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DATE: 21 April 2006

NO. OF PAGES (incl. this): 83

Arbitration V (080/2004): 1. Vladimir Berschader 2. Moïse Berschader ./. The Russian Federation

A copy of the original award has been sent by courier.

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Stockholm, 21 April 2006

Arbitration V (080/2004): 1. Vladimir Berschader 2. Moïse Berschader ./. The Russian Federation

Please find enclosed the Award of the Arbitral Tribunal in the above arbitration.

Upon receiving the Award, please send a written confirmation of receipt to Bengt Sjövall, Mannheimer Swartling Advokatbyrå, Box 1711, 111 87 Stockholm, Sweden.

Yours truly,

Bengt Sjövall
Chairman of the Arbitral Tribunal

cc. Professor Todd Weiler
Professor Sergei Lebedev

ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

VLADIMIR BERSCHADER AND MOÏSE BERSCHADER

V.

THE RUSSIAN FEDERATION

CASE NO. 080/2004

AWARD

Rendered in Stockholm on 21 April 2006

Members of the Tribunal

Advokat Bengt Sjövall

Professor Sergei Lebedev

Professor Todd Weiler

Secretary of the Tribunal

William McKechnie

For the Claimants

Mr. Nigel Blackaby

Mr. Noah Rubins

Freshfields Bruckhaus Deringer

For the Respondents

Mr. Bruno Quint

Mr. Dominique Santacru

Mr. Igor V. Zenkin

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1. Background

1. The Claimants are citizens of Belgium and the sole shareholders of Berschader International S.A. ("BI"), a company organised under the laws of Belgium and engaged in the business of construction and general contracting.

2. According to the Request for Arbitration, in 1994 the Supreme Court of the Russian Federation (the "Supreme Court") issued a public tender for the construction of new court facilities and reconstruction of existing buildings in Moscow. BI participated in the tender process and ultimately won the tender.

3. On 20 December 1994, BI, as Contractor, and the Supreme Court, as Employer-Investor, signed a contract designated BI/VS-I (the "Contract") for the construction and remodelling of the Supreme Court's building complex (the "Buildings").

4. According to the Claimants, BI fulfilled its obligations under the Contract, including the completion of all constructions works, to the satisfaction of the Respondent. The Claimants allege, however, that the Supreme Court accumulated substantial late payments under the Contract resulting in delays in the completion of the project. The Claimants further allege that the Supreme Court failed to pay BI upon the completion of the construction works contemplated under the Contract. BI then exercised its right of retention under the Russian Civil Code to retain possession of the Buildings until outstanding sums had been paid in full.

5. The Claimants further assert that on 29 August 2001 the Administration of the President of the Russian Federation (the "Presidential Administration") issued a letter to BI, purporting to annul the Contract on the grounds of delays to the completion of the construction works.

6. On 21 September 2001, BI notified the Presidential Administration that the action taken by the latter in annulling the Contract amounted to a violation of the Agreement between the Governments of the Kingdom of Belgium and the Grand Duchy of Luxembourg and the Soviet Union on the Encouragement and Reciprocal Protection of Investment of 9 February 1989 (the "Treaty"). Further letters were sent by BI to the Supreme Court and the Cabinet of Ministers of the Russian Federation on 24 September 2001 and the 2 October 2001 respectively.

7. The Claimants allege that on 31 October 2001the Ministry of Internal Affairs of the Russian Federation issued a police order ejecting all personnel of BI and its security service from the project site. The Supreme Court is alleged to have subsequently taken physical possession of the Buildings and moved its activities there.

8. Negotiations between BI and the Respondent ensued and resulted in Supplemental Agreement No. 2 of 24 December 2001 (the "Supplemental Agreement"). In the Supplemental Agreement, the Respondent and BI agreed that the Supreme Court owed US $5,673,763 to BI (the "Agreed Debt"). On 29 December 2001, the Respondent paid US $341,487 to BI in partial settlement of this sum. Despite further negotiations between BI and the Respondent, the Claimants allege that no further payment has been made by the Respondent.

9. On 4 July 2002, the Moscow Arbitrazh Court revoked BI's construction licence.

10. On 4 March 2003, BI was placed in bankruptcy and is currently under the supervision of a receiver pending the outcome of reorganisation proceedings in Belgium.

2. The proceedings

2.1 Request for arbitration and appointment of arbitral tribunal

11. On 26 August 2004, the Claimants submitted a Request for Arbitration to the Arbitration Institute of the Stockholm Chamber of Commerce (the "Institute") in reliance upon Article 2 and Article 10 of the Treaty.

12. In the Request for Arbitration, the Claimants seek the following relief:

i. a declaration that the Respondent has breached Articles 2, 4(1), 4(2) and 5 of the Treaty;
ii. compensation from the Respondent in the amount of US$13,287,147, converted into euros at the most favourable rate in force during the period 24 December 2001 to the date of payment;
iii. interest on US$13,287,147 from 24 December 2001 until the date of payment at the rate of 1/300 of the re-financing rate of the Central Bank of the Russian Federation per day, compounded quarterly;
iv. any other losses suffered as a direct result of the Respondent's breaches of the Treaty;

13. In the Request for Arbitration, Claimants further notified the Institute of the appointment of Professor Todd Weiler as arbitrator.

14. On 15 September 2004, the Respondent submitted a response to the Claimants Request for Arbitration to the Institute. In the response, the Respondent raised objections to the jurisdiction of the Institute.

15. In a letter to the parties, dated 4 November 2004, the Institute informed the Parties that the Institute had found that it was not clear that it lacked

jurisdiction over the dispute and appointed Professor A.S. Komarov as arbitrator on behalf of the Respondent.

16. On 15 November 2004, Professor Komarov resigned. On 26 November 2004, the Institute notified the parties that, due to Professor Komarov's resignation, the Institute was appointing Professor S.N. Lebedev as arbitrator on behalf of the Respondent.

17. On 4 November 2004, the Institute appointed Advokat Bengt Sjövall as Chairman of the arbitral tribunal ("Chairman") and referred the case to the arbitral tribunal (the "Tribunal"). The Institute also fixed the advance on costs at €255,000 in accordance with Article 14 of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC Rules").

18. The Claimants paid their share of the advance on costs in the amount of €127,000. In a letter dated 17 December 2004, the Respondent refused to pay its share on the grounds that the Tribunal has no jurisdiction over the dispute. Accordingly, the Claimant discharged the remaining portion of the advance on costs on 17 December 2004.

2.2 Challenge to the impartiality of Professor Lebedev

19. On 23 December 2004, the Claimants submitted a challenge to the appointment of Professor Lebedev.

20. In a letter to the Institute, dated 27 December 2004, the Respondent rejected the Claimant's challenge and objected to the removal of Professor Lebedev.

21. In a letter to the Institute on 8 January 2005, Professor Lebedev also objected to his removal.

22. On 31 January 2005, the Institute rendered its decision on the challenge to the appointment of Professor Lebedev. The Institute found that there were no grounds for removing Professor Lebedev and the Claimant's challenge was, accordingly, dismissed.

2.3 Decision on language of the arbitration

23. On 15 February 2005, the Tribunal issued the First Procedural Order requesting, *inter alia*, that the Claimants submit a Statement of Claim not later than 15 April 2005, that the Respondent submit a Statement of Defence not later than 15 June 2005. The parties were also ordered to forthwith present any views they may have on the language to be used in the arbitration.

24. In a letter dated 22 February 2005, the Respondent stated its view that the Russian language should be the language of the arbitral proceedings. In a letter dated 25 February 2005, the Claimants responded and stated their preference that English be designated as the sole language for the arbitral proceedings.

25. In two further letters dated 28 February 2005 and 1 March 2005, the Respondent further developed its view on the language to be used in the arbitration. In a letter dated 2 March 2005, the Claimants responded to the views contained in the Respondent's letters dated 28 February 2005 and 1 March 2005 and reaffirmed its position as set out in the letter dated 25 February 2005.

26. In a decision rendered in Stockholm on 16 March 2005, the Tribunal held that the English language was to be designated as the official working language of the arbitration, but that each party was entitled to submit written arguments and supporting evidence in the Russian language and to make oral arguments in the Russian language, upon the condition that translation and interpretation into English was provided where necessary.

2.4 Challenge to the Chairman's impartiality

27. On 15 April 2005, the Claimants submitted their Statement of Claim.

28. On 15 June 2005, the Respondent submitted its Statement of Defence. The Statement of Defence contained a challenge to the jurisdiction of the Tribunal and a challenge to the impartiality of the Chairman. The Statement of Defence did not address the substance of the dispute

29. On 21 June 2005, the Chairman sent a letter to the Institute contesting the grounds for challenging his impartiality.

30. On 22 June 2005, the Claimants sent a letter to the Institute expressing their satisfaction with the independence and impartiality of the Chairman.

31. On 1 July 2005, the Institute issued a decision dismissing the Respondent's challenge to the impartiality of the chairman of the Tribunal.

2.5 Jurisdictional challenge

32. On 28 July 2005, the Tribunal issued the Second Procedural Order requiring the Respondent to submit a short Statement of Defence on the merits by 19 August 2005. The Claimants were also requested to submit any pleadings they wished to make with respect to the jurisdictional challenge by 19 August 2005. Counsel for the Respondent were further requested to submit a duly executed power of attorney authorising them to represent the Respondent.

33. On 19 August 2005, the Claimants submitted a Reply to the Statement of Defence on Jurisdiction.

34. On 9 September 2005, the counsel for the Respondent submitted powers of attorney authorising them to represent the Respondent in the arbitration.

35. On 13 September 2005, the Tribunal issued the Third Procedural Order requesting that the Respondent submit any pleadings it wished to make in response to the Claimants' reply to Statement of Defence on Jurisdiction by 30 September 2005. The Tribunal further invited the parties to attend an oral hearing on the jurisdictional challenges on 19 October 2005.

36. On 14 September 2005, the Claimants sent a letter to the Tribunal challenging the validity of the powers of attorney produced by counsel for the Respondent.

37. On 30 September 2005, the Respondents submitted their response to the Claimant's reply to the Statement of Defence.

2.6 Oral hearing on jurisdiction

38. On 19 October 2005, an oral hearing into the jurisdictional challenges raised by the Respondent was held at Mannheimer Swartling Advokatbyrå, Norrmalmstorg 4, Stockholm. The hearing proceeded in accordance with a schedule which had previously been agreed between the Tribunal and the parties. Representatives of both parties were present at the hearing, together with their respective counsel who made presentations to the Tribunal.

39. During the course of the hearing, the Tribunal issued a third procedural order granting the Claimants an opportunity to submit, by 2 November 2005 at the latest, any further written submissions or evidence they had in relation to (i) the Claimants' correspondence with the Belgian liquidator and the liquidator's knowledge of the present arbitration proceedings, and (ii) the particular Bilateral Investment Treaty ("BIT") which the Claimants wish to invoke under

the Most Favoured Nation ("MFN") clause. The Respondent was granted until 16 November 2005 to submit a response to the Claimants' submissions.

40. On 24 October 2005, the Tribunal sent a letter to the parties confirming the procedural order issued during the course of the hearing.

41. On 2 November 2005, the Claimants duly submitted their final submissions and evidence on the issues set out in paragraph 19 above.

42. On 8 November 2005, the Tribunal received a letter from counsel for the Belgian receiver of BI addressing certain issues relating to the bankruptcy of BI. This prompted the Claimants and the Respondent each to send letters to the Tribunal on 15 and 16 November 2005 respectively. On 16 November 2005, the Respondents also submitted their Post-Hearing Submission and, on 17 November 2005, the Tribunal received a further letter from counsel for the Belgian receiver of BI.

43. In response to this line of correspondence, the Tribunal issued its Fifth Procedural Order on 22 November 2005 requesting the Parties to formally submit any evidence which they wished to present to the Tribunal with regard to the bankruptcy proceedings of BI.

44. This evidence was submitted by the Respondent on 2 December 2005 and by the Claimants on 12 December 2005. On 22 December 2005, the Respondent made its final submissions on the evidence presented by the Claimants.

45. On 23 December 2005, the Tribunal issued a decision on evidence dismissing the evidence presented by the Respondent and the Claimants pursuant to the Fifth Procedural Order on the grounds that such evidence was of no relevance to the question of the Tribunal's jurisdiction.

46. Following the oral hearing, the members of the Tribunal deliberated by various means of communication, including a meeting in Stockholm on 20 October 2005.

3. Terms of the Treaty

47. The Treaty was signed in both Russian and French with both texts being equally authoritative. The following is an unofficial English translation of the Treaty.

TREATY

BETWEEN THE GOVERNMENTS OF THE KINGDOM OF BELGIUM AND THE GRAND DUCHY OF LUXEMBOURG, AND THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS ON THE PROMOTION AND MUTUAL PROTECTION OF INVESTMENTS

THE GOVERNMENTS OF THE KINGDOM OF BELGIUM AND THE GRAND DUCHY OF LUXEMBOURG, on one side

and

THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS, on the other side

DESIRING

to create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party,

CONSCIOUS

of the positive effect that the present Treaty can have on fostering business contacts and strengthening trust in the area of investments,

HAVE AGREED AS FOLLOWS:

ARTICLE 1

1. For the purposes of this Treaty:

1.1 The term "investor" means:

1.1.1 any natural person, who, in accordance with Soviet, Belgian, or Luxembourg legislation, is recognised as a citizen of the Soviet Union, Belgium or Luxembourg respectively, and who is entitled to make investments in the territory of the other Contracting Party in accordance with its country's laws;

1.1.2 any legal entity formed in accordance with Soviet, Belgian or Luxembourg legislation, and incorporated in the territory of the Soviet Union, Belgium or Luxembourg respectively, which is entitled to make investments in the territory of the other Contracting Party in accordance with its country's laws.

1.2 The term "investment" means any kind of asset invested by investors of one Contracting Party in the territory of the other Contracting Party in accordance with its legislation, and in particular:
1.2.1 property (buildings, fixtures, equipment, and other items of material value);
1.2.2 financial credits, as well as shares, and other forms of participation in companies and enterprises, and related debts;
1.2.3 rights of claim related to any performance having an economic value;
1.2.4 intellectual property rights, including patents, brand names, registered trademarks, patterns and models, copyrights, as well as technology and know-how.

The term "investment" also means indirect investments made by investors of one of the Contracting Parties in the territory of the other Contracting Party by the intermediary of an investor of a third state.

No changes in the legal form in which the initial investments or re-investments were made shall affect their definition as "investments" under the present Treaty.

ARTICLE 2

Each Contracting Party guarantees that the most favoured nation clause shall be applied to investors of the other Contracting Party in all matters covered by the present Treaty, and in particular in Articles 4, 5 and 6, with the exception of benefits provided by one Contracting Party to investors of a third country on the basis
- of its participation in a customs union or other international economic organisations, or
- of an agreement to avoid double taxation and other taxation issues.

ARTICLE 3

Each Contracting Party shall promote investments by investors of the other Contracting Party in its territory, and shall admit such investments in accordance with its legislation.

ARTICLE 4

1. Each Contracting Party shall accord the investments made by investors of the other Contracting Party in its territory fair and equitable treatment, to the exclusion of all arbitrary and discriminatory measures that could hamper the management, maintenance, enjoyment, or liquidation of such investments.
2. Other than measures necessary for the maintenance of public order, such investments shall benefit from constant security and protection.

ARTICLE 5

Investments made by investors of one Contracting Party in the territory of the other Contracting Party may not be expropriated, nationalized, or subjected to any other measures having a similar effect, except when such measures are taken for public interest, according to legal process, and are not discriminatory.

In addition, they must be accompanied by payment of compensation, the amount of which must correspond to the real value of the investments in question immediately before the date the measures were taken or made public.

Such compensation shall be paid to the investors without delay, in freely convertible currency, and transferred without delay.

ARTICLE 6

1. Each Contracting Party shall guarantee to investors of the other Contracting Party free transfer abroad of payments in freely convertible currency in connection with their investments, and in particular:

1.1. the amounts of initial investment and additional sums for maintaining or increasing the investment;
1.2. returns from the investment;
1.3. funds in repayment of borrowings related to an investment;
1.4 proceeds due to the investor from the sale or liquidation of all or any part of an investment;
1.5. compensation provided for in Article 5 of the present Treaty.

2. Transfer of payments specified in paragraph 1 of this Article shall be made at the rate of exchange applicable on the date of transfer, pursuant to the exchange regulations in force in the state in whose territory the investment has been made.

3. Each Contracting Party shall take all measures necessary to ensure that, upon fulfilment of formal procedures required by its country's laws, the transfers will be made without delay and without any additional costs, apart from the usual transfer taxes and fees.

ARTICLE 7

1. If, in accordance with a legal or contractual guarantee issued for non-commercial risks connected with an investment, an investor of one Contracting Party is paid compensation, then the other Contracting Party recognizes that by virtue of subrogation the insurer is entitled to exercise the right of the compensated investor, not exceeding the share of the risk that was actually covered by the guarantee and paid to the investor.

2. In accordance with the guarantee issued in regard to the corresponding investment, the insurer is granted all the rights that could have been exercised by the investor had he not been subrogated by the insurer; in such a case, the rights of the insurer may not exceed those of the investor.

ARTICLE 8

1. The present Treaty shall not prevent investors from benefiting from more favourable terms provided by the laws applicable to them in the country in which the investments are made, or by international treaties concluded by the Contracting Parties at present or in the future.

2. Investors of one Contracting Party may enter into separate agreements with investors of the other Contracting Party; the provisions of such agreements, however, shall not be inconsistent with the present Treaty or the laws of the Contracting Party in whose territory the investment is made.

ARTICLE 9

1. Any dispute between the Contracting Parties concerning the interpretation or implementation of this Treaty shall, as far as possible, be resolved by diplomatic means.

2. If the dispute cannot be resolved by the means stipulated in clause 1 of this Article, it shall be submitted to the consideration of a joint committee made up of representatives of the

Contracting Parties. This committee shall convene within the shortest possible time at the request of one of the Contracting Parties.

3. If the joint committee fails to resolve the dispute within six months after the beginning of negotiations, upon the request of either Contracting Party it shall be submitted to an arbitral tribunal.

4. Such an arbitral tribunal shall be constituted for each individual case in following way: each Contracting Party shall appoint one member of the arbitral tribunal; the two members shall then elect a national of a third state as chairman of the said tribunal. The two members shall be appointed within three months, and the chairman within four months from the day one Contracting Party notifies the other Contracting Party if its intention to submit the dispute to the arbitral tribunal.

5. If the deadlines stipulated in clause 4 are not met, either of the Contracting Parties is entitled to invite the Secretary General of the Organization of the United Nations to make the necessary appointments.

6. The arbitral tribunal shall make its decision on the basis of the provisions of the present Treaty, as well as on the commonly accepted principles and norms of international law.

7. The arbitral tribunal shall set its own rules of procedure.

8. The arbitral tribunal shall reach its decision by a majority of votes. Decisions shall be final and binding on the Contracting Parties.

9. Each Contracting Party shall bear the costs of its own member of the tribunal and of its representation in the arbitral proceedings. The cost of the chairman and the remaining costs shall be borne in equal parts by the Contracting Parties.

ARTICLE 10

1. Any dispute between one Contracting Party and an investor of the other Contracting Party concerning the amount or mode of compensation to be paid under Article 5 of the present Treaty shall be the subject of a written notice, accompanied by a detailed memorandum, to be submitted by the investor to the Contracting Party involved in the dispute. Whenever possible, the parties to this dispute shall endeavour to settle amicably and to their mutual satisfaction.

2. If such a dispute has not been settled in this way within a period of six months from the date of the written notification mentioned in paragraph 1 of this Article, it shall be submitted at the investor's choice to:
2.1 The Arbitration Institute of the Stockholm Chamber of Commerce, or
2.2 An "ad hoc" arbitration tribunal established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

3. The arbitration body shall reach its decision based on:
3.1 the terms of the present Treaty;
3.2 the national law of the Contracting Party on whose territory the investment is made, including the rules relative to conflicts of laws;
3.3. the commonly accepted rules and principles of international law.

4. The decisions of the arbitration tribunal shall be final and binding on both parties to the dispute. Each Contracting Party undertakes to comply with such decisions in accordance with its national laws.

ARTICLE 11

Either Contracting Party may invite the other Contracting Party to hold consultations in order to review the application or interpretation of the present Treaty.
The other Contracting Party shall take all measures necessary render such consultations possible.

ARTICLE 12

The present Treaty shall apply to all investments made in the territory of one Contracting Party by investors of the other Contracting Party after 1 January 1964.

ARTICLE 13

1. The present Treaty shall enter into force thirty days after the Contracting Parties have notified one another of the completion of all relevant internal procedures required in their respective states. The present Treaty shall remain in force for a period of fifteen years. Unless any of the Contracting Parties gives written notice of its intention to terminate the present Treaty at least twelve months before its expiration date, the present Treaty shall be prorogated automatically until either Contracting Party shall have given written notice if its intention to terminate this Treaty to the other Contracting Party.
The notice comes into effect twelve months from the date it was received by the other Contracting Party.

2. Investments made prior to the date of termination of the present Treaty shall be subject to its provisions for a further period of fifteen years from that date of expiration.

In confirmation of which, the undersigned duly authorized representatives signed the present Treaty.

Signed in Moscow on 9 February 1989, in three copies in both Russian and French, all text being equally authoritative.

48. The Protocol to the Treaty provides for the following interpretation to be given to Article 2 of the Treaty.

"The Union of Soviet Socialist Republics accords, in its territory, to investors from the Kingdom of Belgium and the Grand Duchy of Luxembourg treatment at least equivalent to that accorded to investors from countries that are members in the Organization of Economic Cooperation and Development on the date this Protocol was signed."

4. Submissions of the parties on jurisdiction

4.1 Respondent's objections to jurisdiction

49. The Respondent's challenge to the jurisdiction of the Tribunal may be summarised under the following five principal arguments:

a. The Claimants have not observed the pre-arbitration settlement procedure provided for under Article 10.1 of the Treaty;
b. The Claimants have not made "investments" within the meaning of Article 1.2 of the Treaty;
c. The Claimants are not "investors" within the meaning of Article 1.1 of the Treaty;
d. The Claimants' claim does not fall within the scope of the arbitration clause contained in Article 10 of the Treaty; and
e. The Claimants' claim constitutes a fraud on BI.

4.1.1 The Claimants have not complied with pre-arbitration procedures

50. The Respondent has submitted that the case submitted by the Claimants cannot be decided by the Tribunal before the pre-arbitration settlement procedures provided for under Article 10 of the Treaty have been observed. The Respondent maintains, in particular, that the Tribunal may only consider the case if a detailed written notice has been submitted by the investor to the State and such written notice has been accompanied by a detailed memorandum.

51. In this particular case, it is argued that the Claimants themselves have not submitted any written notice to the Respondent. The letters, upon which the Claimants rely as written notices fulfilling the Treaty requirements, are said to have been sent by the company BI and not by the Claimants in their separate capacity as investors. The Respondent further contends that the company BI cannot be considered as a representative of the Claimants for this purpose.

52. Moreover, the Respondent contends that the letters relied upon by the Claimants have not been duly served on the Respondent. The letters are said to

have been sent not to the Respondent, but rather to separate governmental bodies of the Russian Federation. The Respondent further maintains that none of these governmental bodies were appointed by the Respondent as a representative for conducting negotiations with BI.

53. In reliance upon Article 16 of the European Convention on State Immunity, the Respondent insists that notice of a dispute can only be deemed properly served upon a defendant State if such notice is sent directly through the diplomatic channel to the Ministry of Foreign Affairs. In disputes involving States, the Respondent maintains that strict adherence to the procedural rules on service is of great importance. In this context, the Respondent argues that the Claimants' attempted notifications have been made in violation of the principle of sovereign equality of states and respect for the rights inherent in sovereignty.

54. Finally, the Respondent argues that the notices sent by BI cannot constitute notices of this dispute under Article 10 of the Treaty since the dispute between BI and the Respondent is different from the current dispute between the Claimants and the Respondent. As an example of the differences between the two disputes, the Respondent alleges that BI has certain tax liabilities which it owes to the Russian Federation and which the Respondent could seek to recover as a counter-claim in any dispute with BI.

4.1.2 The Claimants have not made investments within the meaning of the Treaty

55. The Respondent argues that Article 1.2 of the Russian language text of the Treaty speaks of *kapitalovlozhenie* and *vlozhit* which terms restrict qualifying investments to "capital investments" in Russian. Capital investments (*kapitalovlozhenie*), according to the Respondent, are to be distinguished from "investments" and comprise of property assets which must be contributed to the charter capital of a joint venture company in accordance with the legislation

of the Russian Federation. The Respondent submits that these criteria have not been satisfied in the instant case.

56. The Respondent maintains that none of the investments relied upon by the Claimants in the instant case can be considered as property assets which "investors of one Contracting Party contribute in the territory of another Contracting Party" in accordance with Article 1.2 of the Treaty.

57. The Respondent concedes that the French text of the Treaty does not contain the same limitation on the term "investment" as the Russian text establishes. Since both texts are of equal legal force, the Respondent argues that the meaning which best reconciles the texts, having regard to the object and purpose of the Treaty must be adopted in accordance with Article 33 of the Vienna Convention on the Law of Treaties of 1969. The Respondent submits that the best way to reconcile both texts would be to choose the more restrictive Russian definition of the term "investment".

58. The Respondent further points out that Article 1.2 of the Treaty refers to investments made in accordance with the laws of the host State. The Respondent contends that this reference means that the Treaty only grants protection to capital investments made in accordance with the laws of the Russian Federation. The Respondent argues that since BI's construction licence was revoked by the Arbitration Court of the City of Moscow on the grounds of violation of Article 9 of the Federal Law of the Russian Federation, the investments relied upon by the Claimants are illegal and are not encompassed by Article 1.2. of the Treaty.

4.1.3 The Claimants are not investors within the meaning of the Treaty

59. The Respondent submits that the Claimants cannot be considered "investors" within the meaning of Article 1.1 of the Treaty. The Respondent argues that the

Claimants as physical persons did not implement any capital investments in the territory of the Russian Federation.

60. The Claimants' acquisition of shares in BI was performed in the territory of Belgium and hence cannot be considered as a capital investment in the territory of the Russian Federation. The Contract was concluded by BI and not by the Claimants. The adjusted debt is owed to BI and not to the Claimants and the right of retention in the Buildings is that of BI's and not the Claimants'.

61. The Respondent argues that the protection offered to indirect investments under the Treaty is limited to the second paragraph of Article 1.2, whereby the term investment is stated to include indirect investments made by investors from one of the Contracting Parties in the territory of the other Contracting Party by the intermediary of an investor of a third state. Accordingly, if capital investments had been implemented by the Claimants through a company of a third state, the Claimants would be considered investors under the terms of the Treaty. The Respondent argues that the reason that investments carried out by investors through a company of their home state are not covered by the Treaty is that the Treaty affords protection to the company itself in such instances. In other words, the investors' interests are protected by the fact that the company can rely upon the Treaty and there is, hence, no need for the investors themselves to be able to rely upon the Treaty. This is to be contrasted with the case of investments implemented through a third state intermediary where such intermediary has no right to rely upon the Treaty.

4.1.4 The claims cannot be subject to Treaty arbitration

62. The Respondent submits that only disputes as to the amount or mode of compensation for an act of expropriation under Article 5 of the Treaty may be submitted to arbitration under Article 10 of the Treaty and that the issue of whether or not an act of expropriation took place is to be decided by a Russian

arbitration court. The Respondent argues that this conclusion arises clearly from the express wording of Article 10.1 of the Treaty.

63. The Respondent contends that the Soviet Union proceeded on the basis that the question of the presence or absence of an act of expropriation must in every particular case be decided by the national court of the state in the territory of which the expropriation was alleged to have taken place. The Respondent maintains that this was a point of principle of the Soviet Union and relies upon the dispute settlement provisions of all the treaties concluded by the Soviet Union in support of this contention.

64. The Respondent further contends that the MFN clause contained in Article 2 of the Treaty cannot encompass the dispute settlement provisions of the Treaty.

65. The Respondent relies upon the text of the Protocol to the Treaty in this regard and maintains that, in accordance therewith, the scope of the MFN treatment is limited to treatment granted to states which were OECD members as of 9 February 1989. As of 9 February 1989, the Soviet Union had no Treaties on the protection of capital investments with any of the OECD member states and, accordingly, the provisions of other treaties on the protection of capital investments between the Soviet Union and other states cannot be incorporated into the Treaty.

66. The Respondent also maintains that regard must be had to the phrase "[i]n the territory of the Soviet Union" as contained in the Protocol to the Treaty. The Respondent contends that this phrase clearly indicates that any attempt to expand the scope of implementation of the Protocol is limited to the territory of the Soviet Union or, more particularly, to those treaties on protection of capital investments that were signed by the Soviet Union. In this context, the Respondent argues that the Claimant is not entitled to rely on the provisions of the BIT entered into between Norway and the Russian Federation, since this

treaty relates not to the territory of the Soviet Union but rather to the much smaller territory of the Russian Federation.

67. Moreover, the Respondent argues that, under the terms of the Contract, it is the International Commercial Arbitration Court at the Chamber of Commerce and Industry at the Russian Federation (the "Russian Arbitration Court") which has jurisdiction to hear this particular dispute and that the activities contemplated by the Contract do not fall within the scope of the Treaty. The Respondent claims that where the Russian Arbitration Court decides that the dispute concerning compulsory expropriation constitutes a dispute arising out of the Contract, such dispute is to be settled by the Russian Arbitration Court and not this Tribunal.

4.1.5 The Claimants' claim constitutes a fraud on BI

68. The Respondent further points out that BI is incorporated in Belgium and has every possibility to bring an action under the Treaty and under the Contract to which it is a party. The Respondent maintains that, since the company is in bankruptcy, its receiver has full powers and authority to bring such an action on behalf of the company. Such action, if successful, would benefit all of the company's creditors and shareholders and not only the Claimants.

69. The Respondent submits that the claims presented by the Claimants in this arbitration are not personal, but are rather those of BI. The Respondents argues that under Belgian law only BI, as duly represented by its bankruptcy receiver, is entitled to bring the present claims against the Respondent. The Respondent, therefore, argues that by bringing this claim in lieu of the company the Claimants are committing a fraud under Belgian bankruptcy law and under international public order.

4.2 Claimants' submissions on jurisdiction

4.2.1 Claimants have complied with pre-arbitration procedures

70. The Claimants argue that they have provided three notices of dispute, each of which satisfied the requirements of Article 10 of the Treaty. On 21 September 2001, the Claimants are said to have sent a letter to the Presidential Administration through BI, giving notice that the action taken by the Presidential Administration in annulling the Contract amounted to a violation of the Treaty and that if compensation was not provided promptly, the dispute would be submitted to arbitration under the Treaty. On 2 October 2001, the Claimants claim to have submitted a similar letter to the Government of the Russian Federation through BI, which included a copy of the Notice of Dispute and reminded the Russian Federation of its obligations under the Treaty. Finally, on 9 March 2004, BI sent a letter to the Prime Minister of the Russian Federation informing him of the factual circumstances surrounding the dispute and calling for compensation on the basis of the protection set out in the Treaty failing which arbitration proceedings would be initiated under the Treaty.

71. The Claimants contend that each notice described in detail the factual circumstances surrounding the dispute and the current claims presented under the Treaty. In this context, the Claimants argue that the Respondent had ample notice of the Claimants' grievances, and sufficient information to take the steps necessary to achieve an amicable settlement.

72. The Claimants further reject the Respondent's contention that notice must be sent through diplomatic channels in order to be effective. The Claimants argue that this contention is frivolous and based exclusively upon the European Convention on State Immunity, to which the Respondent is not a party and which has no relevance to arbitral proceedings, since it applies only to litigation in national courts. In the context of investor-State arbitration under

BITs, the Claimants submit that service of process through diplomatic channels is unheard of.

73. The Claimants further contend that it is irrelevant whether the three notices of dispute were served upon the Respondent by the Claimants in their official capacity as officers of BI, or in their individual capacity as future claimants in the present dispute. Relying upon, *inter alia*, the decision of the Permanent Court of International Justice in *The Mavrommatis Palestine Concessions*[1], the Claimants argue that international tribunals have taken a flexible approach to the pre-arbitration notice and negotiation provisions of BITs. The Claimants maintain that the notices of dispute "defined all the points at issue" between the parties and hence satisfy the Treaty's pre-arbitration requirements regardless of whether BI or its owners sent them.

74. During the course of the oral hearing, the Claimants insisted that the dispute between BI and the Respondent is the same as the current dispute between the Claimants and the Respondent. Accordingly, the dispute set out in the notices relied upon by the Claimants is identical to the current dispute before the Arbitral Tribunal.

75. Finally, the Claimants submit that even if there was any formal defect in the Claimants' observance of the pre-arbitration procedures contained in Article 10 of the Treaty, such defect should have no effect on the jurisdiction of the Tribunal. The Claimants rely upon a number of cases including *Nicaragua v United States of America*[2] and *Lauder v Czech Republic*[3] and contend that arbitrators have followed the long-established rule of international law that pre-arbitration negotiation provisions are purely procedural in nature, and that an international tribunal cannot allow itself to be hampered by a mere defect of

[1] Decision of 30 August 1924, P.C.I.J. Series A, No. 2, at 16.
[2] Military and Paramilitary Activities in and against Nicaragua, Judgment on Jurisdiction and Admissibility of 26 November 1984, 1984 ICJ Rep. 427.
[3] Ronald S. Lauder v Czech Republic, Final Award of 3 September 2001 at para. 187.

form. Accordingly, the Claimants maintain that irrespective of whether or not the Claimants observed the precise modalities of the Treaty's pre-arbitration procedures, the Respondent was clearly notified of the dispute beforehand, and since December 2001 has showed no interest in settlement.

4.2.2 The Claimants have made investments within the meaning of the Treaty

76. The Claimants maintain that Russian law has no bearing upon the definition of "investments" under the Treaty. The Claimants further argue that the Respondent's attempt to restrict the meaning of the term "investments" to capital investments capable of contribution to the charter capital of a joint venture constitutes a transparent distortion of the Russian language and is inconsistent with the French text of the Treaty.

77. The Claimants submit that the Tribunal need look no further than the French version of the Treaty itself for the proper translation of the Russian terms *kapitalovlozhenie* and *vlozhit*. The French text uses the words *investissement* and *investir* which are identical to the ordinary meaning of the English terms "investment" and "to invest". The Claimants refute the Respondent's contention that in the event of such contradiction, the narrower Russian language definition must be adopted. The Claimants maintain that in the event of any divergence between the French and Russian texts, the proper meaning under the Vienna Convention is the one "which best reconciles the texts, with regard to the object and purpose of the treaty." The Claimants argue that the Respondent's narrow definition of the terms "investment" and "invest" is clearly incompatible with the Treaty's aim of promoting investment and is creating favourable conditions for investment as set out in the Preamble.

78. The Claimants further contest the correctness of the Respondent's translation of the terms *kapitalovlozhenie* and *vlozhit*, arguing that the terms are, in fact, universally translated as "investment" and "to invest". Moreover, the

Claimants point out that the Respondent has agreed to dozens of other BIT texts in a number of languages, including the BIT concluded between the Government of the Kingdom of Norway and the Government of the Russian Federation, that definitely translate *kapitalovlozhenie* as "investment" and *vlozhit* as "to invest".

79. Finally, the Claimants refute the Respondent's allegation that the investments relied upon by the Claimants are illegal. The Claimants submit that the ruling of the Moscow City Court was illegitimate and forms part of the very expropriatory measures complained of in this Arbitration. Moreover, the Claimants maintain that the Moscow City Court's decision could not have rendered BI's construction activities illegal, because by the time it took effect in August 2002, the construction project had been complete for over nine months.

4.2.3 Claimants are investors within the meaning of the Treaty

80. The Claimants defend their *jus standi* and argue that they should not be disqualified from relying upon the Treaty merely on the grounds that some of their investments are owned indirectly through BI. They contend that this would contradict the universal recognition of shareholders' standing to maintain claims for harm to their investments, regardless of whether such assets are owned directly or through the company through which they conduct investment activity.

81. According to the Claimants, nearly every investment arbitration tribunal that has so far addressed the issue has confirmed the standing of shareholders to maintain investment claims not only for damage to their shares, but for all damage sustained by the company which they own. In support of this contention, the Claimants rely upon the decisions of a number of international

arbitration tribunals, such as *CMS v Argentina*[4], *AMT v Zaire*[5], *Genin v Estonia*[6], *Goetz v Burundi*[7], *Fedax N.V. v Venezuela*[8] and *Enron v Argentina*[9].

82. The Claimants also refute the Respondent's contention that the fact that the Treaty offers protection for investments held indirectly through third-country companies was intended to exclude from coverage indirect investments made through Belgian entities such as BI. The Claimants submit that the provision in question was clearly designed to remove all doubt that Belgian or Russian investors would enjoy standing under the Treaty despite the presence in the chain of ownership of an entity whose home State was not a signatory thereto. According to the Claimants, the *jus standi* of qualifying investors who own their investment through a Belgian or Russian company was taken for granted, and is a lesser authorisation included within the special mention contained in the second paragraph of Article 1.2. The Claimants argue that it would be nonsensical and in breach of the objects of the Treaty for them to be refused protection under the Treaty on the sole ground that their investment vehicle was a Belgian company rather than a company incorporated in a third state.

4.2.4 All claims presented are subject to Treaty arbitration

83. Contrary to the Respondent's contention, the Claimants maintain that compulsory arbitral jurisdiction under Article 10 extends to all claims arising out of Article 5 of the Treaty. The Claimants contend that it stands to reason that by specifically naming "the amount or mode of compensation to be paid" after expropriation, the Contracting Parties understood that the issue of whether expropriation has occurred was also to be arbitrable. The Claimants maintain

[4] CMS Gas Transmission Company v Republic of Argentina, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction of 17 July 2003.
[5] American Manufacturing & Trading v Zaire, ICSID Case No. ARB/93/1, Award of 21 February 1997.
[6] Genin v Estonia, ICSID Case No. ARB/99/2, Award of 25 June 2001.
[7] Goetz v Burundi, ICSID Case No. ARB/95/3, Award of 10 February 1999.
[8] Fedax N.V. v Venezuela, ICSID Case No. ARB/96/3, Decision on Jurisdiction of 11 July 1997 at para. 24, reprinted at 37 ILM 1378 (1998).
[9] Enron Corp. and Ponderosa Assets, L.P. v Argentina, Decision on Jurisdiction of 14 January 2004.

that the "fact" of expropriation cannot be separated from the "amount and mode of compensation". A contrary interpretation would, according to the Claimants, render Article 10 meaningless, since the host State would need only assert that no expropriation had occurred to avoid arbitration altogether.

84. The Claimants also rely upon the Explanatory Statement as evidence that both Belgium and the Respondent understood Article 10 to extend to all disputes related to expropriation. The Claimants further point out that at the time the Treaty was negotiated, there were no arbitrazh courts in the Soviet Union and, as a result, the Respondent could not be correct in its contention that the parties intended disputes concerning the fact of expropriation to be submitted to such "Russian arbitrazh courts". Finally, the Claimants submit that the Respondent has actually admitted the fact of its expropriatory acts.

85. The Claimants admit that Article 10 of the Treaty permits arbitration only of claims relating to expropriation and, therefore, seeks to rely upon the MFN clause contained in Article 2 of the Treaty. In their Request for Arbitration, the Claimants sought to invoke the arbitration clause contained in the BIT concluded between the Government of the Kingdom of Norway and the Government of the Russian Federation on 4 October 1995 (the "Norway BIT"). During the course of the oral hearing, however, the Respondent claimed that the scope of the arbitration clause in the Norway BIT was limited to the calculation of damages for breaches of the Treaty as already established by Russian courts. The Claimants rejected this argument.

86. Nonetheless, in their post-hearing submission of 2 November 2005, the Claimants further sought to invoke Article 8 of the Denmark – Russian Federation BIT of 4 November 1993 (the "Denmark Treaty") in order to avoid any uncertainty in relation to the Norway Treaty. Under Article 8 of the Denmark Treaty, any dispute "in connection with an investment" may be submitted to arbitration. Accordingly, the Claimants submit that a Danish

investor would be entitled to submit to SCC arbitration, not only disputes related to expropriation of its investments, but also any claim arising out of the Russian Federation's violations of other treaty standards, including fair and equitable treatment, full protection and security, and respect for undertakings. The Claimants argue that this improved access to international arbitration constitutes more favourable treatment, since "the provisions for independent international arbitration of disputes between investors and host states" is perhaps "the most crucial element" of BIT protection.

87. The Claimants also refute the Respondent's contention that by operation of the Treaty's Protocol, the most-favoured nation clause applies only to rights granted to nationals of third-party States that (i) were members of the OECD in 1989, and (ii) had already concluded and ratified BITs with the Soviet Union by that date. The Claimants state that such an interpretation of the Protocol is in direct conflict with its plain meaning. The Protocol was intended to limit the effect of the MFN clause to rights granted to citizens of States that were OECD members at the time the Treaty was signed, but there was no intention to require that such States had entered into BITs with the Respondent. The Claimants point out that no tribunal has ever refused to apply the provisions of a third-party investment treaty by operation of an MFN clause on the grounds that the treaty to be applied post-dated the treaty directly applicable.

88. The Claimants deny any contention that the Treaty's MFN clause may not extend to the procedural benefits of investment treaties. The Claimants maintain that the Treaty's MFN clause is "maximally broad" embracing "all areas covered by the present Treaty." It is said to be uncontroversial that dispute resolution is an area covered by the Treaty. The Claimants further contend that the weight of legal opinion is overwhelmingly in favour of extending MFN treatment to BIT dispute resolution provisions. In particular,

the Claimants rely upon the decisions in *Maffezini v Kingdom of Spain*[10], *Siemens v Argentina*[11] and *Gas Natural v Argentina*[12].

89. Finally, the Claimants submit that the arbitration clause in the Contract between BI and the Supreme Court is not relevant to this Tribunal's consideration of the claims raised by the Claimants against the Respondent. The Claimants maintain that many arbitral tribunals, applying the provisions of BITs, have affirmed the principle that exclusive jurisdiction clauses in contracts cannot affect an investor's right to invoke the dispute resolution provisions of an applicable investment treaty. In support of this contention, the Claimants rely upon, *inter alia*, *Compania de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v Argentina*[13]. On this basis, the Claimants state that BI's rights under the Contract cannot affect the Claimants' right to submit Treaty disputes to this Tribunal under Article 10 of the Treaty.

4.2.5 The Claimants' action does not constitute a fraud on BI

90. The Claimants deny the Respondent's allegation that the Claimants' action before the Tribunal is fraudulent under Belgian law and International Public Order. The Claimants further deny that they are participating in these proceedings in the name of BI. The Claimants maintain that they are asserting their own rights as shareholders to bring a claim under the Treaty. The Claimants' promise to satisfy the claims of BI's creditors out of any recovery from the Russian Federation is said to merely constitute an expression of their own interest in re-establishing their business in its former condition by freeing BI from bankruptcy.

[10] Maffezini v Kingdom of Spain, ARB/97/7, Decision on objections to jurisdiction, 25 January 2000.
[11] Siemens A.G. v Argentina, ICSID Case No. ARB/02/8, Decision on Jurisdiction of 3 August 2004.
[12] Gas Natural v Argentina, ICSID Case No. ARB/03/10, Decision on Jurisdiction of 17 June 2005.
[13] Compania de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v Argentine Republic, ICSID Case No ARB/97/3, Award of 21 November 2000, 40 ILM 426 (2001).

91. The Claimants further contend that the Respondent's submissions in this regard are irrelevant to the question of jurisdiction in this case. All submissions regarding any potential breach of Belgian law are irrelevant, according to the Claimants, since the law applicable to the jurisdiction of this Tribunal consists of the terms of the Treaty and any applicable principles of international law. The Claimants refute that the alleged breach of Belgian bankruptcy law constitutes a breach of international public policy.

92. Finally, the Claimants point to the fact that the bankruptcy receiver of BI has refused to initiate proceedings under the Treaty. As a result, BI is, for all practical purposes, precluded from appearing as a claimant in the proceedings. The Claimants allege that this serves to confirm the rationale for recognising the *jus standi* of the Claimants. It is contended that if only the immediate investment vehicle, and not its owners, can maintain a claim under an investment treaty, then a host State need only force the company into bankruptcy in order to escape liability altogether. The Claimants argue that such a situation creates perverse incentives for host States, is incompatible with the investment protection goals of the Treaty and breaches the rule of international law that "no one can be allowed take advantage of his own wrong" – *nullus commodum capere de sua injuria propria.*

5. Reasons for the decision

5.1 Law applicable to the Tribunal's jurisdiction

93. The first issue which the Tribunal is called to address concerns the relevant law applicable to the determination of the Tribunal's jurisdiction. The Respondent contends that the jurisdiction of the Tribunal must be considered in light of the Treaty, Russian law and generally accepted norms and principles of international law. The Respondent also maintains that it is only international treaties which have been entered into by the Russian Federation which should

be considered by the Tribunal. In particular, the Respondent submits that the ICSID Convention and all arbitration decisions based thereon are irrelevant to the question of the Tribunal's jurisdiction since the Russian Federation is not a party to the ICSID Convention.

94. The Claimant, on the other hand, argues that the terms of the Treaty and international law are the only sources of law applicable to determining the jurisdiction of the Tribunal. The Claimant maintains that Russian law has no role to play in this regard. Moreover, the Claimant argues that international arbitration law and practice, while not strictly binding on this Tribunal, nonetheless, constitutes a persuasive source of law which the Tribunal is entitled to have regard to in reaching its decision on jurisdiction.

95. The Tribunal finds that the principal source of law applicable to the question of the Tribunal's jurisdiction must be provisions of the Treaty. Insofar as the terms of the Treaty are unclear or require interpretation or supplementation, the Vienna Convention requires the Tribunal to consider "the relevant rules of international law applicable in relations between the parties"[14].

96. The Vienna Convention provides no role for the domestic law of contracting states in the interpretation of international treaties. Therefore, in the instant case, it is clear that Russian national law is of no relevance in this regard. While Russian law may be relevant in establishing certain factual circumstances involved in the merits of the case, it has no role to play in determining the jurisdiction of the Tribunal.

97. The Tribunal accepts the Respondent's contention that the Russian Federation is not bound by international treaties to which it is not a party, nor by judicial and arbitration practice resulting from the application of such treaties. In particular, the Tribunal is well aware that the Russian Federation is not a party

[14] Vienna Convention on the Law of Treaties, Article 31(3)(c).

to the ICSID Convention. Nonetheless, the Tribunal does not believe that any of these matters precludes the Tribunal from having regard to international investment case law as a persuasive source of law. While such case law and practice is in no way binding upon the Tribunal or the parties, the Tribunal must, nonetheless, be entitled to consider and take into account the conclusions of other arbitral tribunals who have addressed similar issues with respect to similar treaties and identically worded provisions. Moreover, jurisprudence and doctrine emanating from the decisions of international tribunals and the works of learned authors is frequently referred to as a source of international law for the purpose of interpreting treaties under the Vienna Convention.

5.2 Compliance with the pre-arbitration procedures

98. Article 10.1 contains the pre-arbitration procedures necessary to be taken by an investor prior to invoking arbitration under the Treaty. Specifically, Article 10.1 requires "a written notice, accompanied by a detailed memorandum, to be submitted by the investor to the Contracting Party involved in the dispute."

99. The purpose of such pre-arbitration procedure requirements in BITs has been considered by a number of arbitral tribunals in cases such as *Salini v Morocco*[15], *Petrobart v Krygystan*[16] and *Lauder v Czech Republic*[17]. From these decisions, it is clear that arbitral tribunals, while duly considering that purpose, have chosen to take a flexible and pragmatic approach to such requirements. The Tribunal sees the merit in this approach and believes that a formalistic interpretation of Article 10.1 would not serve to protect the legitimate interests of either party in the instant case.

[15] Salini Costruttori S.p.A. v Kindgom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 23 July 2001.
[16] Petrobart Ltd. v The Kyrgz Republic, SCC Case No. 126/2003, Award of 29 March 2005.
[17] Lauder, supra note 3.

100. The purpose of the notification requirement in Article 10.1 is to provide the parties with an opportunity to enter into good-faith negotiations before initiating arbitration. As in *Salini v Morocco*, the Tribunal in this case must be satisfied that the necessary and appropriate steps were actually taken to contact the relevant authorities of the Respondent with a view to reaching a settlement and thereby putting an end to their dispute. The notices submitted must be sufficient to allow the Respondent to become aware of the dispute and to take steps towards negotiations and possible settlement of the dispute if it so wishes.

101. With the three letters to the Presidential Administration, the Government and the Prime Minister of the Russian Federation, all reasonable steps in contacting the relevant authorities of the Respondent were taken with a view to reaching a settlement and thereby putting an end to their dispute. Moreover, the three letters have clearly allowed the Respondent to become aware of the dispute and to take steps towards the resolution of the dispute. Indeed, subsequent to the delivery of the first two letters, the Respondent entered into negotiations in relation to the dispute culminating in the Supplemental Agreement of 24 December 2001 and the payment by the Respondent of US $ 341,487 in partial settlement of the dispute. The Tribunal, accordingly, rejects the Respondent's contention that, in order to be duly served, the notices must be submitted directly through the diplomatic channel to the Ministry of Foreign Affairs.

102. Importantly, the Tribunal also finds that the dispute as described in detail in the letters and the accompanying memoranda submitted by the Claimants corresponds in all material aspects to the dispute currently before the Tribunal. Consequently, while the Tribunal recognises that the letters were formally sent by BI and signed by the Claimants in their capacity as representatives of BI, the Tribunal does not believe that this factor undermines the validity of the letters as notices of the dispute at hand. The purpose of Article 10.1 has been fulfilled. The Respondent has been provided with detailed notice of the circumstances surrounding the dispute at hand and has thus had ample

opportunity to seek an amicable settlement. It would, therefore, serve no purpose for the Tribunal to dismiss this claim and require the Claimants as private persons, rather than in their capacity as representatives of BI, to resubmit notice of the dispute to the Respondent.

103. In conclusion, the Tribunal finds that the three letters submitted satisfy the requirements of Article 10.1 of the Treaty and that the Claimants have thereby complied with the pre-arbitration procedures required under the Treaty.

104. The Tribunal does not, accordingly, accept the Respondent's contention that the dispute referred to therein is materially different from the present dispute between the Claimants and the Respondent.

5.3 Are the Claimants investors within the meaning of the Treaty?

105. The Respondents have argued that the Claimants cannot be considered as "investors" within the meaning of Article 1.1 of the Treaty, since the Claimants as physical persons did not implement any capital investments in the territory of the Russian Federation. The Tribunal is of the view that this argument does not affect the question of whether or not the Claimants come within the definition of "investors" under Article 1.1 of the Treaty. The argument presented by the Respondent goes rather to the issue of whether or not the Claimants have made "investments" within the scope of Article 1.2 of the Treaty.

106. The definition of "investors" under Article 1.1 of the Treaty is quite straightforward and includes, *inter alia*, any natural person who is recognised as a citizen of the Soviet Union, Belgium or Luxembourg and is entitled to make investments in the territory of the other Contracting Party in accordance with its country's laws. It is uncontested that both of the Claimants are natural persons and citizens of Belgium. The Tribunal has, consequently, no difficulty

in finding that the Claimants are investors within the meaning of Article 1.1 of the Treaty.

5.4 Have the Claimants carried out investments within the meaning of the Treaty?

107. The more complex question is whether or not the Claimants have carried out "investments" within the meaning of the Treaty.

5.4.1 The meaning of the terms *kapitalovlozhenie* and *vlozhit*

108. The Tribunal will firstly deal with the Respondent's contention that the terms *kapitalovlozhenie* and *vlozhit* in Article 1.2 of the Russian language version of the Treaty restrict qualifying investments to capital investments capable of contribution to the charter capital of a joint venture. The Tribunal believes that such an interpretation of Article 1.2 cannot be supported.

109. Firstly, the Tribunal finds ample evidence amongst Russian-English legal and economic dictionaries for translating the term *kapitalovlozhenie* as "investment" and the term *vlozhit* as "to invest". Secondly, it is possible to point to a large number of BIT:s concluded by the Respondent where Russian and English are the authentic languages of the Treaty and where the term *kapitalovlozhenie* is translated as "investment" and *vlozhit* is translated as "to invest".[18] It is thus clear that, while those terms may sometimes be used in the Russian language in the more limited sense of "contributions to the charter capital of a joint venture", they are in fact also frequently used in a broader sense corresponding exactly to the English terms "investment" and "invest".

[18] The Netherlands – Russian Federation BIT (1989), the South Korea – Russian Federation BIT (1990), the Denmark – Russian Federation BIT (1993), Norway – Russian Federation BIT (1995).

110. Furthermore, regard must be had to the French version of the Treaty which, as set out in the Protocol, is equally as authoritative as the Russian version. The French text uses the words *investissement* and *investir*. With respect to these French terms, there can be no doubt but that their ordinary meaning is identical to that of the English words "investment" and "to invest". Therefore, and for the reasons set out above, the Tribunal finds that the Respondent's objections on this point must fail.

5.4.2 The lawfulness of the Claimants' investments

111. The Respondent has further contended that the investments relied upon by the Claimants were illegal and, as a result, do not satisfy the requirements of compliance with the laws of the Russian Federation contained in Article 1.2 of the Treaty. The Tribunal is of the view that the lawfulness of the investments relied upon by the Claimants is a not an issue affecting the jurisdiction of the Tribunal, but rather a substantive issue pertaining to the merits of the case. It would, therefore, be inappropriate for the Tribunal to consider this issue at this stage in the proceedings.

5.4.3 The term "investments" under Article 1.2 of the Treaty

112. Article 1.2 of the Treaty contains a broad definition of the term "investment". For the purpose of the Treaty, an investment may comprise any kind of asset invested in the territory of a Contracting Party. Article 1.2 also provides a non-exhaustive list of the kind of assets which will constitute investments under the Treaty. These include property, financial credits as well as shares, rights of claim relating to performance having an economic value and intellectual property rights. The second paragraph of Article 1.2 provides that the term "investment" also means indirect investments made by investors of one of the Contracting Parties in the territory of the other Contracting Party by the intermediary of an investor of a third state.

113. Two further important qualifications are set out in Article 1.2. In order to qualify as an investment under the Treaty, the assets in question must be invested by qualifying investors from of a Contracting Party. Furthermore, the investments must be made in the territory of the other Contracting Party. Both these criteria must be fulfilled in order for the asset in question to constitute a qualifying investment under the Treaty.

5.4.4 The particular investments relied upon by the Claimants

114. The Claimants seek to rely upon the following assets as "investments" for the purposes of Article 1.2 of the Treaty:

(a) the Claimants' shares in BI;
(b) the Contract;
(c) the Claimants' property rights in the Buildings; and
(d) the Agreed Debt.

115. The Tribunal will deal first with the basic question of whether these alleged investments qualify as "assets" protected under the Treaty.

116. There can be no doubt but that shares are one of the categories of property protected by the Treaty. This is expressly stated in Article 1.2.2.

117. As regards the Contract, the Tribunal is of the view that such contract does constitute an "asset" within the meaning of Article 1.2 of the Treaty. In particular, the Contract may be considered as bestowing rights relating to "any performance having an economic value" in accordance with Article 1.2.3. The Tribunal notes that this principle appears to have been generally accepted in a

number of previous investment arbitration disputes, such as *Salini v Morocco*[19], where construction contracts were held to constitute protected assets for the purposes of investment treaties.

118. With respect to the property rights in the Buildings, such rights must also be held to constitute "assets" under the Treaty. The right relied upon by the Claimants in this regard is the right pursuant to Russian law to retain ownership of a construction site until payment for construction services has been rendered in full. Such right clearly entails an economic value and therefore falls within the scope of Article 1.2.3.

119. Finally, the Agreed Debt in effect constitutes credit extended to the Russian Federation and consequently qualifies as an "asset" under Article 1.2.2 of the Treaty.

120. Hence, the Tribunal finds that all the assets relied upon by the Claimants fall within the categories of property protected by the Treaty. However, as noted above, this fact alone does not warrant the conclusion that these assets qualify as "investments" under the Treaty. With regard to each of the assets, the additional question must be asked as to whether or not the further qualifications set out in Article 1.2 are met.

121. In this regard, and turning first to the Claimants' shares in BI, the Tribunal finds that such assets cannot constitute a qualifying investment within the terms of Article 1.2 of the Treaty. BI is a company incorporated and established under the laws of Belgium. The Claimants' shareholding in BI is, therefore, an investment in a Belgian company and, as such, cannot be considered an investment in the territory of the Russian Federation. The reference to "shares and other forms of participation in companies and enterprises" contained in Article 1.2.2 must reasonably be construed as

[19] Salini, supra note 15.

referring to companies and enterprises incorporated under the laws of the State in which the investment is alleged to have been made.

122. This difficulty does not arise with regard to the Contract, the property rights in the Buildings and the Agreed Debt. These assets undoubtedly constitute investments made in the territory of the Russian Federation. However, each of these investments was made by BI, which is a separate legal entity from the Claimants. It is BI, and not the Claimants, who is a party to the Contract, enjoys the right of retention in the Buildings and is the party entitled to payment under the Agreed Debt.

123. The Claimants, insofar as the Tribunal understands their position, do not deny this. However, the Claimants argue that the Treaty does not only protect direct investments but also indirect investments and that the assets relied upon in this arbitration qualify as indirect investments within the scope of the Treaty.

5.4.5 The protection of indirect investments under the Treaty

124. In light of the above, the Tribunal now turns to consider the question of whether, or to what extent, the Treaty offers protection to indirect investments. In particular, it must be considered whether the investments made by BI, as discussed above, can be relied upon by the Claimants as qualifying indirect investments within the scope of Article 1.2.

125. It should be kept in mind that this discussion is of relevance only with respect to the Contract, the Claimants' property rights in the Buildings and the Agreed Debt. The question of indirect investments does not apply to the shares, since the Tribunal has already found that such shares do not qualify as investments made in the territory of the Russian Federation and are consequently excluded from protection under the Treaty.

126. The Claimants have produced a large number of authorities on the basis of which they proclaim "universal recognition of shareholders' standing to maintain claims for harm to their investments, regardless of whether such assets are owned directly or through the company through which they conduct their investment activity."

127. The cases relied upon by the Claimants may, however, be distinguished from the instant case in a number of fundamental respects. In the majority of the cases cited by the Claimants, the investors in question invested in shares in companies incorporated in the host State. These locally incorporated companies then went on to make the particular investments allegedly interfered with by the respondent State. The Tribunal is of the view that these cases are not in fact clear examples of indirect investments. In each case, the Claimants were in a position to point to their shareholding in the locally incorporated companies as constituting direct investments under the terms of the relevant BIT. The principal issue discussed in each case was to what extent the shareholders were entitled to claim damages for loss to the company as opposed to loss to the mere value of their shares.

128. The Claimants refer, *inter alia*, to *Enron v Argentina*[20] and *CMS v Argentina*[21], *AMT v Zaire*[22], *CME v Czech Republic*[23], *Gas Natural v Argentina*[24] and *Maffezini v Spain*[25]. All of these cases concerned investments made via locally incorporated companies. The arbitral tribunal in each case was able to uphold its jurisdiction on the grounds that the claimants' shareholding in the locally incorporated companies constituted a direct investment under the terms of the relevant BIT.

[20] Enron, supra note 9.
[21] CMS, supra note 4.
[22] AMT, supra note 5.
[23] CME Czech Republic B.V. (The Netherlands) vs. Czech Republic, Partial Award of 3 September 2001.
[24] Gas Natural, supra note 12.
[25] Maffezini, supra note 10.

129. A further factor which distinguishes the above cases from the instant case is that the incorporated companies did not qualify as foreign investors in the above cases and hence were not entitled to bring an action under the relevant BITs. The shareholders' investment was not, in other words, protected by the companies' right to rely upon the BIT. In the instant case, on the other hand, BI is fully entitled to bring an action under the Treaty. The investments are, accordingly, already protected by BI's right to rely upon the terms of the Treaty.

130. The Claimants further rely upon the decision in *Fedax N.V. v Venezuela*[26]. This case concerned six promissory notes which had been issued by the Republic of Venezuela in acknowledgment of the debt owed by it to a Venezuelan company under a contract for the provision of services. The Venezuelan company subsequently assigned the promissory notes by way of endorsement to the Dutch company Fedax N.V. ("Fedax"). When Fedax sought protection with respect to the promissory notes under the Netherlands-Venezuela BIT, the Respondent objected to the jurisdiction of the arbitral tribunal on the grounds that Fedax's holding of the promissory notes was not a direct foreign investment and hence did not qualify as an "investment" within the terms of the BIT.

131. As pointed out by the Claimants, the arbitral tribunal, in upholding its jurisdiction, identified a "broad approach"[27] to the definition of investments under international investment agreements and further held that the term "investment" in the Netherlands-Venezuela BIT was to be given a broad reach in light of the negotiating history of the ICSID Convention.[28] However, the tribunal went on to carefully distinguish between the underlying transaction involving the Respondent and the Venezuelan company and "the subsequent

[26] Fedax, supra note 8.
[27] Fedax, supra note 8, paras. 34-35.
[28] Fedax, supra note 8, para. 24.

endorsement of the promissory notes to foreign holders".[29] The tribunal accepted that "promissory notes of this kind have a legal standing of their own, separate and independent from the underlying transaction."[30] The tribunal also pointed out that the notes were fully negotiable and denominated in U.S. dollars, as a result of which the Respondent must have foreseen "the possibility that the promissory notes would be transferred and endorsed to subsequent holders".[31] In the case of such endorsement, the tribunal stated that "although the identity of the investor will change with every endorsement, the investment itself will remain constant, while the issuer will enjoy a continuous credit benefit until the time the notes become due."[32] The tribunal concluded that "[t]o the extent this credit is provided by a foreign holder of the notes, it constitutes a foreign investment which in this case is encompassed by the terms of the Convention and the Agreement."[33]

132. By analysing the nature of the promissory notes in this fashion, the tribunal effectively identified the credit extended by Fedax to the Respondent, as evidenced by the notes, as a direct investment under the terms of the Treaty. By divorcing the promissory notes from the underlying transaction, the tribunal removed the indirect element in the investment. It was irrelevant that the underlying transaction had been concluded between the Respondent and the Venezuelan company. It was the credit extended under the promissory notes which constituted the investment and it was the Claimant who directly made this investment once the notes had been assigned. Ultimately, therefore, the decision of the arbitral tribunal in the *Fedax* case was not based on an acceptance of indirect investments as qualifying investments. Claimants in the instant case may rely upon the investments made by BI.

[29] Fedax, supra note 8, para 38.
[30] Fedax, supra note 8, para 39.
[31] Fedax, supra note 8, para. 39.
[32] Fedax, supra note 8, para. 40.
[33] ibid.

133. Finally, the Claimants point to the decision of the arbitral tribunal in *Genin v Estonia*[34]. The three claimants in this case consisted of Alex Genin, a citizen of the United States, an Estonian company called A.S. Baltoil, and a US Corporation called Eastern Credit Limited Inc. ("Eastern Credit"). All three claimants held interests in the Estonian Innovation Bank ("EIB"), a financial institution incorporated under the laws of Estonia, and sought protection for their interests in EIB under the Estonia – USA BIT. A.S. Baltoil and Eastern Credit were direct shareholders in EIB, whereas Mr. Genin's interest arose by virtue of his 100 % ownership of Eastern Credit. The claimants' respective interests were accepted by the tribunal as qualifying investments under the BIT.

134. While the *Genin* case did involve the indirect shareholding of Mr. Genin, there are nonetheless certain specific matters which distinguish the decision from the case at hand. The tribunal in the *Genin* case was not presented with any objection to Mr. Genin's indirect shareholding constituting a qualifying investment and hence the question was not considered or discussed in the decision. As noted in the foregoing, while international investment case law is not binding on the Tribunal or the parties, the Tribunal is nonetheless entitled to consider and take into account the conclusions of other arbitral tribunals who have addressed similar issues with respect to similar treaties and identically worded provisions. However, when, as in the *Genin* case, an arbitral award provides no reasons for the course of action chosen by the tribunal, such an award has very little relevance as a persuasive source of law. The relevance of the *Genin* case is further diminished by the fact that the definition of "investment" in the Estonia – USA BIT differs considerably from the definition in the Treaty, in that the definition in the Estonia – USA BIT expressly encompasses "shares of stock or other interests in a company" which are "owned or controlled, directly or indirectly" by investors.[35]

[34] Genin, supra note 6.
[35] Genin, supra note 6, para. 324.

135. In conclusion, the Claimants have been unable to produce any authority which is directly applicable to the issue at hand in the present case. Indeed, it would seem that this is the first case in which the sole claimants are foreign shareholders in a foreign incorporated company seeking to rely upon the terms of a BIT without having made any direct investment on their own part. In the absence of any authority on the point, the Tribunal believes that there can be no presumption that the wording of Article 1.2 encompasses the kind of indirect investment relied upon in the instant case.

136. The Tribunal must, accordingly, turn to the text of the Treaty to determine whether the Contracting Parties intended the kind of indirect investment arising in the instant case to be encompassed by the definition of "investment" in Article 1.2. In accordance with Article 31 of the Vienna Convention on the Law of Treaties (the "Vienna Convention"), the Treaty is to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

137. The ordinary meaning of Article 1.2 is, however, difficult to ascertain. The first sentence provides that the investment relied upon may be "any kind of asset" which is invested by qualifying investors of one Contracting Party "in the territory of the other Contracting Party". The plain meaning of the provision requires that the investment in question be made by the investor seeking protection under the Treaty and that such investment be made in the territory of the other Contracting Party. This provision makes no reference to indirect investments and it is noteworthy that this definition is not particularly broad. Definitions in certain other BITs expressly provide for protection of investments "owned or controlled directly or indirectly" by the party concerned (see e.g. Argentina–United States BIT). Such is not the case under the present Treaty. Nonetheless, the wording of the Treaty does not exclude and therefore leaves open the possibility that an investment made indirectly by the investor in

the territory of the other Contracting Party is encompassed by the terms of Article 1.2.

138. The only express reference to indirect investments is contained in the second paragraph of Article 1.2. Here it is provided that "[t]he term "investment" also means indirect investments made by investors of one of the Contracting Parties in the territory of the other Contracting Party by the intermediary of an investor of a third state." Accordingly, if BI had been incorporated in a third state and made the alleged investments in the Russian territory, the Claimants would have been entitled to invoke the terms of the Treaty in reliance upon such investments. Since this is not the case, however, the provision cannot be applied in the instant case.

139. The parties have, nonetheless, suggested diametrically opposed conclusions which may be drawn from the express reference to this form of indirect investment. The Claimants argue that lack of any reference to indirect investments through a Belgian or Russian company shows that the *jus standi* of investors who owned their investment through a Belgian or Russian company was taken for granted. The Respondent, on the other hand, has argued that the express reference to indirect investments in the second paragraph of Article 1.2 clearly shows that this was the only form of indirect investment which the Contracting Parties intended to be protected under the Treaty. Had they intended to include indirect investments made by an intermediary of the investor's state, then this would have been expressly provided for in the second paragraph.

140. In the view of the Tribunal, the specific reference in the second paragraph of Article 1.2 to indirect investments via third state intermediaries may be understood in light of the fact that such investments might otherwise have been entirely unprotected in those cases where no investment protection treaty existed between the third country and the Soviet Union. It may also be noted

that such cases were more frequent in 1989 when the Treaty was concluded than today.

141. Moreover, it cannot be excluded that the decision of the International Court of Justice in the *Barcelona Traction* case had some influence on the drafting of the Treaty on this point.[36] This case involved a claim brought against Spain by Belgium on behalf of the Belgian majority shareholders in a Canadian company on the basis of alleged unlawful measures taken against the company. Belgium's claim was dismissed on the grounds that "where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorises the national State of the company alone to make a claim."[37] This Tribunal is aware that a strong argument can be made that *Barcelona Traction* no longer reflects the current state of international law. But in 1989 the issue was less clear and in light of Belgium's experience, it is perhaps not unreasonable to conclude that the inclusion of the second paragraph of Article 1.2 in the Treaty was intended to avoid a similar result arising with respect to investments between the Contracting Parties.

142. The question, nonetheless, remains as to whether any conclusions may be drawn from the fact that the Contracting Parties, when specifically including indirect investments via third state intermediaries, did not expressly include indirect investments via companies incorporated in the investors' home states. The Tribunal does not find any reason to assume that the Contracting Parties took for granted that such investments were covered by the terms of the first paragraph of Article 1.2. Since, as discussed above, there are specific reasons for including in the Treaty the reference to indirect investments via third country intermediaries, that reference cannot be construed as simply being an expression of a general principle that all indirect investments are protected by the Treaty.

[36] Case concerning the Barcelona Traction, Light and Power Company Limited, decision of the International Court of Justice, 5 February 1970.
[37] ibid at para. 88.

143. What may be assumed, however, on the basis of the ordinary meaning of the wording of Articles 1.1 and 1.2, is that the Contracting Parties considered investments via companies incorporated in the investors' home states to be protected by the right of such companies to bring a claim under the terms of the Treaty. It is clear that a Belgian or Russian company itself, in such circumstances, is a qualifying investor under Article 1.1 and may, therefore, rely on the provisions of the Treaty. In other words, by extending the coverage of the Treaty to investments made through third country vehicles the Contracting Parties provided protection to investments which would otherwise typically have been unprotected. To extend the coverage of the Treaty to the indirect investments of shareholders of Belgian or Russian companies, on the other hand, would have meant providing additional protection to investments which were already fully protected under the Treaty. In the view of the Tribunal, it is more reasonable to assume that the Contracting Parties saw no need to provide such additional protection to the indirect investments of the shareholders of Belgian or Russian companies, particularly in view of the absence of any express provision to this effect in the text of the Treaty.

144. The Vienna Convention also requires that reference be made to the object and purpose of the Treaty. The Preamble to the Treaty makes specific reference to the Contracting Parties' desire "to create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party" and to "the positive effect that the present Treaty can have on fostering business contacts and strengthening trust in the area of investments." The Claimants have argued that this wording should be used in support of a broad and expansive interpretation of Article 1.2. The Tribunal believes, however, that the object of promoting investments as set out in the Preamble does not provide any guidance on whether or not the type of indirect investments relied upon by the Claimants in the instant case is protected by the Treaty. The intention of both Contracting Parties when signing the Treaty may well have

been to promote investment between the two countries, but such aim can be achieved by different means and in varying degrees. The wording of the Preamble cannot reasonably be interpreted as a declaration by the Contracting Parties that all forms of investment – direct or indirect – are to be protected under the Treaty.

145. The Tribunal also finds it of relevance to consider the practice of the Contracting States with respect to indirect investments as evidenced by the terms of other BITs entered into by the Soviet Union, Belgium or Luxembourg. Firstly, it may be noted that a large number of the BITs concluded by Belgium and Luxembourg provide express protection for indirect investments. These include the BITs concluded with Albania, Benin, Burkina Faso, Burundi, Bolivia, Czech Republic, Egypt and Paraguay. For example, Article 1.2 of the Belgium/Luxembourg – Paraguay BIT contains the following definition of "investments":

> "Le terme "<investissements>" désigne tout élément d'actif quelconque et tout apport direct ou indirect en numéraire, en nature ou en services, investi ou réinvesti dans tout secteur d'activité économique, quel qu'il soit."

146. On the other hand, only one BIT signed by the Russian Federation provides express protection for indirect investments. Section 1(c) of the USA – Russian Federation BIT defines investment as "any kind of investment, in the territory of one Party owned or controlled by nationals or companies of the other Party". It may be noted, however, that this BIT has not been ratified by the Russian Federation. Moreover, the large majority of the remaining BITs concluded by the Soviet Union and the Russian Federation contain no express reference to indirect investments.

147. No firm conclusions may be drawn from the contrasting practice of the Contracting Parties in this regard. Nonetheless, such contrasting approaches do

render it unlikely that, in the absence of specific evidence to the contrary, both Contracting Parties intended that the Treaty would encompass the kind of indirect investments relied upon the Claimants. It would seem likely that if the Contracting Parties had so intended, they would have expressly provided protection for such indirect investments in the terms of the Treaty, as in the case of the other relevant BITs concluded by Belgium and Luxembourg.

148. Finally, the Tribunal wishes to address the Claimant's argument that regard must be had to the economic reality behind the investments made by BI. The Claimants contend that the "real" investment of capital was made by the Claimants. The mere fact that such investment may have been made through the vehicle of BI should not, according to the Claimants, preclude protection under the Treaty. The Tribunal acknowledges this economic reality described by the Claimants. Nonetheless, such policy considerations cannot extend the protection offered by the Treaty beyond the terms agreed between the Contracting Parties.

149. Moreover, the Treaty does in fact provide protection for the "real" investment highlighted by the Claimants insofar as BI, as a qualifying investor, would be fully entitled to rely upon the investments it made in the Russian Federation. The argument made by the Claimants on this point would have been more convincing if the vehicle through which the investments were made had been barred from claiming protection under the Treaty. However, this is not the case. The reason why the Claimants, and not BI, are bringing a claim under the Treaty is that the Claimants no longer control BI since that company has been declared bankrupt. The Tribunal does not believe that the purpose of the Treaty is to help shareholders overcome this kind of obstacle.

150. In conclusion, based on a reasonable interpretation of the text of the Treaty in its context and in light of its object and purpose and the practice of the Contracting Parties, the Tribunal cannot find that the Contracting Parties

intended that the indirect investments relied upon by the Claimants would be encompassed by the definition of "investment" under Article 1.2. The Claimants have accordingly failed to show that they have made qualifying investments within the meaning of the Treaty.

5.5 Scope of arbitration under the Treaty

5.5.1 Scope of Article 10

151. The Tribunal now turns to deal with the Respondent's contention that the claims made by the Claimants cannot be subject to arbitration under the Treaty. Once again, the starting point for the Tribunal's analysis of this issue must be the actual terms of the Treaty. The scope of the arbitration clause in Article 10.1 is expressly stated to extend to any dispute between one Contracting Party and an investor of another Contracting Party concerning the amount or mode of compensation to be paid under Article 5 of the Treaty.[38] In the original French version of the Treaty, Article 10.1 provides as follows:

> "Tout différend entre l'une des Parties contractantes et un investisseur de l'autre Partie contractante, relative au montant ou au mode de paiement des indemnités dues en vertu de l'article 5..."

152. By virtue of Article 31 of the Vienna Convention, the Tribunal is, once again, obliged to interpret Article 10.1 in accordance with the ordinary meaning to be given to the terms thereof in their context and in light of the object and purpose of the Treaty. The Tribunal is of the view that the ordinary meaning of Article 10.1 is quite clear. Only disputes concerning the amount or mode of compensation ("au montant ou au mode de paiement des indemnités") to be paid under Article 5 may be subjected to arbitration. The wording expressly limits the type of dispute, which may be subjected to arbitration under the

[38] Article 5 of the Treaty stipulates that qualifying investments shall not be expropriated.

Treaty, to a dispute concerning the amount or mode of compensation to be paid in the event of an expropriatory act occurring under the terms of Article 5.

153. The Tribunal is satisfied that the ordinary meaning of the provision excludes from the scope of the arbitration clause: (i) disputes concerning any of the provisions of the Treaty other than Article 5, and (ii) disputes concerning whether or not an act of expropriation actually occurred under Article 5. From the ordinary meaning of Article 10.1, it can only be assumed that the Contracting Parties intended that a dispute concerning whether or not an act of expropriation actually occurred was to be submitted to dispute resolution procedures provided for under the applicable contract or alternatively to the domestic courts of the Contracting Party in which the investment is made. It is only a dispute which arises regarding the amount or mode of compensation to be paid subsequent to an act of expropriation already having been established, either by acknowledgment of the responsible Contracting Party or by a court or arbitral tribunal, which may be subject to arbitration under the Treaty.

154. From the point of view of the Respondent, it has been alleged that this restriction of the arbitration clause contained in Article 10 was a strict point of principle for the Soviet Union at the time of the signing of the Treaty. The Respondent submits that the Soviet Union proceeded on the basis that the question of the occurrence of an act of expropriation must in every particular case be decided by the national courts of the state in whose territory the expropriation was alleged to have taken place.

155. Support for this contention may be found by considering the other BITs concluded by the Soviet Union. In the majority of the early BITs concluded by the Soviet Union in 1989 and 1990, the arbitration clause is limited to disputes concerning the amount or method of compensation to be paid on foot of an

expropriatory act.[39] For instance, the arbitration provision in Article 8 of the United Kingdom – Soviet Union BIT, signed on 6 April 1989, refers to any legal dispute "concerning the amount or payment of compensation under Articles 4 or 5 of this Agreement." While somewhat broader dispute resolution provisions, relating to the "consequences" of measures taken by the host states, were included in the BITs concluded with France and Canada, the majority of these early BITs illustrate an identifiable practice on the part of the Soviet Union, which corresponds with the policy considerations alleged by the Respondent to lie behind the restrictive wording of Article 10 of the Treaty. Moreover, it is interesting to note that a definite change of policy can be observed in the BITs concluded by the Russian Federation in the late 1990s subsequent to the dissolution of the Soviet Union. The arbitration clauses in these later BITs are generally much broader in their scope and, undoubtedly, encompass disputes concerning the occurrence of an act of expropriation.[40] This further indicates that the restrictive wording of Article 10 arose from the deliberate intention of the Contracting Parties to limit the scope for arbitration under the Treaty.

156. The Tribunal does not agree with the Claimants' contention that this interpretation based on the ordinary meaning of the provision renders Article 10 meaningless for the Contracting Parties. The Tribunal refers to the terms of the Belgium/Luxembourg – China BIT, which was submitted to the Tribunal by the Claimants. Article 10 of the BIT provides that any dispute between an investor of one Contracting Party and the other Contracting Party arising from an investment "shall be subject to the jurisdiction of the State where the

[39] See Soviet Union – Austria BIT, signed on 8 February 1990; Soviet Union – Finland BIT, signed on 8 February 1989; Soviet Union – Germany BIT, signed on 13 June 1989; Soviet Union – Korea BIT, signed on 14 December 1990; Soviet Union – Switzerland BIT, signed on 1 December 1990; Soviet Union – United Kingdom BIT, signed on 6 April 1989. The exceptions are the Soviet Union – France BIT, signed on 4 July 1989 and the Soviet Union – Canada BIT, signed on 20 November 1989.

[40] See, inter alia, Cyprus – Russian Federation BIT, signed on 11 April 1997; Denmark – Russian Federation BIT, signed on 25 September 1996; Egypt – Russian Federation BIT, signed on 23 September 1997; Sweden – Russian Federation BIT, signed on 19 April 1995.

investment is located".[41] As an exception to this general rule, Article 10.3 goes on to provide that "a dispute which arises from an amount of compensation for expropriation, nationalization or other similar measures" may at the election of the investor be referred to "an international arbitration without resort to other means".

157. The terms of this Belgium/Luxembourg – China BIT leave no doubt as to the fact that the only disputes which may be submitted to arbitration under such treaty are disputes concerning the amount of compensation for expropriation. Belgium and Luxembourg were nonetheless willing to enter into the treaty with China and presumably regarded the BIT as a meaningful form of investment protection despite the restricted scope of the arbitration clause. This indicates a readiness on the part of Belgium and Luxembourg to accept such limited recourse to international arbitration in the terms of its BITs. In such light, the Tribunal cannot accept the Claimants' contention that the restriction of Article 10 of the Treaty to disputes concerning the amount or mode of compensation for expropriation renders the provision meaningless for the Contracting Parties.

158. The Claimants have pointed to an explanatory statement made by the Belgian Minister of Foreign Affairs before the Belgian Parliament in connection with the ratification of the Treaty. In this statement, the Minister declared that the Soviet delegation in the negotiations had accepted arbitration "in all areas covered by Article 5" (which would have included the question of whether or not had occurred). This notwithstanding, the Tribunal finds the language of the Treaty to be quite clear and in the view of the Tribunal such language could not possibly lend itself to the interpretation suggested in the explanatory statement.

[41] Belgium/Luxembourg – China BIT, Article 10.2.

5.5.2 Scope of the Most Favoured Nation clause

159. In light of the restrictive scope of Article 10 of the Treaty, the question then arises as to whether the Claimants can invoke a broader arbitration provision taken from a different BIT concluded by the Respondent in reliance upon the MFN clause in Article 2 of the Treaty. Specifically, the Claimants seek to rely upon the provisions of the Norway – Russian Federation BIT or, in the case of doubt, the Denmark – Russian Federation BIT.

160. Under Article 2, each Contracting Party guarantees that the MFN clause shall be applied to investors of the other Contracting Party with respect to all matters covered by the Treaty, in particular Articles 4, 5 and 6. The original French version of the Treaty provides that:

> "Chaque Partie contractante garantit que la clause de la nation la plus favorisée sera appliquée aux investisseurs de l'autre Partie contractante dans toutes les matières visées au présent Accord, et plus particulièrement aux articles 4, 5 et 6..."

161. The Respondent has objected to the application of the MFN clause on a number of grounds. By reference to the text of the Protocol the Respondent contends that the scope of the MFN clause is limited to treatment granted to states which were OECD members as of the date of the signing of the Treaty. The Tribunal finds no support for this contention either in the Protocol or in the text of the Treaty itself. The Respondent further argues that the reference to "the territory of the Soviet Union" in the Protocol means that the MFN clause may only be applied in relation to BITs signed by the Soviet Union and not BITs signed by the Russian Federation. The Tribunal also rejects this argument and notes that the official position consistently adopted by the Respondent in international affairs is that the Russian Federation is the legal successor to the Soviet Union.

162. The Respondent also raises the objection that the Treaty's MFN clause may not be extended to encompass the procedural benefits of investment treaties. The Claimants, on the other hand, reject this contention and claim that the weight of legal opinion is overwhelmingly in favour of extending MFN treatment to BIT dispute resolution provisions. In particular, the Claimants rely upon the decisions in *Maffezini v Kingdom of Spain*[42], *Siemens v Argentina*[43] and *Gas Natural v Argentina*[44].

163. The case of *Maffezini v Kingdom of Spain* concerned the requirement, set out in the arbitration clause of the Argentina – Spain BIT, whereby domestic courts are to be given the opportunity to deal with a dispute for a period of eighteen months before such dispute could be submitted to arbitration. Maffezini sought to avoid the application of this requirement by invoking the dispute settlement provisions in the Chile – Spain BIT through operation of the MFN clause in the Argentina – Spain BIT. In finding that the MFN clause could be invoked in this manner, the arbitral tribunal purported to lay down the following general rule:

> "... if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the ejusdem generis principle."[45]

164. The arbitral tribunal went on, however, to note that there were "some important limits that ought to be kept in mind."[46] The tribunal stated that:

> "As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a

[42] Maffezini, supra note 10.
[43] Siemens, supra note 11.
[44] Gas Natural, supra note 12.
[45] Maffezini, supra note 10, at para. 56.
[46] Maffezini, supra note 10, at para. 62.

private investor, as will often be the case. The scope of the clause might thus be narrower than it appears at first sight."[47]

The tribunal identified certain examples of such policy considerations which could not be bypassed by application of an MFN clause. Firstly, one of the contracting parties may have conditioned its consent to arbitration on the exhaustion of local remedies. Secondly, the contracting parties may have agreed to a so-called fork in the road provision, whereby a final and binding choice is to be made between submission to domestic courts or to international arbitration. Thirdly, the agreement may provide for an additional forum such as ICSID and finally, the parties may have agreed to a highly institutionalised system of arbitration that incorporates precise rules of procedure, such as NAFTA. The tribunal added that other elements of public policy limiting the operation of the clause no doubt would be identified by the parties or tribunals.

165. In *Siemens v Argentina* the Claimants brought an action under the Germany – Argentina BIT and invoked the MFN clause contained therein in an attempt to avoid the application of the same procedural requirement as arose in the *Maffezini* case, namely that the local courts be given an opportunity to deal with the dispute for a period of eighteen months before submission to arbitration. The arbitral tribunal in the *Siemens* case largely followed the decision in *Maffezini* and allowed the Claimants to rely on the MFN clause in order to invoke the arbitration clause in the Argentina – Chile BIT, in accordance with which no pre-arbitration submission to the local courts was required. The Respondent sought to identify certain public policy considerations which precluded the application of the MFN clause, but while the tribunal concurred "with *Maffezini* that the beneficiary of the MFN clause may not override public policy considerations judged by the parties to a treaty

[47] ibid.

essential to their agreement"[48], it was held that the public policy considerations adduced by the Respondent were not applicable.

166. The application of an MFN clause to dispute resolution provisions arose again in the case of *Gas Natural v Argentina*. Once again, the Claimants in this case sought to invoke the MFN clause to avoid the requirement of pre-arbitration submission to national courts contained in the Spain – Argentina BIT. In its decision, the tribunal referred extensively to the decisions in *Maffezini* and *Siemens*. On the basis of the broad terms of the MFN clause in the Spain – Argentina BIT, the Tribunal held that dispute resolution did come within the scope thereof. This conclusion was stated to be "consistent with the current thinking as expressed in other recent arbitral awards"[49] and the tribunal proclaimed that:

> "Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favoured-nation provisions in BITs should be understood to be applicable to dispute settlement."[50]

167. While these cases do, therefore, offer support for the Claimants' reliance upon the MFN clause of the Treaty, a significantly different approach is to be found in the decisions of the arbitral tribunals in *Salini v the Hashemite Kingdom of Jordan*[51] and *Plama v Republic of Bulgaria*.[52] *Salini* involved a dispute between two Italian construction companies and the Kingdom of Jordan over claims under an investment agreement for the construction of a dam. The Italy – Jordan BIT excluded claims arising out of specific investment agreements from the ICSID arbitration procedures provided for under the dispute

[48] Siemens, supra note 11, at para. 109.
[49] Gas Natural, supra note 12, at para. 49.
[50] ibid.
[51] Salini v the Hashemite Kingdom of Jordan, ICSID Case No. ARB102/13, Decision on Jurisdiction of 15 November 2004.
[52] Plama Consortium Limited v Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005.

resolution provision of the Treaty. In accordance therewith, the tribunal held that its jurisdiction under the BIT was limited to the treaty claims raised by the Claimants. The Claimants attempted to circumvent the limitations in the dispute resolution provision by invoking the MFN clause in the BIT, but the tribunal rejected this argument.

168. The tribunal distinguished *Maffezini* on the grounds that the MFN clause in the Italy – Jordan BIT made no reference to "all matters governed by the agreement" and hence could not be given as broad an interpretation as the MFN clause considered in *Maffezini*. The tribunal also held that the Claimants had submitted "nothing from which it might be established that the common intention of the Parties was to have the most-favoured-nation clause apply to dispute settlement."[53] On the contrary, the limited wording of the arbitration clause constituted a strong indication that the parties intended to exclude contractual disputes from ICSID arbitration.

169. Referring to the *Maffezini* case, the tribunal stated:

> "In the words of the Claimants themselves in this case, the award "has given rise to some concern with regard to the possible expansive effects of the extension of a Most-Favoured nation clause to the investors' right to select different forums"".[54]

The tribunal then went on to expressly state its own view on the *Maffezini* decision as follows:

> "The current Tribunal shares the concerns that have been expressed in numerous quarters with regard to the solution adopted in the Maffezini case. Its fear is that the precautions taken by the authors of the award may in practice prove difficult to apply, thereby adding more uncertainties to the risk of "treaty shopping"."[55]

[53] Salini, supra note 51, at para. 118.
[54] Salini, supra note 51, at para. 114.
[55] Salini, supra note 51, at para. 115.

170. The case of *Plama v Republic of Bulgaria* involved a dispute arising out of an investment made by a Cypriot company in a Bulgarian company which owned an oil refinery in Bulgaria. The dispute was submitted to ICSID arbitration in reliance upon the terms of the Energy Charter Treaty (the "ECT") and the Cyprus – Bulgaria BIT. While the Cyprus – Bulgaria BIT itself did not provide for ICSID arbitration, the Claimants argued that Bulgaria had consented to ICSID arbitration by virtue of the MFN clause contained in the treaty. The claimants contended that the MFN clause must be construed as extending to more favourable dispute settlement mechanisms than those in the Bulgaria – Cyprus BIT which are contained in other investment treaties concluded by Bulgaria.

171. The tribunal upheld its jurisdiction under the ECT, but concluded that the MFN provision of the Bulgaria – Cyprus BIT could not be interpreted as providing consent to submit a dispute under the Bulgaria – Cyprus BIT to ICSID arbitration. Since the Tribunal had already upheld its jurisdiction under the ECT, the tribunal's decision with respect to its jurisdiction under the BIT was essentially *obiter dicta*. The issues discussed by the Tribunal in relation thereto are, however, of direct relevance in the instant case.

172. The tribunal stated that the basic prerequisite for arbitration is an agreement of the parties to arbitrate and that such an agreement must be clear and unambiguous.[56] Accordingly, if such agreement to arbitrate is to be founded upon an MFN clause, the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed.[57]

173. The tribunal then conducted a detailed review of the case law in the area and in particular the *Maffezini* decision. The tribunal referred in depth to the risks of

[56] Plama, supra note 52, at para. 198.
[57] ibid.

"disruptive treaty shopping" and the numerous policy considerations identified by the arbitral tribunal in *Maffezini*. On this basis, the Tribunal reasoned that:

> "... the principle with multiple exceptions as stated by the tribunal in the Maffezini case should instead be a different principle with one, single exception: an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them."[58]

174. The tribunal concluded its consideration of the *Maffezini* case with the following remarks:

> "The decision in Maffezini is perhaps understandable. The case concerned a curious requirement that during the first 18 months the dispute be tried in the local courts. The present Tribunal sympathizes with a tribunal that attempts to neutralize such a provision that is nonsensical from a practical point of view. However, such exceptional circumstances should not be treated as a statement of general principle guiding future tribunals in other cases where exceptional circumstances are not present."[59]

175. In light of these decisions the Tribunal will now consider the issue arising in the present case. Firstly, the Tribunal must express its firm view that the fundamental issue in determining whether or not an MFN clause encompasses the dispute resolution provisions of other treaties must always be an assessment of the intention of the contracting parties upon the conclusion of each individual treaty. In each case, the question must be asked as to whether the contracting parties to the treaty intended the MFN provision to incorporate by reference the dispute settlement provisions of other treaties. Ultimately, that question can only be answered by a detailed analysis of the text and, where available, the negotiating history of the relevant treaty, as well as other relevant facts.

[58] Plama, supra note 52, at para. 223.
[59] Plama, supra note 52, at para. 224.

176. In seeking to ascertain the true intention of the Contracting Parties in the instant case, the Tribunal must first determine how the text of the MFN clause in the Treaty is to be construed. In this regard, the tribunal in the *Plama* case discussed certain issues which deserve further consideration.

177. The *Plama* tribunal states that an arbitration clause in a BIT is an agreement to arbitrate, and such agreements should be clear and unambiguous. If this means that, generally speaking, arbitration agreements should be construed in a manner which is different in principle from that applied to the construction of other agreements, this Tribunal finds it doubtful whether such a general principle can be said to exist. At least under Swedish law, the traditional view that arbitration clauses should be construed restrictively now tends to be replaced by a more neutral approach to the effect that arbitration agreements are construed much in the same manner as other agreements. In many jurisdictions, there may in fact exist a tendency to interpret arbitration clauses rather widely.

178. However, another observation made by the *Plama* tribunal is that if an agreement to arbitrate is to be reached by incorporation by reference, doubts as to the intentions of the parties may arise. The present Tribunal agrees. Thus, while it may be true that no general principle exists, according to which arbitration agreements should be construed restrictively, particular care should nevertheless be exercised in ascertaining the intentions of the parties with regard to an arbitration agreement which is to be reached by incorporation by reference in an MFN clause.

179. This observation may be developed further. There is a fundamental difference as to how an MFN clause is generally understood to operate in relation to the material benefits afforded by a BIT, on the one hand, and in relation to dispute resolution clauses, on the other hand. While it is universally agreed that the very essence of an MFN provision in a BIT is to afford to investors all material

protection provided by subsequent treaties, it is much more uncertain whether such provisions should be understood to extend to dispute resolution clauses. It is so uncertain, in fact, that the issue has given rise to different outcomes in a number of cases and to extensive jurisprudence on the subject. The issue has caused the drafters of the United Kingdom model BIT to neutralise this ambiguity by confirming in Article 3(3) that, for avoidance of doubt, MFN treatment shall apply to certain specified provisions of the treaty including the dispute settlement provisions.

180. This general uncertainty about the scope of MFN clauses leaves little room for any general assumption that the contracting parties to a BIT intend an MFN provision to extend to the dispute resolution clause. In the words of the *Plama* tribunal, the interpretation made in the *Maffezini* case went beyond what State Parties to BITs generally intended to achieve by an MFN provision.[60]

181. The tribunal in the *Gas Natural* case suggested that as a matter of principle MFN provisions in BITs should be understood to be applicable to dispute settlement provisions unless it appears clearly that the parties intended otherwise.[61] For the reasons developed above, it should be evident that this Tribunal cannot accept that standpoint. Instead, the present Tribunal will apply the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties.

182. As explained above, this Tribunal does not derive the requirement for clarity and lack of ambiguity involved in this test from any general principle to the effect that arbitration clauses should be interpreted more restrictively than other agreements. Nevertheless, this test is warranted, in the view of the Tribunal, by

[60] Plama, supra note 52, at para 203.
[61] Gas Natural, supra note 12, at para 49.

the particular problems discussed above which are posed by the construction of the scope of MFN provisions in BIT:s.

183. The Claimants point to the expression "all matters covered by the present Treaty" and argue that this settles the question: if the MFN clause extends to all matters covered by the Treaty, surely the ordinary meaning of this expression must be that it extends to the dispute resolution provisions as well.

184. With respect to the construction of expressions such as "all matters" or "all rights" covered by a treaty, it should be noted that, for the reasons discussed above, not even seemingly clear language like this can be considered to have an unambiguous meaning in the context of an MFN clause. As emphasised by the *Maffezini* tribunal, with regard to treaties which in their MFN clauses speak of "all rights" or "all matters" subject to the treaty in question, but which do not provide *expressly* (our emphasis) that dispute settlement as such is covered by the clause, "it must be established whether the omission was intended by the parties or can reasonably be inferred from the practice followed by the parties in their treatment of foreign investors and their own investors."

185. Turning to the issue in the present case, the Arbitral Tribunal agrees that the ordinary meaning of the words "all matters covered by the present Treaty" is clear. However, such expression must be seen in its context, particularly in relation to the concept with which it is intertwined in the text of the Treaty, i.e. "the most favoured nation clause". The Treaty itself contains no definition of the expression "the most favoured nation clause". However, the Protocol to the Treaty provides that the Soviet Union will accord, in its territory, to Belgian investors treatment at least equivalent to that accorded to investors from countries that are members of the OECD on the date when the Protocol was signed. This suggests that what the Contracting Parties had in mind was a fairly standard form of MFN-clause, according to which each Contracting Party accords, in its territory, to investors from the other Contracting Party, treatment

at least equivalent to that accorded to investors from third countries. The use of the expressions "treatment" and "in its territory" should be noted. This language appears to indicate that what the Contracting Parties had in view was the material rights accorded to investors within the territory of the Contracting States.

186. The question must now be asked whether it is possible to apply an MFN clause defined in this (albeit vague) manner to "all matters covered by the present Treaty", as stipulated in Article 2. In the view of the Tribunal, this is clearly not the case.

187. Firstly, Articles 9 and 11 concern the relations between Contracting State Parties only (Articles 9 and 11) and an MFN clause (which concerns the treatment of investors) obviously cannot apply to these provisions.

188. Secondly, Articles 1 (Definitions) and 7 (Subrogation by insurers) deal with matters which have no relation to the treatment of investors. It is very difficult to see how an MFN clause could possibly apply to these provisions.

189. Thirdly, Articles 8, 12 and 13 deal with matters concerning which the application of an MFN clause is at most a theoretical possibility.

190. With regard to Article 8.1, it is hardly conceivable that a future treaty could contain provisions which would improve the treatment of investors already provided for by that Article. With regard to Article 8.2, it is theoretically possible, but improbable, that a future treaty could allow the provisions of agreements between investors of two Contracting Parties to be inconsistent with the Treaty or with the laws of the Contracting Party in whose territory the investment is made. It is rather doubtful however whether this would entail an improvement of the treatment of investors.

191. Articles 12 and 13 deal with questions concerning the period during which investments are protected under the Treaty and with the date upon which the Treaty enters into force. It could perhaps be argued that, theoretically, an MFN clause could operate so as to include retroactive or extended protection for investors in future treaties. In the view of the Tribunal it is uncertain, however, whether an MFN clause could ever be interpreted in this manner.

192. This analysis shows that the expression "all matters covered by the present Treaty" certainly cannot be understood literally. The MFN clause cannot be applied at all to several of the matters covered by the Treaty. Moreover, with respect to a number of other issues encompassed by the Treaty, it remains unclear whether the MFN clause is of any relevance.

193. It would seem that the Contracting Parties were aware of the ambiguity of the expression "all matters covered by the present Treaty", since they added the clarification that the MFN clause would apply "particularly to Articles 4, 5 and 6". Those Articles embrace the classic elements of material investment protection, i.e. fair and equitable treatment, non-expropriation and free transfer of funds. Article 10, which contains the provisions concerning dispute resolution between an investor and a Contracting State Party, is not, however, included in this clarification.

194. It may, therefore, be concluded that the expression "all matters covered by the present Treaty" does not really mean that the MFN provision extends to all matters covered by the Treaty. Therefore, the "ordinary meaning" of that expression is of no assistance in the instant case, and the expression as such does not warrant the conclusion that the parties intended the MFN provision to extend to the dispute resolution clause. In fact, it would seem that the Contracting Parties must have realised and accepted that some of the issues embraced by the Treaty would be excluded from the application of the MFN

provision. The question which must now be addressed is whether dispute resolution was one of those issues.

195. At this point of the reasoning, proponents of the view that the dispute resolution clause should be covered by the MFN provision would argue that the right to arbitration is in fact a form of investment protection, of basically the same kind (*"eiusdem generis"*) as the material protection afforded by the Treaty. Consequently, this right to arbitration must be covered by any clause providing for MFN treatment of investment protection.

196. A further argument, frequently advanced in this context, is that access to arbitration is in fact such an important form of investment protection that not extending MFN provisions to arbitration clauses would run counter to the overriding object and purpose of a BIT, which is to promote and protect investments.

197. The problem with these arguments is that they are of a general nature. They offer strong support for the conclusion that an MFN provision is generally capable of incorporating by reference a dispute resolution clause and that such incorporation would typically advance the purpose of BITs. However, these arguments offer little or no guidance as to whether, in a specific case, the contracting parties to a treaty, which already provides for arbitration in certain types of disputes, actually intended the arbitration clause to be extended in the future to other kinds of disputes.

198. In the instant case, a relevant question is whether the Contracting Parties shared the view that arbitration is an integral part of investment protection and, therefore, must be covered by an MFN clause. If they did, it must be assumed that they intended the MFN clause to be extended to Article 10. If they did not, however, share this view, it becomes much less probable that they intended the MFN clause to encompass dispute resolution provisions.

199. It is not, of course, possible today to read the minds of the Belgian and Soviet negotiators at the time of the conclusion of the Treaty, nor do we have access to any preparatory works which could help us to clarify the views and intentions of the Contracting Parties. Certain factual circumstances may, however, provide assistance in this regard.

200. When the Treaty was concluded in 1989, there was no generally accepted approach to the question of whether an arbitration clause is encompassed by an MFN provision. Even today, no such common approach can be ascertained. Furthermore, the issue had, in fact, not even been clearly addressed in the jurisprudence available at the time. The case which comes closest to dealing with this question is the *Ambatielos Case*[62]. However, as noted by the *Plama* tribunal, the ruling of the Arbitration Commission in that case does not relate to the import of an arbitration clause from another treaty into the basic treaty, but rather to provisions concerning substantive protection in the sense of denial of justice in the domestic courts.

201. The question before the Arbitration Commission in *Ambatielos* was whether "administration of justice" was comprised by the term "commerce and navigation" in the MFN provision in the relevant treaty. The Arbitration Commission found that it could not be said that administration of justice "must necessarily be excluded" from the field of application of the MFN clause but that the question "can only be determined in accordance with the intention of the contracting parties as deduced from a reasonable interpretation of the Treaty". In fact, far from formulating a general principle concerning the scope of an MFN clause, the Arbitration Commission emphasised that this was essentially a question of interpreting the relevant treaty. When interpreting the treaty in the dispute before it in accordance with these principles, the

[62] Ambatielos Claim, Greece v. United Kingdom, XII U.N.R.I.A.A.9, award of 6 March 1956.

Arbitration Commission found that the MFN clause in that treaty encompassed "administration of justice".

202. Given the fact that the question of whether an arbitration clause is encompassed by an MFN provision had not been clearly addressed in the jurisprudence available at the time when the Treaty was concluded, it seems distinctly conceivable that the Contracting Parties simply did not contemplate the possibility that the arbitration provision in Article 10 could be embraced by the MFN clause in Article 2. On the other hand, if indeed the Contracting Parties did intend Article 2 to apply to Article 10, they must have had a strong incentive to clarify this in the text of the Treaty in view of the highly uncertain state of the law. Such clarification could have been achieved by adding Article 10 to the specific references made to Articles 4, 5 and 6 in the MFN clause. The fact that this was not done creates doubts as to whether any of the Contracting Parties intended Article 10 to be covered by Article 2.

203. Certain other facts are of relevance to the intentions on the Soviet side in particular. On that point the Respondent argues as follows. The Soviet Union pursued a very consistent policy to the effect that it never consented to arbitration in BITs concerning questions whether or not an act of expropriation had occurred. The Soviet Union maintained the principle that this issue was to be resolved in accordance with national legislation and by the national courts of the state where the alleged act of expropriation had taken place. Ultimately, this view stems from the principle of state sovereignty, which was of fundamental importance to the Soviet Union.

204. In support of this contention, the Respondent has submitted and relies on extracts from the BITs entered into by the Soviet Union with Turkey, South Korea, Switzerland, Spain, China, Austria, Italy, Canada, the Netherlands, France, Germany and the United Kingdom. A scrutiny of these treaties shows that they all removed the fact of expropriation from the scope of arbitration.

Thus, the principle described by the Respondent was indeed applied consistently by the Soviet Union. The treaties with Canada and France provide for investor-state arbitration concerning "the effects" of i.a. expropriation. This appears to provide for such arbitration in a wider range of issues than the present Treaty, but still must be understood to exclude the fact of expropriation itself from arbitration. In the view of the Tribunal, this consistent practice on the part of the Soviet Union strongly suggests that the Soviet Party did not intend the MFN provision in Article 2 of the Treaty to extend to dispute resolution issues.

205. There are fewer available facts concerning the intentions on the Belgian side. However, as discussed above, the failure by the Contracting Parties to clarify whether or not Article 2 was to extend to arbitration provisions tends to support the view that none of the Contracting Parties had any such intention.

206. The discussion above can now be summarised as follows. The starting point in determining whether or not an MFN clause encompasses the dispute resolution provisions of other treaties must always be an assessment of the intention of the contracting parties upon the conclusion of the original treaty. The Tribunal has applied the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the Contracting Parties.

207. An interpretation of the text of the Treaty in accordance with the principles of the Vienna Convention is inconclusive. No clear "ordinary meaning" can be attributed to the terms of Article 2. The object and purpose of the Treaty is undoubtedly to promote and protect investments, but this is a general statement which does not contribute to the construction of the terms of Article 2. No preparatory work or other instrument or agreement relating to the Treaty, or

subsequent agreements or practice in the application of the Treaty provide any guidance.

208. A reasonable interpretation of the intentions of the Contracting Parties in light of the text of the Treaty and other relevant facts shows that it is improbable that the Soviet Contracting Party intended the MFN provision to embrace arbitration issues. Moreover, neither does the balance of the facts available support the conclusion that the Belgian Party had any such intention. For these reasons, the Tribunal finds that the Treaty does not clearly and unambiguously provide for incorporation by reference of arbitration clauses in other BITs. Therefore, the jurisdiction of this Tribunal can be based only on the arbitration clause contained in Article 10 of the Treaty. As discussed above, the said arbitration clause does not extend to the matters brought before the Tribunal by the Claimants.

5.6 Fraud on Berschader International

209. The Respondent has submitted that by bringing this claim the Claimants are acting in breach of Belgian bankruptcy law and international public order and that the Tribunal, accordingly, lacks jurisdiction. The Tribunal cannot accept this contention. The Tribunal is satisfied that the rights being asserted by the Claimants in this case are their own rights to bring a claim as shareholders under the Treaty and that these rights are entirely separate and independent from any similar rights which may be held by BI. The Tribunal cannot, in other words, accept that the Claimants are unlawfully attempting to assert a claim which rightfully belongs to BI. Under these circumstances, the question of whether the Claimants are entitled to represent BI or not can be of no relevance to the jurisdiction of the Tribunal.

5.7 Advance on costs

210. The Tribunal finally wishes to address the Claimants' request that the Respondents be ordered to pay its share of the advance on costs. This issue is no longer directly relevant in view of the Tribunal's findings with regard to jurisdiction. Nonetheless, the Tribunal does not consider that it would have the authority to order the Respondents to pay their share of the advance on costs.

211. According to Article 14 (2) of the SCC Rules each party shall contribute half of the advance on costs. However, in the event that a defendant party fails to pay its share of the advance on costs and the Claimant nevertheless wishes to proceed with the arbitration, the SCC Rules do not leave the Claimant with any alternative other than to pay the whole of the advance itself. Accordingly, as noted by the Supreme Court of Sweden in a case from 2000[63], an arbitral tribunal does not have the authority to make an interim award compelling a respondent to pay its share of an advance of costs, unless this is expressly stipulated in the agreement between the parties.

5.8 Conclusion

212. In conclusion, the Tribunal finds that the types of indirect investments relied upon by the Claimants do not come within the scope of Article 1.2 of the Treaty. Moreover, the Claimants' shares in BI do not constitute an investment in the territory of the Russian Federation. Accordingly, the investments relied on by the Claimants in these proceedings do not constitute qualifying investments within the terms of the Treaty. The Tribunal further finds that the claims presented by the Claimants are not encompassed by the arbitration clause in Article 10.1 of the Treaty. Moreover, the MFN clause contained in Article 2 does not clearly and unambiguously provide for the incorporation by

[63] NJA 2000:773.

reference of arbitration clauses in other BITs. For these reasons, the Tribunal holds that the Claimants' claims must be dismissed.

5.9 Apportionment of arbitration costs and costs for legal representation

213. In accordance with Article 39 of the Rules of the Arbitration Institute (the "Rules") the arbitration costs (as defined in the said Article) have been fixed by the Arbitration Institute as follows.

Fees	
Advokat Bengt Sjövall	EUR 77 646 and VAT, EUR 19 412
Professor Todd Weiler	EUR 46 588 and VAT, EUR 3 261
Professor Sergei Lebedev	EUR 46 588
Administrative Fee	
SCC Institute	EUR 23 699
Expenses	
Advokat Bengt Sjövall	SEK 25 800 and VAT, SEK 6 450
Professor Todd Weiler	CAD 10 815 and VAT, CAD 757
	EUR 500
Professor Sergei Lebedev	SEK 9 450
	EUR 500
SCC Institute	SEK 2 123

Pursuant to Article 40 (1) of the Rules, the Parties are jointly and severally liable for the payment of the arbitration costs. In accordance with Article 40 (2) of the Rules, the Tribunal will decide how those costs should be finally apportioned as between the Parties. In doing so, the Tribunal will take into account the following considerations.

214. It is generally recognised that Article 40 (2) of the Rules gives the Tribunal broad discretion in deciding on the apportionment of the arbitration costs. A common method is to award costs to the party who prevailed in the proceedings (costs follow the event). If the claim is dismissed, it is usually held in Swedish arbitrations and court proceedings that the claimant is the losing party and therefore is liable to compensate the respondent for costs. However, a tribunal acting in accordance with the Rules is by no means bound by these general guidelines.

215. In the present case, the Tribunal finds that it would not be appropriate simply to apply the principle that costs follow the event. Firstly, the Claimants had good reasons for the argument that this Tribunal has jurisdiction over the claims; the grounds on which the Tribunal has found that it lacks jurisdiction relate to issues which have been extensively discussed, with different approaches being adopted by different tribunals. Secondly, the obvious imbalance between the Parties in economic terms has to be taken into account. Exercising the discretion afforded it by the Rules, the Tribunal therefore finds that the arbitration costs should be equally apportioned between the Parties. The Tribunal notes that this decision appears to be in line with a clear tendency in international investment arbitrations not to order a losing private party to bear the winning government party's costs[64].

216. The same principle should be applied with regard to costs for legal representation. Accordingly, the Tribunal decides that each party shall bear its own costs for legal representation and other costs for presenting its case.

[64] See e.g. Wilson, Cain & Gray, in TDM 2005 (www.transnational-dispute-management.com) at p. 14-18.

6. Award

217. For the foregoing reasons, the Tribunal renders the following award:

(a) The Claimants' claims are dismissed since the Tribunal has no jurisdiction under the terms of the Treaty to hear the claims presented by the Claimants;

(b) The Parties are jointly and severally liable to pay the arbitration costs, EUR 218 194, SEK 43 823 and CAD 11 572, as specified above;

(c) As between the Parties, the arbitration costs shall be apportioned equally. The costs will be drawn from the advances paid by the Claimants to the Arbitration Institute of the Stockholm Chamber of Commerce. The Respondent is ordered to compensate the Claimants for 50 % of the arbitration costs, i.e. EUR 109 097, SEK 21 911.50 and CAD 5 786;

(d) Each Party shall bear its own costs for legal representation and other expenses for presenting its case.

Stockholm, 21 April 2006

Advokat Bengt Sjövall
Chairman of the Tribunal

Professor Sergei Lebedev

Professor Todd Weiler

Separate opinion by
Professor Weiler, see
Appendix 1

In accordance with Section 36 of the Swedish Arbitration Act, either Party may bring an application before the Swedish courts to have this award amended either in whole or in part. Such an application must be submitted to the Svea Court of Appeal within three months from the date upon which the Party receives the award. In the event that the award is subsequently amended or interpreted by the Tribunal pursuant to the provisions of Section 32 of the Swedish Arbitration Act or Article 37 of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, the application shall be submitted within three months from the date upon which the Party receives the final version of the award.

Vladimir Berschader & Moïse Berschader* v. *The Russian Federation

Separate Opinion

1. This is a difficult case involving difficult legal issues upon which reasonable people may disagree. Unfortunately, I find myself in disagreement with my tribunal colleagues on two of the issues presented for our decision: the scope of Article 10 of the Treaty with respect to claims made by qualified investors involving indirect investments made through an enterprise established by the investor in the country of that investor; and the applicability of Article 2 of the treaty to Article 10 of the Treaty, concerning the availability of dispute settlement under this Treaty in cases where more favourable means of dispute settlement have been agreed to by the Respondent in investment protection treaties with other OECD Member countries.

2. With respect to all of the other findings of fact and law contained within the Award, I am in agreement with my colleagues.

3. First, it would be useful to reiterate that this Tribunal must be guided by the terms of the Treaty.[1] Interpretation of these terms must be undertaken using the customary law rules of treaty interpretation, generally recognised to have been memorialised in Article 31 of the *Vienna Convention on the Law of Treaties*. Under these rules, the terms of a treaty must interpreted in good faith in accordance with their ordinary meaning, in their context and in the light of the object and purpose of the treaty.

4. We are in agreement about our need to be guided by the contents of Article 31 of the *Vienna Convention* in interpreting the terms of this Treaty. Where we appear to differ is in its application.[2] While my colleagues concentrate much of their analysis on identifying the intent of the drafters of the Treaty as of the date of its execution,[3] I focus on the treaty terms themselves as the best evidence of ascertaining such intent.[4]

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[1] Article 10:3 of the Treaty indicates that the Tribunal shall base its decision on the terms of the treaty; the national law of the host state [necessarily in as much as it is relevant to, and appropriate for, the issue]; and the commonly accepted rules and principles of international law.

[2] We also appear to agree that there is no need for recourse to the rules recorded in Article 32 of the *Vienna Convention on the Law of Treaties*. For my part, I have concluded that no recourse to these rules is required because the plain and ordinary meaning of the relevant treaty terms can be interpreted in their proper context. Hence, recourse to secondary means of interpretation is unnecessary. My colleagues have also chosen not to resort to the rules contained within Article 32

[3] I am reluctant to adopt this approach because it seems to me that when counsel argue to a Tribunal such as this one about "what the drafters intended" it is normally little more than the deft use of a euphemism to justify counsel's arguments as to how the terms of a treaty should be construed, in absence of any actual evidence on the subject.

[4] As demonstrated by the fact that neither party led any evidence concerning the negotiation and ratification of the Treaty (such as *travaux preparatoires* or contemporaneous legislative or executive statements), the first and best evidence of discerning what the Treaty drafters meant is to found in the terms of the Treaty. The terms have meaning, particularly within the context of an instrument whose objectives are to promote and protect foreign investment. This is why Article 32 of the *Vienna Convention* directs that recourse to *travaux* (absent in this case) should only be had in cases where the

5. Article 31(2) of the *Vienna Convention* states that the context for the purposes of treaty interpretation shall comprise the treaty text itself, its preamble and its annexes, as well as certain other agreements or instruments that are not relevant for this case. The Treaty's preamble is relevant for our interpretation of Articles 1, 2 and 10; its goals and objectives are stated [albeit in unofficial English] as follows:

> DESIRING
>
> to create favourable conditions for investments by investors of one Contracting Party in the territory of another Contracting Party.
>
> CONSCIOUS
>
> of the positive effect that the present Treaty can have on fostering business contacts and strengthening trust in the area of investments

6. Given the Treaty's objectives, I believe that it is incumbent upon the Tribunal to adopt an interpretation of the terms of Articles 2 and 10 of the Treaty that ensures the promotion of "favourable conditions for investments by investors of one Contracting Party in the territory of another Contracting Party."

7. Through their wholly-owned, Belgian-incorporated investment enterprise the investors engaged in exactly the kind of activity that one would assume was envisaged in the preambular terms of the Treaty: they built an edifice for the Respondent's Supreme Court. One could hardly think of a better example of realised business contacts and strengthened trust than such an undertaking. On the basis of assumed facts, however, one could hardly conceive of a more grievous breach of that trust than that which, as alleged by the Claimants, befell them. They lost their investment; did not receive adequate compensation; and their investment vehicle was forced into bankruptcy.

8. In my opinion the terms of Article 10, as viewed within the context of the remaining text of the Treaty, contemplate the protection of investors who indirectly make their investments in the territory of the other Contracting party through an enterprise established in the territory of their respective Contracting Party. The provision refers to "any dispute" between one Contracting Party and an investor of the other Contracting Party as being capable of being submitted to dispute settlement, placing no limits on the mode of investment involved apart from defining the term "investment."

9. The term "investment" includes various forms of property under the Treaty. The terms of the Treaty, including the preamble, indicate that the investment must be made in the territory of another contracting party in order for it to be covered by the Treaty. This requirement is similar to that found in most investment protection treaties (and dissimilar to multilateral economic agreements such as the NAFTA, which contemplates a more

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normal approach to interpretation leaves the meaning of treaty terms ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable.

complicated regime of protection for investors and investments in the free trade area it created).[5]

10. I am accordingly in agreement with my Tribunal colleagues that shares held in an investment vehicle not incorporated in the host State cannot constitute investments protected under the Treaty.

11. There is nothing in the treaty text, however, indicating how the other investments made in the territory of the Respondent – such as the contract and various other property rights – must have been made or maintained by the investors directly. Article 10 does not restrict itself to disputes involving only investments that are directly held by an investor. Nor does the definition of "investor" suggest such a limitation.

12. The definition of "investment" does provide some useful context, however. It states that "[the] term 'investment' 'also means' indirect investments made by investors of one of the Contracting Parties in the territory of another Contracting Party by the intermediary of an investor of a third state." Contrary to my colleagues' conclusion, I regard this clarification as demonstrating how indirect investments made through an intermediary enterprise are clearly contemplated within the Treaty.[6] Otherwise, there would have been no need for a clarification dealing with other approved forms of indirect investment.

13. Finally, while I would agree with my colleagues that most of the cases cited by the Claimants in support of their position on coverage for indirect investments can be factually distinguished from the case at bar, with respect I think their analysis misses the point. As my colleagues acknowledge, cases such as *Fedax N.V.* v. *Venezuela* stand for the proposition that a broad and liberalising approach should be accorded to the interpretation of the definition of "investment" found in an investment protection treaty. Whereas my colleagues distinguish this approach as only being appropriate in relation to cases proceeding under the auspices ICSID, I regard this statement as a conclusion of general application based upon the common objectives of investment protection treaties and the applicable customary international law rules of interpretation.[7]

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[5] The NAFTA created a free trade area between its three signatories, and appears to indicate explicitly when the obligations it contains apply only to investments made in the territory of another NAFTA Party, rather than the circumstances in which investments made anywhere in the North American Free Trade Area receive protection.

[6] My colleagues effectively adopt a *contra proferentum* analysis of this paragraph, reasoning that if the drafters included this provision respecting indirect investments through a foreign intermediary, they must not have intended to permit indirect investments through a local intermediary. The problem with this analysis is that it ignores the term "also means" contained within this paragraph. Use of the term "also" requires there to be some other condition of indirect investment against which one defined is to be compared. Obviously that other condition would be an indirect investment made by an investor through an intermediary organized under the laws of its own Contracting Party (rather than those of a foreign country – whose inclusion ***would have*** required elucidation, given the controversy mentioned by my colleagues with respect to the fact pattern found in the *Barcelona Traction* case).

[7] In this respect I must disagree with the Tribunal's finding at paragraph 136 that, after concluding that no case law was directly on point, it should "turn to the text of the Treaty." With respect, the text of the Treaty was where it should have started; the purpose of doctrine, as received under Article 31(3)(a) of the

14. Accordingly, I find that the plain meaning of Articles 1 and 10, taken in context, contemplate protection for investors who made their investment in an indirect manner such as the Claimants did. An interpretation of these terms that would deprive the investors of the rights contemplated in the Treaty – merely by virtue of the corporate structure they chose to make their investment – is one that places form over substance and does not comport with the objectives of the Treaty.[8]

15. I must also disagree with my esteemed colleagues with respect to their interpretation and application of the Treaty's MFN treatment provision, Article 2. The English translation very closely resembles the very broad "all matters" MFN provisions found in cases such as *Maffezini*, *Gas Natural* and *Siemens*, cited by the Claimants.[9] The terms of Article 2 differ from the MFN provisions found in the *Salini* and *Plama* cases,[10] cited in apposition by my colleagues.

16. I find my colleagues' reliance on the reasoning in these latter two cases unpersuasive. The *Plama* analysis on the MFN issue was *obiter dictum* and accordingly not persuasive because the reasoning was not dispositive of the final award. It was also wrongly

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Vienna Convention, is to inform the Tribunal's interpretation of the Treaty text. In this case, cases such as *Fedax* and *Genin* teach us that we should not adopt a restrictive definition of the Treaty that might frustrate its objective of investment-liberalisation. See: *Fedax N.V.* v *Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction of 11 July 1997 at para. 24, reprinted at 37 ILM 1378 (1998); www.investmentclaims.com/decisions/Fedax-Venezuela-Jurisdiction-11Jul1997.pdf; and *Genin* v *Estonia*, ICSID Case No. ARB/99/2, Award of 25 June 2001; www.investmentclaims.com/decisions/Genin-Estonia-Award-25Jun2001.pdf.

[8] To be clear, in my opinion there is nothing to be gained in attempting to look behind the plain meaning of the Treaty text. My colleagues' attempt to divine what might have been in the minds of the drafters in 1989 in respect of the treatment of indirect investments, mentioned for example in paragraph 141, does not comport with the customary rules of treaty interpretation and – in any event – is completely unreliable in terms of answering the question posed.

[9] *Maffezini* v *Kingdom of Spain*, ARB/97/7, Decision on objections to jurisdiction, 25 January 2000; www.investmentclaims.com/decisions/Maffezini-Spain-Jurisdiction-25Jan2000-Eng.pdf; *Siemens A.G.* v *Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of 3 August 2004; www.investmentclaims.com/decisions/Siemens-Argentina-Jurisdiction-3Aug2004-Eng.pdf; and *Gas Natural* v *Argentina*, ICSID Case No. ARB/03/10, Decision on Jurisdiction of 17 June 2005; www.investmentclaims.com/decisions/Gas%20Natural%20SDG%20-%20Jurisdiction.pdf.

[10] *Plama Consortium Limited* v *Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005; www.investmentclaims.com/decisions/Plama-Bulgaria-Jurisdiction-8Feb2005.pdf; and *Salini* v *the Hashemite Kingdom of Jordan*, ICSID Case No. ARB102/13, Decision on Jurisdiction of 15 November 2004; www.investmentclaims.com/decisions/Salini-Jordan-Jurisdiction-15Nov2004.pdf.

[11] Georg Schwarzenberger, "The Most-Favoured-Nation Standard in British State Practice" (1945) 22 Br Y.B. Int'l L. 96 at 99-100. Professor Schwarzenberger noted that the MFN principle, when embodied in a treaty provision, "consists in forming an agency of equality. It prevents discrimination and establishes equality of opportunity on the highest possible plane: the minimum of discrimination and the maximum of favours conceded to any third state... It is clear that m.f.n. clauses serve as insurance against incompetent draftsmanship and lack of imagination on the part of those who are responsible for the

decided, on this point, as a matter of customary international law interpretation. The *Salini* case is clearly distinguishable on the facts, being involved with the interplay between a concession contract and an investment protection treaty.

17. As Professor Schwarzenberger observed approximately six decades ago, the MFN standard is among the most ancient and venerable in international law, placing the prospective talents of every other country's drafter at the disposal of the parties to a treaty who agree to include such a provision in their agreement. A broad-based MFN provision, covering "all matters" in an investment treaty, such as the provision with which we are dealing, has thrice been found to extend beyond a mere grant of equality as between the substantive provisions of two treaties.[11] It extends to procedural aspects of the dispute, including entitlement to pursue arbitration.

18. Accordingly, and with the doctrinal support of three tribunals composed of some of the most senior members of the investment treaty bar, I find that the terms of Article 2 plainly regulate the possibility that the Contracting Parties may conclude future investment protection treaties that grant more favourable treatment to a new class of investors than that for which the Parties were prepared to commit in the older treaty.

19. My colleagues appear to rely upon the general thrust of the *Plama* award in support of their position, albeit with a caveat concerning that tribunal's general conclusion on the construction of arbitration clauses.[12] I am concerned, however, that my colleagues' approach is really not that different from that of the *Plama* Tribunal,[13] as both effectively apply a rule of strict construction to the provision – requiring that it include terms "clearly and unambiguously" demonstrating how the provision was intended by its drafters to include recourse to dispute settlement as one of the "matters" against which the test of 'most favourable treatment' should be applied.

20. The MFN standard is a tried-and-true expression of the international economic law principle of non-discrimination. In application, its breadth and depth are limited primarily by restrictive language found in the text of a treaty (such as general exception clauses and reservation schedules) and by the requirement that most favourable treatment be accorded only to those who stand in like circumstances. There is simply no reason to suppose that – absent some specific treaty language – any given MFN provision should

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conclusion of international treaties ... it is thus that the standard of m.f.n. treatment has the effect of putting the services of the shrewdest negotiator of a third country at the disposal of one's own country..."

[12] At paragraph 177 of the Award, my colleagues refer to the state of the law on arbitration in Sweden as having passed from a period where strict construction of an arbitration clause has been replaced by a "more neutral approach" to understanding the meaning of their text. They do not mention the applicable customary laws of treaty interpretation at this point.

[13] See, in particular, paragraphs 181-182 of the Award.

be more or less narrowly defined. In other words, MFN clauses apply to all aspects of the regulatory environment governed by an investment protection treaty, including availability of all means of dispute settlement.[14]

21. My colleagues have parsed the entire text of the Treaty to conclude that the term "all matters" found in Article 2 cannot really mean that the MFN obligation should extend to "all matters" covered under the Treaty. They note how various provisions do not lend themselves to a MFN analysis, such as those that include definitions or that govern relations between the Contracting Parties. They also note, somewhat more compellingly, that Article 2 expressly references the other substantive provisions of the Treaty (Articles 4, 5 and 6) as being covered under its auspices, but not Article 10 (which provides access for the Claimants to dispute settlement).

22. It is important to note, however, that Article 2 does not restrict itself to Articles 4, 5 and 6; it merely indicates that this non-exclusive list of substantive obligations are "particularly" covered by the MFN obligation. With respect to the provisions of the Treaty that do not apparently lend themselves easily to a MFN analysis, I would only suggest that "all matters" in context obviously means 'all matters from which one may be capable of deriving more or less favourable treatment.'

23. Because the MFN provision at issue in this case is clear and unambiguous, particularly when read in the light of the MFN principle, as well as prior jurisprudence regarding the similar application of a virtually identical provision, I can see no justification for looking to the subsequent treaty practice of the Contracting Parties for an indication of whether it was intended to cover recourse to dispute settlement.[15] What the Contracting Parties might have agreed upon in later situations with other partners says nothing conclusive about what the terms of the instant Treaty actually mean.

24. If I was to venture down this path, however, the conclusion I would reach is that my interpretation of Article 2 has been strengthened by subsequent practice; not weakened. The Respondent has apparently entered into agreements with other OECD members, France and Canada, wherein greater concessions towards investment liberalisation, and investor-state dispute settlement, were offered. More importantly, the very fact that the Respondent entered into a large number of agreements *after* it agreed to the instant Treaty is actually demonstrative of the fact that its partners in this Treaty were 'first-movers' for whom a broad and remedial MFN provision would be crucially important.

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[14] In this case, and as my colleagues have correctly surmised, we have a very clear restriction placed upon the MFN obligation in this Treaty; it applies only to agreements reached by the Respondent with other OECD members. Unlike my colleagues, however, I conclude that the very existence of this restriction demonstrates how no other implicit limitation was intended for the MFN provision contained within this Treaty.

[15] Again, the customary international law rules of treaty interpretation do not call upon us to decide what was in the minds of the drafters of a treaty as of the day it was signed, or came into force. In light of the objectives of the Treaty and when read in their proper context, the terms are supposed to speak for themselves.

25. The Claimants seek the benefit of treaties concluded by the Respondent with other OECD members that would allow them to have recourse to dispute settlement for the expropriation and breaches of other treaty standards they have alleged. The plain meaning of the terms of Article 2 support their petition; as do the applicable rules of international law and arbitral jurisprudence; as does the context of the Treaty text. Accordingly I would have granted their request.[16]

26. For the foregoing reasons, I would have dismissed the Respondent's preliminary objections and ordered the parties to proceed to a hearing on the merits of the claim.

27. Finally, as some of the objections raised by the Respondent posed legitimate questions for the Tribunal's consideration on a preliminary basis, I would have ordered that each party bear its own costs for legal representation and other expenses borne in presenting its case; and I would have ordered the arbitration costs for the preliminary phase of the hearing to be apportioned equally between them.

Todd Weiler

Done at Calgary, 7 April 2006.

[16] In other words, the "starting point" for this Tribunal's analysis should not have been "an assessment of the intention of the contracting parties upon the conclusion of the original treaty," as stated in paragraph 206 of the Award. It should have been: "the terms of the Treaty, interpreted in good faith in accordance with their ordinary meaning, in their context and in the light of the object and purpose of the treaty."