

## **Decision by the Court of Arbitration**

in the arbitration hearing, pursuant to Article 7, Paragraph (2) of the Agreement between the Government of the Republic of Latvia and the Government of the Kingdom of Sweden on the Promotion and Reciprocal Protection of Investments

between

SwemBalt AB, Sweden

and

The Republic of Latvia

dated: 23 October 2000

## **I. Introduction**

1. On 24 March 1999 the Claimant in this arbitration, SwemBalt AB of Karlskog, Sweden, issued a Notice of Arbitration to the Respondent, the Republic of Latvia. According to a letter dated 13 April 1999 from Jonas Jonsson, First Secretary at the Swedish Embassy in Riga, the Notice of Arbitration was sent to the Respondent on 9 April 1999. SwemBalt referred to Article 7 of the Investment Agreement between Latvia and Sweden ("Investment Agreement") as grounds for arbitration, which provides as follows:

"Article 7

Disputes between the Investor and a Contracting Party

- (1.) Any disputes between one of the Contracting Parties and an investor of the other Contracting Party concerning the interpretation or application of this Agreement shall, if possible, be settled amicably.
- (2.) If the dispute cannot thus be settled within six months following the date on which the dispute has been raised by either party, it shall at the request of either party be submitted to arbitration for a definitive settlement. For the arbitration procedure shall be applied the Arbitration Rules of the United Nations Commission on International Trade Law, as adopted by the General Assembly on 15 December 1976.  
.....
- (5.) The arbitral decision shall be final and binding on both parties to the dispute. Each Contracting Party shall execute them in accordance with its laws."

2. SwemBalt is claiming compensation for loss of a vessel SJFW/SwedeBalt, which is registered in Sweden and was leased to SwemBalt's subsidiary SwedeBalt SIA. The vessel was moored in the Port of Riga with the permission of the relevant Latvian authorities and in accordance with a land lease agreement with the Kurzeme district of Riga.
3. With the assistance of the Swedish Foreign Office, negotiations took place with the Ministry for Foreign Affairs of Latvia in November 1995, on 7 August 1996 and on 17 April 1997. A resolution of the dispute was not achieved during these negotiations and, as mentioned above, a Notice of Arbitration was issued.
4. In the Notice of Arbitration, SwemBalt appointed solicitor Kaj Hober, Stockholm, Sweden, as the arbitrator. The Respondent did not appoint an arbitrator and SwemBalt, in accordance with Article 7.2(b) of UNCITRAL's Arbitration Rules, called upon the Secretary General of the Permanent Court of Arbitration in The Hague on 20 May 1999 to nominate an Appointing Institution. On 13 August 1999 the Secretary General nominated the Arbitration Institute of the Stockholm Chamber of Commerce as the Appointing Institution. On 21 September 1999, the Institute appointed Supreme Court judge Gustaf Moller, Finland, as arbitrator.
5. On 21 October 1999 both arbitrators appointed Dr Allan Philip, Copenhagen, Denmark, as Chairman of the Arbitration Tribunal. On 19 November 1999 the arbitrators established that the Court of Arbitration's seat would be Copenhagen and that the language of arbitration would be English and gave the Respondent time to submit a response. All correspondence with both parties relating to the Tribunal was

sent to the Respondent by fax and registered post, see attached list. At no time prior to the oral proceedings, cf. 6 below, did the Respondent react to the Tribunal's or SwemBalt's letters. The Respondent has received copies of all comments presented by SwemBalt, in addition to copies of SwemBalt's letters to the Tribunal, therefore treatment of the Respondent has been equal to that of the Claimant.

6. On 10 August 2000 the Tribunal held an oral proceeding in Copenhagen. Both parties were invited to be present, but the Respondent did not attend. SwemBalt introduced the case and presented further documents, which, following the hearing, were sent to the Respondent with the necessary translations in English and interviewed the following witnesses:...

Mr Thomas Wiren

Mr Nils-Urban Allard.

SwemBalt argued the case and responded to the arbitrators' questions. Minutes of the hearing were taken and later sent to both parties. Following the hearing and receipt of the minutes and further exhibits presented by SwemBalt, the Respondent submitted a brief with five appendices on 20 September 2000. On 28 September 2000, SwemBalt submitted a response, opposing consideration of the Respondent's brief, whilst pointing out that the Tribunal may decide upon consideration of this brief. SwemBalt's response merely repeats the facts and arguments that have already been presented. The Tribunal has taken the Respondent's brief into account when adopting a decision.

## I. Facts

7. SwemBalt has described the facts as follows:

"1. On 2 April 1993 SwemBalt acquired a Ro-Ro type ship, which was to be moored in the Port of Riga and used as a Swedish trade centre and floating commercial centre. The ship was registered in the Swedish Ship Register under the Swedish flag.

2. On 21 April 1993 the ship was transported from Sweden to the Riga Ship Repair Yard, where internal and external renovation of the ship was carried out. The ship was 118.9m in length, 15.55m wide and weighed 3,500 DW. Following renovation, the internal area of the ship was 2,600 m<sup>2</sup>. The ship also had 21 cabins, which could have been used as offices or overnight accommodation, in addition to three conference rooms, a dining room, a bar and a wide deck.

3. Negotiations on positioning of the ship in the Port of Riga were held with the Mayor of Riga, Andris Teikmanis, with the participation of the Riga Port Authority, the City of Riga architect's office and the Land Commission. As a result of these negotiations the Land Commission stated that the land could be leased and that the ship could be moored at the southern end of the Kipsala peninsula and that contact should be established with Oskars Caune, the local mayor for the Kurzeme district of Riga, as the land belongs to the state, but it is managed by the district.

4. Caune was positively in favour of the project and asked for a plan of the property and plan of the ship to be submitted. On 7 October 1993, the Land Committee, Riga City Council and the local mayor, Caune, granted permission for the lease of the berth to go ahead. On 17 November 1993, following authorisation from Ivars Lismanis at Riga City Council and the Port of Riga, the ship was towed to a suitable location at Kipsala, where it arrived at 3pm.

5. For the purposes of this project, SwemBalt AB established the company SwedeBalt SIA, which signed an agreement on 24 March 1994 with the Kurzeme district of Riga, for the lease of a berth and an 11,200 m<sup>2</sup> area of land. The basis for this agreement was the City of Riga Land Commission decision No. 22734 of 1 December 1993. The agreement was to have been in force from 1 December 1993 to 30 June 1998. In accordance with this agreement, the land was leased to establish a floating commercial centre with a Ro-Ro type ship at the SwedeBalt berth.

6. On Monday 28 March [1994] at 11am, Konstantins Gailiss of the Riga Port Authority arrived at the ship together with about 15 people and three tow boats. At the time, no representative of the owner, or any personnel from Sweden were present. Only personnel from Latvia and Russia carried out operations onboard. Later on [the same day], the ship was forcibly moved, without permission from the owner, and moored two nautical miles from the leased berth. The ship was not secured to a berth, but to mooring posts approximately 30m in the water. SwemBalt and lessees (Global Recycling AB, SwemTek AB, Wirens Rederi AB, Ostman Invest AB, SwedSped AB etc) were prohibited from carrying out any further business activities on the ship. Furthermore, rental agreements that had almost been signed with Gotthard Metall AB (rent of USD 100,000 per annum) and ABB Latvia (rent of USD 100,000 per annum) were annulled as a result.

7. SwemBalt found out on the same day that the ship had been moved and then sent a fax to the Mayor of Riga, Andris Teikmanis. SwemBalt also informed the Swedish Embassy in Riga on the same day. Later that day, SwemBalt learned from the Harbour Master of the Port, Gunars Ross, that Riga City Council had arranged for the ship to be moved and therefore again sent a fax to Mayor Teikmanis.

8. On 14 April 1994 the Swedish Embassy delivered a note to the Ministry of Foreign Affairs of Latvia, requesting an explanation of events.

9. On 22 April 1994 the Embassy received a reply. However, this reply did not provide an explanation of the events.

10. On 18 April 1994 the Mayor of Riga, Andris Teikmanis, informed SwemBalt that a new law had been adopted, which had been applied retroactively, thereby invalidating the land lease agreement.

11. On 17 June 1994 the Swedish Embassy sent a letter to Prime Minister Birkavs, requesting an official explanation of events.

12. On 20 June 1994 a meeting was held between the Parties and governmental authorities involved. However statements made by governmental representatives during this meeting did not correspond to the former official position.

13. On 2 September 1994, Riga City Council decided that lease of the land was not in force. No explanations were provided as to why this agreement was deemed to be invalid. However, it is most likely that Riga City Council based its decision on the new legal act, which was adopted in August 1994 and was intended to be adopted retroactively. According to SwemBalt this would then be a breach of Articles 2(2), 2(5) and 4(1) of the Investment Agreement, and the Civil Law of Latvia, 1937, which as a general norm establishes the principle that the law applied to an agreement shall be the law that was in force at the time the agreement was signed.

14. During 1994 and 1995 the Swedish Embassy and various governmental authorities were in contact on a number of occasions, but without any results.

15. On 20 September 1994 Settervalls Advokatbyra (law office), Stockholm, at the request of SwemBalt, carried out an investigation of the case. Settervalls concluded, *inter alia*, that the lease agreement was valid and that removal of the ship was a breach of the lease agreement and possibly a breach of the "Unification of certain regulations on the arrest of sea-going ships".

16. On 11 April 1995, the Swedish Foreign Office informed SwemBalt that the claim was justified in accordance with the Agreement on the Protection of Investments between Latvia and Sweden.

17. On 17 May 1995, the Swedish Embassy in Riga delivered a memorandum to the office of the Prime Minister of Latvia. The purpose of this memorandum was to provide information on the SwemBalt case, which had been discussed during the visit of the Swedish Prime Minister, Ingvar Carlsson, on 19 May 1995.

18. In Prime Minister Ingvar Carlsson's letter to SwemBalt, dated 11 September 1995, the Prime Minister stated that Latvia's actions did not correspond to the Agreement on the Protection of Investments between the countries.

19. On 2 January 1996 the Legal Service of the Swedish Foreign Office prepared a memorandum in this case, which was later submitted to the Ministry of Foreign Affairs of Latvia.

20. On 3 May 1996, the Maritime Administration of Latvia advertised a public auction of the ship. The ship was designated a "wreck" in the advertisement. The Maritime Administration had concluded that the ship, owing to its being positioned in a place by the Port Authority of Riga, may constitute a danger to navigation. The Swedish Foreign Office regarded this action as unwarranted and "cloaked in legalese". According to SwemBalt, the ship was in a better condition than it appears in photographs. Furthermore, the Latvian authorities and not SwemBalt had removed the ship to the aforementioned

mooring posts. The location itself was not a danger, as the mooring is usually used for ships as a "holding area".

21. In July 1996, Ulf Hjertensson of the Swedish Foreign Office sent a letter to his colleagues in Latvia, reiterating Sweden's position. With regard to the sending of this letter, the Swedish Foreign Office sent notification to the Swedish Embassy in Riga, dated 18 June 1996. Incidentally, this notification stated that SwemBalt continues to have no access to the ship.

22. The ship was auctioned in July 1996 and was acquired by the Ferrum scrap metal company for USD 50 per tonne, which was the scrap value of the ship's metal, totalling USD 150,000.

23. On 31 July 1996, the Swedish Foreign Office sent a fax to SwemBalt, which stated that the Ministry of Foreign Affairs of Latvia will attempt to avert scrapping of the ship.

24. On 7 August 1996 a meeting was held at the Ministry of Foreign Affairs of Latvia between representatives of Latvian governmental authorities, the Swedish Foreign Office and SwemBalt. Following the meeting, the Swedish Foreign Office stated that there is an evident conflict of competence between the Latvian governmental authorities. No amicable resolution of the dispute was achieved as a result of this meeting.

25. On 8 August 1996 an inspection of the ship was carried out, which revealed that reinforcements and other parts had already broken off.

26. The Ministry of Foreign Affairs did nothing to avert scrapping of the ship. The ship was towed to the Mangali quay. There the equipment, for example, the electricity generators, refrigerators, boilers and other standard Swedish equipment was removed. The ship was then moored across the river at the Liepaja Metalurgs site, where it was scrapped for melting.

27. On 17 April 1997 another meeting was held at the Ministry of Foreign Affairs of Latvia, between Latvian governmental authorities, the Swedish Foreign Office and SwemBalt. No amicable outcome was reached during the meeting.

28. SwemBalt has not received any compensation for the ship, or the furnishings or equipment. In addition SwemBalt has not received any compensation for the utilities, which were on the ship."

## **II. Claims by the Parties**

### **8. SwemBalt has made the following claim:**

"1. SwemBalt asks the Arbitration Tribunal to adjudge immediate payment of USD 2,806,258 plus interest:

2. USD 2,250,000 as compensation for the loss of the vessel M/S SwedeBalt, plus interest of 10% per year, starting from 29 March 1994 until the day on which payment is made in full.

3. USD 156,258 as compensation for the loss of equipment and furnishings (Article 2.3.1), plus interest of 10% per year, starting from 29 March 1994 until the day on which payment is made in full.

4. USD 75,000 as compensation for loss of income from March 1994 to 28 March 1995, plus interest of 10% per year, starting from 29 March 1996 until the day on which payment is made in full.

5. USD 100,000 as compensation for loss of income from 29 March 1994 to 28 March 1996, plus interest of 10% per year, starting from 29 March 1996 until the day on which payment is made in full.

6. USD 100,000 as compensation for loss of income from 29 March 1996 to 28 March 1997, plus interest of 10% per year, starting from 29 March 1997 until the day on which payment is made in full.

7. USD 100,000 as compensation for loss of income from 29 March 1997 to 28 March 1998, plus interest of 10% per year, starting from 29 March 1998 until the day on which payment is made in full.

8. USD 25,000 as compensation for loss of income from 29 March 1998 to 30 June 1998, plus interest of 10% per year, starting from 1 June 1998 until the day on which payment is made in full.

9. SwemBalt claims compensation for court costs."

### **9. SwemBalt has presented the following information on calculations of its claim:**

"2.30. Market value of the ship (USD 2,250,000) based on the value of the recently renovated ship at the time of removal, in addition to the projected increase in value. The market value is also based on the cost of building a brand new similar ship, which, according to EIDE Contracting A/S, Norway, would have been NOK 140,000,000 NOK (USD 21,000,000). Furthermore, in January 1996 SwemBalt had the opportunity of selling the ship to Valinvest S.A. for USD 11,700,000. The price included

renovation of the ship by EIDE Contracting A/S, Norway. EIDE offered to renovate the ship for NOK 45,000,000 (USD 6,550,000). The agreement of sale was signed and presented to the Swedish Ship Register for registration on 15 March 1996. As the ship had been confiscated by the Latvian authorities and it could not be moved, both parties agreed to cancel the sale. This cancellation was registered in the Swedish Ship Register on 26 August 1996.

2.30. Compensation for equipment and furnishings based on the following market values:

- (1.)
- (2.)
- (3.)
- (4.)
- (5.)
- (6.)
- (7.)
- (8.)
- (9.)
- (10.)
- (11.)
- (12.)
- (13.)
- (14.)
- (15.)
- (16.)
- (17.)
- (18.)
- (19.)

10. SwemBalt's claim with regard to costs can be defined more precisely as follows:

Duties, incl. VAT	SEK 656,250
Deposit	<u>SEK 750,000</u>
In total	<u>SEK 1,406,250</u>

11. **The Respondent** has asked for SwemBalt's claim to be rejected.

### **III. Evidence**

12. Mr Thomas Wiren acting as a witness explained that he has been active in the shipping industry, including the Baltic region. He wanted to establish his Baltic business centre in Riga and together with 4 other persons decided to establish a floating trade centre in the Port of Riga. At the time when the ship was removed, he was in regular contact with the Mayor of Riga, Mr Teikmanis and the Harbour Master of the Riga Port Authority, Mr Ross. He was under the impression that the order to remove the ship had come from these persons. He tried to reach an agreement, in order to have the ship returned, but, despite certain promises, that did not happen. At one time an area was offered where the ship could be removed, but the financial conditions were not acceptable. Certain references were made to the new law with retrospective effect, but no specific explanations were given. He participated in several meetings with the Port Administration, the Council and the Ministry of Foreign Affairs, but with no outcome. He did not hire a local solicitor to represent him and depended on the support of the Swedish Embassy. There was security on the ship, whilst it was moored, in order to protect his property, but they lost everything

when the ship was removed for scrapping. They have not asked for separate compensation for the cost of security.

13. He bought the ship in 1993 for SEK 5 million and spent at least SEK 2 million on renovations. The ship was insured for SEK 8 million, but the insurance does not cover this type of claim.
14. Nils-Urban Allard acting as a witness explained that he is an employee of the Swedish Foreign Office and has led negotiations on several investment agreements, similar to the agreement with the Respondent. He has also participated in a number of meetings at the Ministry of Foreign Affairs of Latvia concerning this case. He has nothing to add to the information presented by SwemBalt, but, he contends that this case is undoubtedly subject to the Investment Agreement. In his opinion, the Investment Agreement can be applied to the actions of all Latvian authorities, irrespective of whether they are state, regional or municipal authorities. He also contends that regulations on arbitration can be applied automatically, without entering into an arbitration agreement and irrespective of whether contractual relations exist between an investor and a public authority.

#### **IV. SwemBalt's arguments**

15. SwemBalt argues that the Arbitral Tribunal has jurisdiction in accordance with the Investment Agreement. In addition to Article 7 quoted above, reference is made to Articles 1, 2 and 4 of the Investment Agreement, as follows:

"Article 1

Definitions

For the purpose of this Agreement:

- (1) The term "investment" shall mean every kind of asset, invested by an investor of one Contracting Party in the territory of the other Contracting Party, provided that the investment has been made in accordance with the laws and regulations of the other Contracting Party, and shall include in particular, though not exclusively:
  - (a) movable and immovable property as well as any other property rights, such as mortgage, lien, pledge, usufruct and similar rights;
  - (b) shares and other kinds of interest in companies;
  - (c) claims to money or any performance having an economic value;
  - (d) intellectual property rights, technical processes, trade names, know-how, good-will and other similar rights; and
  - (e) business concessions conferred by law, administrative decisions or under contract, including concessions to search for, cultivate, extract or exploit natural resources.
- (2) Goods that under a leasing agreement are placed at the disposal of a lessee in the territory of one Contracting Party by a lessor being a national of the other Contracting Party or a legal person having its seat in the territory of this Contracting Party, shall be treated not less favourably than an investment.
- (3) The term "investor" shall mean:
  - .....
    - (b) any legal person having its seat in the territory of either Contracting Party, or in a third country with a predominant interest of an investor on either Contracting Party.
  - .....

Article 2

Promotion and Protection of Investments

- (1) Each Contracting Party shall, subject to its general policy in the field of foreign investment, promote in its territory investments by investments of the other Contracting Party and shall admit such investments in accordance with its legislation.
- (2) Each Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shall not impair the management, maintenance, use, enjoyment or disposal thereof as well as the acquisition of goods and services and the sale of their production through unreasonable or discriminatory measures.
- .....
- (5) The investments made in accordance with the laws and regulations of the Contracting Party in whose territory they are undertaken, enjoy the full protection of this Agreement.
- .....

Article 4

Expropriation and Compensation

- (1) Neither Contracting Party shall take any measures depriving, directly or indirectly, an investor of the other Contracting Party or an investment unless the following conditions are complied with:
  - (a) the measures are taken in the public interest and under due process of law;
  - (b) the measures are distinct and not discriminatory; and
  - (c) the measures are accompanied by provisions for the payment of prompt, adequate and effective compensation, which shall be transferable without delay in a freely convertible currency.

16. According to SwemBalt, it is an investor in the sense of Article 1. SwemBalt has made an investment by leasing a ship to SwedeBalt SIA, cf. Article 1(2) of the Agreement. Contrary to the Respondent's statement, it took place in accordance with Latvian law in November 1993, following completion of renovation work and with the assistance of a local law office and authorisation from Riga City Council and the Port of Riga. The ship was towed to Kipsala with the aid of a pilot and two tow boats. The ship was towed to Kipsala before the Agreement was signed, as the freezing over of the river may have delayed this until the following Spring, and the authorities granted permission accordingly.
17. SwemBalt also contends that the dispute is between the investor (itself) and Latvia, a Contracting Party to the Investment Agreement. In this regard SwemBalt has referred to the Swedish Foreign Office's letter of 11 April 1995 and the Swedish Prime Minister's letter of 11 September 1995 addressed to him. Both letters support this contention and specify arbitration in accordance with the Investment Agreement. SwemBalt contends that its rights were removed as a result of the joint actions of the municipal authority and the government and that Latvia is responsible for the activities of public authorities at any level.
18. SwemBalt has not been aware of warning letters of 1 February and 24 March 1994 from the Harbour Master of the Port, which the Respondent has now presented. Similarly, SwemBalt alleges that the ship was not moored at the Mangali quay, but at a distance of 300 m and 40 m in the river.

19. In removing the ship and associated income from SwemBalt, the Respondent, according to SwemBalt, has acted contrary to Articles 2 and 4 of the Investment Agreement. The Respondent has also acted contrary to its own laws, cf. Section 265 of the Maritime Code of Latvia, which states that the Maritime Administration may sell a wreck, but all profits from the sale shall be paid to the owner, following costs. According to SwemBalt, the ship was not a wreck when representatives of the government removed it from its place of mooring, or when it was sold, and therefore could not be sold in accordance with this regulation. In either case, SwemBalt has not received any income from the sale.
20. According to SwemBalt, the claim for income reflects the net income, which the Latvian company would have gained over a period of 5 years of activities under the 14 March 1994 agreement to lease an area of land and a berth and which would have been assigned to SwemBalt as payment for the lease of the ship and as dividends. It comprised 7 percent of the gross income from the lease of space aboard the ship, in accordance with agreements that had already been signed or agreements under negotiation, at the time when the ship was confiscated and towed away.

**V. The Respondent's Arguments**

21. The Respondent has presented certain documents pertaining to the ship, as well as an extract from the Law No 322 of 5 November 1991 on foreign investments in the Republic of Latvia, two letters dated 1 February and 24 March 1994, from the Harbour Master of the Port of Riga, which state that the mooring of the ship at Kipsala is illegal, and, lastly, a letter to SwemBalt from the Chairman of Riga City Council, Mr Teikmanis, dated 18 April 1994, in reply to SwemBalt's fax, which states the port authorities did not authorise the towing of the ship to Kipsala and that the agreement for the lease of land is not in force.
22. The Respondent contends that the arbitrators have no jurisdiction in this case, as the Latvian government is not the real Respondent. The reason for this is the fact that the ship cannot be regarded as an "investment" within the meaning of the Investment Agreement. Although the term "investment" is defined as any property, a precondition of applying the Convention, according to the Respondent, is that an investment should be made in accordance with the laws and regulatory enactments of the relevant country. In this regard, the Respondent makes reference to Articles 1(1) and 2(5) of the Investment Agreement. Furthermore, the Respondent has expressed doubts on SwemBalt's ownership of the ship.
23. Concerning the legality of the investment, the Respondent contends that Latvian law was contravened, as the ship was moved to Riga in April 1993, whilst SwedeBalt SIA was established only on 27 October 1993. Similarly, the Respondent contends that SwemBalt has not provided evidence that the ship was intended as an investment in SwedeBalt SIA.

24. Concerning removal of the ship, the Respondent points out that the Harbour Master of the Port warned SwemBalt twice, before the ship was removed to the Mangali quay. The Respondent does not agree with SwemBalt's reference to the law with retrospective effect, and in this regard, makes reference to Mr Teikmanis' letter of 18 April 1994.
25. Finally, concerning the sale of the ship at auction, the Respondent contends that the condition of the ship deteriorated considerably whilst it was located at the Mangali quay, and was a danger to navigation, but SwemBalt did not respond to the notification of 31 August 1995, published in the official newspaper, or to the 7 May 1996 notification of auction.

## **VI. Grounds**

26. As mentioned above, until after the final hearing, the Respondent has not in any way participated in the proceedings and after the hearing only in a limited way. The Arbitrators, nonetheless, are of the view that, in the circumstances, they have an obligation to form their own view of the facts and of the law and, even after having received and considered the Respondent's brief of 20 September 2000, cannot rely indiscriminately on the contentions and allegations of SwemBalt. On the other hand, the Arbitrators, who have been practically without the assistance of the Respondent, have had only very limited possibility of obtaining any information about what actually happened and about the legal basis thereof other than that provided by SwemBalt. All they can do is to try in the best possible way and taking the Respondent's said brief into consideration, to form an opinion of the reliability of the evidence presented by SwemBalt and the acceptability of its legal arguments. This is what the Arbitrators have attempted to do in the absence of other than a very limited contribution by the Respondent at a very late stage.
27. The first question is whether the Tribunal has jurisdiction to decide the claims raised by SwemBalt. Article 7 (1) of the Investment Agreement talks about any dispute between one of the Contracting Parties (Sweden or Latvia) and an investor of the other Contracting party. There is no doubt that a dispute exists between SwemBalt and the Respondent, since SwemBalt has made a claim for compensation against the Respondent, to which the latter at first did not react and at a later stage has objected. The Respondent is a Contracting Party to the Investment Agreement. The Tribunal is satisfied that SwemBalt is an investor in the sense of Article 1 (3) (b) of the Investment Agreement, being a legal person having its seat in Sweden. It is true that the Respondent has argued that an investment to qualify must be made in accordance with its laws and that that is not the case. This, however, is not relevant in relation to the definition of investor in Article 1 (3) (b). SwemBalt is also an investor of the other Contracting Party under Article 7 (1), i.e. an investor of a Contracting Party other than the Respondent, viz. of Sweden. It has also requested, as required under Article 7 (2), the initiation of arbitration proceedings. Prima facie, therefore, we have jurisdiction in this case.

28. Before finally expressing our view in this regard, we wish to point out that resolution of disputes by arbitration generally presupposes the existence of an arbitration agreement between the parties to the arbitration in connection with a (usually contractual) relationship between the parties. No such relationship and no such agreement exists in the present case. However, nothing can prevent two sovereign states, such as in the present case Latvia and Sweden, from concluding an agreement according to which they accept to submit themselves to arbitration of disputes with subjects of the other party whenever such subjects so request and regardless whether the dispute is of a contractual or of a non-contractual nature. This is what in our submission Sweden and Latvia have done in Article 7(2) of the Investment Agreement. As we read that provision, it provides for a unilateral right for either party to the dispute, the state which is a Contracting Party to the Investment Agreement and the investor, unilaterally to initiate arbitration proceedings without the prior existence of a specific agreement between them to submit to arbitration. We conclude, therefore, that we have jurisdiction to decide the present dispute.
29. The Respondent contends 1) that SwemBalt does not own the ship, 2) that no investment has been shown to have been made, and 3) that SwemBalt has not complied with Latvian law with regard to foreign investment in that a) it invested at a time when it had not registered a company in Latvia, and b) it had not made valid agreements about the lease of land, the towage of the ship to its berth and about placing it there.
30. With regard to SwemBalt's ownership of the ship, there is no basis for doubt about SwemBalt's ownership of it. It is correct that its earlier name was Feeder Chief, and that, on application by SwemBalt, on 15 November 1993, the Swedish Ship Register registered a name change to SwedeBalt and issued a new certificate of nationality. Two days later the Port of Riga still used the old name of the ship when issuing the pilot's bill relating to the towing of the ship from the shipyard to the berth at Kipsala. This, in the opinion of the Arbitrators, does not give rise to doubt about the ownership of the ship. The later sale in 1996, which became ineffective because of the auction of the ship in Riga and the subsequent scrapping of the ship, is without relevance to this case except in relation to the claim for damages.
31. With regard to the Respondent's contention that no investment took place, it is correct that no written agreement about the lease has been submitted. However, it is clear from the evidence that the ship was bought by SwemBalt for the purpose of a floating trade centre in Riga, that it was renovated and converted for this purpose, that land was leased in Riga in the name of the Latvian subsidiary to create a basis for the centre and a quay for the ship, and that space aboard the ship was rented or was about to be rented to various traders. In these circumstances we find that, subject only to the question whether the investment was made in accordance with the laws and regulations of the country concerned, to which we shall now turn, there is an investment that is covered by Article 1 (1) and/or Article 1 (2).

32. With regard to compliance with Latvian law, the Respondent has referred to the fact that the ship was towed to Riga for renovation already in April 1993, whilst registration of Swede Balt SIA only took place on 27 October 1993. This according to the Respondent constitutes non compliance with Article 2 of the Foreign Investment Law, which requires that foreign investors must establish a Latvian company, if they wish to carry on activity in Latvia. However, the activity of the Claimant in Latvia only began after the ship, on 17 November 1993, had been towed to its berth in Kipsala. Until then, the ship was under renovation at a Latvian shipyard in Riga, which according to Article 2 of the Foreign Investment Law cannot be regarded as an activity undertaken by SwemBalt.
33. Questions on the validity of the lease agreement still remain and the alleged permission to tow the ship to Kipsala on 17 November 1993. In this regard, the Respondent, apart from the two warning letters and Mr. Teikmanis' letter of 18 April 1994, has provided little to enlighten us. The warning letter from the Harbour Master of the Port of Riga of 1 February 1994, just states as a "fact that You are occupied this place for ship's stay illegali" [sic]. The letter from Mr. Teikmanis, signed by him as chairman of Riga City Council, reads as follows:

"In response to your telefax of 94-04-08 we inform you that the initiative of the company concerning the parking of ship "Feeder Chief" in Kipsala was arbitrary. The towage had not been approved by the administration or captain of the port, and any specific agreements with the corresponding institutions had not been concluded.

We would like to remind you that a ship cannot be towed in any port of the world without permission given by the governing body of the port.

The agreement of March 24 1994, about the lease of land in Kipsala from 1 December 1993, concluded between you and Mr. Caune, the representative of Kurzeme District Government, is illegal and invalid. In accordance with the resolution No. 50 of 26 March 1993, adopted by Riga City Council, land lease agreements in the City of Riga can be concluded only by Riga City Government, in the territory of the Port of Riga - only by Riga Port administration. Besides, the decree No. 75-r of 1 March 1994, adopted by the Cabinet of Ministers, envisages the following: until the law about ports is adopted by Saeima, all land lease agreements within the territories of the ports can be concluded only with the approval of the National Port Council.

Therefore we would like to remind you once more: the problem, concerning the stationing of the ship in the territory of the Port of Riga, has to be resolved in accordance with Latvian law and regulatory enactments.

Thereby, since you have transgressed the established order, you have to assume the responsibility for the sustained losses yourself. Riga City Government will not admit any claims for the compensation of losses."

34. We have not been provided with the text of the legal instruments referred to in the letter. We find it surprising that SwemBalt has not been informed at an earlier stage, when during the autumn of 1993 it negotiated with Mr. Teikmanis and other city, regional and port authorities about the project, about the illegality thereof. It is also surprising that the harbour master of the Port of Riga on 17 November 1993, as it appears from the Pilot's bill, should have taken part with a pilot and two tow boats in towing the ship to Kipsala, if the mooring of the ship there was illegal. Finally, it is

surprising that the authorities waited for more than four months before taking any measures in that regard, if really the whole enterprise was illegal.

35. In these circumstances we find that SwemBalt has shown, that in all likelihood it has complied with Latvian law, that the Respondent has not shown that the investment was not made in accordance with the laws and regulations of Latvia, and that in any event the actions of the Respondent were out of proportion with any non-compliance that may have existed. We conclude, therefore, that SwemBalt has made an investment in Latvia, which fulfils the requirements made by the Investment Agreement for being protected by that agreement.
36. The obligations of the parties to the Investment Agreement are obligations of the Contracting Parties, i.e. the Governments of Sweden and Latvia. From the evidence before us it is not clear, to which extent the decisions resulting in the loss of the ship and other losses of SwemBalt, directly or indirectly, have been taken by governmental or municipal authorities, or both, or whether the Port Authority, which seems to have played a certain role in the events, is a municipal or governmental authority, although the latter is alleged by SwemBalt.
37. Under Article 7 of the Investment Agreement any dispute between a Contracting party and an investor may be subject to arbitration. It cannot be excluded that the circumstances of a dispute may be such that it is of importance, whether the party to which the investor is opposed is the government, or a part of it, or rather a municipal or other non-governmental authority. That may depend, for example, on the character of the dispute or the law applicable to it. Be that as it may, in the present case, we are faced with a dispute in which it is alleged that the duties and obligations of the Respondent under general international law and under the Investment Agreement itself have been breached. In such a case, the subdivisions of the state and the way in which each state chooses to divide the work between such subdivisions is without relevance. If the state delegates certain work to lower levels of government, be they federal, regional or municipal, it must be an obligation of the state under international law to ensure that its obligations under international law, whether general or treaty law, are fulfilled by such subdivisions. We, therefore, conclude that the question, which public authority in fact acted to deprive SwemBalt of its rights, is not relevant in this case, regardless of the status of the authority directly involved.
38. It follows from the above that the Republic of Latvia, by taking the ship away, preventing SwemBalt from using it and, finally, by auctioning it and permitting that it be scrapped without any compensation to SwemBalt, has breached its obligations under the Investment Agreement and general international law. SwemBalt has made claims for compensation for the losses resulting from that breach. The Investment Agreement itself contains no provisions directly regulating the right to compensation. However, indirectly such right may be based upon the provision contained in Article 4 (1) (c) providing as one of the conditions for lawful expropriation that prompt, adequate and effective compensation is paid. In addition, the right to compensation for breaches of international law follows from general

principles of international law as supplemented by general principles of law recognised by civilised nations, cf. Article 38 of the Statute of the International Court of Justice. It seems clear that when Article 7 of the Investment Agreement refers disputes concerning the interpretation or application of the Agreement to arbitration, the intention has been to permit the arbitral tribunal to decide not only the existence or not of a breach of the Agreement, but also any consequences of such breach. We shall, therefore, now consider the claims for compensation made by SwemBalt.

39. SwemBalt is claiming compensation for loss of the ship in the amount of USD 2,250,000. SwemBalt alleges that this reflects the value of the ship at the time it was removed. To support this claim, SwemBalt has informed the Tribunal that the cost of building a new ship at the time said ship was confiscated by the Latvian authorities, would be USD 21 million and in accordance with the signed agreement of sale of 29 January 1996, that is to say, before the ship was designated a wreck, the ship was sold for USD 11,700,00, minus the cost of renovations in the amount of USD 6,550,000. This agreement of sale was registered in the Swedish Ship Register on 15 March 1996, but the sale was cancelled, as the ship had been confiscated by the Latvian authorities.
40. When assessing the information that has been presented regarding the ship, Mr Wiren's statements on the purchasing and renovation costs, the condition of the ship according to the photographs presented to the Tribunal and, in particular, the fact that the ship was sold for a considerably higher amount after it had been moved by the authorities, but before being scrapped, we conclude that the claim for compensation is justified and we pronounce an award of USD 2,250,00. Concerning SwemBalt's allegation that the condition of the ship had deteriorated considerably at the time ship was scrapped, the Arbitrators note that this took place whilst the ship was under the maintenance of the Latvian authorities, and therefore, even if this were true, cannot decrease the value of the ship. Please refer below with regard to the rate of interest.
41. Similarly, SwemBalt has asked for USD 156,258 as compensation for the loss of furnishings and equipment. These have been listed as 19 separate items, including one caterpillar and one international power shovel, PPM and poclain hydraulic excavator, in addition to several other smaller parts and items of furniture. Photographs of the power shovel have been presented, in addition to a number of receipts for separate items of furniture. SwemBalt alleges that these items were acquired for the ship and the leased area of land, but were lost as a result of the actions taken against the ship. Given that the Tribunal has no evidence to refute SwemBalt's allegations, and given that the claim appears to be justified, we pronounce an award for the claim for compensation. Please refer below with regard to the rate of interest.
42. SwemBalt has asked for USD 400,000 as compensation for loss of income. This amount has been calculated as seven percent of the projected income from lease of the ship starting from the day, when the ship was removed up until 30 June 1998. No specific evidence has been presented concerning this claim. The claim was presented

as a claim by SwemBalt as the owner of the ship. According to SwemBalt, the ship was leased to its subsidiary SwedeBalt SIA and it is possible that the latter entered into lease agreements for space aboard the ship. No evidence has been presented with regard to a lease agreement between SwemBalt and the subsidiary, or lease agreements for space aboard the ship, or the subsidiary's budget, or SwemBalt's budget relating to the latter's income from the former.

43. In this situation, and whilst we may recognise it to be true that SwemBalt would have received net income from investments in the ship, we cannot accept the claim as it has been presented. In assessing the overall situation, we are of the opinion that SwemBalt has not provided evidence that a loss greater than USD 100,000 has been sustained, and therefore, this is the amount we have adjudged.
44. With regard to the aforementioned claims, SwemBalt has asked for an interest rate of 10% per year to be applied, starting from various dates to the day on which all payments are made in full. Based on the Tribunal's request for more detailed explanations following the oral hearing, SwemBalt alleges that Swedish law should be applied to the claim for interest rates. SwemBalt contends that not only has his investment been taken, but also any possibility of receiving interest starting from the day on which the above was taken. In addition, interest had to be paid on the loan used to acquire the ship.
45. SwemBalt's claims in these proceedings are not based on the Agreement, but rather as a result of the Respondent's breach of its duties and obligations under international law, including the Investment Agreement between Latvia and Sweden. There is no overall consensus under international or comparative law, or international arbitration rules concerning the right to claim interest for an offence under civil law. The Investment Agreement contains no clear regulations in this regard and the claim for interest may only be loosely based on Article 4 (1) (c). However, based on the analogy of this regulation, the Tribunal has concluded that interest shall be paid, to provide adequate compensation and to take account of the long period of time that has elapsed since the ship was taken illegally from SwemBalt and since when no amicable resolution has been reached.
46. Under international law there are no rules with regard to the rate of interest to be paid. Therefore it is necessary to find references under national law. When deciding under which law said references should be found, the arbitrators made reference to the general principles of international private law, which forms part of general international law. Therefore the Tribunal can choose between the law of the country in which the loss was sustained, Latvian law, and the law of the country in which the Tribunal is held, Danish law, as the Tribunal is of the opinion that the link with Sweden is not sufficiently strong to be able to apply Swedish law. The Tribunal does not have information on relevant Latvian law, therefore in this situation it is natural to apply the law of the country in which the Tribunal is held.

47. Pursuant to Division 3 of the Danish Interest Act, 1986, a rate of interest shall be applied in this case from the day on which SwemBalt has initiated proceedings for repayment of debts, unless the court decides that in exceptional circumstances, interest shall be payable from an earlier date. Pursuant to Division 5 of the Interest Act, the rate shall be an official discount rate, with the addition of 6 percent, unless the court decides otherwise. From this we conclude that 10 percent is a reasonable rate, payable from 9 April 1999, when Latvia was informed of the proceedings, up until the day payment is made in full.
48. SwemBalt has asked for compensation of expenses, including duties and VAT thereof, and accounts, the amounts of which have been specified and documented. The amount of the claim includes a deposit of SEK 750,000, which has been paid to the Arbitration Tribunal. The surplus comprises SwemBalt's duties and costs.
49. In accordance with international practice and in observance of the outcome of the case and Articles 38(e) and 40 of UNCITRAL's rules, the Arbitrators have decided that the Respondent shall pay SwemBalt USD 1,345 USD and SEK 1,406,250, to cover the costs of the arbitration and SwemBalt's accounts and duties, including VAT on the latter.

## **VII. Conclusions**

The arbitrators have concluded that:

1. The Respondent, the Republic of Latvia, shall pay SwemBalt compensation for loss of the ship in the amount of USD 2,506,258, with interest of 10% per year starting from 9 April 1999 up until the day payment is made.
2. The Respondent shall pay SwemBalt compensation for duties and payments to solicitors, including duties and costs of the Arbitration Tribunal, totalling USD 1,345 and SEK 1,406,250, including 25% VAT of SEK 525,000.
3. Payment for the arbitrators shall be as follows:

Allan Philip	DKK 237,000
Kaj Hober	DKK 220,000, including 25% VAT of DKK 176,000
Gustaf Moller	DKK 176,000

All additional claims for VAT or other duties shall be reserved.

The arbitrators' travel and other expenses comprise DKK 29,266.45

4. All payments shall be made no later than two weeks following the date of this Decision.

Copenhagen 23 October 2000

Kaj Hober

Gustaf Moller

Allan Philip