity of KOC, but the commission, so far, has not received all such documents. The latest balance sheet available is from January 1, 1994.

2.2.3 Evidence submitted by the Claimant

The Claimant has submitted, inter alia, an Act of Transfer, dated November 1, 1991, and signed by representatives for GUVD and KOC. It is stated in this Act that the Premises had been assigned from the balance of KUGI to KOC and that the assignment was "valid for possession and use" according to the foundation documents during the period of KOC's activity.

The Claimant has also submitted three Certificates of Registration, the first one dated September 23, 1991, and issued by the Committee for Foreign Affairs in the City Council of St. Petersburg, the second one dated January 20, 1992, and issued by the Committe for Foreign Economic Relationships in the Ministry for Foreign Affairs of the Russian Federation, and the third one dated February 6, 1992, and issued by the local tax authority in St. Petersburg. According to these Certificates, KOC was registered in the State Registration Book, in the State Register of Participants in

Foreign Economic Relationships and in the tax register.

The written evidence submitted by the Claimant also includes a Technical Passport, issued by the Ministry of Housing and Public Utilities of the Russian Federation. In this Passport it is stated, inter alia, that the right to use the Premises was registered with KOC on March 21, 1995.

The Claimant has, moreover, presented letters from KUGI, dated January 12, 1993 and February 16, 1994, regarding the possibility to bring KUGI into KOC as a founding partner on the Russian side. Among the documents submitted by the Claimant is also a Directive, issued by KUGI on November 9, 1994. In this Directive it is stated, inter alia, that KUGI should take over GUVD's share in KOC.

Professor Bring has, in his testimony before the Tribunal, made, inter alia, the following declarations: A state where investments are to be made often insists that its investments laws shall be observed. Even if a clause to this effect is inserted in the investment treaty that does not mean, however, that the investor has to comply with all provisions. He will cease to be protected only when there is a serious violation of the law. If the investor, for instance, fails to observe customs regulations, that should be corrected through national proceedings and not by withdrawing the protection of the investments. – The notion *"investment"* covers, in principle, all kinds of assets, including stocks to be resold and office furniture.

When heard before the Tribunal, Mr. Sedelmayer, Mr. Jack Gosnell, Mr. Benjamin Lehrer and Mr. Dimitri Choulkin has stated, inter alia:

Mr. Sedelmayer: The Premises were offered to him by GUVD, and GUVD also took care of the registration of KOC. He was never told by GUVD that there were any problems connected with the assignment of the Premises. He moved in already in October 1991. In April 1992 he was told by a representative for the City Council of St. Petersburg, Mr. Titov, that laws had been changed and that the Premises were no longer at GUVD's disposal. At the same time, Mr. Titov assured him that he had not done anything wrong and that he should "go on". After that, he had several meetings

with representatives for KUGI, who told him that they would be his new partner. GUVD, however, refused to comply. – KOC's activities went on, and the business was profitable already the first year. After the investments initially agreed on had been made, he had to make additional investments. He notified GUVD all the time, but he did not get any reactions from GUVD. GUVD never made any additional contributions to KOC. All the business activities were registered in KOC's books, which were kept in a small building at the Premises, the Sauna building. – He never had any problems with the customs authorities and was, in fact, not even contacted by these authorities about any irregularities. He was never notified of the proceedings leading to the Arbitration Court Ruling of February 26, 1992.

Mr. Gosnell: He worked as Consul General of the USA in St. Petersburg between 1991 and 1994 and was very familiar with Mr. Sedelmayer's activities. He had also close contacts with Russian authorities, including the customs authorities. If Mr. Sedelmayer had had any problems with the customs authorities he would have been informed, officially or unofficially. However, he never got any such information. Nor did he get any other negative information concerning Mr. Sedelmayer. – In 1992 or 1993 he was told by Mr. Sedelmayer that GUVD wanted to take back the assigned property. He then contacted the mayor, who reacted very quickly and said that he would "take care of this".

Mr. Lehrer: Between 1991 and 1995, he assisted KOC in business and social relations. Among other things, he produced a catalogue concerning KOC's products. KOC seemed to be a prosperous company, and it had good relations with the City authorities. On some occasions, he brought cars from Helsinki to KOC in St. Petersburg. There were never any problems with the customs authorities.

Mr. Choulkine: He has been busy in international trade and assisted KOC as consultant from the end of 1991 until December 1995. He was, among other things, supervising KOC's import of cars and acted himself, on some occasions, as driver between Finland and Russia. He never knew of any problems with the customs authorities or with any other authorities before the take–over of the Premises.

2.2.4 The Tribunal's conclusions

The Tribunal shares the view expressed by Professor Bring that the term *"investment"* should be given a broad definition. It is explicitly stated in Article 1(1)a of the Treaty that the said term covers every kind of asset invested by an investor. The investments listed as examples in Article 1(1)a also show that a wide scope of valuables are covered. It must be presupposed, however, that investments are made within the frame of a commercial activity and that investments are, in principle, aiming at creating a further economic value.

Below, the Tribunal will deal more in detail with the different investments which, according to the Claimant, have been made by him. In this context, it is sufficient to state that, in the Tribunal's opinion, it has been shown that the Claimant has made a number of investments which fall under the definition of the Treaty.

The question, then, is whether the investments, as is stipulated in Article 1(1)a, have been made in compliance with the legislation of the territory concerned, that is the Soviet Union and the Russian Federation. Here, it should be noted that, according to the Claimant, all investments were made as part of the activities of KOC. It has, thus, to be examined whether KOC was established and performed its activities in accordance with Soviet and Russian law.

In the Tribunal's mind, it has been shown by the Registration Certificates submitted by the Claimant that KOC was established in full compliance with the legislation valid at that time. KOC obtained registration not only in local registers but also in the State Register of Participants in Foreign Economic Relationships.

As to GUVD's assignment of the Premises, which was made in order to fulfil the Shareholders Agreement, this transfer does not seem, at the outset, to have caused any objections from the Russian authorities. Later on, GUVD's competence to dispose of the Premises was questioned, as can be seen from, for instance, the Arbitration Court Ruling of February 26, 1992.

The Claimant has alleged that, in the Ruling just mentioned, Soviet and Russian law was applied incorrectly. So for instance, according to the Claimant, the Ruling referred to laws and governmental bodies which de facto did not exist at the time in question.

The Tribunal need not go into the question whether the said Ruling was well-founded or not. Even if GUVD should have made any mistake in contributing its share of KOC's charter capital, there are reasons to argue that this does not concern the investments made by the Claimant. It should also be noted that the Court Ruling of February 26, 1992, did not terminate the activities of KOC. Thus, for instance, the Arbitration Court did not order the liquidation of KOC.

In practice, as far as has been shown to the Tribunal, the activities of KOC went on until the Premises were sealed. A decision on liquidation was not taken until February 8, 1996, by the Civil Judicial Board of the St. Petersburg City Court. By then, the last sealing of the Premises had already taken place.

Below, when discussing more in detail the different investments which, according to the Claimant, were made by him, the Tribunal will return to the question whether, during the time KOC was operating, any investments were made in breach of Soviet or Russian law. The Tribunal will, inter alia, deal with the question whether there were any violations of customs regulations and, if so, how that might affect the applicability of the Treaty.

In this context, it is worth noting that, as far as has been shown, KOC operated quite openly. The evidence submitted by the Claimant gives room for the assumption that the activities of KOC were accepted by several authorities in St. Petersburg, including KUGI. The letters sent to the Claimant from KUGI in January 1993 and February 1994, as well as KUGI's Directive of November 9, 1994, indicate that KUGI accepted both the formation and the registration of KOC. It is also worth noting that, as late as March 21, 1995, the right to use the Premises were, according to the Passport issued by the Federal Ministry of Housing and Public Utilities, registered with KOC.

The total value of the alleged investments made by the Claimant exceeds the Claimant's part of KOC's charter capital, i.e. RUR 700,000. It is uncontested that the charter capital was never formally raised. The question then arises whether the additional investments shall be considered as illegal, as has been alleged by the Claimant. Even this matter will be further dealt with by the Tribunal later on, when the different types of investments are discussed.

Here, it is sufficient to state as a final conclusion that, even if not all of the alleged investments are covered by Article 1(1)a of the Treaty, the Claimant has made a number of investments protected by the Treaty.

2.3 Have the investments been subject to expropriation?

2.3.1 The Parties' positions

The Claimant has alleged that its property in the Russian Federation was confiscated as a result of the Directive issued by the President of the Russian Federation of December 4, 1994. The reasons behind the Directive and behind the physical take-over of the Claimant's property have, according to the Claimant, no bearing on the Claimant's right to receive compensation for the value of the expropriated property. Thus, even if the expropriation of the Claimant's property had been in line with Russian law – which the Claimant rejects – the Claimant would still be entitled to compensation. Expropriation or confiscation resulting from application of Russian laws does not, in the Claimant's opinion, relieve the Russian Federation from liability under the Treaty to pay compensation to an investor who has lost investments due to the application of such laws.

The Respondent has objected that the activities of the Claimant and SGC International within the framework of KOC were declared to be illegal by two different court rulings. The fact is, according to the Respondent, that federal property was returned to the Russian State by order provided under Russian legislation. Consequently, there has been no expropriation or confiscation of foreign investments.

2.3.2 Evidence submitted by the Claimant

The Claimant has submitted a copy of the Presidential Directive of December 4, 1994. There it is stated, among other things, that the Premises should be assigned to the balance of the Procurement Department of the President of the Russian Federation.

The written evidence submitted by the Claimant also includes a Directive issued by the State Committee of the Russian Federation for the Administration of State Property (GKI), dated February 27, 1995, and an Assignment Act, dated March 9, 1995, and signed by representatives for GUVD, GKI and the Procurement Department of the President of the Russian Federation.

The Directive by GKI stipulates that, in order to execute the Presidential Directive of December 4, 1994, the Head Department of the Internal Affairs in St. Petersburg and Leningradskaya region would transfer the Premises to the balance of the Procurement Department of the President. In the Assignment Act it is stated that, following the Presidential Directive and the Directive of GKI, the Premises have been transferred from the balance of GUVD to the balance of the Procurement Department of the President of the Russian Federation.

At the hearing before the Tribunal, Mr. Sedelmayer, Mr. Thomas Church and Mr. Dimitri Choulkine made, inter alia, the following statements:

Mr. Sedelmayer: On October 9, 1995, a group of officials, led by a bailiff, came unexpectedly to the Premises. They said that they were there to "seal" KOC. He had not got any warning in advance, and he never expected that such a thing would happen. Parts of the Premises, including storage facilities, the kitchen, the banquet hall and the Sauna building, were sealed. Before the group of officials left, they put guards around the Premises. – On January 24, 1996, the second sealing took place. He himself was then in Germany. He was told that the staff of KOC was allowed to evacuate some assets, including personal belongings and certain cars. The KOC employees could not, however, take any corporate documents or office assets. The

cars were put in a garage. – When he, later on, returned to St. Petersburg, he was not let into the Premises. He complained of the sealing to different Russian authorities without success. He also tried in vain to get hold of the vehicles which had been taken from the Premises. On March 6, 1996, he and his wife left St. Petersburg by a ferry–boat. Before he was allowed to go on board, he had to leave his car, together with the documents and the computer he kept in the car.

Mr. Church: He had worked with Mr. Sedelmayer as advisor in 1989 and 1990 and was present at the Premises on October 9, 1995. The Premises were then visited by a group of people including police officers and 5–6 women. One of the women read a decree aloud. Someone told him, later on, that it was a Presidential decree. The group wanted to take over the whole property, and there were negotiations with representatives for KOC. He kept some personal belongings in the Sauna building, and he was allowed to take these things with him. Then, after having made an inventory, they sealed the Sauna building. He knew that documents were stored in there.

Mr. Choulkine: When he came to the Premises on October 9, 1995, they were guarded by armed policemen, and he could not get access. He was told that bailiffs had come early in the morning and that several parts of the Premises had been sealed, among these the Sauna building and the ground floor of another house. Also the gate house was unaccessible. He was informed that the sealing was based on a Directive by the President. – On January 24, 1996, the remaining parts of the Premises were sealed. The staff of KOC was allowed to stay until midnight in order to collect their personal belongings. He put his own belongings into his own car and asked the staff to move the other cars from the Premises. The cars were moved to a parking lot in the neighbourhood. With regard to office equipment, he saw a truck where such equipment was loaded, but he does not know where it was stored. Later on, when it was getting dark, he saw people loading two trucks. He was told that the visitors had referred to a Presidential decree even when the second sealing took place. – On March 12, 1996, he was present when Mr. Sedelmayer and his wife left St. Petersburg. Before Mr. Sedelmayer could leave, his car and his documents were confiscated.

2.3.3. Evidence submitted by the Respondent

With regard to the sealing of the Premises, the Respondent has submitted certain "Property Inventory and Seizure Lifting Certificates", issued by the St. Petersburg City Court and dated January 24, 25 and 29, 1996.

In the Certificate dated January 24 it is stated, inter alia: The Officer of Justice Barkanova L.I., in the presence of certain witnesses, enforced a writ of execution of September 20, 1995, issued by the St. Petersburg City Court on the same date, for lifting the seizure of, and removing property from the Premises. Representatives of KOC and Mr. Paul Leonard, a US citizen residing on the grounds, said they would take property out of one of the houses. Property removal began at 18.00 and was completed at 22.00. No complaints were made to the officers of justice, and no losses of property and valuables were reported.

In the Certificate of January 25 it is stated, among other things, that the officials opened the building nr. 8 at the request of Mr. Leonard and removed the equipment belonging to KOC from it. It is also stated in the Certificate that Mr. Leonard pointed out that insufficient time had been allowed for the removal of the equipment and that the cottage was sealed up.

In the Certificate of January 29 it is said, inter alia: At the request of KOC, the hotel building at the Premises was opened at 11.45, and the property remaining in the building: strong boxes, etc., were handed over to the representatives of KOC, Mr. Teterin and Mr. Voynov, in full. The building was sealed up again at 14.20. Also the broiler room, the storeroom at the third floor and the kitchen at the first floor were opened at KOC representatives' request. The property was handed over in full, after which the rooms were sealed. No property losses were reported to the officers of justice.

The Respondent has, moreover, submitted a copy of a Special Appeal to the Supreme Court of the Russian Federation, dated September 27, 1995 and signed by Mr. Sedelmayer. This document has been only partially translated into English. In the

part which has been translated, it is stated that, "in accordance with the St. Petersburg City Court Collegium for Civil Cases decision on civil case No. 3-66/95 of September 20, 1995", buildings and structures at the Premises had been arrested and sealed up and that the signer regarded the said decision on arresting and sealing up buildings as illegal.

The written evidence submitted by the Respondent also includes a document, dated September 19, 1995, which has been sent to the St. Petersburg City Court Collegium from Mr. Teterin, representative of KOC. There it is stated, among other things, that KOC disagreed with the petition of the representative of the Procurement Department for arresting and sealing up buildings and structures at the Premises.

The Respondent has also relied on the testimony of Mr. Igor Dubinin. When heard before the Tribunal, he made the following statement: He was present at the Premises as representative of the Procurement Department when the sealings took place. Both sealings were made in compliance with a decision by the City Court of September 1995. Representatives of KOC had been informed of the sealings in advance, and they had no complaints. - On October 9, 1995, the Sauna building and the ground floor and second floor of another building were sealed, while the building where Mr. Sedelmayer and his family lived was left unsealed. He does not know if any documents were stored in the Sauna building. Before the sealing was effected, an inventory of goods was made, but there were not any documents included in the inventory list. - On January 24, 1996, the remaining parts of the Premises were sealed. The Sedelmayer family had then moved out. The staff of KOC was allowed to take their belongings, including computors and safes. - The Premises were guarded after both sealings. On January 29, 1996, the seals were lifted.

2.3.4 The Tribunal's conclusions

It is uncontested that the Premises were sealed by representatives of Russian authorities on October 9, 1995 and January 24, 1996. The evidence submitted indicates that the said actions were ultimately based on the Presidential Directive of

December 4, 1994, according to which the Premises should be transferred to the balance of the Procurement Department.

What was said in the Presidential Directive was repeated in the Directive issued by GKI on February 27, 1995 and in the Assignment Act of March 9, 1995.

There is also another decision which seems to have been of importance, as far as the sealings are concerned. The evidence presented by the Respondent, including the Certificates issued by the St. Petersburg City Court, Mr. Sedelmayer's appeal to the Russian Supreme Court, the document signed by Mr. Teterin and Mr. Dubinin's testimony, indicates that the immediate ground for the sealing of the Premises was the decision taken by the St. Petersburg City Court on September 20, 1995.

It appears from the documents submitted that the purpose behind the measures taken by the Russian authorities was to get hold of the Premises – that is the real property used by KOC. There is nothing in the documents which indicates that the measures taken aimed at confiscating any movable assets from KOC, at least not primarily. Another thing is that there was an obvious risk that, in connection with the taking of the Premises, KOC would also lose other valuables.

When it comes to the question what property was actually taken in connection with the sealings, the parties have submitted different opinions. The Tribunal will, later on, return to this question. It should, however, be mentioned here that the Tribunal has come to the conclusion that KOC lost not only the Premises but also a certain amount of other investments.

As to the nature of the actions carried out by the Russian authorities on October 9, 1995 and January 24, 1996, they must be regarded as such "measures of expropriation or other measures with similar effects" as are mentioned in Article 4(1) of the Treaty. It should also be kept in mind that, according to the Protocol attached to the Treaty, an investor shall also be entitled to compensation if his investments is "significantly reduced by an interference with the economic activities of an enterprise in which he is participating.

The Claimant's position is that the decisions leading to the take-over, including the President's directive, were not in line with Russian law. The Respondent has taken the opposite view and has, thus, argued that the decisions were well-founded.

In the Tribunal's opinion, this problem needs not to be solved in this context. It should be kept in mind that, according to Article 4(1) of the Treaty, an investor is entitled to compensation even if expropriation measures are carried out for a public purpose in accordance with the relevant legislation.

The situation would have been different if all the alleged investment had been made in breach of Russian law. The investments would, then, not have been covered by Article 1(1)a of the Treaty, and the Claimant would, consequently, not have been entitled to compensation under the Treaty if the investments were confiscated.

Below, the Tribunal will deal with the question whether, during the time KOC was operating, the Claimant made any investments in breach of Soviet or Russian law. Here, it is sufficient to state that at least most of the investments must be regarded as legal.

In view of what has now been said, the Tribunal finds that the requirement for compensation stipulated in Article 4(1) of the Treaty, i.e. that measures of expropriation or similar measures have taken place, is fulfilled.

2.4 Is the Tribunal prevented from trying this dispute because of lis pendens?

2.4.1 Positions taken by the Parties

The Respondent has pointed out that SGC International has brought forward a court case in St. Petersburg against the local customs committee for having detained transport facilities. The case has not been closed. This means, according to the Respondent, that there is a procedural barrier (lis pendens) to the settlement of the dispute by the Arbitral Tribunal.

The Claimant has acknowledged that SGC International has initiated a court case against the local customs committee in St. Petersburg. However, the Claimant has, with reference to Article 4(3) of the Treaty, alleged that a case pending before a court or other governmental body in the Russian Federation does not constitute lis pendens with respect to the Claimant's claims as put forward in this arbitration.

2.4.2 The Tribunal's conclusions

It follows from the Treaty (Article 4.3, first subparagraph) that an investor whose investment has been expropriated shall have the rights to review, by the courts of the State that carried out the expropriation, of all questions pertaining to the expropriation of his investment. However, in the second subparagraph of Article 4(3) it is stated that the investor, irrespective of such action, shall have the right to submit disputes concerning procedures and amount of compensation to an International Court of Arbitration.

In view of what has thus been stipulated in the Treaty, the Tribunal finds that it is not prevented from trying this case or part of it because of the court proceedings mentioned above. Another thing is whether the Claimant is entitled to compensation under the Treaty for loss of the transport facilities in question. Below, the Tribunal will discuss this matter.

2.5 Who is the proper Respondent and who is entitled to represent the Respondent?

2.5.1 Positions taken by the Parties

In the Request for Arbitration, submitted to the Arbitration Institute of the Stockholm Chamber of Commerce on January 15, 1996, the alleged Respondent is "Presidential Administration, Procurement Department of the Hon. Boris N. Yeltsin, President of the Russian Federation, a Government Entity of the Russian Federation".

In the Statement of Claim, dated November 11, 1996, an adjustment has been made. According to the Statement of Claim, the Respondent is "The Russian Federation through its Presidential Administration, Procurement Department, Moscow, the Russian Federation".

The Respondent has alleged that the Procurement Department cannot be regarded as the proper Respondent, because it is not a Contracting Party under the Treaty and, in addition, because it has not appropriate authority to represent the Russian Federation.

The Claimant has argued as follows on the questions now discussed:

(1) It is the Russian Federation, acting through its President and through other administrative organs of the Russian Federation, which has caused the damages to the Claimant.

(2) The Russian Federation is responsible for its actions and cannot avoid such responsibility by trying to shroud that main issue behind internal Russian regulations concerning who has – and who has not – the right to represent the Russian Federation in international arbitrations.

(3) The sovereign character of a state does not per se relieve such state from responsibility for actions affecting other states or their nationals.

(4) The fact that the Procurement Department alleges that it does not have the authority to represent the Russian Federation in this arbitration does not mean that the Russian Federation is not the proper party to this dispute. If the Procurement Department does not have such right, then it should hand over the case to the governmental authority authorised under Russian internal rules to represent the Russian Federation.

(5) The Procurement Department is a federal organ of executive power directly subordinated to, and thus also reporting directly to the President of the Russian

Federation. Being subordinated to the ultimate representative of the Russian Federation, it does not have the corporate freedom normally attributed to separate legal entities.

(6) The Request for Arbitration and the Statement of Claim have been sent to the Russian Federation, addressed to the Procurement Department. In addressing the correspondence to the Procurement Department, the Claimant was guided by the fact that the Procurement Department had acted as the only federal representative of the Russian Federation in its dealings with the Claimant concerning the expropriation during 1994 and 1995. The Procurement Department has never referred the Claimant to any other governmental agency or organ for discussions concerning the expropriation.

(7) The Procurement Department has in fact acted as the representative of the Russian Federation in this arbitration. The objection that the Department does not have such authority has not been presented to the Claimant and to the Tribunal until more than one year after the arbitration was initiated.

(8) It is a well-established principle of customary public international laws that a country cannot rely on internal rules – for example who has the authority to represent the country in arbitrations – as a defence against liability under international law.

2.5.2 Evidence submitted by the Parties

When it comes to the duties of the Procurement Department, the Respondent has presented a document, which is said to be approved by a Decree of the President of the Russian Federation, dated August 2, 1995. According to this document, the Procurement Department shall, in performing its functions, inter alia (a) allocate the funds available to it to finance capital investment in productive projects and to carry on business jointly with other persons in the accepted manner, (b) set up subordinate institutions from the Federal assets managed by it or from funds allocated to it from

the Federal budget, (c) reorganize its subordinate institutions and, in instances provided for in the laws of the Russian Federation, decide on withdrawal of the assets assigned to them or redistribution thereof, (d) decide independently on reorganization and liquidation of the enterprises, organizations and institutions under its control, and (e) act on behalf of the state as a founder of enterprises under its control.

In the written report by Professor Boguslavskii, dated April 1997, it is stated that the Procurement Department cannot be regarded as a proper respondent because it is not a contracting party under the Treaty. The Statute of the Procurement Department provides that the Department has authority to act in the name of the state only in one case, namely as a founder when enterprises under its jurisdiction are established.

At the hearing before the Tribunal, Mr. Sedelmayer has stated, inter alia: In December 1994, he was told by the First Deputy Mayor of St. Petersburg, Mr. Putin, that it has been decided that he had to leave the Premises. Mr. Putin referred to an order issued by the President of the Russian Federation. After that, Mr. Sedelmayer contacted the Head of the Procurement Department, Mr. Borodin, and was told that "they" would try to find a new building. He was offered three different sites in St. Petersburg, but none of these sites was acceptable. In August 1995 a meeting was held at the Premises with General Shepal of the Procurement Department in order to settle the dispute, but no solution was reached. Several other meetings with representatives of the Procurement Department were scheduled during 1995, but those meetings never took place. – After the first sealing of the Premises had taken place in October 1995, he called Mr. Putin and Mr. Manevitj at the St. Petersburg City Administration, and they told him that they were sorry and working on a solution. However, they refused to meet him.

2.5.3 The Tribunal's conclusions

In the Tribunal's opinion, the Treaty must be interpreted so that, if there has been an expropriation in the territory of one of the Contracting Parties giving rise to

compensation, such compensation shall be paid by that Party (see for instance Articles 4.3 and 10). That means that, as far as the present dispute is concerned, it is for the Russian Federation to pay compensation to the extent such compensation is justified under the Treaty. That also means that the Russian Federation is the proper Respondent in this arbitration.

It might be added that, as has been stated above, the sealing of the Premises was founded on a Directive issued by the President of the Russian Federation. Since the President must be regarded as the ultimate representative of the Russian Federation, this circumstance also speaks in favour of the Russian Federation as the proper Respondent in this case.

In the Request for Arbitration, the Russian Federation was not mentioned as the Respondent. Instead, the Request for Arbitration talked about "the Presidential Administration, Procurement Department". Later on, the Claimant adjusted his position, stating that the Russian Federation is the proper Respondent.

In the Tribunal's mind, the fact that the Claimant did not from the outset pointed out the Russian Federation as Respondent is of a minor importance. More important is the question whether the Claimant has directed his claims to a proper representative of the Russian Federation.

Starting with the Request for Arbitration, the Claimant has sent all his claims and other briefs to the Procurement Department. The said Department has answered the Claimant and appointed an arbitrator, and representatives of the Procurement Department have taken part in the meetings arranged by the Tribunal.

However, already in its first submission to the Arbitration Institute of the Stockholm Chamber of Commerce, the Procurement Department made formal objections concerning its authority. The Procurement Department also stated that its appointment of an arbitrator was made without prejudice to its position concerning the claim lodged.

At the same time, it is worth noting that the Procurement Department, when first objecting to the claims, mainly concentrated on the questions whether Mr. Sedelmayer might be regarded as an investor under the Treaty and whether the Department might be liable to pay compensation. The objection that the Procurement Department is unauthorized to represent the Russian Federation was made at a later stage during the arbitral proceedings.

As far as has been shown to the Tribunal, the Procurement Department is a legal entity directly subordinated to the President of the Russian Federation. The Procurement Department has a separate balance sheet and is entrusted with certain executive powers.

In its reply to the Request for Arbitration, the Procurement Department stated that it "reports to the President of the Russian Federation and coordinates the operations of the executive power's federal organs and the companies reporting to it as regards matters concerning administrative and financial service to the Russian Federation's presidential administration, the Government of the Russian Federation and other organs".

As far as the Tribunal can find, the competence and duties of the Procurement Department are such that the Department would not be unfit to represent the Russian Federation in this arbitration. It is, among other things, worth noting that the Department is reporting directly to the President of the Russian Federation.

In the Presidential Directive of December 1994, it was stated that the Premises should be transferred to the balance of the Procurement Department. The evidence submitted indicates that, after the Directive had been issued, the Procurement Department was acting in order to promote this transfer. So, for instance, it is said in the Ruling of the St. Petersburg City Court, dated February 8, 1996, that a claim had been filed by the Procurement Department against KOC. It is also worth noting that Mr. Dubinin, in his testimony before the Tribunal, stated that he attended the sealing of the Premises as representative of the Procurement Department.

According to Mr. Sedelmayer's testimony, he had several discussions with representatives of the Procurement Department before the sealings took place. It is true that, as has been pointed out by the Respondent, there is no evidence supporting Mr. Sedelmayer's statement on this point. However, it seems natural that Mr. Sedelmayer tried to contact the Procurement Department, bearing in mind that the Department had been mentioned in the Presidential Directive. As fas as has been shown to the Tribunal, Mr. Sedelmayer was never referred to another governmental body for discussions concerning the transfer of the Premises.

It should also be noted that, even if the Procurement Department, during the arbitral proceedings, has made objections concerning its authority, it has never handed over the case to another governmental authority which would have been authorized under Russian internal rules. As has been pointed out by the Claimant, it seems to be an inherent part of the internal Russian legal system that a government agency must transfer documents which it does not have the authority to adminster or rule on to the proper agency.

The Tribunal also shares the view that a country can not rely on internal rules concerning who has and who has not the authority to represent the country in arbitrations as a defence against liability under international law.

To sum up, the Tribunal finds that the Russian Federation has been properly represented by the Procurement Department in this arbitration.

2.6. Have the stipulations in the Treaty concerning pre-arbitration procedure and the setting-up of the Arbitral Tribunal been complied with?

2.6.1 Positions taken by the Parties

The Respondent has alleged that the provisions contained in Article 9(3) of the Treaty have not been observed by the Claimant. Thus, according to the Respondent, the Claimant did not appoint his arbitrator until after the deadline stipulated in

Article 9(3) had run out.

The Respondent has, moreover, alleged that the Claimant breached the provisions concerning negotiation set down in Article 10(2). Thus, the Claimant, according to the Respondent, applied for arbitration before the stipulated six-month period had expired.

Since the said Articles have not been observed, the Tribunal has not, in the Respondent's opinion, been duly constituted. As a consequence, the Tribunal lacks competence to handle the present case.

The Claimant has acknowledged that the time limits set down in Article 9(3) of the Treaty have not been met by the Parties. The Respondent has, however, according to the Claimant, appointed its own arbitrator after the expiration of the set time limit and has, by doing so, accepted that the time limit was replaced by agreement of the Parties.

As to Article 10(2), the Claimant has objected, inter alia, that he did try to solve the dispute with the Resondent in a peaceful manner and that arbitration was initiated more than one year after the issuance of the Directive of expropriation in December 1994.

2.6.2 The Tribunal's conclusions

In Article 10(2) of the Treaty it is stipulated that, if a dispute concerning "the scope and the procedures of compensation pursuant to Article 4" has not been settled within six months as from the date it was raised by one of the parties to the dispute, each of such parties shall have the right to submit the dispute to an international arbitral tribunal.

In the Tribunal's mind, it is not quite clear how this provision shall be interpreted. First, it can be questioned whether, as has been alleged by the Respondent, the six-

months period shall not start running until one of the parties has specified its claim for compensation. Another question is whether the time period shall not start running from an earlier date than the date when the expropriation took place or if, as has been alleged by the Claimant, also the decision leading to an expropriation might be taken into account when determining the starting-point.

The Request for Arbitration was submitted on January 15, 1995, that is more than a year after the issuance of the Presidential Directive which was the ultimate ground for the expropriation. If the dates for the sealing of the Premises are taken into account, the Request for Arbitration was filed about three months after the first sealing was executed and about a week before the second sealing took place.

The Claimant has not contended that, before submitting the Request for Arbitration, he presented any specified claim for compensation to his counterpart. It follows, however, from Mr. Sedelmayer's testimony at the final hearing (see Section 2.5.2 above) that, after he had been informed of the Presidential Directive, he contacted the Procurement Deepartment and had several discussions with representatives of the Department in order to try to settle the dispute. As has been pointed out by the Respondent, there is no evidence supporting Mr. Sedelmayer's statement on this point. However, the fact that, according to the Presidential Directive, the Premises should be transferred to the balance of the Procurement Department makes it natural that Mr. Sedelmayer tried to contact the Department.

To sum up, the Tribunal finds that there are reasons to question whether the provisions of the Treaty concerning pre-arbitration procedure have been properly fulfilled. The Tribunal needs not, however, take any final decision on this issue. Even if the said provisions have not been properly complied with, the consequence would, in the Tribunal's opinion, be too far-reaching if, solely on this ground, the Tribunal would be prevented from examining the case.

It follows from Article 9(3) of the Treaty that the members of the Arbitral Tribunal shall be appointed within two months (the chairman within three months) from the date on which one of the parties informed the other of its wish to submit the dispute

to an Arbitral Tribunal for decision. If these time limits are not complied with, each of the parties may, according to Article 10(4), invite the Chairman of the International Court of Arbitation (the Arbitration Institute) of the Stockholm Chamber of Commerce to make the necessary appointments.

As far as has been shown by the documents, the Claimant already in October 10, 1995 sent a letter to the Procurement Department, inviting the Department to appoint an arbitrator. In this letter the Claimant also announced that he had appointed an arbitrator on his side. In the Request for Arbitration, which was filed three months later, the Claimant stated that his request to the Procurement Department had been ignored and that he, for that reason, requested the Arbitration Institute to appoint a panel of arbitrators.

In view of what has now been said, it can be argued that there was no violation of Article 9(3) of the Treaty. When stating his case before the Tribunal, the Claimant has, however, admitted that the arbitrator who was finally appointed by him was appointed after the expiry of two months period set down in Article 9(3).

As has been pointed out by the Claimant, even the Respondent appointed an arbitrator after the said time period had run out. Moreover, when the whole Tribunal had been constituted on September 3, 1996, the Respondent submitted comments on the dispute without raising the question of irregularities in the appointment procedure. There are, thus, reasons to argue that the Respondent is estopped from presenting, at this stage, objections concerning the establishing of the Tribunal.

In view of what has now been said, the Tribunal rejects the Respondent's objections that the Tribunal lacks competence because Articles 9(3) and 10(2) of the Treaty have not been complied with.

2.7 Final conclusion concerning the Tribunal's jurisdiction

It follows from what has now been said that the Treaty is applicable and that

the Tribunal has jurisdiction to try this dispute under the provisions of the Treaty.

3. Investments justifying compensation

According to the Claimant, the investments expropriated can be divided into four categories, viz., (1) in kind contribution of chattels to KOC's capital, (2) vehicles and certain law enforcement equipment, (3) investments in the Premises and the right to use the Premises, and (4) the Claimant's personal belongings. Below, the Tribunal will deal with each category separately.

3.1 In kind contribution of chattels to KOC's capital

3.1.1 Positions taken by the Parties

The Claimant has alleged that he has, directly or indirectly, executed investments of chattels into KOC's capital during 1991 through 1996 at a total value of USD 1,714,405.88. This capital contribution comprised law enforcement equipment, cars, clothes, office inventory etc. The Claimant has claimed compensation under the Treaty with the amount just mentioned.

The Respondent has rejected the claim on the following grounds:

(1) The amount claimed exceeds significantly SGC International's contribution to the charter capital of KOC as determined in the Shareholders Agreement. No amendments to this agreement have been made. Moreover, any action to increase the charter capital unilaterally is illegal and, therefore, such investments are not protected by the Treaty. Thus, even if a compensation is justified under the Treaty, this amount can not exceed the charter capital agreed on, i.e. RUR 700,000.

(2) The Claimant's business activities ran counter to the Russian Law on Joint Stock Companies of 1995. Instead of seeking profit for KOC, the Claimant only looked after the interests of SGC International.

(3) The Claimant has no evidence that any investments have been properly contributed to the charter capital. If any property was imported above the amount decided in the Shareholders Agreement in order to obtain some customs benefits, this would constitute an infringement of Russian laws.

(4) Pursuant to the Regulations of Joint-Stock Companies, at least 50 per cent of the charter capital must be paid within 30 days after the registration of the company and the remaining part within one year. These regulations have not been met by the Claimant.

(5) The documents – bills, invoices, etc. – that have been provided as evidence can be questioned for several reasons. There are doubts about the authenticity of these documents, it is not clear whether they are related to investments or not, and the documents do not prove that the goods have been delivered or seized. Nor do the documents provide proper justification of the prices of the goods.

(6) All documents have to do with relationships between SGC International and other companies and it is not clear what the documents are made out for.

3.1.2 Evidence submitted by the Claimant

The Claimant has submitted a large number of documents, mostly invoices and transport documents (Air Freight Bills). The first document is dated January 14, 1991, and the last one January 22, 1996.

In several invoices, the creditor is SGC International and the debtor KOC. Other invoices have been sent between different branches of SGC International. Among the companies having issued invoices is also Belmonte, the Finnish company Oy Finn Enterprise and different American companies. The group of consignees includes – besides KOC and SGC International – Mr. Sedelmayer personnally, private persons in Finland and companies in Germany, for instance Franz X. Sedelmayer Maschinenbau.

As to the Air Freight Bills, the Issuing Carrier's Agent is in most cases Schenker International, USA.

The documents cover a large variety of goods, for instance cars, office equipment (including computers and office furniture), law enforcement equipment (including weapons), uniforms and other kind of clothes, and food. Some bills are also made out for services.

The total costs according to the invoices and transport documents adduced is USD 1,714,405.88.

The Claimant has, furthermore, submitted a Capital Investment Report, issued in Munich on April 29, 1993 by the Tax consultant Karl-Heinz Kuhnert. As is stated in the Report, it is based on an examination of Russian accounting records in order to establish the amount of investment capital paid to KOC by Mr. Sedelmayer during the period September 23, 1991 to November 30, 1992. The conclusion of the Report is that Mr. Sedelmayer's investments during this time period equalled 964,618.00 rubles. The said amount included costs for motor vehicles and equipment, 370,000 rubles, and costs for show pieces, 107,000 rubles.

Among the documents presented by the Claimant is also an Inventory Report, prepared by Ms. Marlene Julien-Schuster on September 19-24, 1995. This Report contains a large list of supplies and materials which, according to the Report, were kept in the storage and working areas of the Premises. Vehicles, furniture, building materials or equipment installed permanently are not included in the list.

The Claimant has also relied on the afore-mentioned Report by Mr. Grosse, dated November 4, 1996. As has been stated previously, this Report was prepared in order to check the reasonableness of Mr. Sedelmayer's statement of his economic losses. The Report is based on a number of documents presented by Mr. Sedelmayer. These documents included "four files containing receipts (some in the original, some photocopies) of various business and payment transactions carried out during the period 1991-1996".

Mr. Grosse's Report ends with a Certification, stating that the documentation was carefully compiled and conclusive. It is also stated in the Report that, owing to confiscation of all accounting records kept in Russia, it was necessary to complete a great many of the dates and receipts with the help of duplicates existing in Europe and the USA and that, therefore, the actual loss is probably considerably higher than the amounts verified by the documents.

When heard before the Tribunal, Mr. Grosse made, inter alia, the following statement: Mr. Sedelmayer provided him with all the material on which he based his report. The material included documents at a total height of 1–2 meters. He did not review every single document but did random tests. He also checked the summaries and did not find any mistakes there. His conclusion was that the amounts claimed by Mr. Sedelmayer were justified and reasonable.

Mr. Sedelmayer has, in his testimony, made the following statement concerning the investments now discussed: The first investments were made before the end of 1991. He then loaded a truck in Munich and took it to the Premises. The investments were recorded daily in writing by KOC's book-keepers, and the records were kept in the Sauna building. He could not get hold of the records after the first sealing in October 1995. – KOC's activities included delivery of equipment to governmental bodies and training. His contribution to the agreed charter capital consisted mainly of vehicles and law inforcement equipment. He invested his share in 1991 and 1992. He does not remember if there was ever any discussion with GUVD concerning the dead-line for these investments. After the investments initially agreed on had been made, he had to make additional investments. He notified GUVD all the time, but he did not get any reactions from GUVD. – In the beginning, when KOC had started its activities, people from GUVD "came all the time". Later on, when it had turned out that there were problems concerning GUVD's right to dispose of the Premises, he had two meeetings with GUVD. After that, he tried in vain to get together with them. – The import of goods included not only equipment used by KOC. Some articles, for instance weapons and ammunition, were bought directly by Russian customers. He never had any problems with the customs authorities. For the import of arms, a special import licence was needed. – KOC made a profit already after the first year.

KOC started with a staff of 5 people, and when he left, the employees amounted to 40 persons.

Mr. Gerd Beetz has, in his testimony, stated as follows: He has been engaged in automobile business in USA and assisted Mr. Sedelmayer as business consultant from 1991. Mr. Sedelmayer looked for certain products which could be utilized in Russia, and Mr. Beetz helped him finding sellers and securing deliveries. He also assisted Mr. Sedelmayer in recruiting trainers who could be sent to Russia. – Among the products needed were vehicles, tools, clothes and office equipment. 99 per cent of the products were shipped from USA to Europe (Germany or Finland) through Schenker International. Copies of invoices and transport documents were sent to Mr. Sedelmayer. – As far as he knows, all the products delivered from USA were meant for SGC International. He does not know if any products were, later on, sold to other customers.

3.1.3 Evidence submitted by the Respondent

The Respondent has submitted certain documents, inter alia the above mentioned Certificates from the St. Petersburg City Court dated January 24, 25 and 29, 1996 (see Section 2.3.3).

The Respondent has also relied on the testimonies by Mrs. Garaburda and Mr. Dubinin referred to above (Sections 2.2.2 and 2.3.3).

3.1.4 The Tribunal's conclusions

As has been stated by the Respondent, the amount of money claimed exceeds significantly SGC International's share of KOC's charter capital, as determined in the Shareholders Agreement. It is uncontested that the charter capital was never formally increased by the shareholders. Mr. Sedelmayer has, in his testimony before the Tribunal, contended that he tried to increase the charter capital but did not succeed in making GUVD cooperate.

The Tribunal is of the opinion that, even if valuables were invested into the operations of KOC without formally increasing the amount of the charter capital, this can not be considered as illegal under Russian law. Thus, the additional investments would not, for this reason, fall outside the scope of application of the Treaty.

The Claimant's claim for compensation is, however, based on the assumption that the investments now discussed were made within the frame of KOC. To the extent investments were made not only in excess of KOC's charter capital but also without the other shareholder's – GUVD's – consent, it might be questioned if compensation under the Treaty is justified.

The evidence submitted to the Tribunal does not allow any definite conclusions concerning the issue now discussed. According to Mr. Sedelmayer, he notified GUVD of the additional investments without getting any objections. Mrs. Garaburda's testimony, on the other hand, indicates that GUVD was not properly informed.

Mr. Sedelmayer also has stated that all investments were recorded in KOC's books. However, no such records have been presented to the Tribunal. The reason for that is, according to Mr. Sedelmayer, that KOC's accounting books were kept in the Sauna building at the Premises and that the representatives of KOC were prevented from taking any documents from there when the building was sealed on October 9, 1995. Mr. Sedelmayer's statement has, on this point, been supported by the testimony of Mr. Church. Mr. Dubinin, on the other hand, has stated that an inventory was made before the sealing of the Sauna building was effected and that no documents were included in the inventory list.

Irrespective of whose statement is correct, the fact that no parts of KOC's accounts have been presented to the Tribunal is a weak point, as far as the Claimant's evidence is concerned.

It is stipulated in Annex II of the Shareholders Agreement that all the assets contributed by the Foreign Shareholder to KOC's Charter Fund should be handed over before January 1, 1992. This deadline might, however, be revised by decision of

a general meeting of the shareholders.

The evidence submitted by the Claimant indicates that his contribution to KOC's charter capital was not completed on the date stipulated in the said annex. However, according to Mr. Sedelmayer's statement, the delay did not give rise to any objections on the part of GUVD. No matter if Mr. Sedelmayer's statement is correct or not, the deadline in question can not, in the Tribunal's mind, be considered to have had such significance as has been alleged by the Respondent.

When it then comes to the Respondent's objection that there has been an infringement of the regulations in Russian law concerning time for payment of the charter capital in Joint-Stock Companies, the Tribunal can not find that this objection is justified.

With respect to the goods mentioned in the invoices and transport documents submitted to the Tribunal, there are several circumstances supporting the assumption that they were meant for KOC. Appendix II of the Shareholders Agreement contains a list of assets which were supposed to be the Foreign Shareholder's contribution to KOC's charter capital. Among these assets are different kinds of office equipment. The office equipment mentioned in the invoices and the transport documents are to a large extent of the same kinds as are listed in the said appendix. Even when it comes to cars, there is a correspondence beween the invoices and the stipulations in Appendix II of the Shareholders Agreement.

Mr. Beetz' testimony also supports the assumption that the goods mentioned in the invoices and transport documents were intended to be used by KOC. However, as has been pointed out by the Respondent, it is not proved by the said documents that the goods were actually delivered to KOC. In most of the invoices and transport documents, KOC is not mentioned as consignee.

It is also worth underlining that, even if the goods mentioned in the invoices and transport documents were delivered to KOC, it is unclear to what extent the goods were kept at the Premises when the sealing took place. There are reasons to assume

that a number of materials, for instance office equipment, were meant to be used permanently by KOC and that these materials, consequently, stayed at the Premises. On the other hand, it follows from Mr. Sedelmayer's statement that several articles were meant to be resold.

The Inventory Report prepared by Ms. Julien-Schuster shows that a substantial number of goods was present at the Premises as late as September 1995. However, no valuation has been done in this Report.

It is also hard to tell from the evidence submitted what was actually seized by the Russian authorities when the Premises were sealed. On this point, it should be born in mind that, as has been stated previously by the Tribunal, there is nothing in the documents submitted, including the Presidential Directive of December 1994, which indicates that the measures taken by the Russian authorities aimed at confiscating any movable assets from KOC, at least not primarily. There was, however, an obvious risk that, in connection with the taking of the Premises, KOC would also lose other valuables.

In view of, inter alia, the testimonies of Mr. Sedelmayer, Mr. Church and Mr. Choulkine (see Section 2.3.2), it can be assumed that several pieces of furniture and other kinds of office equipment kept in the buildings, as well as a number of products kept in stock, remained at the Premises after the sealings had been executed. It should, on the other hand, be noted that, according to both Mr. Church and Mr. Choulkine, KOC employees were allowed to take with them at least part of their personal belongings. It also follows from Mr. Choulkine's testimony that certain pieces of office equipment were evacuated. Mr. Choulkine has stated that, when the second sealing took place, he first saw a truck where office equipment was loaded and that, later on, he saw people loading two trucks.

Mr. Dubinin, in his testimony, has made a similar statement. He has, thus, testified that, on January 24, 1996, the staff of KOC was allowed to take their belongings, including computers and safes.

The Certificates from the St. Petersburg City Court indicate that people from KOC were allowed to remove certain property from the Premises, not only on January 24, 1996, when the second sealing took place, but also during the following days.

When commenting on the Certificates, the Claimant has not contested that, after the second sealing had been executed, the seals were lifted at some occasions, allowing people to remove property from the Premises. However, the Claimant has alleged that no taking of property from the Premises was sanctioned by the Claimant or by KOC. None of the persons mentioned in the Certificates had any authority to act for the Claimant or KOC, and neither the Claimant nor KOC has received any of the property allegedly taken from the Premises.

Not only Mr. Dubinin's testimony but also the Court Certificates indicate that inventory lists were prepared in connection with the sealing of the Premises. No such lists have, however, been submitted to the Tribunal.

Even if it would have been clear what assets were confiscated, it remains to be decided what compensation shall be paid. In Article 4(2) of the Treaty it is stated that compensation due to measures of expropriation shall be equivalent to the actual value of the expropriated investment immediately before the actual impending expropriation became public knowledge. In the Tribunal's opinion, it can not be taken for granted that the value of the goods mentioned in the invoices and transport documents remained the same all the time. It is a well-known fact that, for instance, the value of computors changes rapidly. Here again, the lack of book-keeping materials creates difficulties.

In the Tribunal's opinion, the circumstances are such that the Claimant shall be granted a certain compensation for loss of such investments as have now been discussed. The compensation must, however, be assessed with great caution. The Tribunal has come to the conclusion that a total compensation of USD 400,000 is reasonable. The Respondent shall, thus, be ordered to pay this amount.

3.2 Vehicles and certain Law Enforcement Equipment

3.2.1 Positions taken by the Parties

The Claimant has claimed compensation for certain vehicles which have been confiscated or have lost their value due to the expropriation. On this point, the Claimant has alleged as follows:

(1) At the time of the expropriation, SGC International maintained six vehicles (4 Ford Explorer and 2 Ford Econoline) at a total value of USD 317,000 in the Russian Federation. The cost for the transport of the vehicles to St. Petersburg was approximately USD 10,340. All these vehicles were expropriated.

(2) In 1995, the Claimant bought six vehicles (all of them of the model Ford Econoline) from the American company Kie Consulting, in the amount of USD 423,990. Two of these vehicles were delivered to St. Petersburg and were confiscated. The remaining four vehicles are in the Claimant's possession but are of no value to him, since they were specially equipped for use in St. Petersburg and had KOC logos printed on the sides.

(3) In September 1995, the Claimant bought two vehicles of the model Ford Victoria from the American company SGC Incorporated, at a total value of USD 119,843.38. These vehicles were confiscated in March 1996.

(4) In 1995, the Claimant bought one Renault truck, re-modeled into a disaster relief vehicle, and two trailers at a total value of DEM 489,120. These vehicles were transported to St. Petersburg and subsequently confiscated in connection with the take-over in January 1996.

The Claimant has, furthermore, alleged that he bought certain law enforcement equipment (jackets, shirts, holsters, etc.) from SGC International at the beginning of 1996, at a total value of USD 132,741.05. This equipment was meant to be imported to St. Petersburg, but the import never took place due to the final take-over of the

Premises in January 1996. The equipment has become useless to the Claimant, since it has the seal of KOC embroidered on each piece of equipment.

In view of what has been mentioned above, the Claimant has claimed compensation in a total amount of USD 1,003,914.43 (317,000 + 10,340 + 423,990 + 119,843.38 + 132,741.05) and DEM 489,120.

The Respondent has rejected the claim on the following grounds:

(1) According to the Claimant, the vehicles and equipment in question were intended for use in KOC's operations. It may, therefore, be assumed that these deliveries were not directly related to investments.

(2) The documents that the Claimant rely upon do not serve as proper proof that the goods have been imported to the Russian Federation.

(3) The documents record that the goods could only be delivered on a license issued by the US authorities to Germany, and a transshipment thereof was banned by US laws.

(4) Under Russian legislation, foreign trade deals must be made in writing. Unless this requirement is met, any deal shall be void.

(5) The Claimant has not submitted adequate written proof of the customs laws having been complied with, i.e. that the goods have been lawfully imported to Russia.

(6) As the Claimant himself admits, some vehicles and equipment have not been imported to the Russian Federation at all. They could not, therefore, be confiscated, and there is no ground for compensation under the Treaty. Besides, these goods could not be depreciated completely, as the Claimant contends.

3.2.2 Evidence submitted by the Claimant

The Claimant has relied on, inter alia, the following documents:

(1) An Invoice dated September 20, 1994, and Bills of Lading, dated September 27 and October 14, 1994. According to these documents, two vehicles of the model Ford Explorer were shipped from Baltimore to Bremerhaven and from there to Helsinki. The consignee is SGC International.

(2) Bills of Lading, dated July 24 and September 25, 1994. According to these bills, two vehicles of the model Ford Econoline were shipped from Baltimore to Bremerhaven and one vehicle of the model Ford Explorer was shipped from New York to Bremerhaven. The consignee is SGC International and Mr. Sedelmayer, respectively.

(3) An Invoice from Kie Consulting Network to Mr. Sedelmayer, dated January 9, 1966. In this invoice six cars of the model Ford Econoline are listed. It is stated that two of these cars had been delivered to St. Petersburg. The invoice also states that the total price (including a Procurement Fee of USD 20,190.00) is USD 423,990.00 and that the price was prepaid in 1995.

(4) An Invoice dated November 6, 1995, and a Shipping Advice, dated November 6 and 8, 1995. According to these documents, two of the cars mentioned under 3 were shipped first to Bremerhaven and then to Helsinki. The consignee is Belmonte Ltd.

(5) An Invoice, dated September 23, 1995, from SGC Incorporated to Mr. Sedelmayer. It is stated in the invoice that two vehicles of the model Ford Crown Victoria had been sold and shipped to Helsinki via Bremerhaven. The total price is USD 119,843.38.

(6) An Invoice from Sedelmayer, München, to Mr. Sedelmayer, dated December 8, 1995. It is stated in the invoice that one truck and two trailers had been purchased. The total price, including costs for freight to St. Petersburg, is DEM 489,120.00.

(7) An Invoice from SGC Incorporated to Mr. Sedelmayer, dated December 3, 1996. In the invoice, a number of jackets, shirts, holsters etc. are listed. The total price is USD 132,741.05.

The Report by Mr. Grosse referred to above (see Section 3.1.2) also deals with the claims now discussed. Thus, the Certification in the Report, stating that the documentation submitted was carefully compiled and conclusive, applies, inter alia, to the documents concerning vehicles and certain law enforcement equipment.

The Claimant has, furthermore, relied on the testimonies of Mr. Mikael Melrose, Mr. Lehrer, Mr. Beetz and Mr. Choulkine. They have made the following statements, as far as KOC's vehicles are concerned:

Mr. Melrose: He is a mechanical engineer, resident in Helsinki, and helped Mr. Sedelmayer repairing motor cars. During the years 1991–1992, he handled between 10 and 15 cars for Mr. Sedelmayer. 4 or 5 of these cars were of the model Ford Explorer. After the repairs, the cars were picked up by drivers wearing KOC uniforms. – He visited the Premises in St. Petersburg once and saw 6–7 vehicles on the spot. All but one of the vehicles were marked KOC.

Mr. Lehrer: He visited the Premises frequently, especially during the fall of 1993. There used to be several KOC–marked cars there. – On two different occasions, he served as a driver, when cars were brought from Helsinki to KOC in St. Petersburg. Each time, 5 or 6 cars were brought to KOC. After the transports, the documents concerning the cars were handed to Mr. Sedelmayer.

Mr. Beetz: During the time he assisted Mr. Sedelmayer, he purchased more than a dozen vehicles for him in USA. The vehicles were modified to meet the specifications spelled out by Mr. Sedelmayer. After that, the vehicles were shipped to Europe. No special licences were required.

Mr. Choulkine: KOC imported a number of cars, which were first shipped to Finland and then taken from there to St. Petersburg. Some of the cars went directly to

customers and some – between 10 and 15 – were used by KOC. He acted himself, on some occasions, as driver between Finland and Russia and never knew of any problems with the customs authorities. Some cars had foreign plates and were imported for a certain stipulated time. – In connexion with the sealing in January 1996, he himself and members of the KOC staff managed to move a number of cars from the Premises to a parking lot in the neighbourhood. Some weeks later, he was told that "customs people" had come to the place where the cars were parked and that they were taking the cars. He went to this place and saw drivers sitting in the cars. He tried to prevent them from taking the cars, but then he was seized and brought to a police station. – Later, he went to a place where the customs authorities kept confiscated vehicles, and he saw 9 – 11 of the cars there. He also went to the customs headquarters, but he could not get anything back and did not receive any explanation. He sued the customs authorities for illegal confiscation but they won the case. He then appealed to another court, and the litigation is still going on.

When heard before the Tribunal, Mr. Sedelmayer has made the following statement concerning KOC's vehicles: Until the end of 1995, 14–15 vehicles were brought to the Premises. All of them were used in KOC's activities, and 10 were marked KOC. He personnally helped taking in 6–8 cars. – In connexion with the sealing in January 1996, representatives for KOC managed to take out certain cars, which were brought to a garage. He could not move the cars from there before he left St. Petersburg on March 6, 1996. – 4 of the vehicles bought for KOC are still in his possession. They were supposed to be used as ambulances and have been equipped accordingly. They have also been remodelled in order to be suitable in Russia.

3.2.3 Evidence submitted by the Respondent

As has been mentioned before, the Respondent has submitted a Report from the State Customs Committee of the Russian Federation, dated June 27, 1996, and a letter from the State Customs Committee to the Head of the Procurement Department, Mr. Borodin, dated November 26, 1997.

The said documents are only partly translated into English. However, in the part of the letter of November 26, 1997 which has been translated it is said thet Mr. Sedelmayer has been repeatedly brought to administrative responsibility for violating customs regulations, while carrying out commercial activity in St. Petersburg.

The Respondent has also relied on the testimonies of Mrs. Garaburda and Mr. Dubinin referred to above (Sections 2.2.2 and 2.3.3).

3.2.4 The Tribunal's conclusions

In the Tribunal's opinion, it is shown by the documents presented that nine vehicles (3 vehicles of the model Ford Explorer, 4 Ford Econoline and 2 Ford Crown Victoria) were shipped from USA to Finland. It is also shown that one truck and two trailers were transported from Germany. Taking into account the contents of the documents, as well as the testimonies on which the Claimant has relied, it must be assumed that these vehicles were meant to be finally delivered to KOC. The testimonies, in particular the statements made by Mr. Melrose, Mr. Lehrer and Mr. Choulkine, also indicate that the vehicles were, in fact, brought to the Premises.

A special question is to what extent the vehicles were intended to be used in KOC's activities. It follows, inter alia, from Mr. Choulkine's statement that all the cars imported by KOC were not used by KOC itself. Instead, some of the cars went directly to customers. Mr. Choulkine has, however, estimated that 10–15 cars were used by KOC. Similar figures have been mentioned by Mr. Sedelmayer.

However, in the Tribunal's mind, it is not necessary to state how many vehicles were used by KOC and how many were sold to customers. In both cases, there are reasons to conclude that the import of vehicles was closely related to KOC's activities.

Another thing worth discussing is how many vehicles were kept at the Premises when the sealings took place and how many were finally confiscated. Here, the lack of book-keeping materials makes it difficult to make an assessment. The fact that all

the cars imported were not used by KOC makes the decision worse. It should also be noted that, even if both Mr. Choulkine and Mr. Sedelmayer have testified that a number of cars were brought from the Premises and finally confiscated, none of them has mentioned an exact figure.

It remains, furthermore, to discuss whether, to the extent vehicles belonging to KOC were confiscated, this can be regarded as an expropriation under the Treaty. Here again, it should be born in mind that, as far as has been shown by the documents submitted, including the Presidential Directive of December 1994, the purpose behind the measures taken by the Russian authorities was to get hold of the Premises and that nothing indicates that the measures taken aimed at confiscating any movable assests from KOC, at least not primarily. That also goes for vehicles.

It has not been shown from the evidence subitted to the Tribunal that any of the vehicles now discussed were seized by the Russian authorities in connection with the sealing on October 9, 1995. Nor has it been shown that any of these vehicles were confiscated on January 24, when the second sealing took place. Instead, it follows from Mr. Choulkine's testimony, as well as from Mr. Sedelmayer's statement, that representatives of KOC managed to remove a number of cars from the Premises to a parking lot and that the cars remained there during some weeks. Not until after this period they were confiscated.

As to the confiscation which ultimately took place, Mr. Choulkine's testimony indicates that the confiscation was decided by the customs authorities. It has not been made clear to the Tribunal what might have been the reason for this decision. It is, however, worth noting that, in one of the documents submitted to the Tribunal, it is stated that Mr. Sedelmayer had violated customs regulations.

It is uncontested that, later on, SGC International initiated court proceedings against the local customs committee in St. Petersburg concerning the confiscation of the vehicles. The case has still not been closed.

It is impossible for the Tribunal to express any opinion on the question whether the

confiscation of the vehicles was well-founded or not. What matters in this context is that the confiscation was decided by the customs authorities. It might, of course, be questioned if the customs authorities took their decision quite independently or if there was any link between this decision and the decisions concerning the sealing of the Premises. In the Tribunal's opinion, it has not, however, been shown that there was any such link.

It follows from what has now been said that the confiscation of the vehicles can not be regarded as an expropriation granting compensation under the Treaty.

As to the four vehicles mentioned above which, according to the Claimant, were bought by him and are still in his possession, there are reasons to assume that they were meant to be sent to St. Petersburg and used by KOC. However, the fact that they were never sent to Russia leads, in the Tribunal's mind, to the conclusion that they can not be regarded as investments in the sense of the Treaty. No matter if these cars may, in the future, be used outside Russia or not, they can not, therefore, give rise to compensation under the Treaty.

What has now been said is also applicable to the law enforcement equipment which, according to the Claimant, was bought by him and was meant to be imported to St. Petersburg. Here again, it must be concluded that no investment under the Treaty has taken place and that, consequently, the Claimant is not entitled to compensation pursuant to the rules of the Treaty.

To sum up, the Tribunal finds that no compensation under the Treaty shall be granted concerning vehicles and other kinds of goods discussed in this Section.

3.3 Investments in the Premises and Loss of Right to use the Premises

3.3.1 Positions taken by the Parties

The Claimant has alleged that he continuously had renovation and reconstruction

works carried out on the Premises and that he paid for such works with his own personal funds. The payments amounted, according to the Claimant, to USD 788,942.30. As a result of the expropriation, he was deprived of these investments.

The Claimant has, furthermore, pointed out that it was foreseen in the Shareholders Agreement that KOC would have the right to use the Premises during 25 years, that is until the year 2016. KOC was, however, allowed in fact to use the Premises only from September 23, 1991 through December 4, 1994, which is 38 months and 21 days. According to the Claimant's evaluation of the right to use the Premises, the value per annum is USD 372,000. Consequently, the total value of the right to use the Premises for the entire 25 year period foreseen in the Shareholders Agreement is USD 9,300,000. After deduction of the value corresponding to the right to use the Premises for 38 months and 31 days, USD 1,201,250, the remaining value is 8,089,750. SGC International's share in KOC was 50 per cent and thus, 50 per cent of the value of the right to use the Premises has been lost, i.e. USD 4,049,375. The Claimant has claimed compensation with this amount.

The Claimant has also claimed compensation for costs for evaluation of the right to use the Premises (USD 1,000) and evaluation of offered substitute real property (DEM 5,310).

The Respondent has rejected the claims which have now been mentioned. According to the Respondent, the Claimant has not submitted adequate proof of investments concerning reconstruction works or of the alleged value of the right to use the Premises in the future. The same goes for evaluation costs.

The Respondent has added that, had the Claimant used the Premises as his office in the capacity of the General Director of KOC, there would have been no objection to that. The Claimant has, however, made an unlawful use of the Premises for his personal needs.

3.3.2 Evidence submitted by the Claimant

The Claimant has, inter alia, relied on Appendix II of the Shareholders Agreement. There, it was stipulated that GUVD's contribution to KOC's Charter Fund was the Premises. It was, however, also stated in Appendix II that the Foreign Shareholder (SGC International) should, inter alia, contribute to the Charter Fund by paying for "reconstruction of the buildings and structures, with necessary materials at prices not exceeding the average German ones, as well as the transportation costs, customs duties and charges for the imported construction materials and equipment, and installation costs according to a cost estimate approved by the Chairman of the Board of Directors". SGC International's contribution in these respects was estimated to 295,000 rubles.

The written evidence submitted by the Claimant also includes a letter from Deputy Mayors Putin and Manevich to Vice Prime Minister Chubais, dated April 27, 1994, and a letter from Mr. A. Sobtchak, Mayor of St. Petersburg, to the US Consulate General in St. Petersburg, dated September 22, 1995.

The letter of April 27, 1994, concerned the possibility for KUGI to become a partner of KOC instead of GUVD. In this letter, it is stated, inter alia, that KOC had made expenditures on the reparation of the Premises in the amount of USD 219,000 and that these expenditures were made out of proceeds of credit without interest, given by the American part.

In the letter of September 22, 1995, it is said that the St. Petersburg Mayor's office was actively conducting negotiations with KOC and other interested parties on the question of "the selection of adequate premises". The Mayor's office was also, according to the letter, considering different options for the compensation of KOC's costs connected with the restoration of the residence on Kammeny Ostrov.

The Claimant has, furthermore, relied on the Capital Investment Report by the Tax consultant Karl-Heinz Kuhnert referred to above (Section 3.1.2). In this Report it is stated that, during the period September 23, 1991 to November 30, 1992, Mr.

Sedelmayer made capital investments concerning construction works amounting to 457,568 rubles.

The Claimant has also relied on two Acts, dated July 1993 and September 1995, respectively, concerning works executed on the Premises.

In the Act of July 1993, Mrs. Z.A. Shiukina, District Architect and representative of GIOP DPTM, Mr. Sedelmayer, representing "the Client", and Mr. A.G. Teterin, representing "the Executor", has stated that certain works listed in the Act were done during the period November 1, 1991 – January 20, 1993. According to this Act, the works included, inter alia, purchase of equipment and construction materials, purchase and installment of phone, fax and telex connections, purchase and installment of the satellite TV system, purchase of a new electric heating system and air conditioners, repairs of wooden structures and inspection and evaluation done by certain specialists. As is finally stated in the Act, the total costs amounted to USD 220,185.44.

In the Act of September 1995, Mr. Venjamin Fabritsky, Chief of Private Architectural Workshop, Mr. Sedelmayer and Mr. Teterin has made a similar statement concerning works done from October 5, 1993, until May 5, 1995. This Act contains a long list of works made in order to put Buildings 1, 2 and 3 "into exploitation". The list also includes security measures, such as installment of metal doors, and works connected with putting the territory around the houses into order. It is finally stated in the Act that the total expenditures amounted to USD 568,756.86.

In order to show that the Claimant has personally brought in large amounts of USD in cash into the Russian Federation during 1992 through 1995, the Claimant has submitted a number of official customs certificates.

The Claimant has, moreover, submitted a Rental Valuation prepared by Ryden Property Consultants and Chartered Surveyors, dated January 29, 1996. In this document, it is stated, inter alia, that the Premises have been inspected in order to advise as to their current open market rental value as at 29 January 1996. The rental

value is, according to Ryden's Valuation, USD 372,000 per annum.

The written evidence presented by the Claimant also includes a statement issued by Mr. Anton Goldes, München, dated April 1, 1995. According to this statement, Mr. Goldes inspected three different buildings in St. Petersburg on March 25, 1995, in order to assess their value. The conclusion drawn in the statement is that the condition of the buildings was such that they could not be used.

According to an invoice, dated April 9, 1995, the cost for Mr. Golde's evaluation was DEM 5,310.

The claims now discussed are also dealt with in the Report by Mr. Grosse referred to above (see Section 3.1.2). Thus, the Certification in the Report applies, inter alia, to the documents presented to Mr. Grosse concerning construction costs, loss of the right to use the Premises and certain expert services.

The Claimant has, furthermore, relied on the testimony by Mr. Fabritski. When heard by the Tribunal, Mr. Fabritski stated, inter alia: He has worked as an architect in St. Petersburg since 1961 and been involved in several big projects. He is also a State Prize winner. In 1991 he was approached by Mr. Sedelmayer, who asked for his assistance in restoring the Premises. He was impressed by Mr. Sedelmayer's serious attitude to the restoration. The Premises are of a great cultural value, but they were in a very bad shape at the time. His firm was contracted, and all the employees took part in the restoration. The works started with the installment of a new plumbing system and an electric heating system. On the whole, not only reconstruction works but also a scientific restoration of the Premises took place. The works concerned the buildings as well as the surrounding territory. All the works were financed by Mr. Sedelmayer. – Everything was done in compliance with the relevant regulations and approved by the relevant authority, GIOP. The representative for GIOP, Mrs. Shiukina, was present more or less all the time. The works were checked by her and a chief executive. – The two Acts submitted to the Tribunal cover only a little portion of all the works that had to be carried out. It is a normal procedure to confirm in a special document which works have been performed.

Mr. Sedelmayer has, at the hearing, made the following statements concerning the Premises: When he first saw the Premises, they were in a bad shape. So, for instance, the basements were flooded, and the gas system did not function. The restruction works started in December 1991 and went on until the Premises were sealed. The works included installment of air conditioning, an electric heating system and new water pipes. In one of the buildings, an exhibition center was set up. – He was anxious to follow Russian law when performing the restruction works, and he informed "everybody" before the works started. Since the buildings were classified as national monuments, approvals from GIOP were needed. He also obtained such approvals. He had many discussions with GIOP, and a representative for GIOP, Mrs. Shiukina, visited the Premises many times. He was, furthermore, negotiating with the Property Fund and KUGI. The Acts submitted to the Tribunal were signed in order to show that the works in question had been finished. – The costs for the works at the Premises were paid by him personally. He brought in cash for that purpose. He considered the Premises as his home, something that needed to be repaired and maintained. – After he had been informed that, following the Presidential decree, KOC had to leave the Premises, he talked with Mr. Borodin at the Procurement Department. Mr. Borodin told him that they did not have enough cash to pay him but that they would try to find a new building. After that, he was offered three different possibilities and also visited the new sites. However, the buildings offered were not acceptable – they had no roofs, no windows etc. – When the second sealing in January 1996 had taken place, he called Mr. Putin and Mr. Manevich from the Mayor's office. They said that they were working on a solution and that he would get some replacement. – In 1994, after Mr. Manevich had issued an instruction ordering the replacement of GUVD by KUGI, he signed a new shareholders agreement for KOC with KUGI as the Russian partner. This document was sent for registration, and he has never seen it since then.

3.3.3 Evidence submitted by the Respondent

The Respondent has relied, inter alia, on the testimonies by Mrs. Garaburda and Mr. Dubinin. When heard before the Tribunal, they made the following statements

concerning the Premises:

Mrs. Garaburda: The Premises were meant to be used jointly by the shareholders of KOC. However, Mr. Sedelmayer used the buildings as his private home. Since he was going to live there, some measures had to be taken. Thus, the heating system was replaced. Mr. Sedelmayer did not, however, make any investments in terms of reconstruction. It was for GUVD to take care of the buildings, and it was only GUVD who could sign contracts concerning reconstruction works. All such works needed also the consent of GIOP. It should, in this context, be noted that one of the Acts submitted to the Tribunal was not signed by any representative for GIOP. – If such investments were made as have been alleged by the Claimant, that would mean that GUVD's rights as a shareholder were violated. Such an amount of works ought to have been discussed at a shareholders meeting, but such a meeting never took place. GUVD was even prevented from KOC's people to visit the Premises.

Mr. Dubinin: He visited the Premises in March 1996. At that time, there was a lot of garbage around the territory, and the buildings were in a bad shape. So, for instance, the roof of one of the buildings was destroyed, the electricity system did not function, there was no heating, the floor in some rooms had been damaged by heavy pieces of furniture, and there was a lot of big nails in the walls.

3.3.4 The Tribunal's conclusions

It can be concluded from Appendix II of the Shareholders Agreement that, at the time KOC was set up, the Premises needed repair. Both Mr. Fabritski and Mr. Sedelmayer have also, in their testimonies, underlined that the Premises were in a bad shape. It is, furthermore, worth noting that, according to the said Appendix, it was for SGC International and not for GUVD to pay for the reconstruction works needed.

Thus, the Claimant was entitled to start executing reconstruction works at the Premises. In the Tribunal's mind, there is no doubt that such works must be regarded

as investments under the Treaty, at least to the extent the costs for the works did not exceed the sum mentioned in Appendix II of the Shareholders Agreement.

The Claimant's allegations concerning what works were actually executed on the Premises have been supported by the two Acts submitted to the Tribunal. The said Acts contain very detailed lists of measures taken. The persons who signed the Acts – including a representative for GIOP, as far as the first Act is concerned, and the chief architect, Mr. Fabritski, concerning the second Act – have confirmed that the lists are correct. The same statement has been made by Mr. Fabritski in his testimony before the Tribunal. It should however, be noted that Mr. Teterin, who signed the Acts as "the Executor", was also an employee of KOC.

In the Tribunal's opinion, there are reasons to assume that the works listed in the Acts were executed. Another matter is, however, whether the costs for the works amounted to the sums mentioned in the Acts and whether all the costs were paid by the Claimant personally.

On these points, it should be noted that no invoices or receipts concerning the works have been presented to the Tribunal. When it comes to the customs certificates submitted by the Claimant, they indicate that he personally brought in large amounts of USD in cash during 1992 through 1995. However, the certificates do not show for what purpose the money was intended.

As to the works mentioned in the Act of July 1993, the letter from the Deputy Mayors of April 1994 is of importance. The costs which, according to this letter, were paid by KOC out of the credit granted by "the American part" are equivalent to those stated in the Act of July 1993.

When deciding what amounts were paid by the Claimant, the figures mentioned in Mr. Kuhnert's Capital Investment Report are also of interest. These figures indicate that, already in November 30, 1992, the Claimant had made investments concerning the Premises which exceeded what was stipulated in Annex II of the Shareholders Agreement.

Even if it would have been possible to state what total amount was in fact paid by the Claimant, it is not clear that he would be entitled to compensation under the Treaty with the same amount. Here again, there are several problems arising. One of these problems is the lack of contacts between the two shareholders of KOC. To the extent the works executed exceeded what was stipulated in the Shareholders Agreement and were made without the consent of GUVD, it can be questioned whether the works shall be regarded as investments within the frame of KOC's activities.

A special question is whether all the works were made in compliance with legal requirements. On this point the Tribunal is, however, prepared to accept Mr. Sedelmayer's statement that he had continuous discussions with the relevant authority, GIOP, and that all approvals needed were obtained. Mr. Sedelmayer's statement has to a large extent been supported by Mr. Fabritski, and one of the afore-mentioned Acts has been signed by a representative for GIOP.

Another thing worth discussing is for what purposes the Premises were used. It can not be doubted that the Premises were, in the first place, used for the activities of KOC. As far as has been shown to the Tribunal, the Premises contained, among other things, offices, show rooms, guest rooms and storage facilities. It is a fact, however, that Mr. Sedelmayer also used one of the buildings for his and his family's personal living. He has stated himself that he regarded the Premises as his home. The question, then, is whether the restruction works shall be regarded as investments under the Treaty to the extent they concerned such parts of the Premises as were used by Mr. Sedelmayer personally.

The Tribunal has previously come to the conclusion that the term investment should be given a wide scope of application. There are reasons to assume that Mr. Sedelmayer's residence was partly used for commercial purposes, for instance receptions. However, even if these circumstances are taken into account, the Tribunal finds that a certain deduction has to be done from the total reconstruction costs when the Claimant's compensation shall be determined.

When taking into account all the circumstances mentioned, the Tribunal finds it reasonable that the Claimant is compensated for investments on the Premises with an amount of USD 450,000.

It remains to discuss the claim for compensation for loss of the right to use the Premises.

Here, it should first be noted that, according to the Shareholders Agreement, the period of functioning of KOC was 25 years from the date of its legal registration and that this period of time should be spontaneously extended if no objections existed on the part of the stockholders. The contract could, however, be terminated in advance under certain conditions, for instance by decision of an authorized state body when KOC's operations flagrantly violated the acting law.

It is shown by the documents submitted that GUVD assigned the Premises to KOC in compliance with the stipulations in the Shareholders Agreement. KOC was also duly registered after the assignment had taken place. The circumstances were such that Mr. Sedelmayer had reason to believe that KOC would be able to keep the Premises as long as KOC's operations went on.

However, very soon GUVD's competence to dispose of the Premises was disputed. In the Arbitration Court Ruling of February 26, 1992, it was stated that GUVD did not have such competence and that the state registration of KOC should be declared null and void. In the Court Ruling of February 8, 1996, it was repeated that GUVD did not have the permission to use the Premises as a contribution to KOC's charter capital.

The Tribunal has previously come to the conclusion that, even if GUVD should have made a mistake in contributing its share of KOC's charter capital, this did not concern the investments made by the Claimant and that the Arbitration Court Ruling of February 1992 did not terminate the activities of KOC. It is also a fact that KOC pursued its operations and stayed at the Premises until the sealings took place. A decision on liquidation was not taken until February 8, 1996.

The evidence submitted by the Claimant also gives room for the assumption that KOC's activities were accepted by several authorities in St. Petersburg, including KUGI. When heard before the Tribunal, Mr. Sedelmayer has stated, inter alia, that he was told by KUGI to "go on". The evidence submitted also shows that KUGI intended to succeed GUVD as the Russian partner of KOC.

Mr. Sedelmayer's statement – which, on this point, has been supported by several documents – indicates that, when it finally turned out that KOC could not stay at the Premises, he was told by representatives of Russian authorities that they would try fo find a new building for KOC. He was also offered different sites in St. Petersburg but did not find them acceptable. His statement concerning the state of the substitute buildings has been supported by the document prepared by Mr. Goldes.

Mr. Sedelmayer had, thus, reason to presume that, even if KOC could not keep the Premises, KOC would have access to other equivalent buildings. That means that, in principle, the rental value would have been the same.

On February 8, 1996, the St. Petersburg City Court ordered the liquidation of KOC. In the Tribunal's mind, it has not been shown that the liquidation was due to any fault committed by the Claimant. The liquidation order, thus, does not affect the Claimant's right to obtain compensation for loss of the right to use the Premises.

As to the rental value of the Premises, the Tribunal sees no reason to question the valuation made in the document prepared by Ryden, i.e. that the value as at January 29, 1996 was USD 372,000 per annum. The question is, however, if it really can be assumed that the rental value would remain the same until the year 2016. As is stated in the valuation document, the valuation is based, inter alia, on the assumption that the state of the market, levels of values and other circumstances are the same as on the date of valuation. In the Tribunal's mind, there are reasons to doubt if this requisite is fulfilled. It should also be underlined that, even if KOC would have been able to keep the Premises – or any other equivalent buildings –, Mr. Sedelmayer would have had costs for maintenance and similar works.

Another circumstance worth pointing out is that KOC was able to stay at the Premises and conduct its business until the first sealing took place on October 9, 1995, that is about 10 months longer than the period of time (38 months and 21 days) mentioned in the Claimant's calculations.

It should also be kept in mind that the Premises were partly used by Mr. Sedelmayer and his family as their private home. This fact motivates a certain deduction from the rental value when assessing the compensation for loss of the right to use the Premises.

When all the relevant circumstances are taken into account, the Tribunal finds it reasonable that the Claimant is awarded a compensation of USD 1,500,000.

With respect to the claim for compensation for evaluation costs, USD 1,000 and DEM 5,310, there is no evidence showing that these amounts have been paid by the Claimant. Hence, this claim can not be accepted.

The Respondent shall, thus, be ordered to pay in total USD 1,950,000 as compensation for the Claimant's investments in the Premises and loss of right to use the Premises.

3.4 Personal belongings

3.4.1 Positions taken by the Parties

The Claimant has alleged that he bought personal belongings, such as kitchen appliances, clothes and other ordinary house accessories, to be used in St. Petersburg during the period 1991 through 1996. These belongings were, according to the Claimant, partially bought with his credit cards and partly in cash. All of these belongings were left behind by the Claimant when the remaining representatives of KOC were forced to leave the Premises on January 24, 1996.

The Claimant has appreciated that the inventory now mentioned had a total value of USD 88,000 (kitchen equipment USD 11,000, other house appliances USD 54,000 and clothes USD 23,000). The Claimant has, accordingly, claimed compensation with the same amount.

The Respondent has rejected the said claim. The Respondent has alleged that the Claimant has not provided any proof that the items mentioned constitute investments for which compensation is due under the Treaty. Nor is there, according to the Respondent, any evidence of these items being installed in the Premises or having been confiscated.

3.4.2 Evidence submitted by the Parties

The items in question have been specified in certain lists submitted to the Tribunal. The Claimant has also submitted a chronological list of personal property bought with credit cards during the period 1991–1996. According to this list, the cost for purchases with credit cards amounted to USD 29,072.82 and CHF 18,252.15.

The Claimant has, moreover, submitted a number of Statements of Account concerning his personal credit cards.

The Respondent has not submitted any specific evidence concerning the claim now discussed.

3.4.3 The Tribunal's conclusions

In the Tribunal's mind, there is no need to discuss whether it has been proven that the items listed by the Claimant were actually purchased and brought to St. Petersburg and if they were, all of them, confiscated by the Russian authorities. The Claimant has classified all the items as personal belongings. The articles listed are also such that they, typically, belong to a private household.

It might be assumed that the items in question were to some extent used in connection with KOC's activities. The Tribunal finds, all the same, that the items can not be considered as being so closely related to KOC that they shall be regarded as investments under the Treaty. Thus, the claim for compensation for loss of these articles can not be accepted.

3.5 Some final remarks concerning Compensation for Investments

It follows from what has been stated by the Tribunal that the Respondent shall be ordered to pay a total of USD 2,350,000 as compensation for investments under the Treaty.

With respect to certain assets, for instance vehicles and law inforcement equipment which were never delivered to St. Petersburg, as well as personal belongings, the Tribunal has come to the conclusion that, even if these assets were lost or became useless due to the expropriation, the Claimant is not entitled to compensation under the Treaty. That does not mean that the Claimant is prevented from claiming compensation on another ground. However, the Tribunal finds that it has not competence to examine if compensation on any such ground is justified.

3.6 Interest

3.6.1 Positions taken by the Parties

The Claimant has claimed interest on the compensation awarded at a rate of 30 per cent per annum. The interest should run from November 25, 1996, that is two weeks after the Statement of Claim was submitted, alternatively from the date of the Arbitral Award, until full payment has been made.

As ground for the interest rate claimed, the Claimant has pointed at Article 4(2) of the Treaty. According to the Claimant, it follows from this Article that the interest

rate applied in the Russian Federation is to be applied on compensation under the Treaty, since the expropriation took place in the Russian Federation. Proceeding from the fact that the expropriation was physically effectuated in 1996, the applicable interest rate should be the Russian interest rate applied in 1996. The average interest rate on loans in St. Petersburg during 1996 was 30.1 per cent per annum for loans in USD and 30 per cent per annum on loans in DEM.

Should the Tribunal find that the Treaty is not applicable to this dispute, the Claimant has claimed interest at a rate of 12.18 per cent per annum. This claim is based on generally accepted principles in public international law concerning compensation for expropriated property. According to the Claimant, it follows from such principles that penalty interest shall be calculated in accordance with the law of the country in which the expropriation took place, i.e. in this case Russian law. Russian law on penalty interest refers to the interest rate valid at the creditor's permanent residence, that is Germany.

The Respondent has stated that, since the Claimant has not substantiated the legality of his claims, he is not entitled to any interest. If the Tribunal chooses to proceed from Article 395 of the Civil Code of the Russian Federation, the latter specifies the interest rate as the rate accepted in the creditor's country. In this case, the SGC International alone can be a creditor, and consequently, interest should accrue at the rate effective in the USA. The interest rate allegedly effective in the Russian Federation has been put at 30 per cent, which is a gross overstatement.

3.6.2 Evidence submitted by the Parties

The Claimant has submitted a Certificate issued by the Commercial Agricultural and Industrial Bank of St. Petersburg, dated October 15, 1997. According to this Certificate, the average interest rate on foreign-currency credits granted by the bank during 1996 amounted to 30.1 per cent for credits in USD and 30.0 per cent for credits in DEM.

The Claimant also has submitted a list prepared by the German Bundesbank concerning interest on loans and on credit balances. In this list it is stated, inter alia, that, with regard to credit to be repaid in instalments of DEM 10,000 to 30,000, the effective average interest per year in January 1996 was 12.18 per cent and the span of interest rate 10.56–13.97 per cent. When it comes to current account credits, amounting to DEM 1–5 million, the effective average interest per year in January 1996 was 8.15 per cent and the span of interest rate 6.50 – 10.75 per cent.

3.6.3 The Tribunal's conclusions

In Article 4(2) of the Treaty it is stated, among other things, that compensation due to measures of expropriation shall include interest at the rate that is in effect in the territory of the respective Contracting Party, accrued until the date of payment.

In the Tribunal's opinion, it follows from the stipulation quoted that the Claimant is entitled to interest on such amounts of compensation as shall be paid by the Respondent.

As to the rate of interest, Article 4(2) must be interpreted so that interest shall be calculated according to the rate applicable in the country where the expropriation took place. Since, in the present case, the measures of expropriation were taken in the Russian Federation, the rate which was in effect in Russia at the time of the expropriation is the relevant one.

In the Tribunal's opinion, the meaning of the phrase "the rate which is in effect" is not quite clear. As has been alleged by the Claimant, the phrase may be interpreted so that it refers to the interest rate which is in fact applied in the country in question. Another possible interpretation, which is in line with the Respondent's, is that the relevant rate of interest is the rate which shall be applied under the laws of the country where the expropriation took place.

If the latter interpretation is accepted, that would mean that the default interest rate

as set forth in Article 395 (1) of the Civil Code of the Russian Federation, part I, is applicable. In the said Article it is stated that the amount of interest shall be determined as the rate of bank interest on the day of performance of the monetary obligation or respective part thereof which existed at the place of residence of the creditor, and if the creditor is a juridical person, at the place of its location. In the event of the recovery of a debt in a judicial proceeding the court may satisfy the demand of the creditor by proceeding from the bank interest on the date of presenting the suit or on the date of rendering the decision. Since, in the present case, the creditor is resident in Germany, the relevant rate of interest would be the rate applied there.

In the present case, compensation shall be paid in another currency than rubles. It seems, then, less appropriate to apply the rate of interest which is used in Russia. It must be assumed that such interest rate is adapted to Russian currency.

In view of what has now been said, the Tribunal finds that the second alternative described above shall be chosen. The rate of interest which was used in Germany at the time in question shall, thus, be applied. When taking into account what is stated in the list prepared by the German Bundesbank and the amount of money which has to be paid, the Tribunal finds that the interest rate shall be 10 per cent.

The Treaty is silent on the question when interest shall start running. The Tribunal finds, however, that the date mentioned by the Claimant as his first alternative is consistent with what is said in the above-mentioned Russian law provision. Interest shall, thus, start running from November 25, 1996.

3.7 Costs

Pursuant to Articles 9(5) and 19(4) of the Treaty each party to an arbitration shall bear the cost incurred by its member of the Arbitral Tribunal as well as the costs of its representation in the proceeding before the Arbitral Tribunal. It also follows from the said Articles that the cost of the Chairman of the Tribunal and the remaining costs shall be borne in equal parts by the parties.

The Claimant is, thus, liable for the costs incurred by the arbitrator appointed by him, Dr Wachler, while the Respondent is liable for the costs incurred by Professor Zykin. As to the costs of the Chairman and other remaining costs, they shall be borne in equal parts by the Claimant and the Respondent.

The Tribunal has requested the Parties to pay security for the arbitration costs in the amount of SEK 700,000 each. The Claimant has paid SEK 1,200,000 and the Respondent SEK 200,000. Taking into account the said payments, the total costs for the arbitration and the liability of each party, the Tribunal finds it appropriate to order the Respondent to pay SEK 495,000 to the Claimant.

VI. THE AWARD

1. The Russian Federation shall pay to Mr. Franz J. Sedelmayer an amount of USD 2,350,000 as well as interest thereon at a rate of 10 per cent per annum from November 25, 1996 until full payment is made.

2. Mr. Sedelmayer and The Russian Federation shall bear their own litigation costs.

3. The compensations to the Arbitrators and the Secretary are determined as follows:

Justice Staffan Magnusson a fee of SEK 450,000 and compensation for costs amounting to SEK 10,000,

Dr. Jan Peter Waehler a fee of SEK 300,000 and compensation for costs amounting to SEK 44,967,

Professor Ivan S. Zykin a fee of SEK 300,000 and compensation for costs amounting to SEK 63,606, and

Mr. Håkan Sandesjö a fee of SEK 120,000 and compensation for costs amounting to SEK 100,346.

4. Mr. Sedelmayer shall bear the fee and costs of Dr. Waehler, as well as half of the fees and costs of Justice Magnusson and Mr. Sandesjö, in total SEK 685,140.

5. The Russian Federation shall bear the fee and costs of Professor Zykin, as well as half of the fees and costs of Justice Magnusson and Mr. Sandesjö, in total SEK 685,140.

6. The Russian Federation shall pay SEK 495,000 to Mr. Sedelmayer as regards arbitration costs.

If a party is not satisfied with the decision concerning compensation to the arbitrators and the secretary, an action may be brought to Stockholms tingsrätt, Stockholm, within 60 days after the date on which the party received the award.

Staffan Magnusson

Jan Peter Wachler

dissenting opinion

Ivan S. Zykin

Håkan Sandesjö

Appendix 1

Arbitration case
Mr. Franz Sedelmayer v. The Russian Federation
through the Procurement Department of
the President of the Russian Federation

Dissenting Opinion of Arbitrator Prof. Ivan S. Zykin

1. Is the Claimant an Investor under the 1989 Investment Treaty?

One of the major issues here is whether the Claimant may enjoy the protection under the Treaty with respect to investments made by SGC International, a legal entity incorporated in the U.S.A.. The Claimant maintains that such protection should be granted as he *de facto* controls this entity, and the control theory leads to the piercing of SGC International's corporate veil and to putting the *de facto* investor, i.e., the Claimant, in the focus.

It may be noted in general that the meaning attributed to the so-called "control theory" may be different in various instances and this circumstance should be taken into account when a reference to this theory is made.

In support of his position that the "control theory" is widely recognized, the Claimant referred, in particular, to the decision rendered in the ELSI case by a chamber of the International Court of Justice in 1989 and to a number of publications on the subject. Most of this evidence deals with a diplomatic protection of company members by the relevant state. The Claimant is not a state in our case, but a private person. The presented publications also discuss the problem in general without paying attention to corresponding approaches existing in Russia and Germany.

Since the claim is based on the 1989 bilateral Investment Treaty between these two countries, its provisions are of decisive importance. The real question is not whether the "control theory" in its various meanings is known in international public law, national laws and legal doctrine, the question is whether it is accepted in the 1989 Treaty in the sense attributed to this theory by the Claimant.

Item 3 of the Protocol to the 1989 Treaty envisages that an investor of one Contracting State may be entitled to compensation if the other Contracting State interferes with the economic activities of an enterprise in which he is participating, if his investment is significantly reduced by such interference.

The decision in the ELSI case is not a legally binding precedent. This decision is based upon a bilateral international treaty between the U.S.A. and Italy and has other dissimilarities with the present case. In the ELSI case, due to measures taken by Italian authorities with respect to an Italian company, the rights of two American shareholders who wholly owned the capital of the said company have been affected. That gave ground to the U.S.A. to intervene basing its claim on the principles of diplomatic protection of these shareholders.

Even if some parallel may be drawn between the ELSI case and the underlying idea of item 3 of the Protocol to the 1989 Treaty, the factual situation in the present case is quite different.

In this case the Russian participant in the joint venture KOC established in Russia contributed certain premises belonging to the Russian State as his share in the capital. This contribution was made without proper authorization required under the Russian legislation. Afterwards, Russian authorities took some measures (including court decisions) in order to remedy the situation and return the premises to its legal owner. That was primarily the aim as correctly follows from the Award. The Premises were not the Claimant's investments and the measures related to KOC in the first run.

Under item 3 of the Protocol to the 1989 Treaty, the interference with the economic activity of a joint venture may, under certain conditions, give ground to a participant of such joint venture to claim compensation. This provision of the Treaty aims at protecting the rights of investors in the sense of the Treaty. It could not, in our view, be regarded as an acknowledgment of the rights of the so-called "*de facto* investor". Such term is not used in the Treaty, and the concept of "*de facto* investor", which seems rather ambiguous in itself, is not accepted in the Treaty.

Item 3 of the Protocol clearly states that an investor may be entitled to compensation with respect to his investment to an enterprise in which he is participating. It does not matter whether the investor controls this enterprise or not.

The Claimant is not a participant of KOC. In our case, the participant involved is SGC International, an American company. The Award correctly states that "in the present case the nationality of SGC International ... is not in issue. Mr Sedelmayer has admitted that SGC International shall be regarded as an American company ... Consequently, Mr. Sedelmayer has not alleged that SGC International is an investor under the Treaty and he has not put forward his claims on behalf of SGC International. Instead, he is claiming compensation as a natural person."

The real issue is then whether Mr. Sedelmayer as a natural person could seek protection under the Treaty between Russian and Germany, in connection with the investments made by the American company under his control in the joint venture established in Russia.

This issue is quite dissimilar to that in the ELSI case. When dealing with this issue further, we leave aside the assessment of the presented evidence as to whether SGC International was totally under the Claimant's control and whether Mr. Sedelmayer falls under the notion of investor pursuant to art. 1, para 1(c), of the Treaty, as far as his permanent residence (*ständigen Wohnsitz*) is concerned.

The Treaty contains no provisions expressly governing the situation in question. The problem is to determine whether the possibility for the Claimant

to bring a suit in such a case is recognized by the Treaty or not, i.e., whether the Claimant is proper.

We share the observation made by professor M.M. Boguslavskii in his legal opinion of April 1997 that the use of the control criterion when the legal personality of a juridical person is actually disregarded is exceptional in international practice and this criterion is always applied for special (and, we could say, rather limited) purposes.

The use of the control criterion may lead to considerable practical difficulties. When a testimony of professor Ove Bring was heard before the Tribunal, the Chairman asked him, among others, two questions which are relevant here. If under the Investment Treaty between Russia and the U.S.A. an American company claims a compensation and under the 1989 Treaty between Russia and Germany a natural person controlling this company also files a claim for compensation of the same allegedly sustained losses, what the solution is. The answer was that a choice should be made. Consequently, in the opinion of professor Ove Bring, only one claim could be satisfied. It remained unclear, however, in whose favour and how this choice should be made.

The next question dealt with another hypothetical situation where a German company made investments in Russia and this company is totally controlled by a natural person, a German resident. The question was who could claim compensation under the 1989 Treaty in an appropriate case. In the opinion of professor Ove Bring, both the company and the natural person could claim. Here again is unclear who is entitled to compensation. Surely, this compensation could not be awarded twice.

Similar difficulty arises when an investor (a company) files a claim with a local court of the relevant state for compensation in an attempt to remedy a situation created by measures taken by that state, and a person who controls this company resorts to international arbitration under the Treaty. What if a company has several participants and none of them taken separately could control it; should they then be deprived of protection because of that? The above examples are not exhaustive.

The use of the control criterion is definitely not a mere technicality with a limited practical significance. Conclusion of investment treaties between different states has a long history. some countries use this criterion in their treaties and many do not. It would be highly improbable to assume in most cases that in the latter situation it is just an accidental omission. On the contrary, there are grounds to maintain that it is a policy decision lying behind this or that approach.

As shown by the Respondent, neither the model treaty on protection of investments used in Germany, nor the model treaty on protection of investments adopted by the Russian Government embody the control criterion in a sense attributed to it by the Claimant, and these two countries do not usually apply this criterion in their treaties in the field.

The 1989 Treaty between Russia and Germany is not an exception in this respect. This view is clearly supported in a number of publications written in Russia and Germany prior to these proceedings and dealing with the Treaty (see, in particular, Professor Dr. jur. C.-Th. Ebenroth, Dr. jur. B. Bippus Der deutsch-sowietische Investitionsschutzvertrag. - Recht der Internationalen Wirtschaft. - Beilage 5 zu Heft 7/1989. - S. 6, 11; Professor M.M. Boguslavskii "Foreign Investments. Legal Treatment." Moscow, 1996. - P. 67-68 (in Russian); Dr. N.I. Marysheva "On the Legal Status of Foreign Investors." - Soviet Journal of International Law. - 1991. - No. 3-4. - P. 38-40 (in Russian); Dr. I.O. Khlestova. Legislation and International Treaties on Protection of Foreign Investments. - Moscow Journal of International Law. - 1992. - No. 2. - P. 102-103 (in Russian)).

Under the circumstances, it is of great importance to properly take into account how the provisions of the Treaty are understood in the signatory states. The relevant available materials show that the control criterion is not accepted in the Treaty even implicitly. No evidence is presented to the effect that these provisions are understood in the opposite meaning in Russia or Germany.

The Claimant could have made investments personally or through a German company, but, instead, he preferred to act, as explained, for tax reasons through a company of a third state. It seems unlikely that the purpose of the 1989 Treaty between Russia and Germany was to encourage such kind of investments and to offer them protection. Figuratively speaking, encouragement and protection here are two sides of a coin. The application of the control criterion in such a situation would mean that the contracting states are placed under obligations which they have not assumed in accordance with the 1989 Treaty.

The fact that the bilateral investment protection treaty between Russia and the U.S.A. has not yet entered into force could not serve either, in our opinion, as a ground for unjustified widening of the scope of application of another bilateral international treaty.

As to the investments allegedly made by the Claimant personally, the presented evidence is not sufficient, in our view, to come to a conclusion that such investments satisfying the requirements of the Treaty were made.

2. The proper Respondent

The Request for Arbitration of January 15, 1996 filed by the Claimant names the Procurement Department as a Respondent. In the letter of October 10, 1995 the Claimant also asked that very body to appoint its arbitrator. Referring to the presented claim against the Procurement Department, that Department in the letter of May 15, 1996 appointed its arbitrator, indicating that it was done without prejudice to the position of the Procurement Department concerning the claim.

It was at the initial stage that the Procurement Department notified by the letter of March 20, 1996 that it could not be regarded as a contracting party under the 1989 Treaty between Russia and Germany. The Procurement Department repeatedly stated this position in its letters of April 15 and May 27, 1996, and in subsequent submissions.

Nevertheless, in the document of May 3, 1996 entitled "Addition to the Request for Arbitration", the Claimant again indicated the Procurement Department as a Respondent.

In two letters of June 28, 1996 informing of the appointment by the Claimant of legal counsel and a new arbitrator, the Claimant used the heading "Franz Sedelmayer./.the Russian Federation". Referring, however, to the above-mentioned letter of the Procurement Department dated March 20, 1996, the Claimant qualified it as "Respondent's correspondence" and maintained that the Respondent could not state that this entity of the Russian Federation was not a "party" to the 1989 Treaty. A similar heading was used in the request to appoint the presiding arbitrator addressed by the Claimant to the President of the Arbitration Institute of the Stockholm Chamber of Commerce (letter of August 22, 1996).

In the document of September 3, 1996, whereby such appointment was made, the name of the Respondent was indicated as "Presidential Administration, Procurement Department, a Government Entity of the Russian Federation", i.e., in conformity with the Request for Arbitration.

In the Statement of Claim of November 11, 1996 the following is written under the heading "Respondent": "The Russian Federation through its Presidential Administration, Procurement Department". The Claimant explained his position in detail on the issue in question in its submission dated May 30, 1997.

It also appears that all correspondence in this case was delivered to the address of the Procurement Department.

For the sake of clarity, it is worth noting that the Presidential Administration and the Procurement Department are different bodies and the former is not involved in the proceedings. These facts seem to be undisputed between the parties.

The confusion has arisen concerning the proper Respondent and as to whether the Procurement Department is representing the Russian Federation if the latter should be regarded as the Respondent. In our view, this confusion has originated from the Claimant.

During the preparatory arbitration meeting held in Stockholm on April 25, 1997 the Respondent clarified its position on the proper Respondent and on the lack of authority of the Procurement Department to represent the Russian Federation and submitted the legal opinion of professor M.M. Boguslavskii,

dated April 1997, dealing in particular with the same issue. In our view, these comments were made without undue delay.

It is well known that arbitration proceedings have their own, very important specific features as compared to court proceedings. Some procedural irregularities appear to have taken place, as far as the issue in question is concerned, from the point of view of the arbitration procedure in particular.

As follows from the Statute of the Procurement Department (approved by Decree of the President of the Russian Federation of August 2, 1995, No. 797), this Department is not legally identical to the Russian Federation. This conclusion is also supported by the legal opinion of professor M.M. Boguslavskii, dated April 1997. The main function of the Procurement Department is to render financial, logistical and social support to different state bodies and their staff. The powers and duties of the Procurement Department are in no way linked with negotiation of international investment treaties or ensurance of their application. By its status, the Procurement Department could not represent the Russian state in such proceedings.

This conclusion is not prejudiced by the fact that the Procurement Department was among the participants in local court proceedings related to KOC. These international arbitration proceedings under the 1989 Treaty and internal proceedings in a Russian court are based on entirely different legal grounds; the proper parties in these proceedings are not the same either. In our opinion, the involvement of the Procurement Department in the events that occurred prior to the initiation of the arbitration proceedings could serve no basis for determination who is the proper Respondent and whether the Procurement Department is representing the Russian Federation. A possible misunderstanding by the Claimant of these points, when initiating the arbitration proceedings, should not adversely affect the rights of the opposite party, whatever that party is.

The powers of attorney submitted by the representatives of the Procurement Department, who participated in the preparatory arbitration meeting and in the final hearing, authorize them to represent this Department. An oral declaration to that effect was also made by the said representatives who stressed that they represented only the Procurement Department, but neither the Russian Federation nor its President.

In the present case, the arbitration proceedings, in our opinion, were initiated against the improper party - the Procurement Department. Subsequently, the Respondent was changed to the Russian Federation and the Claimant insisted that the Procurement Department represented the new Respondent. As noted above, it was the Procurement Department, but not the Russian Federation, who appointed the arbitrator. This appointment related to the proceedings initiated against the former.

The initial procedural irregularities could have been remedied, if the Russian Federation entered the proceedings, vested in the Procurement Department proper powers and confirmed the previous legal steps of the

Procurement Department as if there were taken in the name and on behalf of the Russian Federation. However, it did not happen.

Obviously, a party initiating arbitration may decide whom to name as a respondent. However, the party substitution could not take place automatically only because the claiming party so wished. The procedural rights of other parties concerned should be safeguarded and a state is not an exception in this respect, if it is such a party. The fundamental right of a party to be offered a possibility to choose an arbitrator is one of these rights. The Russian Federation could not be deprived of such right either.

A proper party, in our view, could not be substituted for an improper party by sending the suit to the initial improper party with an allegation that the latter represented and is representing the new proper party.

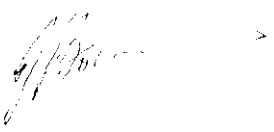
It is either not to the opposite party but to the state concerned that the sovereign right to choose its proper representative in the arbitration proceedings belongs.

It is difficult to ignore the impression that in addition to the notion of the "*de facto* investor" an attempt is made to introduce implicitly the notion of, so to say, a "*de facto* Respondent", which is unacceptable.

In the light of the above, the following conclusions could be made. The arbitration proceedings have been initiated against the improper Respondent. The Procurement Department does not represent the Russian Federation in these proceedings. The Russian Federation could not be regarded as having properly entered the proceedings.

* * *

The foregoing considerations allow, in our view, to conclude that the Tribunal lacks competence to try the case on its merits under the provisions of the 1989 Treaty. Consequently, there is no need to deal with some further issues in this opinion.



Ivan Zykin
Arbitrator

Stockholm, June 26, 1998