AD HOC ARBITRATION

DR. CARL A. SAX V. THE CITY OF ST. PETERSBURG, PROPERTY MANAGEMENT OF THE CITY OF ST. PETERSBURG, PULKOVO SEP, ROSSIYA OJSC AND PULKOVO OSO

FINAL ARBITRAL AWARD

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30 March 2012

Tribunal:
Marc Blessing (President)
Andrey Yurlevitch Bushev (Appointed by the State)
Per Runeland (Appointed by the investor)

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Final Arbitral Award

Abbreviations / Defined Terms	
CM + number	Denotes a submission filed by Claimant (written sub-mission/memorial, letter)
CX + number	Exhibited documentary evidence filed by Claimant
C-WS + number	Witness statement or expert report filed on behalf of Claimant
1RM + number	Denotes a submission filed by Respondent 1 (written submlssion/memorial, letter)
2RM + number	Denotes a submission Filed by Respondent 2 (written submission/mennorial, letter)
RX + number	Exhibited documentary evidence filed by Respondents
R-WB - number	Witness statement or expert report filed on behalf of Respondent
AIPT or Alternative Terminal IAT)	The BOT- Project (build-operate- transfer project), launched in 2007 as a PPP (public-private partnership) with the Northern Capital Gateway Consortium for the construction of an alternative International passenger terminal ("AIPT") at Pulkovo Airport. The 51-page Dewey & LeBoeuf Preliminary information Memorandum (CX-89) on the Project contained (he Prequalification Criteria for the applicants (and affiliates) requiring inter alia to own total assets of US$ I billion, and a demonstration that the applicant has operated and maintained at least one airport with at least 10 million passengers per year, and proven fund" raising ability during the last 3 years for two US$ 500 mio plus projects.
Charter	means the 1595 Charter of the Closed Joint Stock Company 'International Airport Terminal Pulkovo', (CX-5); It was executed in the Russian language (RX- **2);** Respondents filed an English translation as RX-24
DMG	Deutsche Morgan Grenfell & Co., Ltd, London
Foreign Parties	as defined in the ingress of the Founders' Agreement,

mean Pulkovo (Strategic Partners) Limited, a Cypriote company, Grassi Hotelbeteiligungs und Errichtungs GMBH (an Austrian private company) ant SPED

	Investment Ltd., a Cypriote company; the term, as used in the framework of this Award, includes Claimant (as the transferee pursuant to CX-66/CX-59
Founders' Agreement	means the 1995 IAT Pulkovo Founders Agreement (CX-6); It was executed in the Russian language (RX-1); Respondents Filed an English translation as RX-23
Ground Lease	means the Agreement on the Lease of a land plot consisting of an area of 51'300 m2 located at Pulkovskoe Highway - Startovaya ul, in respect of which the Ground Lease was signed and which was Intended for the construction of the NIPT (CX-17)
IAT Pulkovo	means the investment vehicle for the International passenger terminal at the Pulkovo Airport, i.e, the Closed Joint Stock Company "International Airport Terminal Pulkovo', as per the Charter, CX-5
Investment Contract	This term was used by the Parties to denote the 1995 IAT Pulkovo Founders Agreement (CX-6) and the 1995 Pulkovo Charter (CX-5), which contain terms For developing and operating an international passenger terminal at the St, Petersburg Pulkovo Airport; in CM- 84 para. *7,* Claimant characterized the contract as a SOT scheme (build - operate - transfer project). The Charter as such, under Russian law, is not considered to constitute a contract in the ordinary sense.
NIPT	abbreviation for the New International Passenger Terminal at Pulkovo Airport, as projected in 1994 by way or the Protocol of Agreement and the Founders' Agreement respectively the Charter
PH - Brief | C-PH-Brief | R-PH-Brief |	The Post-Hearing Memorials filed by Claimant, respectively by Respondents 1 and 2, on 20 January 2012
Russian Parties	The term, as used in thi$ Award, denotes all of Ute Respondents/shareholders of IAT Pulkovo, as well as - according to the context - IAT Pulkovo itself
Project	The NIPT development project as contemplated under the Protocol of Agreement
Protocol of Agreement	Means the "Agreement" signed on 16 March 1994 (CX-2; in these proceedings, this document was mostly referred to as 'the Protocol of Agreement")
PSP	Pulkovo (Strategic Partnere) Limited is a Cypriot company, said to be in good legal standing (letter of Antis Trianaflyllides & Sons of 0 April 2011), which can be brought up to date within 6 months, upon

	payment of fees; CX-24I; there was no need to ascertain the actual status as of the date of this Award	
SP	Strategic Partners, Inc. (USA)	
SPH	Strategic Partners (Holdings) Limited Is a Cayman Islands Company, which was struck from the Company's Register on 31 October 2005, but - according to Claimant - its reinstatement could be sought within two months, and upon Court approval; letter of Cayman Island's counsel Broadhurst Barristers of 24 March 2011 and letter of Cayman Island Registrar of Companies of 2S March 2011 (CX-242/243). There was no need to ascertain the actual status as of the date of this Award.	
	SPBD	SPBD Investment Ltd, a Cypriote company, controlled by Russian-American persons.
	Transcript plus Date	The verbatim Protocols established by professional court reporters, of the Hearings In Zurich 16/17 De cumber 2010 and in Stockholm 18 to 21 October 2011

A The Parties, their Representatives and the Arbitrators

1. The names and further details of the Parties and their representatives in these proceedings are as named on the first two pages of this Award.

2. Likewise, the Arbitrators, their nomination and their addresses, are as shown on the first page of this Award.

3. **Claimant Dr Carl A Sax,** a US citizen, lawyer and entrepreneur, described himself as a developer who had created end led partnerships and corporations engaged in the development, construction, ownership, syndication and management of income-producing properties for more than 20 years and who was, in the 1990s, the Senior Vice President and General Counsel of Atlantic Coast Airlines.

4. In hrs written witness statement of 15 October 2010 (CWS-1), Mr Sax referred to 14 airport projects around the globe in which Strategic Partners (Holdings) Limited (CI) ("SPH") and Mr Sax personally

(as the Vice Chairman) were involved in proposed developments, these included projects In Russia, Vietnam, Gibraltar, Senegal, the Philippines, Guatemala, Congo, Ecuador, Indonesia, Honduras, Pakistan, Armenia, Jamaica and Uruguay. [1]

5. In the EBRD Memorandum, CX-23, Mr Sax was described, as *"the principal legal advisor and negotiator for the American sponsors; he is the leading force behind the Project; he was formerly an associate at Dewey Ballantine LLP, and subsequently worked in the in-house legal departments of United Express and Continental Airlines, giving him a wide range of contacts in the international airline business. "*

6. Mr Sax bases the claims submitted In this arbitration on a purchase agree ment between Strategic Partners (Holdings) Limited (Cayman lslands)(SPH) and its 100% subsidiary Pulkovo (Strategic Partners) Limited (Cyprus)(PSP), as sellers/transferors/assignors, and Mr Carl A. Sax as purchaser/ transferee/ assignee, dated 17 December 2002 (CX-66/CX-59), under which Mr Sax became the assignee of a *"USS 20+ million pre-development expense receivable from IAT Pulkovo"* and a purchaser and transferee of a 29.7% stock-interest in IAT Pulkovo.

7. **Strategic partners (Holdings) Limited (SPH),** ad described in the EBRD Memorandum, CX-23, is a limited liability company (with a capital of US$ 10'000,--, created by the STV Group as well as numerous other shareholders, including Sax (Holdings) Ltd, with a share of 28.82%, and STV International, AIG, DMG, several junior lenders, Charles Bauccio, TF Comeau & Assoc., AvPride Petroleum, Quantum Investments, and seven further shareholders, SPH was created for developing and eventually carrying out airport investments world-wide, whereby SPH would be the provider of know how.

8. **SPBD Investment** Ltd. is a Cyprus company incorporated in 1991, acting as a consultant and liaison for investors developing projects In Russia and FSU countries, owned by CEBM, Inc. (New Jersey) whose principals were described being Russian American Individuals, Mark and Lena Zilberquit, and Valentina Lifton. CX-23, EBRD Memorandum p. 51.

9. **STV Group** is a US architecture, designer and engineering company, and shareholder of SPH. Head-quartered in New York, STV was described as having a staff of about 1'000 persons. CX-23, EBRD Memorandum page 49.

10. **Respondent 1** is the City of St. Petersburg, and Respondent 2 is the Property Management of the City of St. Petersburg, an agency of Respondent 1, established as a separate corporate body.

11. **Respondent 3,** State Enterprise"Pulkovo", "SEP' was described as being the owner of the assets at Pulkovo Airport and the entity directing the flow of air traffic; on 9 June 2006, a Decree was passed permitting the privatization of State Enterprise Pulkovo. CX-145. On 1 March 2007, it was converted into an open joint-stock company, thus named (OJSO) "Airport Pulkovo"; on information, the Russian Federation became the owner (CX-R3).

    As Claimant explained, the Pulkovo-Airport was transferred to the City of St. Petersburg, by Presidential Decree signed by President Putin on 25 September 2007. [2]

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[1] Mr Sax's witness statement of 15 October 2010, C-WS-1 pages 5-7; Appendix to CM-&4 page 25.

12. **Respondents 4**, OJSC Aviation Company "Rossiya" and Respondent 5 OSO Airport Pulkovo are legal successors to State Enterprise "Pulkovo" which had been a party to the Founders' Agreement, and had been described as being the owner of the assets at Pulkovo Airport. State Enterprise Pulkovo was privatized by a decree of the Government of the Russian Federation of 9 June 2006.

13. Respondents 3 to 5 did not file substantive submissions in these proceedings; they cooperated in so far as the nomination of Respondents' arbitrator Is concerned, and Respondent 5 filed a letter dated 29 September 2009 in which it declared to be in agreement with the Statement of Defense filed by Respondents 1 and 2. However, at all times Respondents 3 to 5 have been kept abreast of the proceedings, were always served with the documents on file and the Tribunal's Orders, and were repeatedly specially invited and encouraged by the Tribunal to actively participate in the proceedings or, at least, to delegate a representative or management member to the Hearings.

14. In addition to the regular communications to all Respondents emanating from the Tribunal and from Claimant, Claimant filed special Notice Letters to Respondents 4 and 5 (CM-83) notifying them of the Stockholm Liability Hearing taking place during the four days from 18 to 21 October 2011 at the Strandvagen 7A Conference Center.

B Claimant's Summarized Chronology of the Circumstances Underlying the Present Dispute

15. This Arbitration involves certain claims by Claimant Mr Sax (as assignee and successor-in-interest of PSP and SPH, according to a Purchase Agreement dated 17 December 2002, CX-66, and a Bill of Sale, CX-59), against the Respondents, for breach of various agreements relating to the development of a New International Passenger Terminal ("NIPT") at the St. Petersburg's "Pulkovo" International Airport.

16. The following paragraphs summarize the history largely on the basis of Claimant's Submissions and from Claimant's point of view. Several elements of Claimant's chronology and characterizations as hereinafter reflected have been disputed by Respondents and, to the extent necessary for the Tribunal's decisions, are discussed In further parts of this Award, Moreover, the following account only references some - but by no means all - of the steps, letters, contracts, meetings, or other milestones in the history of the relationship between the Parties.

17. As will be further noted within the chronology of the proceedings, Claimant -at the Stockholm Liability Hearing 18 to 21 October 2011 - submitted two graphic time-line charts reflecting the steps which Claimant referred to in numerous written submissions filed in this arbitration; these two charts provide a good overview of Claimant's case and, therefore, are incorporated in this Award as a part of the chronological development of the Investment Project, without such Incorporation amounting to an acceptance, by the Tribunal, of the allegations made by Claimant in connection with the steps reflected in the time-line of the charts, See the following two pages.

18. In December 1991, Claimant Hr Carl A. Sax, as he explained, travelled to St. Petersburg in order to

[2] CM-49, para, 61, CX-150 page 1.

discuss the lease or aircraft, In the discussions with representatives of the Office of the Mayor and the St, Petersburg City Council, Claimant, as he explained, was asked to form and invite a consortium of Western companies for exploring the redevelopment of Pulkovo Airport and, in particular, for the development of a New International Passenger Terminal which later became known as Pulkovo-3.

19. Hr Sax states that, in January 1992, he had received a "mandate letter" from the City of st. Petersburg authorizing him to form and invite a consortium of Western companies for the purpose of exploring the development of an international passenger terminal for the Pulkovo airport. The mandate letter was not filed; upon inquiry of the Tribunal, Claimant replied at the Stockholm Hearings that he had been unable to trace that letter. [3]

20. Based on such mandate, Mr Sax, in 1992/1993, slated to have met with representatives of the City of st. Petersburg and representatives of several Western companies, including American international Group, Aeroports de Paris, STV Group, Inc., Butler Aviation, Morgan Grenfell & Co., Ltd, in several cities including St. Petersburg, Paris, London, Washington and Now York, for the purpose of discussing the development of Pulkovo-3.

21. During those meetings (which took place with, among others, Vladimir V. Putin, who at the time was the Vice Mayor of the City of St. Petersburg, and the acting Mayor Anatoly A Sobchak), the request earlier addressed to Mr Sax to form a consortium of Western companies was renewed on behalf of the City of St. Petersburg.

22. On 16 March 1994, Strategic Partners, Inc., USA, (**"SP"**) represented by Mr Sax as its Senior Vice President, SPBD, Inc. represented by it President Mark A. Zilberquit, the Office of the Mayor of St. Petersburg (represented by Vice Mayor and Chairman of the External Affairs Committee, Vladimir V. Putin), the Department of Aviation of the Ministry of Transportation of the Russian Federation, jointly represented by Yuri I. Baranov (Chief of infrastructure Development Division of the Department of Aviation, Moscow) and by Yuri A. Balakin (General Director of Northwestern Directorate of Civil Aviation, St. Petersburg), and the Air Enterprise Pulkovo (represented by Boris G. Demchenko, General Director), entered into an Agreement (the **"Protocol of Agreement"** ', CX-2) under which the Parties agreed to jointly redevelop the St. Petersburg's Pulkovo International Airport, by developing Pulkovo-3. To the extent necessary. Further details regarding this Protocol of Agreement Shall be referred to In a further Chapter of this Award.

23. On 19 March 1995, (1) the City of St. Petersburg (represented by the Property Management Committee, the latter represented by M.B. Manevitch, Committee Chairman and A.V, Vorontsov, Chief of Agency), (ii) the State Enterprise Pulkovo (represented by B,G. Demchenko, Director General, and G5. Naprienko Deputy Director General) and (iii) PSP (represented by Mr Sax, Executive Vice President), entered into a **Founders' Agreement** (CX-6) for the purpose creating a special purpose company - IAT Pulkovo - for jointly developing the New International Passenger Terminal ("NIPT"), and by signing the **Charter of IAT Pulkovo** (CX-5).

24. On 1 May 1996, IAT Pulkovo (represented by Boris G. Demchenko, Mr Sax (of PSP) and the City of St. Petersburg (represented by the Property Management Committee, the latter represented by V.M. Urkovits, the head of the Real Estate Transaction Execution Department) entered into the **Ground**

[3] Transcript 18 oct 11 page 75,

Lease, thereby leasing the land plot on which the New International Passenger Terminal was to be developed (CX-17). The Ground Lease provided, in part, for a term of 45 years and an option to renew the Lease for an additional 45 years.

25. From 1995 through 1997, Claimant, through the offices of STV Group, Inc., In conjunction with other providers, prepared studies for the conceptual design drawings for the New International Passenger Terminal.

26. Moreover, during that period, Claimant retained various consultants including The MDA Group (U.K), Alan Stratford & Associates Air Transport Planning Consultants Ltd.. Tochecon Ltd. and Sir William Hacrow & Partners Ltd., for providing consulting services to review the design of the project structure, the project costs and the financing for the New International Passenger Terminal, These consultants were retained in order to obtain funding for the project which, initially, was sought from Overseas Private Investment Corporation (OPJC) and Deutsche Morgan Grenfell & Co. (DMG), and thereafter from the European Bank of Reconstruction and Development (EBRD).

27. It is Claimant's case in these proceedings that all of these steps, including the mandating of numerous third party providers, were undertaken for and on behalf of IAT Pulkovo.

28. Moreover, according to Claimant, the working on the Pulkovo project included the approval, in May 1995, of the design and the financing structure for the New International Passenger Terminal by Alan Stratford & Associates Air Transport Planning Consultants Ltd., followed, in August 1995, by letters of the Lenaeroprojekt institute regarding required governmental consents (CX-10), and a letter by Oleg Kharchenko (Chief Architect of the City of St, Petersburg) consenting to the location and design of the New International Passenger Terminal (CX-9).

29. Furthermore, Claimant explains that 25 agencies of the City of St. Petersburg also approved the location and design of the New (International) Passenger Terminal (CX-20, 21 and 22).

30. On 13 December 1995, Avia Invest, on behalf of the Department of Aviation of the Ministry of Transportation of the Russian Federation, also delivered a letter to IAT Pulkovo, preliminarily approving the design of the New International Passenger Terminal (CX-8).

31. On 13 February 1995, Aeroports de Paris, at the request of the EBRD, approved the design (CX-11).

32. On 1 March 1996, IAT Pulkovo requested that the International Air Transport Association (IATA) approve the design, rates and charges of the New International Passenger Terminal. The 1996 EAT Pulkovo presentation to IATA included a reference to the development fee as an expense factor Of the project costs (CX-18).

33. On 10 April 1996, Coopers & Lybrand prepared a valuation Analysis for the EBRD and DMG (CX-12).

34. On 2 May 1996, according to Claimant, EBRD delivered its financing letter to IAT Pulkovo regarding the provision of senior debt financing required for the development of the New International Passenger Terminal. [4]

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[4] Not contained in Claimant's file.

35. On 8 May 1996, DMG delivered its financing letter to IAT Pulkovo, agreeing to underwrite that portion of the senior debt financing which was not provided by EBRD (CX-19).

36. On 11 June 1996, DMG delivered its financing letter to IAT Pulkovo, agreeing to underwrite the subordinated financing. [5]

37. On 26 June 1996, Strategic Partners advised the State Enterprise Pulkovo that IATA had agreed to the Rates and Charges for the New International Passenger Terminal (CX-13).

38. On 3 July and 26 August 1996, OPIC delivered its financing letters to IAT Pulkovo regarding its participation with the EBRD for the purpose of providing a senior debt financing for the development of the New International Passenger Terminal. [6]

39. In September 1996, IAT Pulkovo delivered to its participants and lenders the final revised conceptual plans for the New International Passenger Terminal (CX-16).

40. On 27 September 1996, the Federal Aviation Service of the Russian Federation advised the EBRD that State Enterprise Pulkovo would be able to comply with certain of its obligations to permit the development of the New International Passenger Terminal. [7] A similar letter was addressed on 4 October 1996 by JSC "Pulkovo Aerodromstro".

41. On 10 October 1996, the State Enterprise Pulkovo advised EBRD that It would be able to comply with certain of its obligations to permit the development of the New International Passenger Terminal. [8]

42. On 15 October 1996, according to Claimant, the Board of Directors of IAT Pulkovo approved, in principle, the EBRD, OPIC and DMG financing offers, and - in Claimant's words - authorized and empowered Claimant Hr Carl Sax to negotiate, in the name of IAT Pulkovo [9], definitive documents with the EBRD, OPIC, DMG and other parties, and to execute and deliver these documents together with Boris G. Demchenko (Chairman of IAT Pulkovo), (CX-14). [10]

43. In 1997, EBRD delivered its International Airport Terminal Pulkovo Operations Committee Final Review, CX-23, As stated by Claimant, this Review *inter alia* referenced a development fee as well as pre-closing services as a shareholder contribution to capital. Furthermore, it referenced the PreDevelopment Advance, a portion of which was to be rolled-over into a US$ 5 million PSP Standby Loan The 1997 EBRD Review also referenced the agreements of the City of St. Petersburg to complete the access road and utilities (CX-23)

44. On 14 January 1997, Claimant advised Respondents that the EBRD will submit the financing

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[5] Not contained in Claimant's file.

[6] Not contained in Claimants file.

[7] Not contained in Claimant's file,

[8] Not contained In Claimant's file.

[9] In these proceedings, the alleged existence of an authorization as such, as well as Mr Sax' claim to have been empowered to act on b ehalf of IAT Pulkovo, were contested by Respondents. The matter will be further addressed herein below,

[10] The Extract CX-14 in fact provides for the negotiation authority of Mr Demchenko and Mr Sax, with the definitive documents to be submitted for approval by the Board of Directors, whereupon Mr Demchenko and Mr Sax would be authorized to sign the documents on behalf of Closed JSC IAT Pulkovo, with the requirement that all documents "shall be counter *signed by two signatures, one of Mr Boris G Demchenko and another of* Mr *Carl A Sax, simultaneously".*

proposal to its Credit Committee. Furthermore, Claimant advised Respondents that he had fulfilled the financing requirement under the Charter and the Founders' Agreement, and that all outstanding issues would be resolved by Claimant and Respondents so as to expedite the financial dosing (CX-31).

45. On 14 March 1997, Strategic Partners advised Respondents by letter that six items critical for the successful completion had not been timely completed by Respondents (CX-32).

46. On 18 March 1997, the Russian Security Committee approved the design of Pulkovo-3 (CX-30, document in the Russian language only).

47. On 16 April 1997, STV International, at Claimant's request, provided a document package relating to the project (CX-26).

48. In May 1997, the City of St. Petersburg and State Enterprise Pulkovo were advised in a fax memorandum of SP that IAT Pulkovo was positioned to obtain final EBRD Credit Committee approval upon resolution of three issues:
• First, evidence of the financial ability of the City of St. Petersburg to comply with its agreement to finance US$ 16+ million to construct access roadways and utilities for servicing the New International Passenger Terminal, and the proposed guarantee of the City of St. Petersburg's obligation by the Ministry of Finance of the Russian Federation.

• Second, the financial ability of State Enterprise Pulkovo and the Federal Aviation Service of the Ministry of Finance of the Russian Federation to finance US$ 10+ million to construct the apron to service the New International Passenger Terminal, and the proposed guarantee of State Enterprise Pulkovo's obligation by the Ministry of Finance of the Russian Federation.

• The third issue related to customs duties and VAT deferrals for the construction period and its inclusion within any Ministry of Finance Guarantee (CX-25).

49. On 7 May 1997, Claimant advised Alexei L. Kudrin (Vice Minister, Ministry of Finance) by letter that there were three issues to be addressed for completing the financing (CX-33). Mr Kudrin was further updated by a letter dated 29 May 1997 (CX 34).

50. Complying with the requirement for the financing to be provided by EBRD and dmg, the City of St. Petersburg agreed to finance the construction of access roadways and utilities, and State Enterprise Pulkovo agreed to finance the construction of an apron.

51. In June 1997, the MDA Group performed a satisfactory risk assessment for the construction of the New International Passenger Terminal (CX-35).

52. On 25 July 1997, EBRD advised Mr Sax that the EBRD's Operation Committee had given its approval, and that the EBRD believed that financial closing could take place by year-end (CX-28).

53. On the same day, 25 July 1997, the President of EBRD advised Governor Yakovlev that the EBRD's Operation Committee had given its approval (CX-29).

54. On 28 August 1997, EBRD, in a letter addressed to Claimant, informed him that the Bank's Board of Directors had approved the Project on 27 August 1997, indicating further that *"the parties to the Project must now finalize the negotiations, placement of debt and the Project Documentation, following which it will be possible to sign the loan"*, A time-limit as such was not given; the letter said that the Bank hopes "to *complete this work by year end".* Claimant was further advised that all aspects of the Project *"must remain substantially in line with what has been presented to the Bank's Board of Directors"* (CX-27).

55. On 15 January 1998, DMG delivered its IAT Pulkovo Financial Model to the participants and lenders of IAT Pulkovo (CX-42, CX-40).

56. On 20 February 1998, SP delivered its IAT Pulkovo Business Plan to the participants and lenders of IAT Pulkovo (CX-41).

57. On 8 June 1993, the EBRD established on internal Memorandum which Indicates that the Board basically approved the BOT- Project with project costs of US$ 187 million and an EBRD loan of US$ 120 million, indicating further that negotiations of the technical agreements with the Western parties are substantially complete, but that progress towards a closing of the operation is hampered by a number of elements, one being the sporadic presence of SP in Russia, another being the slow review process of the documentation by the City of St. Petersburg and the Airport, and the third being the fact that the Ministry of Finance had indicated that the Project Company would have to apply for the Specified Events Guarantee through the channels that are used for full sovereign guarantees, a process which might take 6 months+ (CX-36).

58. On 8 July 1998. SP submitted a draft independent Accountants' Report (CX-44) to Mr Sax.

59. On 15 July 1998, Strategic Partners advised the Governor Vladimir A. Yakovlev that EBRD had approved the financing already on 25 August 1997, that Since then various parties had been working towards financial closing, that basically a new version of the Charter had been drafted, subject to the final agreement of the City of St. Petersburg, and that various participants, Including the EBRD and dmG, had become concerned that the City of St. Petersburg had not taken all steps required Vo close the financing on an expedited basis, and that in fact the City of St, Petersburg was delaying the closing as a result of certain unspecified considerations (CX-43).

60. On 16 July 1998, on proposal of Mr Sax, a seminar preceding the shareholders meeting took place at which the EBRD proposal was discussed. RX-54. [11]

61. On 17 July 1998, SP commented on a Report regarding the separation of Pulkovo-3 as an independent enterprise (CX-38). In its Memorandum, SP suggested a revision of the Report in several respects.

62. In August 1998, according to Claimant, the financing proposal required to permit the construction of the New International Passenger **Terminal** failed to close*"as a result of the delay of the City* of Sr.

[11] The Minutes of that Seminar were mentioned by Mr Karpov In his examinations on 2D October 2011, he brought the minutes In Russian language with him; they were admitted into the file as RX-55 Overnight, a translation was made by Mr Kropotov together with the Interpreter, and the Minutes were extensively discussed by Mr Sax in the Hearings over lunch-time on Friday 21 October 7011; Transcript 2Joct11 pages 837 ss.

Petersburg and State Enterprise Pulkovo in approving and executing the required documentation before the August 1998 Financial Crisis" (CM-2, para 63))n this context, Claimant repeated earlier allegations that the Crcy of St. Petersburg and State Enterprise Pulkovo were unable to pay for the construction of the access roadways, the utilities and the apron. [12]

63. According to Claimant, on 17 February 1999, the Board of Directors of IAT Pulkovo approved the creation of a Working Commission to address the matters required to recommence the stalled development of the New International Passenger Terminal (CX-46).

64. In July 1999, the Working Commission agreed to finalize negotiations for the development of the New International Passenger Terminal (CX-47).

65. In the further course of 1999, SP, PSP and *inter alia,* Skanska SOT AB entered into a Development Agreement for the purpose of restructuring certain Financial and technical aspects (CX-48).

66. On 13 October.1999, Claimant informed the IATA of the intention to reanimate the Pulkovo-3 Project, raising questions as to the level of charges for international passengers. His query was answered by a fax of IATA dated 14 October 1999 (CX-45).

67. On 16 February 2000, the recently formed Consortium With Skanska BOT et al wrote a letter to Mr Sax withdrawing from the Consortium and Development Agreement, since It had not been possible *"to produce a bankable Development Plan for the Project"* (CX-51, without signatures).

68. On 29 February 2000, Claimant advised State Enterprise Pulkovo that the proposed gallery extension to Pulkovo-2 (i.e. the then existing International passenger Terminal) might be adverse to the interests of IAT Pulkovo and its shareholders, but that he might be inclined to favourably consider entering into a sub-lease for the requested land at an acceptable rental rate, and if the construction of the proposed gallery was structured as the initial phase of Pulkovo-3 (CX-49).

69. On 15 November 2000, SP addressed a letter to Mr Anatoly A. Aleksashin, Vice Governor of the City of St. Petersburg, describing the services which Strategic Partners had performed In respect of the Pulkovo-3 Project, stating therein that *"unfortunately, final negotiations to permit approval of financing for Pulkova-3 by IAT Pulkovo were interrupted by the August 1998 Russia Federation Financial Crisis".* The letter further expressed the firm belief in the Viability of Pulkovo-3 and, in order to reactivate the Project, Strategic Partners submitted a draft Protocol of Agreement regarding the development, financing and operating of Pulkovo-3 and the acquisition, financing and operation of Pulkovo-2, with the hope that the City of St. Petersburg and the Russian Federation would confirm their interest in concluding the negotiations regarding Pulkovo-2 and Pulkovo-3 (CX-54, with Protocol of Agreement CX-55 and Protocol Agreement among Shareholders, CX-56).

70. On 6 December 2000, the letter was acknowledged by Mr A.A. Mercianov, Vice Chairman of the Committee for Economic and Industrial Policy of the City of St. Petersburg, apologizing for the problems in realizing the previously achieved agreements one understandings which were caused by the Financial Crisis of 1998, and requesting Claimant to provide a working proposal for realizing the Project considering the new financial, economic and political situation in the Russian Federation (CX-5.3). [13]

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[12] Mr Sax, Transcript 21ocH 1 page 345 (disputed by Respondents).

71. The letter Was followed up by a further letter addressed to Mr Sax dated 20 December 2000, acknowledging receipt of the letter of 15 November 2000 and the draft Memorandum and Agreement, and the readiness was expressed to recommend to the other shareholders to sign the Memorandum, and proposing to hold a meeting *"in the second half of the year of 2001"* (CX-52).

72. On 21 June 2001, Mr N. Karpov On behalf of Pulkovo Aviation Enterprise addressed a letter to Mr Sax enclosing a copy of the letter from Mr Trubin (Chief of the Department of the Investment Projects of KUGI) which indicated that IAT Pulkovo *"lost the right for this fend (sic!) long ago".* Mr Karpov requested an answer to the question whether Mr Sax agreed to discontinue the activity of the Stock Company IAT "Pulkovo" *"on the voluntary basis as it is determined in Article 17. la of the Charter of the Closed Stock Company "IAT Pulkovo" dated 29.05.1995"* (CX-58).

73. On 26 June 2001, Claimant Mr Sax replied: *"Contrary to your assertion, IAT Pulkovo has not lost the right for this lease long ago. In fact, we will be wire-transferring the required lease payment later this week. Accordingly, we do not agree, to discontinue the activity of IAT Pulkovo on a voluntary basis. In addition, we will strenuously contest any effort to either discontinue the activities of IAT Pulkovo or terminate the Lease Agreement for the land under Pulkovo-3.* " (CX-57).

74. In a *"To Whom It May Concern"* dated 27 June 2002, SP state that it had recently come to its attention that the State Unitary Enterprise Pulkovo and perhaps the City of St. Petersburg had undertaken the expansion of the existing international terminal (Pulkovo-2) in contravention of the current Lease Agreement for Pulkovo-3 and without regard to our many years of effort and multi-million Dollar investment, suggesting that a meeting should take place to discuss possible remedies. It is unclear to whom this document was in fact sent (CX-64).

75. On 21 August 2002, Mr Michael Karpov addressed a fax to SP with a letter from Mr Romanenko of KUGI, alleging overdue payments and fines in an amount of 483'592.92 Rubles, The letter was answered by SP on 2 September 2002 (CX-65).

76. Further correspondence was exchanged on 18 October 2002, 4 November 2002, 19 November 2002 and 21 November 2002 (CX-51, CX-62, CX-63, CX-60).

77. On 17 December 2002, Mr Sax became the successor-in-interest to Strategic Partners and PSP's 29.7% stock-interest in IAT Pulkovo, the PreDevelopment Advance and, as a developer of the New International Passenger Terminal, the Development Fee, by execution of a Purchase Agreement &nd delivery of a Bill of Sale (CX-66 and CX-59).

78. On 4 February 2003, the Arbitrazh Court of the City of St. Petersburg declined the Property Management Committee's claim for the dissolution of the Ground Lease. CX-72.

79. On 8 March 2003, a proposal for the development of Pulkovo-3 was put together (CX-74). It Is not apparent from this document to whom this presentation was made. Claimant explained, however, that the presentation was made to the Presidential Administration of the City of St. Petersburg.

80. On 16 April 2003, State Enterprise Pulkovo, by letter of Mr M Karpov, confirmed that the Arbitrazh Court of St. Petersburg declined the Property Management Committee's claim for dissolution of the

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[13] Mr Karpov characterized the answer as a (merely) *"'polite letter";* Transcript 2loctll page 811.

Ground Lease Agreement, *"and implicitly requested that SP agree to a voluntary dissolution of IAT Pulkovo ".*[14] Mr Sax was also informed by Mr Karpov that it was necessary to come to a final decision regarding the further operation of IAT Pulkovo, indicating further that three shareholders *("FSUAE Pulkovo, KUGI and Grassi")* agreed to discontinue the activity of the Stock Company IAT "Pulkovo" on a voluntary basis (CX-69).

81. In May 2003, SP addressed a letter to Michael Karpov, advising *inter alla* that the shareholders of IAT Pulkovo must vote for voluntary termination and that State Enterprise Pulkovo, as a result of the expansion of Pulkovo-2, was in breach of the Founders' Agreement, the Charter and the Ground Lease (CX-71).

82. On 21 November 2003, the State Enterprise Pulkovo advised Claimant of KUGl's request (addressed to Mr Sax and Mr Demchenko) that payment must be made in respect of the Ground Lease, failing which KUGI would initiate court proceedings for collecting the payment and would Initiate *"the dissolution procedure of the Lend (sic!) lease Agreement to the court".* (CX-70).

83. On 8 June 2004, the Federal Arbitrazh Court dismissed the appeal of the Property Management Committee (Respondent 2), and refused to terminate the Ground Lease (CX-76).

84. On 30 September 2005, Pulkovo Airport and Pulkovo Airlines were divided into two separate entities (CX-83).

85. On 9 October 2006, the Federal State Unitary Enterprise State Transport Company Russia was registered in St. Petersburg, as the successor of Pulkovo Airlines, and on 29 October 2006, the latter and STC Russia started to Fly under a common flag and under the name of the merged entity, i.e The State Transportation Airline "Rossiya" (Respondent 4). CM-2 para. 108.

86. On 1 March 2007, Pulkovo Airport was converted into a joint-stock company named OJSC Airport Pulkovo, and the Russian Federation became the owner of Pulkovo Airport.

87. On 14 September 2007, Grimshaw & Partners, Ltd, won the New International Passenger Terminal design competition (CX-98).

88. On 25 September 2007, President V.V, Putin, by Presidential Decree, authorized the transfer of Pulkovo Airport to the City of St. Petersburg as the sole shareholder of Airport Pulkovo, OJSC, effective 29 December 2007 (CX-83).

89. Two days later, on 27 September 2007, a Presidential decree authorized the transfer of Pulkovo Airport to the City of St. Petersburg, which became the sole shareholder of Airport Pulkovo, effective 29 December 2007.

90. On 2 October 2007, Respondents, through Governor Matvienko and Dr Zilberquit, advised Claimant Mr Sax that the City of St. Petersburg intended to develop the New International Passenger Terminal without Claimant's participation (CM 2, para, 113).

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[14] *CWS-6 para 101 at page 10, with reference to Mr M Karpov's letter of 16 April 2003, CX-69.*

91. On 3 October 2007, Respondent 1 - by Governmental Decree No. 1265 -authorized a strategic Investment project for developing the Pulkovo Airport and an action plan for the construction of an alternative international passenger terminal. CX-151.

92. On 16 October 2007, the shares of Airport Pulkovo OJSC were transferred to the City of St, Petersburg, by Governmental Decree No. 1432-IR.

93. On 14 January 2008, Paul A. Curran of Kaye Scholer LLP addressed a letter to Open Stock Company Airport "Pulkovo", attn Director General Murov, advising that Claimant Mr Sax is the owner of a 29.7% interest in International Airport Terminal "Pulkovo" (a Russian joint stock company) and moreover that Mr Sax
"is also the holder of a 1998 US$ 20 million receivable incurred in connection with the development of a new International airport terminal in St, Petersburg's Pulkovo International Airport, known as Pulkovo-3, presently valued in excess of US$ 50 million, and demanding on behalf of Mr Sax the reinstatement of his 29.7% interest, or the anticipated value, upon completion or Pulkovo-3, of a 29.7% interest in that entity, and the reimbursement of the US$ 20 million resp, US$ 50 million pre-development expenses incurred by Mr Sax." CX-84.

The fetter closed with a paragraph inviting open *bona fide* negotiations, and mentioning the intention to bring arbitration proceedings under the terms of the Founders' Agreement and the Charter, both dated 19 May 1996 (CX-S4).

94. On 24 January 2008, Claimant filed the Request for Arbitration. initiating the present arbitral proceedings.

95. On 21 April 2008, about three months after the present proceedings were initiated, Respondents published a Tender Notice for a USD 1,5 billion tender for a 30-year concession to rebuild, expand and operate Pulkovo Airport, which included the construction of the Alternative International Passenger Terminal. CM-49, para. 76, CX-81, 95, 100, 101.

96. Around the same time, IAT Pulkovo, which was meant to be the investment vehicle under the Investment Contract, was liquidated. In Claimant's view
"Respondents maliciously liquidated the corporate vehicle for Claimants Investment in order to: (a) assert a defense, (b) deprive Claimant of a corporate vehicle, in an attempt to prevent reinstatement, and (c) deny claimant Justice both within the Russian judicial system and within this Arbitral Proceeding." (CM-49, para, 102).

97. According to Claimant, the liquidation was done in an extraordinary summary procedure, without a judicial authorization as per Article 61, of the Russian Civil Code, adopting a procedure exclusively applicable to abandoned companies (CM-3 paras 79-109; CM-49, paras. 87-97), without proper notice to the public, and therefore without providing an opportunity to the public to assert claims (with reference to the 2008 Gazette of state Registration, ex-160). Moreover, Claimant also refers to Section 17.1 and 18.1 of the 1995 Charter which, for a termination or liquidation, requires a unanimous vote at a Stockholders' Meeting, and a ruling to terminate the Company by a competent court. CM-49, para. 109.

98. The liquidation, in Claimant's view, therefore constitutes a violation of customary international law as well as a violation of Russian and St, Petersburg Investor Protection Laws (CM-49, paras. 111 - 130), entitling Claimant to damages (CM-49, paras. 131-159). [15]

99. On 29 September 2008, Claimant filed a Request for Injunctive Relief with the St. Petersburg Arbitrazh Court, seeking injunctive relief to enjoin Respondents from continuing with the Tender For the reconstruct ion of Pulkovo Airport, or any actions designed tp advance the Tender, until Claimant's contractual right to participate in the development of the New International Passenger Terminal is adjudicated through the arbitral proceedings (CX-91).

100. On 3 October 2008, the St. Petersburg Arbitrazh Court denied Claimant's request for injunctive relief for procedural reasons, explaining that an application for injunctive relief must be filed together with the claim, or during the proceedings. However, as at that moment, as the Court stated, no arbitral proceedings were in place, Claimant's application was dismissed.

101. On 31 October 2008, Claimant appealed the decision (CX-78).

102. On 10 December 2000, the Appellate Court issued an interim order (CX-88).

103. On 10 February 2009, the Appellate Court denied Claimant's request for injunctive relief (CX-93).

C The Arbitration Clause and Choice of Law Agreements

104. Section 12.1 of the Founders' Agreement refers to the disputes resolution mechanism of the Charter. It reads as follows:
ARTICLE X II - DISPUTE RESOLUTION

Section 12. 1.: Dispute Resolution Generally all Disputes and conflicts that may arise out of or In connection with this Agreement and the Charter shall be amicably settled by the Founders. In the event that any dispute, controversy or claim arising out of or relating to this Agreement or the Charter, or the breach, termination or invalidity thereof cannot be settled amicably, they shall be settled by arbitration in accordance with the provisions set forth in the Charter.

105. The Charter, m Chapter 20, sets forth the method and procedures for such arbitration as follows:
Chapter 20 : DISPUTE RESOLUTION

20.1 Generally, all disputes and conflicts that may arise out of or in connection with this Charter and the Founders' Agreement shall be amicably settled by the Parties.

[15] In this respect. Claimant filed an expert opinion by Professor Tal-Heng Chen, CWS-7, regarding the alleged violation of customary international law on expropriation which, thereby, also violated principles of good faith and non-abuse of rights, Moreover, Professor Dr Chen, in a remarkably eloquent and intelligent address, testified on these issues at the occasion of the Stockholm Hearings, on Thursday evening of 20 October 2011, after having been present during all of the prior proceedings at the Hearing of 18, 19 and 20 October 2011 Hearing Transcript 20 October 2011, pp. 686-756, His impressing presentation was backed up by numerous international materials and arbitral awards.

20.2 In the event, that any dispute, controversy or claim arising out of or relating to this Charter or the Founders' Agreement, or the breach, termination or invalidity thereof cannot be settled amicably, they shall be settled by arbitration. The Award of the Arbitrators shall be final and binding upon the Parties.

20.3 The arbitration shaft be in accordance with the UNCITRAL Arbitration Rules as in effect on the data of the arbitration, except that in the event of any conflict between those Rules and arbitration provisions of this Charter, the provisions of this Charter shall govern. The Russian material law of shall govern in the trial and award making process.

20.4 The Stockholm Chamber of Commerce shall be the appointing authority, except for the specific provisions in points 19.6(i) and (ii).

20.5 The number of Arbitrators shall be three.

20.6 Each party shall appoint one Arbitrator. If within thirty days after receipt of the Claimant's notification of the appointment of an arbitrator the Respondent has not, by telegram, telex, telefax or other means of communication in writing, notified the Claimant of the name or the Arbitrator ho appoints, the second Arbitrator shall be appointed in accordance with the following procedures:

(i) If the Respondent is a natural or legal person of the Russian Federation, the second Arbitrator shall be appointed by the Chamber of Commerce and industry of the Russian Federation:

(ii) If the Respondent is a legal or natural person of any other country, the second Arbitrator shall be appointed by the American Arbitration Association; and

(iii) If within thirty days after receipt of the request from the Claimant, the Chamber of Commerce and Industry of the Russian Federation or the American Arbitration Association, as the case may be, has not, by telegram, telex, telefax or other means of communication In writing, notified the Claimant of the name of the second Arbitrator, the second Arbitrator shall be appointed by the Stockholm Chamber of Commerce.

20.7 The two Arbitrators thus appointed shall choose the third Arbitrator who will act as the Presiding Arbitrator of the Tribunal, If within thirty days after the appointment of the second Arbitrator, the two Arbitrators have nor agreed upon the choice of the Presiding Arbitrator, then at the request of either Party the Presiding Arbitrator shall be appointed by the Stockholm chamber of Commerce in accordance with the following procedure:

(i) The Stockholm Chamber of Commerce shall submit to both Parties an identical list consisting of the names of all of the persons listed on the then existing joint panel of presiding arbitrators established by the Chamber of Commerce and Industry of the Russian Federation and the American Arbitration Association.

(ii) Within fifteen days after receipt of the list, each Party may return the list to the Stockholm Chamber of Commerce utter having deleted the names to which he objects and having numbered any remaining names □n the list in the order of his preference;

(iii) After the expiration of the above period of time, the Stockholm Chamber of Commerce shall appoint the Presiding Arbitrator from among the names not deleted on the lists returned to it and In accordance with the order of preference indicated by the Parties; and

(iv) Should no joint panel then be available, or if for any other reason the appointment cannot be made according to this procedure, the Stockholm Chamber of Commerce shall appoint as Presiding Arbitrator a person not on the joint panel who shall be of a nationality other than that of Russia or the USA or France.

20.8 The arbitration, Including the making of the Award, shall take place in Stockholm, Sweden.

20.9 The Founders agree that English shall be the language used for the arbitration proceedings.

20.10 The Company shall bear all expense of an arbitration brought m actor dance with this Chapter 19, unless there shall he a determination by the panel that, in connection with tile matter that is subject to arbitration, a party has acted in had faith or committed gross negligence or willful misconduct. The arbitration panel shall make such a determination upon the request of the Company or any party to the arbitration.

106. The last provision in the above dispute resolution section. Chapter 20.10, deals with the allocation of costs for disputes arising under Chapter 19. Chapter 19 provides for an indemnification as follows :
Chapter 19: INDEMNIFICATION

19.1 The Company shall indemnify any Director and officer (including the Chairman, Vice-Chairman and Co-Presidents) against all suits, claims and actions, brought against such Stockholder, Director or officer, that may arise out of or in connection with the activities of the above Company, except for knowingly committed violations of law by such Stockholder, Director or officer.

19.2 The State Enterprise shall Indemnify the Company against any liability or damages which may arise from earlier environmental conditions The Company shall comply with published, readily accessible environmental regulations and shall adopt operating methods which comply with environmental and safely standards.

107. Regarding the applicable law, Chapter 21.1 of the Charter provides as follows:
This Charter shall be governed by appropriate Russian law, treaties and international law."

108. The Founders' Agreement does not contain a choice of law clause.

109. Claimant argues that, due to the connexity, the choice of low provision of Chapter 21.1, of the Charter should also be deemed applicable for the Founders' Agreement.

D The Parties Requests, Prayers for Relief

I Claimant’s Requests

110. Claimant, in his Request for Arbitration dated 24 January 2008 (CM-1), stated his claim as fallows: "Claimant has been damaged in an amount to be proved at the Hearing *of* this matter but believed to be in excess of USD 5O million. In addition, In the event that Claimant's 29.7% interest in EAT "Pulkovo" is not reinstated in the entity which will develop "Pukovo"-3, Claimant is entitled to recover, and seeks an award of, the anticipated value, upon completion of "Pulkovo"-3, of a 29.7% Interest in that entity. Finally, Claimant respectfully requests that the Arbitrators award to him his attorneys' fees, costs and expenses..

111. Claimant in his Statement of Dispute and Claims filed on 22 June 2009, CM 2, para. 162, enlarged his claim to reach a monetary value of US$ 212’500'000, plus a claim for reinstatement as the project developer for the Alternative/New International Passenger Terminal at Pulkovo Airport.

112. In CM-49, filed by Claimant on 35 October 2010, the prayers for relief were further restated and expanded as follows:
"Claimant, as successor-in-interest to Strategic Partners and PSP, demands payment, by Respondents, jointly and severally, of US$ 212,500,000, as follows:

(a) The Pre-Development Advance Claim :

The US$ 19,772,277 Pre-Development Advance, which, as of April 30, 2009, together with interest at LIBOR +2%, aggregates US$ 36,715,527, which will, on the anticipated date of the arbitral award, towards the end of 2010 (the "Anticipated Date of the Arbitral Award"), be no less than US$ 37,500,000.

(b) The 29.7% Interest Claim:

The anticipated value, upon completion, of a 29.7% interest in the Alternative International Passenger Terminal, which will, on the Anticipated Date of the Arbitral Award, in Claimant's opinion, based on the 6.5% capitalized value of the second year’s cash flow from operations (before debt service) of the Alternative International Passenger Terminal (to be determined with specificity during the Arbitral Proceeding), be no less than US$ 159,000,000.

(c) The Development Fee Claim:

The 4.5% Development Fee due Claimant, which, according to Respondents' estimate of the 2006 development cost for the Alternative International Passenger Terminal, is US$ 21,832,681, which will, on the Anticipated Dale of the Arbitral Award, in Claimant's opinion, based on the 2010 estimated aggregate development cost of the Alternative International Passenger Terminal (to be determined with specificity during the Arbitral proceeding), be no less than US$ 25,000,000.

(d) Expenses (including Legal Fees) of the Arbitral Proceeding.

Expenses (Including legal fees) of the Arbitral Proceeding should be awarded/allocated amongst Claimant and Respondents, 29.7% and 70.3%, respectively, according to their Interests in IAT Pulkovo, as more particularly discussed below.

(e) Non-Waiver of Claim for Reinstatement: Claim for Specific Performance

i. Claimant, by monetizing the 29.7% Interest Claim as one for nut less than USS 150,000,000, does not waive his claim, as set forth in the Request for Arbitration, for reinstatement (the "Claim far Reinstatement") of his 29.7% Interest (on a fully diluted basis), as project developer, in the entity which will develop either the New International Passenger Terminal or that portion of the alternative terminal (the "AT") proposed in the Public Private Partnership ("PPP"> entered into by some or all of Respondents with Northern Capital Gateway Consortium designed to service international flights, as defined In Section 8.5 of the Founders Agreement ('International Flights"), However, Claimant conditions his Claim for Reinstatement on the Arbitration Tribunal's imposition on Respondents of conditions precedent and subsequent, acceptable to Claimant, to avoid an Illusory award of reinstatement.

ii. Claimant is entitled to an award of reinstatement requiring Respondents to restructure the PPP to grant Claimant the benefit of the terms of the agreements between Claimant and Respondents, as follows:

a. partition the physical facilities in the AT used to service International Flights from the physical facilities in the AT used to service all other flights;

b. segregate all passengers arriving and/or departing on International Flights from all other arriving and/or departing passengers;

c. segregate all accounting mechanisms for the AT related to that part of the at used to service International Flights, including expenses for development and construction and revenues and expenses for operation of international Flights;

d retain Claimant as the developer of that portion of the AT used to service International Flights; and

e. restructure the PPP for that portion of the AT used to service International Flights to;

1) eliminate the revenue charge of Respondents,

2) grant Claimant a 29.7% interest in that portion of the AT used to service International Flights,

3) extend the lease for the AT to two terms of 49 years each, and impose controls to protect Claimant's rights as a minority shareholder.'

113. In his Memorial CM-66, para, 120, Claimant increased the value of his monetary claim (total of principal amount claimed) to an amount between USS 350'485'672 and USS 459'653'668, plus interest and legal expenses, arbitration costs, literally (in CM 66, para. 120), Claimant claims:
"the pre-development advance claim which is calculated to range between US$ 37'185'672 and US$ I46'353'668, plus the development fee of US$ 18,800,000, plus the value of Claimant's 29.7% interest in IAT Pulkovo which has been calculated at US$ 294'500'000, plus interest to he calculated, plus all legal expenses and other expenses related to this Arbitration "

114. On 22 April 2011, in CM-68, para. *2,* Claimant further amended his claims as follows:

• **Total claim US$ 459'700'000):**

• a) Pre-development Advance Claim, with interest at the contractual rate of 15.5% US$ 146'400 000 as of 31 December 2011

• b) The 29.7%, Interest Claim upon completion of the Alternative International Passenger Terminal; US$ 294'500'000

• c) The 4.5% Development Fee Claim (based on the cost of the Alternative International Passenger Terminal; US$ 18'800'000

• d) Expenses (including legal fees) of the Arbitral Tribunal, to be aworded/alloceted amongst Claimant and Respondents in trie ratio 29.7% and 70.3%, end

• e) Reinstatement of Claimant of his 29.7% interest as project developer, in the entity which will develop the NIPT or the Alternative international Passenger Term Inst, conditioned on the Tribunal's Imposition on Respondents of conditions precedent and subsequent, acceptable to Claimant, to avoid an Illusory award of reinstatement.

115. In Claimant's Post-Heart ng Brief filed on 20 January 2012, Claimant stated that he no longer seeks specific performance of PSP's right to be the developer of the alternative International passenger terminal (AIPT), but maintains the claim for his entitlement to be paid a developer fee, which claim had been transferred to Claimant on the basis of the Purchase Agreement and Bill of Sale.

116. In a further paragraph, claimant stated that he seeks specific performance only insofar as to grant him an equity position in the AIPT that Is financially equivalent to PSP's 29.7% interest in IAT Pulkovo; alternatively, he seeks the monetized value in damages of that interest. [16]

117. The Tribunal notes that CM-85 does not contain any further discussion on the development expenses and some further aspects which were extensively reviewed during the Hearings. The Tribunal, however, understood from the opening paragraphs of the PH-Brief that all earlier factual and legal arguments are to be considered incorporated by reference into the PH-Brief, and that the silence to discuss some further aspects cannot be taken as a waiver or an admission.

II The Tribunal's Classification of Claimant's Claims

118. The several claims, as had been submitted by Claimant in these proceedings, in particular in CM-68 and CM-85, may be classified as follows:
• The claim under (a) basically stands for the Pre-development Costs incurred by the Foreign Parties, essentially in the 1990s;

• the claims under (b), (c) and (e) are claims connected to the frustrated participation as investor and developer in the new project vehicle for constructing and developing the Alternative International Passenger Terminal, whereby the reinstatement claim is a claim which first was submitted as

[16] PH-Brief CM-85, paras. 82/83.

a claim for specific performance, and was then re-phrased as a claim alternatively for specific performance or for a the monetized value respectively a damage claim;

• claim (d) deals with the allocation of arbitration costs.

119. For the purpose of the further review and discussion In the present Award, the Tribunal distinguishes four categories of claims:
• First, Claimant's monetary claim as a creditor for reimbursement of pre-development expenditures incurred (essentially in the 1990s), plus the related interest claim;

• Second, Claimant's monetary claim for a 4.5% developer fee;

• Third, Claimant's investor-claim for the (new) Alternative International Passenger Terminal, or the monetary value ascribed thereto;

• Fourth, Claimant's claim for recovering arbitration costs.

120. The Tribunal observes that the first three categories of claims above are derived from, and are based, on the ground of the Parties investment relationships and the bundle of obligations resulting therefrom. The overall legal relationships consists of multifold aspects grounding in norms of civil law, contract law, matters governing joint ventures, corporate governance, and security laws. All of them are closely interlinked and can hardly be separated one from the other without detriment to the essence of the relationships among the Parties and the their primary interest, which was the cooperation for mutual benefits in their investment activity. In this respect the Tribunal looked into the dispute from the investment law perspective.

III Respondents' Requests

121. Respondents 1 and 2, in their Statement of Defense filed on 20 September 2009, deny all of the claims In full; literally on page 5:
"The Respondents deny, in full, all claims made by the Claimant (para. 162 a-d of the Statement of Claims) and requests that the Tribunal shall reject those claims.

The City requests that the Tribunal shall reject those claims, *inter alia* for the following reasons:

(i) Claims have not been proven, since the documents presented in confirmation of such claims, cannot serve as acceptable evidence.

(ii) Claims are groundless and do not have clear subject, i.e. are objectless.

(iii) Claims are not based on provisions of applicable law and are in contradiction with such provisions.

(iv) The Claimant has failed to prove succession of rights to the shares of IAT Pulkovo and therefore

no is not in the position to file claims under the Statement of Claims.

(v) Claims should be addressed to IAT Pulkovo rather than the City and the City is undue respondent to such claims.

(vi) The statute of limitations applicable to the claims under the Statement of Claims has already expired.

(vii) As of today the project on development of the Terminal has already terminated.

(viii) Claims do not meet criteria of reasonableness, justifiability and commensurability.

(ix) Expenses of the Claimant have not been confirmed, and the calculations of the relief sought are wrong.

Above reasons and many other reasons for rejecting the claims of the Claimant are set out in more detail in this Statement of Defense."

122. In their Rejoinder, as well as in subsequent submissions and the PH-Brief filed on 20 January 2012 (1-RM-37/2-RM-43), Respondents 1 and 2 reiterated their requests.

123. Respondents 3, 4 and 5 did not present substantiated submissions or denials m respect of Claimant's substantive claims, it being however noted that there are a few letters/emails on file, essentially in regard to the nomination of Respondents' Arbitrator. The Tribunal has reasons to believe that none of the Respondents agrees with the claim; Respondents' silence - indeed in conformity with well established practice in international arbitration - cannot be taken as an admission of the facts and legal arguments presented by Claimant; all claims, therefore, must be considered disputed in their entirety by all of the Respondents.

124. Respondents 3, 4 and 5 wore, however, throughout the process kept informed on every step of the proceedings, several Orders of this Tribunal were delivered to them by international courier service; moreover, the Tribunal's numerous emails were properly received. Prior to the Hearings, the Tribunal particularly invited Respondents 3 to 5 to take part in the Hearings, be it only by delegating a "silent listener" for observing the regularity of the process.

E Summarized History of the Arbitral Proceedings

125. On 14 January 2008, Paul A. Curran of Kaye Scholar LLP, on behalf of Claimant Mr Carl A Sax, addressed a NotIce of Arbitration to Respondents.

126. On 24 January 2008, Claimant’s Request for Arbitration was filed (CM-1).

127. On 5 August 2008, the Stockholm Chamber of Commerce appointed Or Marc Blessing to serve as the Chairman.

128. On 28 August 2008, the Tribunal issued its 1st Order regarding the constitution of the Arbitral Tribunal, legal representation, submissions on file and organizing numerous procedural aspects for the upcoming proceedings. Furthermore, a deposit in the amount of EUR 400'000,-- was requested, payable by each side in the sum of EUR 200'000.--.

129. On 3 October 2008, the Tribunal Issued its 2nd Order dealing with Claimant's application for a suspension of the arbitral proceedings. In view of that application, the Tribunal lowered the requested deposit to FUR 100'000.--, payable by Claimant, and suspended any payment from Respondents, The Order was delivered to all five Respondents by special courier service, and delivery documents are on file.

130. On 16 October 2008, Director General Murov of Respondent 5 sent a letter to the Tribunal, correcting the designation of the 5th Respondent.

131. On 13 November 2008, the Tribunal issued its 3rd Order concerning matters of suspension and reiterating the request for funding by Claimant.

132. On 15 December 2008, the Tribunal Issued its 5th Order, dealing with Claimant's request of further time-extension for paying the deposit. It indicated that the Arbitrators Intend to charge for their services on a time-spent basis, at a rate of EUR 500 per hour.

133. On 30 January 2009, Mr Wallace on behalf of Claimant informed the Tribunal that Claimant Mr Sax wishes to voluntarily withdraw the Request for Arbitration on a without prejudice basis.

134. This request gave rise to several Submissions by the Respondents dated 5, 20 and 26 February 2009, and in a Submission of 11 March 2009 (RM-7) filed on behalf of Respondents 1 and 2 the Tribunal was requested not to terminate the proceedings but instead to rule on. the claims as presented in the Request for Arbitration, and to reject those claims, making reference to Section 28 of the Swedish Arbitration Act and Article 34 of the UNCITRAL Arbitration Rules.

135. In a further Submission dated 13 March 2009. Respondent 5 also requested that the Arbitration should proceed. At the same time, Respondent 5 informed the Tribunal that Respondent 3 had subsequently been reorganized and had ceased to exist already in 2006, with Respondents 4 and 5 being the legal successors or Respondent 3.

136. On 19 March 2009, the Tribunal issued its 6th Order, noting the several submissions, and organizing a telephone conference to take place on 2 April 2009.

137. On 2 April 2009, a telephone conference took place, with the participation of Mr Carl A, Sax, counsel to Respondents 1 end 2 and a representative of Respondent 5. Respondents 3 and 4 did not participate, nor did Professor Valery A. Musin dial into the telephone conference. It was discussed that Mr Sax Intended to withdraw his claims, however on a without prejudice basis; such withdrawal, however, was rejected by Respondents' counsel, requesting the Tribunal to render a declaratory award stating that Claimant's claims are invalid, Mr Sax replied that he will be unable to fund the costs of the proceedings. After further discussion, it was decided that the Tribunal will have to ask Respondents to fund the deposit, and the Arbitrators' remuneration on the basis of the hourly rate was mentioned and agreed by those participating in the telephone conference.

138. On 6 April 2009, Che Tribunal issued ils 7th Order, providing a detailed account of the telephone conference of 2 April 2009. Inter alia, Claimant was specifically asked to properly document his *locus standi* under the relevant contracts or as a legal successor-In-interest to the initial parties. The Order also scheduled the next steps in the proceedings. A deposit in the amount of EUR 250'000 was requested, and the Arbitrators' rate was confirmed one again.

139. On 26 June 2009, Claimant filed a second challenge against Professor Valery A. Musin.

140. On 20 September, 2009. Respondents 1 and 2 filed the detailed Statement of Defense (1-RM-2, 2-RM-8).

141. On 28 September 2009, the Tribunal Issued its &th Order, *inter alia* dealing with the impart of the challenge against Professor Musin, and granting a time-limit ta Claimant for filing his Detailed Reply by 4 December 2009.

142. On 1 December 2009, Claimant filed a letter to the Tribunal indicating the appointment of the new legal counsel taking over his representation and asking for- an extension of the time-limit for filing the detailed reply until 4 March 2010. On the same date, Claimant filed a further challenge against Professor Musin addressed to the Stockholm Chamber of Commerce.

143. On 3 December 2009, the Tribunal Issued its 9th Order noting the appointment of new counsel, requesting properly signed Powers-of-Attorney, directing that the arbitral proceedings should not be stayed during the pendency of the challenge against Professor Musin, and dealing with the request for extension. Moreover, the time-table of the proceedings so far and a detailed time-table for the further proceedings in 2010 was set out in the Order, as well as a request for Claimant to pay his share towards securing arbitration costs by effectuating a payment of EUR 250'000 to the Chairmen's special account.

144. On 14 December 2009, Dean Peroff of Amsterdam & Peroff submitted a new Power of Attorney, executed by Mr Carl A Sax on 9 December 2009, valid for one year

145. On 4 January 2010, Claimant filed a Request for Interim Measures.

146. On 5 January 2010, the Tribunal issued its 10th Order.

147. On 12 January 2010, the Tribunal issued its 11th Order.

148. On 25 January 2010, Claimant filed further comments regarding interim relief, together with additional requests.

149. On 27 January 2010, the Tribunal issued its 12th Order.

150. On 26 February 2010, the Arbitration Institute of the Stockholm Chamber of Commerce decided to sustain Claimant’s challenge of Professor Musin

151. On 2 March 2010, the Tribunal issued its 13th Order regarding the way forward.

152. Subsequently, Respondents named Professor Alexei A. Kostin, Vice-President of the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry as Arbitrator. However, Claimant Mr Sax objected to such nomination causing Professor Kostin to voluntarily resign from office on 16 April 2010. Subsequently, Respondents 1 and 2 nominated Professor Andrey Bushev to serve as Arbitrator. Professor Bushev accepted his nomination.

153. On 30 April 2010, Claimant filed his Second Request for Interim Relief.

154. On 17 May 2010, the Tribunal issued its 14th Order, taking note of the appointment of Professor Bushev by Respondents 1, 2 and 5, and requiring a further confirmation on behalf of Respondents 3 and 4. Furthermore, Respondents were given a time-limit to comment on Claimant's Second Request for Interim RelieF until 31 May 2010 and, under the same date, to file the detailed Rejoinder. Finally, the Tribunal proposed either an organizational meeting in Moscow on 8 June 2010 (at the occasion of an international arbitration conference in Moscow, which was attended by the two non Russian Arbitrators), or the holding of a telephone conference on one of several proposed dates in June 2010.

155. On 28 May 2010, the Tribunal issued its 15th Order.

156. On 17 June 2010, the Tribunal issued its 16th Order regarding further matters of the telephone conference and regarding the organization of a Hearing, upon request of Claimant, for dealing with nis motions for interim relief.

157. On 26 July 2010, Claimant's counsel notified the Tribunal of a further challenge, addressed to the Arbitration Institute of the Stockholm Chamber of Commerce, concerning Professor Andrey Bushev.

158. On 5 August 2010, the Tribunal Issued its 17th Order, once again containing a detailed procedural time-tabic.

159. On 19 August 2010, Respondents commented on the challenge, follow-up by Further submissions of the Claimant on 29/30 August 2010.

160. On 16 September 2010, the Stockholm Chamber of Commerce issued its Decision rejecting Claimant's challenge of Professor Bushev.

161. On 17 September 2010, the Tribunal issued its 18th Order dealing with the proper constitution of the Tribunal, the mode of communications and notices emanating from the Tribunal and the further time-table and practical matters in view cf a two-day Hearing to be held tor dealing with Claimant’s requests for interim measures as well as for dealing with several documentary requests.

162. On 22 September 2010, Claimant filed a consolidated Request for Interim Relief.

163. On 27 September 2010, Claimant filed a motion for an Order For Sanctions, absent proper appearances by Respondents.

164. On 29 September 2010, the Tribunal Issued its 19th Order dealing with matters of valid representation and setting further time-limits.

165. On 19 October 2010, the Chairman invited Claimant's counsel to comply with the Tribunal's suggestions; contained in the 1st Order of 28 August 2008, regarding the consecutive numbering of Claimant's Memorials/ Submissions/letters (to be marked as "CM-_), and the consecutive numbering of Claimant's Exhibits with "CX-_" and Witness Statemerits/Expert Reports, to be numbered "CWS-_".

166. On 5 November 2010, the Tribunal issued its 20th Order, addressing numerous submissions filed by the Parties in October 2010. It dealt with the proper standing of Respondents and their representation by counsel. Furthermore, the Tribunal rejected Claimant's request submitted by CM-48 (para. 28), wherein Claimant urged the Tribunal that it should deem *"all of Claimant's allegations against Respondents 3,* 4 *and 5"* as having been admitted, and precluding them from presenting any further evidence before this Tribunal. The Tribunal stated that such a deemed admission (I) disregards the deeply-rooted practice in international arbitration, (ii) is contrary to the Swedish Arbitration Act and some 60 or more arbitration acts following the UNCITRAL Model Law, and (iii) not reflected in any of the arbitration rules of the major arbitral institutions, nor (iv) compatible with the UNCITRAL Arbitration Rules governing the present proceedings.

167. Regarding the nomination of Professor Bushev, the Tribunal noted that he had been validly nominated by Respondents 1, 2, 4 and 5, concluding that, since Respondent 3 no longer appears to be a Party, any doubts as to the proper composition of the Tribunal appear to be removed. The Order further addressed the mode of communications from the Tribunal to the Parties and addressed numerous matters In preparation for the Hearing on interim measures, documentary matters and procedure, fixed to take place in Zurich on 16 and 17 December 2010.

168. On 19 November 2010, the Chairman issued an e-mail requesting clarification regarding Claimant's requests and prayers for relief. Moreover, in respect of the Hearing on interim measures focusing on Claimant's reinstatement claim, the Chairman listed 23 discrete issues which, in his view, should be addressed at the Hearings In connection with Claimant's requests for interim relief.

169. On 24 November 2010, the Tribunal issued its 21st Order referring to Respondents' Submission of 8 November 2010, Claimant's Submission of 15 November 2010, further Submissions by Respondents dated 15 November 2010 and updated Schedules submitted On 18 November 2010. The Order invited counsel to take part in a further telephone conference and addressed several procedural matters. As an Annex to the Order, the Tribunal included the Chairman's e-mail of 19 November 2010.

170. On 29 November 2010, an organizational telephone conference took place.

171. On the same date, 29 November 2010, the Tribunal Issued its 22nd Order which contained a detailed shortlist of topics for discussion, examinations and pleadings at the occasion of the Hearing on interim relief scheduled to take place on 16/17 December 2010.

172. The list contained the following 30 issues;
"Locus standi, **Jurisdiction, Valid Representation**

1 Claimant's *focus standi* as a shareholder of IAT Pulkovo (validity of CX-66 and CX-59) (considering Respondents comments regarding the non-issuance of the shares).

2 Claimant's *focus standi to* make claims as an Investor under the Investment Contract (as opposed to his locus standi ss an assignee of Claims for certain payments and for damages) - this question has to do with the issue whether under the notion of *intuitu personae* - Strategic Partners as an investor could validly transfer the investor's position tv Mr Sax; this latter question arises because, in the framework of interim measures, Mr Sax requests his reinstatement as an investor, and not solely as a creditor for monetary claims.

3 Liability in principle of the Respondents: are the Respondents the correct parties to this arbitration (Respondents allege that Claimant should have directed his claim against IAT Pulkovo, and that the liability of other shareholders was specifically excluded)

4 Are the Respondents property represented in this arbitration?

5 Are Respondents lawyers properly mandated?

Substantive Issues

6 Do the Protocol, the Founders Agreement and the Charter Impose binding Obligations on the Parties?

7 Did Claimant respectively PSP perform correctly, under a preliminary and *prima facie* reasonableness test?

8 What was the significance of the time-window for coming up with the financing?

9 What is the significance of the continued efforts of the parties beyond the time-window?

10 Did the project "fail", as Respondents argue, due to shortcoming of Claimant respectively Strategic Partners/PSP?

11 Did Respondents breach their obligations?

12 Were PSP and /or the Claimant over granted exclusivity?

13 Would exclusivity violate Russian antitrust laws? In 1995/96? In 2007? Under Article 7 of the 199.1 -Law? Article 15 of the 2006 Law?

14 Was the project "up end alive" oven during the years. oF the late 1990s to 2007, or was it conclusively/tacitly (although not through formal notice) abandoned? Was - nt some stage - the *momentum* lost for realizing the initial project?

15 Hence: Did the corporate and contractual relationship come to an end at some stage, tacitly, by conclusive behavior or otherwise?

Time-Bar?

16 Impact of any statute of limitations on (i) the position as investor, and (ii) the position as a creditor for monetary claims for expenditures and damages? Are contractual or corporate actions time-barred?

17 Why did Claimant or hrs predecessors not raise the monetary claims (e q for expenditures

incurred m 1995 onwards) earlier, for Instance in 1999, or at least in subsequent years?

The Alternative Terminal

18 Why was PSP not invited to tender for the Alternative Terminal?

19 Could Claimant have satisfied the pre-qualification requirements for the tender for the AT?

20 Comparing the initial project with the new project IAT): is the AT the kind of project which had been envisaged in 1995/1996, or is it on *"aliud"* (a Latin term) i.e. so different that one must consider if as being a new project?

21 What is the status of the AT development?

22 Can it still he stopped and put on fee?

23 What would be the consequences and impact, if e.g. a stand-still of 12 to 18 months would be imposed?

24 What would be (i) the practicality and (ii) the proportionality of the requested measure, having regard to the actual situation and the merits of the case?

25 Would the requested measure - reinstating Claimant as the investor - be realistically possible?

26 How could Claimant satisfy the normal pre-qualifying means-test?

27 Does the project objectively require that the investor/developer must meet certain credentials, and are Claimant's actual credentials as a developer for such an airport project sufficient, based on what is mentioned in Mr Sax' witness statement?

28 Would Claimant's position be reparable by a simple award of **damages (provided** the legal and factual prerequisite Would be satisfied)?

29 If the Tribunal decides to order Interim measures in the sense of Claimant's request: Is security required and offered, and if so In what amount and in what kind?

30 Finally: Documentary issues to he discussed: (a) Documents requested by Claimant, (b) Documents requested by Respondents 1 and 2."

173. On 8 December 2010, the Tribunal issued its 23rd Order dealing with several matters regarding the structuring of the Hearing and noting Claimant's CM-53 and CM-54, containing the preferred structuring for the Hearings.

174. On 14 December 2010, Claimant filed CM-55 regarding powers-of-attorney and legal succession, supported by a Legal Opinion of Professor Oksana M. Oleymik

175. On 15 December 2010, Claimant filed CM-56, 57 and 58.

176. On 16/17 December 2010, **Hearings on matters of interim relief and documentary requests were held in the Chairman's offices in Zurich,** attended by Mr Carl a. Sax personally, accompanied by his lawyers Andrew J. Durkovic and Vladimir V. Gladyshev, and further accompanied by the expert Peter Forbes of Alan Stratford & Associates Ltd. On behalf of Respondents 1 and 2, the Hearing was attended by Professor Oleg Skvortsov, Leonid Kropotov, Viktor Tulsanov, Pavel Borisenko, Josh Wong and Claes Rainer. The Hearings were verbatim transcribed by a reporter of Merrill Legal Solutions.

177. On 21 January,2011, Claimant filed the Post-Hearing Brief In support of his consolidated request for interim measures of protection (CM-60).

178. On the same date, Claimant filed a further Request for Production of Documents and Information (CM-61).

179. On 21 January 2011, Respondents 1 and 2 filed their Post-Hearing Brief regarding Interim Measures.

180. On 4 February 2011, Claimant filed a further Request for the Production of Documents and Information (CM-62).

181. On 8 February 2011, the Tribunal issued its **Decision on Interim Relief,** as per the Tribunal's 24th Order. The Tribunal's Decision reflected the claims so far submitted by the Parties, their detailed requests regarding interim relief, the legal framework and the numerous issues which the Tribunal had to consider in the context of a decision on urgent interim relief. Details regarding this section of the 24th Order are reflected in a later Chapter of this Award; see the next Chapter F below.

F Claimant's Requests Regarding Interim Relief for His ReInstatement, and the Tribunal's Preliminary Determination

I Claimant’s Requests ("Interim Requests")

182. Although the present arbitration had been Initiated by a letter of Claimant's then counsel Paul A. Curren dated 14 January 2008, followed by the Request for Arbitration dated 24 January 2008 (CM-1), Claimant only submitted a detailed request for interim measures in January 2010.

183. An immediate in-depth examination of Claimant's requests, however; had to be deferred due to Claimant’s challenges to Respondents' nominated Arbitrator, since the Tribunal considered it inappropriate to render decisions on interim relief unless and until its proper constitution has been established.

184. After the decision made by the Stockholm Chamber of Commerce under the date of 16 September 2010 regarding dismissal of the challenge against Professor Bushev, the Tribunal, In its 18th Order of 17 September 2010, suggested that Claimant may update and consolidate his Requests for Interim Relief, facilitating an in-depth review at the Hearing in Zurich, schedules to take place on 16/17

December 2010.

185. Claimant did so by fifing CM-45 titled "Claimant's Consolidated Request for Interim Measures of Protection" dated 22 September 2010 and in its further Submission CM-50, filed on 15 October 2010 in response to comments submitted by Respondents 1 and 2.

186. Claimant's requests ('Interim Request") as per para. It of CM-50 read as follows:
"(a) An Injunction precluding Respondents from Facilitating the construction or financing of that portion of the AT used to service International Flights, including but not limited to:

i. participating in any act to facilitate initial disbursement of financing of the AT by the EBRD, the IFC and/or any other entity for that portion of the AT used to service international Flights;

ii. participating in any act to facilitate; the construction of that portion of the AT used to service International Flights.

(b) An order requiring Respondents in take such actions as are necessary to cause Northern Capital to refrain from:

i. participating in any act to facilitate initial disbursement of financing of the AT by the EBRD, the IFC and/or any other entity which would he used to finance the construction of, or which would encumber the facility of revenues of, that portion of the AT used to service International flights;

ii. participating in any act to facilitate the construction of that portion of the AT used to service International Flights.

(c) An order requiring Respondents to notify Northern Capital, Fraport AG and any and all financiers of the AT (referred to collectively here as the "Third Parties") of the pendency of this Arbitral Proceeding and of Claimant's Claim for specific performance herein.

(d) Alternatively, if for some reason the Arbitration Tribunal does not consider it appropriate to grant the above requests, Claimant requests that the Arbitral Tribunal deem waived any and all objections to Claimant's claim fur specific performance in the Arbitral Proceeding, and strike paragraphs 378-384 of Respondents' Statement of Defense.

(e) The drawing of adverse inferences by the Arbitration Tribunal from Respondents' failure to inform Claimant and the Arbitration Tribunal of Respondents' ongoing efforts to aggravate the current dispute by proceeding speedily with the construction of the AT, which is dearly incompatible with the pendency or this Arbitral Proceeding."

187. With a view to providing some guidance to counsel of both sides as to the main areas which the Tribunal would wish to review together with the Parties at the Zurich-Heading, the Tribunal prepared a short-list of 3D issues to be discussed in the context of properly analyzing his requests for interim measures. This short-list was contained in the Tribunal's *22™ Order,* issued on 29 November 2010. The short-list has been reflected above in Chapter E of this Award.

188. Claimant argued his case regarding his interim Requests in further written Submissions, and extensively argued hrs case orally at the occasion of the Hearing in Zurich held on 16/17 December

2010.

II Respondents' Denial Regarding Interim Relief

189. Respondents 1 and 2 denied all of the requests.

190. In respect of Respondents 3, 4 and 5, the Tribunal has not seen any comments in respect of the Interim Requests, The Tribunal takes them as being denied by all Respondents.

III The Tribunal's Procedural Decision as per the 24th Order of 8 February 2011

191. In its 24th Order, para. 130, the Tribunal ruled as follows:
"The Tribunal concludes, for the purpose of the present decision on the granting of interim relief referring to Claimant's reinstatement as an investor, that the Interim Requests - absent a showing of proper *locus standi* of the Claimant - must be denied.

This conclusion, however, only applies to Mr Sax' reinstatement claim, but does not as such apply to purely monetary interests/claims which might have been validly assigned to him by PSP on the basis of the assignment filed as CX-66. This, however, is not to be reviewed in the present Order."

192. The Tribunal - in reaching its aforementioned conclusion - considered the Following aspects - which are literally incorporated herein - regarding Claimant's *locus standi;*

Quote:

193. "Essentially, Claimant's substantive Claims submitted in the framework of the present Arbitration stand on two different legs, one being for some monetary campcnsation/damages, and the second being his claim for specific performance. in the sense that he should be reinstated as the investor for the Pulkovo Airport Project (the latter coupled with a number of conditions precedent and subsequent and acceptable to Claimant (sac hereto Claimant's requests in Chapter B above).

194. Claimant's interim requests (as recited in Chapter C above) all refer to Claimant's reinstatement claim.

195. The distinction between the two legs of Claimant's claim is important and triggers significantly different legal issues. In fact: While a claim for some reimbursement of expenditures and a claim for damages may well have arisen (or may validly have been assigned to Claimant by Pulkovo (Strategic Partners) Ltd., (Cyprus) as the party to the Pounders' Agreement and the Charter, which matter however does not need to be discussed or decided herein, it is a fundamentally different matter whether Claimant, as an individual, could validly "stand into the shoes" of the initial party to the underlying contracts (respectively the Investment Contract, as the Claimant characterizes the

contracts), and thereby claim to be given the position as a succeeding investor, succeeding to Strategic Partners.

196. The Tribunal will, therefore, have to analyse whether Pulkovo (Strategic Partners) Ltd. could, with valid effects vis-a-vis the other parties of the Founders' Agreement and the Charter, assign and transfer its position as an investor to Mr Carl A. Sax as an individual. It is noted that the sale and transfer was made pursuant to a tripartite Sales Agreement, CX-66, dated 17 December 2002, signed by Mr Carl A Sax on behalf of Pulkovo (Strategic Partners) Ltd., further signed by Mr Carl A Bax on behalf of Strategic Partners (Holdings) Ltd. and signed by Mr Carl A Sax in his personal name, relating to the sate of a 29.7% stock interest in IAT Pulkovo, and the assignment of a "$20+-miilian pre-development expanse receivable". The sale is further evidenced by a Bill of Bale, signed by the sellers/assignors Pulkovo (Strategic Partners) Ltd, and Strategic partners (Holdings) Ltd, signed under the same data by Mr Carl A Sax, signing for both (CX-59).

197. the Tribunal had specifically raised this rather obvious intuitu personae - issue in its communications to counsel for their preparations for the December 2010 - Hearings.
(Note: some 15 pages of text of the 24" Order are not reflected here, as they essentially drill with the basic requirements for obtaining interim relief according to the 1976 UNCITRAL rules, the 2010 UNCITRAL Roles and the Swedish Arbitration Act and the criteria of the avail shinty rations materia, considerations of practicability and proportionality, the general requirement for posting security and the requesting party's liability for damages, - The text hereinafter reflected deals with the most significant Issue of Claimant' locus standi.)

198. The issue of Claimant’s *focus standi* is the single most important and most critical element to he considered here and this most critical element, therefore, had been clearly flagged out to the Parties and choir counsel prior to the Hearings. In succinct form, the most relevant aspects are as follows:

199. In January 1992, Mr Sax, as per his allegations In CM-2, para 3 ss., received a "mandate letter" Inviting him to form a consortium of Western companies for the purpose of discussing the development of the Pulkovo Airport.

200. Based on such mandate, Claimant, in 1992/93, together with a number of Western companies, met with representatives of the City of St. Petersburg for the purpose of discussing the development of the Pulkovo Airport.

201. During those meetings with representatives oF the City of St. Petersburg (Vladimir V. Putin, at that time Vice-Mayor of the City, and Mayor Anatoly A. Sobchak), the City of St Petersburg requested Mr Sax to form a consortium of Western companies far the purpose of developing Pulkovo-3.

202. Thereupon, on 16 March 1994, the company named "Strategic Partners, Incorporated, USA", represented by Claimant Mr Sax, entered Into an Agreement (which in these proceedings was referred to as the "Protocol of Agreement") under which the Parties agreed to jointly redevelop the St. Petersburg Pulkovo International Airport, by developing Pulkovo-3 (CX-2) The Agreement was signed by Vladimir V Putin In his (then) capacity as the Vice-M&yor of the City of St Petersburg.

203. The Protocol of Agreement relates to the financing and construction of Pulkovo airport facilities and

provided for the establishment of a joint stock company

204. While the Protocol of Agreement was entered Into in the name of a US company ("Strategic Partners, Incorporated; USA"), Claimant - according to his witness statement CWS-1 of 15 October 2010, para, 11 - formed a Cayman Island company bearing the same name, i.e. Strategic Partners (Holdings) Limited ("SPHL"), In which Claimant - according to his statement - at all material times held a minimum of 25% of the shares, and in which he served as Vice Chairman and Director.

205. Furthermore, according to his supplemental witness statement (CWS-5 pages 3/4), Claimant Mr Sax, In 1995.
"assembled one of the Fust consortia to offer airpor t *terminal development, construction, reparation, financing and management services through a consortium of internationally recognized companies, known as Strategic Partners (Holdings) Limited ("Strategic Partners"). Strategic Partners' shareholders and/or participants included American International Group, American International Underwriters Overseas, Ltd. a/k/a, AIG; Deutsche Bank f/k/a, Deutsche Morgan Grenfell f/k/a, Morgan Grenfell & Co., Ltd.; STV Group, incorporated; AvFuel Incorporated, VINCI f/k/a, Group GTM; Aeroports de Paris; SKANSKA and others."*

206. In parallel, or shout the sane time, SPHL (Strategic Partners (Holdings) Limited), which Mr Sax described as a consortium, formed - for the purpose of implementing the Pulkovo project - a wholly-owned subsidiary, i.e Pulkovo (Strategic Partners) Limited, Cyprus (CM-2 para, 12)

207. Subsequently, PSP (represented by Mr Carl A. Sax as Executive Vice-President and General Counsel) together with four further parties, entered into the Founders' Agreement (CX-6) dated 19 May 1995, and JSC International Airport "Pulkovo" was formed (by the Parties referred to as "IAT Pulkovo").

208. Likewise, the Charter of JSC International Airport "Pulkovo", equally dated 19 May 1995, was signed by the five founders, among them PSP, again represented by Carl A. Sax as Executive Vice-President.

209. Claimant refers to the Founders' Agreement and the Charter for creating IAT Pulkovo (as the corporate vehicle) as the "Investment Contract" (CM-49, para, 34).

210. The investor, therefore, as regards the project lined up in 1994/95 was the Cypriot subsidiary of Strategic Partners whose shareholders and/or participants included the companies as referred to by Mr Carl Sax in his witness statement (see above), all of them known as significant players

211. The significance of SPHL's then held position as a major player for airport developments was further emphasized by Claimant, by referring to an impressive list of SPHL's then (1996 to 1999) involvements in the development of numerous international airports and airport terminals, including projects in Russia for (i) Moscow's Seremetjevo 3, and (ii) airports in Vietnam, (iii) Gibraltar, (iv) the Philippines, (v) Guatemala, (vi) Congo, (vii) Ecuador, (viii) Indonesia, (ix) Honduras, (x) Pakistan, (xi) Armenia, (xii) Jamaica and (xiii) Uruguay.

212. l he more precise involvements in these projects mentioned In CWS-1, however, have not been ascertained in the present proceedings[17], and the Tribunal was not made aware of, for instance,

[17] At the Hearing of 16 December 2010, Mr Sax, questioned about the then current airport (re-)development projects, specifically referred

currant projects where SPHL (or Claimant personally) plays a significant role as an airport developer. Claimant, at the December 2010 Hearings, simply mentioned that he, when reinstated as an investor, would without difficulty be able to put together a new and significant international consortium for realizing the Pulkovo project.

213. The above are some of the parameters which the Tribunal has to consider in respect of its reflections on Claimant's *locus standi.* The Tribunal's reflections are as follows.

214. It is within the nature of such an investment contract that the contract is concluded with each one of the parties having regard to the parties' individual standing, abilities, capabilities or resources. The contractual relationship, thus, is formed *intuitu personae* (for using this Latin term of art).

215. A natural consequence of this understanding of the contractual relationship is that the individual party as such is not exchangeable or interchangeable, unless all other parties would agree; more particularly, obligations assumed by one party cannot, without the agreement of all other parties, be "assigned'" to a new party.

216. While the above certainly holds true as a general conclusion, quite irrespective of any legal system applicable, this understanding - in the present case - is moreover clearly apparent from, and reflected in, the Charter (CX-5), Chapter 16, and in the Founders' Agreement, Article XI (CX-6).

217. Chapter 16 of the Charter and Article XI of the Founders' Agreement reflect the *Intuitu personae* notion under the title "Transfer of Shares". According to those provisions, it is dear that the right to transfer shares Is restricted in very explicit terms and provisions and, *inter alia,* requires an "acquisition proposal", with an offering procedure which is in detail laid down in Clause 16.4. "The provisions are very detailed and run over some 5 pages, all of which indicate the importance which the Parties attributed to the matter. Absent a compliance, it would seem clear that a valid transfer of the position as a shareholder and investor could net take place.

218. Thus, PSP - absent compliance with Chapter 16 of the Charter and Article XI of the Founders' Agreement - was precluded from transferring its shareholding to Claimant Mr Sax. An effective transfer was moreover not possible, because the shares in IAT Pulkovo were never formally issued, and thus could not be validly registered in the personal name of Mr Carl A Sax.

219. Claimant - in the framework of the present Arbitration - described himself as being the "successor-in-interest" of PSP, based on the assignment between PSP and Mr Sax of 17 December 2002. The relevant document was submitted as CX-66, as referred to above Respondents 1 and 2 dispute the validity of such An assignment as regards the position as a shareholder or investor, emphasizing that the shares of IAT Pulkovo had never been issued and, therefore, could net validly be transferred.

220. The above situation leads to a rather obvious conclusion in the sense that - absent a formal approval by all Parties of the Charter and the Founders' Agreement - PSP could not validly transfer its position as an Investor in IAt Pulkovo, and Claimant Mr Sax could not validly assume and take over the

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to the project in Ho Chi Minh City, which project was worked on by strategic Partners together with AIG, Deutsche Bank, Raytheon and Nissha Iwal. On question of the Chairman whether any of these projects materialized, Mr Bax answered by a "no". Transcript 16dec10, page 93.

function from PSP as a party to the contractual relationship formed in 1994/1995. Such approval, however, did not occur.

221. Therefore, as regards the position as an investor/sharcholder, the Assignment as per CX-66 can not produce a valid effect recognizable under the applicable Russian Law. Only purely monetary interests or claims may be considered assignable without consent of the other investars/ shareholders.

222. Under the *intuitu personae* notion, one may also say that it was

• one thing to deal with Strategic Partners in 1994 and thereafter with the - at that time - impressing business partners lined up and associated with Strategic Partners at that tune (as described by Mr Sax in bis witness statement, CWS-5, pages 3/4, specifically referred to above), and the numerous projects then worked on (also referred to above, projects numbered (i) to (xiii).

• and another thing to see and accept Mr Sax re instated as an investor, in his personal capacity, with no established record whether or not he had kept any personal activity in airport development since the later 1990s, and without the support he had indicated standing behind Strategic Partners in the 1990s, simply with the proposition that - as he affirmed during the Hearings (see the passages quoted above) still today he would easily be in a positron to put together a consortium which would match any required standard for a requisite qualification to realize the Alternative Terminal Project.

223. Hence, the Contract-party which had been accepted to become an Investors in the 1990s, i.e. Strategic Partner respectively PSP, on the one side, and Claimant as an individual entrepreneur on the other side, are different "pairs of shoes".

224. At the Hearing, Claimant, in his Impressive enthusiasm (greatly respected by the Tribunal), affirmed that in 2007 - had his continued right to be the investor for a new Airport Terminal been respected - he would, within weeks, have been able to put together a new and strong consortium (possibly better than Northern Capital Gateway); see the excerpted dialogue above.

225. Yet, such An affirmation, impressive as it is, can hardly be sufficient for the Russian Parties to rely on.

226. More significantly, claimant had made no tangible steps to take part in the 2007 tender, nor has he put together such a consortium which could have fulfilled the pre-tendering qualifications.

227. To summarize the Tribunal’s reflections: For two essential reasons, the Tribunal has significant difficulty to affirm Claimant's *locus standi* as en investor;

• First, the shareholder's position of the investor PSP was clearly *ad personam,* and was transferable only upon a prior offering of shares to the other parties, and thereafter by complying with all further transfer restrictions; nothing of this was done; end it could not even be done, since the IAT Pulkovo shares had never been issued; consequently. Claimant (quite correctly) only describes himself as a "successor-in-interest", and not, legally, as o successor.

• Second, under the circumstances, the Russian Parties, in 2007, could not reasonably be expected to accept Mr Carl A Sax as the individual Investor, not even on the basis of a promise - which had not even been made - to put together a strong consortium, 13 years after the discussions regarding the Protocol in 1994. During those years, the *momentum* got lost, and the "world" changed, possibly in Russia even faster than elsewhere.

228. Between 1994/95 and 2007, the "world" has changed - this trifle statement raises a legal question not argued by the Parties, but nevertheless worth mentioning as an *obiter dictum:*

229. Claimant, in his testimony on 16 December 2010 at the hearing, mentioned that he (respectively Strategic Partners), In 1994/1995, were accepted without a tendering procedure, and he stated that - when planning for the Alternative Terminal in 2007 - the Russian Parties should simply have called him, and should have accepted him without submitting the project to a public tender, arguing implicitly that legally/contractually the Russian Parties were still bound by the initial agreement reached In 1995.

230. This raises ah interesting issue;

• During this period of time, relevant Russian law changed or may have changed. in particular, Russian anti-trust law changed, and possibly new procurement laws and requirements were enacted or became more closely observed or enforced than, for Instance, in 1994/1995.

• If this, as a legal hypothesis, is correct, and if in 2007 new public procurement rules and tendering requirements were applied, the question is whether, in the framework of a contractual relationship, a party has an implied or vested right that, during the term of the contractual relationship, changes in the legislative framework would not apply to such existing relationships.

• This issue is normally answered in the negative, i.e.. in the sense that a contractual party (such as PSP respectively Mr Sax) has no protected or vested right, absent very particular assurances or particular stabilization-of-law clauses (as controversial as they are), that the applicable laws remain unchanged during the contract period, or even during an unlimited period of time.

• Hence, it is not an exception, but rather a normal situation, that laws are changing. in some countries more often and more rapidly than in others, arid in specific areas of business more rapidly than in others.

• For instance, changed financial and economic situations have given rise to new urgent measures and regulations, and - absent very specific guarantees -parties have no choice but to adapt to changed legal parameters, possibly after a certain transitory period, and in exceptional circumstances, new regulations even purport to take a retroactive effect. [18]

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[18] During the deliberations of the present Award, the Tribunal was made aware of Article 422 of the Russian CC which addresses this issue. Accordingly, a contract must comply with the rules mandatory for the parties established by law as well os by other legal acts (Imperative norms) which are rn effect at the time of its conclusion. If, after the conclusion of a contract, a law is adopted which establishes rules that are mandatory for the parties and are different from those which were in effect at the time the contract was concluded, the contract shall remain In force, except for cases where the law specifically provides for a retroactive effect.
In many cases a new law may impose on the parties additional obligations or even restrictions. Where such provisions relate to, so called, vertical relationships, i.e. the relationships between a party to the contract and the public authority (e.g, tor the payment of taxes, customs duties, compliance with reporting requirements, licensing and the like), which become obligatory tor such a party, and where - as a result

231. This obiter *dictum* supports the Tribunal's conclusion that Claimant's claim in the sense that he was contractually and legally entitled to be the foreign investor In connection with trie 2007 Alternative Terminal, without subjecting himself to a tendering procedure - is unconvincing.

232. To sum up The Tribunal concludes, for the purpose or the present decision on the granting of interim relief referring to Claimant's reinstatement as an investor, that the Interim Requests - absent a showing of proper *locus stand)* of the Claimant - must be denied.

233. This conclusion, however, only applies to Mr Sax' reinstatement claim, but does not as such apply to purely monetary ihtenasts/daims which might have been validly assigned to him by PSP on the basis of the assignment filed as CX-66. Tills, however, is not to be reviewed in the present Order." unquote

234. It is clear that the above decision only reflected the Tribunal's provisional view for the purpose of an interim procedural decision, and that therefore the *locus standi* of Claimant as regards his reinstatement claim remained open for further and better submissions by the Parties and reconsideration by the Tribunal, and in fact was further reviewed at the Stockholm Hearings.

235. Claimant, in his PH-Brief filed on 20 January 2012, recognized the Tribunal’s concern regarding the reinstatement claim, by amending his request to a purely monetary claim.

G The Further Procedure After the Tribunal's Ruling on Interim Relief of 8 February 2011 up to the Closing of the Proceedings - The Liability Phase

236. In a second part of the 24th Order, the Tribunal listed Claimant's extensive documentary requests, noting that they go far beyond the standards of the 1999 ISA Rules (and the 2010 IBA Rules) on the Taking of Evidence in International Commercial Arbitration. -- Hence, all requests were, for the time being, denied.

237. In further parts of the 24th Order, the Tribunal dealt with several further matters including the applicability of the Tribunal's determination to the remaining Respondents, the cost implications (to be decided in the Final Award), and the organization of the further proceedings.

238. In the fatter respect, the Tribunal suggested a bifurcation in the sense that, first, the issues on liability would be considered, in which context the Tribunal identified eight main issues - quite in the sense of a "road-map" - which should be addressed by counsel in up-coming written end oral proceedings, and in respect of which detailed liability Hearings need to be scheduled.

239. This "road-map" listed the following issues;

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of the issuance of such act of state - the performance of the obligation becomes impossible in full or in part, the obligation Is terminated in full, or in the respective part (Article 471,1 Russian CC), It is therefore clear that each party bears a risk of the changing of the relevant legislation, (To note! This in is added by the Tribunal for the purpose of this Award and was not contained In the text of the 24th Order.)

quote

240. Issue 1: Did Strategic Partners/PSP fulfill its promised tasks correctly, by providing the financing as contemplated, (i) timely, or within a conceded stretch of the time-window? And (ii) in a manner which should have been accepted by Respondents and IAT Pulkovo?

a) If yes: what are the consequences?

b) If no: what are the consequences? Did the Project - as Respondents allege - fail due to shortcoming of Strategic Partners/PSP? Would this bar any and all of Claimant's claims?

241. Issue 2: Did the Protocol, the Founders' Agreement and the Charter at ail Impose binding obligations?

242. Issue 3: Was the Project not realized in the 1990s

a) due to shortcomings of Respondents?

b) Were they committed in a binding manner, and it so, did they breach their contractual obligations?

243. Issue 4: Was the Project still-born after 1997 or any time thereafter, or tacitly abandoned?

a) And was thereby the contractual relationship terminated?

b) If so; at what moment in time?

c) And what would be the effect of such a determination on the *dies a quo* regarding the running of any statute of limitations?

244. Issue 5: If the answers to the two Above questions is yes what are the consequences?

a) Does this trigger a liability in principle vis-a-vis Claimant? Of which Parties?

b) Is liability excluded due to Section 8.4 of the Founders' Agreement? [19]

c) If not' liability for disbursements only, or disbursements and loss of expected profits?

245. Issue 6: If no: consequences? Would Claimant still have a valid claim in principle for recovering costs? And what is the impact of Section 8.4 of the Founders' Agreement?

246. Issue 7: To the extent a monetary claim of Claimant appears justified in principle find would not be

[19] The Founders' Agreement (CX-6) in Section 8.4, contains an explicit provision dealing with the situation that the project may not proceed as intended, and the Founders have agreed that each of them shall absorb any resulting damages themselves *"and shall not transfer responsibility for them* to other *Founders".*

cut by Section 8.4:

a) Should Strategic Partners, or PSP, or Claimant have voiced claims earlier? And why was this not done?

b) Are any and all claims time-barred?

c) If not: against which Parties can claims be directed?

d) What is the scope of Claimant's claim? Recovery of pre-development expenditures? other cost or damage items? *Lucrum cessans?*

247. Issue 8 : Were Respondents committed to exclusively deal with Strategic Partners/PSP, and was there a commitment - *e.g.* still valid m 2007 - that the Alternative Terminal must be realized with them, and not with any third party?

a) Would exclusivity, as it was required by claimant, violate Russian antitrust laws/procurement lows? In 1994/95/96? In 2007?

b) Should Strategic Partners/PSP have been Specifically invited to take part in the tendering process?

c) Should Strategic Partners/PSP or Claimant saw *sponte* have participated in the tendering process?

d) Could Claimant thereby, or through other precautions, have mitigated his losses?

248. Further, the 24th Order indicated that, in the case liability would have to be affirmed by this Tribunal, the Tribunal would open the **quantum phase** in which

• Claimant would be given the possibility to (in detail) quantify his monetary claims, and

• would have to furnish evidence regarding the pre-development costs and other costs or damages for which he seeks a reimbursement;

• moreover, currency issues and matters of interest would have to be addressed (*dies a quo and ad quern,* applicable Interest rates, simple interest, compound interest and, if compounded, on what basis).

249. The Order, finally, addressed the further procedure up to a liability Hearing, and invited comments from counsel on the further procedure as proposed by the Tribunal.

250. In a joint Submission dated 4 March2011, counsel to both sides basically agreed to the Tribunal's proposals regarding the further proceedings, with a primary focus on liability issues to be cleared first, thereafter - if necessary -followed by a quantum phase.

251. On 18 March 2011, the Tribunal issued its 25th Order essentially dealing with Claimant's CM-63/64 in which the Claimant voiced concerns regarding the enforceability of this Tribunal's Final Award

in case one of the Respondent Parties would raise an objection in the sense that it had not been properly notified of the present arbitral proceedings, or that it had not validly been represented.

252. On 28 March 2013, the Tribunal issued its 26th Order indicating the dates and venue and practical matters for the liability Hearings scheduled to take place on 18-21 October 2011 in Stockholm.

253. On 22 April 2011. Claimant filed its Memorials CM-65, CM-66 (hereinafter sometimes referred to as the **"C- Liability Brief")**, CM-S7 and CM-68. followed by CM-69 on 27 April 2011, including Mr Sax' Witness statement CWS-6 and four expert opinions. In CM-69, Claimant requested assistance from the Tribunal by issuing an Order that Respondent 1 provide the official address of Respondent 4.

254. On 2 July 2011, Respondents 1 and 2 filed their written Submission on Liability (" **R-Liability** Brief"), including Mr Karpov's witness statement and four expert opinions

255. On 21 July 2011, the Tribunal issued its 27th Order, providing proposals and directions for the Liability Hearing in Stockholm, and proposing a further telephone conference, after having received the joint proposals of the Parties regarding the schedule/structuring of the Liability Hearings.

256. The Order also addressed the financial status of the advances and interim payments, and included an estimated budget for the further work likely to be necessary for the further steps in this arbitration, followed by a request for further deposits payable by each side.

257. On 5 August 2011, Claimant filed CM-70, requesting leave to address a comment m Andrew Fletcher's opinion according which, under English law, the Purchase Agreement (CX-66) does not transfer to Claimant any rights to profits from the Investment Project.

258. On 9 August 2011. Issued its 28th Order, noting the availabilities of the witnesses and the experts at the upcoming Liability Hearing, noting the likely prevention of Professor Sukhanov, yet requesting further particulars as to the reasons for his alleged unavailability prior to making a decision whether or not his expert opinion should be disregarded. The Tribunal also granted a 30 day time-limit for Claimant to address the conclusion in Andrew Fletcher's opinion. In the saint Order, the Tribunal denied Claimant's request contained in CM-69, and dealt with CM-71 which was filed on the same day.

259. On 16 August 2011, Claimant filed CM-72, applying for an extension of time until 16 September 2011 to address the opinion of Andrew Fletcher QC; furthermore, in CM-73, Claimant requested to disallow Professor E.A. Shukanov's Opinion (RWS-5).

260. On 19 August 2011, the Tribunal issued its 29th Order, granting the time ox-tension requested by Claimant, and on the other hand Indicating that Professor Shukanov's Opinion, filed by Respondents, would have to be disregarded, if he would not be available for oral examination at the October-Hearings, since the alleged importance and eminence of Professor Sukhanov cannot be accepted as a *"valid reason"* for exceptionally accepting his expert opinion on the record.

261. On 25 August 2011, Claimant's counsel filed CM-74, requesting the production of Respondents'

counsel's instruction letter to Andrew Fletcher Qc, as referred to in the latter's expert opinion RWS-4.

262. On 24 August 2011, Claimant filed CM-75, with a renewed motion that the Tribunal requests Respondents 1 and 2 "to *confirm DLA Piper's continued authority to act on their behalf*" - The Tribunal reverted to the request in its 31st Order, paras. 26 and 27.

263. On 26 August 2011, the Tribunal Issued its 30th Order.

264. On 30 August 2011. Claimant's counsel transmitted the email correspondence between counsel regarding the Hearing Schedule for the Stockholm Hearings in respect of matters on which they could not agree.

265. In reaction thereto, the Chairman circulated an email reflecting his own proposal for the structuring of the Hearing.

266. In the afternoon of the same day, the telephone conference took place, dealing with Respondents' application for extending the time-limit regarding the additional advance, and thereafter dealing with the Parties' *desiderata* regarding the Hearings in Stockholm and further practical aspects. Essentially, both sides agreed to the Hearing Schedule as it had been proposed by the Chairman. Respondents' counsel Josh Wong inquired whether the Tribunal will once again submit a list of issues to be addressed during the Stockholm Hearings.

267. The essentials of the discussion are reflected in the Tribunal's 31st Order of 31 August 2011, transmitted to the Parties on 2 September 2011. The Order also dealt with Claimant's CM-74 and CM-75. At the same time, the Tribunal condensed its preparatory work by reflecting on, and putting together, a short-list of key-issues, including a series of more particular questions.

268. On 2 September 2011, the Tribunal - having condensed the numerous questions in **a Questionnaire with 53 questions,** grouped under 8 Key-Issues - communicated its 32 Order, accompanied by a *caveat* that the Questionnaire did not claim to be complete, and that more and other factual elements and legal issues might have to be addressed during the Hearings. The Questionnaire is reproduced herein below; it will also serve as the topical list of matters which this Tribunal - for the purpose of reaching its decisions had to consider.

Issue 1: Proper Performance by Claimant and the EBRD Offer

1 Regarding the LORD offer, is there a significant discrepancy between basic terms of the Founders' Agreement ("**FA**"), and the EBRD offer?

2 What about, for instance.

(i) the increased amount Of the loan.

(ii) the Interest terms.

(ii) the removal of majority for the Russian Parties of 63 4% to a majority of the Foreign Parties/

EBRD, by the required transfers of 21.5%

(iv) pledging of the shares in favour of EBRD.

(v) transfer of management functions to Aeroports de Paris?

3 Hence: Have the Foreign Parties properly fulfilled their "primary obligation" by providing the EBRD offer as it was made'

4 Were the Russian Parties bound to accept whatever financing offer would be presented? Or were they free to reject it, or lot it lapse time-wise?

Issue 2: What if the EBRD-Offer, For Good Reasons, Had to be Considered Unacceptable for the Russian Parties?

5 Were the Russian Parties still bound to the FA, even though the Foreign Parties could not - according to the Russian Parties' arguments - present an acceptable financing commitment?

6 In this context: can the Russian Parties invoke the *exceptio non (rite) adimpleti contractus?* Is this defence, in Russian law, also available in the ambit of corporate law (as opposed to the "traditional" ambit of this Roman law maxim in contract law)?

7 If indeed the Russian Parties were well-founded not to take the EBRD-offer further: Could the Foreign Parties continue to claim to be part of the Investment Project, and derive benefits there under (for instance based on the 29.7% equity share and profit share), even though, possibly and eventually, the Russian Parties would have had to find financing through entirely different sources, without the Foreign Parties' or Mr Sax assistance, or ultimately through the City's or the State budget?

In other words: Was the FA still binding on them, or could they repudiate the Investment Contract altogether?

8 If the Investment Contract remained to be binding; to what extent did the FA contain further binding provisions?

9 If not; Did Respondents' have the right to repudiate the Investment Contract, or to tacitly terminate it, respectively to terminate it trough inactivity of the Parties?

*** And did they do so?**

10 At what moment in' time should Claimant have realized the disinterest of the Russian Parties, or a unilateral refusal to further support the project?

11 Claimant, after 1999, tried to keep the project on track, or to revitalize is, but no fresh momentum could be found; was the FA terminated already in the first half of 1999, as discussed fey Professor Belov?

12 What is the effect of Mr Karpov's letter of 16 April 2003 (CX-69)?

Issue 3: Claim for Reimbursement of Pre-Development Expenditures

13 SPH and/or Claimant want to very considerable expense for the planning of the NIPT, lined Up consultants, prepared numerous documents, for which Claimant now seeks reimbursement - and Mr Rowson stated in para 26 that he was advised that the expenditures "*are reimbursable under various* agreements *prepared by the Parties.*

What Is the documentary basis for this statement, in Claimant's view?

14 In 1995 and beyond: was it discussed among the shareholders that such expenditures would be incurred for and on behalf of IAT Pulkovo (or its shareholders), and not only on behalf of the Foreign Parties or Mr Sax personally?

15 And if this was discussed: Was there ever an agreement - at the time when entering into the Founders' Agreement ("FA"), or any time thereafter - that these costs are reimbursable to the Foreign Parties/Claimant, either through IAT Pulkovo or otherwise through the Other Founders?

16 How do we have to understand that the Foreign Parties agreed to FA 6.3, on the face of that provision waiving costs before entering into the FA, when on the other hand - as per Mr Rawson's report - already prior to December 1994 very significant costs exceeding US$; 3.3 million seem to have been incurred which, despite the terms of FA 6.3, are now claimed as part of Claimant's pre-development advance claim?

17 Following up from Q 14 above: In the framework of negotiations leading the conclusion of the Fa, did the Foreign Parties and/or Claimant indicate the fact (and magnitude) of the expenditures already incurred and likely or expected to be incurred in the time to conic, particularly in connection with the securing of a financing commitment?

18 More particularly, after the conclusion of the FA, and during the further "life" under the FA and as shareholders in IAT Pulkovo:

Was the nature and magnitude of further spending during 1995 to 1998 ever discussed with the Russian Parties and the Board of IAT Pulkovo, and was =t approved?

19 Far instance, were all Parties to the FA and shareholders of IAT Pulkovo, and IAT Pulkovo itself as the corporate entity, made aware of the charging (or ultimately intended charging) by the Foreign Parties/Claimant) for the following costs and expenditures incurred by the Foreign Parties:

(i) the charging of several millions for consultants

(ii) the charging of advisory costs paid or to be paid to DMG, OPIC, Unipart capital and MIGA of US$ 1.5 million,

(iii) the charging of approx. US$ 2 million for salaries to employees of Sax (Holdings) Limited,

(iv) the charging of the salary for Mr Carl A Sax of over US$ 1 million,

(v) the charging for Claimant's and STVs office overheads,

(vi) the charging of US$ 1 million for design and engineering, and

(vii) the charging of over US$ 4 million for "transfer agreements", for transferring interests of individual shareholders to Strategic Partners.

20 If not: why was this not disclosed, discussed upfront, with the view towards seeking an agreement how to deal with such costs?

21 In the fr&rnework of the liability decision to be made by the Tribunal: how should the Tribunal decide liability and recoverability in principle for any one/each one of the items as per Q 19 (i) to (vii) now claimed in this arbitration?

22 When incurring those pre-development expenses; Could the Foreign Parties or Sax act on behalf of IAT Pulkovo, and bind IAT Pulkovo thereby, as Claimant asserts?

Did Mr Sax have a proper corporate authority to act for IAT Pulkovo, or a mandate ?

23 Or could Mr Sax only act on behalf of the Foreign Parties respectively himself, absent the required unanimous decision under FA Chapter 12,7, as this was argued by Respondents?

24 In this context. Was Mr Sax ever correctly appointed as Vice President of IAT Pulkovo, and registered as such, ss he claims, and as this had been foreseen in FA 13.3?

* If not: why not?

25 Mow did the Foreign Parties and/or Mr Sax commercially assess their continued spending under the perspectives of the - as it scams - relatively easy exit clause according to FA 8.4?

26 Is FA 8.4 applicable in our context, as Respondents' maintain, or inapplicable, as Claimant maintains?

27 IF there had been no agreement that these pre development costs should ultimately be borne by IAT Pulkovo or Respondents, on what basis could those costs rind their way into the EBRD financing offer, as port of the loan?

And on what basis could the Foreign Parties expect that this will be acceptable to the Russian Parties?

Has this been discussed, agreed?

Issue 4: Claim for a 4.5% Developer Fee

28 What Is the legal/contractual basis for this claim?

29 Mow was it negotiated/agreed? Do we have a signed document?

Issue 5: Termination of IAT Pulkovo

30 Was IAT Pulkovo properly administered even beyond 1998 and ultimately properly liquidated?

31 If not: Would an incorrect administration or liquidation of IAT Pulkovo give rise to a justified Claim or Claimant?

32 If so, for whet kind of claims?

33 Is there a violation of international law? Was there an act akin to expropriation?

Issue 6: Statute: of Limitation for Monetary Claims

34 How can we understand Claimant's rationale for not submitting the pre-development expense claim forthwith or rather promptly, as expenditures were being incurred, or in any event immediately when the EBRD offer lapsed in 1998, if there had been an agreement that they are reimbursable?

35 Would it be unreasonable to think that Claimant, a very well experienced lawyer, must have been aware of the statute of limitation, end a 3 year statute arguably must have been familiar to fern, since this is the statute of limitation according to many if not most US State lew legislations.

36 Regarding Claimants monetary claims: when did a violation of rights occur, falling under Article 200.1 Russian CC?

37 Respectively, when could or should Claimant have presented his claims for pre-development expenses, under Article 200.2 Russian CC?

38 Are some or all of Claimant's monetary claims for pre-development expenses time-barred?

39 If not: on what basis does Claimant have a valid claim in principle (subject to the analysis of the quantum in a final stage of this arbitration)?

40 And how to deal with interest (which may be more significant than the capital amount), interest rate, simple, compound (and compounding basis)?

Issue 7: Claim for Re-instatement as an Investor

41 Does Claimant have standing On the basis of CX-66, for claiming that he should have been selected as the developer for the AT in 2007?

42 What was transferred/assigned to Claimant under CX-66, having regard to (the probably universal, but 2'000 year old Roman notion of) *"nemo plus juris transfer protest quam ipse habet"?*

43 The issue might not really be answered by English law (governing CX-66), but by Russian law, since the transfer/assignment: would have to deploy certain effects for IAT Pulkovo. Views/ comments?

44 On the same issue: what could be transferred as a stock Interest, having regard to the strict Transfer restrictions as per the Charter and the FA?

45 Re-thinking the Tribunal's earlier preliminary decision as per the 24th Order: Can Mr Sax stand "into the shoes" of the initial Party?

Or was the Tribunal's *intuitu personae* reflection correct, in the sense that the participation in the project as **an** investor and developer is not "inter-changeable" or transferable from SPH/PSP to an individual (Mr Sax), even though at the time Mid-1990s Mr Sax might have been the driving force behind SPH/PSP?

46 Regarding Mr Sax' claim that, in 2007, he should have been elected as the developer/invcstor for the Alternative Terminal

• Is it of significance that - during the 1990s, SPH and Mr Sax were apparently significantly engaged in numerous airport developments, and were active around the globe (as can be seen from Mr Sax first witness statement, CWS-1, identifying numerous airport development projects in which strategic partners were involved, such as in Moscow/Seremetjevo, Vietnam, Gibraltar, Senegal, the Philippines, Guatemala., Congo, Ecuador, Indonesia, Honduras, Pakistan, Armenia, Jamaica and Uruguay - none of which however materialized, see Transcript of 16 December 2011, p, 93),

• whereas there seems to be no further record of Mr Sex involvement since 1998 to date (but for Mr Sax to correct If this is wrong).

47 Why did Mr Sax not participate in the tender process for the Alternative Terminal?

48 How could Mr Sax have fulfilled the (very heavy) pre-qualification criteria?

49 Was Mr Sax aware that procurement laws in Russia changed?

Was he entitled to expect that laws in Russia would rot be changed, and would remain stabilized on the basis as they were in 1995?

And would a claim for exclusivity, as requested by Claimant, he contrary to Russian antitrust law?

Issue 8: Cost Decision

Introduction:

The Tribunal may he minded to make a cost decision within its determination on liability, irrespective of whether or not the case will proceed to a final Quantum Stage.

For that purpose, the Tribunal is likely to request the Parties to file their cost submissions within about 2 weeks after the Stockholm Hearings, respectively within 2 weeks after the exchange of any post-hearing briefs (if any; for discussion).

The format and level of detail of the cost submissions must be discussed basically at the Hearing, as we want to avoid to receive a one-sheet summary of costs from one side, and a full leaver-arch file of detailed invoices etc from the other side.

In this context, however, some issues arise which may also be discussed at the Hearing:

50 Is Charter Section 20.10 applicable, as Claimant asserts, or inapplicable, as Respondents assert?

51 Does it derogate the Tribunal's authority and level of appreciation under the UNCITRAL Rules?

52 If Section 20.10 is applicable' how to understand better the provision on costs in Charter Section 20,10, referring to an arbitration *"in accordance with this Chapter 19"?*

53 What would be the yardstick for measuring bad faith or gross negligence or willful misconduct, in connection with a claim for costs?'

269. On 17 September 2011, Claimant's counsel filed CM-76, a brief responding to issues arising out of

the expert witness statement of Andrew Fletcher QC, supported by CX- 256 and an expert opinion on English Law prepared by Romie Tager QC (CWS-10), dated 14 September 2011, and a supplemental witness statement of Mr Carl A Sax (CWS-11), dated 16 September 2011.

270. On 20 September 2011, Respondents filed 1-RM-33/2-RM-39, requesting the Tribunal to disregard the Claimant's CM-76 and the supplemental witness statement of Mr Sax as having been filed without first having obtained leave from the Tribunal.

271. On 16 September 2011, Claimant filed 04-77, a renewed motion for a jurisdictional ruling as to Respondents 3, 4 and 5, referring to the Tribunal's Orders No. 25 paras. 36-39 and No, 28 para. 9, to which no suit was given by Respondents. Claimant requests the Tribunal to rule that Respondents had *"full opportunity to present their case to the Arbitral Tribunal",*

272. On 22 September 2011, by CM-78, Claimant commented on Respondents request to exclude CM-76 and CWS-11, maintaining that Claimants responses were proper and did not constitute a bad faith conduct and that, on the contrary, the Fletcher Opinion should be excluded from the files in its entirety.

273. On 28 September 2011, the Chairman sent out an email explaining his views regarding the admissibility of CM-76 and CWS-11, concluding that - although these filings had not had the prior authorization of the Tribunal - they should nevertheless not be struck from the tiles, and that they might be discussed at the Hearings, to the extent necessary, The same should apply to the legal opinion filed by Andrew Fletcher QC.

In the Chairman's view, as explained in the email, It would be procedurally unwise to discard these filings (while the Tribunal's earlier decision not to consider the legal expert report prepared by Professor E.A. Sukhanov filed by Respondents if Professor Sukhanov without good cause did not present himself at the Hearings for cross-examination - when cross-examination of him had been requested by Claimant's counsel - was a "dear-cut" and rather obvious decision, mandated by deeply rooted notions of due process; the two situations, therefore, could not be seen as being of a similar nature and procedural impact/relevance).

274. On 29 September 2011, Respondents' counsel requested leave from the Tribunal to submit short written comments in response to CM-76, CWS-10 and CWS-11 in advance of the Hearings.

275. On the same day, Claimant's counsel agreed to Mr Kropotov's request, proposing however that, prior to the Hearings, any written submission be filed no later than by 13 October 2011.

276. On 30 September 2011, the Tribunal confirmed its agreement to the foregoing by email.

277. On 5 October 2011, Respondents filed 1-RM-34/2- RM-40, with brief comments regarding Claimant Mr Sax's witness statement (C-WS-11), and questioning its credibility

278. On 6 October 2011, Claimant filed CM-79, addressing matters of Mr Sax' testimony.

279. On 10 October 2011, Claimant filed CM-80, suggesting an expert conferencing with the two English

law experts, and opposing Respondents' intention to file a further opinion addressing Mr Tager's opinion.

280. On 10 October 2011, the Tribunal issued its 33rd Order, addressing the matters raised in CM-80, suggesting the preparation of a joint report of the experts on points of agreement and disagreement or, alternatively, the filing of a short rebuttal opinion by Andrew Fletcher QC; the Tribunal also suggested that the experts might meet in Stockholm just prior to their joint examination.

281. On 12 October 2011 Respondents filed 1-RM 3.5/2-RM-41 regarding *"without prejudice"* meetings of the two English law experts Andrew Fletcher QC and Ronnie Tager QC.

282. On 13 October 2011, Claimant filed a Pre-Hearing Brief elaborating on further aspects of the Investment Contract, the alleged illegal expropriation, and commenting on Respondents arguments. CM-84.

283. CM-84 was accompanied by an Appendix 1, containing detailed responses to the issues and the questions 1 to 53 raised in the Tribunal's 32nd Order. Hereinafter **APP-CM-84.**

284. Further, on 13 October 2011, Respondents filed 1-RM-36/2-RM-42, containing Respondents skeleton brief on liability issues on the 53 questions raised by the Tribunal.

In a separate document, Respondents' counsel addressed several Russian law aspects, essentially in response to Claimant's CM-76.

285. Furthermore, Respondents filed a supplemental opinion by Andrew Fletcher QC, dated 12 October 2011 (RWS-7), containing comments to the opinion submitted by Claimant's expert Romie Tager QC (C.WS-10).

286. On 17 October 2011, the two English law experts Andrew Fletcher QC and Romie Tager QC filed a joint Memorandum on matters of English law on which they agreed and disagreed.

287. From 17 to 21 October 2011, **the Liability Hearings** were held at the Strndvägen 7A Conference Center in Stockholm. The following persons participated:

• Claimant: Mr Carl A Sax (as Party and witness)

Andrew J. Durkovic, counsel

Vladimir V. Gladyshev, counsel

Professor Oxana M. Oleynik, as legal export, present on 18 and 19 October 2011

Christer Hakansson, counsel, partly only

Romle Tager QC, as legal expert on English law, present during 20 October 2011

Professor Tai-Heng Cheng, as legal expert on international law, present from 18 to 20 October 2011

Peter Forbes (Director of Alan Stratford and Associates), as expert, present on 18 and 19 October 2011

Ian Rowson, as expert, present on 18 and 19 October 2011

• For Respondent 1 + 2: Professor Oleg Skvortsov, counsel

Leonid Kropotov, counsel

Ms Maria Onikienko, counsel

Josh Wong, counsel

Claes Rainer, counsel, partly present

Elizaveta Reyvakh, as interpreter

Maria Smirnova, representative of Respondent 2

Natalia Nazarova, representative of Respondent 2

Mikhail Lvovich Karpov, as witness

Professor William E. Butler, as expert, present on 20 October 2011

Professor V. A. Belov, as legal expert, present on 20 October 2011

Andrew Fletcher QC, as legal expert on English law, present during 20 October 2011

• Respondents 3-5: no appearances

• Tribunal: Advokat Per Runeland

Professor Andrey Bushev

Mart Blessing

* Court reporter: Mrs Susan McIntyre, Reporting International London, rptgintl@dircon.co.uk

288. The Parties and witnesses/experts - in agreement with the Parties and their counsel - were heard as follows:
• **First Day, Tuesday 18 Oct 2011:** Opening by the Tribunal. Discussion of the further program. Claimant's counsel presented and filed two time-charts in colors showing the time-line of the development of the project from its first stages in 1991 to 2007; these time-charts are appended hereto as Appendices 1 and 2. The entire rest of the day was devoted to direct examination and cross-examination of Mr Carl A Sax The examination of Mr Karpov as well as the examination of Claimant's economic experts Peter Forbes and Jan Rowson (initially planned to be heard on the first day), had to be postponed.

• **Second Day, Wednesday 19 Oct 2011:** Peter Forbes and Ian Row-son, both of Alan Stratford (on the NIPT Rase Case Scenario and the claim for reimbursement of pre-development expenditures, as per their expert reports of April 2011 (CWS-9); thereafter followed by the examination of Respondents' legal experts Professor William Sutler and Professor V.A. Belov, followed by Claimant's legal expert. Professor Oxana Mikhailovna Oleynik.

• **Third Day, Thursday 20 Oct 2011:** Andrew Fletcher QC and Romie Tager QC, in expert witness conferencing; a bundle on the leading English cases on contract interpretation was submitted, their examination - mostly by the Tribunal - was followed by the examination of Mikhail L. Karpov as witness; Mr Karpov brought with him the Minutes of a seminar of 16 July 1998, in Russian language (an overnight translation thereof was prepared by Leonid Kropotov, and was filed on 21 October 2011 as RX-55), the testimony of Mr Karpov was interrupted in the late afternoon of 20 October 2011 so as to allow the hearing of the testimony of Professor Dr Tal-Heng Cheng on aspects of international law; he delivered a voluminous folder with a collection of rases and materials as references to his (interesting and eloquent) oral presentation between 17h00 and 18h35.

• **Fourth Day, Friday 21 October 2011:** Opening address by Maria Smirnova, delegate of Respondent 2, followed by continuation of the examination of Mr Karpov. Further statements and examination of Mr Sax; in addition, Mr Sax extensively discussed the Minutes referred to by Mr Karpov (RX-55); by agreement, and due to lack of further time, counsel preferred not to deliver oral dosing arguments; closing of the Hearings in the afternoon of 21 October 2012.

289. On the last day, 21 October 2011, the Parties and their counsel, with words of thanks, affirmed the correctness of the proceedings, and voiced no criticism regarding due process, fairness of the procedure, their right to be heard and equal treatment. The statements were recorded as follows:
The Chairman : The Chairman: Now, for the record, a very important and serious question. You know this Tribunal has a prime duty; the prime duty is to treat the parties equally, with equality, and to give each party a sufficient time and opportunity to be heard. These are the two prime duties of this Arbitral Tribunal. I now would like to ask, Claimant first and then Respondents, whether ar least on the two prime duties there are any complaints to the proceedings wo had or complaints regarding this Arbitral Tribunal. Can I ask you, any complaint, Andrew?

Mr Durkovic : No complaint at all, and we express our appreciation to all three arbitrators for their fine work and for their patience and for listening to things that perhaps they already understand and putting up with the repetition sometimes and the length of things. Very, vary well done. It Is actually quite an honor to be here with such distinguished arbitrators on the panel. Also our appreciation to the other side. It has been very cordial, thank you; it has been a pleasure working on the other side of the case.

The Chairman : Thank you so much.

Mr Kropotov: No complaints. Thank you to the Tribunal, and we can support what Andrew said in that respect and in respect of the Tribunal.

The Chairman : Thank you. I forgot something very important. Elizabeth, thank you so much for your translation it was wonderful. You were a perfect translator. [20]

290. Moreover, on the last day, the further procedure and time-table was discussed, in particular the size of Post-Hearing Briefs and the level of detail for the cost submissions, coupled with the suggestion that counsel may wish to come up with a joint proposal The following steps were thereupon agreed:
• within 14 days: joint proposals of counsel regarding (i) the size of contemporaneous Post-Hearing Briefs and (ii) the format/level of detail of the subsequent contemporaneous cost submissions;

• by Friday 20 January 2012, filing of contemporaneous Post-Hearing Briefs;

• by Monday 20 February 2012, filing of contemporaneous cost submissions.

291. The Tribunal indicated its intention to notify its Award within March 2012.

292. On 10 November 2011, Susan McIntyre delivered the verbatim transcripts to the Members of the Arbitral Tribunal and the Counsel who attended the Stockholm Hearings; In total 904 pages plus 107 pages of indices.

On the same day, the Chairman forwarded the transcripts to all other recipients of the Tribunal's communications, in particular to Respondents 4 and 5.

293. On 16 November 2011, the Tribunal issued its 34th Order, reflecting the sequence of examinations at the Stockholm Hearings, Furthermore, the 34th Order confirmed the further procedural milestones as they had been agreed in Stockholm, i.e. 20 January 2012 for the simultaneous filing of Post Hearing Memorials and 20 February 2012 for the simultaneous filing of Cost Submissions, whereupon the present arbitral proceedings, as far as relating to liability, will be considered dosed, with no further fillings being admitted into the record except upon specific leave by the Tribunal.

294. In connection with these two further filings due 20 January 2012 and 20 February 2012, the Tribunal invited counsel to communicate Internally in respect of (i) the length of the Post Hearing Memorials and (ii) the format and level of detail and further issues (compensability of Party costs, interest, currency, payment terms) for the preparation of the Cost Submissions.

295. The 34th Order also Informed the Parties of a further draw-down from the deposit in the total amount of EUR. 202'860, covering interim fees of the Arbitrators on time-spent basis, travel disbursements,. Conference Center charges and charges of the verbatim reporter.

296. On 12 December 2011, Respondents' counsel transferred the further advance of EUR 100'000— to the Tribunal's separate account.

297. On 20 January 2012, Claimant filed the Post-Hearing Brief CM-85, together with an updated Index of Claimant's Submissions CM.1 to CM-85, and an updated index of Claimant's exhibits CX-1 to CX-262, Claimant's PH-Brief essentially focuses on the validity of the Investment Contract, its breach by Respondents under the standards of Russian end international law amounting to an unlawful expropriation and, consequently, the liability for the full *quantum* of damages, including interest and sanctions.

[20] Transcript 21oct11 pages 902/903.

298. On the same day, also Respondents 1 and 2 filed their Post-Hearing Brief 1-RM-37/2-RM-43.

299. On 30 January 2012, Claimant filed CM-86 which discussed a number of issues which counsel to both sides had not been able to solve in respect of the format and contents of their cost submissions due to be filed in February 2012.

300. On 31 January 2012, the Tribunal Issued its Order, suggesting to organize a telephone conference on either 6, 7 or 8 February 2012. After review of counsel's availability, the telephone conference was fixed to take piece on Tuesday 7 February 2012, at 15h30 Zurich time.

301. On 7 February 2012, a telephone conference took place attended by Claimant's counsel Andrew Durkovic (partly), Vladimir Gladyshev and Respondents' counsel Leonid Kropotov and the members of the Tribunal for discussing the different views reflected in CM-86 in respect of cost-related issues.

302. *Inter alia,* the Tribunal discussed the time for payment and any post-award interest which might be due and payable in respect of the Tribunal's cost decisions. Regarding payment terms, Mr Leonid Kropotov on behalf oF Respondents urged that any payment should only become due after 1 January 2013, because - as he explained - there is no allowance in the City's budget for the current year; Mr Durkovic on behalf of Claimant disagreed and stressed that a payment for reimbursement of Party costs will be due as of the day of notification of the Arbitral Award.

303. On this query, the Tribunal indicated that it could be minded to grant a grace period of -30 days for a party to reimburse arbitration costs to the other party, but that - certainly - the Tribunal could not endorse Mr Kropotov's proposal. Applying a 30-day grace period would mean that default interest on the outstanding payment would only start to run as from the 31st day onwards on a simple (not compounded) interest basis. It may be noted that Claimant's counsel, in CM 07 para. 7, agreed to the application of such a grace period.

304. As for the interest rate, there was discussion whether it should be determined by looking at the *lex causae,* or whether some other basis would be more appropriate.

305. On 20 February 2012, Respondents filed the Cost Submissions 1-RM-38/2-RM-44.

306. On the same day, also Claimant filed the cost submission, CM 87, together with a spread-sheet and the updated indices of CMs and Cxs. As far as the interest rate is concerned, Claimant's counsel requests that any sum awarded to Claimant but unpaid during the grace period shall bear interest at the rate of 21.58 % per annum, charged on a monthly compounded basis. [21] Claimant's submission *inter alia* also contains the Engagement Letter signed between Amsterdam & Peroff and Claimant Mr Sax, providing for stage payments and a 10% success fee, CX-265 and Exhibits.

307. The discussion of these cost-filings will follow in the Cost Section at the end of this Award.

308. On 21 February 2012, the Tribunal asked Respondents' counsel for clarification of the claim for recovery of counsel fees, which was answered by return mail of Mr Kropotov.

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[21] CM-87 para, 20.

309. On 27 February 2012, the Tribunal Issued its 36th Order, granting each side an opportunity to comment on the other side's cost submissions by 27 February 2012, and inviting further comments from Respondents *"in case this Tribunal was to decide nn same reimbursement of costs to Respondents",* in particular

• to also state their views with regard to a grace period of 30 days after notification of the Award, and

• to make their views known as to the rate of simple or compounded post-award default interest.

Thereafter, as stated in the Order, the proceedings - as far as they relate to the liability phase - would be closed.

310. On 27 Fe bruary 20 12, Respondents replied by 1-RM-39/2-RM-45 regarding reimbursement to Claimant, proposing *"to set the term for cost-reimbursement as one year after the communication of the Award; the reason for such a long term is that St Petersburg City is a public subject with rigid and long-lasting planning procedures..."* and further stated that they would agree to apply the LIBOR rate for 3 months deposits, as a rate which would not depend on the winning party. Respondents "*see no grounds to apply interest rate for personal loans in the State of Florida and any further "insentivised" increase of the rate",*

311. In addition, Respondents commented on claimants cost statement by remarking that only some general indications are given regarding the Swedish and Russian counsel, but "*no words about trie services",* further remarking that travel expenditures to Madrid, Valencia, Portofino etc. are included with no evident relation to this Arbitration, and the same would apply to the fees and expenses of several experts from whom no expert reports had been received.

312. The Arbitrators deliberated the issues throughout the proceedings and met again in Stockholm during the week of 5 March 2012 for oral deliberation sessions.

H *Locus standi,* Jurisdiction and Valid Representation

I Arbitrability

313. The present investment dispute is governed by an undisputedly valid arbitration agreement reflected in Chapter C above. In these proceedings, neither Party has ever raised a concern or a plea that a State court rather than the present Arbitral Tribunal should exercise jurisdiction to hear the claims and to adjudicate the present dispute, and both, Claimant as well as the Respondents I and 2, have actively participated in these proceedings.

314. The Tribunal reiterates that in the case at hand the Parties relationship is that of an investment, and is based on a complex mix of numerous legal norms, none of which prevails, and which must be analyzed in a close link with others Thus the position Of the investor and stockholder is to be considered along with, and n context of, the rights and obligations arising under the Investment

Contract as a whole.

315. The Tribunal, therefore, affirms its subject-matter jurisdiction.

II Claimant's *locus standi* - The Parties'Arguments

316. Pursuant to a Purchase Agreement dated 17 December 2002, filed as CX-66, and pursuant to a Bill of Sale of even date (CX-59), Claimant Mr Sax as buyer in his own name acquired from PSP (also represented by Mr Sax) and SP (also represented by Mr Sax) as sellers, a 29.7% *"stock interest"* in IAT Pulkovo, as well as a US$ 20+ million pre-development expense receivable from IAT Pulkovo.

317. According to Article 14 of the Purchase Agreement, a registration of the transfer of the stock-interest was envisaged, but never took place.

318. The Agreement is governed by, and to be interpreted and enforced with, the laws of England and Wales.

319. The validity and legal effects of CX-66/CX-59 are disputed by Respondents, particularly in respect of the effects or meaning of the transfer of the "*stock - interest",* Respondents maintain that no assets other than receivables were transferred, but not the rights and obligations under the Founders' Agreement. Therefore. Respondents argue, Claimant neither became a party to the Founders Agreement, nor did he become entitled to any profits there under. R-Liab Brief para 54/55, Fletcher Opinion RWS-4 paras 73-82.

320. Respondents further recall that in any event PSP was not entitled to sell its shares without prior approval from all other parties, nor could they be sold, since they had never formally been issued. Claimant, therefore, never became a party to the Investment Project, and thus is *"definitely not entitled to file the 29.7% Interest Claim, Development Fee Claim and claim for Reinstatement".* 1-RM-32/2-RM-38 para, 62.

321. Claimant's expert, Romie Tager QC, disagreed with several conclusions; CWS-10.

322. Prior to the Stockholm Hearings, the two English law experts Andrew Fletcher QC (expert for Respondents) and Romie Tager QC (for Claimant) rendered highly detailed expert opinions on the meaning to be given to the term *"stock interest",* which - both experts agreed - is not a recognized term of art.

323. Prior to the Hearings, the two experts met on 17 October 2011 and, thereupon, filed a joint opinion on points of their mutual agreement, and points on which they disagree. They constituted a file containing the Minutes of their Joint Meeting as well as copies of the leading authorities/court cases on which they relied.

324. Both experts, Fletcher and Tamle, were examined at the Stockholm Hearing, first through examinations by counsel, and subsequently through questions put to them by the Arbitral Tribunal in an expert conferencing mode. [22]

325. Under a strict view, Mr Fletcher explained (and taking guidance from the Lord Hoffmann Interpretation principles as reflected in the leading English-law case on contract interpretation, i.e. the *Chartbrook Case*[23], Claimant - for lack of a recognized title - acquired nothing.

326. Mr Tager, while agreeing that *"Chartbrook Is probably the most important case*[24], disagreed.

327. In the PH-Brief, Claimant further addressed the issue in some more detail, *inter alia* referring to Article 7 of the Russian Foreign Investor Law of 9 July 1999 which deals with an investor's right *"in accordance with an agreement" to "transfer rights and obligations to another person in accordance with the civil legislation of the Russian Federation".*[25] Hence, Claimant argues, the Purchase Agreement and Bill of Sale in conjunction with the guarantees reflected in Article 5 of Russia's Foreign Investment Law gave Claimant the right to obtain damages equal to the pre-development. advances plus interest, damages connected to the developer fee and an equity participation equivalent to PSP's 29.7% Interest in IAT Pulkovo.[26]

328. Respondents, in their PH-Brief, again denied the validity of the assignment.

III Claimant's*locus standi* - The Tribunal's Determination

329. The Tribunal was not convinced by the rather legalistic approach of the English few experts and the real significance of the chosen English law and, in conducting the expert conferencing, indicated - on a preliminary basis - that the Tribunal would
• rather be minded to look at the quite apparent intentions evidenced by the wording of CX-66, in the sense that, short of being able to transfer the shares as such[27], the parties quite obviously intended to provide that Claimant Mr Sax can, to the greatest extent legally/contractuatly possible, *"stand into the shoes of SPS/SP"* (term as used by the Tribunal in the examination)[28], and further:

• that - with such basic understanding of the Intention evidenced by the text - the decisive question would only be to explore to what extent such agreement (made under English law) would deploy valid effects in Russia, i.e. vis-a-vis IAT Pulkovo and its other stockholders.

• which question makes it abundantly dear that the latter Issues will - to the largest extent - be

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[22] Transcript 20oct11-pages 510-571.

[23] *Chartbrook v/ Persimmon Homes Ltd (2009) UKHL 38; significant parts of the Chartbrook- dicta are reflected in the Transcript 20oct11 at pages 536 ss.*

[24] *Transcript 20oct11 page 527.*

[25] Claimant's **ph.** Brief page 8.

[26] Claimant's PH-Brief, particularly pages 9-21.

[27] The stock certificates fact no: been issued, moreover, for an effective transfer, transfer restrictions as per the Charter and the founders' Agreement in the sense of pre-emptive rights would hove had to be complied with prior to any such sale or transfer.

[28] Literally "The Chairman : Look, I make it simple - maybe incredibly simple. It's a complex agreement, many pages, but the intention is clear to me. Mr Sax wanted to stand into the shoes of Strategic Partners. it's as simple as *that. Strategic Partners. should, if possible, go out of the way and he is there. That's it. Them's nothing missing Maybe you can add ten pages, you can reduce ft to two lines, it is alt the same I read this as the intention, and the intention Is not contested by Mr Sax wearing the Strategic Partners' hat nor Mr Sax wearing any other het. So who is going to contest in between the three parties all represented by Mr Sax?"* Transcript 20oct11 page 521.
Compare also Transcript 20oct11 page 511, 540. On page 556: Chairman: *"Of course it is not the transfer of shares,* but it *is probably the transfer of everything else that, except for the shares, could be transferred."*

governed by Russian law, and not by English law.[29]

330. It is clear that the position as a stockholder may comprise a whole bundle of rights, such as e.g, contractual rights and, foremost, corporate rights (and obligations), including for instance:
• the right to be compensated for expenditures properly incurred for and on behalf of the company (if any),

• the right to cash receivables sold to the stockholder,

• the right as a stockholder to exercise voting rights,[30]

• the right to receive corporate **Information,**

• the right to take part in stockholders meetings,

• the right to be paid dividends if and when declared, and

• ultimately the right to receive the liquidation proceeds or the liquidation surplus (if any) upon winding up of the company.

331. Since the stockholding as such could not be transferred, failing compliance with the statutory procedure Tor validly transferring the stock In accordance with the Charter and the Founders' Agreement, it is however clear that merely contractual claims of SPC/SP (referred to as the "receivables") could be transferred (and indeed, for the purpose of this arbitration, the transfer of contractual claims is particularly relevant), but not, for instance, the exercising of voting rights.

332. Hence, the validity of the assignment in respect of the pre-development expense claim (explicitly mentioned in CX-66), cannot reasonably be doubted.[31] Likewise, it cannot be doubted that the arbitration clause is transferred together with any such claims, as on ancillary right attaching to such claim "like a shadow".[32]

333. On the other hand, a stockholder may also have assumed particular obligations vis-a-vis the company, such as Financing obligations, or may have acquired a particular position such as - as will have to be further discussed in the framework of this Award - the position (claimed by Mr Sax) to be chosen as a developer of a project and to assume the function of an investor.

334. It is in this respect that concerns arose: It is quite obvious that the transfer of the position to be chosen as a developer and investor of the Project is more problematic. Although it remained unclear in this arbitration what exactly such position would comprise, it nevertheless appears obvious that,

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[29] Compare the Tribunal's remarks at the Hearing, for instance the Chairman, Transcript page 513: "*... the test of this agreement is whether and to what extent it is effective in Russia under Russian law, i.e. where the agreement should produce some effects."*

[30] See e.g. Transcript page 516.

[31] Mr Fletcher mentioned that under English law the fact that Mr Sax signed in three different capacities could make the agreement null and void, because a conflict of interests cannot be excluded. Mr Tager - correctly so - disagreed by stating that the acting in a double or triple capacity dues not entail nullity, but may only make the contract voidable. - The latter, In the Tribunal's view, is definitely the correct view, end the fact is that no one Invoked the nullity of CX-66/CX-59.

[32] Chairman, Transcript page 516: *if you have a claim which is subject to an arbitration clause, the arbitration clause travels with it."*

for instance, the position as a developer would not only consist of the right to claim a 4.5% fee, but most likely would also Involve some kind of obligations, i e. obligations to function as a developer/ coordinator, and no further explanations are necessary to state that the position of a developer and investor in such a project does not simply consist of earning revenue; profits first of all will have to be earned, and this may involve a plethora of tasks over years or even decades. [33]

335. The obvious problem then is that - according to a quite universal legal notion, including English law [34] and Russian law (see Article 391 Russian CC) -obligations (as opposed to simple monetary claims) can only be transferred or "assigned" to another person with the consent of the creditor (the creditor in the instant case being IAT Pulkovo and/or arguably Respondents).

336. Regarding the claimed 4.5% developer fee (if indeed it. had been agreed -which is an issue addressed below), it is clear that such fee had not already been "earned", but yet would hove had to be earned on the basis of - probably some - activity at least as a developer. Given that It is dear that only a contractual benefit, but not a contractual burden, can be transferred without the consent of the creditors, little further explanation Is needed to state that - for lack of consent - the position as a developer as such (could not validly be transferred from PSP to Claimant. And basically the same applies to the position as a 29.7% investor/shareholder.

337. Claimant's references, in this respect, to the Russian Investor Law are unconvincing. The referenced Article 7 specifically refers to a foreign investor's right *"in accordance with an agreement to transfer its rights and obligations...*" (emphasis added); yet, in the present case, the trouble is that there is precisely no such agreement pursuant to which the Respondents had consented ta the transfer of rights and obligations from PSP to Mr Carl A Sax personally.

338. As regards Russian law, the Tribunal further notes that even assignment of a monetary claim may be restricted Where such a claim is closely connected with specifics of the creditor (Article 383 Russian CC). In the latter case, the assignment of the claim is permissible only subject to the debtor's consent (Article 308 (2) Russian CC). [35]

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[33] Sea Transcript page 515: Chairman: *"...There is in our case a special momentum to this issue, and that is perhaps the. 4.5 % developer claim to the extent that the 4.5 % developer claim was not yet earned as a receivable in 2002 If the developer claim would be a claim of Mr Carl Sax that in a future development of Pulkovo Airport international Passenger Terminal, in 2007 and beyond he should be recognized as the developer, then there is a bigger question mark whether that is transferable because that would probably not only mean that CarI Sax can cash the 4.5 percent and run away, but probably he would have to do something for that.*
And If you have to do something, then probably you cannot simply assign or transfer such a task without the agreement of the creditor So here we probably have an area we might need to discuss."
Yesterday we touched on some other aspects of a shareholder's position. Of course a shareholder has also voting rights. Whether these could be transferred internally, an interesting question; probably not as long as you are not really recognized as the shareholder. The shareholder on record has to exercise the voting rights, but probably he can be inspired by the transferee who wilt tell him in what, manner to vote, etc. the same for cashing dividends, but these two aspects are irrelevant for our case.
So we have only two relevant scenarios, in my view, that is to understand to what extent receivables, claims already existing, could validly be transferred from SPS (Strategic Partners) to Mr Cart Sax personally, in that respect I basically see no problem. These are claims and the claims may originate from the Founders' Agreement. The Founders' Agreement has an arbitration clause and it Is quite common knowledge and accepted that if you have a claim which is subject to an arbitration clause, the arbitration clause travels with it, So I think it is even undisputed by Respondents that all the claims which are now in the hands of Mr Carl Sax *are validly subject to fee arbitration clause "*

[34] Andrew Fletcher QC to the Chairman, Transcript page 519 line 14: "So *for as assignment is concerned. I accept what you say, in general the benefit is assignable but not the burden of a contract, English law doss draw a distinction between those contracts where the identity of the contracting party is significant and prohibits assignment of contracts of that kind without the consent of the other party.*
The Chairman: English law is in good company." Transcript 20oct11 page 519.

[35] For instance, as it was clarified by the Supreme Commercial Court of the RF under the joint venture contract (Chapter 55 Russian CC) a partner's persons by nature of such an arrangement may have a material significance for the other partner(s), and therefore assignment of

339. In addition, the Tribunal takes into consideration the requirements of Article 1,216.2 Russian CC (The Law applicable to an Assignment of a Claim) under which
"the permissibility of the assignment of a claim, the relations between the new creditor and the debtor, the conditions under which this claim may be made to the debtor by the new creditor, and also the question of proper performance of the obligation by the debtor, shall be determined according to the law that is applicable to the claim that is the subject of the assignment."

340. Since, in the case at hand, the claims are subjected to Russian law and international law, one may come to the conclusion that restrictions of Article 333.2 Russian CC should be taken into consideration when analyzing the validity and effects of the assignment of the claims to Mr Sax. On the other hand, it is the Tribunal's view that the application of the statutory provisions, including that of Article 388.2 Russian CC, shall not he made in the abstract, hut must connected to the circumstances of a concrete case, The Tribunal considers that in an investment relationship, as the one at hand, the creditor's *persona* has a material (essential) significance for the partners.

341. Taking into consideration that Mr Sax appeared to have been the driving force relating to the pre-development-phase of the Project, and the expenditures incurred, he cannot be considered as a totally unrelated third party as if, for Instance, the assignment had been made to a Chinese Investor who had not so far been involved In the Project. For this reason, the Tribunal concludes that the assignment of monetary claims in tact did not require the Respondent's consent.

342. Hence, it seems to be legally possible is to accept Claimant's standing as a transferee of the pre-development advance claim and of the developer fee claim (i.e. the developer fee which SPS could earn under the Project), and of the financial benefits which SPS possibly could derive as the 29.7% investor.

343. The legal construction in respect of the developer fee and the investor claim would then be the following:
• Since by means of CX-66/CX-59 only claims could be transferred, but not as such the position as a shareholder, SPS remained a shareholder of IAT Pulkovo, and remained a party to the Founders' Agreement;

• To the extent that the Founders' Agreement fore-shadowed that SPS Will be the developer of the Project (as argued by Claimant), SPS - and not Claimant - remained eligible for such task;

• however, SPS can/could, even in advance of earning any remuneration as a developer[36], assign such future remuneration to Claimant Mr Sax;

• likewise, as regards the position as an investor and 29.7% shareholder of IAT Pulkovo, it is clear

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the claim deriving from such a contract requires the other partner's consent (compare the Information Letter of Presidium of the Supremo Commercial Court of the RF as of July 25, 2000, No 56, s. 4). Another, but not last and least example may be found In relationships regarding setting up business organizations of a certain type (Act (opredeleniye) of the Supreme Commercial Court of April 24, 2008, No 10963/07) Furthermore, compare hereto the approach specifically supported In Article 9,1.7 (2) of the 2004 UNIDROIT Principles of international Commercial Contracts 2004, It provides that *"the consent of the obligor is not required unless the obligation in the circumstances Is of on essentially personal character".*

[36] For good reason, it was not alleged by Claimant that, for instance, the 4.5% developer fee was a fee payable upfront, without the Foreign Parties or Mr Sax even having started any kind of development for the realization of the Project; it was thus not simply a renewabl *e* collectible like an amount due and payable forthwith And even less could the future investor's benefits be considered a mere "receivable".

that the shareholding as such could not validly be transferred to Claimant (for lack of consent by the other shareholders, lack of satisfying their rights of first refusal, and for tack of proper issuance of the shares; hence, it is dear that SPS remained the shareholder in IAT Pulkovo even after December 2002;

• however, as it is normally possible that a shareholder can, for instance, be committed to assign future dividends or liquidation proceeds to another party (for instance to a creditor who had granted a loan to the shareholder), it would likewise seem possible for SPS to assign all such future benefits to Claimant;

• In both cases, the debtor of such assignments vis-a-vis would be SPS, and it is SPS which - under CX-66/CX-59 - would be liable to effectuate those payments, not Respondents or IAT Pulkovo;

• however, as ft is Claimant's case that SPS was unlow fully "thrown out-of the Project, and was not further considered after 1999 and beyond. Claimant suffered an **indirect loss** [37], a loss for which damages might be Claimed;

• such indirect damage is a receivable in the sense as it is claimed by Claimant.

344. The transfer, therefore, must be regarded as valid as far as any *"receivables"* are concerned.

345. As a conclusion, the Tribunal certainly accepts the validity of CX-66 and CX-59 as such, giving them such meaning as is clearly apparent from them on a reading of the rather dear text (which in fact hardly needs an interpretation), in the sense that Claimant Mr 3ax thereby intended to *"stand into the shoes of PSP/SP".*

346. The essential question to be analyzed and answered in this Award is to see how far these "shoes" were fit to walk Claimant up the hill to collect and cash the following:
• The reimbursement of the pre-development expenses.

• The alleged 4.5% developer fee and

• The 29.7%. monetized Interest in the future operational profits of the NIPT and/or the AIPT

347. On the other hand, Claimant's extensive references in his PH-Brief to the Investor protection afforded to foreign investors under the Russian Foreign investor Law are not to the point in the framework of these proceedings, as the further discussion in this Award will show, nor is there room for arguing an expropriation case.' [38]

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[37] The direct loss Is suffered by SPS which was no longer enabled to became the developer, and was deprived of its position to be the Investor for the NIPT and the AIPT; hence, SPS was deprived of earning the fee and deprived of the chance to earn the hundreds of millions which - according to Claimant - could be earned by it under Its 29.7% shareholding; due to this shortfall suffered by SPS, SPS will not be enabled to pay Claimant, and this causes the indirect loss to Claimant. - Ail this sounds a bit complicated, but indeed is very simple However, it was not possible for SPS to assign its position as a shareholder in IAT Pulkovo, or the position as the "developer".

[38] Certainly, Professor Cheng's testimony as an expert on international law at the Stockholm Hearings was the intellectual high-light of the Hearings, because - In his very eloquent address - he recalled all the very well known and deeply rooted principles of international law with which the Arbitrators of course full-heartedly agree in all respects, and with which they certainly were already very familiar. — The only problem is that Professor Cheng's scientific analysis was In almost ail respects entirely outside the real fact pattern which is before this Tribunal.

348. To sum up:

The Tribunal concludes that **Claimant has standing (locus standi)** as regards all the monetary interests claimed herein.

IV Jurisdiction over Respondents

349. In the present case, some queries were raised in respect of Respondent 3 which, according to Respondents' explanations, became merged into, and was absorbed by, Respondents 4 and 5.

350. More generally, Respondents - In their Liability Brief as well as in their PH-Brief[39] - raised the jurisdictional defense that Claimant should have addressed any and all claims solely to IAT Pulkovo, as the party potentially liable for his claims, and not to his other previous stockholders, basically on the argument that stockholder® do not have liabilities among each other.

351. Claimant argues that Respondents' liability must be affirmed, given the fact that under their authority TAT Pulkovo became struck from the commercial register.

352. For the Tribunal, it is obvious that these issues may be rather complex; there is no easy answer for a *"post mortem liability"* cf stockholders of a company to each other, especially if during the lifetime" of the company such a liability among stockholders was not explicitly provided for (in fact, Section 8.4 of the Founders' Agreement seems to evidence the intention to exclude liability claims among stock-holders).

353. Nevertheless, the Tribunal Lakes it that there are at least some good grounds to affirm jurisdiction over the Respondents, and by this affirmation to afford ail parties the benefit of arbitral jurisdiction in respect of all of the issues filed in this arbitration. On this basis, the Tribunal conducted these proceedings.

V Valid Designation and Representation of Respondents

354. Matters of the correct designation of the Respondents and their registered addresses as well as the validity of Respondents' 1 and 2 representation by outside lawyers on the basis of valid powers of attorney have been extensively discussed since October 2010, with clarifications repeatedly sought by Claimant; see eg CM-63/64, CM-77.

355. Already in its 25th Order of 18 March 2011, the Tribunal dealt with Claimant's concern regarding the name change of Respondent 4 which occurred on 22 November 2010 (and which remained non-notified to this Tribunal), and the change of Respondent 5's registered address. Claimant, in that context, alleged *"an attempt to manufacture a future defense against enforcement in Russia of any interim or final award in this arbitral proceeding, much like the defense asserted by*

Indeed, the further reasoning of this Award will show that there is no merit whatsoever for arguing an expropriation case.

[39] Respondents' PH-Brief pages 16-18

Samaraneftegaz in Yukos Capital SARL v/Samaraneftegaz."

356. The Tribunal already addressed these Concerns In its 25th Order, and the reasoning there given entirely stands as a conclusive reasoning for the present Award; the decisive part, reflecting a deeply rooted notion of due process, may he rooted by the following extract from the 25th Order:
"A party (here Respondents) which had been validly addressed as a Respondent in arbitral proceedings, is under a duty to notify the Arbitral Tribunal end the other Parties of any changes of its corporate name and structure as well as of its changed address for allowing a valid service of communications. A failure to do so cannot later on, or in any subsequent (enforcement-) proceedings, serve ss an argument that the Party had not been validly kept informed of the further arbitral proceedings. - For this simple reason, Claimant's concern is not well-grounded."

357. The 25th Order further dealt with the validity of counsel's mandate to represent Respondents 1 and 2 which was signed by the first Deputy Director of Respondent 2 whose authority to validly sign such mandate was doubted by Claimant

358. Similarly, in this respect, the Tribunal in its 25" Order considered that it would be...
"....quite unthinkable that, in any subsequent/resulting enforcement proceedings, one or the other of the Respondent Parties would invoke that it had not been properly kept informed on the present arbitral proceedings and any of the numerous procedural steps, or invoke that the company name or service address for communication was wrong, or invoke that a particular service Address should have peen used as opposed to the business address, or invoke that any of its legal counsel were at any given moment in time not properly mandated by Respondents 1 and 2, or would invoke that the Power-of-Attorney, executed by the first Deputy Director Mr O.A, Ljapustin was invalid for some formal internal flaws or lack of authority."

359. As the Tribunal further stated:
"Any of the above defenses, or defenses of a similar nature, whether raised in these proceedings or in any subsequent proceedings or enforcement proceedings, would look "so bad" and would seem to be so dearly nonmeritorious by any standards that the present Arbitral Tribunal finds it unnecessary and unwarranted to burden the present proceedings with continuing queries of the present nature."

360. Summarized in an abstract form, the Tribunal noted:
"A party (here; Respondents) which over a period of time knowingly and without intervention accepts to be represented by counsel/outslde counsel cannot later on, or in any subsequent (enforcement-) proceed lugs, deny the validity of such representation - whatever legal system applies, For this simple reason, Claimant's concern is not well-grounded."

A footnote mentioned:

"This notion is so clear and obvious that no legal authorities need to be cited, indeed, any citation could only dilute the clarity of the Tribunal's dictum."

361. All of these reflections are made part of the Tribunal's jurisdictional decision as per the present Award, and hence this Tribunal is sufficiently satisfied
• (i) that Respondents 1 and 2, purported to be represented by counsel, had indeed validly mandated all of their legal representatives, and that

• (ii) all Respondents were at all times validly kept informed on the proceedings, and had all appropriate opportunities to make their case known to the Tribunal.

• (iii) In particular, the Tribunal addressed special invitations in its Orders for all of the Respondents to delegate an in-house counsel or member of the management to be present during the Hearings, so as to get their own impressions on the appropriateness and correctness of the proceedings.

• (iv) And the Stockholm Liability Hearings were attended by two representatives of Respondent 2, i.e. Maria Smirnova and Natalia Nazarova, with the former addressing the Tribunal at the last day of the Hearings; [40]

• (v) Mrs Smirnova, in particular, explicitly confirmed the following:

"First of all, being a representative of the City Property Management Committee I would like to emphasize that the legal position represented by DLA Piper during the proceedings is totally supported by and agreed with the Committee, and of course wo tan see that all the claims set forth In the claim of Mr Sax are groundless, but I would like to elucidate (or) a bit different aspect... [41]

362. Needless, to mention that the Tribunal Is moreover satisfied that the counsel appearing for Claimant had been properly mandated, although the Power or Attorney issued by Mr Cart A Sax in favour of Amsterdam & Peroff, dated 9 December 2009, was only valid for one year.

363. To sum u p:

The Tribunal is entirely satisfied that Claimant as well as Respondents 1 and 2 were at all times properly mandated by their lawyers purporting to have been given such mandate.

Moreover, the Tribunal is satisfied that all the Respondents (including Respondents (3), 4 and 5) were at all times sufficiently and correctly kept informed on the proceedings, and at all times had the possibility to make their views known to the Tribunal.

I A First Review of the "Investment Contract" and Supporting Documents Filed in this Arbitration

364. The two documents, i.e, the Founders' Agreement (CX-6, RX-1, RX-23) and the Charter (CX-5, RX-2, RX-24), have been characterized by Claimant as constituting an "Investment Contract" related to the development and construction. of art international passenger terminal facility (the Investment project); it *"comparts with internationally-recognized practices concerning so-called 'build, operate*

[40] Transcript 21oct11, pages 769 ss.
[41] Transcript 21oct11, pages 769, line 17-21.

and transfer' investment contracts". CM-84 para. 7. Respondents also used the term of "Investment Contract".

365. In CM-84, para. 7, Claimant stated that the Investment Contract
"was drafted, reviewed, revised and executed under the auspices and supervision of a team of specialized international lawyers familiar with both Russian and international law."

366. At the Stockholm Hearing, upon question of the Tribunal as to who drafted the texts forming part of the Investment Contract, Mr Sax gave to understand that the texts came from the US side, without giving any more precise details.

367. The investment project was Initiated by a "Protocol" (which In these proceedings was most frequently referred to as the "Protocol of Agreement") of 16 March 1994 (CX-2), and was followed up by the Founders' Agreement of 19 May 1995 (CX-6) and the Charter (CX-5).

368. It would serve no useful purpose to describe all the elements of the three documents, i.e. the Protocol of Agreement, the Founders' Agreement and the Charter; however, for the further discussion hereinafter, it is helpful to recall just a few provisions which are of particular significance.

369. **The Protocol of Agreement** of 16 March 1994 (CX-2) - which had been drafted by Mr Sax[42] - could best be characterized as a memorandum of intent[43] reflecting The agreement to establish a joint stock company, premised on the recital according to which "SP *and SPBD have agreed to provide Financing (..) and guarantees to construct the Complex, and to design (..) engineer and construct the Complex with the participation of focal Russian companies"* (preamble to the Protocol).

370. Clause 2 provides that *"the Foreign Partners shall secure financing for 190% of the cost to construct the Complex, which is anticipated to be approximately US$ 75 million, from the European Bank for Reconstruction and Development (EBRD) and from its own participants, and shall guarantee repayment to the EBRD. "*

371. Regarding the shareholding in the joint stock company, Clause 5 stated: *"The Russian Parties shall be entitled to 66 2/3%, SP shall be entitled to 29 2/3%, and SPED shaft be entitled to 3 2/3% interest in the stock and dividends of PIATA"* (i.e. the joint stock company).

372. Regarding dispute resolution, Clause 8 of the Protocol provided for LCIA arbitration in Stockholm, Russian law as applicable law, with each party to bear their own costs and half of the cost of the tribunal, unless the arbitration panel determines a different allocation *"according to the equities of the matter in dispute".*

373. In view of the claims made in the framework of this Arbitration, it is noteworthy to remark the "cornerstones" of the Protocol, i.e. on the one hand

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[42] See the answer of Mr Sax to the Chairman's question at the Stockholm hearing. Transcript 18oct11 page 64.

[43] Respondents characterized the Protocol as a "conceptual framework" which, however, does not contain essential terms of a contract, and as such does not have a binding effect R-Liability Brief paras 11-21.

• the Foreign Parties' financing obligation,

• coupled with the 2/3 Russian to 1/3 foreign participation in the joint stock company and,

• on the other hand, absence of a provision In the sense that expenditures as may be Incurred by the Foreign Parties could be invoiced to the Russian Parties, or could otherwise be recovered from the joint venture company.

374. According to the **Founders' Agreement,** dated 19 May 1995, IAT Pulkovo was to have a share capital of Rubles 50 mio, divided into 1'000 shares of Rubles 50'000 each, Whereof the Property Management was to acquire 303 shares, the State Enterprise Pulkovo 334 shares, SP 297 shares (thus representing 29.7% of the share capital), and two Western minority shareholders (Grassi and SPBD) 33 shares each.

375. The **Russian Parties,** therefore, were to control **63.7%** of the share-capital, with the remaining **36.3%** being subscribed by the Foreign Parties. No less than 50% of the purchase price for the shares was to be paid prior to IAT Pulkovo's registration, the balance to be paid within the first year of the IAT Pulkovo's registration (but for the Property Management Committee which was to pay its share by leasing to IAT Pulkovo the plot of land on which the Terminal was to be constructed.

376. The Founders' Agreement set: out the obligations of the Parties with respect to the establishment of IAT Pulkovo, laid down details for the management of the Company, and set out the plans of the further cooperation. [44]

377. Regarding the expenditures of the Founders, Section 6.3 provides that each Founder *"agrees to pay its own expenditures related to the Company's formation incurred prior to the Company's registration".*

378. Section 3.4 is an exit-clause allowing the Founders - under the terms of the clause - to withdraw themselves, whereupon *"the Company shall be deemed as invalid, and shall be liquidated* with each Founder accepting to bear any damages itself, *"and shall not transfer responsibility for them to other Founders".*

379. Further, rather detailed provisions of the Founders' Agreement deal with transfer restrictions regarding any disposition of shares, requiring the presentation of an *"Acquisition Proposal"* to the other Founders/shareholders, allowing them to exercise their pre-emptive rights under Section 11.1 to 11. 4 of the Founders' Agreement (with certain small-scale permitted dispositions according to Section 11,10).

380. Again, in view of the claims made in the framework of this Arbitration, it is noteworthy that:
• the repartition of the shareholding, is now 63.7% for the Russian Parties, and 36.3% for the Foreign Parties,

[44] Respondents considered that the Founders' Agreement only in its first part provides for binding obligations, but not in its second part, i.e. after the establishment of IAT Pulkovo, which merely has the character of a letter of intent. R-Liab Brief paras. 23-45; Rejoinder paras. 213-215; with further references to the opinion of Professor Belov and the witness statement of Mr Karpov.

• there is no provision for the reimbursement, by Respondents or by EAT Pulkovo, of expenditures as may be Incurred by the Foreign Parties In connection with the tasks they have assumed to provide a financing commitment; to the contrary:

• Section 6.3 of the Founders' Agreement provides: *"Each Founder agrees to pay its own expenditures related to the Company's formation incurred prior to the Company's registration;"*[45]

• Section 8.4 of the Founders' Agreement (already referred to above) then spells out what should happen at the end : it deals with damages as may be suffered by the parties who had *"funded the establishment of the Company and implementation of the provisions of Article VIII"* and provides that each such Founder ***"shall accept these damages as its own, and shaft not transfer responsibility for them to other Founders"*** (emphasis added) -- a provision which, as the text says, is broadly worded, covering not only the funding, by any of the Founders, oF the establishment or IAT Pulkovo, but moreover whatever had been done For the implementation; and as regards the Foreign Parties, the wording suggests a conclusion that it also covers all their expenditures incurred in the context of Section 8.1, i.e. in the context of their efforts to obtain the debt-Financing.

• Further important elements are the tight transfer restrictions as per Article XI, and

• The Dispute Resolution clause is set out in Article XII.

381. The Charter, equally dated 19 May 1995, excludes in Chapter 3.5 the liability of the Founders other than up to the value of their shareholdings; and Chapter 4.11 provides for the issuance of share certificates In accordance with the contributions paid by each of the shareholders.

382. Chapter 4.16 of the Charter states that the estimated cost to develop and construct the Terminal "will be up to US$ 100 million, including capitalized deferred construction expenses. The Foreign Parties will use their best efforts to seek debt financing for the Company from Independent banks in the amount or US$ 60 million".

383. Further, Chapter 4.16 provides:
"It is understood under the financing documents that the Company will be the borrower and PSP will be responsible for guaranteeing the obligations of the Company to the banks. No other Founder will bear responsibility for the obligations of the Company under the financing documents "

384. Chapter 11 deals with the decisions requiring a unanimous vote at a Shareholders' Meeting.

385. Chapter 12 of the Charter provides for a Board consisting of 11 members, whereof 6 nominated by the Russian Parties and 5 by the Foreign Parties. Resolutions are basically passed by majority.

386. However, Chapter 12.7 of the Charter contains a long catalogue of decisions requiring **unanimity,** such as e.g. the ***"entry into any contracts, agreements and borrowings, In any amount exceeding US$***

[45] Claimant's counsel, at the Stockholm Hearing, stressed that this provision only deals with expenditures related to the formation, and nothing else, - The Tribunal may remark that, nevertheless, one may debate whether a narrow or wider meaning should be given to the term *"related to";* there is, however, no necessity to define this further.

10'000 or its equivalent" and the *"retention of professionals providing services to and on behalf of the Company".*

387. Chapter 13 of the Charter provides for a Management Committee consisting of "Executive Officers" which, according to Chapter 13.3, were to be appointed at a Board of Directors' Meeting.

388. Chapter 16 of the Charter provides for very detailed transfer restrictions regarding share deals, in a more elaborate fashion than those provided for in the Founders' Agreement.

389. Termination of IAT Pulkovo shall occur by unanimity of the shareholders, or upon a court decision or decision of an arbitral tribunal, or in accordance with the Founders' Agreement and the Russian legislation (Chapter 17).

390. An indemnification clause provides for holding the directors and officers of IAT Pulkovo harmless in case of suits, Claims or actions brought against them (Chapter 19).

391. Chapters 20 and 21 contain the dispute resolution provisions and applicable law clause referred to above in Chapter C.

392. For matters of interpretation of the Investment Contract, Claimant - in CM-84 para 8 - referred to Article 431.1 and 431.2 Russian CC on the interpretation of contractual obligations, which for the research of the real intentions and common will of the parties to a contract, determines that

"all surrounding circumstances shall be taken into consideration, including negotiations and correspondence which preceded the contract, practice established in the mutual relations of the parties, business custom, and subsequent conduct of the parties."

393. Although a detailed account on the negotiation and drafting history of the Protocol of Agreement (and the subsequent Founders' Agreement) would have been of significant interest to the Tribunal so as to obtain a deeper understanding of the points which may have significant importance for the assessment of the present dispute, for instance in respect of
• the repartitioning of the stockholders' participation quotas,

• the maximum amount of the loan financing,

• matters regarding the bearing of costs and expenses incurred by the Parties,

• the exit clause of Section 8.4,

• matters of representation of the joint-venture company IAT Pulkovo etc.

• the hold-harmless provision in Section 19 and its relation to Section 20

no such details or other sources of information (which could have shed a light on those aspects that were particularly significant or important to the Parties) were provided by either side (neither preparatory drafts and their revisions, nor any notes on discussions/negotialions).

394. Apart from the above three documents, numerous further documents were filed in this arbitration. However, a simple review (i) of the Investment Contract and (ii) of the further files submitted by the Parties in these proceedings, shows that, significantly for the present dispute,

• none of them evidences or provides for an explicit Written authority, granted or to be granted to SPS or Mr Carl A Sax personally, to represent IAT Pulkovo or the other shareholders/Respondents vis-a-vis any third parties,

• none of them evidences or provides for the passing of a Resolution of the Board of Directors, following up on Chapter 13 of the Charter, appointing Mr Carl A Sax as Co-President or Vice-President of IAT Pulkovo, let alone with sole signing authority on behalf of IAT Pulkovo, and

• more particularly: none of the documents submitted in these proceedings provides for an authority, which allegedly had been granted to SPS or Mr Carl A Sax personally, to deal with and negotiate on behalf of IAT Pulkovo or the other shareholders/Respondents with financial institutions such as DMG and EBRD; [46]

• moreover, no contractual provision contains a straightforward obligation for the other shareholders/Respondents to *tel quel* accept a (or indeed any) financing proposal that may be submitted to them by SPS or Claimant; [47]

• no document was made known in these proceedings which purported to grant an authority or mandate to SPS or Mr Carl A Sax personally to unilaterally appoint any professionals or consultants or other service providers or advisers on behalf of the Company, or at the expense of either IAT Pulkovo or Respondents. [48]

395. Furthermore, no transfer of shares in IAT Pulkovo in favor of any lending institution reducing the shareholdings of the Russian Parties was envisaged in the Investment Contract. [49]

396. Moreover, no conversion of PSP's or Claimant's project expenses into a loan had been foreshadowed in the Investment Contract, as this was later on requested in the Credit Proposal pr EBRD, Clause 3.2.2.

397. No developer fee of 4.5% for the management and construction of the Terminal is mentioned in the Investment Contract. Section 3.3 of the Founders' Agreement only contains a clause whereby the *"Stockholders shall recognize the Importance of the following agreements to the Company and cooperate with its efforts to enter into each of the following:* (omissis) *(c) Project Development Agreement between the Company end PSP",*

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[46] Suggesting a conclusion that, hence, Claimant or Mr Carl A Sax, absent a mandate from IAT Pulkovo or the other shareholders/ Respondents, only could act on his own behalf, or on behalf of the Foreign Parties/SPS.

[47] This may lead to an understanding - to be discussed further hereinafter - that any such acceptance remained within the free decisions of all of the shareholders, in particular the Respondents, subject to applying a *bona fide* approach when reviewing the proposed financing terms of a lending institution. In fact, Charter Section 12.7 (e) explicitly required the passing of a Board Resolution which had to be adopted by an unanimous vote of all directors in writing, or by all directors present in person at a meeting (or represented by a proxy).

[48] For these, Chapter 12 (s) of the Charter explicitly required unanimous approval by a Board Resolution which had to be adopted by an unanimous vote of all directors In writing, ar by all directors present in person at a meeting (or represented by a proxy).

[49] However, the proposed Credit Agreement with EBRD required such transfers of 21.5% In IAT Pulkovo to EBRD end DMG, with a right to subsequently resell those shares.

398. No pledging of the shares in IAT Pulkovo was fare-shadowed in the Investment Contract, as this was later on requested in the Credit Proposal of EBRD in Clause 3.3.4.

399. No possibility of the transfer of management functions to any third party or provider (such as Aeroports de Paris) had been contemplated in contractual documents.

J References to Provisions of Russian Law

400. In the framework of (he present case., numerous provisions of Russian Law were referenced and discussed, *inter alia;*

• Articles 17, 35, 46 and 55 of the Russian Constitution

• Article 61 of the Russian CC on the liquidation of a legal person,

• Article 128.1 and 128.2 Russian CC on the power of representation, and Article 185 and 187 regarding powers of attorney,

• Article 21 of the Law on State Registration,

• Articles 420 Russian CC in connection with Articles 309 and 310 Russian CC,

• Article 307 Russian CC on contractual rights and obligations,

• Article 421 Russian CC, cited by Claimant in connection with a mixture of provisions creating mutual obligations, CM-84 para 6,

• Article 328.1 and 328.2 Russian CC on reciprocal obligations,

• Article 450.2 and 450.3 Russian CC regarding out of court unilateral withdrawal from a contract; Article 405.2 Russian CC cited in conjunction with and Art 153 and Article 158.1 and 158.2 Russian CC,

• Article 15 CC on the right to compensation for damages suffered,

• Article 401 Russian CC and the mirroring provision for tort of Article 1064 Russian CC,

• Article 183 Russian CC on the conclusion of a transaction by an unauthorized person,

• Article 393 Russian CC on the liability for damages in the case of a breach of obligations,

• Article 388.1 Russian CC regarding the assignment of rights and the exception clause in Art, 388.2 Russian CC,

• Art 391.1 Russian CC regarding the assignment of a debt,

• Articles 196, 200 and 208 Russian CC regarding the Statute of limitations,

• Article 69 Russian CC on Joint Stock Companies.

401. Moreover, references to the Russian Federation's Investor Protection Laws and Russian Competition Law were made, in particular to:
• Law No. 1545-1 of 4 July 1991, Articles 1-3, 6-8, 15, which was operative at the time when the Founders' Agreement was concluded in 1995 (CX-106), in particular Art. 7 (RX-33),

• Law No. 160-FZ of 26 July 1999, Article 2, 4-7, 10, 20 (which - Claimant explained - is the law which currently in force, CX-132).

• Law No. 1488 of 26 June 1991 Concerning Investment Activities in the RSFSR,

• St. Petersburg Investor Protection Laws of 1998 (CX-130)

• Russian Law on Protection of Foreign Investments, Articles 2,5, 6 and 7, regarding investor protection and the transfer of rights,

• Law of RSFSR On Competition and Restriction of Monopolistic Activities in Commodity Markets, of 22 March 1991 (RX-33),

• Federal Law on Competition, dated 26 July 2006 (RX-34), currently in force.

402. In addition, numerous references to Russian court cases and decisions were made, as well as references to international arbitral awards.

K Introduction to the Substantive Discussion

403. For the purpose of the substantive discussion, this Award will follow the List of 9 Issues as reflected in the 32nd Order of 2 September 2011. The issues, as listed in the 32nd Order, are quoted in the headings of the following **Parts L to R** of this Award, and the more particular Qs Nos 1 to 53, as identified by the Tribunal in the 32nd Order, are restated in small caps.

404. In preparation for the Stockholm Liability Hearings, both sides submitted Memorials addressing *seriatim* all of the issues and each one of the 53 questions below; Claimant did so In CM-84 and in a detailed APPENDIX **("APP CM-84",** a document without pagination; pages manually inserted by the Tribunal, numbered 1 to 27) filed on 13 October 2011, and Respondents 1 and 2 did so in 1-RM-36/ 2-RM-42, equally dated 13 October 2011 (together with separate comments on Claimant's summary on Russian law applicable to the Purchase Agreement stipulated In CM-76).

It is, for the purpose of this Award, therefore deemed most appropriate to review the Issues 1-7 one by one of the Questions, and to conclude each Chapter with short answers; Issue B wiil be addressed in the Cost Section.

L Issue 1:

Did the Foreign Parties/Claimant Perform Properly, and Were the Financing Terms, as Proposed by EBRD,

Satisfactory Such that the Russian Parties Should Have Accepted Those Terms?

1 Regarding the EBRD offer is there a significant discrepancy between basic terms or the Founders' Agreement CPA"), and the EBRD offer?

2 What about, for Instance,

(i) the increased amount of the loan,

(ii) the interest terms,

(iii) the removal of majority for the Russian Parties of 63.4% to a majority of the Foreign Parties/EBRD, by the required transfers of 21,5%

(iv) pledging of the shares in favor of EBRD,

(v) transfer of management Functions to Aeroports de Paris?

3 Hence: Have the foreign Parties property fulfilled their *"primary obligation",* by providing the EBRD financing offer as it was made?

4 Were the Russian Parties bound to accept whatever financing otter would be presented? Or were they free to reject it, or let It lapse time-wise?

I Claimant's Position

405. Claimant in these proceedings emphasized in all of the substantive submissions that Claimant had properly fulfilled his contractual duty by *"employing all necessary efforts"* to obtain the financing commitment. The most detailed account of Claimant's position was given in App CM-84, Med a few days prior to the Stockholm Liability Hearing, addressing *seriatim* all of the Issues and Questions put by the Tribunal in its 32nd Order

406. According to Claimant, the fact that the financing commitment was not already obtained by the 31 December 1995 deadline, set out in Section 8.1(c) of the Founders' Agreement, was not a breach of the Investment Contract, because, in the above sense, *"the Foreign Parties were dearly employing 'all necessary efforts' to obtain such commitment";* CM-66 para. 5.

407. Most essentially, Claimant argues that PSP properly fulfilled its primary obligation, and that there was no significant difference between the Founders' Agreement and the EBRD proposal, essentially since the *"the Founders Agreement requires such financing as is necessary to construct and commence operation in Section 8.1 (b)'".* [50]

408. Hence, Claimant' case is to maintain that:
• the Foreign Parties properly complied with their *"primary obligation"* (CM-66 para. 2) to secure the financing for the NIPT, and

[50] *Transcript 18oct11 page 150.*

• the terms of the financing had been agreed by the Parties to the Investment Contract (CM-66, para, 4; Mr Sax in CWS-6, paras, 24-57), and

• the Investment Contract included firm obligations of the Parties. [51]

• Furthermore, Che amount of the financing needed was assessed by DMG/EBRD, and the Founders' Agreement contemplated that the amount of financing might increase;

• Interest terms had not been specified in the Founders' Agreement, and the EBRD indicated a commercial pricing [52];

• regarding the removal of the Russian 2/3-majority, Claimant calculated that the Russian Parties even after the exercising of the DMG- and EBRD-options would still control over 50% in IAT Pulkovo;

• EBRD'S request regarding the pledging of the shares of IAT Pulkovo, according to Claimant's testimony, "*was commercially reasonable, by definition";* [53]

• The further EBRD requirement that the management functions should he assigned to a Western provider (i.e. Aeroports de Parts) was also necessary for the project to qualify as pertaining to the private sector;

• Mr Sax underlined the latter aspect at the Hearings; *"EBRD required a Non-Russian management to qualify for Pulkovo-3 as a private sector project... with regard to compliance, 1 believe that the private sector criteria of EBRD were commercially reasonable and I know that they were agreed to by SEP.. "* [54]

• Even If the EBRD proposal had to be considered unacceptable by the Russian Parties, they were still bound by the Founders' Agreement; yet, according to Claimant, the Russian Parties could have properly withdrawn from it, or could have negotiated an exit scenario; neither was done.

• The *exceptio non (rite) adimpieti contractus* Is not available to the Russian Parties, and Article 328 CC does not provide a basis.

• Even if the Russian Parties were well-founded not to take the EBRD offer further, PSP could rightfully continue to claim to be part of the Investment Project which was not terminated In accordance with procedures available under Russian law, and PSP's performance was moreover accepted by the Russian Parties. [55]

• The provisions of the Founders' Agreement remained binding and there was no right to repudiate the Investment Contract, or to tacitly terminate It.

• The disinterest of the Russian Parties was only realised on 2 October 2007 when Claimant, was advised Chat the City of St. Petersburg intended to develop the N1PT/AJTP without the participation of Claimant and/or PSP.

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[51] CM-84 para, 11.

[52] See also Transcript 18oct11 pages 151/152.

[53] See also Transcript 18oct11 pages 152/153.

[54] *Transcript 18oct11 page 153. SEP - State Enterprise Pulkovo.*

[55] APP CM-84, at pages 8.

• In Mr Karpov's letter of 16 April 2003 CX-69), Claimant finds evidence that the Russian Parties confirmed fulfillment of Claimant's primary obligation, that the Founders' Agreement was still in effect and that any dissolution required the consent of all shareholders. [56]

• Regarding the question whether SPS or Claimant properly fulfilled the primary obligation regarding the providing of a financing offer, Claimant's answer is a dear "yes".

409. However, Mr Sax also fully agreed - upon a question by Respondents' counsel - that the Russian Parties *"had full rights not to agree to proceed with the EBRD proposal",* [57] Claimant also confirmed this explicitly in the Appendix to CM-84 at page 7, answering issue 4.

410. At the Stockholm Hearings, Claimant Mr Sax in his testimony, maintained that Respondents should have accepted the financing offer of EBRD, despite some changes to the parameters as they were initially set out in the Protocol of Agreement and the Founders' Agreement. At the Hearings, Mr Sax described the significant benefits which would have been available for all parties, including the Russian Parties, had they accepted the financing offer which, as he explained, in 2011 would have been fully amortized.

411. Asked by the Tribunal whether the financing proposal of EBRD, as presented, fell outside the parameters which Initially had been discussed and agreed between the Foreign Parties and the Russian Parties, Mr Sax, in his oral testimony as a witness of 18 October 2011, defended the reasonableness of the EBRD financing proposal; for Instance, EBRD did not ask for control over IAT Pulkovo, but on the other hand required debt-subordination for satisfying their requirement as to the equity: debt ratio. [58]

412. The Tribunal explored some further details regarding the magnitude of the required financing, noting that the Protocol of Agreement envisaged a financing in the approximate amount of US$ 75 Million [59] ;the question was put to Mr Sax whether that figure was a negotiated figure, whether for instance the Russian Partners had a cap in mind in the region of that amount, and whether Mr Sax - in the framework of the discussions regarding the Protocol of Agreement - indicated or "warned" that the financing requirement could in the end be much higher, such as U5$ 100 Mio or 200 Mio.

413. On the latter question Mr Sax replied that *"we all agreed that the guesstimate was US$ 75 million, However, quite frankly, nobody knew exactly what it was going to cost because everyone knew that the EBRD loan process was a tedious, time-consuming process going over multiple number of years, and obviously during that period there would have to be adjustments of the* cost". [60]

414. Considering that the EBRD financing proposal in Fact indicated a financing requirement in an amount more than double of what has been contemplated, the Tribunal remarked at Che Hearing that such proposal meant that, in the end, the Russian Parties had to pay most of the bill For such financing through the operation of the Terminal. Mr Sax replied as follows:

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[56] APP CM-84, page 10.

[57] *Transcript 18oct11 page 159.*

[58] Transcript 18oct11, pages 39-41,

[59] Transcript 18oct11, pages 64 ss.

[60] Transcript 18oct11, page SB.

"I think your question is relevant if the profitability of the project Is In question. However, if the profitability of the project is all excessive that all of the parties, including the Russian Parties, are making more money than they have ever made before in the entire history of the Russian Federation, then in fact whether it costs 75 million or 150 million or 200 million is irrelevant "

415. Apart from the estimated amount of financing, the Protocol of Agreement laid down a further cornerstone by stating the Parties' participation in the Project, by providing that the Russian Parties shall be entitled to 66 2/3% and the Foreign Parties to 33 1/3% (29 2/3% for Strategic Partners and 3 2/3% for SPBD. On the question put to him at the Hearing, Mr Sax confirmed that this repartition was a negotiated repartition, in the sense of a "*two-thirds/one-third deal*" [61]

416. On further question by the Tribunal whether a two-third majority was important for the Russian Parties, Mr Sax replied:
" Mr Sax : If we said at the time that you get only 51%, then unless we were able to put the money on the table, they would not have signed. With the money on the table, yes, they would have signed at 50,1%, but don't think that the negotiations at that time -- I understand the question that you are asking, but I can't honestly answer the question. Again, I will say the 66% and one-third different was a discussion; it was not a thoroughly contested item..."

417. In another context, a similar question was asked as to Whether the shareholdings, as initially agreed between the Foreign Parties and the Russian Parties in the Protocol of Agreement, were to be considered fixed. In his response, Mr Sax referred to Section 14.3 of the Founders' Agreement which as he said - contemplates that
"in the event the financiers ask for shares, that we agree, the Founders' agree, to dilute our shares pro rata. There was also an agreement -- oral -- between myself and the Russians that die Russian shares would nor fall below 50.1%" [62]

418. Fact Is that the EBRD/DMG required - as a condition for their Financing -the surrender, In their favor, of a 21.5% shareholding in IAT Pulkovo (respectively in a new Project Company to be formed [63]). Mr Sax commented on this requirement as follows:

Mr. Sax : "Now was the EBRD 1.5% the exact number contemplated when the Founders' Agreement was signed? No. Was it contemplated that they would ask for a share Interest? Yes. Was the DMG number of 20% contemplated at the time the Founders' Agreement was signed? No. Was it contemplated that they would ask for a Share interest' Yes, because we didn't know the number Did I tell my partner DMG at the time that they were being greedy' Yes, Did the Russians say that DMG was being greedy? Yes. Would I agree today that they were being greedy? Yes, But it is what it is, because in 1998 there were a lack of financiers available in Russia and if you did not go to DMG or IFC or OPIC, quite frankly you couldn't find senior debt financing, and If you didn't deal

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[61] Transcript 10oct11, page 73.

[62] Transcript 18oct11 page 42. It may, however, be noted - quite in contrast to the explanation of Mr Sax - that Section 14.3 of the Founders' Agreement specifically provides trial modifications of the Agreement may have to be made "to *the extent* necessary *to obtain financing referred to in Section 8.1 (a)* ***so long as such amendment or modification does not alter the relative percentage interests*** *in the capital stock of the Company among the Founders."*

[63] See hereto the requirement oft he EBRD counsel reflected in Transcript 18oct11 page 158.

with somebody like DMG or Credit Suisse or someone like that you couldn't get subordinated debt or equity or mezzanine financing or whatever you want to call it at the time.

So to directly respond to your question: the Russians knew. They didn't like the 20% and neither did I. They may not have liked the 1.5%, but they knew it was a "falt accompli", quite frankly, at the time that the EBRD asked for it because there was not an alternative lender of EBRD stature. And even if you take the numbers and you work the numbers out the Russians never fell below choir 50.1% threshold that they were interested in maintaining, even with the dilution of the EBRD and DMG." [64]

419. The EBRD proposal also contained further aspects, which wore all *"commercially reasonable",* such as e.g. the requirement of issuing shares and the requirement that *o* new project company replacing IAT Pulkovo should be formed, as Mr Sox explained at the Hearing. [65]

420. In sum, it is Claimant's case to argue that Respondents *"against good faith":*

• failed to accept the terms of the EBRD financing proposal,

• failed to implement numerous steps towards implementation of the Project (starting with failures to obtain governmental permissions, failure to build an apron as well as access roads, failure to provide for a correct management and administration of IAT Pulkovo, and

• *inter alia* also failed to Issue the IAT Pulkovo share certificates.

421. The Founders, Claimant nevertheless acknowledges, had the option to terminate the relationship, either by terminating the Ground Lease, or by with drawing from IAT Pulkovo and liquidate the company; however, neither right was exercised. [66] In the opposite, according to Claimant, the Parties

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[64] Transcript 18oct11 page 42.

[65] At the Stockholm Hearings, Mr Sa x staled that SP/PSP "*became aware of three facts: 1. the shares had not been issued by the Russians as promised. 2. From speaking to our counsel, that we could not compel the Russians to issue the shares.*
The Chairman: You did not?
Mr Sax : We could not. Mot that we did not, but we could not.
The Chairman : As a shareholder?
Mr Sax : I couldn't compel them to sign a credit agreement where they were going to make a whole lot of money, how can I compel them to issue shores in a Russia corporation? The Chairman : But you required that the Shenes be issued? Mr Sax: No; the agreement requites that the shares be issued. The problem is there was no procedure in Russia requiring that a shareholder could compel the Russians to issue the shares and, even If there was - which there isn't more importantly, it you read the letter from Bertram Millet in 1999, you'll find confirmation of the fact that in 1998, just prior to the closing, EBRD's court set, Dickstein Shapiro, came up - found - that there was a - I'll use the word "defect" (I won't use the word that I use to describe it) - but let's say a ridiculously absurd defect that EBRD's counsel found in IAT Pulkovo, and EBRD's counsel wanted us and the Russians to form a new company - this is RX-6, the EBRD letter dated January 8, 1999 and the EBRD wanted us to revise the Charter, farm a new company, etc etc. as more particularly set forth in Bertram's letter. As a result of that, candidly, even if there was a way to compel the Russians to issue the stock I wouldn't have compelled the Russians et the time because it was illogical to when I knew that we had to form a new company to be able to close the financing with the EBRD. So as a result of that you have the following situation: 1. The four corners of the document are crystal clear to me what they transferred, and they certainly didn't transfer the right to compel the Russians to issue the shares of IATP. 2. There was no procedure m Russia for us to compel the Russians to issue the shares; and 3. There was no reason for us to do it when we knew that the EBRD required a formation of a new company and, at that time, the issuance of shares in that company. So as a result of that - again, to me - the four corners of the document are clear and everything Is obfuscation." Transcript 18oct11 pages 48-50.

[66] CM-66 paras. 16-13,

"... continuously treated the investment Contract as valid and enforceable until 2 October 2007 when Claimant was advised that the City of St. Petersburg would develop an international passenger terminal at Pulkovo Airport without claimant's participation". [67]

II Respondents' Position

422. Respondents, in Rejoinder paras. 120-172 and 1-RM-32/2-RM -38, paras. 167-182, and throughout their PH Brief, maintain that they have fulfilled all their obligations under the Founders' Agreement correctly and that the Investment Project was not realized due to Claimant's failure to meet his primary obligation by providing an acceptable financing commitment.

423. More particularly - addressing Claimant's allegation that the City of St, Petersburg had not helped EAT Pulkovo in obtaining all permissive documents and did not use all best efforts for the project to succeed, did not build an a prion and roads such that the financial closing had not occurred Respondents maintain that the permissive documents had been obtained by 15 July 1998, as confirmed by CX-10 and CX-21. And as regards the alleged obligation to construct an apron and access roads, Respondents deny that they had assumed any such obligation in fact, such obligations were proposed by the EBRD as a condition for obtaining the financing, but the EBRD's proposal had never been accepted by Respondents.

424. Already in Rejoinder para. 132, and repeated in 1-RM-32/2-RM-38, para. 177, Respondents maintain that roads had to be constructed by Iat Pulkovo, not by Respondents, and it was not an obligation oF the City of St, Petersburg to construct any of the roads, utilities or the apron.

425. Furthermore, the Foreign Parties had no authority, on behalf of IAT Pulkovo or the other shareholders, to represent them in relations With other third parties, for any of the following (Rejoinder, para. 96):
"(i) Assign different consultants and advisors and execute contracts with them, (ii) agree on specific terms and conditions of debt financing, (iii) incur multi-million expenses, and (iv) spend money for any other arrangements either related or not related to the Investment Project, The Claimant was not a representative of the Respondent and was not entitled to act on their behalf and spend any money- Therefore, any actions of the Claimant in the course of attracting financing were mode on his own, at his expense and without any consent or approval of other shareholders of iat Pulkovo,"

426. For Respondents it is clear that Claimant *"solely caused the failure and subsequent termination of the Investment Project",* by not providing the financing commitment on acceptable terms, i.e. by submitting a financing proposal with substantial delay and on terms which Respondents could not and were not obliged to accept since, *inter alia,* they contradicted the initial agreements of Che Parties to the Investment project and the Founders' Agreement and were commercially unreasonable, involving three times increased costs.

427. At the Stockholm Hearings, the adequacy and acceptability of the financing commitment was

[67] CM-66 para 13,

reviewed in great detail, with the benefit of the testimonies of Mr Sax and Mr Karpov.

428. Summarizing Respondents' arguments, the following points may be shortlisted:

• Claimant was required to provide *"the guarantee of obtaining financing"*'[68] which he failed to do;

• the time limit for obtaining the financing was not met: the deadline for obtaining financing had been established in Section 8.1 (c) and 8.4 of the Founders' Agreement and expired on 31 December 1995, and no agreement is In place according to which an extension had been granted;

• the financial terms proposed by EBRD were commercially unacceptable;

• the EBRD moreover only Issued a proposal which as such was not a financial commitment, nor a guarantee to provide financing;

• Claimant never had the power to negotiate on behalf of IAT Pulkovo or its shareholders, and in any event any and all commitments or agreements would have had to be signed off by both, Mr Demchenko and the Claimant; the Founders' Agreement nowhere envisages an authority given to Claimant to represent any of the shareholders of IAT Pulkovo;

• the two documents filed in support of an alleged authority, CX-14 and CX-15, are incomplete extracts and do not constitute sufficient evidence of an alleged authority;

• Claimant should have worked together with the Chairman of the Board, Mr Boris G Demchenko, and documents required to be countersigned by him;

• Claimant even failed to show evidence that he had been appointed Vice-Chairman of IAT Pulkovo; under Russian law there is no such special position within a Board of Directors of a Joint stock company such as a Vice Chairman; Claimant may only have been entitled to act for IAT Pulkovo If he hod been given a power of attorney, and Claimant himself does not assert that such power of attorney existed; [69]

• furthermore, under Article 12.7 of the Charter, an approval of the Board of Directors Is required for the execution of any commitment exceeding US$ 10'000, and Article 11.2 requires an unanimous approval for the construction budgets or commercial budgets and for the business plan;

• moreover, the Russian Federal Law on Joint Stock Companies, in Articles 78/79, requires a Board approval for large scale transactions, or approval by the Shareholders' Meeting; [70]

• the EBRD proposal contained a long list of conditions precedent which EBRD required to be fulfilled;

• Respondents had never agreed to unconditionally accept any and all of the terms of financing which might he proposed by any member, and Claimant himself recognized this;

• the fact that Respondents continued their cooperation with the Claimant, giving him a chance to fulfill his commitment, does not mean that the Respondents had agreed to renegotiated the terms

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[68] *Respondents' PH-Brief para. 124.*

[69] Rejoinder, para. *87.*

[70] Rejoinder, para. 88; RX-25.

for obtaining the financing;

• in fact, the terms proposed by EBRD could not be approved for commercial reasons, particularly due to significant discrepancies and con traditions between the proposal and the basic terms laid down in the Founders' Agreement;

• the amount of the loan was increased by a multiple of three in comparison to what was established in the Founders' Agreement, which meant that the cost of the Investment Project also increased by a multiple of three;

• the interest rates were substantially higher than those agreed in 1995 when the cost of the loan had been estimated at 8.5% to 9.5% p.a., while EBRD's proposal indicated an interest rate of 13% [71].

• It was never envisaged that all assets of IAT Pulkovo and the shares in IAT Pulkovo owned by the Parties should he pledged in favour of EBRD, neither the Founders' Agreement nor the Charter foreshadowed such a pledging which, however, was required by the EBRD proposal;

• Claimant's comment that EBRD's request regarding the pledge, in the sense that *"it was commercially reasonable",* is of no avail;

• the transfer of the management functions in relation to the International Passenger Terminal to Aeroport de Paris had also not been covered by any provisions in the Founders' Agreement or by the Charter, and this is another requirement to which the Russian Parties could never agree;

• the partial transformation of the pre-development expenses Into a loan has also never been agreed, neither in the Founders' Agreement nor in the Charter;

• the proposition that Claimant should be owed a development fee in the amount of 4.5% of the Terminal's development costs has also never been agreed;

• the transfer of a 1.5% stock Interest in IAT Pulkovo to EBRD on the financial closing and a further transfer of a 20% stock interest in IAT Pulkovo to DMG upon the financial closing were likewise never agreed and entirely contradicted Section 14.3 of the Founders' Agreement, and Mr Karpov in this respect testified: *"The Russian Parties did not even want to hear about redistribution of shares"* [72]*;*

• Mr Sax himself admitted that he also considered the requested surrender of a 21.5% shareholding as too high, with reference to the Transcript of 18 October 2011, pages 166/167;

• for all these reasons and contradictions of the proposed terms to what had been agreed by the Parties to the Investment Project, Respondents or IAT Pulkovo could not be expected to take such a proposal forward. [73]

429. In fact, Respondents maintain, *"Claimant has not proved that any agreements in relation to main terms of construction and financing of the Investment Project Were reached between all parties,*

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[71] Respondents' PH-Brief, para. 158.

[72] *Respondents' PH-Brief, para. 179 and Mr Karpov's Witness Statement para. 10.*

[73] See also Rejoinder 1-RM-17/2-RM-11, paras. 81-117 and in the Liability Memorial 1-RM-32/2-RM-38, paras. 64-166.

including the Respondents, and EBRD, DMG." [74]

430. In particular, as Mr Karpov explained in his witness statement, the requested transfers of shares in IAT Pulkovo to the financial institutions was a deal-breaker (a *"stumbling block"),* since the Russian Parties would loose the controlling majority. These terms were incompatible with basic terms of the Founders' Agreement, as laid down in Section 14.3 of the Founders' Agreement, and moreover *"commercially unreasonable".* [75]

431. Respondents further noted that in August 1998 the EBRD's proposal had *"expired without a mutual agreement of the participants of the Investment Project and the proposed terms of financing"* [76] and hence, the Investment Project

"...in any case was factually terminated at the end of 1998 - first half of 1999."

432. Respondents conclude as follows:
"Bearing all of the aforesaid in mind, it should be noted that the Claimant has not fulfilled its main and sole function under the Founders' Agreement and in the whole Investment project: Obtaining of financing. Furthermore, everything the Claimant managed to Obtain from the financial institution, he ob twined with an enormous delay which was in material contradiction with the Founders' Agreement, and actually ruined the Project." [77]

433. In their PH-Brief of 20 January 2012, Respondents once again addressed the issue on pages 21ss, and in detail argued the non-acceptability of the financing proposal in paras. 147 to 188, conducting that - due to Claimant's failure to obtain and present an acceptable financing - Respondents were freed from their obligations under the Founders' Agreement. [78]

III The Tribunal's Observations and Assessment

(a) Brief References to the Hearings

434. Claimant acknowledged that the Russian Parties were free to reject or accept any financing commitment, and were free to allow any offer to lapse; however, they were not free to pursue the development of an international passenger terminal at Pulkovo Airport without PSP's participation, unless they first withdraw from IAT Pulkovo in accordance with the terms of Section 8.4 of the Founders' Agreement.

435. At the Stockholm Hearings, Claimant explained from his side

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[74] *Rejoinder, para, 103.*
[75] *R-Liab Brief para. 92.*
[76] 1RM-31/2-RM-38, para. 183.
[77] Rejoinder, para. 119
[78] R-PH-Brief paras 194 ss.

"why Pulkovo did not close in 1998.... I blame only two people: No 1 the then Governor of the City of St. Petersburg, Vladimir Yakovlev who, quite candidly, for his personal reasons wanted to usurp the Americans' position for fns own personal reasons, and no.2, Governor Valentina Matvienko who Wanted at the time Deripaska's company.... to, again, replace the Americans as the developer of Puikovo-2" [79]

436. Regarding the expiry of the 31 December 1995 deadline, Mr Sax acknowledged that It took *"a lot longer to deliver the financing commitment than we thought",* but stressing that the Russians from time to time extended the deadline, and were kept abreast of the Financing. [80]

437. Regarding discrepancies between the Founders' Agreement and the EBRD offered terms, Mr Sax denied these, explaining in detail the commercial reasonableness of the terms offered by EBRD. [81] Mr Wong replied:

"Mr Wong: You have a rationale to it and you say It's commercially reasonable, but I think what I say is that it was not unreasonable for my clients to look at what was in front of them and think: Wow, this Is different. We are talking three times the money, We are talking a reduction in our shareholding and other matters as well. I would invite you to accept that, putting you in the shoes of my client, it Is not unreasonable for them to look at what you proposed and think: This is way off from what wo expected, and ft was not unreasonable for my clients to say: Look, we can't accept this."

Mr Sax: I think it was, quite candidly, unreasonable, and I think if your clients did not accept it, they had bad advice -- and I'll tell you why; it's very simple EBRD and BAG were two of the premiere financial Institutions in the world in Russia at that time. Forget Cart, Cart Is nobody, PSP is nobody, SP is nobody, but DMG and EBRD are somebody (omissis) They were getting a completed Terminal without putting out any money. They were getting a substantial cash-flow. They were getting the first PPP as a project like this in Russia and/or the world. And what happened"? Okay, they decided not to do It. And if they would have done It, they wouldn't have to wait 15 years or 13 year for the next project." [82]

438. Further In the examination, Mr Wong drew the attention to Section 14.3 of the Founders' Agreement, requiring any modifications to be signed off by each of the Founders. Mr Sax's answer to this was that it had been intended that all of the project documents and financing documents would be executed upon Closing, including a new Founders' Agreement, since the
"EBRD's counsel wanted some ridiculous defect cured by incorporating a new company and signing a new Founders' Agreement.... But the bottom line is that the intervening event, the financial crisis and the delays caused by the Russians, prohibited those changes." [83]

439. Mr. Wong then continued:

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[79] Transcript 18oct11 pages 62/63,
[80] Transcript 18oct11 page 145.
[81] Transcript 18oct11 pages 147-154.
[82] Transcript 18oct11 pages 154-156.
[83] Transcript 18oct11 pages 158.

"Mr Wong: Our position very simply is that our clients had full right not to agree to proceed with the EBRD proposal.

Mr Sax : I agree "[84]

440. At the Hear ng, the discussion on the EBRD offer extended over Transcript pages 144 to 183, essentially with Mr Sax maintaining that the EBRD offer was commercially reasonable, while Respondents' counsel maintained that It was far away from the parameters agreed in the Founders' Agreement.

(b) Two General Remarks

441. First, Claimant Mr Sax stated eloquently, at the Stockholm Hearings, that the commitment offered by EBRD should have been accepted by Respondents, and - with his charisma and enthusiasm - figured out the very significant benefits every party could have derived through an implementation of the Project, even though the amount of the loan was significantly higher than Initially contemplated, and despite the required out in the Russian Parties' participation and other requirements of the EBRD. By today, 2011, he said, the entire loan would have been amortized.

442. Perhaps, the Tribunal may remark, Mr Sax was right; perhaps this is the typical American entrepreneurial approach which looks far ahead and, with creativity, aims to overcome obstacles, tries to evaluate the chances and - faced with difficulties - reflects on the questions: "*what are our options...?",* rather than to get stuck in doubts, hesitations and concerns, driven by a mind-pattern where the reaction "*we can't, we are afraid that..."* prevails the thinking and decision making.

443. However, It is very clear that only a common denominator of the mind-sets would provide a basis for the PRP (which indeed - as it was described -was the first Russian PPP). Such common basic mind set was not there, and could not be reached. And, realistically, the Tribunal concludes after intensive study of all the parameters, that Claimant Mr Sax should have taken this as pect and risk into calculation when launching and pursuing this project.[85]

444. Second, there is one additional aspect which, in the Tribunal's view, needs to be mentioned: A PPP like any project with a partnership character - requires openness and transparency, and arrangements without a prior discussion and mutual *consensus* rarely succeed.

445. The Foreign Parties, however, played their cards vary close to their chests, essentially pursuing their own agenda, without an open/transparent communication, neither as to the incurring of pre-development costs, nor as to the appointment of consultants, nor as to the charging of Mr Sax' salary and office expenditures, nor as to their Intention to seek a partial reimbursement of their disbursements via the EBRD financing, nor - after 1998 - as to their intention to claim a full

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[84] Transcript 18oct11 page **159,**

[85] Risk, it may be noted specifically, is recognized as being one of the fundamental aspects of any entrepreneurial activity under Russian law (Article 2.1 Russian CC). A level of uncertainty is, obviously, dramatically higher in an economy in transition like the Russian economy had been at the time in the 1990s, and in fact still is. Risk not only means the positive side of gaining profits, but also includes the negative side of suffering losses, particularly in a pioneering project. Mitigation of risks may require specific efforts, and in particular constant and active coordination of all activities among the parties.

reimbursement of their expenditures should the Project not be pursued.

446. It is difficult to see how, under such parameters, mutual trust: could be built up which, after all, is probably the single most important factor for a successful PPP.
The above two aspects, as will be seen in the following discussions, may account for the failure of the Project.

(c) Assessments

447. With the above introduction, the Tribunal now turns to the "acceptability" of the offered EBRD-commitment.

448. Claimant's repeated statements and affirmations defending the EBRD proposal, by emphasizing that all of the terms of the EBRD proposal were *"commercially reasonable",* is not the decisive criterium; indeed, the Tribunal may remark, most probably they were reasonable, from the EBRD's point of view; but this Is not the real Issue.

449. The (only) real issue Is whether these terms were within - or outside of -the agreed parameters of the Parties to the Investment Contract.

450. On the latter/decisive issue, the Tribunal's conclusions are Clear:
• Under any standards of review, and irrespective of the particular parties in question, a comparison of (i) what was discussed as the basic parameters for the financing to be sought according to the Protocol of Agreement and the Founders' Agreement on the one hand, and (ii) the commitment as offered by EBRD on the other hand, shows that the offered commitment was significantly different from the agreed parameters, indeed well outside of the parameters on which the Parties intended to build the PPP.

• And the above, even more so, must to be concluded having regard to the Russian parties to the PPP, who - certainly at that time in the 1990s approached such novel investments with less entrepreneurial flexibility and optimism than perhaps other parties, for reasons which everyone may very well understand, and arguably *inter alia* for the reason of a probably rather cumbersome public administration; no doubt, this aspect has to be respected; and it must have been known to Mr Sax at all times.

451. What are the most problematic changes?
• Problematic is the significantly indicated **increased amount** of the proposed loan, by a factor of more than two, or even three as alleged by Respondents,

• Problematic are the high interest rates (although, the Tribunal recognizes, **interest rates** were particularly high at the relevant time),

• Problematic, or even more than that, is the significant **cutting of the Russian majority percentage,** a provision which stands in direct contradiction to a particular "condition" as per Article XIV - OTHER

CONDITIONS of the Founders' Agreement, reflected in Section 14.3, which excluded specifically any alteration "to *the relative percentage interests in the capital stock of the Company among the Founders",* and moreover requiring (in the next following sentence of the text in Section 14.3) that any amendments require *written instrument signed by each of the Founders")*

• Problematic, and certainly an aspect raising additional concern, is the requirement to **pledge** the shares in IAT Pulkovo,

• Particularly problematic Is the **shifting of the management functions** to a Non-Russian provider (Aeroports de Paris), as something the Russian Parties at that time did not want to give out of their own hands and control, and

• Problematic is the fact that the EBRD did not issue a financing commitment, but simply made a **proposal** for the envisaged financing.

452. And without singling out a particular discrepancy/change - but instead **looking at the *ensemble*** of all deviations from what had been contemplated in the Investment Contract, no further detailed analysis is required to conclude that an acceptance by the Russian Parties could neither be anticipated, nor could it reasonably be expected by the Claimant.

453. In addition to all of the foregoing problematic aspects:
A probably particularly disturbing element, on top of everything said above, might have been the burdening of the EBRD financing proposal with some of the **pre-development expenditures,** - a matter which may have raised serious concerns, as no advance indication (or "advance warning") whatsoever seems to have been given that such a charge would be made (at least none of these were made known In the present arbitral proceedings). Absent an open prior discussion and consent, it is hardly imaginable that the Russian Parties could reasonably be expected to agree with such a charging of the proposed EBRD loan - and indeed they did not.

(d) Summing up the Tribunal's View:

454. Under the Protocol of Agreement, the Foreign Parties intended to undertake a clear contractual commit me nt, expressed by the language in title 2 "Financing" in the sense that the Foreign Partners "shall secure financing for 100% of the cost to construct the complex which is anticipated to be approx. US$ 75 million from the European Bank of Reconstruction and Development (EBRD) and from its own participants, and shall guarantee repayment to the EBRD. The complex shall repay the Financing from operational revenues. The Financing shall be collateralized by the assignment of usage fee..."

455. The wording of this contractual undertaking, particularly by using the definitive terms *"shall secure"* and *"shall guarantee repayment"* and *" shall be collateralized by the assignment of usage fee"* make it clear that the Foreign Partners entered into a commitment, which was not only based on deploying best-efforts.

456. Section 8.1 of the Founders' Agreement is more cautiously worded:
"The Foreign Parties shall be responsible for the following (a) to use all necessary efforts to secure US$ 60 million in debt financing..., and (b) if the debt financing can be obtained, to provide at least US$ 15 million in subordinated debt financing towards the development and construction of the Terminal."

457. Considering all of the factual and legal arguments presented by the Parties in the framework of this Arbitration, the Tribunal has reached a dear decision that the Foreign Parties, respectively Claimant, failed to live up to the terms of the Protocol of Agreement, arid entirely missed the targets as per Section 8.1 of the Founders' Agreement.

458. While the Tribunal has noted to what the extent the Foreign Parties and Claimant tried - with the assistance of several advisors and by putting together an impressing documentation - to obtain a Financing commitment, the result of these efforts, however, only resulted in a suggested financing proposal Which significantly deviated from the parameters initially agreed upon between the Foreign Parties and the Russian Parties, and therefore was not given suite by the Russian Parties.

459. The facts of the case, therefore, are clear in the sense that the first hurdle in realizing the Project, i.e. the obtaining of a financing commitment, could not be taken, which made the Projects "still-born child".

460. Hence, when reviewing and taking together all of the above enumerated "flaws" and changes envisaged by the EBRD's proposal[86] as compared to what the Parties had initially contemplated, there cannot be the slightest doubt that the primary obligation, incumbent on the Foreign Parties and/or Claimant: Mr Sax, bad not been met, and Claimant - correctly so - explicitly acknowledged that the Russian Parties were in all respects free to discard the EBRD proposal, or to let it lapse.

461. In short, the conclusions herein drawn can be summarized as follows;
• The Foreign Parties/Claimant failed to fulfill their contractual undertaking/promises,

• hence failed in achieving and fulfilling their primary obligation to secure financing for the launch of the Project;

• and - considering the discrepancy - the Foreign Parties/Claimant could not have expected the Russian Parties to go forward on the basis of the EBRD proposal.

462. Short answers to the initial Questions raised under Issue 1:

463. Q 1: the answer is YES, there was a significant discrepancy.

464. Q 2: None of those elements of the financing proposal were covered by the mutual agreement of the Parties evidenced by the Protocol of Agreement and the Founders' Agreement.

465. Q 3 : The answer is that the Foreign Parties did not accomplish what they had undertaken to procure

[86] It may be noted that the EBRD only presented a proposal, which as such was still quite far away from a financing offer, financing commitment or financing guarantee.

as their primary obligation

466. Q 4 : On the question (i) whether the EBRD financing proposal should have been considered as acceptable by the Russian Parties (having regard to the matrix provided for in the Protocol of Agreement and the Founders' Agreement), and (ii) on the related question whether Claimant, under a standard of average reasonableness and good faith, could have expected the Russian Parties to accept the EBRD proposal, the Tribunal can only answer with a "no".

467. Hence, the Russian Parties were entirely free not to take the proposal any further, and Claimant has explicitly acknowledged that.

M Issue 2:

What Is the Consequence if the EBRD Offer, For Good Reasons, Had to be Considered Unacceptable by the Russian Parties?

5 Were the Russian Parties still bound to the FA, even though the Foreign Parties could not - according to the Russian Parties' arguments - present on acceptable financing commitment?

6 In this context: can the Russian Parties Invoke the *exceptio non (rite) adimpleti contractus?* Is this defense, in Russian law, also available in the ambit of corporate low (as opposed to the "traditional" ambit of this Roman law maxim in contract law)?

7 If indeed the Russian Parties were well-founded not to take the EBRD-offer further: Could the Foreign Parties continue to claim to be part of the Investment Project, and derive benefits there under (for instance based on the 29.7% equity share and profit share), even though, possibly and eventually, the Russian Parties would have had to find financing through entirely different sources, without the Foreign Parties' or Mr Sax assistance, or ultimately through the City's or the State budget?

In other words: was the FA still landing on them, or could they repudiate the Investment Contract altogether?

8 If the Investment Contract remained to he binding: to what extent did the FA contain further binding provisions?

9 If not: Did Respondents' have the right to repudiate the Investment Contract, or to tacitly terminate it, respectively to tormina to It trough inactivity of the Parties' And did they do so?

10 At what moment in time should Claimant have realized the disinterest of the Russian Parties, or a unilateral refusal to further support the project?

11 Claimant, after 1999, tried to keep the project on track, or to revitalize is, but no fresh momentum could be found; was the FA terminated already in the first half of 1999, as discussed by Professor Belov?

12 What is the effect of Mr Karpov's letter of 16 April 2003 (CX-69)?

I Claimant's Position

468. It is Claimant’s view that, even if the EBRD proposal for flood reason had to be considered unacceptable, the Russian Parties remained committed unless they properly withdrew in accordance with Section 8.4 of the Founders' Agreement which, however, they did not.

469. According to Claimant, there Is no provision in Russian corporate law for a party to invoke the *exceptio non (rite) adimpleti contractus;* Article 328 of the Russian Civil Code does not provide a basis for such withdrawal.

470. Even If the Russian Parties would have had to find another financier, they were - In Claimant's view - still bound to recognize the Foreign Parties as partners to the project with a 29.7% equity share and profit share, and all provisions of the Founders' Agreement remained fully in force and binding, and moreover contained a specific framework of ongoing future obligations as set forth in Section 8.5.

471. In any event, Respondents did not have the right to repudiate the Investment Contract, or to tacitly terminate It.

472. Only on 2 October 2007 did Claimant realize that the City of St. Petersburg intended to develop the NIPT without the participation of Claimant and/or PSP. It is, therefore, incorrect to argue that the Founders' Agreement had terminated already in the first half of 1999 (as this had been discussed by Professor Belov).

473. Mr Karpov's letter of 16 April 2003 (CX-69) fully confirms that PSP had satisfied its primary obligation, that the Russian Parties no longer had the right to withdraw from EAT Pulkovo and that the only way was to obtain consent of all stockholders to dissolve IATP, The letter also suggests that the Russian Parties Intended to honor the terms of the Founders' Agreement and the Charter and confirms that Claimant had been making regular lease payments on behalf of IAT Pulkovo. [87]

II Respondents' Position

474. Respondents denied the acceptability of the offered financing proposal.

475. Among further arguments, Respondents also invoked that the Investment Contract did not Impose binding obligations on them. [88]

476. Respondents' view is that - due to the delay in Claimant's performance and the unacceptability of the EBRD proposal - they were
• (i) relieved from any and all obligations which would become incumbent on them, based on the concept reflected in Article 328.2 of the Russian CC, and

[87] APP-CM -84, pages 8 -10.
[88] Statement of Defense paras 1 *27-15* 3; Rejoinder paras, 192-250; R-Liability Brief paras. 8-45.

• (ii) they correctly terminated the Contract by a unilateral repudiation to which they were entitled (without a necessity to comply with the requirement of a written withdrawal as per Section 8.4 of the Founders' Agreement),[89] and

• (iii) as a consequence, the Foreign Parties could no longer claim performance from the Russian Parties, or remain as parties to the Investment Contract.

477. Moreover, Respondents became entitled to claim damages for the costs incurred and losses suffered due to Claimant's failure to perform his obligations in obtaining the financing for the Project. And in any event, the Founders' Agreement was terminated in accordance with Section 8.4 thereof.[90]

478. Relating to Question 8, Respondents maintain that the Founders' Agreement does not contain any provision to the effect that the investment Project's realization should be continued even absent the financing which had to be secured by the Foreign Parties/claimant.

479. Respondents moreover state that, after 28 August 1990, Respondents had terminated all cooperation with the Claimant until the middle of 1999 which fact, as such, evidences Respondents' intention to repudiate the Investment Contract- The loss of interest to pursue the Project Is also evidenced by Mr Karpov's letter known as CX-69.

480. Respondents' loss of interest to further pursue the Protect should have been realized by Claimant after August 1998, as he also should have realized it in the year 2000 when Claimant mentioned the pre-development expenditures allegedly incurred, and on 17 December 2002 when, in the framework of the Purchase Agreement, he sought to acquire *"the right to damages (i.e. lost profits) for breach of the Founders' Agreement and Charter; the right to receive the developer's fee contemplated in, inter alia, Section 8.3 (c) of the Founders' Agreement, and the right to receive the approximately $20 million Receivable plus interest",* which provisions make it clear that Claimant had recognized the failure of the Investment Project,[91] and thus intended to obtain assignment for claiming damages.

481. The effect of Mr Karpov's letter of 16 April 2003 (CX-69) was to provide written notice of withdrawals from IAT Pulkovo by the three shareholders and to notify Claimant of the intention to terminate the participation in the Investment Project.

III The Tribunal's Assessment and Decision

482. On the basis of the very extensive proceedings in this Arbitration, the documents on file and the testimonies delivered at the Hearings, one single most important aspect became clear: namely the aspect that the Foreign Parties'/Claimant's promise and obligation to make available a viable financing commitment was not only their primary obligation but in fact, literally said, the key tor the Investment Project and, indeed, for any subsequent steps towards the further implementation

[89] 1-RM-32/2-RM-38, paras. 103-159.

[90] 1-RM- 36/2-RM- 42r pages 4/5; Liability Brief paras, 104-135, 151-159 and 183-189.

[91] 1-RM-36/2-RM-42, p. 6; CM-76, para. 6

of the Project (as partly foreshadowed in the Founders' Agreement). [92]

483. The "key" however, was not provided, and the Tribunal has stated its view that the Foreign Parties/ Claimant were unable to honor their commitment and promises. All of this became clear in the second half of 1998, and the situation remained un-rescued in 1999 and beyond.

484. What is the consequence of the above for the contractual relationship between the Russian Parties end the foreign Investors? - The only correct straightforward answer is to conclude that the very foundations on which the Investment Project was premised and intended to be built, were not provided.

485. No single argument was advanced in the framework of this Arbitration In the sense, for instance, that the Russian Parties had intended to have the Foreign Parties on board of such a project, and to grant them a 29.7% share in the future operational profits, even absent their expected contribution, i.e. absent their providing the very "key" for the Project in terms of art acceptable financing commitment. Nothing suggests that the Russian Parties had intended to give away 29.7% of IAT Pulkovo's share "for nothing", i.e. as a gift.

486. The providing of an acceptable financing commitment, therefore, was a necessary *quid pro quo* for the Foreign Parties to remain part of the Project. Or, for using an expression several times used by Claiment Mr Sax in the Hearings, but used by him In a different context: *"It could not be a gift!".* In the present case, the continued shareholding of the Foreign Parties in IAT Pulkovo and their right to insist on further implementation of the Project would have had to be earned first, by providing an acceptable financing commitment - and it was not.

487. Conversely, from Claimant Mr Sax' perspective, nothing suggests that he or his predecessors (the Foreign Parties) could legitimately expect to gain the fruits of a 29.7% shareholding in - what they expected to become - a highly profitable project, without them having secured the financing according to the terms of the Protocol of Agreement and the Founders' Agreement and the Charter. For good reasons, Claimant did not allege that he or the Foreign Parties were in arty event entitled to derive the fruits of a profitable Project even if, for instance, the Project ultimately became financed by public resources of the Russian government, the Russian taxpayers, or by Russian banks, or by a totally different bank consortium which the Russian Parties themselves were able to line up.

488. The Inter-relatedness of Claimant's obligation to come up with an acceptable financing commitment on the one side, and the further tasks incumbent on the Russian Parties (as per Section 8.3 of the Founders' Agreement) on the other side, was that of a reciprocal commitments, depending on each other, therefore falling under Article 328.1 of the Russian CC.

489. All of the above not only intuitively appears to be simple, clear and straightforward: It is also covered by deeply rooted legal notions commonly known in Civil law and stemming from the Roman-law-based notions of *exceptio non (rite) adimpleti contractus.*

490. The *exceptio-* principle is reflected in Article 328.2 of the Russian Civil Code which reads as follows:

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[92] See hereto also Professor Belov's Opinion, R-WS-3, at page 11,

Article 328.2 Russian CC:

" In case of failure of the obliged party to make performance of the obligations provided by agreement or the presence of other circumstances obviously indicating that such performance will not be made within the established time-period, the party upon whom the reciprocal performance lies has the right to suspend performance of its obligation or to repudiate performance of this obligation and to demand compensation for losses."

491. While the above stated English translation certainly does not sound very elegant, its meaning and effect, nevertheless, are clear.

492. While already the contractual provision in Section 8.4 of the Founders' Agreement provided that, if *"responsibilities are not satisfied and/or the commitments for the financing for the Terminal have not been received prior to December 31, 1995"* the Founders shall have the right to withdraw from the Company *"by delivering a written notice of such withdrawal to the other Founders",* whereupon *"the Company shall be deemed as invalid, and shall be liquidated in accordance with the effective legislation, and each Founder which funded the establishment of the Company and implementation of the provisions of Article VIII and incurred damages hereunder shall accept these damages as its own, and shall not transfer responsibility for them to other Founders",*

the statutory provision Article 328.2. of the Russian Civil Code, quite in the same sense, provide that - even absent a consent by the Foreign Parties -the non-fulfillment of their primary obligation entitled the Russian Parties in their sole discretion to withhold their further performance; and the further provision in Article 405.2 of the Russian CC in any event allowed the Russian Parties to repudiate any further steps under the Investment Contract due to a loss of interest caused by Claimant's delay in providing the financing commitment. [93]

493. Once again this provision appears to be clear on its face and requires no further legal interpretation.

494. Considering
• the development of the Project through its initial stages to 1998, and

• considering the financial crisis which hit most of the world's economies in summer/beginning of Autumn 1998, and which also affected Russia (as this was particularly underlined by Claimant), and which may well have set back the NITP Project on the priority list of the Russian Parties, and

• considering moreover that the Foreign Parties/Claimant were unable, during the time-period granted to them and kept open until 1993, to come up with a financing commitment which was compatible with the cornerstones laid down by the Parties,

the Tribunal is bound to conclude that towards the end of 1998 or early 1999 in the latest the Foreign Parties/Claimant lost their chance which had been given to them to earn and maintain their 29.7% investor status regarding IAT Pulkovo.

[93] Compare hereto also the detailed explanations in Professor Belov's Opinion, R-WS-3, pages 12-16.

495. After 1998/early 1999, it is therefore the Tribunal's view that the Project was not only still-born, but that moreover the *momentum* had been lost entirely and that, without an explicit new agreement, the Russian Parties were no longer bound to cooperate towards the implementation of the Project. Absent such new or renewed cooperation, the Foreign Parties' investor-status could not be re-vitalized or kept alive.

496. It is undisputed that Claimant, after 1998, tried to rescue the project and to put it on a different ground, with a "re-programming" of the Terminal.[94] The Tribunal, at the Hearing, remarked that many *"Very sophisticated contracts"*[95] were drafted in 1998 to 2001, but noted that not one single contract was finalized and signed by any of the Russian Parties.

497. In response, Mr Sax only referred to some letters, such as CX-53, but acknowledged that no contracts were signed.[96]

498. The Tribunal, in this context, mentioned the requirement, under Russian law, that agreements between companies must be in writing (with references to Articles 161 and 432.2 Russian CC), and Professor Skvortsov added that, according to a proposed special law related to foreign economic activities, transactions which are not recorded in writing are declared void.[97] Mr Gladyshev commented that signatures do not need to appear on the seme document, and exchanges of letters may satisfy the in-writing-requirement; however, Mr Gladyshev did not refer to any document or letter which could evidence a legally recognizable commitment of the Russian Parties, and not only a polite acknowledgement.

499. Hence, fact is that - in the present case - We do not have any signatures on file evidencing any kind of contractual agreement to <u>any</u> of the Foreign Parties further proposals, whether on the same document nor indeed on any other document.[98] Nor is there any evidence on file that the Foreign Parties were ever mandated to come up with such further proposals and/or drafts.

500. Tellingly, the draft contracts filed by Claimant were never discussed as such with Respondents, let alone that they ever had been agreed. And none of the several letters which Claimant submitted in these proceedings and had been addressed to some officials of the Russian Parties received any meaningful response apart from a polite answer.

501. The fact, therefore, remains that the project as such became stale, despite the efforts undertaken by Mr Sax to keep it on track and to revitalize by putting it on a new or renewed basis.

502. Moreover, it is also plain that the Russian Parties were under no contractual <u>obligation</u> to pursue the Project at all, let alone on terms proposed by the Foreign Parties/Claimant; nothing suggests that the Foreign Parties/Claimant had to be given a "second chance".

503. To conclude; All the further endeavors which the Foreign Parties and/or Claimant undertook to

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[94] Transcript of 18oct11 page 191.

[95] *Transcript 18oct11 page 192.*

[96] Transcript 18oct11 page 195 line 24.

[97] Transcript 18oct11 page 197.

[98] At the Hearings, there were discussions regarding the letter in CX-52 to 54 (Transcript 18oct11 pages 207-230ss), but no elaborate explanation is needed to conclude that these letters can not be taken as evidencing any kind of legally relevant agreement.

revitalize the Project, and the continued efforts to provide a new documentary framework (through numerous draft contracts prepared after 1998), were done by the Foreign Parties/Claimant on their own Initiative and at their own risk and costs.

504. The Tribunal's Summarized Short Answers to the Questions 5 - 12

505. **Q 5:** The answer is NO.

506. **Q 6** : The answer is YES.

507. **Q 7** : The answer is NO.

508. **Q 8** : The answer it that the Investment Contract contained no further binding provisions regarding the implementation of the Project; regarding liquidation, see below.

509. **Q 9** : The Investment Contract became stale ; the Tribunal sees no requirement for a particular repudiation.

510. **Q 10**: As from 1999; no more particular determination is needed for the purpose of this Award.

511. **Q 11** : The answer is YES.

512. **Q 12** : The letter only corroborated what Claimant must have been aware of already as from 1999.

N Issue 3:

Claimant's Claim for Reimbursement of Pre-Development Expenditures of 19'700'000—, respectively by End of 2011 - With Compounded Interest - Representing a Monetary Claim of US$ 146'400'000.— :

13 SPH and/or Claimant went to very considerable expense for the planning of the NIPT, lined up consultants, prepared numerous documents, for which Claimant now seeks reimbursement - and Mr Rowson stated in para 25 that he was advised that the expenditures "*are reimbursable under various agreements prepared by the Parties..."*

What is the documentary basis for this statement, in Claimant's view?

14 In 1995 and beyond: was ft discussed among the shareholders that such expenditures would be incurred for and an behalf of IAT Pulkovo (or its shareholders'), and not only on behalf of the Foreign Parties or Mr Sax personally?

15 And if this was discussed. Was there ever an agreement - at the lime when entering into the Founders' Agreement ("FA"), or any time thereafter - that these costs are reimbursable to the Foreign Parties/ Claimant, cither through IAT Pulkovo or otherwise through the other Founders?

16 How do we have to understand that the Foreign Parties agreed to FA 6.3, on the face of that provision

waiving costs before entering into the FA, When on the other band - as per Mr Rowson's report - already prior to December 1994 very significant costs exceeding USS 3,3 million seem to have been incurred which, despite the terms of FA 6.3, are now claimed as part of Claimant's pre-development advance claim?

17 Following up From Q 14 above: in the framework of negotiations leading the conclusion of the FA, did the Foreign Parties and/or Claimant indicate the fact (and magnitude) of the expenditures already incurred and likely or expected to be incurred in the time to come, particularly in connection with the securing of a financing commitment?

18 More particularly, after the conclusion of the FA, and during the further "life" under the FA and as shareholders In IAT Pulkovo:

Was the nature and magnitude of further spending during 1995 to 1998 ever discussed with the Russian Parties and the Board of IAT Pulkovo, and was it approved?

19 For instance, were all Parties to the FA and shareholders of IAT Pulkovo, and IAT Pulkovo Itself as the corporate entity, made aware of the charging (or ultimately intended charging) by the Foreign Parties/ Claimant) for the following costs and expenditures incurred by the Foreign Parties

(i) the charging of several millions for consultants,

(ii) the charging of advisory costs paid or to be paid to DMG, OPIC, Unipart Capital and MIGA of US$ 1.5 million

(iii) the charging of approx. US$ 2 million for salaries to employees of Sax (Holdings) Limited,

(iv) the charging of the salary for Mr Carl A Sax or over US$ 1 million,

(v) the charging for Claimant’s and STVs office overheads,

(vi) the charging of US$ 1 million for design and engineering, and

(vii) the charging of over US$ 4 million for "transfer agreements", for transferring Interests of individual shareholders to Strategic Partners.

20 If not why was this not disclosed, discussed upfront, with the view towards seeking an agreement how to deal with such costs?

21 In the framework of the liability decision to be mode by the Tribunal: how should the Tribunal decide liability and recoverability in principle for any one/eecti one of the items as per Q 19 (i) to (vii) now claimed in this arbitration?

22 When incurring those pre-development expanses' Could the Foreign Parties or Sex act on behalf of IAT Pulkovo, and bind IAT Pulkovo thereby, as Claimant asserts?

Did Mr Sox have a proper corporate authority to act for IAT Pulkovo, or a mandate ?

23 Or could Mr Sax only act on behalf of the Foreign Parties respectively him self, absent the required unanimous decision under FA Chapter 12.7, as this was argued by Respondents?

24 In this context: was Mr Sax ever correctly appointed as Vice President of IAT Pulkovo, and registered

as such, as be claims, and as this had been foreseen In FA 13.3?

* If not: why not?

25 How did the Foreign Parties and/or Mr Sax commercially assess their continued spending under the perspectives of the - as it seems - relatively easy exit clause according to FA 8.4?

26 Is FA 8.4 applicable in our context, as Respondents' maintain, or inapplicable, as Claimant maintains?

27 If there had been no agreement that these pre-development costs should ultimately be borne by IAT Pulkovo or Respondents, on what basis could those costs find their way into the EBRD financing offer, as part of the loan?

And on What basis could the Foreign Parties expect that thia will he acceptable to the Russian Parties?

Has this been discussed, agreed?

I Claimant's Position

513. It is evident from the file that the Foreign Parties and/or Mr Sax personally incurred expenditures in connection with their task to provide a financing commitment, and it is also obvious that those expenses added up to hundred-thousands of US Dollars, possibly even beyond the mark of US Dollars one Million. The exact magnitude, however, did not have to be established so far, and on the basis of this Award will not have to be established, for the reasons explained below.

514. Suffice it to note that Claimant filed an Expert Report by ASA Alan Stratford & Associates, prepared by Peter Forbes and fan Rowson, of the predevelopment expenditures incurred by the Foreign Parties/Claimant (labeled as an "Advance Claim"), together with a valuation of two additional monetary claims (to be discussfld/reviewed further below in this Award) be. (i) for a 4.5% developer fee and (ii) for the monetary value of the 29.7% equity stake in the Project Company.

515. Their reports provide for the following valuations of claimant's claims:
• the Pre-Development Advance claim: depending on the Interest rate, the claim was valued USS 146'400'000.—on a compounded interest basis, applying the contractual Interest rate of 15,5% p.a.,

• the Development Fee claim of 4,5% on the investment costs (estimated at US$ 418'200'000): the claimable amount was assessed at US$ 18'000'000, and

• the 29.7% share, the valuation was indicated with figures of between US$ 180'100'000 and US$ 294 500'000

516. Regarding the Pre-Development Advance Claim, Mr Rowson states in para. 26:
"I am advised by counsel to Claimant that expenditures incurred by SP prior to the date on which the Loan agreement between EBRD and IAT Pulkovo and the Subordinated loan agreement were to

be executed and delivered **are reimbursable under various agreements** prepared by the parties and the EBRD in accordance with the parties agreement and instructions." (emphasis added)

517. Mr Rowson's statement, however, remained entirely unsupported by the evidence.

518. In all the numerous written submissions as well as during the oral examinations, Claimant Mr Sax argued that these expenditures were properly incurred for carrying out the task for obtaining the financing commitment, and are fully recoverable from Respondents. - However, Claimant did not/ could not refer to any particular contractual provision backing up bis statement.

II Respondents' Position

519. Respondents reject all of Claimant's allegations and, in 1-RM-32/2-RM-38 paras, 209-260, for instance commented on the hypothetical situation (i) that the Investment Project was not realized in 1998 due to shortcomings of Respondents and (ii) that neither the Investment Project nor the Founders' Agreement had been terminated, maintaining that, even in such a hypothetical situation, the Respondents would not be liable vis-a-vis Claimant.

520. In support of their conclusion, Respondents stress that neither the Founders' Agreement nor the Charter envisages any liability of the Parties for defraying another Party's expenses, and that there is no provision stipulating any liability of Respondents to Claimant for not accepting the EBRD Financing proposal, or indeed any financing proposal, or for not proceeding to a financial closing.

521. In this context, Respondents throughout all of their submissions stressed that Claimant had no authority to represent them In any transactions or relations with third parties, and they had never authorized the Claimant to Incur any expenses on their behalf, nor to assume any obligations on their behalf.[99] The costs incurred and the losses arising from the failure of the Investment Project, therefore, have to be borne by Claimant himself.

522. Russian law and Russian court practice require a claimant to prove the violation of a right, the losses and their amount, and the cause-and-effect connection between the violation of the right and the losses suffered.[100] Claimant has not even attempted to substantiate or prove an entitlement to damages.

523. Moreover, Respondents stress that their liability vis-a-vis Claimant was expressly excluded by the Founders' Agreement, Section 8.4, which specifically provided that *"each Founder which founded the establishment of the Company and Implementation of the provisions of Chapter VII and incurred damages hereunder, shall accept these damages as its own and shall not transfer responsibility for them to other Founders."*[101]

524. Mr Karpov's witness statement, para. 27, confirms that Section 8.4 correctly expresses What the

[99] 1-RM-32/2-RM-38 paras. 212-215 and Karpov witness statement para. 23.

[100] Reference was made to the Commentary to the Russian Civil Code provided by Claimant, CX-163, page 143.

[101] *1-RM-32/2-RM-38, paras. 222-224 and 231-243.*

Parties had bargained for: *"The idea of Section 8.4 was to say that if the Investment Project was not successful, then each party would risk only those expenses which it had incurred."*

525. Respondents emphasize further that the Russian shareholders never agreed
• to pay damages, or

• reimburse expenditures to any of the participants,

• nor had they ever agreed to be liable for any loss of profits,

• nor even did they ever contractually commit themselves to appoint the Foreign Parties or Claimant as a development manager or construction manager for the NIPT,

• let alone to pay him a fee of 4.5% of the cost of the development of the Terminal.

III The Tribunal's Assessment and Decision

(a) The Alleged Pre-Development Expenditures' Claim

526. As far as necessary within the liability phase of these proceedings, the Tribunal looked into the entire documentation provided by Claimant in support of his "Pre-development Advance Claim", submitted for a total nominal amount of US$ 19'772'277,--, calculated - together with simple respectively compound interest -in a total amount of US$ 37'185'672.—, respectively US$ 146'353'668.-. [102]

527. Regarding the various cost items of the Pre-Development Advance Claim, the Tribunal notes that these include
• significant costs incurred by SPS for consultants,

• costs incurred for financial institutions,

• costs for annual salaries of Mr Carl A Sax (at US$ 350'000 p.a.) and Mr Michael Santoro (at US$ 175'000 p.a.),

• costs of Sax (Holdings) Ltd, and STV International Inc.,

• office costs,

• design and engineering costs.

528. Furthermore, the Pre-Development Advance Claim comprises
• expenses referred to in transfer agreements for expenses incurred by Mr Sax (us$ 1'391'666),

[102] CM-66 para 120. The further calculations in the Rowson Report evidence pre-development expenditures as of 30 December 1G9B in the adjusted amount of US$ 19'765'315; see CWS-9, Rowson Report para. 100. The difference Is, however, irrelevant

• Mr Sax legal fee of US$ 250'000,

• Mr Sax' financial service fee of US$ 280'000, and

• charges of other service providers totaling approximately US$ 4 Mio.

529. Considering these expenses, the Tribunal noted the total absence of any contemporaneous document, originating from the years 1994 onwards, which foreshadowed or discussed the Incurring of such expenses and their recovery. [103]

(b) References to the Examination at the Stockholm Hearing

530. At the Stockholm Hearing, the following question was put to Mr Sax:
"The Chairman :... Now here. In our scenario, I am deeply troubled by the huge amount of expenditures you incurred, Mr Sax dr Strategic Partners, for this project, and neither in the Protocol Agreement nor in the Founders' Agreement do I see a basis for compensation up front for payment of these expenditures". [104]

531. Mr Sax essentially answered:
Mr. Sax : Let me say this. Did we know that we were going to have to spend a lot of money? Yes. Am I going to say that anyone at the time understood that it was going to be $ 20 million? No - including Carl, But everyone knew it was going to be such amount as might be required by the financiers to be able to reach Financial Closing- Did we try and negotiate all of the various Fees, agreements, with all of the consultants, lawyers, and everyone else to the lowest amount possible? You bet. Why? Because we were paying." [105]

532. Further in the examination, the Tribunal asked as follows:
Chairman : Would you go so far as to say that the Russian Parties were there and agreed that in the end the expenditures Strategic Partners and yourself incurred will be charged to the loan, will be incorporated in the loan, and repayable thereby by the parties and essentially also picked up by the Russian Parties? Did you discuss that?" [106]

533. Claimant's answer was a *"yes"* that the pre-development expenses would be reimbursed, and moreover reference was made by Mr Sax to the letter of "one *of the Vice-Mayors of the City of St, Petersburg',* written in 2000.

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[103] The only answer which the Tribunal can give to itself is that, normally, In BOT Projects or BOOT Projects and PPPs, the upfront expenditures incurred by each one of the parties for the project's development, construction and start-up typically will only be recoverable after realizing the project, through future revenues during the confession period or contract term.

[104] Transcript 18oct11 page 76.

[105] Transcript 18oct11 pages 77 to SO.

[106] Transcript 18oct11 pages 81/82.

534. In the Further examination, the following dialogue ensued:
"Mr Sax : What is relevant is that as a practical matter everybody knew everything. And I am not going to say that in 1995 there was a signed agreement which I cannot put my hands on that said the Russians are going to agree to reimburse us $ 20 million out of loan proceeds, and I can't say it for two reasons. Reason number one is in 1995 nobody knew, including Cad, that it was going to cost us $ 20 million- We were laying out all expenses that wore required from tima to time, whatever that amount would be. Number two, we were operating on the same basis that the EBRD operates, which is: you reach an agreement; you then negotiate all the various terms and conditions of the various agreements (which everybody did); and then you have Financial Closing and at Financial Closing everybody everything is memorialised in writing And everything would have been memorialized in writing but for two facts, 1. The Russians didn't have the money for the access roads, utilities and apron; and, 2. The 1998 financial crisis occurred and traffic was destroyed.

The Chairman : Now, look, Carl, I have, of course, great admiration for all the energy and devotion you did put into this project I think it's absolutely extraordinary - extraordinary entrepreneur, what you tried to achieve and what you put in motion to make this project fly and become a success. We see that in our files. We see hundreds of pages of draft agreements very sophisticated agreements. So I must confess, I am deeply impressed by the energy and devotion you put into it. I also can correctly say you said you are not stupid. You are smart, you also said. The only thing which Is missing Is clarity in respect of the terms on which you or Strategic Partners Intended to operate and make this project fly. The most logical, the most obvious, matter of clarity which is missing, in my view, looking at it ex post, 15 years later, is clarity of the relationship and your position as the moving force, as the developer, that the expenditures you incurred, the disbursements you incurred, would ultimately be charged somehow to the project, including the Russian Parties. I am still puzzled and I am still crying out for a good or better understanding Why is it nut in the Founders' Agreement or in some documents that you make an estimate of the disbursements which you calculate, estimate, will have to be incurred so as to come up with the financing commitment of EBRD, DMG or others? All of the documents, the studies you put together. it seems to me why was that not openly discussed at the time in 1995/96/97; coming to and saying: Look here, 1 incurred X, Y, Z and it has to be reimbursed. Why do I not see a dear-cut agreement on all these papers; an agreement that your expenditures of 19,7 million, whatever the figure was, will be put into the EBRD financing and will he repayable by the parties, including the Russian Parties? This for me is still something I really fall to understand. I cry out for a good answer." [107]

535. Further in the examination, the Chairman - insisting on the Issue - asked:
"The Chairman:.. I verily believe that the Russian Parties were quite aware that significant disbursements are being made. Maybe they were still surprised to see that in the end you are charging your own salary into the EBRD, etc., and your office expenditures; this might have been raising a little bit more question marks, but basically I have no problem to accept most probably by a likelihood of things that the Russian Parties knew that significant expenditures were incurred by you. What I don't see is a clear agreement of the Russian Parties that they will be reimbursed. This is what I don't see." [108]

536. Mr Sax did not directly answer the question, but prior to that question, he made the following

[107] Transcript 18oct11 pages 85-88.
[108] Transcript 18oct11 pages 90/91.

statement:
" Mr Sax: I cannot say It in any other way hut the following one. in 1995, at the time the Founders' Agreement was signed, everyone understood that we were going to pay for the expenses required to obtain the financing and be reimbursed. Otherwise It would have been a gift. And J don't know how to say it, but there Is no logical reason to make a gift for the deal. And it's not a buy-in price, it's not on option price; there was no reference to it anywhere that it could be - it just isn't." [109]

537. Regarding the alleged incurring of the pre-development expenditures for and on behalf of IAT Pulkovo, the following dialogue ensued:
" The Chairman : Now, look, Mr Sax, in your statements you every time strongly emphasize you or SP incurred these expenditures Tor and on behalf of the company. Actually, I will leave it to the examination by Respondents' counsel but, as far as) know the file, there is nowhere a corporate resolution which 'would empower SP and/or yourself personally to act for and on behalf of IAT Pulkovo and to incur expenditures; in the opposite, there are some provisions that require double signature for any expenditure beyond US$ 10,000 or something of that nature. So is my thinking that you incurred these things on behalf of SP anti probably on behalf of yourself rather than on behalf of IAT Pulkovo correct? What would you say?

Mr Sax: Dr Blessing, first, there Is no logical reason for, let's call it SP/PSP, to incur expenses on its behalf without knowing that it is going to be reimbursed as soon as it meets the pre-conditions. Why? Because what else is there? It's not an option price and it's not a gift; the only thing it could possibly be is a reimbursable expenditure. Again, I hate to say that in my experience as a lawyer the best agreement is a handshake between two parties, when the parties are still friendly.

The Chairman: And the second best?

Mr Sax : Well, that's the only best. When you have an agreement and that agreement is breached, then you have everybody saying "you should have written this piece of paper', you should have had that resolution", "you should have had the other resolutions." And this is the situation when you are dealing, in the early 90s, with the conversion of communism to capitalism (and we used to say red to pink). And the situation was more relationship oriented as opposed to documentation oriented. If you were around in Russia in the early 90s you know that the typical Russian agreement was a couple of pages long, if that; and the typical American lawyer couldn't handle looking at it because It was so short it didn't say anything. It was what the Aussies would call Heads of Agreement, The situation was very simple We had an agreement The deal would have closed but for the fact that Sobchak lost the ejection to Yakovlev, and it was unexpected; and that the financial crisis stopped us figuring out a solution to the problem. That's it. There would not have been a problem. Wo would have funded it; PSP/SP would have been reimbursed expenses; SEP would have been reimbursed their expenses; the terminal would have been up by now; the financing would have been paid off by 2010 or 2011 and everybody would have made a lot of money, That's just the way it is. And it would have been nice today if I could take out a piece of paper that was signed by the Board of Directors that says. We agree to reimburse PSP 19,772,000. Yes it would, except for two facts: 1, I don't happen to recall it; and, 2. I don't have lATP's records. If I had IAT P's records maybe I could point to something, but I don't and I can't." [110]

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[109] Transcript 18oct11 page 68.
[110] Transcript 18oct11 pages 92-94.

538. The questions were followed up by Respondents counsel Mr Josh Wong:
Mr Wong:... Dr Glassing has already asked many of the questions that we wished to ask as well, We don't propose to repeat those, so that should eave time. The first issue, just touching on some of the points that have already been in discussion, Mr Sax, is you said you are a sophisticated lawyer, but yet you still say that you prefer to do things by handshake. Now that leaves you in a difficult position today when you are trying to make your claim, because in reference to the expenses you are saying things like "It couldn't have been a gift; it's obvious": but things, are not obvious if they are not written down. So what surprises me, Mr Sax, is just a lack of any documentation to support your core claims in respect of expenses, in respect of predevelopment advances, whan you yourself know, as a lawyer - and people around this table, as I am sure your side, almost all are lawyers - you get something down if it has been agreed. My submission, which I will make to the Tribunal at the end, is the fact that it is not written down really suggests that it had not been agreed how do you respond to that?" [111]

539. Mr Sax answered that all relevant documents were intended to be signed at the financial closing, and that everything had been on the table; further he said:
" Mr Sax: There is nowhere a document that says Carl, fay out ail this money for free. You are not going to get it back; It's a gift. The Russians never have to pay It back if you have satisfied the pre-conditions. You just keep laying It Out for ever and ever and ever and ever, I don't see it says it anywhere like that, because it doesn't. And if we should have, as a sophisticated lawyer, gotten the Russians to write off, to sign off, on every expenditure, then what can I say? But that's not the way a developer does business today, be it in New York or Italy or in Sweden anything is possible."

Mr Wong : Be that as it may, I think we have all agreed that there isn't anything in the Founders' Agreements or the Charter (which you described as the Investment Contract) which entities you to pre-development advances or the development fee. The documents which you referred to are all documentation which depend on your side, arid there's nothing which comes close to what we can call an agreement."

Mr Sax : (after referring to the reference in the Founders' Agreement to a development agreement to be concluded): "... And it Is a term of art, a "development agreement" is a term of art, used in any transaction where there is a developer, be it a party who is a developer, a third-party developer. And every development agreement, as evidenced by the Coopers & Lybrand's valuation study, refers to reimbursement for expenses, plus interest, plus a development fee. So therefore that agreement by name is Included, And 1 challenge you to tell me what else could be in that agreement besides three things: the obligation of the developer to the company during the development period, the reimbursement: or the developer for his expenses during the development period; and, the payment of fees or expanses or a combination of both during the development and construction period. Otherwise what is the purpose for the agreement? To give the Russians a gift? Why don't we can it an agreement to give a gift'" [112]

540. Mr Sax then made his point dear, in the sense that the reference, in the Founders' Agreement, to the Parties' intention that they shall agree on and execute a development agreement would signify and equate at the same time that the Parties will agree on the reimbursement of the predevelopment

[111] Transcript 18oct11 page 96.
[112] Transcript 18oct11 pages 99-101.

expenses and the payment of a developer fee, See hereto the following dialogue:

541. On Mr Wong's observation that there exists no clause in the Founders' Agreement or the Charter or the Investment Contract which provides for a reimbursement of the pre-development expenses, Mr Sax replied:
" Mr Wong :... The point you are making is it was agreed that you would be reimbursed for those (sc: referring to advance funds, costs and expenses incurred). We have; I think, agreed that there isn't any clause in the Fourniers' Agreement or the charter which supports that

"Mr Sax : No, we haven't agreed to that fact. Because I have said previously that the agreement to execute a development agreement was evidence of the fact of pre-development expense reimbursements and a developer fee reimbursement. Because the general commercially-accepted definition of a development agreement has three or four things in it:

(1) Obligations, I'm going to develop the project, whatever it is.

(2) I'm going to pet reimbursed.

(3) I'm going to get a development fee, and:

(4) If you don't like me, fire me -- or you can't fire me,' [113]

542. Mr Wong, further insisting that Mr Sax should show In the relevant documents a clause reflecting an agreement that pre-development expenses shall be reimbursed, Mr Sax answered:
"Mr Sax : The situation is very simple. I consider myself an experienced developer. If you would like to bring in a developer with the experience that I have as an expert witness and say what else would he in the development agreement, be my guest Otherwise I say to you that everyone understood, including and starting with PriceWaterhouseCoopers, what would be in the Development Agreement. I make no claim that we expected $ 20 million to be spent at the time, because we didn't. Okay? However, we did expect it to he reimbursed and everyone understood it would be reimbursed because it wasn't to be a gift. [114]

543. further examination, Mr Wong confronted Mr Sax with the written testimony of Mr Karpov who stated that
"Russian shareholders had never agreed to reimburse PSP's expenses incurred in implementing the Investment Project. According to the Founders' Agreement, all project implementation expenses should be borne by each party on its own." [115]

544. Mr Sax answered that his case Is that IAT Pulkovo agreed to reimburse PSP,
"... and would have done so but for the breach by the Russian Parties.... The Russian Parties should reimburse because they breached. Otherwise IAT Pulkovo would have been the reimbursing agent through loan proceeds..." [116]

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[113] Transcript 18oct11 page 117.
[114] Transcript 18oct11 pages 118/119.
[115] Transcript 18oct11 pages 122/123.

545. Questioned further on Mr Sax's authority to act in the name and for and on behalf of EAT Pulkovo, the extract of the resolution CX-15 and CX-15 were examined; CX-14 provides for an authority to negotiate of Mr Boris G, Demchenko as Chairman of the Board and Mr Carl A. Sax as Vice-chairman of the Board, for documents to be counter-signed by both of them. Mr Sax commented that Mr Demchenko "*never accompanied"* him to meetings For the purpose of negotiating documents [117]

546. Nevertheless, Mr Wong certainly correctly summarized the point by saying that no document or agreement could be finalized without the Russian side *"being involved, or at least signing off on it".* [118]

(c) The Tribunal's Observations

547. What should the Tribunal conclude from these examinations?

548. On the basis of Mr Sax' statement, it is in the Tribunal's appreciation of the evidence, very clear
• that the Russian Parties had never - with any requisite degree of clarity, if at all - been appraised of the magnitude of the pre-development expenditures incurred or intended to be incurred by the Foreign Parties;

• that these expenditures were in fact incurred by the Foreign Parties on their own initiative and

• were incurred without any prior approvals evidenced in any proper form as per the requirements in the Founders' Agreement and the Charter, and

• there is no evidence in any recognizable form - apart from vague unilateral allegations made by Mr Sax - that any of such expenditures were ever accepted by Respondents of IAT Pulkovo as reimbursable expenditures, whether orally, or in writing,

• nor could a reimbursement be inferred by way of implication,

• nor is there the slightest evidence that the Russian Parties had agreed that such expenditures whether in full or in part - would ultimately be charged to the project via the EBRD financing.

549. With the above summarized reflection in respect of the evidence, it is more than obvious that the entire pre-development reimbursement claim must fail.

550. The Tribunal will odd further aspects in this context:

551. **First:** There is no basis for a reimbursement of any of the Parties expenditures in the Protocol of Agreement.

552. **Second:** There is no such basis in the Founders' Agreement and /or the Charter; on the contrary, Section 6.3 regarding incorporation expenses, and Section 8.4 of the Founders' Agreement referred

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[116] Transcript 18oct11 page 123.
[117] Transcript l&octll page 132, line 23/24; see also at page 137 line 14.
[118] *Transcript 18oct11 page 133, line 6,*

to above both speak against the recoverability of costs incurred by a Party.

553. **Third:** Already when entering Into the Founders' Agreement, SPS/SP respectively Claimant - according to the Forbes Expert Report, CWS-9, had incurred quite substantial sums as development expenditures. Assuming that such amount realty had been spent, the Tribunal received no answer why - in negotiations with the Russian Parties - this aspect had not been clearly voiced by Claimant (or his predecessors), drawing their attention thereto, followed by discussion with a view towards finding an agreement as to the reimburseability of such expenditures (for instance in the case that the Project should not proceed for a reason or failure attributable to either the Foreign Parties or the Russian Parties).

554. **Fourth:** After the signing of the Founders' Agreement, further significant expenditures were incurred by the Foreign Parties, allegedly tin behalf of IAT Pulkovo, with Mr Sax purporting to act on behalf of IAT Pulkovo, when - on the other hand -

• no evidence was shown in these proceedings that <u>any</u> of the incurred expenditures had first been discussed,

• no evidence was shown m these proceedings that any or them were approved by the Russian Parties,

• no evidence was shown in these proceedings that Mr Sax had complied with the strict requirements as per the Founders' Agreement, requiring Board approvals and double signature from Mr Demchenko; on the contrary, there (5 evidence that he did not, and

• incidentally, it may be remarked in passing that no actual and legally satisfactory evidence in respect of <u>any</u> of the items of the alleged disbursements had been submitted in these proceedings so far [119] and lastly

• no evidence was shown in these proceedings that there had been any sort of an agreement that such costs should he reimbursed, other then, in case the Project comes to fruition, through the future earnings during the tenure of the PPP (which was supposed to be entered for an unlimited period of time).

555. **Fifth:** It is, therefore, a clear and indeed inevitable conclusion that, in case of a failure of the Project, those costs/expenditures remained nonreimbursable, in any event hot reimbursable from IAT Pulkovo or from any of the Respondents.

556. Perhaps Claimant Mr Sax, from the very beginning, had his own "agenda" in this respect, by calculating that such expenditures could be packed Into the EBRD financing commitment; yet, if so,

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[119] Of course it is true that the Tribunal ordered a bifurcation of the proceedings such that evidence as to *quantum* would only have to be submitted in a separate *quantum* phase, after the present liability phase.
However, this had not been so from the Inception of these proceedings, and Claimant could have served documentary evidence justifying the huge expense claim of $ 19.7 mio much earlier in these proceedings, for instance in support of his request for interim relief fin respect of which it had been made clear that a reasonable likelihood of success on the merits rs an aspect to be considered by the Tribunal); after all, Claimant as an experienced lawyer and advised by experienced counsel - must have known (or could not reasonably expect) that this Tribunal If It has to proceed to an examination of the *quantum* - would simply accept the PriceWaterhouseCoopers Report referred to In the ASA Report, and that - for this Tribunal to assess *quantum,* the detailed back-up documentation would have to be analysed. If need be thousands of detailed documents -- to the extent that these still exist.

such intention would have had to be made transparent to the Russian Parties up-front as a matter of the most basic notions of proper behavior and good faith in a partnership-situation - a requirement which is so obvious that no legal authority would have to be researched for backing up this clear statement.

557. Likewise, arty other "agenda" for a recovery-claim would also have had to be voiced against the background of the clear waiver-provision in Section 8.4. of the Founders' Agreement, which likewise is so clear that it needs no Interpretation; the provision simply must be applied, otherwise one would abolish the notion that Parties may hove confidence that clear words mean what they plainly say.

558. **Sixth:** Also after 1999, Mr Sax continued to incur expenditures, which he then occasionally mentioned to the Russian Parties in passing, but without in any way inspiring the understanding that he requires reimbursement. Mr Say confirmed this at the Hearings of 21 October 2011, by explaining that - had he addressed a claim for reimbursement - the Russian Parties would immediately have ceased any further cooperation (which Mr Sax in 1999 and beyond hoped to reactivate by several different proposals).

559. **Seventh:** Hence, not even In the years 1999 to 2007 did Mr Sax claim the reimbursement of pre development expenses incurred, since as he feared - this could have prompted counter-productive/ negative reactions, frustrating any future endeavors to reactivate the Project. This is an element to be taken into account when discussing the issue of the time bar for the claims submitted in this Arbitration In the further part of this Award.

560. **Eighth:** At the examination of Mr Sax on 18 October 2011, Mr Durkovic raised the question whether these expenses could alternatively be sought as **damages** *"for the breach of the Russian Parties"*[120] (Instead of claiming those expenditures on an alleged agreement as to then reimbursability).

561. Indeed, theoretically, this would seem to be possible; however, this would require the showing of a fault committed by the Russian Parties, in the sense of a violation of contractual obligations. Having reached the decision that the Russian Parties could not be blamed for not having accepted the EBRD financing proposal, and that they were indeed free to do so on the basis of the contractual documents, no violation of a contractual obligation could be affirmed, nor a liability in tort, nor a liability in the sense of *culpa in contrahendo.*

562. <u>The Tribunai's Summarized Short Answers to the Queshtions 13 - 27</u>

563. **Q 13**: Reimburseability of the Foreign Parties alleged pre-development expenditures could not be shown by Claimant.

564. **Q 14:** No such evidence was shown.

565. **Q 15:** The short answer is NO.

566. **Q 16:** No explanation whatsoever was given.

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[120] *Transcript 18oct11. pages 83/84.*

567. **Q 17:** No evidence at all

568. **Q 18:** The answer is NO.

569. **Q 19:** The Parties were not made aware of any of these Items.

570. **Q 20**: There was no explanation given, absent from Mr Sax' statement that the Russian Parties could not have assumed that it was a gift.

571. **Q 21**: Not applicable.

572. **Q 22**: No.

573. **Q 23**: Ml Sax could only act on behalf of the Foreign Parties.

574. **Q 24**: There was no evidence as to a formally correct appointment (but this aspect did not bear weight tor the Tribunal's decision).

575. **Q 25**: No answer was given.

576. **Q 26**: Section 8.4 of the Founders-' Agreement is applicable as per its clear terms.

577. **Q 27**: It is the Tribunal's view that it was frat only inartful, but indeed inappropriate for the Foreign Parties to have EBRD pack a part of the Foreign Parties'/Claimant's pre-development expenses into the EBRD financing proposal, quasi through a "back-stage door", without a deal prior consent of the Russian Parties.

O Issue 4:

Claim for a 4.5% Developer Fee (Valued at US$ 18'000'000.–):

28 What is the legal/contractual basis for this claim?

29 How was it negotiated/agreed? Do we have a signed document?

I Claimant's Position

578. This claim, according to Claimant, fails under the heading of damages Incurred as a direct result of Respondents' breach of the Investment Contract. When Respondents appointed Northern Capital Gateway as the developer of the AIPT, they effectively precluded any other entity from developing the NIPT and, by extension, from collecting the development fee.

579. Regarding the negotiation of the developer fee, Mr Sax in APR to CM-84, pages 20/21, stated the

following:
"The Russian Parties and the Foreign Parties agreed although not in an executed written contract, as such - that PSP, as the developer, would receive a standard development fee to be paid at financial closing and/or during the course of the development itself. Evidence of this agreement is found in various documents prepared and/or approved by the **EBRD** and DMG. Further, it is found in u draft Development Agreement, which was approved by the Russian Parties, the EBRD and DMG and was to be fully executed at the time of financial closing. The earliest evidence of the parties' agreement is found in the Coopers & Lybrand (later PWC) Valuation Analysis (CX12), which analyzed independently the value of certain in-kind contributions to IATP, including those of the Russian Parties, Said Valuation Analysis concludes that the amount of the fee (4.5% of the total estimated development costs) was "within a reasonable range of development fees attributable to other Infrastructure projects of similar size." (CX-12, at p. 12), The valuation Analysis also contains an in-depth discussion, beginning on page 10, of the development process, development Tees and reimbursable predevelopment expenses in general."

580. At the Stockholm Hearings, Mr Sax emphasized the reference in Section 8.3 of the Founders' Agreement to the execution of a *"project development agreement between the Company and PSP"* as the contractual evidence that a development fee must be paid. [121]

II Respondents' Position

581. Respondents, throughout these proceedings, emphasized that there is no agreement whatsoever in place which appointed PSP or Claimant as the developer for the NIPT, and that the reference to a conclusion of a development agreement in Section 8.3 of the Founders' Agreement cannot be taken as a legally valid commitment to conclude such a contract on the terms as described by Mr Sax, lot alone for the payment of a developer fed to Mr Sax, whether at a percentage of 4 5% of the development costs, or otherwise. [122]

582. Mr Karpov confirms this in his Witness statement at para. 25:
"Russian shareholders of IAT Pulkovo never agreed to appoint PSP as a construction manager and pay them 4.5% of the cost of the development of the Terminal Under no circumstances could PSP manage the construction, therefore, the Founders' Agreement could not have contained and did not contain any provisions on the engagement of PSP as a construction manager and the payment to it of a remuneration."

III The Tribunal's Assessment and Decision

583. The Tribunal has already noted that there exists not one single document which would evidence the agreement, by IAT Pulkovo and/or the Russian Parties, to pay, or owe to pay, a developer fee to SPS or Mr Sax.

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[121] Transcript of 18oct11 page 117.

[122] Far details see 1-RM-2/2 RM-8, Statement of Defence paras. 316-347; R-PH-Brief paras. 173/174.

584. Compare hereto the dialogue at the Stockholm Hearings:
" Mr Wong: I am going to move to the pre-development fee next. Mr Sax, I am going io move oil to the 4.5% development fee I hesitate to ask you again, but, just to be sure, there isn't anywhere in the Founders' Agreement or in the Charter which entitles you to the 4.5 development fee, is there?

Mr Sax : It you would like me to be repetitious I will be more than happy to. The Founders' Agreement, whatever the number was, 8.3 or something, lists the term "development agreement". To me a development agreement has a number Of items, and In tills particular case it is a development fee; that's what a developer works for (omissis)

Mr Worg: Can I ask you to look at Mr Karpov's witness statement again, paragraph 25. The question asked by Mr Karpov was: Did Russian shareholders of IATP Pulkovo ever agree to appoint PSP as construction manager and pay it 4.5% of the Cost of construction of the Terminal? If yes, then why was not this provision incorporated Into the Founders' fee? Mr Karpov responds to this by stating, at paragraph 25: Russian shareholders of IAT Pulkovo never agreed to appoint PSP as a construction manager and pay thorn 4.5% of the cost of the development of the Terminal. That was never agreed. The official general contractor was appointed and only it could manage the construe-tion." [123]

585. Mr Sax replied that PSP was never retained as the construction manager, but as the project developer, and was to receive 4.5% of the development costs. [124]

586. Fact however remains that Claimant was unable to provide any kind of evidence that such a developer fee had been agreed to, whether based on development costs, or on any other basis or project-related costs.

587. Apart from that, it is the Tribunal's view that an acceptable financing proposal (resulting in a financial commitment) was an essential pre-condition for pursuing the Project, The failure to come up with a financing proposal/financing commitment in a form and substance which could be considered acceptable under the circumstances, was a deal-breaker, respectively a *conditio sine qua non* without which the Russian Parties were not obliged in any respect to undertake further Steps for implementing the project.

588. It is true that neither the Protocol of Agreement nor the Investment Contract specified the pre-conditional nature of the Foreign Rarties'/Sax' obligation in exactly these clear words. Yet, in fact, Section 3.4 of the Founders' Agreement goes even further, by allowing any party to withdraw itself from the Project by a simple written notice, and without incurring any financial obligations.

589. Yet, even absent the explicit provisions in Section 8.4 of the Founders' Agreement, the Tribunal would reach the identical conclusion regarding the pre-conditional character of submitting an acceptable financing proposal/financing commitment, for the following reasons:

590. Absent Section 8,4, the Arbitral Tribunal would have to interpret the Investment Contract according to the usual civil law-based contract-interpretation-rules. These typical civil law interpretation rules found their way into the Russian Civil Code, and are reflected in Article 431, which reads as follows:

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[123] Transcript 18oct11 pages 140/141.

[124] Transcript 18oct11 page 142.

Article 431 Russian Civil Code

In interpreting the conditions of the contract, the court shall take into consideration the literal meaning of the words and expressions contained in it The literal meaning of a condition of the contract, in case of its ambiguity, shall be established by means of comparison with other conditions and with the sense of the contract as a whole.

If the rules contained in paragraph one of the present article do net make it possible to determine the content of the contract, the common will of the parties shad be ascertained by taking into consideration the purpose of the contract in this case, all the surrounding circumstances shall be taken Into consideration, including negotiations and correspondence which preceded the contract, practice established in the mutual relations of the parties, business custom, and subsequent conduct of the parties.

591. According to Article 431.2, If a situation is not explicitly covered by the wording of a contract, all surrounding circumstances shall be taken Into consideration for assisting a tribunal to correctly interpret the contract, including the subsequent conduct of the Parties. Claimant's counsel, correctly so, have specifically referred to Article 431 Russian CC in CM-84 page 4.

592. Such further circumstances could e.g. be the pre-contractual discussions, earlier drafts of a contract (for instance earlier drafts of the Protocol of Agreement and the Founders' Agreement, their changes up to the signed wording), oral testimony of negotiations etc.

593. In the present case, no such surrounding evidence was made available, an aspect which the Tribunal mentioned specifically at the Stockholm Hearings, remarking that - In the present case - no such further interpretative guidance was given to the Tribunal.

594. Absent such further evidence assisting the Tribunal in its task to make a correct interpretation and to reach a correct understanding of the Parties' deal, civil law requires a court or tribunal to proceed to a hypothetical contract intarp rotation.

595. The hypothetical contract interpretation - for the present discussion -would essentially raise the following question:
Assuming that - just before signing the Investment Contract - one of the Parties raised the following question:

"But, what is the situation if the Foreign Parties, against our expectation, would not succeed in coming up with a financing commitment, or would provide a financing offer totally unacceptable to us - what then?

And if in such situation, we as the Russian Parties, would ourselves have to find financing, for instance front our own taxpayers; Would we still be bound to beam up with these Foreign Parties?

Would we still have to retain them as the developer paying them a percentage fee?

And would we still have to concede to them 29.7% of the future revenues from a successful operation of the New Passenger Terminal, even for many decades of its operation, although they did

not fulfill their primary obligation, i.e. to come up with a financing commitment?"

596. Putting the issue in this way makes the answer so obvious that It does not even have to be proposed or stated here.

597. Indeed significantly, in the present case, the Parties to the Investment Contract bargained for an explicit and practically unconditional exit clause, and this is the aforementioned Section 8.4 of the Founders' Agreement, a clause which most probably was drafted by the international law specialists mandated by the Foreign Parties, as this was stated in CM-84 para. 7.

598. With the above reflections, it is clear that the Foreign Parties - not having presented an acceptable financing proposal - entirely lost their further standing and eligibility as investors of the Investment Contract.

599. It is for this reason that the Tribunal already had to conclude that the Investment project became stillborn after 1998, and none of the Foreign Parties' endeavors to rescue Its life were blessed by any kind of success. Neither were the parameters for a financing commitment the subject of further discussions after 1998, nor was any green light given to the Foreign Parties to seek to obtain a now proposal, nor was there an explicit request made by the Russian Parties to the Foreign Parties to continue their efforts and to come up with new drafts of agreements.

600. Nevertheless, the Foreign Parties continued to establish such further drafts (presented in this Arbitration) which, however, to the extent they had been submitted to the Russian Parties, do not even seem to have prompted any further attention or interest by them.

601. It is the Tribunal's clear assessment and conclusion that the Foreign Parties, after 1998/beginning 1999, could no longer claim to be retained as the developer, let alone to become entitled to earn the potential benefits as 29.7% Shareholders of IAT Pulkovo. This is a clear and inevitable conclusion directly following from the pre-conditional nature attributed to the delivery of an acceptable financing commitment.

602. After having stated the above reflections, it is even superfluous to mention that there is nowhere a binding contractual agreement for mandating the Foreign Parties to become the developer for the planned International Passenger Terminal, and the merely "programmatic" reference thereto in Section 8.3 (c) of the Founders' Agreement is very far away from stepping up to the level of evidencing a contractually binding/enforceable commitment, since quite obviously the successful conclusion of the Project Development Agreement will still depend on the agreement of both sides as to the mutual tasks and the Foreign Parties' remuneration.

603. Hence, Section 8.3 of the Founders' Agreement would only provide a basis for a claim if, at least, all the *essentialia negotii* of such a Project Development Agreement had been agreed upon, and absent such terms, Section 8.3 can only be understood as a programmatic article Indicating the way forward for the Parties, coupled with a good faith obligation to follow that route.

604. <u>To sum up:</u>

Due to the pre-conditional nature of the submitting, by the Foreign Parties, or an acceptable financing proposal, resulting in an acceptable financing commitment, the Project became stillborn, latest as from the beginning of 1999.

605. No agreement is in place (neither explicit nor conclusive) of the Parties which would have bound the Russian Parties beyond 1999.

606. The provision in Section 3.3 of the Founders' Agreement to *"recognize the importance of the following agreements* **to** *the Company and cooperate with its efforts to enter Into each of the following.. (c) Project Development Agreement between the company and PSP"* does not os such give rise to particular contractual claims. And, most importantly, no agreement whatsoever, whether in writing or oral, has been reached at any time that a 4.5% devel **oper** fee would be payable to the Foreign Parties.

607. What is the effect of the above?
The effect is that in December 2002, when the Foreign Parties and Mr Sax entered into the Transfer Agreement (CX-66/CX-59), there was no valid or "claimable" contractual right to a developer fee which could be transferred to Mr Sax as the transferee.

608. In any event, the objections and defenses which were available to the Russian Parties to contest any and all claims, and all their objections available to the Russian Parties in the context of the non-fulfillment of the Foreign Parties' commitment to provide a financing commitment, remained of course available against Claimant as the transferee/assignee.

609. With this clear conclusion, Claimant's developer fee claim has to be dismissed in its entirety.

610. The Tribunal's Summarized Short Answers to the Questions 23 and 29

611. **Q 28:** There exists no contractual basis;

612. **Q 29:** There exists no evidence of a legally recognizable agreement.

P Issue 5:

Was the Termination of IAT Pulkovo Correct?

30 Was IAT Pulkovo properly administered even beyond 1998 and ultimately properly liquidated?

31 If not Would an incorrect administration or liquidation of IAT Pulkovo give rise to a justified claim of Claimant?

32 If so, for what kind of claims?

33 Is there a violation of international law? Was them an act akin to expropriation?

I Claimant's Position

613. Claimant maintains that the Investment Contract never lapsed or ceased to be effective; among other reasons, Russian law precludes either
• a "lapse" of a contract,

• a tacit abandonment, or

• a unilateral dissolution,

• except where so provided by contract or statute, and moreover:

• there had never been a rescission of contract complying with the requirements of Article 452.1 of the Russian Civil Code (which requires for a rescission to be conducted in the same form as the contract itself, he. by a written agreement of ad Parties. [125]

614. In Claimant's view, in short, the corporate administration of IAT Pulkovo by Respondents was incorrect, the non-issuance of share certificates was incorrect, and no correct winding-up has taken place.

615. As a result, Claimant asserts, an "*act of expropriation occurred at the moment IATP was illegally liquidated, in contravention of the Rules of Russian Law on Protection of Foreign Investments and Customary Rules of international Law on Prohibition of Expropriation of Foreign Investments.* "[126]

616. In support of Claimant's expropriation case. Professor Tai-Heng Cheng submitted his Expert Opinion on 22 April 2011 and provided an excellent end eloquent presentation of his assessment under the perspectives of Russian investment law and international law at the Stockholm Hearings of 20 October 2011. [127]

II Respondents' Position

617. Respondents reject any and all allegations made by Claimant, and - supported by a very elaborate opinion of Professor V.A. Belov - maintained that the liquidation of IAT Pulkovo was correctly performed.

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[125] CW-66 paras 16-10.

[126] *App CM-84 page 21.*

[127] C-WS-7 of 22 April 2011 and Transcript of 20oct11 pages 686-756.

III The Tribunal's Assessment and Decision

618. The Tribunal notes that the Parties argued the allegedly incorrect administration of IAT Pulkovo quite extensively in their written submissions and through expert opinions, However, these observations bear little weight, for a simple reason: IAT Pulkovo only hod to become activated once the Foreign Parties had met their primary obligation by putting an acceptable Financing commitment on the table.

619. Only if and when Claimant would have fulfilled properly such primary task would it have become of importance to fully install and ascertain the appropriate corporate management, administration and "house-keeping". The *dictum* "first things first" applies, and it has its legal connotation, for instance in Article 328 of the Russian CC cited above.

620. Apart from the above very general remarks, it must be said that the Tribunal is not convinced that the Russian Parties failed to honor their tasks; and If indeed there was a stowing down in respect of Respondents' cooperation after 31 December 1995, this would only seem to he understandable against the background that the Foreign Parties had failed to present the promised financial commitment within the deadline of 31 December 1995.

621. Furthermore, Claimant's allegation regarding Respondents' failure in respect of the construction of access roads and the financing of the apron, were contested by Respondents and, in essence, remained without proof. Yet, this aspect did not have to be explored any further in these proceedings, due to the Foreign Parties' failure to meet their primary' obligation.

622. For the same reason, Claimant's further complaints regarding an alleged failure to properly issue the share certificates in respect of IAT Pulkovo remain irrelevant. The Tribunal, however, notes that Respondents submitted substantiated legal comments rejecting any allegation of a shortcoming under the provisions of the Russian corporate law, and the Tribunal has in particular noted the detailed explanations provided by Professor V.A. Belov, It Is, however, not necessary for this Tribunal to explore these aspects in more detail, or to reach decisions thereon, since these matters are not directly relevant for the decisions to be made by the Tribunal.

623. In addition, Claimant throughout the proceedings argued that the liquidation of IAT Pulkovo was incorrect and, therefore, triggers Respondents' liability.

624. However, also this argument - whether correct or not - is of no avail to Claimant, since, practically speaking, there was no substance in IAT Pulkovo to be liquidated. In this context, the Tribunal was given to understand that IAT Pulkovo had not as yet been funded by the Parties through any meaningful cash injections or otherwise which would have given it a substance to be distributed to the shareholders as liquidation proceeds. This fact may also have been the reason that the shares of IAT Pulkovo had never been issued to its shareholders.

625. Hence, even If IAT Pulkovo disappeared from the surface without going through all the steps for the liquidation of a company which (in contrast to IAT Pulkovo) had had an active life, no tangible claim would possibly seem to arise for the Foreign Parties which could have been the subject matter of an assignment to Claimant on the basis of the transfer documents CX-66/CX-59.

626. And in any event, even if there had been some assets, such as for instance some office materials, desks, choirs or possibly some money on a bank ac count (if at all) such assets have not been in evidence in these proceedings and, If they existed, would be insignificant.

627. In any event, no evidence was provided that Claimant Mr Sax or the Foreign Parties have made any cash contribution to IAT Pulkovo, and if some assets, tangible materials, possibly office equipment etc, had been contributed, it would presumably have been provided by the Russian Parties.

628. A few comments need to be made on the topic of expropriation:

629. Beyond any doubt. Professor Cheng provided an excellent and succinct account of the basic notions oF international law which, most certainly, as such did apply to the Investment Contract alongside with the Russian law, and the Tribunal finds itself in full agreement with all the reflections and principles to which Professor Cheng has referred.

630. The only problem is that - in reality, and as discussed above - none of the parameters which would have to underlie the application of those notions of international law and notions on the prohibition of expropriation of a foreign investment are present in the Instant case. More precisely:
• Fact Is that the Foreign Parties/Claimant did not fulfill their primary obligation.

• Such failure is accountable for the fact that the Project did not proceed and became entirely stale towards the end of 1998/beginning of 1999.

• Thereafter, the Russian Parties could no longer be considered bound to work towards an implementation of the Project, and Indeed any such further implementation would have required the Parties to settle down new terms, for Instance providing that the Foreign Parties are given a second chance to endeavor to come up with a more acceptable financing proposal etc.; the Tribunal has expressed its view in this regard very clearly and it is not necessary to repeat its reflections in this respect.

• At the moment in time when the Foreign Parties and Mr Sax entered into the Transfer Agreement (CX-67/CX-59) in December 2002 no "living" investment project existed anymore; and the Foreign Parties - for reasons already explained in this Award - no longer had a valid claim to be and remain as the Investors for the development and construction of a new international Passenger Terminal at Pulkovo Airport.

• As far as the shareholding of the Foreign Parties In IAT Pulkovo is concerned, the <u>only</u> residual matter which, in December 2002, was not yet settled, is the formal liquidation or de-registration oF IAT Pulkovo.

• The latter, however, basically had no assets of any significance (apart possibly from some office equipment and the lease provided to it by Respondents), or possibly some grants or licenses provided by **Respon** dents on which the Foreign Parties hardly could have a claim in liquidation proceedings.

• In any event, the Tribunal was not made aware of any significant assets (such as e.g. bank accounts), to which the Foreign Parties or Claimant had made a contribution, and no particular substantiated claim in the framework of this Arbitration were alleged in these proceedings.

631. It would be inappropriate to argue that the present case has anything to do with an illegitimate expropriation of the Foreign Parties or of Claimant. In the opposite, it is the case of the Foreign Parties' failure to provide what they had firmly undertaken to provide.

632. For the above reason, the Tribunal sees no merits in any damage claim connected to an allegedly incorrect liquidation of IAT Pulkovo, let alone for an expropriation claim.

633. The above reflections, finally, bring the Arbitral Tribunal back to what the Parties themselves had expressly bargained for:
Namely to provision of Section 8.4 of the Founders' Agreement which had already been cited several times In this Award, and which so clearly reflects the Parties' bargain.

Section 8.4 of the Founders' Agreement operates in the sense of a full waiver of any of Claimant's claims, and there Is no legal way how this dear contractual hurdle could be removed or ignored.

634. The Tribunal's Summarized Short Answers to the Questions 30 to 33

635. **Q 30:** Pending the Foreign Parties' coming up with an acceptable financing proposal, a minimum of house-keeping seems to have been done for IAT Pulkovo, for instance regarding the formalization of corporate powers and administrated, non-issuance of shares and possibly other matters which di not have to be explored in detail.

636. **Q 31:** The Tribunal was given to understand that IAT Pulkovo had no assets of any significance which had been contributed by the Foreign Parties, and for which there could be a valid recovery-claim; and if IAT Pulkovo had some fixtures and possibly licenses In view of a future operation, these were provided by the Russian Parties, The Tribunal does not see any claim which Claimant could possibly derive from that, even if what was contested by Respondents - the liquidation of IAT Pulkovo had not been conducted in the most correct "text-book" fashion.

637. **Q 32**: None. Apart from the above, any claims were waived on the basis of Section 8.4 of the Founders' Agreement.

638. **Q 33**: Claimant, without any foundation, has invoked a violation of international law (or Russian law on Foreign Investments); the question however is moot since the Foreign Parties, after 1998/ beginning 1999, were no longer eligible to remain as the investors, after having failed to submit an acceptable financing commitment, and no unfair or inequitable treatment or expropriation in connection with the dissolution of the project-vehicle and/or the launching of the AITP in 2007 could be found.

Q Issue 6:

Are All Monetary Claims Barred by the Russian Statute of Limitations?

34 How can we understand Claimant's rationale for not submitting the predevelopment expense claim

forthwith or rattier promptly, as expenditures were being incurred, or In arty event immediately when the EBRD offer lapsed In 1998, if there had been an agreement that they are reimbursable?

35 Would it be unreasonable to flunk that Claimant, a very well experienced lawyer, must have been aware of the statute of limitation, and a 3 year statute arguably must have been familiar to him, since this is the statute of limitation according to many if not most US State- law legislations.

36 Regarding Claimants monetary claims: when did a violation of rights occur, falling under Article 200.1 CC?

37 Respectively, when could or should Claimant have presented his claims for pre-development expenses, under Article 200.2 CC?

38 Are some or fill of Claimant's monetary claims far pre-development expenses time-bared?

39 If not: on whet basis does Claimant have a valid claim in principle (subject io the analysis of the quantum in a final stage of this arbitration)?

40 And how to deal with interest (which may be more significant than the capital amount), interest rate, simple, compound (end compounding basis)?

I Claimant's Position

639. Claimant, throughout these proceedings, maintained that, prior to October 2007, he never had a reason to present his monetary claims for the reimbursement of very substantial pre-development expenditures, since only in October 2007 did it become dear that the Russian Parties were no longer minded to stand by the Investment Contract with the Foreign Parties, by choosing another party for developing and constructing an international passenger terminal, respectively the AITP.

640. Literally, Mr Sax stated In APP-CM-84 at page 22:
"The agreement was that the pre-development expenses would be reimbursed at financial dosing - although neither IATP nor the Russian Parties were obligated to accept the financing terms to which the EBRD and DMG had committed before the anticipated mld-1998 financial closing. Indeed, after the 1998 Financial Crisis, the Parties attempted diligently to restructure the financing and development arrangements. Those efforts, albeit unsuccessful, culminated after the Presidential Administration provided Claimant with assurances that the Investment Contract remained in full force and effect, that further development of the NIPT would commence as soon as certain specified circumstances were present, and that Claimant's position was secured by virtue of the highest Russian courts' refusal to dissolve the NIPT ground lease. It was only after the stated circumstances materialized, and Claimant reinitiated communications with the City of St Petersburg, that he learned that Respondents intended to develop the NIPT without the Involvement of PSP/Claimant It was only at this point, that Claimant knew that there would be no financial closing to fund the reimbursement of the SP/PSP pre-development expenses."

641. Furthermore, Claimant stated that he may have understood that the statute of 3 years might apply.

However, under Russian law, the *dies a quo* (i.e. the day on which a statute of limitation starts to run) is the day an which a breach of contract occurred, and this happened on 2 October 2007, and not before. Thereafter, arbitral proceedings were initiated less than 4 months later, i.e. in January 2008.

642. In support of his legal arguments regarding the statute of limitations. Claimant fifed the Expert's Witness Statement of Professor Oxana Oleynik dated 21 April 2011 (C-WS-8). Professor Oleynik based her opinion on the application of Article 200.1 of the Russian Civil Code in support of her proposition and conclusion that the relevant statute of limitations only started to run as from the moment when Mr Sax knew or should have known about the violation of his rights.

643. Moreover, Professor Oleynik stated:
"As I understand, the Parties have repeatedly asserted that once financing commitments were obtained, their obligations as to development and subsequent commercial exploitation of the Terminal are not subject to any time-limit." [128]

644. Professor Oleynik's Opinion then deals with the situation that several viola tions had occurred, for instance in the framework of contracts which had to be performed in instalments, and she then reached the conclusion that none of several (smallish) breaches which occurred prior to October 2007 *"resulted in such a violation of the right on which Mr Sax predicates the present claim, to wit - none of the above violations have led to an unconditional deprivation of the right to take part in the development and commercial exportation of the Terminal."* Prior to the Decree of the President of the Russian Federation of 25 September 2007 No.1283 "*On transfer to the ownership of St. Petersburg Shares of the Joint Stock Company "Pulkovo"",* and the date closely linked to It, I.e. 2 October 2007, when Claimant was informed that the development of a new international passenger terminal would be realized without his participation."

645. As regards Claimant's interest claim, Mr Sax explained that the Russian Parties had approved an interest rate of 15.5% p.a.; see his statement in APP-CM-84 page 23:
"The Russian Parties **approved** an interest rate of 15.5% p.a., compounded annually. This interest rate Is first set out in the EBRD Operations Committee Final Approval. It is significant to note that, had financial dosing of the EBRD/DMG financing gone forward, DMG's subordinated financing would have accrued interest at a fixed rate of 17.5% per annum, compounded semiannually, which supports the notion that the approved interest rate of 15.5% for the riskier pre-development advances, was reasonable"

II Respondents' Position

646. Respondents reiterate that the Investment Project was finally terminated at the end of 1998 - first half of 1999, for Sack of a mutual agreement of the participants to the Project to EBRD's financing proposal. [129]

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[128] Opinion Professor Oleynik, CWS-8 page 2, end of 2nd paragraph. - The Tribunal notes that the source of this information remained unclear.

[129] 1-RM-32/2-RM-38, paras 183-208.

647. Implementation of the Investment Project without financing was impossible. Moreover, the obtaining financing was not enough for the further Implementation of the Investment Project; Since the Parties moreover had to come to a mutual agreement in respect of the details of further actions and terms of their cooperation in the implementation of the investment Project which, however, never occurred.

648. Respondents maintain that Claimant should have raised his claims at the end of 199B first half of 1999, as the first milestone date. With reference to para. 20 of Mr Karpov's witness statement, Respondents argued that *"beginning from the second half of 1999, IAT Pulkovo completely cessed all of its operations. Meetings of shareholders and those of the Board of Directors were not held, members to the Board of Directors were not elected, the sole executive body was not established. There was no money in the operating account of IAT Pulkovo."*

649. Alternatively, the claims should have been voiced at the beginning of 2000, when Claimant requested from other parties of the investment Project the reimbursement of his expenses due to the failure of the Investment Project.[130]

650. Reference was made to the witness statement of Mr Karpov, para. 24, who refers to a meeting between Mr Demchenko and Mr Carl A. Sax in St. Petersburg. At that meeting, Mr Sax noted that he had incurred substantial expenses on the assumption that they would be repaid during the Terminal's operation. Because of the failure of the investment Project, he (Mr Sax) had no possibility to get his expenses reimbursed through the profits from the Terminal's operation and, therefore, requested a reimbursement of his expenses from the other shareholders of IAT Pulkovo.

651. At that meeting, as Mr Karpov stated, Mr Demchenko referred Mr Sax to the agreement of the Parties, i.e. that the non-implementation of the Investment Project was the risk of each party and that losses which they might suffer In connection therewith could not ba shifted onto other parties, and each party would have to bear the losses itself, as clearly set out in Section 8.4 of the Founders' Agreement.

652. Respondents, therefore, argue that in any event Claimant, in the beginning of the year 2000, had to recognize that the Investment Project failed, that Respondents would not further proceed and that his claim for a reimbursement of pre-development expenses was rejected. Claimant, therefore, should have raised his claims at least in the beginning of the year 2000, as the <u>second</u> milestone point in time.

653. As a <u>third</u> milestone date, Respondents refer to 17 December 2002 when Claimant acquired from PSP under the Purchase Agreement the "Receivable" i.e. the right to claim pre-development expenses. PSP Itself, when executing the Share and Purchase Agreement relating to the IAT Pulkovo shares (CX-66, CX-59) thereby terminated its participation In the Investment Project; however, Claimant as a new participant had never been approved as a new investor.

654. Respondents also noted that the assignment of the "Receivable" against IAT Pulkovo In December 2002 had not been notified, neither to IAT Pulkovo nor to the other shareholders.

655. As a <u>fourth</u> milestone date, Respondents refer to Mr Karpov's written notification of 16 April 2003

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[130] 1-RM-32/2-RM-38, paras. 268-337.

(CX-69) which notification *"obviously should have triggered the Claimant's claims to the Respondents if he deemed that termination of the Investment Project infringes his rights."* (1 RM-32/ 2-RM-38, para. 283).

656. Based on the foregoing, Respondents conclude that any and all claims are time-barred, by application of the three year statute of limitations as per Article 196 of the Russian CC.

657. In any event, due to Claimant's failure to obtain an acceptable financing, Respondents were entitled to unilaterally repudiate the Founders' Agreement. Such right, Respondents maintained, is based on the *exceptio non (rite) adimpleti contractus* - defense as per Article 328.2, and by Article 405.2 of the Russian CC. These Articles provide for the right of unilateral out- of-court repudiation based on two interrelated grounds: in case of failure or delay of a party to perform its obligations, and in case of a loss of interest by the other party due to such delay. [131]

658. Respondents also refer to Section 8.4 of the Founders' Agreement which provides that the Investment Project and the Founders' Agreement may be terminated in case financing is not obtained, by serving a written notice by any of the participants to other participants of the Project. Such notice. Respondents allege, was given by Mr Karpov in his letter to Mr Sax of 16 April 2003. [132]

659. Respondents expert, Professor Belov, concludes in respect of the moment in time of the termination that the Founders' Agreement was terminated when Claimant had to recognize tacit actions of the Respondents on a unilateral repudiation of the Founders' Agreement and termination of the investment Project. Such actions - in his view - took place at the end of 1998 or first half of 1999. [133] However, according to Professor Belov, even if the Tribunal should consider that the unilateral repudiation did not already occur 1998/1999, it in any event occurred on 16 April 2003, based on Mr Karpov's letter of 16 April 2003.

660. In the legal analysis, regarding the starting-point: of the running of the time-period of limitation *(dies a quo),* Respondents not only refer to Article 200.1 of the Russian Civil Code, but particularly to Article 200.2 second sentence which reads as follows:

"Fur obligation for which the time-period of performance is not defined or is defined as the time or demand, the running of the limitation of action starts from the time when the right to make a demand for performance of the obligation arises for the creditor and, if the debtor is given a grace period for the performance of such demand, then the calculation of the limitation of actions starts at the end of this time-period

661. Respondents maintain that all of Claimant's claims (reimbursement of alleged pre-development expenses, the payment of a development fee and the compensation for loss of profits) fall into the category of obligations whose period of performance is not determined, such that the statute starts to run as from the moment in time when Claimant had *"the right to make a demand for performance".*

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[131] 1-RM-32/2-RM -38, para. 191 and 110/111, and Opinion of Professor Belov referring to questions 1.2 and 1.3.

[132] CX-69, 1-RM-32/2-RM-38 para. 196 and paras. 136-150.

[133] Opinion Professor Belov referring to questions 1.7/1.8.

662. Under Article 393 of the Russian Civil Code, the obligation to reimburse losses (actual damages and lost profits) arises when the debtor fails to perform or stops performing its obligations.

663. In the present case, Respondents stopped performing their alleged obligations under the Founders' Agreement at the end of 1998 first half of 1999.

664. Thus, Respondents conclude, the Claimant's right to present a demand for reimbursement of losses arose at the end of 1998 - first half of 1999. From that time, the three year statute of limitations started to run. In support of this conclusion, Respondents refer to the Expert Opinion of Professor Butler and his answers to questions 6 and 7.

665. However, evert if the Tribunal would determine that toe *dies a quo* was triggered at the second, third or fourth milestone date (as above referred to), the claims would clearly be time-barred.

666. In respect of the further issues of issue 7, Respondents deny that any of the claims could validly be directed against the Respondents, but in fact should have been directed against IAT Pulkovo. Any of Claimant's alleged losses should be recovered from IAT Pulkovo and not from Its shareholders, in particular the Respondents. [134]

667. In 2008, IAT Pulkovo was struck from the state register of legal entities and in fact ceased to exist. [135]

668. Under the Russian Federal Law on Joint Stock Companies, Article 56.3 and Article 2.1, shareholders are not liable for obligations of a joint stock company, and their liability in connection with the activity at the company are limited to the value of shares belonging to them. A subsidiary liability of the shareholders for obligations of IAT Pulkovo is excluded, as specifically provided for under Section 4.3 of the Founders' Agreement.

669. As a final point, Respondents also note that Claimant filed his claims on the basis of an alleged joint responsibility of the Respondents whereas, as Respondents point out, the Founders' Agreement does not establish or provide for a joint responsibility of the Parties to the Investment Project, As a consequence, Claimant would have to determine how the liability of the Respondents would have to be split between GUP Pulkovo and the City of St. Petersburg (or Respondents 1-5) and would have to specify the alleged responsibility and fault causing the failure of the Investment Project. [136]

670. Finally, Respondents also refer to Section 6.3 of the Founders' Agreement regarding expenditures which provided that each party agrees to pay its own expenditures related to the company formation where such expenditures have been incurred prior to the company's registration.

671. Under a different line of arguments, Respondents extensively argued - particularly at the December 2010 Hearings - that the Alternative Terminal is a different investment project, different from the NIPT, and that Claimant can not raise any claims in respect thereof. [137]

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[134] 1-RM-32/2-RM 38, paras. 305-331, and the Butler Opinion relating to Question 3.

[135] Rejoinder paras, 351-356.

[136] 1-RM-32/2-RM-30 para. 328 and Rejoinder paras. 412-425,

[137] 1-RM-32/2-RM-38, paras. 338-352, and presentations at the December 2010 Hearings in Zurich.

III The Tribunal's Assessment and Decision

672. In the previous Parts of this Award, the Tribunal already had to reach the conclusion that - absent a contractual basis for claiming the reimbursement of pre-development costs - all monetary claims submitted in this Arbitration under the heading "Pre-Development Costs" and a "4.5% developer fee" have to be denied. Hence, the extensively debated matter of the statute of limitations, for all intents and purposes, has become moot.
Nevertheless, in the following few paragraphs and *obiter dictum,* the Tribunal will provide its legal assessment.

673. It is Claimant's case that pre-development costs amounting to millions of US Dollars had to be incurred in connection with the endeavor to obtain a financing commitment and, apparently, significant costs started to be incurred already in 1994. However, such costs were not claimed prior to Claimant's filing his Request for Arbitration In January 2008.

674. The delays in submitting such monetary claims, in particular for recovery of disbursements, is indeed difficult to understand, Very certainly, Claimant Mr Sax, a highly experienced lawyer and a highly *"sophisticated investor"* (as he described himself) [138], must have been aware of the running of a statute of limitations, and it must have been within his thinking that such statute, under Russian law, could be the same as in many US state laws, i.e. 3 years.

675. During these proceedings, Claimant has not provided convincing reasons why the Foreign Parties (and subsequently Claimant) never put those pre-development claims on the table, except for occasionally and in passing mentioning the high amount of disbursements which they had incurred.

676. Nevertheless, there are probably Some reflections which might give an answer;
• First, it is rather typical for this kind of investment (be it as a PPP, or BOT, or BOOT) that the foreign/ Western party provides the up-front financing for the Project (be It the financing for an industrial complex/production facilities in the private or public sector, or for infrastructure projects), whereby the up-front expenditures would be earned back during the term of the PPP (BOT or the BOOT) [139]; hence, such up-front costs are, rather typically, not charged to the corporate vehicle (in the present case IAT Pulkovo), which typically starts without assets apart from the paid-in share-capital and possibly contributions in kind. Nor are such expenditures charged to the other shareholders. The up-front expense of the foreign investor Is typically earned back through future profits derived from the operation of the project or facility, and in the present case the Charter provided for an unlimited term of operation in Chapter 1.4.

• The above (rather typical pattern) may indeed explain why the Foreign Parties and Claimant Mr Sax never (In the years 1994-199B) advised the Russian Parties and IAT Pulkovo of the pre-development costs as they were being incurred, and in fact never required a prior approval for incurring any such costs (which, if they were to be charged to IAT Pulkovo, would have had to be approved by a unanimous Board Resolution in respect to any amount exceeding USS 10'000).

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[138] Transcript 18oct11, pages 61 and 118.

[139] See hereto the chairman's comments in Transcript of 18oct11 pages 75/76.

• No evidence was put on file the Russian Parties had been advised that. in the end, such costs would In part be debited to IAT Pulkovo.

• However, possibly when the Foreign Parties and/or Mr Sax realized that the implementation of the Project (and thereby the recovery of pre-development expenditures) might be rather uncertain, the Foreign Parties submitted those pre-development expenses to EBRD, causing EBRD to reflect them as a part of the loan. [140]

• The fact is that the charging of the pre-development expenses via the EBRD loan had never been openly discussed up front and certainly had never been approved by the Russian Parties. in any event, Mr Sax did not claim that he had ever asked the Russian Parties to agree that such charge should come into the financing proposal, nor did he claim that particular expenditures bad ever been validly approved by the Russian Parties and/or by IAT Pulkovo.

• After 1999, i.e, at a time when the EBRD proposal was no longer on the table, the Foreign Parties tried to rescue or revitalize the Project and, as the Tribunal may assume, for commercial reasons (and for the reason not to burden or jeopardize such a "revitalization") the Foreign Parties and/or Mr Sax - who occasionally mentioned the huge predevelopment expenditures already incurred in some letters - never demanded a reimbursement.

• And even after the transfer/assignment of the "receivables" as per CX-66/CX-59 to Mr Sax personally, the pre-development expenditures were never claimed any time prior to January 2008.

677. The above paragraph tries to provide some understanding of business reasons which might have been in place and which resulted in the indeed surprising situation that very significant expenditures (whatever their amount might be) were not invoiced to either IAT Pulkovo and/or the Respondents for 10 or even more years.

678. Now turning to the issue of the statute of limitations: Article 200 of the Russian CC - in rather bad English translation - reads as follows:
<u>Article 200:The Start of the Proceeding of the Term of the Limitation of Action</u>

1. The proceeding of the term of the limitation of actions shall start from the day, when the person has teamed, or should have learned, about the violation of this right Exceptions to this rule Shall be established by the present Code and by the other laws.

2. By the obligations with h fixed term of execution, the proceeding of the term of the limitation of actions shall start after the expiry of the term of execution. By the obligations without a fixed term of execution, or by those, whose term of execution has been defined as that on demand, the proceeding of the term of the limitation of actions shall start from the moment, when the creditor's right to present the claim for the execution of the obligation arises, and if the debtor has been granted a privileged term for the execution of such a claim, the term of the limitation of actions

[140] It was not clarified, in these proceedings, whether such an intention of the Foreign Parties (i.e. to charge their pre-development expenses via the EBRD loan) had been the intention from the very beginning, or whether such intention only came up e,g. in 1996/1997. Likewise, it was not clarified whether and how EBRD was instructed in regard of the predevelopment expenditures; yet, It would seem rather unlikely that EBRD would put the Foreign Parties expenses Into its proposed loan package on its motion, or without the Foreign Parties approval.

shall be counted after the expiry of the said term.

3. By the regress obligations, the proceeding of the term of the limitation of actions shall start from the moment of execution of the basic obligation."

679. It is very clear for this Tribunal that the relevant provision in the present context Is Article 200.2 Russian CC, second sentence, and contrary to the opinion of Professor Oxana Oleynik referred to above - not Article 200.1 Russian CC. In fact, it remained unclear cm what kind of instruction Professor Oleynik rendered her opinion, since her instruction letter had not been disclosed by Claimant.

680. In other words, if the Tribunal had affirmed a monetary claim, and if Claimant's allegations as to the reimburseability of expenses were correct (since *"it could not be a gift"),* it is the Tribunal's view that

• the statute of limitations would not start to run from the day of a violation by Respondents,

• but would start to run as from the day when a claim for reimbursement of expenses arose, which basically would coincide with the day on which the Foreign Parties had to effectuate a payment to a provider of services, a consultant etc,

• *Eventualiter,* If the understanding had been that pre-development expenditures would only flow back after commencing a commercial operation of the Passenger Terminal, the *dies a quo* would have to be determined at the time when the Project became still-born, i.e. end of 1998/beginning of 1999.

However, the premise (underlying the above), i.e. the existence of an agreement between the Russian Parties and the Foreign Parties that predevelopment expenses are as such chargeable to either the Russian Parties or to IAT Pulkovo as the project-company (and should not simply be earned back through the dividends expected to flow during the tens of years of the operation of the Terminal which the Parties had in mind), has nowhere been established in these proceedings.

681. The most straightforward answer, therefore, is to conclude that the *dies a quo,* in the Tribunal's view, would have to be located in early 1999, i.e. at a moment in time the Foreign Parties must have realized that, realistically, the EBRD proposal was no longer on the table. It is from that latter moment that a diligent' creditor would have been required to either consider pursuing a claim or, alternatively to drop it.

682. And, conversely, it Is as from that moment in time that the 3 year period starts during which IAT Pulkovo and/or Respondents had to be aware of the risk to be confronted with a claim for the pre-development expenditures incurred by the Foreign Parties and/or Mr Sax. Anri after such lapse of time, IAT Pulkovo and the Respondents hod to be protected in their reliance that -due to the non-filing of reimbursement Claims - they will not any further be concerned with any such claims.

683. The above approach, as explained by the Tribunal, shows that the statute of limitation in fact is a concretization of the *bona fides* principle, i.e. the requirement of the Parties to act in good faith. The

principle had two sides of the coin:

• It does require from a creditor a certain minimum standard of diligence (he must properly raise a claim within a certain period, i.e. 3 years under Russian Law and numerous other national laws, including US laws), and

• on the other hand, after a certain lapse of time (3 years or whatever the statute is) grants a protection to the other party/debtor who deserves legal protection in his/its expectation that he/it will no longer have to be concerned with any claims originating from a remoter past.

684. The Tribunal has also noted that Respondents' alternatively pleaded to take the date of CX-66/CX-59, i.e, 17 December 2002 as the *dies a quo.* In this respect, the Tribunal would say that - if one were to apply the most generous viewpoint for setting the *dies a quo* - this approach would also be possible, yet with a significant stretch of leniency. Such leniency would be justified if for instance, through certain statements or behavior, the Russian Parties had repeatedly signalized that they are not only aware of the predevelopment expenses, but had also signalized to be favorably prepared to come up with a reimbursement. However, the present file is extremely slim in this regard and, in particular, there is not one single document which could reasonably have inspired the Foreign Parties' or Mr Sax's confidence that the Russian Parties and/or IAT Pulkovo in fact considered to reimburse approximately US$ 20 million pre-development expenditures incurred.

685. Nevertheless, even under the latter approach with a *dies a quo* starting some time in 2002, it would be very clear that the monetary claims, submitted as late as in January 2008 - were entirely time-barred.

686. Finally, the Tribunal must clearly discard Claimant's pleadings regarding the statute of limitations arguing that the *dies a quo* was only triggered In October 2007. There can be no merits to such position.

687. <u>To sum up:</u>

688. The Tribunal had to find that Claimant's monetary claims lack any contractual/legal basis and had to be rejected in their entirety.

689. However, even if the Tribunal had come to a different conclusion and had found that a certain amount was due to Mr Sax as reimbursement for predevelopment expenditures, or as damages, the Tribunal would have had to entirely reject any such claims as time-barred.

690. <u>The Tribunal's Summarized Short Answers to the Questions 34 to 40:</u>

691. **Q 34:** Claimant as witness gave to understand that a clear demand in the years 1999 and following addressed to the Russian Parties that they should effectuate the reimbursement of the pre-development expenses would have boon counter-productive. - However, it is obvious that such an argument does not improve Claimant's situation.

692. **Q 35:** The question was not asked at the Hearing, but a 3 year statute of limitation basically must

have been familiar to Claimant as a lawyer; apart from that, the dear legal provisions of the Russian CC must be taken as known by any investor or contract-party, let alone by a *"sophisticated investor";* and Claimant himself described himself as an experienced and sophisticated investor and lawyer. [141]

693. **Q 36:** It is the Tribunal's view that the Russian Parties did not violate any contractual rights of the Foreign Parties; in any event, such a violation has not been evidenced. Absent proper performance by the Foreign Parties, the Russian Parties were entitled to withhold their own further performance under the *exception* rule discussed above

694. **Q 37:** Claimant respectively the Foreign Parties should have raised the problem of the expenditures upfront during 1995 and 1997 and should have sought agreement on reimbursability in case the project would not proceed; however, no such agreement was ever discussed, let alone agreed. In any event, the Foreign Parties should have presented their accounting promptly upon incurring the costs and expenditures, at least in 1997.

695. In any event, the submission to IAT Pulkovo and/or Respondents of the predevelopment expenses should have taken place latest in 1999 so as to comply with an appropriate standard of diligence. The deferring of such submission of the accounting and claiming of an allegedly due reimbursement for opportunity reasons or business reasons - as they were explained by Mr Sax - does not wash away the standard of diligence which must be applied to any diligent creditor.

696. Claimant's argument that he only was prompted to claim such reimbursement after October 2007 is entirely unconvincing, and indeed meritless under Russian law and standards of due diligence.

697. **Q 38:** Yes, all of the pre-development expenses are time-barred under Article 200.2 second sentence of the Russian CC; the latest conceivable *dies a quo* for determining the 3-year period was the 17th December 2002 when the transfer Agreement CX-66/CX-59 was signed.

698. **Q 39:** The Tribunal found no single legal basis for any of Claimant's claims.

699. **Q 40:** The question of interest is moot.

R Issue 7:

Claimant's Investor Claim

Does Claimant Have a Valid Claim for His Re-lnstatement as a 29.7% -Investor For the Alternative Airport Terminal?

Or, Alternatively, Does Claimant Have a Valid Damage Claim, for the Claimed Amount of US$ 294'500'000.--, or for any Other Amount?

The Tribunal's Second Look at The Issue Concerning Claimant's *locus standi* for Being Reinstated as the

[141] Transcript of 18oct11, at page 61: *" Mr Sax : took, I consider myself a sophisticated investor and a sophisticated lawyer... "* Further, at page list *" Mr Sax : " I consider myself an experienced developer..."*

Investor for the Alternative International Passenger Terminal at Pulkovo Airport

The more precise questions for this Chapter P and the following Qs were as follows:

41 Does Claimant have standing on the basis of CX-66, far claiming that he should have been selected as the developer for the AT in 2007?

42 What was transferred/assigned to Claimant under CX-66, having regard to the (probably universal, but 2'000 year old Roman notion of) *"nemo plus luris transfere potest quam ipse habet"?*

43 The issue might not really be answered by English law (governing CX-66), but by Russian law, since the transfer/asssignment would have to deploy certain effects far IAT Pulkovo, Vlews/comments ?

44 On the same issue: what could be transferred as a stock-interest, having regard to the strict Transfer restrictions as per the Charter and the FA?

45 Re-thinking the Tribunal's earlier preliminary decision as per the 24th Order: Can Mr Sax stand "into the shoes" of the Initial Party?

Or was the Tribunal's ***intuitu personae*** reflection correct, in the sense that the participation in the project as an investor and developer Is not "in ter-changeable" nr transferable froth SPH/PSP to an individual (Mr Sax), even though at the time Mid-1990s Mr Sax might have been the driving force behind SPH/RSF?

46 Regarding Mr Sax' claim that, in 2007, he should have been elected as the developer/lnvestor for the Alternative Terminal;

• Is it of significance that - during the 1990s, SPH and Mr Sax were Apparently significantly engaged in numerous airport developments, end were active around the globe (as can be seen from Mr Sax first witness statement, CW5-1, identifying numerous airport development projects in which Strategic Partners were involved, such as in Moscow/Seremetjevo, Vietnam, Gibraltar, Senegal, the Philippines, Guatemala, Congo, Ecuador, Indonesia, Honduras, Pakistan, Armenia, Jamaica and Uruguay - none of which however materialized, see Transcript of 16 December 2011, p, 93),

• whereas there seems to be no further record of Mr Sax involvement since 1998 to data (but far Mr Sax to correct If this is wrong).

47 Why did Mr Sax not participate in the tender process for the Alternative Terminal?

48 How could Mr sax he have fulfilled the (very heavy) pre-qualification criteria?

49 Was Mr Sax aware that procurement laws In Russia changed?

Was ha entitled to expect that laws in Russia would not be changed, and would remain stabilized on the basis as they were in 1995?

And would a claim far exclusivity, as requested by Claimant, be contrary to Russian antitrust law?

I Claimant's Position

700. Claimant's investor claim, throughout these proceedings, stood out as B major pillar of his case. It is, very basically, his claim that - when the project to construct an international passenger terminal at Pulkovo Airport - was re-launched in 2007. the Russian Parties should have contracted with him (and/or his partners) and in fact were contractually and legally bound to do so.

701. Under Russian law, Claimant asserts, he is entitled to specific performance, and the employment of Northern Capital Gateway to become the developer of a new inter national passenger terminal triggered his investor claim.

702. During the present proceedings, Claimant has several times rephrased his request for specific performance and **after** the Tribunal's ruling on his request for interim relief and reinstatement as an investor - he amended his claim to a claim for monetary relief and/or damages. Claimant and Claimant's counsel submitted very extensive pleadings **on** the issue, supported by references to Articles 7 and 10 of the Russian Foreign Investment **Protec** tion Law, and by references to numerous decisions and arbitral awards.

703. In APP-CM-84, Claimant again stressed his experience, ability and qualifies tions for implementing the project respectively the AIPT, coupled with the claim to be afforded a *"full compensation commensurate to his restoration as the investor, ar an award of significant moral damages which satisfies the requirement for full compensation under Russian law."*

704. In respect of the question why he did not, in 2007, participate in the tender for the AIPT, Mr Sax stated that he would have waived his rights for damages and specific performance resulting from the breach of the Investment Contract by acquiescing to Respondents' claim that his lights had been extinguished, which is not the case.

705. In respect of changed procurement laws in Russia, Claimant argued procurement laws are not retroactive and that the investment protection laws include a grandfathering provision.

II Respondents' Position

706. Respondents' position was argued very extensively in these proceedings, initially with a main focus on the allegation that the 2007 AIPT-Project is a different project' - an *aliud,* for using the Roman law term - with little commonality to the NIPT-Project conceived in the middle 1990s, and testimonies on this subject were heard in the Zurich Hearings in December 2010.

707. In addition, Respondents developed their investment-law defense in extensive pleadings, in essence disputing Claimant's Investor claim (whether as a claim for specific performance, or for a purely monetary claim for damages). *Inter alia,* Respondents argued that

• Russian law prevails over customary international law;

• there is no breach of international law entitling the Claimant to his claims;

• the Founders' Agreement which was the agreement that basically described the Intentions of the Parties does not have a choice of law Clause similar to the one reflected in the Charter with Its reference to Russian law, treaties and principles of international law;

• neither did the Protocol of Agreement contain any reference to international law;

• general principles and norms of international law invoked by Claimant do not prevail over domestic statutes in case of conflict and can only apply on a subsidiary basis;

• apart from the above, there was no breach of international law by Respondents; they acted in good faith in the negotiations and the performance of the contracts, did not abuse any of Claimant's rights and have nowhere breached the standard of fair and equitable treatment in relations with the Claimant;

• nothing can be seen as constituting an act of expropriation, neither under international law nor under Russian law;

• this is not the case where a foreign investor's property had been seized or expropriated by the host government;

• the termination of IAT Pulkovo was made in compliance with the Russian legislation and was within the regulatory powers of the state, and since

• no direct or Indirect expropriation has taken place. [142]

708. Finally, Respondents argue that Claimant would have had the possibility to mitigate his losses by raising his claims much earlier, or by requiring from the Respondents' specific performance of their alleged obligations in 1999, or by attempting to settle the dispute with the Respondents, or by participating in the tendering process for the AIPT Project.

III The Tribunal's Assessment and Decision

709. The Tribunal was caused to reflect on the issues regarding the requested reinstatement of Claimant as an Investor a first time in the framework of the decision to be made on Claimant's request For interim relief.

710. In its determination of the issue, communicated by the Tribunal’s 24th Order of 8 February 2011, the Tribunal essentially reasoned that the position as such of a joint-venture partner (or partner to an investment project) Is an *ad personam* position, acquired *intuitu personae,* earned because of the individual attributes, capabilities etc. of each one of the partners - and, consequently, it cannot be transferred to someone else without the consent of all other partners.

711. This - Indeed most basic legal principle - -s probably recognized in all legal systems, since the Roman

[142] Rejoinder paras. 438-479; R-PH-Brief paras. 332-341.

times, mere as a matter of pure and basic common sense than as a matter of sophisticated legislation. The Tribunal's reflections, communicated with the 24th Order, are - in essence are reproduced In Chapter F above.

712. For the purpose of the present Award, no second thoughts had to he given to the Tribunal's statements as per the 24th Order: It is therefore Clear that the Claimant's *locus standi* in respect of any claim seeking his reinstatement as an investor - to the extent It was maintained by Claimant - must be denied, This also means that Claimant's requests are reduced to purely monetary claims.

713. The basis for such monetary claim is the same as the one applicable to the 4,5% developer claim, in the sense of an indirect damage claim. The legal construction could be the following:
(i) Because the shareholder-position of the Initial Foreign Parties as such could not be transferred to Claimant - as repeatedly discussed herein the Foreign Parties, remained as shareholders of IAT Pulkovo;

(ii) according to Claimant's case, they were expropriated in October 2007, and IAT Pulkovo seized to exist;

(ii) for such expropriation, the Foreign Parties could claim reinstatement and/or damages in the sense of loss of future profits which could be derived from the commercial exploitation of the AITP during an indefinite period of time

(iv) such reinstatement claim (or, alternatively, damage claim) would be commensurate to the 29.7% shareholding;

(v) and due to the transfer and assignment as per CX-67/CX-59, arguably, the Foreign Parties would have to surrender and disgorge all such benefits [143] - which would have flowed to the Foreign Parties but for their expropriation by the Russian Government - to Claimant;

and in that sense, Claimant could be seen as indirectly damaged party.

714. Claimant has not argued his case along the above lines, but for the Tribunal this would be the most logical and simple way to understand Claimant's monetized investor claim.

715. The question which therefore Is left on the table Is, whether or not such a monetized investor claim, in the sense as above described, or indeed any monetary claim advanced by the Claimant and not so far addressed in this Award, Could have merit.

716. For such "monetized investor claim" the Tribunal has to apply its analysis already extensively discussed In this Award - as to the Foreign Parties performance (respectively unsuccessful

[143] The construction would signify that the Foreign Parties - undo the Chartier and under Russian law - would have been allowed to - in advance - assign any and all benefits from a future investment, unlimited in time, to an assignee such as Mr Sax. This, obviously, is something entirely different from, for example, the assignment of an already declared dividend etc. Whether such a general transfer/ assigmerit of all economic interests by a shareholder of a Russian company to a third party like Mr Sax would at all be permissible under Russian law, may seem doubtful, and may remain as an interesting question. Intuitively, one would expect that such an assignment is potentially invalid, because in fact and reality such a far- reaching assignment by a shareholder to a creditor may totally remove the shareholders' interest to the Company, and might be seen as a circumvention of the transfer restriction as per the Charter and the Founders' Agreement, - For the purpose oF this Award, this legal aspect does not need to he explored any further, and the Tribunal simply discusses this Chapter of the Award on the hypothesis that indeed such assignment was somehow and to some extent possible.

performance) under the Investment Contract.

717. This clearly means chat
• due to the failure of the Foreign Parties to come up with an acceptable financing commitment, the primary obligation Incumbent on the Foreign Parties - and *conditio sine qua non* for the Foreign Parties participation in the exploitation of the Project - was not met;

• and due to this, the Project became stillborn towards the end of 1998/beginning of 1999, and never became revitalized thereafter on the basis of a renewed agreement, or through continued active cooperation of the Russian parties;

• with the consequence that, after 1999, the Foreign Parties - having failed in their promised performance - could no longer expect or claim to become the developer and/or investor in a subsequent project, or even in a re-launch of the initial project.

718. The Tribunal's Summarized Short Answers to the Questions 41 to 49:

719. **Q 41:** The answer is No.

720. **Q 42**: The *nemo plus juris transferre potest* - rule applies [144] : In December 2002, the Foreign Parties had already at least 3 years earlier lost any contractual expectation or claim to he considered as the future developer and/or 29,7% investor in a subsequent project for an International Passenger Terminal.

721. **Q 43**: Certainly, the ultimate and most Important test is under Russian law, not under English law.

722. **Q 44:** Only assignable monetary interests, but not the standing as a shareholder of IAT Pulkovo (the latter consisting of multifold corporate and contractual rights associated to the position as a shareholder).

723. **Q 45:** The *intuitu personae* principle is a universal most basic and Indeed axiomatic notion and applies wherever a relationship Is based on particular personal qualifications which are not exchangeable or Interchangeable (except with the consent of the Other parties).

724. **Q 46:** No answer needs to be given : but it might well be that Mr Sax had been one of the foremost developers for airport projects in the mid- 1990s, with numerous connections enabling him to put a powerful consortium together the question remains whether he was In the same position In 2007 (no representations were made by Mr Sax referring to recent projects in which be had been involved, but he affirmed that he would have been in the position to put a strong consortium together for developing and constructing the AIPT).

725. **Q 47:** He explained that this would have undermined his case claiming that he had never lost the entitlement under the Investment Contract (an argument which the Tribunal understands).

726. **Q 48:** probably a consortium assembled by him could have met the requirements.

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[144] The rule means that re-one can transfer more rights than he himself has.

727. **Q 49:** According to Claimant, the new Russian legislation on procurement and competition has no retro-active effect; however, the issue remains irrelevant, duo to the Tribunal's conclusions.

S Overall Summary of the Tribunal's Assessments and Conclusions Regarding Liability

I Regarding the Pre-Development Advance Claim in the amount of US$ 146'400'000.--:

728. Claimant has standing (*locus standi)* to bring such claim on the basis of the Purchase Agreemcnt/Bill of Sale dated 17 December 2002 (CX 66 and CX 59), and the Tribunal has jurisdiction to decide the claim.

729. However, on the merits, the Tribunal found that there exists/existed no agreement, neither written, oral or by way of implication, between Claimant or his predecessors SRS/SP (respectively the Foreign Parties) and IAT Pulkovo or its other stock-holders (respectively Respondents 1-5) for recovering any of the alleged and claimed pre-development expenses.

730. Claimant's repeated oral affirmations at the Stockholm Hearings in the sense "... *it could not be a gift!"* does not translate into a contractual obligation.

731. Any liability of Respondents, therefore, has to be denied in its entirety.

732. Moreover, even if the reimbursabillty in principle would have had to be answered otherwise, i.e. positively, any and all claims would have had to be declared time-barred in accordance with Article 200.2 second sentence of the Russian CC, and consequently any such claims would have had to be rejected also under this defense.

733. The entire pre-development expense claim, therefore, has to be denied.

II Regarding the 4,5% Developer Fee, Claimed in the Amount of US$ 18'800'000.--:

734. Claimant has standing *(locus standi)* to bring such claim on the basis of the Purchase Agreement/Bill of Sale dated 17 December 2002 (CX-66 and CX-59), as far as this claim could be understood in the sense that the initial Foreign Parties - if and when retained as developers for the NIPT - would Have bean required, pursuant to CX-66/CX-59, to assign such developer fee to Claimant Mr Sax.

735. However, during the present proceedings it has been shown that there exists no acknowledgment (let alone any kind of a valid agreement, be it in writing, oral or otherwise such as by implication or conclusive conduct) that such a developer fee would indeed be owed, or would be due to be paid,

by IAT Pulkovo or its other stock-holders (respectively Respondents 1-5) to SPS/SP respectively the Foreign Parties, or Claimant personally; a sufficient contractual and/or legal foundation for such claim has not been demonstrated, whether as to the principle of such a claim, or its quantification (i.e. the claimed 4.5 percentage).

736. Even if such a developer fee had somehow been on the discussion fable (of which the Tribunal, however, has seen no evidence), the Tribunal finds that SPS/SP (or allegedly Claimant Mr Sax personally) did not *"earn the ticket"* to be accepted/chosen as the developer for the project, be it in 1998 or any time thereafter, or In 2007 and beyond.

737. This latter conclusion has to do with the non-conformity of the EBRD financing offer with the parameters of the Investment Contract. Such conformity has to he qualified as a *conditio sine qua non* (a condition precedent) for the further implementation of the Project and, in any event, for the Foreign Parties'/Claimant's further eligibility to participate in the development of the Project and, ultimately, for participating in the expected benefits of the Project which, according to Mr Sax's (possibly overly enthusiastic) statements at the Stockholm Hearings, would have shown huge profits.

738. In other words and in the latter respect:
• Could Mr Sax claim to be entitled to derive such profits, even if - for instance - the Russian Parties, absent an acceptable EBRD financing offer - had decided to put up the financing themselves, i.e. by using the Russian taxpayers' money?

• In the Tribunal's view, the answer is 'no" and the exceptio non *adimpleti contractus* - defense appears to be available to Respondents, as per Article 328 of the Russian CC.

• However, it is not necessary for this Tribunal to make a final statement in this regard, since the claim in any event has to be denied on other grounds.

739. The 4.5% developer fee claim, therefore, has to be denied.

III The Investor Claim, Claimed in the Amount of US$ 294'500'000.--:

740. The Tribunal had opined in its Decision on Interim relief that Claimant has no standing *(locus standi)* to bring any kind of an investor claim on the basis of the Purchase Agreement/Bill of Sale (CX-66 and CX-59), absent the existence of a consent of IAT Pulkovo and /or all of the Respondents to Claimant assuming the function as investor in lieu of the initial parties to the Founders' Agreement and the Charter.

741. However, thereafter, Claimant has converted his claim into a monetary claim similar to the conversion of the developer-fee claim, and For such a claim the Tribunal affirms its jurisdiction.

742. The failure to satisfy the *conditio sine qua non* of coming up with an acceptable financing proposal and financing commitment, however, made the Project Still-borne as early as in late 1998/beginning of 1999.

743. After 1999, Claimant could not expect to be retained as the investor after having failed to satisfy the primary obligation, and could not expect to be entitled to participate in the expected profits once the Project is completed (of which Claimant spoke at the Stockholm Hearing), and hence Claimant could not convince the Tribunal of any good reason why nevertheless he should have been eligible and retained, in 2007, as the developer and investor of the AITP.

744. In the Tribunal's view, the *exceptio non adempleti contractus* - defense is available to Respondents, as per Article 328.2 of the Russian CC.

745. Moreover, the present extensive proceedings have shown that no evidence whatsoever exists that there had been any objectionable acts of expropriation or unfair treatment - under the standards of Russian and international law - by any of the Russian Parties, or the Russian Government.

746. Claimant's arguments regarding the alleged improper liquidation of IAT Pulkovo In 2007, which to his submission would give rise to a claim for damages under international law, or his arguments that he had the right to be named Che developer for Pulkovo's Alternative Terminal without undergoing the tendering process, are meritless.

747. The investor claim, therefore, has to be denied.

748. Absent a finding of any liability of any of the Respondents, this Award will therefore finally conclude the present arbitral proceedings, without any further Quantum stage.

749. Remains the decision on costs In the next Part, and the Final Holding.

T Regarding Arbitration Costs:

Issue 8 :

Is Section 20.10 of the Charter Applicable?

50 Is Charter Section 20 10 applicable, as Claimant asserts, or inapplicable, as Respondents assert?

51 Does it derogate the Tribunal's authority and level of appreciation under the UNCITRAL Rules?

52 if Section 20,10 Is applicable: how to understand bettor the provision on costs in Charter Section 20.10, referring to an arbitration in accordance *with this Chapter* 19"?

53 What would be the yardstick For measuring bad faith or gross negligence or willful misconduct, in connection with a claim For costs?

I The Provision on Costs As Per Chapter 20.10 of the Charter

750. Chapter 20.10 of the Charter provides for the following:

20.10 The Company shall bear all expense of an arbitration brought in accordance with this Chapter 19, unless there shall be a determination by the panel that, in connection with the matter that is subject to arbitration, a party has acted in bad faith or committed gross negligence or willful misconduct. The arbitration panel shall make such a determination upon the request of the Company or any party to the arbitration

751. Chapter 19 provides for the following:
19.1 The Company shall indemnify any Director and officer (including the Chairman, Vice-Chairman and Co-Presidents) against all suits, claims and actions brought against such Stockholder, Director or officer, that may arise out of or in connection with the activities of the above Company, except for knowingly committee; violations of law by such Stockholder, Director or officer.

19.2 The State Enterprise shall indemnify the Company against any liability or damages which may arise from earlier environmental conditions. The Company shall comply with published, readily accessible environmental regulations and shall adopt operating methods which comply with environmental and safety standards.

II Claimant's Position

752. Claimant, by reference to Chapter 20.10 of the Charter, argues all expenses of the legal proceedings should be allocated to Claimant to the tune of 29.7%, with the remaining 70.3% to be allocated to the Respondents, i.e. according to the respective percentages of the Parties interest in IAT Pulkovo.

"Claimant and Respondents expressly egreed in the Charter that founded IAT Pulkovo that the *'Company shall bear all expense of an arbitration brought'* pursuant to the Parties contractual agreements...(ref omitted). Accordingly, Claimant and Respondents are contractually obligated to pay 29.7% and 70.3%, respectively, of the expenses (including legal fees) of the Arbitral Proceeding". [145]

753. Claimant emphasizes that the reference to *"all expense of an arbitration"* not only covers the Tribunal costs and disbursements, but also the party costs, including the legal fees incurred, which provision should take precedence over Articles 38 and 40 of the UNCITRAL Arbitration Rules, which provide for a discretion of the arbitral tribunal to require the unsuccessful party to pay the adversaries' legal costs,

754. More particularly, Claimant, in APP-CM-84 pages 26/27 argues that Section 20.10 should apply against Respondents who had acted in bad faith or committed gross negligence or willful misconduct, such that the Tribunal should find that all arbitration costs are to be borne by Respondents. Claimant says that
"the bad faith conduct of Respondents in this arbitral proceeding is well documented and has been a subject of various submissions by Claimant; Respondents' bad faith conduct includes: (a) intentional breach of contract; (b) appointment of clearly biased arbitrators; (c) misrepresentation

[145] CM-2 (Statement of the Dispute and the Claims, of 22 June 2009), page 32/33.

of the Russian law to the Tribunal, (d) misrepresentation of facts to the Tribunal and (e) corporate shell game related to attempt to shield Respondents 4 and 5 from execution of an arbitral award."

755. Furthermore, Claimant refers to Respondents' bad faith behavior by proceeding to an illegal dissolution of IAT Pulkovo shortly after commencement of the present Arbitration.

756. Section 20.10 of the Charter protects and shields Claimant from being punished with high costs of arbitration. Section 20.10 of the Charter forms part of the arbitration clause and, as such, derogates the Tribunal's authority under Article 41 of the UNCITRAL Arbitration Rules.

757. In relation to Issue 52, Claimant mentions that in the English text the word "stockholder" is omitted, whereas the Russian text contains a reference to stockholders (shareholders), *"making it abundantly clear that these arbitral proceedings fall under provisions of Chapter 19. "*[146]

758. In relation to Issue 53 regarding the yardsticks for measuring had faith or gross negligence, Claimant stated:
The yardstick is: (a) any conduct that aims exclusively to harm the other party in the litigation beyond the permissible conduct of a party to the litigation, (b) any conduct not in accord with laws or applicable rules of international law and (c) any conduct that aims to provide an unfair advantage to a party."

759. On these grounds, Claimant seeks a cost award against Respondents, In CM-68, Claimant requested that the expenses Including legal fees be awarded/allocated between Claimant and Respondents in the ratio 29.7% and 70,3%.

760. In Claimant's Cost Submission, dated 20 February 2012 (CM-87 of 20 February 2012 and CX-265 and Exhibits 1-9), seeks recovery of US$ 2'829'688.98 (see further below).

III Respondents' Position

761. Respondents commented on the cost-issue in their Skeleton Brief of 13 October 2011 (1-RM-36/ 2-RM-42 pages 19/20), with further references.

762. First, Respondents are of the opinion that Section 20.10 of the Charter is inapplicable, since it states that IAT Pulkovo (not the Parties) shall carry the costs, while in the present arbitral proceedings IAT Pulkovo had not been a party. For this reason, Section 20.10 altogether does not apply with the effect that the general principles must be applied: *"The losing party pays the costs".*

763. Second, even under the assumption that Section 20.10 should be applied, Respondents argue that the reference to Chapter 19 is a misprint and the correct wording should read: *"in accordance with this Chapter 20",*

[146] *APP-CM-84 page 27.*

764. Third, Respondents reject Claimant's assertion that Respondents acted in bad faith, and (in respect of issue 53), turn around and reproach that - not they - but Claimant must be blamed for having acted in bad faith by filing this arbitration.

765. Fourth, due to Claimant's bad faith, gross negligence or wilful misconduct, all costs should In any case be imposed on Claimant who committed an *"abuse of process", inter alia* because:

• the period of limitation has expired long time ago;

• the Claimant did not receive any rights under the Purchase Agreement;

• the Respondents are not the proper respondents In the case, and

• the Claimant obviously lost his right to be the investor in the end of 1998 - first half of 1999.

766. Finally, Respondents argue that Claimant's bad faith has caused, end continues to cause, much higher costs for the Respondents due to several actions by Claimant, his "...endless challenges of the Arbitrators nominated by the Respondents, initiation of proceedings in Russia with respect to putting on hold the tender for the Alternative Terminal, refusal to pay an advance to cover the costs of arbitration, interim measures hearings etc."

767. Due to his bad faith, Claimant should bear all of the costs in these proceedings.

IV The Tribunal's Determination

(a) Provisions of the Charter

768. The Arbitral Tribunal first has to reflect on the wording and meaning of Chapter 20.10 of the Charter and its applicability in the framework of the present Arbitration.

769. A first - rather obvious - question arises whether the reference in Chapter 20.10 to Chapter 19 is a typo (as Respondents assert), or whether the Parties really intended to make reference to Chapter 19 which, essentially, deals with liability suits.

770. Obviously, if this Tribunal had had the benefit to consider any earlier drafts of the Charter, an answer could possibly be found therein, for instance if Chapter 20 of the charter, in an earlier draft, had been its Chapter 19, such that - for the final version - the reference in Chapter 20.10 was not corrected. Yet, as already discussed, no such materials were made available in these proceedings.

771. If the reference to Chapter 19 Indeed was a typo or a forgotten correction, Chapter 20.10 of the Charter would generally apply to arbitral proceedings, but only if - as per its terms - the Company (i.e, IAT Pulkovo) is a party. Otherwise, Chapter 20.10 of the Charter cannot be applied, in any event not as per its wording. An application to the present proceedings opposing Mr Carl Sax and the

former shareholders of IAT Pulkovo (but not IAT Pulkovo) would indeed require a somehow creative stretch of interpretation of Chapter 20.10 of the Charter which might be difficult to justify.

772. In the other alternative, i.e. in case the reference to Chapter 19 was not a typo, or was not an overlooked correction which should have been done, but was indeed what the Parties had Intended to agree, then the Tribunal would have to determine whether the present Arbitration could be considered to constitute an arbitration under Chapter 19 of the Charter.

773. On reflection, the answer to this question is negative:
Chapter 19 appears to be a hold-harmless-clause, dealing with the indemnification of directors and officers against suits, claims and actions brought against them, or against stockholders etc., and it would seem difficult to justify that the present dispute would be covered by the probably narrower intentions underlying Chapter 19 (although, to some extent, Claimant's claims may have to do with an alleged liability of representatives of IAT Pulkovo and/or its other shareholders).

774. However, as the following reasoning will show, the above questions can be left open, due to the second part of Chapter 20,10 Initiated by the words "...,*unless there shall be a determination*...": As the above summary of the Parties' arguments indicates, Claimant Mr Sax has referred to the *"unless provisions"* by arguing misconduct by the Respondents and their bad faith, including "intentional breach of conduct", which might be a typo and was intended to read *"intentional breach of contract",* appointment of biased arbitrators, misrepresentations to the Tribunal of facts and law etc.

775. However, this Tribunal cannot share Claimant's view, as explained below after an introductory comment.

(b) Introductory Comment to the Tribunal's Further Assessment:

776. It is a good - unscripted practice of international arbitral tribunals that the award to be written up by the Arbitrators should at all times be carefully worded, moderate in its expression, polite, inoffensive and respectful, and unnecessary criticism of persons Involved, or of the Parties, should be avoided. And parties engaged in international arbitration, for good reasons, expect to be treated with courtesy, entire correctness and due respect oven though the arbitrators in the end might reach different views from those prevented by the Parties.

777. In the present case, the decision on costs which the Tribunal is required to make, urges or even forces the present Arbitrators to step out of the above described attitude and to speak "clear text".

(c) The "Clear Text"

778. The "clear text", which the Tribunal necessarily must state for the cost decision it has to make, is the following:

779. It is the Tribunal’s view that the filing of this Arbitration by Claimant was unreasonable.

780. It is the Tribunal's view, more particularly, that Claimant has presented an untenable claim for reimbursement of prodevelopment expenditures, due to the simple fact that not one single document could be produced in this Arbitration evidencing the slightest agreement of Respondents to reimburse such expenditures which, indeed obviously, were incurred by the Foreign Parties on their own initiative and at their own risk and peril.

781. The absence of <u>any</u> contractual or legal basis for Claimant's massive claim is best evidenced by Mr Sax' statement at the Stockholm Hearing when he could argue nothing better for supporting his case than by saying, in respect of the predevelopment expenditures: *"It could not be a gift".*

782. The same "verdict" must be stated in relation to Claimant's 4.5% developer fee claim, in respect of which, again, Claimant was unable to present even the slightest basis for such claim
And again this Is best evidenced by Mr Sax' own statements at the Stockholm Hearing when, absent any proper contractual evidence, he simply referred to the programmatic clause in the Founders' Agreement contemplating the entering into a development contract with the Foreign Parties and when, absent any negotiated terms for such development contract, he only was able to assert that *"everybody knows what a development contract is",* and everybody knows that the developer earns a fee of 4.5%.

783. The Tribunal does not go too far in commenting that such a line of argumentation could not be endorsed by any court nor any arbitral tribunal, wherever the court or tribunal is established and whatever law applies.

784. For these two categories of claims, therefore, there was not even a shadow of a valid contractual agreement, and above all, if there had been a contractual agreement, any and all claims - again obviously were entirely time-barred under a 3-year statute of limitations, and Claimant's arguments seeking to bring his claims under Article 200.1 of the Russian Civil Code were -once again obviously - entirely non-meritorious.

785. The most unhelpful claim, however, was Claimant’s investor claim which, for the reasons very clearly explained in this Award, had a zero chance of success.

786. All of the above, furthermore, Is connected to a basic misconception of the Claimant regarding the fulfillment of the Foreign Parties primary obligation, i.e. the fulfillment of their promise to provide a financing commitment.

787. It Is Indeed inconceivable that the Foreign Parties could reasonably expect to become 29.7% investors in such a project (which, according to Mr Sax' own words, would have resulted in *"more profits than ever earned by the Russian Parties")* If the Foreign Parties should fail to achieve to come up with an acceptable financing commitment.

788. In the latter regard, the strong stands taken by Claimant in these proceedings that the EBRD financial proposal should have been acceptable to the Russian Parties is indeed hardly comprehensible, since the EBRD proposal was so fat away from what the Foreign Parties and the

Russian Parties had bargained for in the Protocol of Agreement and the Founders' Agreement.

789. Based on the foregoing, the Arbitral Tribunal must conclude that this entire Arbitration was initiated by Claimant not in good faith, but indeed 'frivolously" [147], causing very significant monetary damage and other inconveniences to the Respondents.

790. The Arbitrators, by the introductory remarks stated In Sub-title (b) above, have indicated that they did not take it as a light decision to speak this "clear *text",* and there is no intention whatsoever to be offensive to any of the Parties.

791. Yet, this Tribunal in fact has a primary duty and mission, which is to render a clear decision when the facts and the legal assessments are so clear as they are in the present case.

792. After all, it also must be said. None of the elements discussed in this Award and which had to be decided by this Arbitral Tribunal were of any complex nature, and the legal assessment IS not derived from any "enigmatic" legal texts or articles of legislations, but based on the most Simple and most obvious legal and contractual notions which apply under Russian law. under international law, under US law or indeed whatever educated legal system.
This must have been known to Claimant Mr Sax, as a most experienced lawyer, and the present Award can not come as a surprise to him.

793. In the further Chapter, the Tribunal will have to discuss the cost consequences of this Arbitration resulting From the above assessment.

U Allocating Costs under the UNCITRAL Arbitration Rules

I The Notion that "the Costs *Follow the Event"*

794. According to Article 38 of the 1976 UNCITRAL Arbitration Rules, the Arbitral Tribunal has to fix the costs of arbitration in its Award.

795. The term "costs" is defined therein and include the fees of the Arbitral Tribunal (stated separately as to each Arbitrator and to be fixed by the Tribunal itself in accordance with Article 39), the travel and other expenses incurred by the Arbitrators, the costs of expert advice and of other assistance required by the Arbitral Tribunal, the travel and other expenses of witnesses (to the extent approved by the Arbitral Tribunal), the costs of legal representation and assistance of the successful party if claimed during the proceedings, and to the extent that such costs are reasonable, and the fees and expenses of any appointing authority.

796. According to Article 40 of the 1976 UNCITRAL Arbitration Rules, the costs of arbitration shall in

[147] This term Is used in comments to US court decisions, i.e. In cases where - in contrast to the practice in International arbitration the "American rule" prevails, in the sense that even the winning party has to pay its litigation expenditures incurred, unless the claim had been brought against good faith or even *"frivolously".*

principle be borne by the unsuccessful party, However, the Arbitral Tribunal has the authority to apportion the costs between the Parties if deemed reasonable.

797. The UNCITRAL Arbitration Rules, therefore, reflect the general notion prevailing in international arbitration known as *"the costs follow the event",* abbreviated "CFE"[148] - sometimes simply paraphrased with the words: *"the loser pays!".* Again, one may add that this notion may be characterized as an almost universal notion in international arbitration.[149]

798. Applying this standard to the present case, the Tribunal will have to award that:
• all Tribunal costs shall have to be borne by Claimant, and to the extent that these had been advanced by Respondents, Claimant will have to reimburse those advances to Respondents;

• alt party costs incurred by Claimant must be borne by Claimant himself, and no reimbursement is due in respect of any such costs by the Respondents;

• all of Respondents' reasonable costs incurred In this Arbitration, including reasonable legal fees, are to be reimbursed to Respondents by Claimant.

II Deposits Paid to the Tribunal's Account, and Tribunal Costs

799. The Tribunal costs and disbursements were secured by deposits paid by the Parties as follows:
• Payment by DLA Piper on behalf Of Respondents 1 and 2, credited 7 May 2009 EUR 250'000

• Payment by Mr Vladimir Goryunov on behalf of Mr Sax, credited 8 Jan 2010 EUR 125'000[150]

• Payment from Trefina AG on behalf of Mr Sox, credited 13 Jan 2010 EUR 125'000

• Payment ex Amsterdam Peroff, on behalf of Mr Sax, credited 30 August 2011 EUR 100'000

• Payment by Respondent 2, credited 12 Dec 2011 EUR 100'000

• **Total** (nominal) **deposits** paid on account **EUR 700'000**

800. The Arbitrators respectively the Tribunal incurred expenditures which were covered et the debit of the above Advance in the total amount of EUR 29'854.- as per the following table:

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[148] For a detailed analysis of CFE see e.g. John Y. GOTANDA, Bringing Efficiency to the Awarding of Fees and Costs in International Arbitration, *Liber amicorum* Eric Bergsten, 2011, pages 141-155. He also published extensively elsewhere on the same subject, Jose ROSELI, Arbitration Costs as Relief and/or Damages, lntArb Vol 28 (2011), 115-135. See further, particularly relating to investment disputes: Thomas H WEBSTER, Efficiency in Investment Arbitration - Recant Decisions on Preliminary and Cost Issues, ArbInt Vol 25 (2009), 469-514 (with an analysis of 100 investment cases decided); Noam Robins, The Allocation of Costs and Attorney's Fees in Investor-State Arbitration, (2003) FILJ, 109 ss.

[149] The Tribunal, of course, is aware this notion - as described - was not as such a guiding notion in the United States, as far as US domestic arbitration and US State Court Litigation is concerned, and where, generally, even a successful party has to bear its own costs of litigation, unless the claimant's claims had been initiated against good faith or frivolously.

[150] The actual amounts credited on the special account in respect of the several payments by the Parties always showed a shortfall, mostly EUR 50, due to banking charges of the remitting bank (not by Julius Bar) This shortfall Is ignored here, but reflected in the table below regarding banking charges.

Expenditures Service Providers and Banking

• Invoice of Merrill Re porting/Wordwave € 452.40 anti € 5'821.95, rounded down EUR 6'274

• In voice of Susan McIntyre (reporting)(GBP 9'420.59) EUR 11'181

• Strandvagen Conference Center (SEK 112'518) EUR 12'599

• Balance of banking charges debited and interest earned EUR 200

• **Total** costs/disbursements **EUR 30'254**

801. The **Arbitrators' fees were** charged at the agreed rate of EUR 500.—per hour, and were settled In several intervals from the deposits paid by the Par ties. Furthermore, at the same time, the Arbitrators' disbursements - incurred in CHF, SEK, GBP and EUR were covered at the debit of the deposit, as shown in the following table.

Fees and disbursements of the Arbitrators - and Overall Outgoings

	Dec 2010	Jun2010	Dec 2010	Aug 2011	Nov 2011	Mar2012	Total
Marc Blessing	€ 39'900	€ 43'500	€ 70'700	€ 66'000	£ 97'500	€ 66'512 [151]	€ 384'112
MB Exp							€ 1'651 [152]
B & K Exp [153]	€ 2'065 [154]	€ 870 [155]	€ 8'247 [156]	€ 1'980 [157]	€ 7'943 [158]	£ 2'748 [159]	€ 23'853

[151] The Chairman's last time-sheet (since the. payment in November 2011) recorded 195.10 working hours, representing € 97'550. ; as such charge would have exceeded the credit still on deposit, the Chairman reduced tils fee by over € 30'000 (i.e. down to € 66'512), so as to avoid having to ask the Parties to pay in a further deposit

[152] Part of traveling expenditures for deliberations in Stockholm in March 2012, including charge For conference room and one overnight.

[153] The Chairman is charged by Baer & Karrer AG for telephones, mails, copies etc; the charge in this row also contains the traveling expenditures to Stockholm In Oct 2011 which are reflected within the charge of Beer & Karrer AG.

[154] The charge of B&K AG is for CHF 2'889.05, corresponding to € 2'065, far emails, photocopies, DHL courier service, telephones etc.

[155] Emails, photocopies, telephone charges, mailings.

[156] B&K charge for Arb Hearing Room CHF 2'400 2 Break-Out rooms CHF 1'600; Tribunal Conf room CHF 600 Reporter working Office CHF 400, catering services CHF 814.8, emails, telephone charges, photocopies CHF 4'397.50, in total CHF 10'212.30 - € 8'246.84 34 paid In B&K AG; €-figures In the table are rounded to one full €, avoiding cents.

[157] Emails., photocopies, telephone charges.

[158] This includes the travel expenditures of MB to Stockholm *ami* the Diplomat Hotel Fur Dr. MB and for Professor A. Bushev; furthermore, B&K expenditures for photocopies, telephone changes, mailings.

[159] Charge B&K AG tor emails, office materials, over 5'000 photocopies, mailings, courier services,

Per Runeland	€ 26'313[160]	€ 11'000	€31'500	€ 11'000	€37'000	€ 29'000	€ 148'843
Per Runeland Exp			€ 4'000[161]		€ 3'591	€ 1'029	€ 8'620
Prof A. Bushev			€ 31'500	€ 12'000	€ 32'000	€ 21'000	€ 96'500
Prof Bushev Exp			€ 3'600		€ 1'017	€1'520	€ 6'167
Total Arb Fees							£ 629'455
Total Tnb Exp							€ 40'291
Total Fees Exp of the Arbitrators							€ 669'746
Exp for Service Providers (above)							€ 30'251
Grand total							**€ 700'000**

The total Tribunal costs (including fees and all costs/disbursements), therefore, amount to **EUR 700'000,--**, thereby absorbing the entire deposits made by the Parties, **paid in** the same amount of EUR 700'000,--.

III The Final Allocation of the Tribunal Costs to the Parties

(a) Allocation

802. As a consequence of the fact that Claimant entirely loses in respect of aft of his claims, the Tribunal determines Chat 100% of the Tribunal Costs are to be borne by Claimant Mr Carl A Sax.

803. Since Respondents have paid deposits in the total amount of EUR 350'000, Claimant Mr Sax has to

[160] The SJ Berwin Invoice was for GBP 23'310.

[161] The SJ Berwin Invoice of 22 Dec 2010 for travel expenditures was far € 3'800; however, already prior to the receipt of that invoice, the Chairman - on 20 December 2010 - had made a payment arrangement far € 4'000 at the debit of the client Account-

reimburse the amount of **EUR 350'000** to Respondents 1 and 2.

804. Such payment is to be made to the account as will have to be indicated by Respondents' counsel of record, i.e, Professor Oleg Skvortsov and/or Leonid Kropotov.

805. At the telephone conference of 7 February 2012, it was discussed Chat - in principle - the reimbursement for costs becomes due and payable immediately upon notification of the Award (a principle which was particularly stressed by claimants counsel Mr Durkovic). However, the Tribunal indicated at the telephone conference that ft would rather be minded to grant a grace period of 30 days for effectuating such payment, such that interest on any unpaid amount would only start to accumulate as from the 31st day onwards, until a full payment has been made.

806. The Tribunal finds it reasonable to grant such grace period to Claimant, such that the reimbursement shall have to be made within 30 days from the electronic notification of the present Award in PDF-format. The PDF will be followed up by hard copy originals of this Award, dispatched by courier service to the counsel of record of Mr Sax and Respondents land 2, and to Respondents 4 and 5.

807. After the lapse of 30 days, if unpaid, interest will become due and payable on the amount of EUR 350’000.- up to the day of full payment.

(b) General Remarks Regarding Post-Award Interest

808. In most arbitration proceedings, little to nothing is argued by the Parties, or determined by arbitral tribunals, as to the post-award-phase of the dispute, possibly on the expectation that, in any event, the determinations as made by the Arbitral Tribunal will be fulfilled by the Parties without any further complications. However, the latter is not always the case and, in a postaward-phase, the most typical/frequent issue which is likely to arise Is the Issue of post-award-interest payable by one party to the other for the reimbursement of costs. Quite often times, such post-award-discussions have led to further significant costs in the framework of enforcement proceedings.

809. Matters of interest rates are often times connected to the financial market for the respective currency, rather than to a particular *lex causae* (meaning the law applicable to the substance). Indeed, an unpaid creditor will suffer a damage which is best measured according to the cost for borrowing the sum at the relevant market for the currency at the commonly used commercial rates for the particular currency. [162]

810. For Instance, the 2004 UNIDROIT Principles provide as follows;
Article *7.4.9* (Interest for failure to pay money)

[162] Matthew Secomb, A Uniform, Three-Step Approach to Interest Rates in International Arbitration, in; International Arbitration and International Commercial Law, liber amicorum Eric Bergsten, Welters Kluwer 2011, 431-450, J. Gotanda, Interest as Damage, Columbia Journal of Transnational Law 47 (2009), 491-536. In ICC Case No 8908, the claimant was awarded interest on the USD amount at the 3-month LIBOR rate plus 1%. On the other hand, the application of statutory rates of interest, such as the rate of the *lex causae,* might be totally unfair (indeed, some of them have underlying policy reasons for encouraging prompt payments by debtors etc. which find no justification in international arbitration). See further Article 7.4.9(2) of the 2004 UNDROIT Principles of international Commercial Contracts, referred to below in this Award; see also the Ole Lando - Principles in Article 4,507 (1), cited in Secomb's report at p. 446

(1) If a party docs not pay a sum of money when it falls due to the aggrieved party is entitled to Interest upon that sum from the time when payment is due to the time of payment whether or not the non-payment is excused.

(2) The rate of interest shah tote the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall he the appropriate rate fixed by the law Of the State of the currency of payment.

(3) The aggrieved party is entitled to additional damages if the non-payment caused it a greater harm.

811. Certainly, the average bank short-term lending rate to prime borrowers of the currency in question at the place for payment Is a frequently used formula in international arbitration, The fall-back provision In the UNIDROIT Principles suggests to look at the appropriate rate fixed by the law of the State of the currency of payment, which in the present case will be the USA and the EU.

812. Moreover, frequently, the LIBOR rate for US$-denominated payments (or the Euribor For payments in EUR) is taken as a basis, plus one to several percents as a mark-up SO as to reflect the lending rate which could be obtained by a prime non-banking borrower.

(c) Positions of the Parties

813. Claimant, in CM-87, has researched quite in detail the possibilities for him to obtain refinancing in case he would become the award-creditor, recalling that

"the purpose of post-award Interest is twofold: (a) to compensate the winning party for lost use of the money during a default period, and (b) to Incentivise the losing party to pay the award." [163]

814. Claimant went on to describe quotations he had received from certain personal loan lending clubs, offering interest rates between 6 78% to 27.99% p.a., the Wells Fargo Bank offering 21.58% p.a., both on Dollars, and referring to some rates offered by Banca FINNAT in Milan with rates of 5.5-7% p.a, on EUR, or an EURIBOR rate of 1 month 1.07% or 3 months 1.37% plus 350/450 basis points subject to net worth, yet with the comment that unsecured loans are not available in italy today. The same, as Claimant's counsel writes *"is undoubtedly true in the United States as well".* [164]

815. Claimant further referred to the statutory post-judgment interest rate in the State of Florida, as of 1 January 2012 is the statutory rate of 4.75% p.a. Further, Claimant quotes the Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 at Article 2 (6) which took at the reference rate of the respective Central Bank, currently 1% p.a., *"plus at least 8 %*". Thus, Claimant states:

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[163] CM-87 para. 8.

[164] *CM-87 para. 10.*

"The annual interest rate for post-judgment interest under the European Union Directive is at least 9% pa.". [165]

816. Claimant also refers to the writings of irmgard Marboe, Calculation of Compensation and Damage in International Investment Law, where It Is stated that
"the higher interest rate is, as a matter of principle, in line with the specific function of post-award interest, mainly preserve as an efFective incentive to comply with the terms of the judgment or award as expediently as possible. It will also serve to ensure the effectiveness of international jurisprudence and enhance legal certainty..." [166]

817. Further references of Claimant refer to the compounding of interest, with a reference to the CMS v/ Argentina Decision in which a differentiation of simple and compound interest was made, with the first 60 days after the date of the Award to carry simple interest and thereafter compounded annual interest at the arithmetic average of the 6 months US Treasury Bills' rate.

818. However, the market may also be the home-market of the party in question, i.e. in the present case, the financial market in Russia, with its prevailing conditions for refinancing in US Dollars. As the relevant market is situated within the territory of the applicability of the *lex causae,* it may be quite appropriate to take guidance from Article 395 of the Russian CC. In this context, Claimant argues:

"the appropriate measure of interest applicable where a party fails to pay a monetary debt - including failure to pay an arbitration award when due - is the applicable rate of interest in the jurisdiction where the prevailing party resides or is located Post-award interest is governed by Articles 395 of the Civil Code of the Russian Federation." [167]

819. Article 395 of the Russian CC, as it was referred to by Claimant in CM-87, reads as follows:
Article 395 Russian Civil Code

Responsibility for the Non-Discharge of the Pecuniary obligation

1. For the use of the other person's money as a result of its illegal retention, of the avoidance of its return or of another kind of delay in its payment, or as a result of its groundless receipt or saving at the expense of the other per son, the interest on the total amount of these means shall be due. The interest rate shall be defined by the discount rate of the bank interest, existing by the date of the discharge or the pecuniary obligation or of the corresponding part thereof at the place of the creditor's residence, and if the creditor is a legal entity - at the place, of its location. If the debt Is exacted through the court, the court may satisfy the creditor's claim, proceeding from the discount rate of the bank interest on the date of filing the claim or on the date of its adopting the decision. These rules shall be applied, unless the other interest rate has been fixed by the law or by the agreement

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[165] CM-87 para. 13.

[166] Irmgard Marboe, Calculation of Compensation and Damage in International Investment Law (Oxford University Press 2009), page 378, Section 6,246. CM-87 para. 16.

[167] CM-87 para. 11.

2. If the losses, caused to the creditor by an illegal use of his money, exceed the amount of the Interest, due to him on the ground of item 1 of the present Article, he shall have the right to claim that the debtor recompense him the losses in the part, exceeding this amount.

3. The Interest for the use of the other person's means shall be exacted by the date of payment of the amount of these means to the creditor, unless the law, the other legal sets or the contract have fixed a shorter term for the calculation of the interest.

820. Respondents have not submitted detailed allegations regarding post-award interest in the case the Tribunal's determination would result in an award in Respondents' favor, with the consequence that the Respondents will not he the debtors but, in the opposite, will be the creditors as regards the recovery of costs. However, Respondents, commenting on Claimant's interest claim, nevertheless mentioned that an application of the LIBOR for 3-months deposits *"as a rate which would not depend on the winning party"* would be appropriate.

(c) The Tribunal's Determination

821. As matters of interest in the post-award-phase may give rise to further arguments between the parties, this Tribunal, already in the Stockholm Hearings, had decided to raise and discuss the issue with the Parties, basically inviting them to agree on the common ground as to (i) whether or not there should be a certain grace period of, For instance, one month after a notification of the award for making the payments as per the determination of this Tribunal, as well as (ii) in respect of the interest rate to be applied, and whether interest should be calculated on a simple or compounded basis.

822. The subsequent Cost Submissions of the Parties, however, did not result in a common ground, and the issue was further debated orally between the Tribunal and counsel to both sides at the occasion of the telephone conference of 7 February 2012.

823. Claimant has depicted a wide horizon of references which might be considered by this Tribunal in case Claimant would finally become the Award-creditor, and has concluded that monies which would become due to him should carry a 21.58 % Interest ticket, compounded on a monthly basis.

824. Respondents, in response to a query of the Tribunal specifically addressed in the Tribunal's 36th Order of 22 February 2012 - as to Respondents' interest claim In the case of a cost decision In favor of Respondents, did not indicate actual rates for which the City of St. Petersburg may obtain financing on the international financial markets, or may obtain financing from Russian banks or under governmental loans which had been refinanced, or are to be refinanced, on the international monetary markets, but indicated agreement to apply the LIBOR rate for 3 month deposits (without indicating a percentage mark-up). No submission as to the currently applicable rates for US$ and EUR was made. [168]

825. For the Tribunal, it seems clear that Respondents' submission in the sense that the LIBOR for

[168] 1-RM-39/2-RM-45, filed on 27 February 2012.

3-month deposits should be applied, may not provide adequate remedy for actual refinancing costs, as the LIBOR for US Dollars as well as for EURO are fluctuating well below one percent.

826. However, on the other hand, the Tribunal cannot go *ultra petita,* i.e. beyond what had been requested by Respondents.

827. For this reason, the Tribunal determines that Respondents' claim for the reimbursement in the amount of EUR 350'000 shall carry interest at the LIBOR rate for 3-month deposits.

828. The reimbursement to he made by Claimant rs payable within 30 days from the notification of this Award, as per the discussions as per the telephone conference held on 7 February 2012, and the respective details of the Bank account of Respondent 2 will have to be indicated by Respondents' counsel of record, he. DLA Piper, respectively Professor Oleg Skvortsov and/or Leonid Kropotov

829. Since both sides agreed to a grace period of 30 days after communication of this Award, the interest starts to run as from the 31st day, until full payment.

IV Claimant's Cost Claim, an Allocation

830. Claimant's cost submission (CM-87 of 20 February 2012, consisting of 67 pages),specified the costs for his representation in the present proceedings in the total amount of US$ 2'829'688.98, consisting of the following major items:
• Legal counsel costs (without success fee): US$ 1'851'804.88

• Experts fees and costs US$ 442'234.11

• Party expenses US$ 535'649.99

• Total cost claim **US$ 2'829'688.98**

831. In support of the claim, all fee arrangements entered into between Mr Carl a Sax and his legal advisors were filed, as exhibits to CX-265. The claim appears to be well documented.

832. However, as a consequence of the rule *"the costs follow the event",* Claimant - whose claims had to be rejected by this Tribunal in their entirety - will have to bear his own costs to their full extent, without any recovery from the responding parties.

833. The question, debated at the telephone conference of 6 February 2012, whether or not Mr Sax' time and expenditures would be a recoverable item under the present special circumstances, is moot.

V Respondents' Cost Claim, and its Allocation

834. Respondents' cost claim submitted on 20 February 2012 and the pertaining schedule shows the

following break down of costs;
• (Legal counsel's fees "In *fact incurred"* US$ 2'171'114.65)

• Legal counsel's fees *"billed within the agreed budget"* US$ 1'117'901.06

• Legal counsel's expenses US$ 58'098.37

• Experts' fees US$ 95'767.32

• Experts' expenses US$ 12'105.79

• **Total** fees and costs (but without the *"incurred costs")* **US$ 1'283'872.54**

835. The Tribunal has considered these cost claims and finds as follows:
• The Tribunal notes and understands that Respondents' counsel's charges (i.e. the *"incurred fees")* - according to the DLA Piper's customary billing rates - represent almost the double amount as compared to the budget agreed, respectively contracted for, with Respondents.[169] Hence, the costs incurred by Respondents 1 and 2 are capped at the amount of US$ 1'117'901.06, and it is clear that the Tribunal can only consider the fatter amount as a recoverable expense.

• Taking such latter figure, and given the magnitude, length and numerous complications in the present proceedings, there can be no doubt that the amount represents entirely reasonable attorneys' fees.

• The legal counsel's expenses are well documented and appear justified.

• The experts' fees are likewise well documented and reasonable.[170]

• The experts' expenses are equally well documented.

836. It is apparent that Respondents' cost statement is significantly lower than Claimant's cost statement.

837. The Tribunal finds it reasonable, having regard to
(i) the very extensive filings of Mr Sax,

(ii) the burdening of the proceedings with unsuccessful challenge procedures,

(iii) the excessive documentary requests which had to be rejected, and

(iv) the equally non-meritorious requests for interim relief - all of which created a very heavy burden for Respondents and their counsel -

to award, in favor Respondents, a full recovery of the costs, in the amount of **US$ 1'117'901.06,** the reimbursement to be borne by Claimant Mr Carl A Sax.

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[169] This understanding - upon a query by the Tribunal - was confirmed by Mr Leonid Kropotov, in his email dated 21 February 2U12.

[170] The Tribunal notes that US$ 6'136.31 of fees were charged for preparing the first Professor Sukhanov opinion RWS-5, but not for his second opinion (which the Tribunal did not admit into the files). This seems to be very correct indeed.

838. The Tribunal understands that Respondent 2 had financed the proceedings; hence, the payment will have to be made to Respondent 2.

839. The reimbursement to be made by Claimant is payable within 30 days from the notification of this Award, as per the discussions as per the telephone conference held on 7 February 2012, and the respective details of the Bank account of Respondent 2 will have to be indicated by Respondents' counsel of record, i.e. DLA Piper, respectively Professor Oleg Skvortsov and/or Leonid Kropotov.

840. After the lapse of the 30 day grace period, if unpaid, simple or compound interest will be due and payable on this amount of US$ 1'117'901.06 until full payment, at the LIBOR rate for 3-month deposits.

V A Final Word of Thanks

841. The Tribunal owes words of thanks to all of the **legal counsel** appearing In these proceedings, for their very extensive work, and for the fine and friendly cooperation between the two teams of lawyers, and their very fine cooperation with the Arbitral Tribunal. This is very highly valued.

842. Moreover, thanks are owed to the **legal experts** who have done a vary impressive job in analyzing in depth the relevant aspects of the Russian Civil Law, Corporate Law and the Russian Investment Law.

843. All of the Experts' Opinions and the legal/statutory provisions referred to in their Reports were carefully studied by the Arbitral Tribunal. The only reason why these Opinions are not given more coverage in this Award is that - as apparent in the reasoning above - practically none of those issues gained any kind of relevance.

844. Notwithstanding the outcome of these proceedings, particular words of thanks are also owed to Claimant Dr **Carl A, Sax.** He beyond doubt took center-stage in the Hearings in Zurich and Stockholm, and with his impressive entrepreneurial approach, his eloquence and his enthusiasm, he will remain unforgettable to all those who participated in these proceedings. — Nevertheless, upon careful consideration of all relevant arguments, this Tribunal had to deny all of his claims.

W The Decisions of the Arbitral Tribunal

845. Based on the foregoing facts, legal arguments, considerations and the "Summary of the Tribunal's findings" as contained in Chapter S hereinabove, the Tribunal issues its
FINAL AWARD

holding

as follows:

I Operative Chapter on Standing *(focus standi)* and Jurisdiction

846. Claimant Mr Carl A Sax's *locus Standi* regarding his claim for reimbursement of the pre-development advance of US$ *19'772'277.--,* claimed in these proceedings together with compound interest resulting in a total amount of US$ 146'400'000.--, is affirmed.

847. Claimant Mr Carl A Sax'S *locus standi* as an assignee of the Foreign Parties' expectation to be paid a 4.5% developer fee (which had been estimated by Claimant to represent an amount of *"no less than US$25'000'000.--",* subsequently reduced to the amount of USS 18'800'000,--) is likewise affirmed

848. Claimant Mr Carl A Sax's *locus standi* as an assignee of the Foreign Parties' expectation to earn future revenues - proportionate to the shareholding of 29.7% - from the operation of the New International Passenger Terminal at Pulkovo Airport, respectively as an assignee of the Foreign Parties potential damage claim, which Claimant calculated to represent an amount of US$ 294'500'000.--, is likewise affirmed.

849. On the other hand, the Tribunal notes that Claimant has converted his initial claims for his reinstatement as a developer and as a 29.7%-investor, for which this Tribunal would have had to deny Claimant's *locus standi,* into monetary claims, as per the two preceding paragraphs.

850. Arbitral jurisdiction regarding all of the Respondents 1, 2, 4 and 5 is confirmed. A determination regarding the absorption of Respondent 3 is moot, having regard to the outcome of these proceedings.

851. The Tribunal affirms the arbitrability of the investment dispute adjudicated herein.

852. The Tribunal moreover notes and states that Claimant as well as Respondents 1 and 2 were, throughout these proceedings, at all times validly represented by their counsel of record, as per the first two pages of this Award.

II Operative Chapter on Substance Regarding the Monetary Claims

853. Claimant Mr Carl A Sax'S claim for reimbursement of the **pre-development advance** of US$ 19'772'277, claimed in these proceedings together with compound interest resulting in a total amount of US$ 146'400'000,--, is denied in its entirety.

854. Claimant Mr Carl A Sax's claim as an assignee of an alleged 4.5% developer fee (claimed in these proceedings initially in the amount of no less than US$ 25'000'000.--, subsequently reduced to 18'800'000.--), Is denied in its entirety.

855. Claimant Mr Carl A Sax's investor claim, i.e. his claim as an assignee of the monetary benefits derived from a 29.7%-investment (with a monetized value ascribed thereto representing an amount of up to US$ 294'500'000.--), is denied in its entirety.

III Operative Chapter on the Tribunal Costs

856. The costs of the proceedings amount to EUR. 700’000 ("the Tribunal Costs"), covering the fees of the Arbitrators, their disbursements, as welt as the expenditures incurred in connection with the Hearings in Zurich and Stockholm.

857. These Tribunal Costs were advanced by Claimant in the sum of EUR 350'000, and by Respondents 1 and 2 to the tune of EUR 350'000, resulting in a total deposit of EUR 700'0000. Ko refund to the Patties is co be made

858. in accordance with the outcome of this Award, all of the Tribunal Costs are to be borne by the Claimant Mr Carl A Sax.

859. Since Respondents 1 and 2 (through their counsel of record, DLA Piper) have paid deposits totaling **EUR 350'000.**--, Claimant Mr Carl A Sax shall have to reimburse Respondents 1 and 2 the amount of EUR 350'000.--.

860. Such reimbursement as per the foregoing paragraph (i) shall have to be made within 30 days from the emailed notification of this Award in RDF-format, (ii) to the bank account of Respondent 2 as will have to be indicated, after notification of this Award, by Respondents 1 and 2' counsel (DLA Piper) to Claimant and his counsel.

861. After lapse of the 30-day period, if unpaid, interest according to the LIBOR rate for 3-month deposits will have to be paid, until payment in full.

IV Operative Chapter on the Party Costs

862. Claimant's party costs shall have to borne by Claimant himself to their Full extent.

863. Respondents 1 and 2 party costs, specified in the amount of US$ 1'283'872.54, shall be reimbursed by Claimant in their full amount of USS **1'283'872.54.**

864. Such reimbursement as per the Foregoing paragraph (i) shall have to be made within 30 days from the emailed notification of this Award in PDF-format, (ii) to the bank account of Respondent 2, as will have to be indicated, after notification of this Award, by Respondents 1 and 2' counsel (DLA Piper) to Claimant and his counsel.

865. After lapse of the 30-day period, if unpaid, if unpaid, interest according to the LIBOR rate for 3-month deposits will have to be paid, until payment in full.

866. No party costs are granted to the other Respondents (3), 4 and 5.

V Final Provision

867. Any and all further claims, requests and prayers for relief, which had been submitted in these proceedings, are hereby dismissed.

868. This Final Award is effective upon signing by all three Arbitrators and communication to the Parties by the Chairman's Office.