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AWARD ON JURISDICTION

Made on December 17, 2009

The seat of the arbitration is Stockhom/Sweden

Arbitration V (096/2008)

Claimant :	**Mercuria Energy Group Limited,** 2 Gr. Afxentiou Ave, Akamia Center, Office 401, 6023 Larnaca, Cyprus
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Arbitral Tribunal:	Professor Pierre Tercier (Chairman), 5, ch. Guillaume Ritter, CH-1700 Fribourg Professor Albert Jan van den Berg (Arbitrator), Hanotiau & van den Berg, IT Tower, 9th floor, 480 Avenue Louise, B.9, B-1050 Brussels Professor Vaughan Lowe, QC (Arbitrator), Essex Court Chambers, 24 Lincoln's In Fields, GB-London WC2A 3EG

TABLE OF CONTENTS

A. Factual Background[1]

The identification of the facts set out below is based on the Claimant's Statement of Claim dated April 3, 2009 and is without prejudice to the presentation of the factual and legal details of the case by the Parties and the Tribunal's considerations and conclusions. When necessary, Part B of this award will include further discussion of issues of fact of particular importance to points of decision.

I. The Parties and Certain Companies Concerned

1. ***The Claimant,*** **Mercuria Energy Group Limited** ("**Mercuria**" or "the Claimant"), is a company organised and existing under the laws of Cyprus. It was incorporated in Cyprus on February 10, 2004. It forms part of the **Mercuria Energy Group**. The Claimant is the holding company of the Mercuria Energy Group. Before changing its name to Mercuria Energy Group Limited, it was called **J&S Group Limited**, and before that **J&S Holding Limited**.

2. ***The Respondent*** is the **Republic of Poland** ("**Poland**" or "the Respondent"). Its Head of State is its President, Mr. Lech Kaczynski.

3. This Award, limited to jurisdictional issues, will deal with Mercuria's alleged investment in **J&S Energy SA** ("**J&S Energy**" or "**the Company**"), a company organised and existing under the laws of Poland.

4. Although not party to the present arbitration, **J&S Services and Investment** ("**JSSI**") "is a fully-owned subsidiary of Mercuria, and J&S Energy's sister company" (Claim. 03.04.09, no. 50).

5. **PKN Orlen** (not a party to the present arbitration) is, according to the Claimant, "a company controlled by [Poland] which is one of Central Europe's largest refiners of crude oil, and which owns extensive underground crude oil storage facilities" (Claim. 03.04.09, Appendix A).

II. Factual Background

6. In 1993, Messrs. Jankilevitsch and Smolokowski founded JSSI in Cyprus (above, no. 4; Claim. 03.04.09, no. 50). Much of JSSI's business consists in trading with Polish

[1] The following abbreviations are used in the present document:

- Claim. 03.04.09	Claimant's Statement of Claim of April 3, 2009
- Resp. 19.05.09	Respondent's Jurisdictional Objections of May 19, 2009
- Claim. 30.06.09	Claimant's Reply to Jurisdictional Objections of June 30, 2009
- Resp. 31.07.09	Respondent's Rebuttal on Jurisdictional Objections of July 31, 2009
- Claim. 31.08.09	Claimant's Rejoinder on the Respondent's Jurisdictional Objections
- PO No. […]	Procedural Order No.
- Exh. C-[…]	Claimant's Exhibits
- Exh. CA-[…]	Claimant's legal authorities
- Exh. R-[…]	Respondent's Exhibits
- Exh. RA-[…]	Respondent's legal authorities

refineries, to which JSSI delivers crude oil at the Polish border with Belarus (Claim. 03.04.09, no. 106).

In 1995, the company J&S Energy was incorporated in Poland (Claim. 03.04.09, no. 43). It "deals with the import and export of chemical products and oil-derivatives" (Exh. C-393, Claim. 03.04.09, no. 112). In July 1996, J&S Energy became a joint-stock company (Exh. C-393, Claim. 03.04.09, no. 112).

7. On May 30, 1996 Poland enacted its "*Act on state reserves and obligatory fuel stocks*" ("the Reserves Act"), which introduced an obligation for manufacturers and importers to maintain mandatory reserves (Claim. 03.04.09, no. 183; Exh. C-234). According to the Supreme Chamber of Control's "Statement on results of the audit of actions undertaken by the President of the Material Reserves Agency and the Minister of Economy referring to the fine imposed on J&S Energy SA" (Exh. C-234), the obligation applied "only to manufactures and importers which exceeded the limit of 200,000 tons […] per annum and practically covered only six domestic refineries" (Exh. C-234, section 3.1, footnote omitted). According to the Supreme Chamber of Control, the solutions set up by the Reserves Act "did not guarantee reaching – up to December 31, 2008 – the required level of obligatory liquid fuel stocks, whilst such obligation was undertaken by [Poland] in its negotiation position [with the European Community] in the area "Energy" of May 2001" (Exh. C-234, section 3.1, footnote omitted).

   On September 6, 2001 Poland anticipated its EU accession by adopting the "*Act of September 6, 2001 on amendment of the act on state reserves and obligatory fuel stocks*". This amendment, applicable from January 1, 2002, implemented a general requirement to create and maintain stocks by manufacturers. The target level of the stocks corresponded to at least 90 days average daily internal consumption (see below, nos. 12 and 18). This reserves requirement would be reached partly by the Material Reserves Agency ("ARM") and partly by manufacturers and importers (Claim. 03.04.09, no. 185; Exh. C-234).

8. On February 6, 2002 JSSI – represented by Messrs Jankilevitsch and Smolokowski - and PKN Orlen "were negotiating the renewal of the long-term crude oil supply contract, which they had signed five years earlier and which was to expire later that year (Claim. 03.04.09, no. 119). The next day, the then CEO of PKN Orlen was arrested (Claim. 03.04.09, no. 119-122).

9. On April 30, 2002, according to the Claimant:

   "J&S Energy was entered in the register of entities obliged to create fuel stocks, which register is kept by the President of ARM. However, it benefited from an option not to comply with the transitional regime of increases. Its obligation was to maintain stocks equivalent to at least 7 days' worth of imports of fuels in the preceding year." (Claim. 03.04.09, no. 186, footnotes omitted).

10. In 2003, according to the Claimant, "J&S Energy began addressing the problem of lack of storage capacity in the most direct manner possible: the construction of fuel storage facilities" (Claim. 03.04.09, no. 265). In August, "the Ministry of Treasury invited bids for the purchase of shares in Siarkopol Gdansk S.A. [...] a State-controlled company located in the port of Gdansk, for the purposes of constructing storage for liquid products" (Claim. 03.04.09, no. 266, footnote omitted). According to the Claimant, "J&S Energy entered a bid for Siarkopol, as did the State-controlled companies Naftoport, PKN Orlen and Grupa Lotos" (Claim. 03.04.09, no. 267, footnotes omitted). According to the Claimant, "[s]ubsequently, PKN Orlen and Grupa Lotos withdrew their bid" (Claim. 03.04.09, no. 268). Then, "[i]n February 2004, the Ministry of Treasury cancelled the tender process" (Claim. 03.04.09, no. 269).

11. On February 10, 2004 the Claimant (then called J&S Holding Limited) was incorporated in Cyprus (Claim. 03.04.09, no. 101; see above no. 1). According to the Claimant, "[i]ts share capital was divided into two equal parts owned, respectively, by Mr. Jankilevitsch and Mr. Smolokowski" (Claim. 03.04.09, no. 19; Exh. C-35). Further, "[i]n the summer of 2004, Mr. Jankilevitsch and Mr. Smolokowski undertook a series of transactions for the transfer of a proportion of their share capital in favour of Marco Dunand, Daniel Jaeggi, Vadim Linetskiy and Pavel Pojdl, Mercuria's [then called J&S Holding Limited] four new shareholders" (Claim. 03.04.09, no.19). The question of the Claimant's shareholders will be examined below (see below, no. 85).

12. On May 1, 2004 the Respondent became a member of the EU and was therefore bound by European law (Claim. 03.04.09, no. 187). According to the Claimant, "the Respondent's Act of Accession to the EU derogated from otherwise applicable EU law by setting a schedule for attaining the 90-day level of required [oil reserve] stocks" (Claim. 03.04.09, no. 187; see above no. 7). According to the Claimant, "[t]he Respondent was required to achieve 58 days by the date of accession, 65 days by December 31, 2004, 72 days by December 31, 2005, 80 days by December 31, 2006, 87 days by December 31, 2007, and 90 days by December 31, 2008" (Claim. 03.04.09, no. 187; Exh. CA-3).

13. On July 2, 2004 Mr. Jankilevitsch and Mr. Smolokowski entered into a share sale agreement with the Claimant (then called J&S Holding Limited) (Claim. 03.04.09, no. 43; Exh. C-467).

    On July 21, 2004 J&S Holding Limited paid US$ 24,960,000 to Mr. Jankilevitsch and US$ 24,960,000 to Mr. Smolokowski in accordance with the aforementioned share sale agreement (Exh. C-469-470).

14. In 2005, J&S Holding Limited changed its name to J&S Group Limited (Claim. 03.04.09, no. 101).

15. In July 2005, the Polish Reserves Act was amended (Claim. 03.04.09, no. 188). According to the Claimant, "the option to maintain only 7 days' worth of stocks was revoked, and J&S Energy became subject to the transitional schedule for increasing reserves" (Claim. 03.04.09, no. 189).

16. On October 3, 2005, according to the Claimant, "J&S Energy requested permission from the Minister of Economy to maintain up to 20% of its reserves on the territory of the Federal Republic of Germany" (Claim. 03.04.09, no. 276; Exh. C-124).

    On November 2, 2005 the Minister of Economy refused by letter J&S Energy's request (Claim. 03.04.09, no. 277; Exh. C-125).

17. On February 8, 2006, according to the Claimant, J&S Energy's Warsaw offices were raided by ABW (the Internal Security Agency), "with more than 50 officers occupying J&S Energy's offices" (Claim. 03.04.09, no. 160). According to the Claimant, warrant authorising the raid "clearly stated that the subject-matter of the raid was the investigation of the activities of Mr. Grochulski, an alleged member of the Polish fuel mafia who – besides being active in the fuel industry - had no links to J&S Energy" (Claim. 03.04.09, no. 167). Also according to the Claimant, "J&S Energy itself was not under investigation" (Claim. 03.04.09, no. 167).

18. On July 24, 2006 the European Union Council adopted Directive 2006/67/EC ("the Directive"), "which codified previous Council Directives on mandatory reserves" (Claim. 03.04.09, no. 184; Exh. C-6). According to the Claimant, "it imposes an obligation on EU Member States to maintain minimum stocks of crude oil and/or petroleum products" (Claim. 03.04.09, no. 184). Article 1(1) states that all Member States must maintain stocks of certain categories of petroleum products representing a

minimum volume of "at least 90 days average internal daily consumption in the preceding calendar year" (Claim. 03.04.09, no. 184; Exh. C-6, see above, no. 7).

19. On September 11, 2006, "J&S Energy applied to extend the deadline for increasing mandatory reserves from September 30, 2006 to December 31, 2007" (Claim. 03.04.09, no. 295; Exh. C-138).

    On September 29, 2006 the Minister of Economy refused by letter J&S Energy's application (Claim. 03.04.09, no. 298; Exh. C-140).

    On October 10, 2006 J&S Energy sought a re-hearing of its request (Claim. 03.04.09, no. 299; Exh. C-141). J&S Energy expanded on its application by letter of November 3, 2006 (Claim. 03.04.09, no. 300; Exh. C-143).

    On November 23, 2006 by Decision no. 42/10/2006 the Minister of Economy denied the request (Claim. 03.04.09, no. 301; Exh. C-144).

    On December 12, 2006 J&S Energy by letter "petitioned the Ministry of Economy for permission to temporarily not increase its reserves, this time until March 31, 2007" (Claim. 03.04.09, no. 311; Exh. C-145).

20. According to the Claimant, "it was […] impossible for J&S Energy to meet its December 31, 2006 deadline to increase its mandatory reserves" (Claim. 03.04.09, no. 311).

21. In 2007, J&S Group Limited (formerly J&S Holding Limited) changed its name to Mercuria Energy Group Limited (Claim. 03.04.09, no. 01; Exh. C-34).

22. On January 11, 2007 by Decision no. 3/01/2007 the Minister of Economy denied J&S Energy's request of 12 December 2006 (Claim. 03.04.09, no. 315; Exh. C-149).

    On January 22, 2007 J&S Energy applied by letter for a re-hearing of its request (Claim. 03.04.09, no. 317; Exh. C-151). On February 22, 2007, by Decision no. 4/02/2007, the Minister of Economy denied the request, "restating that J&S Energy bore the "risk" of the storage deficit in Poland and of the logistical difficulties encountered by J&S Energy" (Claim. 03.04.09, no. 319; Exh. C-154). On March 27, 2007 J&S Energy appealed against the Minister's decision to the Warsaw Administrative Court (Claim. 03.04.09, no. 320; Exh. C-159). On July 13, 2007 J&S Energy discontinued the proceedings (Claim. 03.04.09, no. 373; Exh. C-164).

    On February 15, 2007 "Mercuria Energy Trading S.A. ("METSA"), of the Mercuria Group, wrote to the Ministry of Economy, proposing that Mercuria and the Ministry of Economy collaborate in the construction of the additional storage infrastructure required by Poland" (Claim. 03.04.09, no. 273; Exh. C-17).

23. On February 16, 2007 the "*Act on Reserves of Crude Oil, Petroleum Products and Natural Gas and on the Bases of Action in Situations where Threats appear to the Fuel Security of the State and of the Disturbances on the Oil Market*" ("the MRA") was promulgated in Poland and replaced the provisions of the Reserves Act (see above, no. 7) relating to mandatory stocks of liquid fuels (Claim. 03.04.09, no. 191).

    According to the Claimant, the main features of the MRA are the following:

    - "The MRA maintained the transitional schedule contemplated in the Reserves Act, according to which producers and importers would become fully subject to the reserves obligation of 76 days (plus 10%) by the end of 2008. Reserves were to be at target levels corresponding to 66 days' worth of the previous year's imports (as calculated under the new MRA regulations) on July 1, 2007, 73 days' worth of the previous year's imports (plus 10%) on December

31, 2007, and 76 days' worth of the previous year's imports (plus 10%) on December 31, 2008" (Claim. 03.04.09, no. 195; Exh. C-9, Article 71(4)).

- Under the MRA, failure to comply with the ultimate deadline of December 31, 2008 would entail a fine of 250% of the value of the missing reserves (Claim. 03.04.09, no. 194; Exh. C-9, Article 63). According to the Claimant, the MRA did not prescribe penalties for failure to meet the transitional deadlines (Claim. 03.04.09, no. 194);
- "Regulations under the MRA allow up to 55% of mandatory reserves of petroleum products to be stored in the form of crude oil" (Claim. 03.04.09, no. 198Regulation 81/547; Exh. C-65). The Polish regime is, according to the Claimant, "stricter than EU law in this regard" (Claim. 03.04.09, no. 198);
- "Importers who contract out their mandatory reserves storage cannot store products in the form of crude oil unless they also sign a processing contract with a refinery, approved by ARM, in relation to those stocks" (Claim. 03.04.09, no. 199; Exh. C-9, Article 11(3) – (4) and (7));

24. On April 2, 2007, after negotiations, J&S Energy and PKN Orlen signed a crude oil storage contract (Exh. C-360). In order to meet the requirements of ARM, the parties had on March 2, 2007 been directed to sign an annex to the contract ("the Annex")(Claim. 03.04.09, no. 327). However, "on July 17, 2007 PKN Orlen wrote to J&S Energy stating that it had no intention of signing the Annex" (Claim. 03.04.09, no. 334; Exh. C-309). After more negotiations and amendments of the Annex in September and October 2007, the Annex was not signed before October 15, 2007, which constituted the deadline for demonstrating the mandatory reserves (see below no. 28) (Claim. 03.04.09, no. 391-404).

25. According to the Claimant, "[o]n May 31, 2007 ARM wrote to J&S Energy calling for an increase of the Company's mandatory reserves" (Claim. 03.04.09, no. 369; Exh. C-160) and "J&S Energy replied in early June 2007, requesting a meeting to present to ARM its "current situation as regards mandatory reserves"" (Claim. 03.04.09, no. 369; Exh. C-161). The meeting took place in June 2007. According to the Claimant, ARM's representative declared that since "J&S Energy's petitions to extend deadlines for increasing mandatory reserves were still outstanding, ARM could and would not, at that stage, take disciplinary action against J&S Energy in connection with its mandatory reserves" (Claim. 03.04.09, no. 370).

26. On July 1, 2007 J&S Energy had not still met the interim deadline to increase its mandatory reserves (Claim. 03.04.09, no. 335). Between July 31, 2007 and August 2, 2007 ARM carried out inspections in order to assess the volume of J&S Energy's mandatory reserves as at June 30, 2007. According to the Claimant, "[o]n August 2, 2007 ARM's inspectors issued a Report of the "*ad hoc*" inspection stating that "*as of 30 June 2007 J&S ENERGY has got* [a] *deficit of fuels*" of ca. 160,000 m³ (Claim. 03.04.09, no. 375; Exh. C-166).

27. On August 10, 2007, after negotiations, a transport agreement between J&S Energy and PERN – a State-controlled company that operates the crude oil pipeline system in Poland – was ready for signature (Claim. 03.04.09, no. 350 and 336; Exh. C-280). According to Claimant, PKN Orlen refused on September 3, 2007 to receive the shipment of oil from J&S Energy (Claim. 03.04.09, no. 351-354). After further negotiations, PERN and J&S Energy entered into agreements on September 24, 2007 for the transport and storage of 50,000 Mt of crude oil (Claim. 03.04.09, no. 412; Exh. C-284-287; C-356-357). J&S Energy then "took steps towards securing storage space for a further 100,000 Mt of crude oil" (Claim. 03.04.09, no. 414). After an oral

agreement of PERN, this latter then announced that it would not store the 100,000 Mt of crude oil "due to the increasing needs of other customers" (Claim. 03.04.09, no. 415-417). PERN finally agreed to store the supplementary 100,000 Mt of crude oil, but confirmed it only after October 15, 2009, which was the deadline set for constituting the mandatory reserves (see below no. 28) (Claim. 03.04.09, no. 423).

28. On August 20, 2007 ARM forwarded to J&S Energy a "Post-Audit Statement" issuing a direction to J&S Energy to supplement deficits of mandatory reserves by September 11, 2007 (Claim. 03.04.09, no. 377 and 378).

On September 17, 2007, according to the Claimant, "ARM launched *ex officio* proceedings against J&S Energy for the purposes of "*imposing a financial penalty under art. 63 clause 1 paragraph 1"* of the MRA" (Claim. 03.04.09, no. 380). According to the Claimant, "ARM's notice granted J&S Energy 14 days in which to file "any motions or comments" – that is, to demonstrate that it was in compliance with its mandatory reserves obligations" (Claim. 03.04.09, no. 380; Exh. C-171). The deadline was then set as October 15, 2007 (Claim. 03.04.09, no. 380; Exh. C-174 and C-177).

29. On October 3, 2007 J&S Energy filed a "*Motion in the Proceedings on Imposing a Fine*", in which, according to the Claimant, "it detailed the numerous logistical difficulties it had faced in the constitution of its material reserves" (Claim. 03.04.09, no. 426; Exh. C-174).

According to the Claimant, on October 15, 2007 J&S Energy "filed a "*Pleading in the Case of Imposing a Financial Penalty*", submitting to ARM the available documentation demonstrating, fulfilment of its mandatory reserves obligations" (Claim. 03.04.09, no. 431). According to the Claimant, "J&S Energy insisted that, although PERN had refused to deliver written confirmation in this regard, [...] the Company had [...] stored a total of 150,000 Mt of crude oil at PERN's Adamowo tanks" (Claim. 03.04.09, no. 432).

On October 16, 2007, according to the Claimant, the President of ARM "issued a decision imposing on J&S Energy a fine of PLN 461,695,807.24 (at the time, in excess of US$ 200 million) for failure to keep and to establish mandatory reserves of fuels" (Claim. 03.04.09, no. 435; Exh. C-11).

According to the Claimant, "[o]n October 30, 2007 J&S Energy appealed the President of ARM's decision to the Minister of Economy" (Claim. 03.04.09, no. 455; Exh. C-186). According to the Claimant, before that date, PKN Orlen refused to hand over the signed Annex; therefore, J&S Energy was unable to file it in support of its appeal (Claim. 03.04.09, no. 447 and 455).

On December 14, 2007 by Decision no. 13/12/2007 the Minister of Economy reversed the President of ARM's decision of October 16, 2007 (Claim. 03.04.09, no. 464; Exh. C-12).

30. On February 5, 2008 "ARM issued to J&S Energy a "notice of instituting administrative proceedings […] in the case of imposing a financial penalty under art. 63 clause 1 par. 1" of the MRA, granting J&S Energy 14 days within which to file "motions or comments""(Claim. 03.04.09, no. 496; Exh. C-196). The deadline was then extended to February 22, 2008 (Claim. 03.04.09, no. 496; Exh. C-197). According to the Claimant, "[o]n March 4, 2008 ARM wrote to J&S Energy to prolong the administrative proceedings for another month" (Claim. 03.04.09, no. 502; Exh. C- 207).

On April 3, 2008 "ARM issued a second Decision imposing a financial penalty on J&S Energy" of PLN 461,695,807.26 (Claim. 03.04.09, no. 505; Exh. C-13).

On April 17, 2008 "J&S Energy appealed ARM's April 3, 2008 Decision to the Minister of Economy, requesting the revocation of said Decision and the cancellation of the financial penalty" (Claim. 03.04.09, no. 522; Exh. C-214).

On June 5, 2008, according to the Claimant, "the Minister of Economy issued a Decision upholding ARM's April 3, 2008 decision to impose a financial penalty on J&S Energy, albeit slightly lowering the amount of the financial penalty to PLN 452,045,537.36" (Claim. 03.04.09, no. 534). The decision stated that the fine should "*be paid* […] *within 14 days from the date on which this decision becomes final and binding*" (Claim. 03.04.09, no. 550; Exh. C-14).

31. On June 23, 2008 J&S Energy lodged an appeal with the Warsaw Administrative Court against the Minister of Economy's decision of June 5, 2008 (Claim. 03.04.09, no. 551; Exh. C-227).

    On the same day, according to the Claimant, "ARM issued a "Reminder" to J&S Energy demanding full payment of the financial penalty imposed by the Minister of Economy "within 7 days from the date of delivery of this reminder"" (Claim. 03.04.09, no. 552; Exh. C-15). Also on June 23, 2008 Mercuria "wrote to the Prime Minister of Poland requesting suspension of the payment of the financial penalty" (Claim. 03.04.09, no. 554; Exh. C-19). According to the Claimant, since no answer was given, J&S Energy and the Claimant "were therefore left with no choice but to pay the financial penalty" (Claim. 03.04.09, no. 558). By a loan agreement of the same day, Mercuria transferred to J&S Energy the sum of US$ 212.9 million to enable it to pay the fine (Claim. 03.04.09, no. 574; Exh. C-371).

    On June 30, 2008 J&S Energy paid the fine (Claim. 03.04.09, no. 577).

32. On December 23, 2008 "the Warsaw Administrative Court handed down an oral judgment in favour of J&S Energy, quashing the Minister of Economy's June 5, 2008 Decision and cancelling the financial penalty imposed thereunder" (Claim. 03.04.09, no. 579; Exh. C-236). Both the Minister of Economy and J&S Energy have appealed the judgment before the Polish Supreme Administrative Court (Claim. 03.04.09, no. 581; 21 September 2009 Transcript, p. 101: 10-11). This judicial proceeding is still pending; a hearing was going to be held on October 13, 2009 (21 September 2009 Transcript, p. 101: 14-15). The Arbitral Tribunal has not been informed about the result of the aforementioned hearing.

III. The Arbitral Proceeding

33. On July 24, 2008 the Claimant, Mercuria, filed a Request for Arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC"). In its Request it sought interim measures. It also appointed Professor Albert Jan van den Berg as arbitrator, who accepted the appointment.

34. On July 31, 2008 the SCC registered the Request for Arbitration submitted by Mercuria.

35. On August 21, 2008 the Respondent filed its Answer to the Request for Arbitration. It appointed Professor Vaughan Lowe QC, as arbitrator, who accepted the appointment.

36. On August 27, 2008 the Claimant responded by letter to the Respondent's Answer to the Request for Arbitration and objected to, amongst other things, Poland's proposal that Polish be one of the languages of the arbitration.

37. On September 9, 2008 the SCC informed the Parties that its Board had decided that the seat of arbitration would be Stockholm and that the advance on costs, determined at EUR 722,000, was to be paid by the Parties in equal shares.

38. On September 12, 2008 the SCC informed the Parties that its Board had appointed Professor Pierre Tercier as Chairman of the Arbitral Tribunal, who accepted his appointment.

39. On September 24, 2008 the Respondent responded by letter to the Claimant's request for Interim Measures.

40. On October 13, 2008 the Arbitral Tribunal invited the Parties to comment on the language of the procedure and on the requested interim measures.

41. On October 27, 2008 the Claimant filed an Addendum to its Request for Interim Measures. It requested that the Arbitral Tribunal order the Respondent not to take any action that would result in J&S Energy having to cease its activities.

42. On the same day, the Respondent, by letter, accepted that English should be the only language of arbitration.

43. On November 10, 2009 the Respondent filed its Response to Claimant's Addendum to Request for Interim Measures.

44. On December 3, 2009 a **preliminary hearing** was held in Brussels with the Parties to decide on various procedural matters and on the request for interim measures. As regards the provisional timetable, it was decided that two provisional timetables should be adopted; one (Plan A) in case the Respondent did not raise any jurisdictional objections in its Answer to the Request for Arbitration and the other (Plan B) in case of jurisdictional objections (3 December 2009 Transcript, p. 27: 21-25)

45. On December 10, 2008 the Respondent invited the Claimant to "*describe any additional connection between itself and Switzerland so that any such information may also be taken into account at this time*".

46. On the same day, the Respondent confirmed that it had no intention of withdrawing two of J&S Energy's trading licences "*on the basis of the same set of facts and circumstances which led to the imposition of the fine on J&S Energy by the Minister of the Economy or on the basis of facts or circumstances known to it as at 25 November 2008.*"

47. On December 12, 2008 the Claimant responded to the Respondent's request that it comments on the connection between itself and Switzerland.

48. On December 23, 2008 the Arbitral Tribunal issued its **Procedural Order No. 1,** that had been submitted before in draft to the Parties, and issued two provisional timetables (Plan A and Plan B).

49. On the same day, the Claimant confirmed by letter "*that, on the strength of the Respondent's undertaking, it withdraws its Request for Interim Measures, without prejudice to its right to reinstate the same or make a new Request for Interim Measures at any time, as it may deem fit, should the Respondent breach such undertaking.*"

50. On January 5, 2009 the Arbitral Tribunal issued its **Procedural Order No. 2**, whereby it took note:

    1. *Of the Respondent's commitment contained in its letter dated December 10, 2008;*
    2. *Of the Claimant's withdrawal of its Request for Interim Measures without prejudice.*

51. On April 3, 2009 the Claimant filed its **Statement of Claim**. In its prayer for relief it asked the Tribunal to (Claim. 03.04.09, no. 851):

> *"(1) declare that the Respondent has breached Article 10(1) of the ECT; and*
> *(2) declare that the Respondent has breached Article 13(1) of the ECT; and*
> *(3) order the Respondent to pay to the Claimant compensation in the amount of not less than US$ 466,981,199, including:*
> *a. compensation in the amount of not less than US$ 214,929,867 in respect of capital transfer and related harm; and*
> *b. compensation in the amount of not less than US$ 179,293,973 in respect of loss of J&S Energy value; and*
> *c. compensation in the amount of not less than US$ 43,284,256 in respect of harm to Mercuria's business and reputation; and*
> *d. compensation in the amount of not less than US$ 3,587,373 in respect of compliance-related harm; and*
> *e. compensation in the amount of not less than US$ 6,770,631 in respect of harm from the cancellation of the IPOs; and*
> *f. compound pre-award interest at the rate of 14% on the above sums, constituting US$ 29,115,099; and*
> *g. such further amounts of interest as may accrue until the date of the Award; and*
> *(4) order the Respondent to pay post-award interest at the rate of LIBOR plus 2%; and*
> *(5) order the Respondent to pay the entire costs of the arbitration, including the arbitrators' and the SCC's fees and expenses, and all legal costs incurred by the Claimant, plus interest; and*
> (6) *order any such further relief as it may deem appropriate."*

52. On May 6, 2009 the Respondent informed the Arbitral Tribunal that it would file jurisdictional objections and that it would comply with Plan B of the provisional timetable.

53. On May 19, 2009 the Respondent submitted its **Jurisdictional Objections** and its Request for Document Production (Resp. 19.05.09) (See below no. 66 for the prayers for relief).

54. On June 2, 2009 the Arbitral Tribunal invited the Claimant to file an Answer to the Respondent's Request for Document Production.

55. On June 15, 2009 the Claimant submitted its Answer to the Respondent's Request for Document Production.

56. On June 25, 2009 the Arbitral Tribunal issued its **Procedural Order No. 3** whereby it decided:

> "*1. The Respondent's Request under 8.1 of the Request for Document Production is accepted.*
>
> *2. The Arbitral Tribunal takes note of the Claimant's willingness to produce the documents mentioned in the Respondent's Document Production Requests no. 8.4(a), 8.4(b), 8.7(a) and 8.7(c).*
>
> *3. The Claimant is invited to produce the aforementioned documents at the latest by July 10, 2009.*
>
> *4. All other Document Production Requests are rejected."*

57. On June 30, 2009 the Claimant submitted its **Reply to the Respondent's Jurisdictional Objections** (Claim. 30.06.09) (See below no. 66 for the prayers for relief).

58. On July 31, 2009 the Respondent submitted its **Rebuttal on Jurisdictional Objections** (Resp. 31.07.09) (see below, no. 66 for the prayers for relief).

59. On August 31, 2009 the Claimant filed its **Rejoinder on the Respondent's Jurisdictional Objections** (Claim. 31.08.09, no. 136-138) (see below, no. 66 for the prayers for relief).

60. On September 21, 2009 the Arbitral Tribunal held a **hearing on jurisdiction** with the Parties in Brussels. The Arbitral Tribunal heard the oral submissions by the Counsel of the two Parties. No new request was submitted. The transcript of the hearing has not been contested.

B. Legal considerations

I. Generally

1. The Proceedings and the Constitution of the Arbitral Tribunal

61. The Claimant initiated the present arbitration proceeding on July 24, 2008 (see above, no. 33). The SCC registered the Request for Arbitration on July 31, 2008.

    The Arbitral Tribunal was constituted on September 12, 2008 (see above, no. 38). After an exchange of correspondence in connection with the nationality of the Chairman of the Arbitral Tribunal and the nationality of the Claimant, the Parties did not raise any formal objections to the appointment of its members.

62. The proceeding was conducted in accordance with the SCC's Arbitration Rules. During the course of the preliminary hearing and following the request of the Parties (see above, no. 44), the Arbitral Tribunal decided to adopt two provisional timetables; Plan A in case of no jurisdictional objections and Plan B in case of jurisdictional objections. As the Respondent has submitted jurisdictional objections, Plan B is applicable and the Arbitral Tribunal will, in this first phase, render an award on its jurisdiction.

63. The Arbitral Tribunal considers that each Party has been given the opportunity to be heard. Each Party has submitted two written submissions and one oral submission on the jurisdictional issues. Neither of the Parties requested the hearing of witnesses or experts.

2. Principal Relevant Legal Provisions

64. Both Cyprus and Poland are signatories to the Energy Charter Treaty (ECT). In accordance with Article 44 of the ECT, the ECT entered into force for Cyprus on April 16, 1998 and for the Republic of Poland on July 23, 2001.

65. The principal relevant provisions of the ECT are set out below:

    - Article 1(6):

      "'*Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:*

[…]

(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.

[…]*"*

- Article 1(7):

"'Investor' means:

(a) with respect to a Contracting Party:

[…]

(ii) a company or other organization organized in accordance with the law applicable in that Contracting Party.

[…]*"*

- Article 1(8):

"'Make Investments' or 'Making of Investments' means establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity."

- Article 10(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*."

- Article 13(1):

"Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:

(a) for a purpose which is in the public interest;
(b) not discriminatory;
(c) carried out under due process of law; and
(d) accompanied by the payment of prompt, adequate and effective compensation.

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date").

Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment."

- Article 26:

"*(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.*

(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or […]."

(3)(a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

(b)(i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph 2(a) or (b).

[…]"

3. Final Positions of the Parties and Structure of the Award

66. Pursuant to their last submissions, the positions of the Parties are as follows:

a) The Respondent raises the following jurisdictional objections (Respondent's Rebuttal on Jurisdictional Objections of July 31, 2009, no. 1):

"(1) Pursuant to Section 2(3) of Procedural Order No. 1 of 23 December 2008, and further to Respondent's Jurisdictional Objections dated May 19 2009 and the Claimant's Reply to Respondent's Jurisdictional Objections, the Respondent presents its Rebuttal on Jurisdictional Objections. In this submission, the Respondent will further present and elaborate on the following objections to the jurisdiction of the Tribunal:

1. *The ECT is not intended to protect investments of nationals of the Respondent State;*
2. *Denial of benefits by the Respondent to the Investor (Article 17(1) ECT);*

3. *Refusal of the Respondent to consent to arbitration (Article 26(3)(b)(1) ECT);*

4. *The Claimant has failed to establish a* prima facie *case; and*

5. *In any event, the Tribunal has no jurisdiction under the ECT as to the alleged acts or damages that occurred before 23 July, 2001 (*ratione temporis*).*

(2) In the event that the Tribunal finds that it does have jurisdiction in this case, the arbitration should be suspended in the exercise of the Tribunal's general case management powers on the grounds that:

a. *The claim is not "ripe"; or*
b. *lis pendens.*

(3) In any event, should the Tribunal decide that any of the objections raised above relate to admissibility rather than jurisdiction, the Respondent reserves its rights to raise them again in subsequent submissions relating to the substantive issues of this arbitration. There is no agreement that the Respondent has to set out any or all its admissibility arguments at this stage of the proceedings."

b) The Claimant requests as follows (Claimant's Rejoinder of August 31, 2009, no. 136 - 138):

"*[T]hat the Arbitral Tribunal:*

- *Reject the Respondent's Jurisdictional Objections of May 19, 2009 and July 31, 2009 in whole;*

- *Consequently, declare that it has jurisdiction over the present dispute and that the Claimant's claims are admissible.*

The Claimant also requests that the Arbitral Tribunal order the Respondent to pay the costs incurred by the Claimant in connection with the Respondent's Jurisdictional Objections, including but not limited to the arbitrators' and the SCC's fees and expenses, where applicable, and all legal costs incurred by the Claimant, plus interest.

The Claimant reserves the right to amend, supplement and expand its submissions regarding the Respondent's Jurisdictional Objections."

67. At the hearing held on September 21, 2009, the Respondent formally abandoned its jurisdictional objection arising from Article 17 of the ECT. Counsel for the Respondent declared: "[…] *the Respondent formally withdraws its objection which has been referred to in our submissions as the denial of benefits by the Respondent to the investor based on Article 17(1) of the Energy Charter Treaty."* (21 September 2009 Transcript, p. 68: 23 – p. 69: 2). Counsel further stated: "[…] *it is withdrawn formally and will not be re-introduced, with the single caveat that it is withdrawn on the basis of all facts and matters known to us at the present time*." (21 September 2009 Transcript, p. 71: 3-7).

The Claimant's Counsel noted the Respondent's withdrawal and stated the following: "[…] *those objections that have been pleaded in this phase of the Arbitration cannot be*

re-labelled "admissibility" later and re-argued." (21 September 2009 Transcript, p. 74: 1-4).

Consequently, the Arbitral Tribunal notes that the objection contained in the Respondent's Rebuttal on Jurisdictional Objections under no. (1) 2 is formally abandoned.

68. In its submissions, the Respondent also raises an objection in connection with the *rationae temporis* condition; it asserts that the Arbitral Tribunal does not have jurisdiction to rule on violations alleged by the Claimant to have occurred before the ECT came into force in Poland, i.e. on July 23, 2001 (Resp. 19.05.09, section (B)5 and Resp. 31.07.09, section (B)5).

The Claimant's Counsel has not contested this assertion. The Claimant contends that its claims "exclusively concern facts that took place after July 23, 2001" and that any facts pre-dating this date are "solely intended to provide the Arbitral Tribunal with background information in relation to the Respondent's breaches of the ECT after that date" (Claim. 30.06.09, no. 171-173 and Claim. 31.08.09, no. 124).

At the hearing, the Respondent acknowledged the position stated by the Claimant in its submissions on jurisdiction (21 September 2009 Transcript, p. 93: 21-25 and 94: 1-3).

Therefore, the Arbitral Tribunal will only consider facts relating to the period after the ECT came into force in order to rule on the jurisdictional issues. The facts relating to the period before the ECT came into force will be considered only as an explanation of the factual background.

69. On the basis of the Parties' submissions and arguments, the Arbitral Tribunal will analyze the following remaining questions:

- It will commence its analysis with the Respondent's jurisdictional objections arising from Mercuria's investment in Poland (see below II);
- It will further examine the Respondent's jurisdictional objections arising from the scope of the consent given by the Republic of Poland in accordance with article 26 ECT (see below III);
- It will then examine the objection with respect to the establishment of a *prima facie* case (see below IV);
- Finally, it will address the issue of the allocation of costs (see below V).

II. Respondent's jurisdictional objections arising from Mercuria's investment in Poland

1. The issue

70. The first jurisdictional question concerns the Claimant's standing to sue.

In that regard, the Respondent presents the following jurisdictional objection (Resp. 31.07.09, no.1):

> *"(1) The ECT is not intended to protect investments of nationals of the Respondent State;"*

Following the Respondent's objection, the Claimant's request is as follows (Claim. 31.08.09, no. 136):

> *"Reject the Respondent's Jurisdictional Objections of May 19, 2009 and July 31, 2009 in whole;"*

The Arbitral Tribunal will therefore examine whether Mercuria made an investment in Poland in accordance with the provisions of the ECT at the relevant time.

2. The Position of the Parties

2.1 The Respondent's Position

71. According to the Respondent, the real investors in J&S Energy are Messrs. Jankilevitsch and Smolokowski, both Polish nationals. The Claimant acquired its 100% shareholding in J&S Energy from Messrs. Jankilevitsch and Smolokowski on July 2, 2004 (Resp. 19.05.09, no. 1.7 and 1.9).

72. The Respondent argues that if the source of the funding by which Mercuria acquired its interest in J&S Energy was Polish, Mercuria's investment in the company does not fall within the protections offered by the ECT. In its Rebuttal on Jurisdictional Objections, the Respondent noted that it had requested from the Claimant "*documents evidencing the amount and source of the consideration paid by the Claimant for the shares in J&S Energy in July 2004*" (Resp. 31.07.09, no. 1.12). According to the Respondent, the documents produced by the Claimant do not indicate the ultimate original "source" of the funds used to purchase J&S Energy's share capital, which fact the Respondent describes as "*relevant, and even decisive*" (Resp. 31.07.09, no. 1.12). Referring to Professor Weil's dissenting opinion in the ICSID case *Tokios Tokeles* (Exh. RA-4), the Respondent submits that the Tribunal should give effect to the "*economic reality*" of the instant case and "*deny the Claimant's masquerade as a foreign investor in the Republic of Poland*" (Resp. 31.07.09, no. 1.14).

73. Furthermore, the Respondent refers to the 1991 Energy Charter Declaration that, according to the Respondent, emphasizes on foreign Investments in another Contracting Party (Resp. 31.07.09, no. 1.19). As all Contracting Parties to the ECT are also signatories to the Energy Charter Declaration, the latter is a tool for interpretation of the former (Resp. 31.07.09, no. 1.17 and 1.19).

74. In addition, referring to Article 10(1) ECT, the Respondent alleges that the Claimant did not make an "Investment" in Poland. Relying on the definition "'Make Investments' or 'Making of Investments'" in Article 1(8) of the ECT, the Respondent submits that the Claimant did not "*establish a new Investment*", because the shares in J&S Energy were already issued. Further, it did not "*[acquire] all or part of existing Investments or [move] into different fields of Investment activity*" because J&S Energy was owned by Polish nationals and so could not have been an investment in Poland (Resp. 31.07.09, no. 1.27).

2.2 The Claimant's Position

75. The Claimant relies on Mercuria's place of incorporation, Cyprus, as establishing its nationality. The shares owned by Mercuria in J&S Energy thus constitute an Investment of an Investor within the terms of Articles 1(6) and 1(7) of the ECT.

76. According to the Claimant, Article 1(6) of the ECT does not require a qualifying investment to be "foreign" in nature. The nationality requirement applies to the investor and not to the source of funds used to make the investment (Claim. 30.06.09, no. 42).

77. As regards the funding of the investment, the Claimant alleges that there is no provision in the ECT that requires that the investment be funded from the investor's country of incorporation (Claim. 30.06.09, no. 43). Rejecting the approach taken in Professor Weil's dissenting opinion in the ICSID case *Tokios Tokeles*, the Claimant maintains that a physical transfer of funds to the host State is unnecessary (Claim. 30.06.09, no. 48) and that the origin of the funds is irrelevant (Claim. 30.06.09, no. 48; Claim. 31.08.09, no. 23-24; Exh. RA-3; Exh. CA-16, 84 and 88).

78. Concerning Article 1(8) of the ECT, the Claimant argues that this provision is irrelevant in the case at hand (Claim. 31.08.09, no. 37). The definition given in Article 1(8) rather concerns the pre-investment period, protection for which was intended to be included in another treaty subsequent to the ECT, whilst the protection under Article 10(1) addresses investments which have already been made (Claim. 31.08.09, no. 38). It is therefore, according to the Claimant, not necessary to show that a claimant made an investment pursuant to Article 1(8) to bring a claim under Article 10(1). It is sufficient to show that the Claimant holds an Investment, as this term is defined by Article 1(6) (Claim. 31.08.09, no. 38).

3. The decision of the Arbitral Tribunal

3.1. The issue

79. The Claimant's claims are based on Article 10 of the ECT ("Promotion, Protection and Treatment of Investments). The first part of this provision reads as follows:

"*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.*"

By ratifying the Energy Charter Treaty, and in particular its Article 10, a Contracting Party has made a commitment that is contingent upon two conditions: (i) there must be an Investment (ii) made by an Investor of another Contracting Party. In the case at hand, the Arbitral Tribunal must decide whether the Claimant's ownership of J&S Energy's share capital constitutes an Investment by an Investor.

On the basis of the Respondent's allegations, both conditions must be examined. The Arbitral Tribunal notes however that the Respondent has not raised any objection concerning the geographical requirement that the investment be made "in the Area". Therefore, the Arbitral Tribunal will not examine the geographical requirement.

3.2. An Investment made by an Investor?

80. (i) An investment in accordance with the ECT is defined in Article 1(6). The relevant part of this provision in relation to this Award is the following :

"'Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
[…]

(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.
[…]"

Article 1(8) of the ECT provides that:

"*'Make Investments' or 'Making of Investments' means establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity."*

81. According to the Claimant, on July 2, 2004, it entered into an agreement to purchase all of the shares of the Polish company J&S Energy from its former shareholders. It cannot be denied that the Claimant has, by this purchase, made an investment. The Claimant has purchased all the shares that already existed in J&S Energy. As these shares already existed at the time that they were purchased by the Claimant, the Arbitral Tribunal rejects the Claimant's contention that Article 1(8) of the ECT is irrelevant.

Furthermore, the ECT does not require that an "existing investment" be an investment that was made by foreign nationals. Therefore, the Arbitral Tribunal does not admit the Respondent's argument that would hinder the Claimant's investment in J&S Energy because the previous owners were Polish nationals.

Thus, the Claimant has made an "Investment" in accordance with the ECT by acquiring an "existing investment", in the form of shares in the company J&S Energy.

82. (ii) The ECT requires that the Investment has been made by an Investor of another Contracting Party of the ECT. Article 1(7) ECT defines an Investor with the following terms:

"(a) *With respect to a Contracting Party*
[…]
(ii) *A company or other organization organized in accordance with the law applicable in that Contracting Party*."

Whether a company is an Investor of another Contracting Party may be deduced by using the test of incorporation. Pursuant to the wording of the definition in ECT Article 1(7) and to the incorporation test, the Arbitral Tribunal considers that Mercuria must be considered as an Investor of another Contracting Party since it is organized under the laws of Cyprus. The Arbitral Tribunal recalls that Mercuria, then called J&S Holding Limited, was incorporated in Cyprus on February 10, 2004. Its changes of name in 2005 and 2007 (see above, nos. 14 and 21) do not affect the fact of its incorporation under the laws of Cyprus.

83. The Respondent does not deny that Mercuria was incorporated in Cyprus, but considers that the Arbitral Tribunal must go further in order to analyze the origin of the funds that made Mercuria's investment in J&S Energy possible.

The Respondent relies on the dissenting opinion made by the president, Prosper Weil, in the *Tokios Tokeles* case. The majority of that arbitral tribunal was of the opinion that Tokios Tokeles was an investor of Lithuania because it was "*an entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations*" (ICSID Case No. ARB/02/18, *Tokios Tokeles v. Ukraine*, Decision on Jurisdiction of

April 29, 2004 at paragraph 52) and "*the Claimant manifestly did not create Tokios Tokeles for the purpose of gaining access to ICSID arbitration under the BIT against Ukraine, as the enterprise was founded six years before the BIT between Ukraine and Lithuania entered into force*"(idem, at paragraph 56). As regards the origin of funds, the majority of the arbitrators found that: "*the ICSID Convention contains no inchoate requirement that the investment at issue in a dispute have an international character in which the origin of the capital is decisive*." (idem, at paragraph 82).

In the dissenting opinion drafted by the president of that arbitral tribunal, it was stressed that: " *it appears that the ICSID arbitration mechanism is meant for* international *investment disputes, that is to say, for disputes between States and* foreign *investors*" (Dissenting opinion, paragraph 5, emphasis original). Moreover, contrary to the majority of the arbitral tribunal, the president stressed that "*the origin of the capital is relevant, and even decisive*". He further stated: "*What* is *decisive in our case is the simple, straightforward, objective fact that the dispute before this ICSID Tribunal is not between the Ukrainian State and a foreign investor but between the Ukrainian State and an* [sic] *Ukrainian investor*" (Dissenting opinion, paragraph 21, emphasis original).

84. The Arbitral Tribunal does not share the opinion of Professor Weil. Even if the test of incorporation is a formalistic one, it is a test recognized by all legal systems. If the authors of the ECT had wished to insert a criterion based on economic considerations, they would have done so expressly. The proof of this is to be found in Article 17(1) ECT, which expressly states that, in certain situations, a Contracting Party may – but only if it declares it – deny the advantages of Part III of the ECT in circumstances where a legal entity is owned or controlled by citizens or nationals of a third state. The same reasoning could have been made applicable for the case where the capital used to acquire the investment originated from citizens residing in the State where the investment was made; but it was not.

The Tribunal thus concludes that there is no indication in the ECT that the proximate or ultimate origin of capital is relevant in this context; and it observes that, in any event, there appears to be no manageable way of determining the national "origin" of capital.

This being said, it does not mean that the principle of incorporation does not have any exceptions. In that regard, there may be circumstances in which the presumed validity and effectiveness of the nationality acquired by incorporation can be overturned and the veil of incorporation can be lifted (see *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain*), 1970 I.C.J. 3 at para. 58). For instance, a tribunal would not necessarily be bound to accept a nationality acquired by a claimant after a dispute had arisen and for the sole purpose of giving the claimant a procedural or substantive advantage in arbitration under the ECT or a BIT.

This Arbitral Tribunal agrees with Professor Weil and with the decisions rendered on this issue by other tribunals that where a corporate investor has been artificially organized in order to have a link with another Contracting Party for the sole purpose of benefiting from the ECT's provisions, it is possible that the protection afforded by Part III of the ECT may be denied to that investor.

85. The Arbitral Tribunal will therefore examine whether there was any abuse of rights in the case at hand, such that Mercuria might be denied the protection of Part III of the ECT.

a) The Arbitral Tribunal recalls the facts leading to Mercuria's acquisition of J&S Energy as pleaded by the Claimant (see above, nos. 6 et seq.):

- In 1995, J&S Energy was incorporated in Poland. It was entirely owned by two Polish citizens, Mssrs. Jankilevitsch and Smolokowski (Claim. 03.04.09, no. 43);
- On February 10, 2004 the Claimant (then called J&S Holding Limited) was incorporated in Cyprus. Its share capital was divided into two equal parts owned, respectively by Mssrs. Jankilevitsch and Smolokowski (Claim. 03.04.09, no. 19);
- On June 21, 2004, Mssrs. Jankilevitsch and Smolokowski entered into an agreement to transfer a proportion of their shares in the Claimant (then called J&S Holding Limited) to Mssrs. Marco Dunand, Daniel Jaeggi, Vadim Linetskiy and Pavel Pojdl (Claim. 03.04.09, no. 19);
- On July 2, 2004 Mssrs. Jankilevitsch and Smolokowski entered into a share sale agreement with the Claimant. The Claimant purchased J&S Energy from Mssrs. Jankilevitsch and Smolokowski (Claim. 03.04.09, no. 43);
- On July 21, 2004 the payments for the purchase of the shares were made (Transcript, p. 251: 22-23);
- From November 2004 till November 2008, Mercuria's shareholders changed at four occasions (Claim. 03.04.09, no. 20, Claim. 03.04.09, no. 27, Claim. 03.04.09, no. 25, Claim. 03.04.09, no. 25).

86. It is undisputed that Mssrs. Jankilevitsch and Smolokowski indirectly benefit from the protection granted to Mercuria, as do its other shareholders. However, for the Arbitral Tribunal, this circumstance alone does not lead to the conclusion that Mercuria was artificially organized in order to benefit from Part III of the ECT.

There is no cause to disregard the nationality of the Claimant here. It is true that the Claimant was initially a company that consisted of Mssrs. Jankilevitsch and Smolokowski setting up business as a two-man company in Cyprus. But the sale of J&S Energy occurred as part of a plan to transfer all of the J&S companies to the Claimant, as is shown by the shareholders' agreement (Exh. C-41). The shareholders agreement further provides for the introduction of new shareholders to the Claimant, which shareholders would make a non-negligible contribution to its share capital.

In this context the question is not the precise legal position on any one day but rather whether the overall scheme surrounding the establishment of Mercuria was of such a nature as to warrant the Arbitral Tribunal treating it as a chimera and disregarding the ostensible existence of the new Cyprus company. The Tribunal does not consider that it was of such a nature.

Accordingly, in the absence of evidence that the other shareholders are straw men, or that Mercuria is the *alter ego* of Mssrs. Jankilevitsch and Smolokowski, or that there is some other reason for disregarding the corporate personality of Mercuria, the Arbitral Tribunal has no justification at this jurisdictional stage for departing from the *prima facie* validity of the Cyprus incorporation.

Consequently, the Respondent's jurisdictional objection on this ground must be dismissed.

III The objection arising from the Respondent's Refusal to consent to arbitration (Article 26(3)(b)(1) ECT)

1. The issue

87. The next jurisdictional question is that of the Respondent's refusal to consent to arbitration. In that regard, the Respondent raises the following objection (Resp. 31.07.09, no. 1):

> *"3. Refusal of the Respondent to consent to arbitration (Article 26(3)(b)(1) ECT)"*

Following the Respondent's objection, the Claimant's request is as follows (Claim. 31.08.09, no. 136):

> *"Reject the Respondent's Jurisdictional Objections of May 19, 2009 and July 31, 2009 in whole;"*

J&S Energy has commenced proceedings in the Polish courts. The question is what the consequences of this are, according to Article 26 ECT, for the jurisdiction of the Tribunal. The Arbitral Tribunal will therefore examine whether the situation in this case falls within the scope of the Respondent's reservation to the principle of "unconditional consent" to arbitration pursuant to Article 26(3)(b)(i) ECT (see above, no. 65).

2. The position of the Parties

2.1 <u>The Position of the Respondent</u>

88. Poland is listed in Annex ID ECT as one of the Contracting Parties that qualifies its unconditional consent to ECT arbitration contained in Article 26(3)(a) ECT in the event that an Investor has previously submitted its dispute to the courts or administrative tribunals of Poland. Poland is entitled to refuse, and has refused, its consent to ECT arbitration in this case because the Claimant has submitted its grievance to the Administrative Courts of Poland and the fundamental subject matter of that dispute is identical to that of the dispute before the Arbitral Tribunal (Resp. 31.07.09, no. 3.1-3.3).

2.2 <u>The Position of the Claimant</u>

89. According to the Claimant, Article 26(3)(b) constitutes an exception to the general principle of "unconditional consent" given in Article 26(3)(a) and should be strictly interpreted. The triple-identity test requires that the Investor be the claimant in both proceedings and that the dispute be the same in both proceedings (which encompasses both identity of cause of action and identity of object of the dispute) (Claim. 31.08.09, no. 106-108). According to the Claimant, these requirements are not fulfilled (Claim. 31.08.09, no. 122). In addition, "*none of the documents cited by the Respondent supports the proposition that consent to arbitration was not meant to be given where a local subsidiary in the host State is pursuing its local remedies whilst at the same time its shareholders pursue their own rights under the ECT before an international tribunal*" (Claim. 31.08.09, no. 121).

90. The Claimant alleges that the Respondent has misinterpreted Mercuria's claim: the imposition of the financial penalty on June 5, 2009 merely constitutes one of the breaches of the ECT committed by the Respondent and is in no way imposed permanently. Furthermore, J&S Energy's proceedings before the Polish administrative courts are strictly limited to achieving the reversal of the financial penalty. The scope of that proceeding and of the present arbitral proceeding are therefore distinct (Claim. 30.06.09, no. 11-13).

3. The decision of the Arbitral Tribunal

3.1 "The fork in the road"

91. This case is subject to the "fork in the road" principle. It is undisputed that the Republic of Poland has made a reservation in accordance with Article 26 of the ECT. The Tribunal understands that the broad purposes of the "fork in the road" principle include (a) the avoidance of parallel proceedings on the same issue in different tribunals, and (b) the prevention of ECT arbitration being used as a further appeal against final decisions of municipal courts and tribunals. The "fork in the road" principle is distinct, logically and legally, from the principle of the exhaustion of local remedies. The "fork in the road" does not require that if a claimant elects to put one element of the dispute before the national courts it must in consequence submit every aspect of the dispute to the national courts. Distinctly different elements may be pursued in different fora, at the choice of the claimant. The "fork in the road" is, accordingly, properly applicable to each legally discrete aspect of the overall dispute, and not to the entire dispute.

92. The Tribunal notes that not all Contracting Parties have opted in to the Annex ID scheme. For some States, therefore, it is possible in some circumstances to "resubmit" the same dispute to ECT arbitration after it has been submitted to the national courts.

It would be very unusual to be able to pursue a claim for a *breach of treaty as such* in a national court. Ordinarily a claimant would pursue a claim asserting rights under *national* law which, if accepted, would constitute a fulfilment of the claimant's rights under the treaty. Further, national court decisions would have *res judicata* effect; and an ECT or BIT tribunal plainly has no appellate jurisdiction in respect of national courts.

Because an identical dispute would be precluded by reason of *res judicata,* it must therefore be envisaged that "the dispute" referred to in Article 26(3)(b)(i) of the ECT is not an *identical* dispute but rather a distinct procedure arising from the same facts and the same essential complaints but presented in a different legal framework.

For example, a claim for non-payment of sums due under a contract might be pursued as a matter of (national) contract law in the courts of the host State. If the courts ultimately refuse to order payment, a State that has not chosen to disallow "an investor to resubmit the same dispute to international arbitration at a later stage" may find that the investor chooses, after a final dismissal of its claim in the national courts, to pursue the claim that "the State should have paid the amount in accordance with the contract" before an arbitral tribunal, presenting the same facts as had been presented to the national courts and arguing that what the State did wrong was failing to pay the sum due under the contract. A State which has chosen to disallow claims in respect of the same dispute would be entitled to deny that the tribunal has jurisdiction over such a claim, even though it might be said that the State has violated a treaty duty (such as the duty of fair and equitable treatment, or of full protection and security) *simply by reason of its refusal to pay the amount due under the contract*. That is the same dispute, even though

the legal "cause of action" before the national court is different from that before the arbitral tribunal. The obligation that is said to have been violated is the same in each case.

On the other hand, if the investor asserts that the non-payment of the contractual sum is to be viewed not simply as a failure to fulfil the *contractual* commitment, but as part of or evidence of a policy of treating the investor unfairly and inequitably in breach of treaty obligations, that would not be the same dispute. The obligation to treat the investor fairly is not the same as the obligation to pay sums due under the contract.

The Tribunal is not of the view that it is the only indicator, but it is certainly one indicator that the legal standards to be applied and the nature of the proof to be adduced in the two sets of proceedings are different: if the case that the claimant has to make out before the treaty tribunal is plainly different from that which it has to make out before the national courts, that is a strong indication that it is not the same dispute that is being pursued in the two fora.

Thus, awarding $1,000,000 due under a contract is not the same as awarding $1,000,000 damages because it was unfair and inequitable, and a breach of a treaty obligation, to refuse to pay the $1,000,000 due under the contract. If the sums awarded are identical the difference may be obscured; but the difference is real. Moreover, it cannot be assumed that the sums awarded would be the same in each case. For example, it may in some circumstances be "fair and equitable" to order a respondent to pay less or more than the sum due under the contract.

3.2 Practical considerations

93. Aside from legal principle, there are good practical reasons for taking the view that claims in the national courts that seek the "correction" of actions that are considered to harm an investment should not necessarily be regarded as embodying the same dispute as claims for breaches of treaty obligations arising from the same facts, such that they could result in the barring of the latter. If a local subsidiary suffers an injury, such as a fine, a refusal of a permit, or damage to its property, it is important that the managers of the local subsidiary be able to take prompt action to protect the subsidiary's interests, and also that the local courts be promptly given the opportunity to correct a situation that may give rise to a violation of a treaty obligation, without either (a) requiring the parent/investor to make a claim under a treaty such as the ECT or a BIT, or (b) jeopardizing the right of the parent/investor to make such a claim if the treatment of the subsidiary reaches a level that amounts to a violation of ECT or BIT obligations.

For example, the local subsidiary might challenge a fine in the local courts on the basis that it is disproportionate or was not adopted in accordance with procedures prescribed by the local law. The parent/investor may regard that fine as being, or as being part of, an instance of unfair and inequitable treatment, or as contrary to binding undertakings given by the government; and the parent/investor may contemplate a claim under a treaty. Though the proceedings in the national court and the proceedings in the "treaty tribunal" may both involve a claim that entails the "repayment" of the fine, either by quashing it and returning the monies paid, or as compensation for unfair and inequitable treatment, the claims are not identical. One is a public law challenge to the imposition of the fine; the other is a characterization of the fine as (for example) an unfair and inequitable act in violation of a treaty.

This is readily apparent when one considers the criteria to be satisfied in each case. For example, a failure to comply with local procedures for the imposition of a fine may be

insufficiently serious to amount to "unfair and inequitable treatment". Conversely, while the local procedures may stipulate that the fine imposed must be treated as a nullity, the application of the "fair and equitable" standard may indicate that a lesser fine would not have constituted a breach of the treaty. (The Tribunal leaves open the question whether a tribunal would in such circumstances be competent to require only partial repayment of a fine).

3.3 The proceedings in Poland v. the present arbitration proceeding

94. In the case at hand, it is undisputed that J&S Energy has submitted a dispute before the Polish administrative authorities by filing an appeal against the Minister of Economy's decision that imposed on it a fine of PLN 452,045,537.36. The crucial question for this head of the Respondent's jurisdictional objections is what, precisely, is the "dispute" of which the Polish courts are seized?

In the proceedings now pending in the Polish Supreme Court, J&S Energy seeks the annulment of the fine and the Polish authorities seek the confirmation of the fine.

- If the Polish Supreme Court upholds the fine as validly imposed in accordance with Polish law, the Claimant may subsequently initiate a distinct and different claim that the fining of its subsidiary amounts to a breach of a treaty obligation – such as the obligation of the State to treat the Claimant fairly and equitably. Such a claim would not necessarily be the same claim as the one pursued in the Polish courts; and it would therefore not be barred by Article 26 of the ECT.
- If the Polish Supreme Court annuls the fine imposed on J&S Energy that would, similarly, not preclude a claim by Mercuria that the imposition of a fine on its subsidiary was an instance, or one element of an instance, of (for example) unfair and inequitable treatment of the Claimant by the Polish authorities. The question whether the imposition of a fine, whether subsequently withdrawn or upheld, does constitute unfair and inequitable treatment is, of course, a matter for the merits stage, and the Tribunal takes no position on that question.

The Arbitral Tribunal is conscious that some may consider the effect of the fork in the road principle in these circumstances to be surprisingly narrow. It may appear that the Polish proceedings have had no practical effect under Article 26 of ECT.

In part, this is because the Polish proceedings concern matters of public law. If the proceedings had, for example, been proceedings in contract for the recovery of a payment due from the Polish authorities to J&S Energy or Mercuria, it would certainly have been arguable that the ECT Tribunal could not entertain a claim for the same contract debt. In the case of a public law action for the quashing of a fine, however, it is very unlikely that a tribunal established under the ECT would have the jurisdiction actually to quash the fine (as opposed to having jurisdiction to order the payment of compensation in respect of a fine imposed in breach of the treaty), even if it were asked to do so. In the present case, the Arbitral Tribunal is not asked to quash the fine.

In part, the lack of practical effect results from the separation in Polish law between the action for annulment of a fine and subsequent proceedings for the recovery of damages incurred as a result of the wrongful imposition of the fine, such as damages for loss of reputation or for the costs of arranging the financing of the payment of the fine (if either of those is recoverable under Polish law). The pending action in the Supreme Court is a precondition for any action that might be taken in the Polish courts for the recovery of such consequential losses, but it is not a part of those proceedings.

The Tribunal therefore considers that the consequential losses, like the heads of claim that are independent of the imposition of the fine, are not covered by the pending Polish proceedings and are not excluded from the jurisdiction of the Tribunal by Article 26 of the ECT.

Further, as has been noted above, if the fine is confirmed, that definitive confirmation by the Polish Supreme Court will not preclude a claim that the fine constituted a breach of the treaty and a claim before this Tribunal that the amount of the fine is one component of the damages to be assessed in respect of such a breach. Similarly, if the fine is quashed and repaid, an argument that the circumstances of its imposition and execution constituted a breach of the treaty will remain open to the Claimant.

95. As to the application of the conditions listed in Article 26 of the ECT in the case at hand, the Arbitral Tribunal accordingly summarizes its reasoning as follows:

a) The consent given by the Republic of Poland does not apply to an investor who has previously submitted the dispute to a competent court or a tribunal in the host State. In the case at hand, the appeal lodged against the imposition of the fine was not submitted by the Investor (Mercuria) but by the Polish company on which the fine was imposed. These are two distinct entities.

b) One could certainly inquire whether an exception should be allowed to these principles in the case of a foreign investor which is the sole shareholder of a local company. While the Tribunal accepts that the doctrine of the abuse of rights, the application of which would have to be justified on the basis of evidence before the Tribunal, may be applicable, any more general exception must be strictly interpreted.

c) For the reasons stated above, the Arbitral Tribunal is of the opinion that Poland's refusal to consent to arbitration does not apply where the claimant in the local proceedings is not identical to the party seeking to rely on the protections of the ECT. Nonetheless, for completeness' sake, the Arbitral Tribunal will also examine the conditions in addition to the identity of the claimant that must be satisfied in order for Poland's reservation to take effect.

96. For completeness of the reasoning, the Arbitral Tribunal adds the following with respect to the condition of identity of actions.

a) On the basis of the claims that have been submitted to it, the prayers of relief are not identical under the two procedures. If it is not to stray into the merits of the case, the Arbitral Tribunal may only consider the claims as stated in the Claimant's Statement of Claim. On this basis, it appears that the claims before the Polish courts and the claims before the Tribunal are not identical:

- in the first judicial procedure, before the Polish administrative authorities, J& S Energy seeks the annulment of the fine that has been imposed on it (PLN 452,045,537.36). If the claims are granted, J&S Energy may claim interest on the fine that should be reimbursed to it. However, it cannot claim a higher amount;
- in the case submitted to the present Arbitral Tribunal, the Claimant seeks relief that goes beyond the reimbursement of the fine, which is evidenced by fact that the totality of the claims amount to USD 466,981,199. It may be that this higher amount indicates that J&S Energy has suffered damage in excess of the amount of the fine. At

the hearing on September 21, 2009, the Respondent's Counsel confirmed that nothing prevented J&S Energy, if its domestic appeal were granted and therefore the fine were to be repaid, filing a claim in the Polish courts for satisfaction of losses caused by the imposition of the fine. However, that claim, which should be filed before the civil court (21 September 2009 Transcript, p. 120: 11), is different from J&S Energy's current claim. This demonstrates that the claims are not identical.

- It remains, however, to examine whether certain types of harm alleged in the arbitral proceedings do not directly concern Mercuria, rather than J&S Energy. To the extent that this is the case, it would be even more obvious that the cases were not identical.

b) The cause of action on which each proceeding is based must also be identical. The investor must be faced with a real choice of forum, in that both proceedings must guarantee comparable protection. This would only be the case if the sole question to be resolved in these arbitral proceedings concerned the imposition of the fine and its justification.

Pursuant to Article 26 of the ECT, disputes "*which concern an alleged breach of an obligation of* [a Contracting Party] *under Part III* " must indeed be submitted to either domestic authorities or another authority (commercial arbitral tribunal) in order to bar the access to the ECT arbitral tribunal. In other words, the claim which is submitted must permit the domestic authorities or commercial arbitral tribunal, directly or indirectly, to rule on the alleged violations of the ECT. Admitting the contrary would deprive the investor of the protection guaranteed by the ECT and would encourage it systematically to renounce all domestic remedies in order to secure its rights and to privilege the ECT as the source of all remedies. This could not reasonably be the aim.

IV The objection arising from the Claimant's failure to establish a *prima facie* case

1. The issue

97. The next jurisdictional question is that of the Claimant's failure to establish a *prima facie* case. In that regard, the Respondent raises the following objection (Resp. 31.07.09, no.1):

"The Claimant has failed to establish a prima facie *case."*

Following the Respondent's objection, the Claimant's request is as follows (Claim. 31.08.09, no. 136):

"Reject the Respondent's Jurisdictional Objections of May 19, 2009 and July 31, 2009 in whole;"

The Arbitral Tribunal will therefore examine whether the Claimant has failed to establish a *prima facie* case.

2. The position of the Parties

2.1 The Position of the Respondent

98. The Respondent states:

"*The Claimant's entire claim is founded, and contingent, upon the purported wrongful imposition of a fine upon its subsidiary, J&S Energy.*

[…] *J&S Energy has successfully had the fine overturned in the Administrative Court. The Minister and J&S Energy have appealed that decision to the Supreme Administrative Court, but the decision is pending.*" (Resp. 19.05.09, no. 4.1-4.4).

99. Relying on international case-law, the Respondent argues that the Arbitral Tribunal is not required, for the purposes of considering a jurisdictional challenge, to accept the Claimant's incorrect characterization of the imposition of the fine as permanent. The Arbitral Tribunal should instead "*find that* [the factual premise on which the Claimant's claim is advanced] *has not yet become certain and therefore decline jurisdiction on the grounds that, as a logical consequence of the absence of the cause of the alleged legal injury, the Claimant has failed to make out a* prima facie *claim of breach of the ECT.*" (Resp. 19.05.09, no. 4.5-4.20).

2.2 The Position of the Claimant

100. According to the Claimant, a *prima facie* case exists where a tribunal, assuming that the facts as alleged by the claimant in relation to the merits are true, finds that the claimant has established the legal basis of its claim (Claim. 30.06.09, no. 152). The Claimant argues that as it does not allege that the fine is permanent, the legal authorities quoted by the Respondent are irrelevant (Claim. 30.06.09, no. 149 - 153). Finally, in contrast to what the Respondent alleges, the harm caused to the Claimant by the Respondent's acts is not uncertain. Even if the amount of the fine were ultimately reimbursed, the Claimant would have suffered losses arising from the cost of its financing, the fact that J&S Energy's value was wiped out, and the impact on the Claimant's broader business (Claim. 30.06.09, no. 161-170).

3. The decision of the Arbitral Tribunal

101. As a preliminary remark, the Arbitral Tribunal stresses that the Respondent's argument that the Claimant has not established a *prima facie* case is closely related to its argument that the Tribunal lacks jurisdiction because of the proceedings pending before the Polish Supreme Administrative Court.

102. An arbitral tribunal has jurisdiction if the alleged facts, if found eventually to be true, could constitute a violation of the Treaty. In the case at hand, the Claimant contends that the Polish government's approach, measures and decisions taken in respect of J&S Energy constitute breaches of the guarantee of fair and equitable treatment as well as expropriation. To date, nothing in the file suggests that the facts as alleged by the Claimant could not be true, or that, if true, those facts could not constitute a violation of the ECT.

103. Plainly, the quantification of any damages would be dependent upon the outcome of the Polish proceedings, but the possibility of arguing that the acts and omissions of the Polish authorities, of which the imposition of the fine is one (very important) component, give rise to a finding of liability under the ECT is not dependent upon the outcome of those proceedings.

104. The Respondent's objection in connection with the *prima facie* condition must therefore be dismissed.

V. The Respondent's Request for suspension of the procedure

1. The issue

105. If the Arbitral Tribunal rules that it has jurisdiction, the Respondent requests a suspension of the procedure.

In that regard, the Respondent requests the following (Resp. 31.07.09, p. 3) :

" 2. In the event that the Tribunal finds that it does have jurisdiction in this case, the arbitration should be suspended in the exercise of the Tribunal's general case management powers on the grounds that :

6. The claim is not "ripe"; or

7. lis pendens."

The Claimant seeks the following prayer for relief (Claim. 31.08.09, no. 136):

"*Reject the Respondent's Jurisdictional Objections of May 19, 2009 and July 31, 2009 in whole;"*

2. The position of the Parties

2.1 <u>The position of the Respondent</u>

106. According to the Respondent, the Claimant's case is not yet " ripe", because the determination of any loss suffered by the Claimant is dependent on the outcome of the decision relating to the fine, currently under review by the Polish Supreme Administrative Court. Without a decision from the Supreme Administrative Court, the Claimant is unable to point to any factually established loss (Resp. 31.07.09, section 6).

Furthermore, relating to the issue of case management, cost effectiveness and efficient dispute resolution, the Respondent alleges that if the Claimant recovers the fine in the domestic proceedings, almost half of its claim made in this arbitration will fall away (Resp. 31.07.09, section 7).

2.2 <u>The position of the Claimant</u>

107. The Claimant contends that it has detailed in its Statement of Claim facts that constitute ECT breaches (Claim. 31.08.09, no. 126). According to the Claimant, in the event that the Polish Supreme Administrative Court confirms the decision of the Warsaw Regional Administrative Court and in the event that the fine is reimbursed, the loss suffered by

the Claimant may be reduced. However, the loss suffered by the Claimant is not the same as that suffered by J&S Energy (Claim. 31.08.09, no. 128).

As regards the *lis pendens*, the Claimant asserts that the parties to the Polish Administrative Court proceedings are not the same as the Parties to the present dispute, and the two actions are different, such that the principle of *lis pendens* is not applicable (Claim. 31.08.09, no. 131).

3. The decision of the Arbitral Tribunal

108. a) It is within the power of the Arbitral Tribunal to suspend the procedure, not only upon the request of all concerned Parties, but also if one Party claims it. In the latter case, the Party must submit a reasoned request that would justify the suspension. In the case at hand, the Respondent argues that a suspension of the procedure would be justified until the Polish Supreme Court has ruled on the question of the fine imposed on J&S Energy.

b) The Arbitral Tribunal refers to its reasoning above (see no. 94 et seq.). As long as the two procedures are independent from each other and do not overlap, there is no reason to suspend the present proceeding pending the decision of the Polish Supreme Administrative Court. Nothing precludes the Arbitral Tribunal from integrating the outcome of the domestic proceedings in its investigations in the present procedure.

c) This decision can also be justified on the basis of the planned timetable. At the hearing on September 21, 2009, the Respondent's Counsel informed the Arbitral Tribunal about the forthcoming hearing scheduled on October 13, 2009 with respect to the domestic procedure before the Polish Supreme Administrative Court (21 September 2009 Transcript, p. 101: 15 and p. 102: 4-13). According to **the experience of the Respondent's Counsel**, that Court would then be expected to render its judgment some weeks after the said hearing. Depending on the content of that judgment, several scenarios are possible, but it is certain that the positions will be clarified and that it will be possible in this arbitral proceeding to have an exchange of briefs that will include facts related to the outcome of proceedings before the Court.

d) This being said, it is true that there is an economic link between the two procedures. If the fine imposed on J&S Energy is repaid to it, partially or wholly, with or without interest, it will manifestly influence the Claimant's prayers for relief in the present proceeding. In that case, it is obvious that the Claimant must, in due course, clarify its position in order to prevent double recovery.

Therefore, the Arbitral Tribunal dismisses the Respondent's request for suspension.

VI. The allocation of costs

1. The issue

109. The Claimant has requested the Arbitral Tribunal to award costs against the other Party:

"The Claimant also requests that the Arbitral Tribunal order the Respondent to pay the costs incurred by the Claimant in connection with the Respondent's Jurisdictional Objections, including but not limited to the arbitrators' and the SCC's fees and

expenses, where applicable, and all legal costs incurred by the Claimant, plus interest." (Claim. 31.08.09, no. 137).

2. The decision of the Arbitral Tribunal

110. The Arbitral Tribunal is of the opinion that the question of costs should be reserved until the Final Award, because only at that moment will it be possible and appropriate to assess the proper amount and allocation of costs.

111. Consequently, the Arbitral Tribunal defers the question on the allocation of costs for this jurisdictional phase to the Final Award.

C. Award

112. For the foregoing reasons, the Arbitral Tribunal unanimously decides the following:

1. The Respondent's jurisdictional objections against the Claimant's prayers for relief are dismissed.

2. The Arbitral Tribunal dismisses the Respondent's request for a suspension of the procedure.

3. The Arbitral Tribunal reserves the question of all costs and their allocation to the Final Award.

4. The Arbitral Tribunal will decide on the next steps of the proceeding in a Procedural Order.

Place of Arbitration: Stockholm
Date: December 17, 2009

For the Arbitral Tribunal:

Pierre Tercier, Chairman

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Albert Jan van den Berg, Arbitrator

Vaughan Lowe, QC, Arbitrator