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**LLC AMTO v. Ukraine, SCC Arb. No. 080/2005, Final
Award, at 17 (26 March 2008)**

Submitted by: Arnold & Porter LLP



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2016

**Capacity Building on Existing International
Investment Agreements in the APEC Region,
Relevance, Emerging Trends, Challenges and
Policy Options to Address Coherence in Treaty
Making**

**Lima, Peru
22-24 February 2016**

ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

ARBITRATION № 080/2005

IN THE MATTER OF: An arbitration pursuant to the Energy Charter Treaty and the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce:

LIMITED LIABILITY COMPANY AMTO

(Claimant)

and

UKRAINE

(Respondent)

Mr. Bernardo M. Cremades, Chairman
Mr. Per Runeland, Arbitrator
Mr. Christer Soderlund, Arbitrator

FINAL AWARD

This is an arbitration pursuant to Article 26 of the Energy Charter Treaty (hereafter «*ECT*») and the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce adopted in 1999 and in force as at the commencement of the arbitration (hereafter «*SCC Rules*»),

I. PARTIES

§1.- The Claimant is: Limited Liability Company AMTO a corporation pursuant to the laws of Latvia, with its registered office at Terezes 1, Riga, LV-1012 Latvia (hereafter «*AMTO*» or the «*Claimant*»).

The Claimant is represented in this arbitration by Advokat Sverre B. Svahnstrom and Ms. Irina Tkatsenko, Advokatfirman Svahnstrom, Taby Centrum, Ing. S, SE-183 34 Taby, Sweden (Tel: +46 8 15 80 00; Fax: +46 8 54 47 42 55; E-mail: sbs@svahnstrom.se and irina.tkatsenko@svahnstrom.se), and Prof. Kaj Hober and Mr. Fredrik Andersson of Mannheimer Swartling, Norrmalmstorg 4, Box 1711, SE-111 87 Stockholm (Tel: +46 8 505 765 00; Fax: +46 8 505 765 01; E-mail: kho@msa.se and fra@msa.se).

The Respondent is: UKRAINE (hereafter «*Ukraine*» or the «*Respondent*»), c/o The Ministry of Justice of Ukraine, with offices at 13 Horodetskogo street, Kiev 01001, Ukraine (Tel/Fax: +380 44 278 37 23).

The Respondent is represented in this arbitration by Grischenko & Partners (Dr. Sergiy Voitovich, Messrs Dmitri Grischenko and Dmitry Shemelin), 37-41 Artema Street, 04053, Kiev, Ukraine (Tel: +38 (044) 490 37 07; Fax: + 38 (044) 490 37 09; E-mail: sav@gp.ua) and Proxen & Partners (Messrs Andriy Alexeyev and Oleg Shevchuk), Apartment 6, 3rd Floor, Shota Rustaveli Street 20, Kiev, 01033, Ukraine (Tel: + 38 (044) 495 2220; Fax: + 38 (044) 289 1546; E-mail: a.alexeyev@proxen.kiev.ua).

§2.- The Claimant and the Respondent are collectively referred to as the «*Parties*».

II. COMMENCEMENT OF THE ARBITRATION

§3.- The Request for Arbitration dated October 31, 2005 of AMTO and AOZT Elektroyuzhmontazh-10 (a closed joint stock company registered in Ukraine) (hereafter «*EYUM-10*») was received by the Arbitration Institute of the Stockholm Chamber of Commerce (hereafter «*SCC Institute*») on November 24,

2005. In the Request for Arbitration AMTO and EYUM-10 appointed as an arbitrator in this case Mr. Per Runeland, SJ Berwin LLP, 10 Queen Street Place, London EC4R 1BE, United Kingdom.

The Respondent submitted its Reply to the Request for Arbitration to the SCC Institute on February 17, 2006. The Respondent submitted for the reasons set out in this document that the Request for Arbitration be dismissed for manifest lack of jurisdiction of the SCC Institute pursuant to Article 7 of the SCC Rules.

§4.- After receiving the Claimant's comments the SCC Institute decided on March 9, 2006 that: (i) it was not clear that the SCC Institute lacks jurisdiction over the dispute regarding AMTO; and (ii) it was clear that the SCC Institute lacked jurisdiction over the dispute regarding EYUM-10, and so the claims raised by EYUM-10 were dismissed. The SCC Institute also directed the Respondent to appoint an arbitrator.

By letter dated March 21, 2006 the Respondent appointed as arbitrator Mr. Christer Soderlund, Advokatfirman Vinge, Smalandsgatan 20, P.O. Box 1703, SE-11187 Stockholm, Sweden.

By letter dated March 22, 2006 and pursuant to Article 13 of the SCC Rules, the SCC Institute advised the Parties of its decisions (i) to appoint Mr. Bernardo M. Cremades, B. Cremades y Asociados, Goya 18, 2º, 28001, Madrid, Spain, as Chairman of the Arbitral Tribunal; (ii) to fix the place of arbitration as Stockholm; and (iii) to fix the advance on costs (since revised).

§5.- The advance on costs was paid and the case was referred to the Arbitral Tribunal pursuant to Article 15 of the SCC Rules on April 7, 2006.

III. PROCEDURAL HISTORY

§6.- On April 21, 2006 and after consultation with the Parties, the Arbitral Tribunal issued Procedural Order № 1 setting a preliminary timetable for the arbitration and addressing certain procedural matters. The timetables established in this and subsequent procedural orders were amended on various occasions at the request of or after consultation with the Parties.

§7.- On June 2, 2006 the Claimant submitted its Statement of Claim, supported by various exhibits.

On July 13, 2006 the Respondent submitted its Statement of Defence, including its objections to jurisdiction and admissibility, supported by numerous exhibits. The Statement of Defence also included a counterclaim for non-material injury subsequently quantified at the request of the Arbitral Tribunal.

On October 16, 2006 the Claimant submitted its Reply to the Respondent's Statement of Defence, supported by various exhibits.

§8.- By letter dated November 10, 2006 the Respondent requested that the Arbitral Tribunal rule on the admissibility of the Claimant's Exhibits C-12 and C-13 (respectively the commission agreement and registration certificates relating to the Claimant's shareholding in EYUM-10) and Exhibits C-58 and C-59 (witness statements of Messrs Timofeyev and Kuznetsov). The Arbitral Tribunal denied the Respondent's requests to declare these exhibits inadmissible in its letters of November 16 and December 7, 2006.

On January 18, 2007 the Respondent submitted its Rejoinder in this arbitration, supported by various exhibits.

§9.- The Arbitral Tribunal and the Parties had an intensive exchange of communications relating to the further procedural steps in the arbitration (including whether or not to bifurcate the proceedings for preliminary consideration of jurisdictional issues), the presentation of evidence, the conduct of the hearing, and the timetable for the remainder of the arbitration. The Claimant specifically requested an oral hearing and both Parties made extensive submissions regarding the issues raised, including the procedure for an oral hearing.

On March 7, 2007 the Arbitral Tribunal issued Procedural Order № 2. Paragraph 1 of Procedural Order № 2 provided for a single further exchange of submissions and evidence by the Parties. Paragraphs 2 and 3 provided as follows (emphasis original):

- «
2. *The Pre-hearing briefs shall be accompanied by any further written evidence (including witness statements and expert reports) in relation to all issues in this arbitration (including jurisdiction, liability and damages) that the Parties wish to submit in support of their cases, as well as any further relevant legal submissions;*
 3. *The Pre-hearing briefs are the final opportunity of the Parties to present written submissions, witness statements, expert reports or documentary evidence to the Arbitral Tribunal prior to the hearing. Further, the Parties*

shall not present any witnesses or experts for oral evidence at the hearing except in respect of matters included in their written statements.»

Paragraph 4 provided for a single hearing on all issues of up to five days duration, that the Tribunal proposed to begin on June 25, 2007; paragraph 5 dealt with the availability of witnesses and counsel on the proposed hearing date and the language(s) of the witnesses; and paragraph 6 provided for the hearing procedure.

§10.- There were further applications by the Parties for extensions of time for the submission of the Pre-hearing briefs, resulting in the postponement of the hearing, so as to begin on October 3, 2007.

On April 27, 2007 the Claimant submitted its Pre-hearing brief (entitled 'Surrejoinder') together with various exhibits and witness statements.

On May 7, 2007 the Arbitral Tribunal ruled on a request by the Claimant for the production of documents, requiring the production of certain documents.

On June 18, 2007 the Respondent submitted its Pre-hearing brief, with various exhibits attached.

On May 9, 2009 the Arbitral Tribunal confirmed dates for the oral hearing for all issues between the Parties for October 3 to October 7, 2007. On June 27, 2007 the Arbitral Tribunal confirmed the hearing date, venue, and other arrangements for the oral hearing.

¶

§11.- On September 20, 2007 the Claimant advised the Arbitral Tribunal that the Parties had reached an agreement regarding the procedure for the remainder of the arbitration. This agreement included the cancellation of the hearing scheduled to begin on October 3, 2007. On September 24, 2007 the Arbitral Tribunal received an 'Agreement on How to Conclude the Procedure' executed by both the Claimant (dated September 21, 2007) and the Respondent (dated September 24, 2007). On the same date the Arbitral Tribunal cancelled the hearing pursuant to the Parties' procedural agreement.

On September 24, 2007 the Arbitral Tribunal also issued Procedural Order № 3 confirming the terms of the Parties' procedural agreement. Procedural Order № 3 read as follows:

Considering:

1. *The Parties in a document entitled 'Agreement on How to Conclude the Procedure' dated September 21, 2007 (Claimant) and September 24, 2007 (Respondent), agreed to ask the Arbitral Tribunal to cancel the hearing scheduled to take place October 3-7, 2007 in Stockholm and to render an award based solely upon the respective Parties' written submissions, including attached exhibits, subject to the eight conditions therein set out; and*
2. *The Arbitral Tribunal has accepted the Parties' agreement and accordingly has cancelled the hearing, and in this Procedural Order N ° 3 confirms the procedure for the remainder of this arbitration:*

The Arbitral Tribunal Hereby Orders as Follows:

1. *The Parties shall refrain from submitting further Briefs, with the exceptions outlined below.*
2. *The Parties shall refrain from submitting further witness statements.*
3. *The Arbitral Tribunal shall be allowed, at its discretion, to ask written questions to the Parties.*
4. *Each Party shall submit written answers to the Arbitral Tribunal's questions.*
5. *Each Party shall be given one opportunity to comment upon the other Party's answers to the Arbitral Tribunal's written questions.*
6. *The Arbitral Tribunal shall draft and submit to the Parties a Recital to the Award, including the undisputed facts of the case and the Parties' legal grounds and argumentation.*
7. *Each Party shall be given one opportunity to comment in writing on the Recital.*
8. *The Arbitral Tribunal shall set final deadlines for the submissions, it being understood that a Party's non-compliance with a deadline shall be acknowledged as a waiver to make the relevant submission, and that such non-compliance shall not prevent the Arbitral Tribunal from rendering the Award.»*

§12.- On October 3, 2007 the Claimant requested that the procedure agreed between the Parties for the conclusion of the arbitration, as confirmed in Procedural Order № 3, be amended to allow the Parties to summarise their respective cases in one final set of written pleadings. The Respondent opposed any amendment to the Parties' agreement. After receiving the further submissions of the Parties, the Arbitral Tribunal dismissed the Claimant's

request to amend the agreed procedure, for the reasons set out in its decision of October 17, 2007.

§13.- On December 18, 2007 the Arbitral Tribunal submitted to the Parties a draft Recital to the Award (consisting of the parts relating to the Parties, Commencement of the Arbitration, Procedural History, Factual Background and Claims, Defences and Legal Grounds of the Parties) in accordance with the Parties' agreement and paragraph 6 of Procedural Order № 3. The Tribunal also asked three questions relating to the ownership or control of the Claimant. The Tribunal received the Parties' comments on the draft Recital and their answers to the questions on January 18, 2008, and subsequently their comments on the other party's answers.

The Respondent in its letter of January 23, 2008 objected to certain parts of the 'Claimant's Comments on the Draft Recital' on the basis that they went beyond the scope of the requested comments and were in fact rebuttal statements. The Respondent also requested the exclusion of new exhibits presented by the Claimant. The Claimant responded to these objections and also requested the exclusion of certain material in the Respondent's submissions of January 18 and 28, 2008. The Respondent in its letter of February 5, 2008 then requested the exclusion of certain further comments.

The Agreement of the Parties of September 21, 2007, as confirmed by Procedural Order № 3 dated September 24, 2007 required the Parties to refrain from submitting further briefs. The issue of further submissions was also dealt with in the Arbitral Tribunal's decision of October 17, 2007. The material objected to by the Parties consists, firstly, of further argumentation on factual and legal issues and, secondly, of certain new information presented by the Claimant. The factual and legal issues had already been comprehensively argued by the Parties, and the further argumentation on these issues by both Parties was neither requested nor necessary.

The Claimant also presented new information relating to the termination of the sixth bankruptcy proceeding, including the text of the decision of the Commercial Court of Kiev of December 6, 2008. The Arbitral Tribunal has examined this material to decide whether it was significant to the determination of the issues in this arbitration. If it were significant, then the Respondent would have been entitled to make further submissions relating to its admissibility and/or to make submissions in response. Having considered this new material, it does not affect any decision of the Arbitral Tribunal, and therefore no further submissions have been required from the Respondent.

At the request of the Arbitral Tribunal and on February 18, 2008 the Parties submitted their statements on the amount and the payment of the costs in this arbitration.

§14.- On various dates and with notice to the Parties the SCC Institute extended the period of time for rendering an Award in this arbitration pursuant to Article 33 of the SCC Rules. The latest decision of the SCC Institute (advised on December 21, 2007) extended the time for making the Award until March 31, 2008.

IV. FACTUAL BACKGROUND

§15.- The Claimant is a limited liability company with its legal address in Terezes iek 1, Riga, LV-1012 Latvia. It was established on March 6, 1998, and registered in the Commercial Register on February 14, 2005 (United Registration number 50003383371). Its subscribed and paid up capital is 4800.00 LVL. As of February 14, 2005 its total capital (divided into ten shares of 480.00 LVL each) was held by Five Key Invest & Assets Limited Holding JSC, registered in Liechtenstein. The shares of Five Key Invest & Assets Limited Holding JSC are held by Key's Depository Foundation, Vaduz, Liechtenstein, as of November 21, 2006.

§16.- According to AMTO, the Claimant's main business activity is to act as an investment company. It has been registered for VAT in Latvia since 1998, has made residents income tax and social security payments since 2000, has operated a multi-currency bank account in Latvia since March 6, 1998, and has rented an office in Latvia since September 2000. The Claimant asserts that it has investments in Finland, Ukraine, the United States and Latvia. The Latvian investment project, initiated on February 1, 2006, relates to a real estate acquisition and development project in Riga which, however, has still not been executed.

§17.- EYUM-10 is a closed joint stock company registered in Ukraine. Its Certificate of State Registration was issued on December 9, 1994, with its major types of activities stated to be 'installation of electric wiring and reinforcement', 'installation of fire and security alarm systems' and 'painting works'. It has an issued share capital of 1 519 040 UAH, divided into 303,808 shares.

§18.- EYUM-10 is the legal successor of a state entity called (in translation) Erection Division № 10 of the EYUM Group that had participated in the construction of the Zaporozhskaya AES (hereafter «ZAES») nuclear power plant. EYUM-10 became a supplier of services to ZAES. EYUM-10 was reorganised as a closed joint stock company in 1994.

§19.- In late 1999 the Claimant sought an investment in the nuclear energy industry in Ukraine, and decided to buy shares in EYUM-10. The shareholding was dispersed amongst several hundred employees of EYUM-10. As stated in the "Minutes № 11 of the session of the Management Board" of EYUM-10 dated August 22, 2000, by August 2000 AMTO had acquired 16% of the shares in EYUM-10. It had encountered the active opposition of the management to its share acquisitions, as recorded in the 'Minutes №11':

«HEARING GIVEN TO:

The information of Lomakin A.M., the Chairman of the Management Board ...The Members of the Management Board of CTJSC EYUM-10 and the Administration, the Legal Department, have arranged for and conduct the work on protection of the enterprise against attempts of foreign company LLC "AMTO" ■ to overtake the majority shareholding of CTJSC EYUM-10, in accordance with the adopted decisions of the Management Board (Minutes No. 10 of 19.07.00).»

«HEARING GIVEN TO:

- The information of Lomakin A.M., on the operation of the commission for the securities. In accordance with the previously adopted decisions of the Management Board, there has been developed a scheme of purchase of shares of CTJSC EYUM-10, respective announcements made in the press, on TV, via radio. There has been arranged a reserve fund for shares purchase.

LLC "AMTO" holds 16% of the shares of CTJSC EYUM-10. Upon the filed statements of claim Energodar Court will consider the legality of the deals of purchase and sale of the shares of CTJSC EYUM-10 by LLC "AMTO".

- information about shareholders working at CTJSC EYUM-10 and having sold shares in CTJSC EYUM-10...

RESOLVED:

*1 That the Legal Department analyse an opportunity to revoke the credits to the employees of CTJSC EYUM-10, who had sold their shares - **unanimously**.*

*2. That meetings be held in the subdivisions of CTJSC EYUM-10, at which meetings the matters of the enterprise's granting of the privileges at the expense of its profit to the employees of CTJSC EYUM-10, who had sold their shares, be discussed. That a suggestion be lodged that amendments should be made to the Collective Agreement of CTJSC EYUM-10 which amendments to be aimed at protection and consolidation of the labour collective - **unanimously**.»*

The Claimant continued to purchase shares and on January 21, 2002 a share certificate for 200508 shares was issued to the Claimant, with a certificate for a further 3657 shares issued on March 4, 2003. The Claimant's total shareholding in March 2003 was therefore 204,165 shares or 67.2% of the total share capital.

§20.- ZAES is the largest nuclear power plant in Ukraine. It is a separate division of the National Nuclear Power Generating Company 'Energoatom' (hereafter «*Energoatom*»), owned by the Respondent. At the time of the Claimant's purchase of shares in EYUM-10, EYUM-10 had established relationships with ZAES/Energoatom, and the Claimant asserts that by that time ZAES/Energoatom was EYUM-10's largest debtor. A letter from ZAES to EYUM-10 dated February 28, 2002 refers to the financial difficulties of ZAES and the nature of its relationship with EYUM-10.

«SD «Zaporozhskaya AES" ofGP NAEK "Energoatom», understanding the problems of your company, would like to advise you of the following... The existing situation does not allow us to pay taxes, to implement the production and technical program of our company and to exploit the nuclear power plant normally.

Taking into account that for many years SD ZAES and CJSC EYUM-10 had partner relations we send you the schedules of debts on the following contracts liquidation to be agreed by EYUM-10:

*Contract No. 2 KRE-99, the amount of debt-1 898 297,07 UAH
Contract No. 1PKE-2000, the amount of debt-8 916 550, 95 UAH
Contract No. 9PKE-99, the amount of debt-1 094 998,38 UAH
Contract No. 2KRE-2000, the amount of debt-12 574 088,95 UAH*

Monthly payments in the amount of 408 068,36 UAH, we are going to make will allow your company to pay the restructured budgetary debt as well as current taxes. Only at this approach SD ZAES will be able to make orders for your works and to pay for them in 2002.

CJSC EYUM-10 has been being the strategic partner ofSD ZAES for 20 years executing important works on reconstruction and technical rearmament repair. We consider CJSC EYUM-10 works to be strategically important and directed on the reliable and safe exploitation of power units of our nuclear power plant. Taking into account the actuality of your work SD "Zaporozhskaya AES" hopes that our further cooperation with your company will be fruitful, mutually beneficial and long-term. The continuation of the contractual relations is vitally an important stage not only for SD ZAES but also for atomic energy on the whole.»

§21.- In 2002 and 2003 EYUM-10 commenced court proceedings in the Commercial Court of Zaporozhskaya Oblast in respect of amounts pursuant to eleven contracts between EYUM-10 and Energoatom/ZAES entered into in 1998, 1999 and 2000. EYUM-10 was successful in its claims, that were upheld on appeal and cassation was denied. The Respondent accepts that EYUM-10

obtained judgement against ZAES for the total amount of 28,377,868.04 UAH (not including state duty and court fees).

EYUM-10 sought execution on the basis of its judgments. Execution was stayed because of bankruptcy proceedings against Energoatom. There were six separate bankruptcy proceedings commenced between March 2002 and December 2003, as follows:

1. First Bankruptcy Proceedings: 12 March 2002-May 17, 2002;
2. Second Bankruptcy Proceedings: May 21, 2002-October 11, 2002;
3. Third Bankruptcy Proceedings: October 11, 2002-February 6, 2003;
4. Fourth Bankruptcy Proceedings: February 7, 2003-October 29, 2003;
5. Fifth Bankruptcy Proceedings (Case № 05-5-43/50551): October 29, 2003-July 6, 2005;
6. Sixth Bankruptcy Proceedings (Case № 43/167): Commenced December 2, 2003.

There were numerous procedural steps, orders and appeals related to these proceedings. The Ukrainian bankruptcy legislation and the conduct of these bankruptcy proceedings are fundamental to the Claimant's claims pursuant to the
* Energy Charter Treaty in this arbitration.

§22.- On July 25, 2003 the Resolution of the Cabinet of Ministers of Ukraine No. 1160 entitled 'On changes to the list of highly hazardous enterprises, whose discontinuance of operations requires special measures to prevent harm to human life and health, property, facilities and the environment' decreed that the list of highly hazardous enterprises which had been previously approved by the Resolution of the Cabinet of Ministers of Ukraine No. 765 of May 6, 2000 should be worded as follows:

*«Power Engineering State body
National Nuclear Energy Generating Company "Energoatom "
Dneprgidroenergo GAG K Dnestrgidroenergo GAEK Dnepreenergo JSC
Donbasenergo JSC GEK Tsentreenergo JSC Zapadenergo JSC Vostokenergo
Ltd.»*

On 26 July 2005, Law No. 2711-VI 'On Measures to Ensure the Stable Operation of Fuel and Energy Sector Enterprises' was published in the organ of the Ukrainian Parliament 'Holos Ukrayiny' and entered into force (except for Articles 3 to 11 which entered into force on September 26, 2005) (hereafter, «*Law 2711-IV*»). The Preamble of this Law states that: «*The objective of this Law is to support the improvement of the financial standing of the fuel-and-energy sector enterprises, prevent their bankruptcy, and enhance their investment attractiveness by regulating the procedural issues and implementing mechanisms of the debt repayment, granting the right to use them to the business entities, specifying the procedure of the interaction of state authorities, local self-administration bodies, and budget fund administrators with business entities in respect of the application of the debt repayment mechanisms*»

§23.- On May 15, 2006 EYUM-10 and Energoatom signed an Agreement relating to Energoatom's outstanding debts to EYUM-10, including the eleven judgment debts referred to above, two further judgement debts of 2005, and an acknowledgement of debt. This Agreement was entitled 'Agreement on Substitution of Primary Obligation by the New Obligation Between the Same Parties'.

The Claimant states that this agreement did not enter into force because Energoatom did not provide a required bank guarantee, although Energoatom made payments in accordance with the time schedule of the agreement. The Agreement was amended and re-executed on August 11, 2006, and Energoatom made certain payments in reduction of its outstanding debt to EYUM-10.

§24.- The Parties submitted numerous documents, witness statements, expert reports and other exhibits with their pleadings. The Tribunal received witness statements or expert reports on factual, legal or damages issues submitted by the Claimant of: Mr. Valentin Blueger, Partner at Blueger & Plaude; Mr. Mikhail Petrovich Timofeyev; Mr. Ivan Vladimirovich Kuznetsov; Baker Tilly International; Ms. Anna V. Tsyrat, of Jurvneshservice, Kiev, in relation to Ukraine bankruptcy proceedings; Mr. Oleksy Svyatogor in relation to the Ukraine electricity industry; and Mr. Urpo Salo of Tietotili Consulting Oy in relation to lost revenue.

The Tribunal received witness statements or expert reports on factual, legal or damages issues submitted by the Respondent of Mr. Volodymyr Maksymovych Pyshny, Vice President for Repairs and Plant Production of Energoatom; Emergex Business Solutions LLC. in respect of damages issues; Mr. Oleg Mykolayovych Rogozhnikov; Mr. Yuriy Oleksandrovych Nedashkovsky, former President of Energoatom and Deputy Minister of Fuel and Energy of Ukraine;

Mr. Alexander N. Biryukov on bankruptcy law issues; and Mr. Maslak Yuriy Gennadiyovych on economic issues.

V. CLAIMS, DEFENCES AND LEGAL GROUNDS OF THE PARTIES

§25.- The Claimant has commenced this arbitration pursuant to Article 26 ECT alleging that the Respondent has breached various provisions of the ECT. The Claimant refers in particular to Articles 10(1), 10(12), and 22(1), and seeks compensation and other relief. The Respondent asserts that the Arbitral Tribunal does not have jurisdiction over this dispute, and denies any violation of the ECT. The Respondent also denies the Claimant's claims for compensation, and asserts a counterclaim based on the unfounded allegations of the Claimant in this arbitration. The Claimant asserts that the Tribunal has no jurisdiction under Article 26 ECT over the counterclaim, and in any event the counterclaim is unfounded.

1. The Respondent's Objections to the Jurisdiction of the Arbitral Tribunal:

§26.- The Respondent states that the Tribunal does not have jurisdiction under Article 26 ECT to determine the issues raised by the Claimant or the claims are otherwise inadmissible on a number of grounds, including the following:

(a) AMTO's shares in EYUM-10 do not constitute a qualified 'Investment' under the ECT, since they are not 'associated with an Economic Activity in the Energy Sector', as required by Article 1(6) of the ECT: The Respondent states that EYUM-10's activities, which consist of electric installation works, repair, reconstruction and technical re-equipment works and services to ZAES, do not fall within any of the categories listed in Article 1(5) of the ECT, which constitutes the controlling definition of 'Economic Activity in the Energy Sector', and also do not fall within the illustrative list of 'Economic Activity in the Energy Sector' presented in the Understandings IV.2.b.ii of the Final Act of the European Energy Charter Conference. Further, AMTO's shares in EYUM-10 are not sufficiently closely "associated with" an economic activity of ZAES/Energoatom in the energy sector, such as the production (or sale) of Energy Materials and Products.

The Claimant states that its ownership of shares in EYUM-10, pursuant to the broad definition laid down in Article 1(6) of the ECT, constitutes an Investment, and hence, makes AMTO an Investor under Article 1(7). Furthermore, the Claimant states that AMTO's Investment, i.e. the ownership of shares in EYUM-10, 'are associated with an Economic Activity in the Energy Sector'. The Claimant further states that EYUM-10 provided and still provides qualified

construction and maintenance services to the nuclear industry in Ukraine, and according to the illustrative list contained in Understanding No 2, such work shall be deemed to constitute 'Economic Activity in the Energy Sector' pursuant to Article 1(5) of the ECT.

(b) There is no relevant or appropriate consent on the part of the Claimant to arbitrate: The Respondent states that Article 26(4)(a) of the ECT requires a separate written consent on the part of the Investor to be provided to a relevant Contracting Party to the ECT prior to commencement of arbitration, and that submission of a request for arbitration is not sufficient. A belated submission of a written consent is invalid under both the ECT and the SCC Rules. The Respondent states that the belated submission of a written consent of the Claimant dated April 27, 2006 also shall be deemed to support the Respondent's submission of the necessity of a separate written consent to arbitration. In any case, according to the Respondent, belated consent was defective as based on an invalid power of attorney, and this defect cannot be cured by ratification of consent itself half a year later and almost a year after the initiation of arbitration. The Respondent also submits that the initial absence of an arbitration agreement cannot be cured by subsequent agreement or conduct if a party disagrees on this point.

The Claimant states that the lack of a separate written consent is of no legal consequence, since AMTO accepted Respondent's offer to arbitrate by commencing these arbitration proceedings and further submitted an additional and separate written consent. Initial absence of an arbitration agreement can indeed be cured by subsequent agreement or conduct.

(c) The ECT does not confer substantive protection to the pre-investment period, and so events occurring prior to the making of the Investment should be disregarded by the Arbitral Tribunal as not subject to its jurisdiction in this case. The Respondent states that the investment period began either: (i) on March 4, 2003 when AMTO was issued with the share certificate bringing AMTO's ownership in EYUM-10 up to 67.2 percent; or (ii) on January 21, 2002 when the first share certificate was issued to AMTO, although by that time AMTO did not yet own the entire 67.2 percent of shares in EYUM-10.

The Respondent contends that the commission agreement of AMTO with a broker for purchase of shares in EYUM-10 concluded in March 2000 did not confer on AMTO any right to undertake "the Economic Activity in the Energy Sector" as per Article 1(6)(f) of the ECT.

The Claimant states that it engaged a broker in order to acquire shares in EYUM-10 which had been distributed among EYUM-10's employees. By entering into a commission agreement with the broker on 1 March 2000, AMTO acquired

contractual rights qualifying as an Investment under Article I(6)(f) of the ECT. Moreover, as soon as AMTO acquired its first shares in EYUM-10 in March 2000, it made a qualifying investment under Article I(6)(b) of the ECT. Accordingly, the Claimant maintains that it enjoyed protection as an Investor under the ECT at all times from the date of conclusion of the commission agreement with the broker and the acquisition of its first shares in EYUM-10 in March 2000 and onwards.

(d) There was no relevant dispute between AMTO and Ukraine: The Respondent states that this is a trivial commercial dispute between two Ukrainian juridical persons and does not involve Ukraine as a State. This is a unilateral grievance which may not be equated with a dispute, since it did not exist prior to the Claim Letters but arose afterwards due to the non-response thereto.

The Respondent further contends that the Claimant did not request the amicable settlement of the dispute under Article 26 of the ECT, and the Respondent's consent did not extend to disputes which were not subject to a request for amicable settlement. The Claim Letters could not be viewed as a request for amicable settlement of a dispute 'non-existing prior to non-response thereto within a reasonable period of time'. Accordingly, there was no 'cooling-off period' as required by the ECT as a prerequisite for admissibility of a claim under the ECT.

The Claimant states that the Claim Letters make clear that the Respondent is considered to have breached the ECT. The fact that Respondent did not respond to the letters does not prevent the existence of a dispute. In any case, questions as to the existence of a 'dispute' and compliance with the cooling-off period relate to admissibility and not to jurisdiction, and the Claimant submits that the Tribunal cannot dismiss a case on the grounds of admissibility.

(e) The subject matter of the actual dispute between EYUM-10 and ZAES/Energoatom has already been exhausted and therefore there is no basis for the present arbitration: The Respondent relies upon the agreements between EYUM-10 and Energoatom/ZAES for the repayment of the outstanding debts, which are already being performed.

The Claimant states that the 'agreement' of May 15, 2006 never came into force, and that the subsequent 'agreement' of August 11, 2006 was made for the sole purpose of saving the managers of Energoatom from criminal liability for having spent public funds without a valid agreement. Although Energoatom unilaterally made some voluntary payments as indicated by the two 'agreements', Energoatom subsequently breached the 'agreement' by simply ceasing its payments and requiring EYUM-10 to repay the last instalment. Accordingly, the Claimant

maintains that the purported settlement agreements between EYUM-10 and Energoatom/ZAES do not in any way preclude this ongoing arbitration.

(f) There was no valid Power of Attorney in respect of the Claim Letters, the belated consent to arbitrate, or the Request for Arbitration: Accordingly there was no valid request for amicable settlement, consent by the Claimant, or request for arbitration for the purpose of Article 26 ECT.

The Claimant states that the alleged deficiencies in the Power of Attorney issued to AMTO's counsel Mr Svahnstrom should not be taken seriously. The Claimant denies that AMTO's counsel lacked authority to act on behalf of AMTO. The initial power of attorney was valid in all the three involved countries (Ukraine, Latvia and Sweden), despite the fact that the exact date of its signature was missing. In any case the Claimant subsequently submitted a new power of attorney, in October 2006, in which it is clearly stated that the legal representative of the Claimant reconfirms the first power of attorney and confirms and ratifies all actions and measures taken by Mr. Svahnstrom on behalf of AMTO.

(g) The Tribunal's jurisdiction (if any) is limited to the claims (if admissible) set out in the Claim Letters: The Respondent states that as the claims submitted in the Request for Arbitration and the Statement of Claim are not the same as in the Claim Letters. In the alternative, the scope of the case can be no more than as it is framed in the Request for Arbitration.

The Respondent further asserts that the new/different facts, arguments, causes of action and legal claims, which are not contained in the Claim Letters or Request for Arbitration, shall be disregarded, since, in particular, they are not covered by the Respondent's consent in the absence of any request on the part of the Claimant for amicable settlement thereof.

The Claimant states that the Tribunal's jurisdiction is not limited by the Claim Letters nor by the Request for Arbitration. In any case, pursuant to Article 22(1) of the SCC Rules, AMTO is entitled to change and amend its claims unless the Tribunal considers it inappropriate.

(h) This case is inadmissible as the Respondent denies the advantages of Part III of the ECT on the basis of Article 17(1) of the ECT: The Respondent states that a dispute concerning interpretation and application of Article 17 of the ECT is excluded *ratione materiae* from this arbitration, since Article 26 of the ECT deals with breaches of 'obligations', and Article 17 of the ECT refers to a 'right'. The Respondent states that the Claimant has failed to prove that it is not ultimately beneficially owned or controlled by nationals of a third state and that it has substantial business activities in Latvia within the meaning of Article 17(1).

Also, the Respondent criticised the *Plama* Decision on various grounds, including, without limitation, its retrospective only effect of the 'denial of advantages'.

The Claimant states that AMTO is not owned or controlled by citizens of a third state within the meaning of Article 17(1) of the ECT, but rather owned by corporate entities of signatory states of the ECT. AMTO is owned by a company registered in Liechtenstein, which in turn is owned by a foundation based in Liechtenstein. Furthermore, AMTO has substantial business activities in Latvia within the meaning of Article 17(1) of the ECT. The reference to "substantial business activities" in Article 17(1) of the ECT is intended to exclude so called mailbox companies from protection under the ECT. AMTO is not such a company. AMTO is a registered company in Latvia and maintains office premises in Riga with full-time employees. Further, AMTO has bank relations in Latvia. Thus, the Claimant states that there is no ground for the application of Article 17 of the ECT.

(i) Suspension of termination of this proceeding is required because of the parallel international proceeding before the European Court of Human Rights. The Respondent asserts that such parallel international proceedings manifestly do not contribute to the legal security of the international resolution of disputes, and to avoid possible double recovery shall be executed for reasons of fairness and predictability of international arbitration. *Lis pendens* and *res judicata* approaches relied upon by the Claimant should not be applied formalistically.

According to Claimant, application to the European Court of Human Rights (the «ECHR») is not a ground for suspension nor termination of this arbitration. The case at hand is not subject to *lis pendens* with respect to the proceeding before the ECHR. *Lis pendens* would require parallel proceedings involving the same parties and the same causes of action. However, EYUM-10, the claimant in the ECHR proceeding, is not a party to this arbitration. Further, in the ECHR proceeding, EYUM-10 relies on the Respondent's violations of the European Convention of Human Rights. In this proceeding, however, AMTO's claims are based on the ECT. Therefore, a ruling by the ECHR would not have *res judicata* effect in this arbitration. Accordingly, there is no *lis pendens* in the arbitration. Further, as alleged, a risk of double recovery cannot be a jurisdictional objection, relying on the *Nycomb* tribunal's conclusion in this matter.

2. The Claimant's Allegations of Violations of the ECT:

§27.- The Claimant alleges the following violations of the ECT by the Respondent:

(a) Violation of Article 10(1) of the ECT: The Claimant states that the Respondent has violated Article 10(1) of the ECT in that:

(i) The Respondent has failed to "encourage and create stable, equitable, favourable and transparent conditions for investors of other Contracting Parties to make Investments in its Area" in accordance with the first sentence of Article 1 of the ECT. The Claimant suffered intimidation, discrimination and constant obstruction at the hands of Energoatom from the very first moment it became known that the Claimant intended to acquire shares in EYUM-10. In particular, malicious rumours were released about AMTO and its reasons for investing in EYUM-10; potential sellers of EYUM-10 shares to AMTO were threatened and intimidated; AMTO was obstructed from holding meetings with the workers and shareholders of EYUM-10; and AMTO's representatives were accused of inciting a strike against Energoatom which was said to cause harm to the country.

Once the Claimant had made its investment in EYUM-10, the Respondent continued to treat the Claimant's investment unfavourably. While Energoatom was in a position to obtain extra funding for certain purposes, a conscious decision was taken not to obtain funding to pay the debts owed to the foreign owned EYUM-10. As a direct 'punishment' for EYUM-10's attempts to recover its receivables by reverting to the courts of Ukraine, ZAES/Energoatom - being the monopoly buyer in Energodar - stopped ordering services from EYUM-10. The Respondent tried through its tax authority and the local court to destroy EYUM-10 by imposing an injunction on EYUM-10's assets thus preventing it from using its funds and unreasonably refusing to allow EYUM-10 to make necessary payments to its staff and service providers.

(ii) The Respondent has accorded AMTO's investment in the Ukraine treatment less favourable than that required by international law. In particular, AMTO has been subjected to a denial of justice under international law. This denial of justice comprises (i) the Respondent's general failure to provide EYUM-10 with an effective means of enforcing its bankruptcy claim; (ii) the interference by the Government of Ukraine in the bankruptcy proceedings against Energoatom; and (iii) the actions of the Ukrainian courts in handling EYUM-10's attempts to recover its legitimate claims, i.e. the refusal to allow EYUM-10 to participate in the first three bankruptcy proceedings in violation of applicable law; the delaying, staying and dismissal of EYUM-10's own bankruptcy claim in breach of applicable law, the wrongful dismissal of EYUM-10's second bankruptcy claim, and; the unreasonable delay in the handling of case No. 43/167.

(iii) The Respondent has failed to accord AMTO's investment fair and equitable treatment by breaching many of the specific elements identified in this standard by international tribunals. In particular, (i) the interference by the Government of Ukraine in Energoatom's bankruptcy amounts to arbitrary and discriminatory treatment; (ii) the deficient manner in which the proceedings were handled by the Ukrainian courts violates the requirement of due process; (iii) the various breaches of the Ukrainian Bankruptcy Law constitute a direct infringement of the principle of legality; (iv) AMTO's legitimate expectations of enjoying an effective means for enforcing EYUM-10's claims against Energoatom have been grossly offended; and (v) the sum-total of the Respondent's actions show that it manifestly failed to provide a stable, predictable and transparent framework for AMTO's investment.

(iv) Actions of Energoatom amount to discriminatory measures in breach of the third sentence of Article 10(1) of the ECT. Energoatom pursued a campaign of hostility and intimidation towards AMTO and continually refused to pay the undisputed claims owed to EYUM-10. This treatment all stems from discrimination against AMTO as a foreign investor in direct breach of the third sentence of Article 10(1).

(v) The Respondent failed to provide Energoatom with adequate funding to pay its debts.

The Claimant relies on the final sentence of Article 10(1) that the Respondent shall observe any obligations it has entered into with an investor or an investment of an investor. The Claimant states that international liability is not precluded by the allegations that AMTO has failed to comply with its duty to assess its investment's risk or by alleged non-exhaustion of local remedies. AMTO asserts that it has not failed in assessing the investment risks, since AMTO was entitled to believe that Ukraine, being a Contracting Party of the ECT, and its organs and enterprises, would act in conformity with the obligations under the Convention. Moreover, AMTO had in fact exhausted all local remedies by (through EYUM-10) being successful in the court cases. AMTO/EYUM-10's request, after having found that the firm judgments could not be enforced, that Energoatom, one of Ukraine's largest, state owned and multi-privileged enterprises, be declared in bankruptcy, is not a normal local 'remedy' against the state authorities' refusal to enforce the judgments. In any case, after three and a half years of unsuccessful attempts to obtain that Energoatom be declared in bankruptcy it could no longer be required from AMTO/EYUM-10 that they should continue to pursue the seemingly hopeless bankruptcy alternative.

§28.- The Respondent contends that there is no violation of Article 10(1) for a number of reasons including the following:

(i) the alleged breach of the first sentence of Art. 10(1) of the ECT concerns the pre-investment period;

(ii) if the standard of treatment required by international law under the ECT prohibits the denial of justice under the ECT such protection exists only for investments and AMTO is not an investment, nor has it resorted to any legal proceeding in Ukraine, so that it cannot have been denied justice. Further, EYUM-10 is a national of the Ukraine State, so that it cannot avail itself of international protection meant for aliens (nor did it ever appropriately disclose (much less claim) its foreign-related status before the Ukrainian authorities in the actual and alleged proceedings in Ukraine;

(iii) the fair and equitable treatment standard assures a minimum standard of treatment, it applies to pre-investment stage, it is not a direct commitment of the Contracting Parties to the ECT, and in any event it is necessary to demonstrate that both elements were violated, which is not demonstrated here because of the absence of any plausible comparison (even if "unfair" treatment could be assumed). Further, the breach of this standard requires both the accumulation of breaches and the impact on the investor to reach a minimum threshold of intensity that is missing in this case. The Respondent also denies the normative nature and character of the elements of 'fair and equitable treatment' as discerned by arbitral tribunals;

(iv) the Claimant has failed to show prima facie a 'like' situation and its discrimination claim is mostly based on unsupported allegations.

The Respondent further states that a denial of justice may be attributed only to a final action of the state's judicial system. The ECT is not a *carte blanche* for an investor's conduct in disregard and neglect of its logical and reasonable duties of general due diligence, and EYUM-10 has not been 'deprived' of its rights to enforce since deprivation has a sense of irreversibility, meaning that enforcement was made completely impossible, which has not been tested nor proven. The Respondent also states the final sentence of Article 10(1) (the 'umbrella clause') does not apply, that the State was not involved in negotiating, executing and implementing Energoatom's obligations towards EYUM-10, and that suppositions about lack of funding of Energoatom are insufficient to invoke the umbrella clause of Article 10(1).

(b) Violation of Article 10(12) of the ECT:

§29.- The Claimant submits that the Respondent has failed to provide EYUM-10 (and consequently, AMTO) with effective means by which to assert

its legitimate claims. For a period of more than five years, EYUM-10 (and consequently, AMTO) has been prevented from enforcing its rights under eleven final and binding court judgments.

The Claimant states that Energoatom has since March 12, 2002 almost constantly been under a moratorium, thus preventing EYUM-10 from enforcing its rightful claims against Energoatom. The Claimant further asserts that the procedure regarding bankruptcy cases in Ukraine makes it possible for a debtor effectively to escape enforcement by abusing the legal system. In Energoatom's case the courts of Ukraine have supported Energoatom's abuse of the bankruptcy legislation, by continuously acting in breach of the Bankruptcy Law. For example, decisions to initiate bankruptcy proceedings have not been publicly announced, which has deprived creditors such as EYUM-10 of the possibility to participate in the proceedings. EYUM-10's own requests for Energoatom to be declared bankrupt have been wrongfully dismissed by the courts. When EYUM-10 was finally allowed to participate in an on-going bankruptcy proceeding, the handling of the case has been constantly postponed and has still not been tried by the court of first instance.

The Claimant further submits that the Government of Ukraine has interfered in the on-going bankruptcy cases against Energoatom. Firstly, the Cabinet of Minister of Ukraine issued an *ad hoc* Resolution characterising Energoatom as a "highly hazardous enterprise" on the same day as Energoatom filed its additional appeal against the commencement of EYUM-10's bankruptcy claim against Energoatom. This *ad hoc* Resolution was intended as a clear signal to the Commercial Court of Appeal and ultimately resulted in Energoatom's appeal being accepted by the court five days after the Resolution was issued. Secondly, shortly after the Commercial Court of Kiev finally ruled that a preliminary hearing would take place in the sixth bankruptcy case, the Respondent introduced Law 2711-VI which provided Energoatom with enhanced protection against bankruptcy. Thirdly, on 28 November 2005 Energoatom was put on the list of companies in the energy sector to which the special procedure for payment of debts according to the Law 2711-VI applies.

In light of these circumstances, the Claimant submits that the Respondent has breached Article 10(12) of the ECT, under which the Contracting Parties have specifically undertaken a positive obligation to provide an effective means for the assertion of claims and the enforcement of rights that exists over and above the general concept of denial of justice in customary international law.

§30.- The Respondent states that Article 10(12) expresses an element of the minimum standard of customary international law requiring access to courts and other enforcement authorities, but it does not require the satisfaction of monetary

demands and repayment of debts during a moratorium period, especially between two domestic entities and without any attempts to enforce its rights on the part of the alien before the host state courts. In particular, the judicial proceedings involving EYUM-10 have always been consistent with Ukrainian laws and delays were possible under the said laws and/or caused by creditors' actions, and any errors committed in the course of these judicial proceedings have been corrected by the appellate courts in Ukraine. The Respondent denies any cooperation between Energoatom and its creditors and submits that Claimant has not proven otherwise. Resolution No. 1160 did not constitute governmental interference in judicial proceeding but it was merely a clarification of a previous resolution (and was not taken into account in the court judgements), and the passing of new legislation had a largely positive effect for EYUM-10 because of partial lifting of moratorium on payment of previous debts.

§31.- The Claimant states that that the acts and omissions of Energoatom are attributable to the Republic of Ukraine pursuant to Article 8 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts.

The Ukraine has failed to ensure that the state enterprise Energoatom was conducting its activities in relation to the services in its Area in a manner consistent with Ukraine's obligations under ECT (Article 22(1)).

AMTO admits that the relationship between EYUM-10 and Energoatom has included civil law and commercial acts. This does not mean, however, that such acts cannot be attributed to the State. It follows from Article 8 of the ILC Articles that *any* act, which is in fact carried out on the instructions of, or under the direction or control of the State, is attributable to it. The ultimate purpose of all Energoatom's dealings is to implement the Government's policy, to achieve the results, and to maintain a high degree of productivity, safety and stability in the production of electricity, in the interests of the Nation and in accordance with instructions from, and under the ultimate control of, the superior political organs of the Ukraine. The procurement, negotiating, purchase and performance of the construction and maintenance services constitute activities that are attributable to the State. This is even more so with respect to Energoatom's failure to pay its clear and unquestionable debts towards EYUM-10, due to lack of funding within the framework of the highly centralised and regulated electrical power industry. This is conduct attributable to the State and for which the State is responsible.

In relation to the so-called structural-functional test for arbitration, the Claimant states that this test has been applied by the arbitral tribunals in the *Maffezini v. Spain* and *Nykomb v. Latvia* arbitrations. In its analysis of the ownership-control relationship in *Nykomb v. Latvia*, the tribunal took into consideration the legislative and governmental control of the company, and also the fact that it was

a nation-wide monopoly. The tribunal found the conduct of Latvenergo to be attributable to the State. The same factors, reasoning and conclusion also apply to Energoatom.

AMTO maintains that Energoatom does indeed belong to the governmental structure of Ukraine, through its participation in the highly centralised and totally state controlled Wholesale Energy Market. The structural test has thus been met. In this context AMTO refers to the opinion of Professor Walde, quoted by the Respondent in the Rejoinder. Professor Walde explains that state ownership creates a rebuttable presumption that the structural test has been met. AMTO agrees with the view of Professor Walde, that state ownership of a private company leads to the presumption of state control. In this case, however, it should be noted that Energoatom is not an ordinary private joint stock company. It is by nature a specific juridical person known as a 'state company' (Gosudarstvennoe predpriyatie, GP). More importantly, the Respondent has not rebutted, and cannot rebut, the presumption of state control.

The Claimant states that Energoatom's 'underpayment' of its debts towards EYUM-10 was a direct consequence of the Government's failure to provide Energoatom with financial means, which would have made it possible for Energoatom to pay. By creating the Wholesale Energy Market, Ukraine has created a structure whereby Energoatom was no longer able to obtain payment for the electricity it produces and sells to the market, and where it has turned out that Energoatom has been barred from successful debt collection through the courts and enforcement agents.

The Respondent contests the alleged attribution of acts of Energoatom to Ukraine by the Claimant, and states in particular that the requirements of the structural-functional test for attribution are not satisfied in the present case.

The Respondent also contends that Article 22(1) does not apply in the present case, since the contractual obligation of Energoatom to pay under the commercial contracts is not an obligation of a Contracting Party under Part III of the ECT. Further, the contractual relations of ZAES/Energoatom with EYUM-10 do not fall under relations described in Article 22(1) of the ECT (it was EYUM-10 which provided services to ZAES/Energoatom, and not vice versa as provided in Article 22(1)).

3. The Relief sought by the Claimant:

§32.- The Claimant seeks the following relief:

«AMTO requests the Tribunal to

- (i) *declare that the Respondent has breached the ECT and is liable towards AMTO for damage suffered as a result of the Respondent's breaches;*
- (ii) *order the Respondent to restore AMTO's investment by paying to EYUM-10, Euro 3,529,194 together with interest at a yearly rate of eight (8) percent on Euro 6,117,187 from 1 January 2002 to 31 May 2006, on Euro 5,881,848 from 1 June 2006 to 15 June 2006, on Euro 5,641,312 from 16 June 2006 to 15 July 2006, on Euro 5,403,774 from 16 July 2006 to 15 August 2006, on Euro 5,166,236 from 16 August 2006 to 15 September 2006, on Euro 4,928,698 from 16 September 2006 to 15 October 2006, on Euro 4,687,711 from 16 October 2006 to 15 November 2006, on Euro 4,452,230 from 16 November 2006 to 15 December 2006, on Euro 4,223,318 from 16 December 2006 to 15 January 2007, on Euro 3,989,098 from 16 January 2007 to 15 February 2007, on Euro 3,758,262 from 16 February 2007 to 15 March 2007 and on Euro 3,529,194 from 15 March 2007 until full payment is made;*
- (Hi) *order the Respondent to restore AMTO 's investment by paying to EYUM-10, Euro 11,470,000 together with interest thereon at a yearly rate of eight (8) percent on Euro 692,000 from 1 January 2001 to 31 December 2001, on Euro 2,861,000 from 1 January 2002 to 31 December 2002, on Euro 5,067,000 from 1 January 2003 to 31 December 2003, on Euro 7,150,000 from 1 January 2004 to 31 December 2004, on Euro 9,012,000 from 1 January 2005 until 31 December 2005 and on Euro 11,470,000 from 1 January 2006 until full payment is made.*
- (iv) *order the Respondent to compensate AMTO for costs in the amount of USD 594,902 plus interest thereon at the rate of eight (8) percent per annum, from 16 October 2006 until payment is made;*
- (v) *order the Respondent to compensate AMTO for its arbitration costs, including counsel's fees and the costs for experts and witnesses, and, as between the parties, alone to bear the compensation due the Arbitral Tribunal and the SCC Institute, in amounts to be specified at a later stage.»*

§33.- The Respondent states that the Claimant has not demonstrated that it is entitled to any compensation as it has failed to prove any breach of the ECT, or that any such breach had a detrimental effect on its investment (AMTO's shares in EYUM-10). Further the Claimant is not entitled to restitution as restitution is distinguished from compensation as a form of non-monetary relief. The Claimant states that since restitution in kind is not possible in this case, AMTO claims restitution/reparation which should take the form of, first, payment of Energoatom's debt to EYUM-10 less payments already made pursuant to the Settlement Agreement and, secondly, payment of lost revenue from 2000 to 2005.

The Respondent states that the claims for restitution of revenue are unclear, unfounded and speculative. The Respondent also challenges the Claimant's treatment of inflation and currency conversion. The Claimant considers that lost

revenue should be translated into Euros in order to compensate for the severe inflation in Ukraine during the relevant period. Furthermore, Claimant contends that AMTO is entitled to formulate its claim in whatever currency it deems appropriate. Explicit ECT support for conversion into Euros is not required.

According to the Respondent, the claims for arbitration and non-arbitration costs (plus interest) lack legal foundation and are unsupported. These expenses do not qualify as an investment and may not be reimbursed under the ECT. The claim for arbitration costs should be dismissed since the statement of claim is not legally and factually grounded, lacks proper evidence and is subject to dismissal.

§34.- As regards the claim for interest, the Respondent contends that (i) the Claimant requests interest in addition to the 10% increase in sales calculated over the lost profit, which amounts to double recovery; (ii) taking into account triple overpricing in the underlying contracts, it is logical to submit that the final settlement already covers any reasonable conceivable interest; (iii) there is no reason why non-arbitration costs should include interest, and (iv) the Claimant's reliance on the Swedish statutory interest rate does not support its suggested 8 percent rate. The Claimant states that it is well established that an aggrieved party is entitled to interest on money that should have been paid at an earlier moment in time. There is no double recovery since the growth rate and the interest claim serve different purposes and a flat annual interest rate of 8 percent is clearly reasonable compared to the Swedish statutory default rate of interest. Additionally, AMTO relies on Article 7.4.9 of the UNIDROIT Rules to support its claim for interest.

Finally, Respondent submits that there is a risk of multiple recovery because the same amounts are being claimed in various fora and that any assessment of damages to AMTO should be made proportional to AMTO's percentage of ownership in EYUM-10. AMTO denies that there is any risk of double recovery. All amounts paid under the Settlement Agreements have been taken into account. Any amounts awarded in this arbitration will effectively preclude AMTO/EYUM-10 from obtaining compensation on the same grounds in any other proceedings. If the Respondent is ordered to pay directly to EYUM-10, AMTO will benefit in proportion to its shareholding, and there is no need to adjust the claim as alleged by the Respondent.

4. The Respondent's Counterclaim and Prayer for Relief.

§35.- The Respondent requests that the Claimant's case is dismissed on jurisdiction/admissibility grounds and on the merits. Further, the Respondent counterclaims: (i) for reimbursement of the arbitration costs and related expenses; and (ii) compensation for non-material injury to its reputation in the amount of 25,000 Euros as a result of unfounded allegations that

DonetskOblEnergo's claim was fictitious, and of co-operation between Energoatom and DonetskOblEnergo.

The Claimant contends that Respondent does not have the right to raise counterclaims pursuant to Article 26 (1) of the ECT, and that in any case Respondent has failed to show that AMTO has caused any injury whatsoever and AMTO cannot be penalised for presenting its claim on the basis of alleged breaches of the ECT. The Respondent submits that the allegations of the fictitiousness of the DonetskOblEnergo's claims and of collusion are included in the alleged breach of Respondent's obligations of Part III and are therefore covered by the definition of Art. 26(1) of the ECT; and that the ECT does not prohibit the right to raise counterclaims. Moreover, by virtue of Article 26(4)(c) of the ECT, Respondent is entitled to submit counterclaims under Article 21(2) of the SCC Arbitration Rules.

VI. DECISION: JURISDICTION

(a) Investment/Economic Activity in the Energy Sector:

§36.- The Respondent's first jurisdictional objection is that AMTO's shares in EYUM-10 do not constitute a qualified 'Investment' under the ECT. Article 1(6) of the ECT defines 'Investment' as follows:

- «6. *'Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:*
- (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;*
 - (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;*
 - (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an investment;*
 - (d) Intellectual Property;*
 - (e) Returns;*
 - (f) any right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.*

A change in the form in which assets are invested does not affect their character as investments and the term 'Investment' includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the investor making the investment and that for the Contracting Party in the area of which the investment is made (hereinafter referred to as the 'Effective Date') provided that the

Treaty shall only apply to matters affecting such investments after the Effective Date.

'Investment' refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its area as 'Charter efficiency projects' and so notified to the Secretariat.»

This definition of Investment has three parts: a wide definition ('every kind of asset') illustrated by a list of six types of rights; a clarification (covering changes in form, and a temporal qualification of the investment), and a restriction as to the types of economic activity included in the definition of investment. The definition part reflects a standard formula of investment treaties; the clarifications are also routine; and the restriction reflects the purpose of the Energy Charter Treaty to promote long term cooperation in a particular sector, namely the energy sector.

§37.- 'Economic Activity in the Energy Sector' is defined in Article 1(5) as follows:

«5. 'Economic Activity in the Energy Sector' means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex N1, or concerning the distribution of heat to multiple premises.»

Annex N1 lists certain energy materials and products excluded from the definition of 'Economic Activity in the Energy Sector'. These exclusions are not relevant to the present case.

§38.- The Energy Charter Treaty was adopted in the Final Act of the European Energy Charter Conference. The Final Act, which included representatives of the Republic of Latvia, the Principality of Liechtenstein, and Ukraine, also adopted certain understandings in respect to the ECT, including Understanding 2 and 3 in relation to Articles 1(5) and 1(6):

«By signing the Final Act, the representatives agreed to adopt the following Understandings with respect to the Treaty:

2. *With respect to Article 1(5)*

- (a) *It is understood that the Treaty confers no rights to engage in economic activities other than Economic Activities in the Energy Sector.*

- (b) *The following activities are illustrative of Economic Activity in the Energy Sector:*
- (i) *prospecting and exploration for, and extraction of, e.g. oil, gas, coal and uranium;*
 - (ii) *construction and operation of power generation facilities, including those powered by wind and other renewable energy sources;*
 - (Hi) *land transportation, distribution, storage and supply of Energy Materials and Products, e.g., by way of transmission and distribution grids and pipelines or dedicated rail lines, and construction of facilities for such, including the laying of oil, gas, and coal-slurry pipelines;*
 - (iv) *removal and disposal of wastes from energy related facilities such as power stations, including radioactive wastes from nuclear power stations;*
 - (v) *decommissioning of energy related facilities, including oil rigs, oil refineries and power generating plants;*
 - (vi) *marketing and sale of, and trade in Energy Materials and Products, e.g., retail sales of gasoline; and*
 - (vii) *research, consulting, planning, management and design activities related to the activities mentioned above, including those aimed at Improving Energy Efficiency.*

With respect to Article 1(6)

For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's.

- (a) *financial interest, including equity interest, in the Investment;*
- (b) *ability to exercise substantial influence over the management and operation of the Investment; and*
- (c) *ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.*

Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists.»

■

§39.- The Arbitral Tribunal accepts that the Claimant owns 204,165 shares in EYUM-10. These shares constitute a kind of asset owned by the Claimant within the definition of the first part of Article 1(6) ECT, and in particular constitute 'shares ...in a company or business enterprise' identified in Article **K6(b)**.

However, the Respondent has objected that the Claimant's shares do not constitute a qualifying Investment for the purposes of the ECT because they do not satisfy the requirements in the last paragraph of Article 1(6) in that these shares are not «*associated with an Economic Activity in the Energy Sector.*» The Respondent states that EYUM-10's operations neither constitute in themselves an 'Economic Activity in the Energy Sector' nor are they 'associated with' such an activity.

§40.- The Claimant and the Respondent have both submitted evidence on the nature of the contracts concluded between EYUM-10 and Energoatom/ZAES. The Claimant submitted descriptions of its contracts as of April 2006, and the Respondent submitted eleven contracts or contractual amendments from the period 1999-2001. The Tribunal finds that EYUM-10's contracts related to electrical installation, repairs and technical reconstruction or upgrading -in short, the provision of technical services- at the ZAES nuclear power plant.

The Respondent submitted that the provision of technical services does not fall within the definition of 'Economic Activity in the Energy Sector' in Article 1(5). The Respondent notes that Understanding 2 of the Final Act includes amongst activities illustrative of Economic Activity in the Energy Sector the «*construction and operation of power generation facilities*» but emphasizes that the Understandings are not part of the ECT and cannot be used to extend or modify the definition in Article 1(5); in any event «*construction and operation*» is a compound and single standard and if the Claimant's activities amount to construction (which the Respondent denies) they did not involve or concern the operation of power generation facilities.

Further, the Respondent states that the Claimant's investment is not 'associated with' an Economic Activity in the Energy Sector. It states that the ECT does not protect 'investments remotely or loosely related to Economic Activity in the Energy Sector' and refers to the fact that ZAES/Energoatom has dozens, if not hundreds, of contractual relationships. It is not the object and purpose of the ECT to protect such investments.

episodic, fragmentary, incidental, etc». The Respondent states that EYUM-10's short term case-by-case relationships with ZAES in respect of repair and reconstruction works 'do not have such integrity and stability' as to justify ECT protection.

§41.- The Claimant states that EYUM-10's operations constitute Economic Activity in the Energy Sector, as its specialised construction and maintenance services to the nuclear power industry are 'construction' within the meaning of Understanding 2 of the Final Act. Alternatively, EYUM-10's operations are 'associated with' an Economic Activity in the Energy Sector.

§42.- The Parties' submissions require the Arbitral Tribunal to interpret the final part of Article 1(6) to decide whether AMTO's shareholding in EYUM-10 qualifies as an investment «*associated with Economic Activity in the Energy Sector*». The definition of investment in the first part of Article 1(6) is broad and inclusive, and the energy sector restriction in the final part of Article 1(6) is open-textured. The drafters of the Energy Charter Treaty did not require an Investment to be an Economic Activity in the Energy Sector, but only to be 'associated with' such an activity.

The Respondent submitted that a mere contractual relationship with an entity engaged in an economic activity in the energy sector is not sufficient to be 'associated with' that activity. The Respondent referred to contracts of a power station for publishing, advertising or security services as examples of contractual relationships that would not be 'associated with' an Economic Activity in the Energy Sector.

The Arbitral Tribunal considers that the interpretation of the words 'associated with' involves a question of degree, and refers primarily to the factual rather than legal association between the alleged investment and an Economic Activity in the Energy Sector. A mere contractual relationship with an energy producer is insufficient to attract ECT protection where the subject matter of the contract has no functional relationship with the energy sector. The open-textured phrase 'associated with' must be interpreted in accordance with the object and purpose of the ECT, as expressed in Article 2. The associated activity of any alleged investment must be energy related, without itself needing to satisfy the definition in Article 1(5) of an Economic Activity in the Energy Sector.

§43.- In the present case, ZAES/Energoatom is engaged in an Economic Activity in the Energy Sector as its activity concerns the production of Energy Material and Products, namely electrical energy. EYUM-10 provides technical

services -installation, repair and upgrades- directly related to the production of electrical energy. It has provided these services through multiple contracts over a substantial period of time. In its letter to EYUM-10 dated February 28, 2002 ZAES described EYUM-10 as being a 'strategic partner for 20 years' and stated that EYUM-10's services were *«strategically important and directed on the reliable and safe exploitation of power units of our nuclear power plant.»* The close association of EYUM-10 with ZAES in the provision of services directly related to energy production means that AMTO's shareholding in EYUM-10 is an *«investment associated with an Economic Activity in the Energy Sector»*.

For these reasons, the Arbitral Tribunal finds that the Claimant's shareholding in EYUM-10 is an Investment within the meaning of the Energy Charter Treaty.

(b) The Claimant's consent to arbitrate:

§44.- The Respondent submits that an investor initiating arbitration pursuant to Article 26(4) ECT must expressly consent to arbitration, which the Claimant has failed to do. The Respondent refers to the language of Article 26(4) that any Investor choosing international arbitration *«shall further provide its consent in writing»*, (emphasis Respondent). The Respondent also relies on Article 26(5) that refers to the State party consent *«together with the written consent of the Investor given pursuant to paragraph (4).»* The Respondent submits that *«The investor's consent in writing as a separate instrument must be addressed and delivered to the ECT Contracting Party to the dispute»*. The Respondent recognized the widespread opinion that an investor's consent to arbitration can be perfected by initiating an arbitration proceeding, but stated that this is not possible under the express language of the ECT.

The Respondent also states that the Claimant's Request for Arbitration did not include a copy of the arbitration agreement or clause (as required by Rule 5(iv) of the SCC Rules) nor *«the Claimant's explicit and unequivocal positive consent in writing...for arbitration»*.

The Respondent states that Article 26 of the ECT contains a standing offer to investors of dispute resolution by arbitration, but this *«offer can operate as unconditional only to the extent that it is accepted correctly»*. (Rejoinder, paragraph 59). The express consent to arbitrate of the Claimant after the Request for Arbitration was belated, defective, impermissible and inadmissible. The ECT requires the Investor's consent prior to commencement of the arbitration.

§45.- The existence of an arbitration agreement must be determined in accordance with the ECT, supplemented as required by the SCC Rules. It is well established that arbitration pursuant to an investment treaty such as the ECT

requires an arbitration agreement. However, this arbitration agreement is not created by a contemporaneous exchange of promises between the parties in the manner of a commercial arbitration agreement. Rather, often offer and acceptance are separated in time and form. The State parties make an open offer of arbitration to investors of the other party or parties in the Treaty itself, which can be accepted by an investor when a dispute arises. Only at this time is there mutual consent to arbitration and therefore the Arbitral Tribunal has jurisdiction over the dispute (see, for example, *banco International, Inc v. Argentine Republic*, ICSID ARB/97/96 'Preliminary Decision on Jurisdiction' December 18, 1998, paragraph 44; 40ILM 457 (March, 2001).

Article 26(3) ECT provides the 'open offer' of the State Parties to arbitration. It states (as far as is relevant) that «...*each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration... in accordance with the provisions of this Article.*»

The Respondent's objection relates to the Claimant's consent. There is no doubt that the Claimant must consent to arbitrate and this consent must be 'in writing' (Article 26(4), opening sentence). The Respondent submits that the consent must also be express, for the reasons explained above.

§46.- Consent to arbitrate, as the foundation of the jurisdiction of an arbitral tribunal, should be unequivocal. The consent of an Investor under the ECT must be unconditional, as consent is mutual and also the consent of the State Party described in Article 26(3) is unconditional. However, where the consent of the Investor to arbitration is in writing, unequivocal and unconditional then the ECT imposes no further formal requirements.

A request for arbitration is by its very nature a consent to arbitrate because a legal proceeding cannot be requested by a party without their own participation in the proceeding. To request legal process is to submit to this process. An unconditional request to initiate arbitration proposed by another is the consent that completes the arbitration agreement and establishes the jurisdiction of the arbitral tribunal.

§47.- In the present case, the Claimant's Request for Arbitration unequivocally seeks to submit a dispute with the Respondent to arbitration pursuant to the ECT. It does not seek to modify the arbitration process defined in Article 26 ECT, to which Ukraine has already consented, by imposing any of its own conditions. The Request for Arbitration therefore satisfies the requirement of Article 26(4) that the Investor 'further provide its consent in writing' for this dispute to be submitted to arbitration.

The Respondent's objection to jurisdiction on the grounds of the Claimant's lack of consent is therefore dismissed.

(c) Jurisdiction Ratione Temporis:

§48.- The Parties have put in issue the date when the investment was made, and therefore when the jurisdiction of the Arbitral Tribunal begins. While the Respondent argues that the investment period began on March 4, 2003 under a 'conservative' approach or on January 21, 2002 under a 'liberal' approach, the Claimant contends that it made its initial investment as early as March 2000.

The fact that AMTO engaged the services of a broker for purposes of acquiring shares in EYUM-10 is not by itself an investment in EYUM-10, i.e. the acquisition of shares therein. Nor is the fact that AMTO on March 17, 2000 forwarded a payment to the broker indicative of any actual acquisition of shares in EYUM-10.

However, the 'Minutes No. 11 of the session of the Management Board' of EYUM-10 dated August 22, 2000 records a discussion of the purchases of shares in EYUM-10 and states that AMTO holds 16% of the shares in EYUM-10. This statement provides, in the view of the Tribunal, sufficient evidence that AMTO at that date had achieved a shareholding in EYUM-10.

Therefore, the Tribunal concludes that jurisdiction *ratione temporis* begins on August 22, 2000.

(d) The Existence of a 'dispute':

§49.- Article 26 provides a procedure for the settlement of disputes, and the existence of a dispute precedes the initiation of international arbitration in accordance with the provisions of this Article. The Respondent makes two distinct submissions. Firstly, there was no dispute between the Parties, as the only dispute was a commercial dispute between EYUM-10 and Energoatom. Secondly, any dispute is now disposed of, as EYUM-10 and Energoatom / ZAES have reached a settlement, which is in the process of being performed.

The Respondent refers to international jurisprudence articulating the principle that a dispute is 'a disagreement on a point of law or fact, a conflict of legal views or interests between parties' or a 'claim of one party... positively opposed by the other.' It also refers to the decision in *Emilio Agustin Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7) describing the natural sequence of events from which a dispute emerges.

«96. The Tribunal notes in this respect that there tends to be a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of a difference of views. In time these events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. The conflict of legal views and interests will only be present in the latter stage, even though the underlying facts predate them. It has also been rightly commented that the existence of the dispute presupposes a minimum of communications between the parties, one party taking up the matter with the other, with the latter opposing the Claimant's position directly or indirectly.»

The Respondent has affirmed that the Claim Letters of May 16, 2005 represented the first communication to the Ukraine alleging a breach of the ECT. There was no conflict at this time, as the Respondent had taken no position on the Claimant's allegations, and therefore there was no 'dispute' for the purposes of Article 26. In effect, the Respondent states that the Claim Letters were mere notifications of a claim, and the initiation of communication that might lead to a dispute, but not a request to amicably settle an existing dispute pursuant to Article 26(2). The Respondent further notes that there was no response to the Claim Letters. If this non-response itself gave rise to a dispute then it was obligatory for the Claimant to subsequently request amicable settlement of such dispute, so that a three month cooling off period might legitimately start to run under Article 26(2). As there was no request for amicable settlement, the Respondent's consent under Article 26(3) does not cover this dispute, and the Arbitral Tribunal has no jurisdiction.

§50.- It is commonplace for investment treaties to provide for a period of consultation or settlement discussions (often inappropriately referred to as "cooling-off periods" or "waiting periods"). Some previous awards have found that non-compliance with such clauses did not constitute a bar to jurisdiction (see, for example, *Ethyl Corporation v. The Government of Canada*, Award on Jurisdiction, June 24, 1998; 38 ILM 708, paragraphs 79-88 (Article 1120 of NAFTA); *SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction of August 6, 2003, paragraphs 183-184 (Switzerland-Pakistan BIT)). However, each instrument and each case must be dealt with independently, and there is certainly no general principle that an investor may ignore consultation or settlement clauses with impunity.

The purpose of the Energy Charter Treaty includes the promotion of long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter. This purpose is facilitated by the amicable settlement of disputes. The request for amicable settlement required by Article 26(2) ensures that a State party is notified of a dispute prior to the initiation of an arbitration and has an opportunity to

investigate and take steps to resolve the dispute. Article 26(2) does not raise any fundamental rights -there is no breach of due process in the loss or curtailment of a period for settlement discussions- but is an important element of the dispute resolution process and is a manifestation of the cooperation in the energy sector that is at the heart of the ECT.

§51.- The Respondent states that there was no dispute involving Ukraine prior to the Claim Letters, but rather a commercial dispute between two Ukrainian juridical persons (i.e. EYUM-10 and Energoatom). This submission defines the dispute by reference to contract claims, and therefore inevitably excludes the treaty claims pursuant to the ECT (unless the parties were identical, which is not the case here). Two Ukrainian juridical entities, and the non-payment of contractual debts and court judgments, were at the centre of the dispute. Nevertheless, both the Claimant and the Respondent were involved in the dispute. The Claimant was directly involved in the negotiations between EYUM-10 and Energoatom. Mr. O.M. Rogozhnikov, the deputy general director for economy and finance of Energoatom stated that during negotiations with contractors in 2000-2001 he was aware of the new foreign ownership of EYUM-10. In his witness statement he states that he met several times with a Mr. Viktorov «*who simultaneously represented EYUM and its foreign investor. At those meetings, we discussed plans of restructuring indebtedness towards EYUM, whereat Mr. Voktorov... repeatedly offered assistance of foreign investor in solving financial problems at ZNPP.*»

§52.- The Claimant did not articulate and transmit a claim pursuant to the ECT to the Respondent prior to the Claim Letters. The Claimant until this time concentrated its efforts of recovery on Energoatom, but the close links of Energoatom with the State leads the Tribunal to the conclusion that the Claimant, EYUM-10, Energoatom and the Respondent were all part of the same dispute prior to the sending of the Claim Letters. Ukraine knew of the debt repayment problems of Energoatom. The Claim Letters did not make known to Ukraine a set of circumstances for the first time, but rather advised that a particular investor had turned its efforts for relief from a state-owned entity to the State itself. In short, the novelty of the Claim Letters was their legal pretensions. The factual background to those pretensions was already known to Ukraine. It is true the background was not known in all its detail, but was sufficiently well known not to be at all unexpected. Further, the Respondent was in a position to respond promptly to the Claim Letters. Nevertheless, it chose not to reply to these letters.

For these reasons, the Tribunal finds that the Claimant and the Respondent were parties to an existing dispute at the time of the Claim Letters. Accordingly, the

Claimant was entitled to request amicable settlement pursuant to Article 26(2), and at the expiry of its three month period, to initiate arbitration.

§53.- Additionally, a State party that considers the amicable settlement requirements of Article 26(2) have not been complied with by an Investor has an obligation, as a matter of procedural good faith, to raise its objections immediately. This ensures the Investor can, if necessary, remedy the defect so that both parties are in a position to engage in the amicable settlement discussions envisaged by the ECT, and thereby help to preserve their long term cooperation in the energy sector.

Accordingly, the Tribunal finds that by failing to raise any immediate objection to the Claim Letters, the Respondent recognized the existence of the dispute and the validity of the Claim Letters.

§54.- Finally, the Respondent submits that the subject matter of the dispute has been exhausted by the settlement agreement between EYUM and Energoatom.

The settlement agreement relates to the contractual dispute between EYUM-10 and Energoatom and not to the treaty claims of the Claimant against the Respondent pursuant to the ECT. The contract and treaty claims are, of course, part of the same wider dispute, and the contractual settlement, depending on the parties to the settlement and its terms, might preclude the ECT claims, but that is not the case here. Accordingly, the Tribunal finds that the settlement agreements have no implications for the jurisdiction of this Tribunal.

(e) Jurisdictional Submissions Relating to the Claim Letters:

§55.- The Respondent makes two distinct jurisdiction submissions based upon the Claim Letters. Firstly, the Claimant impugns the validity of the power of attorney of the Claimant's counsel, Mr. Sverre B. Svahnstrom, enclosed with the Claim Letters, and on this basis submits that the request for amicable consent, investor's consent to arbitrate, and Request for Arbitration are all unauthorized. Secondly, the Claim Letters define the scope of the dispute for the subsequent arbitration, so that the Claimant cannot include claims in the arbitration that were not submitted to amicable settlement.

The power of attorney included in the Claim Letters specifically referred to arbitration and proceedings against the Ukraine pursuant to the ECT. It was signed by 'Leonids Krizanovskis, Director' and dated 'Riga, May 2005' with the actual date of signature not completed. The Respondent states that the

authority of Mr. Krizanovskis to issue powers of attorney is not confirmed in any way either by the constituent documents of AMTO or by-laws, or otherwise.

§56.- The applicable law in the present arbitration is the ECT itself, and 'applicable rules and principles of international law' (Article 26(6)). There is no requirement in the ECT relating to powers of attorney, and nor has the Respondent identified any relevant principles of international law relating to powers of attorney. Further, the Respondent's objection is purely formal, in that there is no evidence to suggest that Mr. Svahnstrom was not in fact authorized by the Claimant to act on its behalf, either at the time of the Claim Letters or at any subsequent time, or has in any manner exceeded his authority. Accordingly, the Arbitral Tribunal accepts the power of attorney provided with the Claim Letters, and finds that the Claim Letters, their request for amicable settlement, the Claimant's consent to arbitrate and the Request for Arbitration have all been fully authorized by the Claimant. The Respondent's objection based on lack of authority is therefore dismissed.

§57.- The Respondent also submits that the Claim Letters define the dispute that can be submitted to arbitration. This submission misconceives the nature of the request for amicable settlement. Article 26(2) requires the Claimant to submit the 'dispute' for amicable settlement. A dispute, as already explained, is a state of affairs involving a failure to agree. The purpose of a request for amicable settlement is to discuss the dispute, with a view to exchanging views over its causes, the interests involved, clarifying factual uncertainties and possible misunderstandings, and identifying possible solutions within the framework of the promotion of long term cooperation in the energy field based on complementarities and mutual benefits. A party can request amicable settlement of a dispute without identifying any ECT claims, and an Investor may have good reason not to formulate claims at this stage, in order to avoid taking a position or appearing to threaten the State party with arbitration before bona fide settlement discussions. The purpose of Article 26(2) -to provide for settlement discussions- requires the avoidance of legal forms, and the facilitation of open communication. The Investor must inform the State of the state of affairs involving disagreement, and request amicable settlement. If the State considers there is insufficient information to initiate discussions then the good faith response is simply to so advise the Investor, and require more detail. In other words, to initiate the type of communications envisaged by Article 26(2).

Similar views have been expressed by other tribunals. For example, in *Generation Ukraine, Inc v. Ukraine* (ICSID Case No. ARB/00/9) page 45:

«The requirement to consult and negotiate, however, does not serve to compel the investor to plead its legal case on multiple occasions. To insist upon a

precise congruity in the investor's articulation of its grievances in these different for a would only have a chilling effect on consultation and negotiation between the investor and the host State.»

§58.- The Arbitral Tribunal considers that the Claim Letters satisfied the minimum requirements of advising the Ukraine of a dispute and requesting amicable settlement. In the subsequent Request for Arbitration the Investor was free to frame its claims as it wished, provided they related to the same dispute, as here they clearly do. Accordingly, the Respondent's objection that the Request for Arbitration includes claims not raised in the Claim Letters is rejected.

(f) Article 17 ECT/Denial of Advantages:

§59.- The Respondent submits that the claims brought by the Claimant are inadmissible by operation of Article 17(1) of the ECT and alleges that Article 17(1) ECT requires the termination of this arbitration. Article 17 provides:

«ARTICLE 17

***NON-APPLICATION OF PART III [i.e. Articles 10-17 ECT, entitled
'Investment Promotion and Protection'] IN CERTAIN CIRCUMSTANCES***

Each Contracting Party reserves the right to deny the advantages of this Part to:

- (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized;...*
- (2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:*
 - (a) does not maintain a diplomatic relationship; or*
 - (b) adopts or maintains measures that:*
 - (i) prohibit transactions with Investors of that state; or*
 - (ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments.»*

The Respondent asserts that the exercise of its right under Article 17 is not arbitrable. In the alternative, it states that the Claimant has failed to prove that it is not owned or controlled by citizens of a third state or that it has substantial business interests in Latvia. Further, the Respondent can exercise its right to deny advantages at any time, meaning that the right can be exercised during the arbitration, and did not need to be exercised at the time of the making of the Investment, or prior to the alleged breaches.

(i) Arbitrability and Article 17III:

§60.- The Respondent's first submission is that the State's 'right' to deny advantages under Article 17 is not subject to arbitration, so that the State is the sole and exclusive judge of whether the Investor has the characteristics described in Article 17(1). This submission has a terminological basis, as Article 26(1) entitles an Investor to submit to arbitration an alleged dispute relating to the State's 'obligations', and Article 17 refers not to a State's obligations but a 'right' to deny advantages. Therefore, the Arbitral tribunal has no jurisdiction *rationae materiae*.

A dispute regarding an obligation includes a dispute relating to the existence of an obligation. Indeed, this is the essence of the *competence/competence* principle in international arbitration. The State might assert 'rights', 'powers,' 'privileges' or 'immunities' to deny, annul or evade an obligation, but the legal description of the objection does not detach it from the Claimant's assertion of the existence and breach of an obligation. The Respondent's exercise of its 'right' to deny advantages is an aspect of the dispute submitted to arbitration by the Claimant, and within the jurisdiction of this Arbitral Tribunal.

Accordingly, the Respondent's submission that the Tribunal has no jurisdiction over its exercise of its 'right' to deny advantages pursuant to Article 17 ECT is rejected.

(ii) Interpretative Issues:

§61.- Article 17 enables a State party to deny the Part III treaty rights to certain classes of investors. Article 17(1) excludes Investors that are legal entities rather than natural persons, where the legal entity has no real connection with its nominal nationality. Article 17(2) excludes protection for Investments of Investors from countries with which the State does not maintain normal diplomatic or economic relationships.

Article 17 can be read together with the definition of 'Investor' in Article 1(7) as establishing two classes of Investors of a Contracting Party for the purposes of the ECT. The first class comprises Investors with an indefeasible right to investment protection under the ECT. This class includes nationals of another Contracting Party -whether natural persons or juridical entities- except for those nationals falling within the second class.

The second class comprises Investors that have a defeasible right to investment protection under the ECT, because the host State of the investment has the power to divest the Investor of this right. In this second class are legal entities that satisfy the nationality requirement by reason of incorporation but are owned or controlled by nationals of a third state in a manner potentially unacceptable to

the host State. Such foreign ownership or control is potentially unacceptable where it involves a State with which the Host State does not maintain normal diplomatic or economic relationships, or where it is not accompanied by substantial business activity in the state of incorporation.

As the purpose of the ECT is to establish a legal framework 'in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits...' then the potential exclusion of foreign owned entities from ECT investment protection under Article 17 is readily comprehensible. 'Long term economic cooperation', 'complementarities' or 'mutual benefits' are unlikely to materialise for the host State with a State that serves as a nationality of convenience devoid of economic substance for an investment vehicle, or a State with which it does not enjoy normal diplomatic or economic relations.

§62.- Article 17(1) affects only juridical rather than natural persons, and requires the fulfilment of two requirements in order for the host state to exercise its right to deny. First, the investor must be owned or controlled by citizens or nationals of a 'third state'. 'Third state' is not defined in the ECT, but is used in Article 1(7) in contradistinction to 'Contracting Party', which suggests that a third state is any state that is not a Contracting Party to the ECT. Secondly, the investor must have 'no substantial business activities' in the state of its incorporation. These are cumulative requirements so that both must exist before the respondent can exercise its right to deny.

§63.- There are important differences in drafting between Article 17(1) and 17(2). In particular, Article 17(2) places the burden of proof to establish the facts necessary to exercise this power on the State Party, while Article 17(1) is expressed in a neutral manner in respect of the burden of proof.

§64.- The burden of proof of an allegation in international arbitration rests on the party advancing the allegation, in accordance with the maxim *onus probandi actori incumbit*. In application of this principle, a claimant has the burden to prove that it satisfies the definition of an Investor so as to be entitled to the Part III protections and the right to arbitrate disputes in Article 26. On the same basis, the claimant would be expected to have the burden of proof that it controls, directly or indirectly, an Investment for which protection is sought, and this is a fact explicitly stated in Understanding 3 to the Final Act. However, when a respondent alleges that the claimant is of the class of Investors only entitled to defeasible protection, so that the respondent can exercise its power to deny, then the burden passes to the respondent to prove the factual prerequisites

of Article 17 on which it relies. Article 17(2) adopts exactly this approach but, as already mentioned, Article 17(1) is neutral on the question of burden of proof.

§65.- Burden of proof is an important issue in respect of Article 17(1) as it might be difficult, as the present case demonstrates, for the respondent to determine who owns or controls an Investor when ownership or control might involve a number of entities in different jurisdictions. Similarly, the claimant knows exactly what its business activities are in a particular area, and can easily present the evidence to establish those activities, while this information might not be accessible to the respondent.

Nevertheless, the relative accessibility of evidence would not seem to justify any modification to the normal rules regarding the burden of proof. It would support a duty to disclose evidence so that a respondent could request the disclosure of specific documents from the claimant where the documentation is not otherwise accessible. Alternatively, where the agreed procedure, as in this case, provides for Tribunal questions then the Tribunal can request the necessary clarifications. In both cases, negative inferences might be drawn against the claimant for a failure to provide the requested documents or information. Alternatively, as the Respondent sought to do in this case, the respondent might seek to exploit the paucity or ambiguity of the evidence relating to the claimant's business activities to argue these activities have no substance, thereby effectively compelling the Claimant to supplement this evidence, or defend its limitations.

(iii) Ownership or control:

§66.- AMTO is a Limited Liability Company incorporated in Latvia and first registered on March 6, 1998. Its shares used to be owned by Mr. Leonids Krizanovskij, a Latvian citizen and the current managing director of AMTO. Mr. Krizanovskij's shareholding was wholly transferred to Five Key Invest & Assets Limited Holding JSC on February 14, 2005. There is also evidence that for an undefined period Alston Ltd, an English legal entity, was the owner of the shares in Five Key Invest & Assets Limited Holding JSC. Five Key Invest & Assets Limited Holding JSC is a company registered on May 4, 2001 under the laws of Liechtenstein. The Board is composed of Mr. Harry Jean Louis Gstohl (a Liechtenstein citizen) and Mr. Ivan Vladimirovich Kuznetsov (a Russian citizen). Five Key Invest & Assets Limited Holding JSC is the current owner of all shares in AMTO.

On November 21, 2006 all the shares in Five Key Invest & Assets Limited Holding JSC were transferred to a Liechtenstein foundation called Key's Depositary Foundation (hereafter, *«the Foundation»*) with its registered office in Vaduz, Liechtenstein. According to the Claimant, the Foundation has no owners. It has a director and a so-called protector. The ultimate beneficiaries, who cannot

exercise ownership rights, are (1) Anastasia Kuznetsova, citizen of USA; (2) Alexandra Kuznetsova, citizen of USA; (3) Irina Kuznetsova, permanent resident of Cyprus, citizen of the Russian Federation; (4) Prokhor Kuznetsov, permanent resident of Cyprus, citizen of the Russian Federation; (5) Ivan Kuznetsov, permanent resident of Cyprus, citizen of the Russian Federation.

The Claimant stated in its Surrejoinder that the Foundation's «*ultimate beneficiaries are Russian nationals*». The Claimant provided additional information regarding the ownership and control of AMTO in response to the Tribunal's written questions.

In summary, AMTO is incorporated in Latvia and wholly owned by Five Key Invest & Assets Limited Holding JSC, a company incorporated in Liechtenstein. This company is in turn wholly owned by the Foundation.

§67.- The Tribunal notes that one of the Claimant's witnesses, Mr. Ivan Vladimirovich Kuznetsov is almost certainly also a member of the Board in Five Key Invest & Assets Limited Holding JSC given that their names are identical except for a minor spelling divergence (Kuznetsov/Kusnetsov), they share Russian nationality and reside in St Petersburg. Mr. Kuznetsov is also one of the beneficiaries of the Foundation.

Five Key Invest & Assets Limited Holding JSC's Board is composed of only two people: Mr. Harry Jean Louis Gstohl and Mr. Kuznetsov. Liechtenstein's law requires at least one of the members of the Board of a joint stock company to have the nationality of a country belonging to the European Economic Area. Mr. Gstohl is a citizen of Liechtenstein and Mr. Kuznetsov is a Russian citizen. Taking into account that Mr. Kuznetsov is one of the beneficiaries of the Foundation that owns all the shares in Five Key Invest & Assets Limited Holding JSC and also a member of Five Key Invest & Assets Limited Holding JSC, the Tribunal concludes that Mr. Kuznetsov is the person who controls AMTO.

Accordingly, AMTO is controlled by a Russian national. This finding raises a difficult interpretive issue of the whether Russia is a 'third state' within the meaning of Article 17(1). However, the Tribunal's finding on the second precondition in Article 17(1), relating to substantial business activity in Latvia, means the Tribunal does not need to determine this question.

(iv") Substantial business activities:

§68.- The application of Article 17(1) ECT in this case also requires that AMTO has substantial business activities in the country in which it is organised, i.e., in Latvia.

In support of its contention that AMTO conducts substantial business activity in the territory of Latvia, the Claimant has submitted: (i) a report by the law firm of Blueger & Plaude; (ii) a tax certificate from the State Revenue Service of Riga; (iii) a statement from its landlord; and (iv) a bank statement.

The Blueger & Plaude Report states that AMTO's main activity is in the field of financial investments by participating as a shareholder in companies in Finland, Ukraine, USA and Russia. The Report refers to various agreements and share certificates relating to these investments, but these were not presented to the Tribunal. The Blueger & Plaude Report also refers to a project on real estate acquisition in Riga of which only a preliminary purchase agreement had been concluded as of September 18, 2006. Neither the preliminary agreement nor any subsequent agreement or related evidence has been submitted.

AMTO's tax certificate shows payment of taxes during the period from January 1, 2000 until March 31, 2007 of the following types: (i) residents income tax; (ii) social insurance obligatory payments; (iii) internal VAT; and (iv) entrepreneurial activity risk state fee. The Claimant states that it employs two staff full-time and the 'social insurance obligatory payments' relate to these staff. No VAT has been paid during the referred period.

AMTO also holds a multi-currency account in the Latvian bank Rietumu Banka. A brief statement of the activity of this account from March 6, 1998 to March 31, 2007 giving the total amount of transactions in each currency has been presented as evidence by the Claimant. However, this bank statement provides no evidence of payments in respect of day-to-day business activities, and the Tribunal has not been provided with evidence that any other bank account exists.

The Claimant also submitted a statement from AMTO's landlord, certifying that AMTO has been renting an office in Riga from September 1, 2000 to the date of the statement, March 30, 2007.

§69.- The ECT does not contain a definition of 'substantial', nor does the Final Act of the European Energy Charter Conference that would serve as guidance for interpretation. As stated above, the purpose of Article 17(1) is to exclude from ECT protection investors which have adopted a nationality of convenience. Accordingly, 'substantial' in this context means 'of substance, and not merely of form'. It does not mean 'large', and the materiality not the magnitude of the business activity is the decisive question. In the present case, the Tribunal is satisfied that the Claimant has substantial business activity in Latvia, on the basis of its investment related activities conducted from premises in Latvia, and involving the employment of a small but permanent staff.

§70.- Therefore, the second requirement of Article 17(1) ECT. Accordingly, the Respondent has no right to deny the Claimant the advantages of Part III as AMTO has substantial business activities in the territory of Latvia.

As a consequence, the Tribunal does not need to determine whether Russia qualifies as a 'third state' for the purposes of this Article 17(1), or whether Respondent can exercise its right to deny advantages at any time, including after the initiation of an arbitration.

(g) *Parallel international proceedings:*

§71.- On December 16, 2004 EYUM-10 submitted an application to the ECHR based on alleged violations of the Convention for the Protection of Human Rights and Fundamental Freedoms (the «*European Convention*») against Ukraine.

The Respondent has requested that the present arbitration be terminated or suspended based on the existence of a parallel international proceeding before the ECHR. The Respondent considers that the doctrine of *lis pendens* should be applied flexibly to avoid international proceedings concerning the same events and similar claims, even if the parties and the respective causes of actions are formally different.

According to the Claimant, EYUM-10's application to the ECHR is no ground for either termination or suspension of this arbitral proceeding, since the parties to both proceedings are different and so is the legal basis or cause of action for the respective proceedings.

This is a case of an international tribunal and a supra-national court having concurrent jurisdiction over a dispute arising out of similar facts. However, the parties and the causes of action are different in these two proceedings. With regard to the parties, EYUM-10 is not a party to the present arbitration and AMTO is not a party to the ECHR proceedings. With respect to the causes of action, the present arbitration is based on alleged breaches of the ECT, while proceedings before the ECHR are based on Article 6(1) of the European Convention and its Protocol No. 1, Article 1. These circumstances are sufficient to disqualify the Respondent's *lis pendens* objection.

Accordingly, this Arbitral Tribunal concludes that the ECHR proceedings provide no justification to terminate or suspend the arbitration, and the Respondent's submission on this ground is rejected.

§72.- Accordingly, all of the Respondent's jurisdictional objections are rejected, and, as a consequence, the Arbitral Tribunal turns now to consider the merits of the dispute.

VII. DECISION: MERITS

(a) Introductory Comments:

§73.- The Claimant alleges that the Respondent has breached Articles 10(1) and 10(12) ECT in the various ways set out above. Articles 10(1) and 10(12) read as follows:

«ARTICLE 10 PROMOTION, PROTECTION AND TREATMENT OF INVESTMENTS

(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.»

(12) Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorizations.»

Article 10(1) is a complex provision of five sentences. It opens with an expansive obligation to 'encourage and create, stable, equitable, favourable and transparent conditions for Investors...to make Investments...'. The four subsequent sentences refer to various other obligations, some of which are well known in investment treaty law. Some obligations relate to 'Investments' and some to 'Investors'. Some are explicitly unlimited in time ('commitment... at all times'; 'the most constant protection'), but the temporal application of the opening sentence is ambiguous and has been the subject of conflicting interpretations by the Parties in this arbitration. The final sentence is an 'umbrella clause' requiring the State to observe any obligations it has entered into with an Investor or an Investment of an Investor.

§74.- There is clearly overlapping within Article 10(1). It refers to both fair and equitable treatment and the minimum standard required by international law, when these two standards may be identical in many contexts. Conduct that breaches these standards might also constitute 'unreasonable or discriminatory measures' or failure to 'create stable, equitable, favourable and transparent conditions for Investors'. The result is that a claimant can plead that the same conduct breaches various obligations in Article 10(1) in circumstances where the content and relationship between these obligations is not clear.

§75.- The Claimant in the present arbitration also alleges a denial of justice. Denial of justice is a concept of state responsibility afflicted by imprecision. It is a manifestation of a breach of the obligation of a State to provide fair and equitable treatment and the minimum standard of treatment required by international law. Denial of justice relates to the administration of justice, and some understandings of the concept include both judicial failure and also legislative failures relating to the administration of justice (for example, denying access to the courts).

In Article 10(12) of the ECT there is a specific obligation to ensure that domestic law provides an effective means for the assertion of claims and the enforcement of rights. Legislative failures affecting the administration of justice in cases under the ECT can therefore be measured against the express standard established by Article 10(12).

§76.- In respect of the applicable standard to establish a case of denial of justice under Article 10(1) in respect of judicial decisions, the Tribunal refers to the discussion in *Mondev International Limited v United States of America*, (ICSID Case No. ARB(AF)/99/2) Award of October 11, 2002 (42 *ILM* 85 (2003)), at paragraphs 126-127. This tribunal concluded (paragraph 127):

«The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on one hand that international tribunals are not courts of appeal, and on the other hand [investment treaties are] intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.» (footnote omitted)

In the context of the present arbitration, the Tribunal would add that the experience of an investor in domestic courts may involve a series of decisions, and these decisions should be considered in their entirety. Further, the available means within the host State's legal system to address errors or injustices, and whether or not they were exercised, are relevant to the assessment of the propriety of the outcome. The investor that fails to exercise his rights within a legal system, or exercises its rights unwisely, cannot pass his own responsibility for the outcome to the administration of justice, and from there to the host State in international law.

(b) Proceedings in the Ukrainian Courts:

§77.- The Claimant states that the handling of EYUM-10's attempt to seek enforcement of its claims before the Ukraine courts amounts to a denial of justice. Accordingly, the treatment of its claims by the Ukraine courts was 'treatment' less favorable than that required by international law and therefore a breach of Article 10(1) of the ECT.

The allegations of a denial of justice relate to the six bankruptcy proceedings against Energoatom commenced between March 2002 and December 2003. EYUM-10 was the initiating creditor in two of these proceedings (the fourth and fifth bankruptcy proceedings) and a bankruptcy creditor in the sixth claim. It complains of the delay, error and tolerance of procedural abuse by the Ukraine courts in these proceedings. EYUM-10 was not a party to the first three bankruptcy proceedings but claims that it was prevented from participating in these proceedings 'due to the courts' failure, in violation of applicable law, to order the initiating creditors to publicly announce the opening of the bankruptcy cases'.

§78.- The treatment of an investor by national courts should be examined in its entirety to determine whether or not there has been a denial of justice. Accordingly, an investor may complain, as in this case, that its treatment in various proceedings cumulatively meets the standard of a denial of justice. When considering the investor's treatment in its entirety the tribunal must consider proceedings both initiated or available to the investor. In the present case the Claimant's involvement in the Ukrainian courts began with eleven cases of contractual non-payment. The Claimant was successful in all of these cases, and there are no allegations regarding the Ukrainian courts in respect of these proceedings.

The Claimant complains that procedural violations meant that it was denied an opportunity to participate in the first three bankruptcy proceedings, and that these three proceedings were terminated in breach of the Law on Restoring

Debtor's Solvency, or Declaring a Debtor Bankrupt of May 14, 1992 (the «*Bankruptcy Law*»). The Tribunal accepts the Respondent's submission that the Claimant has not adequately proven its allegations of irregularities relating to these proceedings. In particular the duty to publicise the bankruptcy proceedings rested with the applicant and not with the court itself, and no basis to impute a failure by a private creditor to the Ukrainian courts has been established. Further, the loss of opportunity to participate in these bankruptcy proceedings was remediable by the Claimant commencing its own bankruptcy proceedings. This was in fact the course adopted by the Claimant, in initiating the fourth bankruptcy proceeding, less the nine months after the dismissal of the first proceeding.

§79.- The fourth bankruptcy proceeding was commenced by EYUM-10 and six other creditors in the Commercial Court of Kiev on February 7, 2003. The Claimant complains of various procedural irregularities that delayed these proceedings, but the Tribunal considers these irregularities insignificant and accepts the Respondent's submission that they can be explained by the interaction of the Bankruptcy Law with the Code of Economic Procedure of the Ukraine, and procedural steps taken by the debtor. On July 16, 2003 the Commercial Court of Kiev dismissed a further request by the debtor company for suspension of the proceedings and ordered the initiation of the judicial procedure for the administration of the debtor's property, appointed a liquidator, recognized EYUM-10 and various other entities as judgment creditors in the proceedings, and made various related orders. Energoatom appealed to the Commercial Court of Appeal of Kiev. The Commercial Court of Appeal issued its decision on August 1, 2003 partially allowing the appeal and quashing the decision of the Commercial Court of Kiev and referring the case back to this court. EYUM-10 filed a request for cassation with the Superior Court of Ukraine which was dismissed on October 29, 2003. The Claimant complains that the decision of the Commercial Court of Appeal was influenced by Resolution 1160 by the Cabinet of Ministers. The Claimant states that the decision of this court «*lacks foundation in reality as well as in law... The ruling of the Commercial Court of Appeal is nothing but an obedient reaction to the very clear signal sent by the Cabinet of Ministers through the adoption of the superfluous Resolution № 1160*». Further, the decision of the Superior Commercial Court to reject the cassation appeal was based on arguments «*which have not before been recognized in Ukrainian Case Law*».

§80.- The Arbitral Tribunal has considered the decisions of both the Commercial Court of Appeal and the Superior Court. There is no evidence, either within these decisions or otherwise adduced by the Claimant, that the courts were improperly influenced by Resolution 1160. The decisions adopt a

formalistic approach to the requirements of the bankruptcy law, and indicate some uncertainty over the proper procedural treatment of debts of a subdivision of an entity such as Energoatom. However, these decisions respond to legal and procedural issues raised by these bankruptcy proceedings, were delivered without undue delay, and there is no indication that the parties were not properly heard. In the absence of any demonstrated procedural irregularity or interference, the Claimant's objection to these decisions is simply that they are wrong in law. This Tribunal is not a court of appeal for the decisions of the Ukrainian courts and, in any event, the Tribunal does not accept that these decisions are wrong in law.

§81.- EYUM-10's response to the decision of the Superior Court of the Ukraine was to exercise its right in Ukrainian law to present a new bankruptcy petition against Energoatom. This was presented the same day as the Superior Court's decision. It was initially rejected by the Commercial Court of Kiev wrongly, in the Claimant's submission. The remedy for this error lay in EYUM-10's right of appeal. EYUM-10 duly exercised its right of appeal and the Commercial Court of Appeal of Kiev quashed the earlier decision, so any error in this proceeding was rectified within the Ukraine legal system. The fifth bankruptcy proceeding was consolidated into the sixth bankruptcy proceeding and does not need to be further considered.

§82.- The sixth bankruptcy proceeding was initiated by a creditor called DonetskOblEnergo, another state owned enterprise, on December 2, 2003. The Claimant makes numerous complaints regarding the conduct of these proceedings, including failure to follow the statutory procedure for publication of the proceedings and for the preliminary hearing; exclusion of EYUM-10 and other creditors; collusion between the petitioning creditor and Energoatom (both state-owned enterprises); procedural delays and interference by legislative decree. These allegations are denied by the Respondent. The Respondent also points to the procedural complexity of these bankruptcy proceedings and the need for resolution of various procedural objections raised by creditors and the debtor (including another creditor actually owned by the Claimant), which led to legitimate appeals or cassation complaints that necessarily required time for resolution. The Respondent rejects the claims of collusion between the petitioning creditor and the debtor, and refers to an earlier judgment on which the petition was based. The Respondent also rejects the allegations of interference by legislative decree.

§83.- The Arbitral Tribunal finds that there is no denial of justice in respect of the sixth bankruptcy proceeding. The Claimant has not established any

improper conduct by the Ukrainian courts, and the delay in the proceeding is not excessive, and is explained by the procedural complexity of the case.

§84.- Accordingly, the Claimant has failed to demonstrate any denial of justice in the handling by the Ukrainian courts of the bankruptcy proceedings or any series of circumstances that cumulatively amount to a denial of justice. The Claimant was frustrated that over a period of years it was unable to enforce its judgment debts against Energoatom. However, there were many other judgment creditors, and the debtor was a large and strategic state enterprise. The Claimant's submissions demonstrate unrealistic expectations of a simple and rapid result, in a juridical structure where there were many other interests and competing rights to be considered by the Ukraine courts. These creditors may not have always complied with their obligations under the Bankruptcy legislation but such conduct cannot be imputed to the Ukrainian courts and to the Ukrainian State. The decisions of the Ukraine courts might be considered by practitioners from other jurisdictions to be formalistic, but bankruptcy legislation is a technical subject matter. In any event, the Ukraine courts appear to have applied the law and to have in fact resolved the many appeals and cassation requests relatively rapidly. EYUM-10 also established its debts before the Ukrainian courts without any problems. EYUM-10's experience of Ukrainian bankruptcy proceedings may have been a frustrating process but its submissions suggest that its expectations were unrealistic, and its evidence fails to prove any legal error, abuse, undue delay or interference in the process by the Ukrainian courts. Accordingly, the allegations of a denial of justice with respect to the bankruptcy proceedings are rejected in their entirety.

(c) The Ukrainian Bankruptcy Legislation:

§85.- The Claimant also submits that the bankruptcy legislation in the Ukraine is clearly inadequate and does not live up to the standard required by international law. The Claimant states that this constitutes a breach of Article 10(12) of the ECT in that the Respondent has failed to ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to investments. The Claimant identifies three specific deficiencies in the Bankruptcy Law of Ukraine.

- «(i) *Under Ukrainian law, no remedies are available when a debtor is protected by moratorium, at the same time as creditors are denied to participate in the on-going bankruptcy proceeding;*
- (ii) *Under Ukrainian law, no remedies are available when a court does not adhere to the stipulated timeframes in the Bankruptcy Law, thus preventing creditors from participating in the on-going bankruptcy proceeding;*

- (Hi) *Under Ukrainian law, no remedies are available when the debtor cooperates with the initiating creditor (as Energoatom obviously does with DonetskOblEnergo in the pending bankruptcy case No 43/167), with the purpose of depriving other creditors of the right to enforce their legitimate claims.»*

The Claimant relies on the expert evidence of Dr. Anna Tsytrat, an experienced Ukrainian commercial lawyer. The Claimant also relies on the success of Energoatom in escaping enforcement in the six bankruptcy proceedings and over many years as confirmation of the inadequacy of the Bankruptcy Law. The Claimant did not provide any comparative analysis of bankruptcy legislation, or identify any international standards against which the Bankruptcy Law of the Ukraine might be assessed.

§86.- The Respondent provided an expert opinion by Dr. Alexander N. Biryukov, a Ukrainian lawyer and professor specializing in bankruptcy law. It also referred to the international assistance in the preparation of the Bankruptcy Law, and its subsequent evaluation. The Bankruptcy Law of 1999 was drafted with the assistance of the international auditing firm Deloitte & Touche, and also a U.S. bankruptcy judge. In the opinion of Dr. Biryukov the bankruptcy law reflected both *«international trends and regional developments»*. The Bankruptcy Law was not sufficient in itself to modernise bankruptcy proceedings in Ukraine, with Deloitte recognizing that *«effective implementation was required, including training of practitioners, bankers, lawyers, judges, company owners and managers; designing procedures; revising other elements of the bankruptcy regime; extending the activities to all parts of the country»*. A USAid report entitled 'Ukraine Financial Sector Review 2004' reports on progress, stating that the Bankruptcy Law *«was an important step forward. There has been extensive training of judges, lawyers and others on the law but continuing work in this area is necessary for the law to be effectively implemented»* (page 14). The report also said that *«Ukraine should take steps to address the recognised weaknesses in the current bankruptcy law and improve enforcement of the law»* (page 15). The same report quoted from a European Bank for Reconstruction and Development assessment of the bankruptcy law of Ukraine that identified the following advantages and weaknesses:

«Positive Compliance Provisions

- *Speedy hearing and determination of proceedings.*
- *Adequate stay/suspension of action provisions on the opening of proceedings.*
- *Representation of creditors through a committee.*
- *Priority provisions.*

Serious Weaknesses and Defects

- *Debtor delivery of property and information to trustee.*
- *Reorganization: no independent assessment of plan, lack of provisions for material information, lack involvement of creditors, and no supervision of the plan.*
- *Barely basic provisions for avoidance of pre-bankruptcy transactions.*

Additional Weaknesses

- *Complicated requirements for filing application to initiate the process, including employee consultation.*
- *Debt must be at least 3 months overdue before commencing proceeding.*
- *Absence of individual notice to creditors of the proceeding.*
- *Qualifications required for appointment as an insolvency representative (trustee).*
- *Absence of set off.*
- *Sanctions for creditors who fail to file timely.*
- *Insufficient sanctions for failure to comply with the law.*
- *Absence of provisions dealing with recognition of cross-border insolvency.»*

The Tribunal notes that the list of 'additional weaknesses' includes problems relating to the initiation of the process, notice to creditors, and insufficient sanctions for non-compliance, which are all matters complained of by the Claimant in its experience of Ukrainian bankruptcy proceedings.

The Respondent also submits that the moratorium provisions of the Ukrainian legislation are not unusual or inconsistent with Ukraine's obligations under the ECT. Further, in this case the special character of Energoatom had to be recognized as it is an enterprise responsible for the nuclear security of the country, «*A bankruptcy of such an enterprise -would inevitably raise a number of complex issues, which need careful and time-consuming decision-making..., the Claimant would not plausibly have legitimate expectations that Energoatom would be bankrupt within a short period of time...».*

§87.- The fundamental criteria of an 'effective means' for the assertion of claims and the enforcement of rights within the meaning of Article 10(2) is law and the rule of law. There must be legislation for the recognition and enforcement of property and contractual rights. This legislation must be made in accordance with the constitution, and be publicly available. An effective means of the assertion of claims and the enforcement of rights also requires secondary rules of procedure so that the principles and objectives of the legislation can be translated by the investor into effective action in the domestic tribunals.

There is no question that the Ukraine satisfies this fundamental criteria in the enforcement of contractual rights. EYUM-10 established its contractual rights and obtained judgment against Energoatom without difficulty. There is also a

modern Bankruptcy Law for the enforcement of these claims, and an Economic Procedural Code and competent courts to enforce the claims. The Claimant's submission presupposes that Article 10(12) requires a State not only to ensure legislation and rules are promulgated to recognise and enforce property and contractual rights, but also that the quality of the legislation meets minimum international standards. This must be correct because, for example, a State that has legislation on regulating an important area of law such as the institution of bankruptcy which is constitutional and accessible, but also antiquated and totally ineffective does not satisfy Article 10(12). Accordingly, Article 10(12) is not only a rule of law standard, but also a qualitative standard.

§88.- The difficulty is to identify the criteria by which to assess the effectiveness of the legislation and rules called into question under Article 10(12) ECT. Bearing in mind the context and the object and purpose of the ECT, the Tribunal considers that 'effective' is a systematic, comparative, progressive and practical standard. It is systematic in that the State must provide an effective framework or system for the enforcement of rights, but does not offer guarantees in individual cases. Individual failures might be evidence of systematic inadequacies, but are not themselves a breach of Article 10(12). It is comparative in that compliance with international standards indicates that imperfections in the law might result from the complexities of the subject matter rather than the inadequacies of the legislation. It is progressive in the sense that legislation ages and needs to be modernized and adapted from time to time, and results might not be immediate. Where a State is taking the appropriate steps to identify and address deficiencies in its legislation -in other words improvement is in progress- then the progress should be recognized in assessing effectiveness. Finally, it is a practical standard in that some areas of law, or the application of legislation in certain circumstances, raise particular difficulties which should not be ignored in assessing effectiveness.

§89.- In the present case, the Claimant has not demonstrated that the Bankruptcy Law does not provide an effective means to enforce a creditor's rights in the Ukraine. It is a modern law, which introduced new concepts. Its introduction has been accompanied by training programmes for participants in the bankruptcy process. There are some problems with the law, which have been exploited by both creditors and debtors to their own advantage, and it seems that Ukrainian economic procedure, or the customs of thought of its lawyers and judges, have not succeeded in finding solutions to these problems. Its application to a state entity of strategic importance in the energy sector has not surprisingly caused problems. EYUM-10 has had a frustrating experience in the collection of its debts from Energoatom, but the Claimant has failed to demonstrate that the Bankruptcy Law is not effective for the enforcement of rights within the

meaning of Article 10(12) of the ECT, or that its provisions otherwise constitute a denial of justice. Accordingly, the Claimant's claims on this ground are dismissed.

(d) State Interference in the Bankruptcy Proceedings:

§90.- AMTO alleges that as a result of *ad hoc* interference in ongoing bankruptcy proceedings by the Government of Ukraine, AMTO's investment in Ukraine, EYUM-10, has been prevented from enforcing legitimate claims against Energoatom.

The Claimant has identified three instances of interference by the Ukraine in the ongoing bankruptcy proceedings: (i) the *ad hoc* Resolution No. 1160 dated July 25, 2003; (ii) Law 2711-IV 'On Measures to Maintain Stable Functioning of Fuel-and-Energy Enterprises' dated June 23, 2005; and (iii) the Law 'On amendment to Article 3 of the Law No 2711' dated December 22, 2006. Relying particularly on the timing and content of these measures, the Claimant states that they amount to breaches of Articles 10(1) and 10(12) of the ECT, and in particular, are discriminatory treatment, unfair and inequitable and a denial of justice.

§91.- The Respondent denies any interference in the ongoing judicial proceedings. The Respondent submits that the Claimant's allegations that the Resolution was a kind of 'signal' from the government to the court and that it made any impact on the bankruptcy proceedings in question are unsupported and wrong. With regard to Law 2711-IV, the Respondent contends that the Claimant seriously errs with respect to the time of its entrance into force, its effect and its scope. As to the scope of Law 2711-IV, the Respondent submits that it is addressed not solely to Energoatom, but to many other enterprises as well. Pursuant to this Law, the Ministry of Fuel and Energy of Ukraine issued the Order No. 568 'On Approval of the List of Enterprises', which had decided to participate in the procedure of repayment of indebtedness. Initially, this List included 440 enterprises, but did not consist of solely government-owned Energoatom. Accordingly, enhanced protection against the bankruptcy and the different measures that form part of bankruptcy proceedings were obtained not only by Energoatom, but by many other enterprises. The Respondent has also challenged the Claimant's allegations regarding the effect of the December 22, 2006 amendment.

§92.- The Tribunal has examined the Resolution and has compared it to the previous Resolution No. 765. The Resolution substitutes the list of *"highly hazardous enterprises, whose discontinuance of operations requires special*

measures to prevent harm to human life and health, property, facilities, and the environment" composed of three generic types of power plants (nuclear power plants, water power plants and cogeneration plants) with a list featuring the actual names of the enterprises affected, including Energoatom.

Accordingly, the Tribunal finds that the Resolution was not a 'mere clarification' as its effect was to include Energoatom in the list of highly hazardous enterprises. Indeed, Energoatom itself states in its additional appeal submitted on July 25, 2003 (drawing the attention of the Court of Appeal of Kiev to the Resolution in the fourth bankruptcy case) *"the status of the State body NNEGC 'Energoatom' has changed and it currently belongs to highly hazardous enterprises. Accordingly, the bankruptcy proceedings against the State body NNEGC "Energoatom " were conducted without due regard to the requirements stated in Article 43 of the Law of Ukraine "On the restoration of solvency of the debtor or declaring it bankrupt.""* (Emphasis in the original)

However, Energoatom was not the only enterprise affected by the Resolution since seven other enterprises are also listed in the Resolution. Further, the ruling of the Court of Appeal does not rely on or even mention the Resolution, but is based on entirely different grounds. Therefore, the Tribunal finds that the promulgation of the Resolution during the fourth bankruptcy case was a mere coincidence in time, and does not constitute *ad hoc* regulation by the Respondent aimed at interfering with the bankruptcy proceeding. The Resolution did not affect the finding of the court and it does not appear to have been enacted specifically for this purpose. Consequently, it does not evidence any violation of Article 10(1) or 10(12) ECT.

§93.- Law 2711-IV suspends the moratorium of the debtor during the period of the debt repayment procedure, and this period was extended several times including by the December 22, 2006 amendment. The Claimant contends that this legislation constitutes an intervention of the Respondent in the bankruptcy proceeding against Energoatom with the effect of causing delay and preventing EYUM-10 from enforcing its rights. The Respondent affirms that its aim is precisely to allow settlements with creditors, thus procuring a result which is largely beneficial for EYUM-10.

The objective of the Law 2711-IV reads as follows: *"to support the improvement of the financial standing of the fuel-and-energy sector enterprises, prevent their bankruptcy, and. enhance their investment attractiveness by regulating the procedural issues and implementing mechanisms of the debt repayment..."*

Article 4.1(vi) of the Law 2711-IV determines that: *"the settlement participants shall not be subject to the moratorium for the satisfaction of claims of creditors... during the validity period of the debt repayment procedure."*

Article 3.4 of the Law 2711-IV initially set August 10, 2006 as the time limit of the debt repayment procedure. This was subsequently extended, and Article 3.4 of the Law 2711-IV as modified by the December 22, 2006 amendment reads: *"The procedure of repayment of indebtedness for the fuel and energy complex enterprises shall be effective up to by January 1, 2008."*

§94.- The Tribunal notes that Law 2711-IV entered into force no later than on September 26, 2005 in accordance with Article 12(1) and (2), which provides for entry into force on the date of publication, except for Articles 3-11, set to enter into force two months after the publication of the law. Law 2711-IV was published on July 26, 2005. Therefore, it was wholly in force by the end of September 2005, which does not coincide with any relevant date of the bankruptcy proceeding. Similarly, the two amendments of the Law 2711-IV dated July 28, 2006 and December 22, 2006 that extended the procedure of debt repayment do not coincide with any significant date in the bankruptcy proceeding.

Further, The Tribunal considers that Law No. 2711-IV was a *bona fide* attempt to remedy the immobilization of payment flows throughout the fuel and energy sector created by serious imperfections in the pricing and payment system. Law 2711-IV was not specifically aimed at Energoatom, or to the special detriment of EYUM-10. In fact, it appears that the effect of the Law 2711-IV and the subsequent amendments on EYUM-10 as a creditor was to assist debt recovery from Energoatom. The second Settlement Agreement was signed between Energoatom and EYUM-10 on August 11, 2006, benefiting from the amendment to Article 3.4 of the Law 2711-IV introduced by Law No. 51-V of July 28, 2006, which extended the debt repayment period that would otherwise have expired one day before the second Settlement Agreement was signed.

§95.- Accordingly, the Tribunal concludes that the Claimant has not established any instance of State interference in the bankruptcy proceedings by these legislative enactments.

(e) Tax Inspection and Bankruptcy Proceedings Against EYUM-10:

§96.- The Claimant alleges that 'aggressive' conduct on behalf of tax authorities constitutes further evidence of a breach of Article 10(1), by failing to provide treatment that is not unreasonable or discriminatory, and fair and

equitable treatment. In addition, the Claimant has stated that the implementation of an aggressive tax inspection against EYUM-10 including the arrest of EYUM-10's assets was unreasonable and disproportionate as well as arbitrary and in breach of AMTO's legitimate expectations.

Further, the Claimant has submitted that the tax authorities imposed a number of measures on EYUM-10, including the illegal enforcement by freezing EYUM-10's assets and thereby immobilizing its operations. *«The management of EYUM-10 and of [the Claimant] strongly felt that the tax authorities' attempts to destroy EYUM-10 was linked with its foreign ownership.»*

§97.- Bankruptcy proceedings were commenced against EYUM-10 in November 2002 by the Energodar United Tax Authority of Zaporizka Oblast (hereafter the *«Tax Authority»*), alleging non-payment of state taxes since 1998. EYUM-10's assets were then subject to administrative arrest from March 27, 2003. EYUM-10 took steps to seek to use available funds for activities such as the payment of wages and the completion of existing contracts, but its request were denied by the Tax Authority on April 16, 2003. On April 17, 2003 EYUM-10 applied to the Commercial Court of Zaporizka Oblast against the Tax Authority's decision and on the same date decided to submit a request for its own bankruptcy. On May 8, 2003, the court annulled the Tax Authority's decision, which it found 'not grounded'. EYUM-10 finally reached a settlement agreement with its creditors, including the Tax Authority, according to which a significant part of EYUM-10's total debt was written off.

§98.- The Claimant has alleged that the Tax Authority was perfectly aware of the fact that EYUM-10's failure to pay taxes in time was due to Energoatom's failure to pay its debts. Nevertheless it sought to bankrupt EYUM-10, refused its applications to continue to trade without giving any reasons, and acted illegally. It treated EYUM-10 in a discriminatory manner because of its foreign ownership and its actions against Energoatom in the Ukraine courts. It puts forth that *«the intention of the tax inspection cannot have been any other than to starve and strangle EYUM-10 to death»*.

§99.- The Tribunal finds that the Claimant has not demonstrated any discriminatory or unfair treatment, or any other breach of Article 10(1) arising from the actions of the Tax Authority. The Tribunal notes that the bankruptcy petition by the Tax Authority was based on non-payment of taxes since 1998, i.e. a period of time which preceded AMTO's ownership, and well before EYUM-10's legal action against Energoatom. There were also other creditors of EYUM-10 who participated in the bankruptcy proceedings, and in the settlement

agreement. The Tribunal also accepts the Respondent's submission that the Tax Authority acted in accordance with Ukrainian law, and its decisions were properly reviewed by the Ukrainian courts. In summary, there is no evidence arising from the tax inspection and related bankruptcy proceedings of any unreasonable, disproportionate, arbitrary, or discriminatory conduct, or any breach of its legitimate expectations. There was no unfair or inequitable treatment, or any other breach of Article 10(1) ECT.

(f) Allegations relating to the Actions and Funding of Energoatom:

§100.- The Claimant makes several allegations relating to the conduct of Energoatom. These allegations include specific acts of intimidation, discrimination and obstructive behaviour and more general allegations relating to inadequate funding and the Respondent's responsibility for Energoatom's failure to pay its debts to EYUM-10.

(i) Energoatom and its relationship with the Respondent:

§101.- The Claimant's allegations raise questions of the legal nature of Energoatom, its relationship with Ukraine, and the possible attribution of its conduct to the State.

Energoatom is a separate legal entity owned by the Respondent. It is not an ordinary private company, but a specific juridical person known as a state company. It was established in 1996 through Resolution № 1268 of October 17, 1996 of the Cabinet of Ministers. Its close links with the State are demonstrated by Article 4 that provides that *«The president, the first vice-president and the vice-president of the company are appointed and dismissed by the Cabinet of Ministers of Ukraine, and the board members are appointed and discharged from their responsibilities by the Ministry of fuel and energy.»* The Charter of Energoatom (as amended in 2005) also confirms the role of the Cabinet of Ministers and the Ministry of Fuel and Energy in the appointment of its senior executives.

Article 3.7 of the Charter provides:

«3.7. SE "NNEGC "Energoatom" shall bear no responsibility for obligations of the State....

SE "NNEGC "Energoatom" shall bear responsibility under its obligations to the extent of the property belonging to it pursuant to the effective laws.»

Ukrainian law provides for the separate legal responsibility of the State and state owned legal entities. The Civil Code of Ukraine provides that *«The State...shall not be responsible under the obligations of juridical persons created thereby,*

except for the cases established by law» (Article 176.1, in force from January 1, 2004; a provision to similar effect was in force prior to this date).

Energoatom is a strategically significant state entity, in close communication with the State. The Claimant submitted that Energoatom's legal independence was purely formal as even its commercial activities were controlled by the State, with prices, retailers, and forms of payment established by law and ultimately fixed and controlled by a state organ called the National Energy Regulatory Commission of Ukraine. However, the Tribunal finds that Energoatom was a separate legal entity and not an organ of the Ukraine state.

§102.- In these circumstances the Arbitral Tribunal considers that the conduct of Energoatom is attributable to the Ukraine, in accordance with established principles of international law, where it is shown that Energoatom was exercising *puissance publique* (governmental authority) or acted on the instructions of, or under the direction or control of, the State in carrying out the conduct.

(ii) Allegations of Intimidatory, Discriminatory of Obstructive Behaviour:

§103.- The Claimant complains of intimidation, discrimination and constant obstruction on the part of Energoatom, so that the conditions which AMTO experienced when making its investment in the Ukraine were in no way equitable or favourable. Moreover, the tactics invoked by Energoatom were far from being transparent. The Claimant states: (i) AMTO was from the very beginning confronted by hostility from Energoatom and its representatives; (ii) malicious rumours were spread about AMTO and its intentions with its investment; (iii) potential sellers of shares to AMTO were threatened and intimidated in order to discourage them from selling shares to AMTO; (iv) the management of Energoatom/ZAES tried to prevent a meeting that AMTO had arranged with the workers and shareholders of EYUM-10; (v) the representatives of AMTO were accused of inciting a strike against Energoatom; (vi) although Energoatom had financial problems it has been able to obtain extra funding for specific purposes, but not for the payment of its debts to EYUM-10 owned by foreigners; (vii) as a direct 'punishment' for EYUM-10's attempts to recover its receivables by turning to the courts of Ukraine, ZAES/Energoatom stopped ordering services from EYUM-10; and (vii) refers to actions by the Tax Authority and the local courts.

The Tribunal has already dealt with the actions of the Tax Authority and will not re-examine them here.

§104.- The Claimant alleges that the discriminatory conduct *«resulted in a dramatic reduction of orders from Energoatom which, in its turn, reduced EYUM-10's sales volumes»*. The Respondent's 'punishment policy' affected the orders by Energoatom from the middle of the year 2000 and onwards. This dramatic fall, it is argued, was in terms of time and factual circumstances linked to the acquisition of EYUM-10 by foreign owners.

The Respondent states that Energoatom had unrestricted liberty to place orders for maintenance services whenever it wished, and that Energoatom did not need to justify why orders have not been placed. There has been no duty incumbent on Energoatom to place any particular volume of orders with Energoatom under domestic law and, even less, under international law.

In the view of the Tribunal, the mere fall in procurement, whether dramatic or not, does not as of itself establish a case of discriminatory conduct. There is no direct evidence of a deliberate policy to this effect, nor any demonstration based on technical, commercial and other business policy considerations that no *bona fide* reason existed for the failure to place further orders.

§105.- The Claimant also referred to two witness statements, a flyer, a letter by Mr. Pyshnyj's to EYUM-10 dated 22 January 2003, an article by the local press and a clarification. The Respondent has denied the statements of the witnesses and has submitted its own witness statements denying any wrong against the new owners by Energoatom.

The evidence does not establish the alleged intimidation or obstruction. The flyer is not signed and its origin is uncertain, and consequently cannot be attributed to Energoatom.

The letter by Mr. Pyshnyj demands revocation by EYUM-10 of its application for Energoatom to be declared bankrupt, and requires EYUM-10 to sign a number of amicable settlements or the further renewal of the contractual relations between SD ZAES and EYUM-10 CJSC will not be 'possible'. This letter is dated January 22, 2003, and so cannot be supportive of actions alleged to have taken place before that date. In fact, the Claimant itself acknowledges that *«EYUM-10 does not have any document, which demonstrates how the punishment policy was established»*.

The article refers to a press conference that took place on February 21, 2002 between representatives of Energoatom/ZAES and EYUM-10 in Energodar. At that conference, the deputy financial director of the ZAES, Mr. Prokofiev, is quoted by the journalist as saying: 'the class of owners of the contractor has changed'. In a later clarification issued by the newspaper, the quotation is expanded as follows: *«owners of a new type took over the contractor's company -bad guys, the new Latvian shareholders, began to extort money from SS*

ZNPP...» The director of the newspaper, in this clarification, said that these words were interpreted as a rebuke to the management of AMTO because it imposed harsh conditions upon SS ZNPP and demanded immediate repayment of all the debts.

In these circumstances, the Tribunal considers that there is insufficient evidence to establish the alleged facts, or their possible attribution to the Respondent. Accordingly, the allegations of a violation of Article 10(1) ECT on the basis of these events are dismissed.

(iii) Allegations Relating to the Ukraine Energy Sector and the Funding of Energoatom:

§106.- The Parties made lengthy submissions relating to the structure of the energy sector in the Ukraine, the commercial dependence or independence of Energoatom in relation to the State, and its pricing and funding.

§107.- The Claimant alleges a breach of Article 10(1) because Ukraine did not provide Energoatom with adequate funding. *«If the funding had been properly organised and performed as AMTO as a foreign investor had a right to expect, then Energoatom would have been able to pay EYUM-10 for all ordered performed and approved services already before the end of 2001.»* Further *«The Respondent's selective allocation of funds to Energoatom, for certain purposes but not for paying debts owing to EYUM-10, money which EYUM-10 was entitled to and needed for its survival, constitutes an improper favouring of certain creditors, and thus a discrimination against EYUM-10».*

The origin of the Claimant's claims is the non-payment of contractual debts by Energoatom. The payment or non-payment by a state entity of contractual debts owed to a service provider involves no exercise of sovereign authority or *puissance publique*, and cannot be attributed to the Ukraine. The Claimant has sought to elevate contractual non-payment into a structural or funding problem in the Ukrainian energy sector, so as to condemn these decisions as unfair or discriminatory to its Investment and therefore involving responsibility pursuant to Article 10(1) ECT.

The Claimant relies on the non-payment by Energoatom of its debts and its involvement in bankruptcy proceedings as proof of the structural problems in the energy sector and inadequate funding. In the Claimant's submission, the fact that some creditors were paid and not others, and particularly that EYUM-10 was not paid, confirms discrimination.

§108.- In the Tribunal's view, the evidence establishes that Energoatom had financial problems, and that EYUM-10 sought to recover its debts with determination and little success. Failure to actively ensure adequate funding of Energoatom's operations may have negative implications, but it is not of the importance to elevate it to the nature of an international breach. There is insufficient evidence to establish the reasons for the funding difficulties of Energoatom and the selection of the creditors it would pay, within the limits of its financial capability. There are no specific decisions of Ukraine demonstrated to have caused the non-payment of EYUM-10's debts. Further, the Claimant has not established any discriminatory intent on the part of the Ukraine against either the Claimant or EYUM-10. The Arbitral Tribunal finds that the chain of causation for the non-payment of EYUM-10's debt goes no further than Energoatom. The decisions not to pay EYUM-10, and to resist enforcement in bankruptcy proceedings were decisions taken by Energoatom. These decisions did not involve *puissance publique* and it has not been shown that they were made on the instructions of, or under the direction or control of Ukraine.

Accordingly, the Claimant's claims under this heading are dismissed.

(g) Umbrella Clause/ Respondent's Liability for Energoatom's Breach of its Obligations:

§109.- The Claimant refers to the 'umbrella clause' in the final sentence of Article 10(1) and states that *«the broad definition of 'any obligations' includes both specific contractual obligations and the more general commitments made under the domestic investment legislation of a Contracting Party»*.

*

The Respondent has denied that any liability can be based on the umbrella clause, noting that there is no contractual relationship between the Claimant and the Respondent, but between two Ukrainian legal entities, Energoatom/ZAES and EYUM-10.

§110.- The so-called 'umbrella clause' of the ECT is of a wide character in that it imposes a duty on the Contracting Parties to 'observe any obligations it has entered into with an Investor or *an Investment of an Investor* of the other Contracting Party'. This means that the ECT imposes a duty not only in respect of the investor which is otherwise customary in an investment treaty context, but also vis-a-vis a subsidiary company, established in the host state. This means that an undertaking by Ukraine of a contractual nature vis-a-vis EYUM-10 could very well bring into effect the umbrella clause. However, in the present case the contractual obligations have been undertaken by a separate legal entity, and so the umbrella clause has no direct application.

§111.- The Arbitral Tribunal has also considered the possible application of the umbrella clause in conjunction with Article 22(1) ECT. Article 22(1) provides:

«Each Contracting Party shall ensure that any state enterprise which it maintains or establishes shall conduct its activities in relation to the sale or provision of goods and services in its Area in a manner consistent with the Contracting Party's obligations under Part III of this Treaty.»

Energoatom is wholly-owned by the Ukraine, and the question arises as to the effect of Article 22(1).

§112.- The Tribunal considers that Article 22 does not go so far as to impose liability on the State in the event that a state-owned legal entity does not discharge its contractual obligations in relation to an 'Investment', i.e. a subsidiary of the foreign investor. Rather, it imposes on the state a general obligation to 'ensure' that state-owned entities conduct activities which, in general terms of governance, management and organization, make them capable of observing the obligations specified under Part III of the ECT. It does not constitute an obligation of the state to assume liability for any failing of a state-owned legal entity to discharge a commercial debt in a given instance.

(i) Conclusion:

§113.- The Claimant made the following submission in its Surrejoinder:

«...the Respondent has undertaken an express obligation in Article 10(1) of the ECT to encourage and create stable, equitable, favourable and transparent conditions for investors to make investments (emphasis added). There is no requirement in the ECT to consider a particular level of development and experience of the host state before making investments. The actions carried out by Energoatom with respect to AMTO 's investment clearly show that the Respondent has failed to create stable, equitable, favourable and transparent conditions for investors in Ukraine.»

The logic of this passage is that the non-payment of the accounts receivable of an Investment of a foreign investor by a state entity and resistance to enforcement *ipso facto* demonstrates inadequate investment conditions, and a breach of the ECT. The Claimant here explicitly submits that 'there is no requirement in the ECT to consider a particular level of development and experience of the host state before making investments'. In effect, an investor can assume that its investment shall always enjoy the 'favourable conditions' referred to in the ECT, and therefore the investor is relieved of the normal assessment and assumption of investment risk.

§114.- The arbitration of foreign investment disputes raises difficult questions of responsibility, both in the factual sense of establishing the operative causes of the loss, and in terms of legal responsibility. In the present case, the Claimant established the contractual responsibility of Energoatom in Ukrainian law in the Ukrainian domestic courts. It has failed to establish any liability under the ECT for Ukraine. In the end, the responsibility for the non-payment of EYUM-10's debts for so long, in fact and in law, lies with Energoatom.

§115.- The Parties' submissions and evidence have raised many issues. The Claimant has formulated its allegations of breaches of the ECT in a number of different ways, and has argued both that specific actions attributable to the Respondent amount to breaches of the ECT, and also that actions in combinations or cumulatively establish breaches of the ECT. Having considered all the Claimant's submissions and allegations, the Arbitral Tribunal finds that no breach of the ECT by or attributable to the Respondent has been established.

Accordingly, all of the Claimant's claims are dismissed.

VIII. RESPONDENT'S COUNTERCLAIM

§116.- The Respondent makes a counterclaim for arbitration costs, and for non-material injury to the Respondent's reputation as a result of the Claimant's wrongful allegations of collusion between Energoatom and DonetskOblEnergo. The Respondent quantified its counterclaim for non-material injury at €25,000.00.

The claim for costs in international arbitration does not require a counterclaim. Costs may be claimed on the basis of the applicable rules, relate to the proceedings as a whole, and are considered by the Arbitral Tribunal after the determination of jurisdiction, and the substantive claims and counterclaims. The Arbitral Tribunal has treated the Respondent's claim for costs accordingly in the next section, and so the claim for costs does not need to be further considered in the context of the counterclaim.

§117.- The Claimant states that the Respondent has no right to raise counterclaims under the ECT, and accordingly the counterclaim must be dismissed. Further, the Claimant states that the Respondent has suffered no injury, and AMTO cannot be penalised for presenting a claim for compensation for alleged breaches of the ECT.

The Respondent states that Article 21 of the SCC Rules applicable in this case permits the Respondent to make a counterclaim. As to the substance of the claim, the Respondent states that the Claimant has irresponsibly and insistently disseminated to the SCC Institute and to the Arbitral Tribunal untrue information about collusion between two state-owned entities, with the implication that Ukraine was involved. The Respondent considers that 'such dissemination does not deviate very much from libel'.

§118.- The jurisdiction of an Arbitral Tribunal over a State party counterclaim under an investment treaty depends upon the terms of the dispute resolution provisions of the treaty, the nature of the counterclaim, and the relationship of the counterclaims with the claims in the arbitration.

Article 26(6) ECT provides that the applicable law to an ECT dispute is the Treaty itself and 'the applicable rules and principles of international law'. The Respondent has not presented any basis in this applicable law for a claim of non-material injury to reputation based on the allegations made before an Arbitral Tribunal. Accordingly, the Arbitral Tribunal finds that there is no basis for a counterclaim of this nature and it is accordingly dismissed.

IX. COSTS

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§119.- Articles 39 to 41 of the SCC Rules draw a distinction between the 'Arbitration Costs' (meaning arbitrators' fees, the Administrative Fee of the SCC Institute, arbitration expenses and the fees and expenses of any tribunal appointed expert) and the costs incurred by the Parties for legal representation. The Arbitral Tribunal is empowered by Article 40(2) and Article 41 to make orders in respect of both classes of costs:

«Article 40 Payment of Arbitration Costs

(2) The Arbitral Tribunal decides on the apportionment of the Arbitration Costs as between the parties with regard to the outcome of the case and other circumstances.

Article 41 Costs incurred by a Party

Unless the parties have agreed otherwise, the Arbitral Tribunal may, at the request of a party, in an Award or other order by which the arbitral proceedings are terminated, order the losing party to compensate the other party for legal representation and other expenses for presenting its case.»

§120.- The Claimant and the Respondent have both sought an award of costs in their favour, including Arbitration Costs, counsel's fees, disbursements for experts and other services and expenses. The Respondent made its claim for costs under the heading 'Counterclaim' in its pleadings, but, as already stated, costs are a separate matter from a counterclaim. Both the Claimant and the Respondent have submitted statements quantifying their respective costs and expenses, and the Respondent has also submitted full supporting documentation.

§121.- All issues in this arbitration have been strongly contested. The Claimant has succeeded on the questions of jurisdiction, and the Respondent has succeeded on the merits. The Parties have therefore shared success, and the Arbitral Tribunal does not consider there is a 'losing' party within the meaning of Article 41 of the SCC Rules entitled to an Award in its favour for legal representation and related expenses.

§122.- Accordingly, each Party shall pay one-half of the Arbitration Costs as determined by the SCC Institute, and each Party shall bear its own costs for legal representation and other expenses.

Payment of the Arbitration Costs will be made from the Advances of the Parties on the basis of the joint and several liability for these costs vis-a-vis the SCC
% Institute and the members of the Arbitral Tribunal.

X. AWARD

In light of the foregoing and having considered the claims, counterclaims and defences submitted by the Parties, and all the submissions and evidence relating thereto, this Tribunal decides and declares that:

1. The Arbitral Tribunal has jurisdiction over claims submitted by the Claimant arising from August 22, 2000;
2. The claims of the Claimant are dismissed in their entirety;
3. The counterclaim of the Respondent is dismissed;
4. The Arbitration Costs, as determined by the SCC Institute, amount to the following:

(T) Mr. Bernardo M. Cremades: Fee of EUR 139,125.00, and compensation for expenses of EUR 677.00;

(ii) Mr. Per Runeland: Fee of EUR 83,475.00, and compensation for expenses of EUR 1,600.00;

(iii) Mr. Christer Soderlund: Fee of EUR 83,475.00 plus VAT of EUR 20,868.75, and compensation for expenses of EUR 2,100.00 plus VAT of EUR 525.00;

(iv) SCC Institute: Administrative Fee of EUR 26,125.00, and compensation for expenses of EUR 13,205.00.

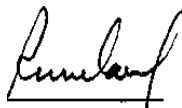
In the relationship between the Parties, each of them shall be liable for 50% of the Arbitration Costs.

5. Each party is to bear its own costs for legal representation and other expenses.

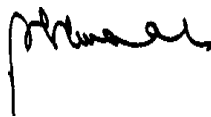
Place of Arbitration: Stockholm, Sweden.

Date: March 26, 2008

THE ARBITRAL TRIBUNAL



Mr. Per Runeland
Arbitrator



Bernardo M. Cremades
Chairman



Mr. Christer Soderlund
Arbitrator