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**OF THE STOCKHOLM CHAMBER OF COMMERCE**

Box 16050, 103 21 Stockholm, Sweden
Phone: +46 8 555 100 50, Fax: +46 8 566 316 50
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# Final Award

**22 December 2011**

The seat of the arbitration is Stockholm, Sweden

**Arbitration V (096/2008)**

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|---|---|
| **Claimant :** | **Mercuria Energy Group Limited,** 2 Gr. Afxentiou Ave, Akamia Center, Office 401, 6023 Larnaca, Cyprus |
| **Claimant's counsel:** | Mr. Philippe Pinsolle, Ms. Yas Banifatemi, SHEARMAN & STERLING LLP, 114, Av. des Champs Elysées, 75008 Paris, France, tel: +33 1 53 89 70 00, fax: + 33 1 53 89 70 70, email: ppinsolle@shearman.com, ybanifatemi@shearman.com |
| **Respondent:** | **Minister of Economy**, Ministry of Economy, Plac Trzech Krzyzy 3/5 00-507 Warsaw, **Poland**<br><br>Mr. Robert Zajdler, State Treasury Solicitors' Office, Hoza 76/76 Street, 00-682 Warsaw, Poland, tel. +48 22 392 32 60, fax: +48 22 392 31 20, email: robert.zajdler@prokuratoria.gov.pl |
| **Respondent's counsel:** | Mr. Audley Sheppard, CLIFFORD CHANCE LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ, United Kingdom, tel: + 44 20 7 006 8723, fax: + 44 20 7 006 5555, email: Audley.Sheppard@cliffordchance.com; and<br><br>Mr. Bartosz Kruzewski, CLIFFORD CHANCE JANICKA, NAMIOTKIEWICZ, DEBOWSKI I WSPÓLNICY SP.K., 19 Lwowska Street, 00-660 Warsaw, Poland, tel.: + 48 22 627 11 77, fax: + 48 22 627 14 66, email: Bartosz.Kruzewski@cliffordchance.com |
| **Arbitral Tribunal:** | Professor Pierre Tercier (Chairman), 5, ch. Guillaume Ritter, CH-1700 Fribourg, Switzerland<br><br>Professor Albert Jan van den Berg (Arbitrator), Hanotiau & van |

den Berg, IT Tower, 9th floor, 480 Avenue Louise, B.9, B-1050 Brussels, Belgium

Professor Vaughan Lowe, QC (Arbitrator), Essex Court Chambers, 24 Lincoln's Inn Fields, London, WC2A 3EG, United Kingdom

**Table of Abbreviations**

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|---|---|
| 2001 Act | Act of 6 September 2001 on Amendment of the Act on State Reserves and Obligatory Fuel Stocks |
| 2005 Act | Act of 1 July 2005 on the Change of the Act on State Reserves and Obligatory Fuels Reserves |
| Annex C-[…] | Claimant's annexes |
| Annex CA-[…] | Claimant's legal authorities |
| Annex R-[…] | Respondent's annexes |
| Annex RA-[…] | Respondent's legal authorities |
| ABW | Polish internal security agency |
| ARM | Material Reserves Agency |
| Claimant | Mercuria Energy Group Limited |
| Company | J&S Energy SA |
| C-PHB | Claimant's Post-Hearing Brief of 15 April 2011 |
| C-R-PHB | Claimant's Reply to the Respondent's Post-Hearing Brief of 29 April 2011 |
| Directive | Directive 2006/67/EC imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products |
| ECT | Energy Charter Treaty |
| EFI | Exemption from increasing mandatory stocks |
| First Financial Penalty | Decision of the President of Material Reserves Agency No BOA-0250-2c/07 on imposing a fine |
| IEA | International Energy Agency |
| IPO | Initial public offering |
| J&SE | J&S Energy SA |
| J&S Group Limited | Mercuria Energy Group Limited (2005-2007) |
| J&S Holding Limited | Mercuria Energy Group Limited (until 2005) |
| JSSI | J&S Services and Investment Ltd |
| Mercuria | Mercuria Energy Group Limited |
| MRA | Act of 16 February 2007 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 |
| Mt | Metric tonnes |
| Naftobazy | Naftobazy Sp. z o.o. |

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|---|---|
| NRA | Law of 30 May 1996 on State Reserves |
| OECD | Organization for Economic Co-operation and Development |
| OLPP | Operator Logistyczny Paliw Plynnych Sp. Z o.o. |
| PERN | Przedsiebiorstwo Eksploatacji Rurociagow Naftowych "Przyjazn" S.A. |
| PO No. [...] | Procedural Order No. |
| PKN Orlen | Polski Koncern Naftowy Orlen S.A. |
| PLN | Polish Zloty |
| R-PHB | Respondent's Post-Hearing Brief of 15 April 2011 |
| R-R-PHB | Respondent's Reply to the Claimant's Post-Hearing Brief of 29 April 2011 |
| SCC | Arbitration Institute of the Stockholm Chamber of Commerce |
| SCC Arbitration Rules | Arbitration Rules of the Arbitration Institute adopted by the Stockholm Chamber of Commerce and in force as of 1 January 2007 |
| Second Financial Penalty | Decision of the President of Material Reserves Agency No. BPR-0250-2c/08 on imposing a fine |
| Shell Polska | Shell Polska Sp. Z o.o. |
| SoC | Claimant's Statement of Claim of 3 April 2009 |
| SoD | Respondent's Statement of Defence of 24 May 2010 |
| SoRj | Respondent's Rejoinder of 20 December 2010 |
| SoRy | Claimant's Reply of 11 October 2010 |
| Transcript | Transcript of the evidentiary hearing from 31 January to 10 February 2011 |
| USD | United States dollars |

## Table of Contents

## I. THE PARTIES

1. The Claimant, Mercuria Energy Group Limited ("Mercuria" or "Claimant"), is a company incorporated since 2004 under the laws of Cyprus.

2. Before changing its name to Mercuria Energy Group Limited, Claimant was called J&S Group Limited and, prior to that, J&S Holding Limited.

3. The Respondent is the Republic of Poland ("Poland" or "Respondent"). Its Head of State is its President, Mr. Bronisław Komorowski.

4. This Award deals with the alleged violation by Poland of Mercuria's rights under the Energy Charter Treaty ("ECT") in relation to Mercuria's investment in J&S Energy SA ("J&SE" or "the Company"), a company organised and existing under the laws of Poland.

## II. THE TRIBUNAL

5. Claimant nominated Professor Albert Jan van den Berg as arbitrator on 24 July 2008. On 21 August 2008, Respondent nominated Professor Vaughan Lowe QC as arbitrator.

6. On 12 September 2008, the Board of the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC") appointed Professor Pierre Tercier as Chairman of the Arbitral Tribunal (the "Tribunal").

7. The Tribunal has been constituted as follows:

Professor Albert Jan van den Berg
(nominated by Claimant)
Hanotiau & van den Berg
IT Tower, 9th Floor
Avenue Louise 480 – B9
1050 Brussels
Belgium

Professor Vaughan Lowe QC
(nominated by Respondent)

Essex Court Chambers
24 Lincoln's Inn Fields
London WC2A 3EG
United Kingdom

Professor Pierre Tercier
(Chairman)
5, ch. Guillaume Ritter
CH-1700
Fribourg
Switzerland

## III. PROCEDURE

8. On 24 July 2008, Claimant filed a Request for Arbitration before the SCC pursuant to Article 4 of the Arbitration Rules of the SCC adopted by the Stockholm Chamber of Commerce and in force as of 1 January 2007 ("SCC Arbitration Rules").

9. By sending its Request to the SCC, Claimant chose to initiate an arbitral proceeding under the SCC Arbitration Rules.[1]

10. In its Request, Claimant sought interim measures. It also nominated as arbitrator Professor Albert Jan van den Berg, who accepted the nomination.

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

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

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

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[1] ECT, Article 26(4)(c).

14. On 9 September 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 was to be paid by the Parties in equal shares. According to Article 20(2) of the SCC Arbitration Rules, hearings need not take place at the seat of arbitration, and in this case the hearings took place in Brussels.

15. On 12 September 2008, the SCC informed the Parties that its Board had appointed Professor Pierre Tercier as Chairman of the Tribunal.

16. On 24 September 2008, the case was referred to the Arbitral Tribunal by the SCC.

17. On the same day, Respondent responded by letter to the Claimant's request for interim measures.

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

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

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

21. On 10 November 2008, Respondent filed its Response to Claimant's Addendum to Request for Interim Measures.

22. On 3 December 2008, a preliminary hearing was held in Brussels with the Parties to decide on various procedural matters and on the request for interim measures.

23. On 10 December 2008, Respondent confirmed that it had no intention of withdrawing two of J&SE'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."

24. On 23 December 2008, the Tribunal issued Procedural Order No. 1, and issued two provisional timetables (Plan A and Plan B).

25. On the same day, Claimant, in reliance on Respondent's undertaking, withdrew its Request for Interim Measures.

26. On 5 January 2009, the Tribunal issued Procedural Order No. 2, whereby it took note of Respondent's undertaking and Claimant's withdrawal of its Request for Interim Measures.

27. On 3 April 2009, the Claimant filed its Statement of Claim (or "SoC") together with the following Witness Statements and Expert Reports:

- Witness Statement of Marco Dunand;
- Witness Statement of Daniel Jaeggi;
- Witness Statement of Jarek Astramowicz;
- Witness Statement of Grzegorz Zambrzycki;
- Expert Report of Navigant Consulting, Inc. (Brent C. Kaczmarek);
- Expert Report of Jan Brouwer;

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

29. On 19 May 2009, Respondent submitted its Jurisdictional Objections and its Request for Document Production.

30. On 25 June 2009, as a result of Respondent's aforementioned Request for Document Production and Claimant's Answer thereto of 15 June 2009, the Tribunal ruled on Respondent's Request for Document Production in Procedural Order No. 3.

31. On 21 September 2009, after two exchanges of Briefs on the Respondent's Jurisdictional Objections, the Tribunal held a Hearing on Jurisdiction with the Parties in Brussels. The Tribunal heard the oral submissions by the Counsel of the two Parties. No new request was submitted. The transcript of the hearing was not contested.

32. On 24 December 2009, the Tribunal issued its Award on Jurisdiction, in which it dismissed the Respondent's jurisdictional objections and reserved the question of costs until the Final Award.

33. On 22 January 2010, the Parties submitted to the Tribunal their joint proposal for a new Provisional Timetable.

34. On 18 February 2010, the Tribunal issued Procedural Order No. 4, in which it denied Respondent's request for bifurcation and accepted the Procedural Timetable proposed by the Parties.

35. On 30 March 2010, Claimant advised by letter that ARM had, on 26 February 2010, discontinued the administrative proceedings against J&SE in which ARM had sought re-imposition of the financial penalty. In light of this, Claimant amended its Request for Relief.

36. On 24 May 2010, Respondent filed its Statement of Defence (or "SoD") together with the following Witness Statements and Expert Reports:

- Witness Statement of Wiesław Górski;
- Witness Statement of Mirosław Gutowski;
- Witness Statement of Miłosz Karpiński;
- Witness Statement of Maciej Woźniak;
- Witness Statement of Waldemar Pawlak;
- Expert Report of Colin Birch and John McVay of Purvin & Gertz;
- Expert Report of Carlos Lapuerta and Richard Caldwell of The Brattle Group.

37. On 31 August 2010, pursuant to the Parties' Document Production Requests of 19 July 2010, and to an exchange of a number of letters between the Parties, the Tribunal issued Procedural Order No. 5 by which it ruled on the aforementioned Requests.

38. On 11 October 2010, Claimant submitted its Reply (or "SoRy"), as well as the following witness statements and expert reports:

- Expert Reply Report of Brent Kaczmarek;
- Rebuttal Report of Jan Brouwer;
- Second Witness Statement of Marco Dunant;
- Second Witness Statement of Grzegorz Zambrzycki.

39. Claimant further amended its Prayer for Relief in its Reply, changing some of the amounts claimed and removing its request for a declaration that Respondent had breached Article 13(1) of the ECT.[2]

40. On 20 December 2010, Respondent submitted its Rejoinder (or "SoRj") together with the following Witness Statements and Expert Reports:

- Second Witness Statement of Wiesław Górski;
- Second Witness Statement of Mirosław Gutowski;
- Second Witness Statement of Miłosz Karpiński;
- Second Witness Statement of Maciej Woźniak;
- Second Report of Colin Birch and John McVay of Purvin & Gertz;
- Second Report of Carlos Lapuerta and Richard Caldwell of The Brattle Group.

41. On 27 January 2011, Respondent informed the Tribunal that Mr. Górski would be unable, due to illness, to travel to Brussels to testify, but that he could give evidence via videoconference.

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[2] SoRy, ¶ 808.

42. By letter of 28 January 2011, Claimant objected to an examination of Mr. Górski by videoconference, proposing instead that the Tribunal travel to Poland to take his evidence or, alternatively, that he not testify and that the Tribunal consider his written statements as his evidence.

43. From 31 January to 10 February 2011, evidentiary hearings took place in Brussels (the "Hearing"). As a preliminary question, the Tribunal heard the Parties' positions on the examination of Mr. Górski.[3] After deliberation, the Tribunal decided that Mr. Górski would testify via videoconference from Poland and be examined and cross-examined by Counsel in Brussels, provided that Respondent would make the logistical arrangements and arrange medical assistance during Mr. Górski's testimony.[4] Claimant made a reservation of its rights with respect to that decision,[5] which reservation was withdrawn after the examination of Mr. Górski.[6]

44. The following witnesses and experts were heard:

- Jarek Astramowicz (President of the Management Board of J&SE since May 2009);
- Grzegorz Zambrzycki (President and General Director of J&SE from 1 January 2001 to the end of January 2009);
- Daniel Jaeggi (Vice-president of Mercuria Energy Group Holding);
- Marco Dunand (CEO and co-founder of Mercuria Energy Trading);
- Brent Kaczmarek (Expert Witness: Navigant);
- Carlos Lapuerta and Richard Caldwell (Expert Witnesses: The Brattle Group);

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3 Transcript, 11/11–20/9.

4 Transcript, 122/1–25.

5 Transcript, 123/8–10.

6 Transcript, 1437/18–22.

- Miłosz Karpiński (Head of Unit of Fuel, Oil and International Energy Agency Unit, Ministry of Economy);
- Wiesław Górski (by videoconference) (Director of the Intervention Reserves and Stocks Bureau of ARM);
- Mirosław Gutowski (manager of the Services Sales Department of OLPP 2005–2008; Director of the Sales Office of OLPP since 2008);
- Maciej Woźniak (from 2006 to 2008 Director of the Crude Oil and Gas Department at the Ministry of Economy and from 2008 to December 2010 adviser to the Polish Prime Minister on energy security);
- Waldemar Pawlak (since 2007 Minister of Economy and Vice Prime Minister of Poland);
- Jan Brouwer (Expert Witness: Downstream BV);
- John McVay (Expert Witness: Purvin & Gertz).

45. Having examined the witnesses and experts, Counsel made closing statements. Thereafter, the Parties agreed on submission of Post-Hearing Briefs.[7] In response to the Chairman's question, the Parties confirmed that they did not have any procedural requests, criticisms or objections.[8]

46. On 14 and 21 February 2011, Claimant and Respondent respectively submitted written copies of their closing statements.

47. On 17 February 2011, the Tribunal issued Procedural Order No. 6 in which it noted the agreement of the Parties regarding the transcript, the Post-Hearing Briefs, the Submissions on Costs and the closing of the present proceedings.

48. On 15 April 2011, the Parties submitted their Post-Hearing Briefs ("C-PHB" for Claimant and "R-PHB" for Respondent).

49. On 29 April 2011, each Party submitted its Reply to the other Party's Post-Hearing Brief ("C-R-PHB" for Claimant and "R-R-PHB" for Respondent).

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7 Transcript, 2082/12–2083/23.

8 Transcript, 2076/21–2077/3.

50. On 16 May 2011, the Parties filed their Submissions on Costs ("C-CS" for Claimant and "R-CS" for Respondent).

51. On 23 May 2011, each Party replied to the other Party's Submission on Costs ("C-R-CS" for Claimant and "R-R-CS" for Respondent").

52. On 1 July 2011, by letter to the Parties, the Chairman of the Tribunal declared the proceedings closed pursuant to Article 34 of the SCC Arbitration Rules.

53. The SCC has extended the time-limit for rendering the Final Award on the following dates:

- On 30 April 2010 until 30 June 2011;
- On 23 June 2011 until 30 September 2011;
- On 5 September 2011 until 31 October 2011;
- On 21 October 2011 until 30 November 2011; and
- On 29 November 2011 until 31 December 2011.

## IV. FACTUAL BACKGROUND

54. The Factual Background is divided into two subsections. Subsection A deals with J&SE and its changing obligations over time under Poland's mandatory reserves legislation, as well as its interactions with Poland's Mandatory Reserves Authority ("ARM") and the Minister of Economy. Subsection B addresses J&SE's negotiations with Operator Logistyczny Paliw Plynnych Sp. z o.o ("OLPP"), Polski Koncern Naftowy Orlen S.A. ("PKN Orlen"), and Przedsiebiorstwo Eksploatacji Rurociagow Naftowych "Przyjazn" S.A. ("PERN") in its attempts to constitute its mandatory reserves as required by Polish legislation.

A. J&SE and Poland's Mandatory Reserves Legislation

*a) Events Prior to First EFI Application*

55. In 1993, Messrs. Jankilevitsch and Smolokowski founded J&S Services and Investment Ltd ("JSSI"), a wholly-owned subsidiary of Claimant, which is a company incorporated in Cyprus with its address at: Nicolaides Sea View City, Arch. Makarios III & Kalogreon Corner 4, D1, 4th floor, P.O. Box: 40917, 6016 Larnaca. According to Claimant, much of JSSI's business consists in trading with Polish refineries, to which JSSI delivers crude oil at the Polish border with Belarus.[9]

56. In 1995, J&SE, also a wholly-owned subsidiary of Claimant, was incorporated in Poland with address at: Piekna St. 18, 00-549 Warsaw, Poland.

57. In July 1996, J&SE became a joint-stock company.[10]

58. On 30 May 1996, Poland enacted its Law of 30 May 1996 on State Reserves (the "NRA"),[11] which introduced an obligation to establish reserves of raw materials, materials, fuels, machinery, equipment, agricultural products, food products and half-finished food products, medicinal products and medical devices as well as other devices required to realise the goals of the state's defence and security policy.[12]

59. The obligation to create and maintain fuel reserves was directed to entities producing or importing more than 200,000 tons of liquid fuels,[13] which did not include J&SE.[14] This Act also established the Material Reserves Agency

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9 SoC, ¶ 106.

10 Annex C-393.

11 Annex CA-52.

12 Annex CA-52, Art. 2(1).

13 SoD, ¶ 25; Annex C-234, section 3.1, footnote omitted.

14 SoD, ¶ 28; Annex C-234, section 3.1, footnote omitted.

("ARM"), whose function was, *inter alia*, to manage and maintain Poland's national reserves.[15]

60. On 22 November 1996, Poland deposited its instrument of ratification in order to become a member of the Organization for Economic Co-operation and Development ("OECD"), a pre-requisite for membership of the International Energy Agency ("IEA").[16]

61. On 12 February 2001, according to Respondent, J&SE was granted a licence to store liquid fuels, which was valid until 25 February 2012.[17]

62. On 6 September 2001, Poland adopted the Act of 6 September 2001 on Amendment of the Act on State Reserves and Obligatory Fuel Stocks (the "2001 Act").[18] This amending Act, applicable from 1 January 2002, implemented a general requirement on producers and importers to create and maintain stocks. As of 1 January 2002, they were required to accumulate and maintain compulsory stocks of liquid fuels in the amount corresponding to at least a seven-day average of production or import.[19] The 2001 Act also provided that companies should increase their mandatory stocks by the end of 2008, in accordance with a regulation to be adopted on the basis of the Act.[20]

63. On 14 June 2002, pursuant to the 2001 Act, Regulation no. 756 of the Minister of Economy on the Schedule for Accumulating Liquid Fuels was adopted in order to determine a specific schedule for accumulating the compulsory fuel reserves for companies required to maintain stocks under the previous version of the law.[21]

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15 Annex CA-52, Article 10.

16 SoD, ¶ 23.

17 SoD, ¶ 100.

18 Annex CA-53.

19 Annex CA-53, Art. 2(3).

20 Annex CA-53, Art. 2(3).

21 Annex CA-54, referred to at SoD, ¶ 30.

64. On the same day, the following regulations were adopted:

- Ordinance no. 757 of the Minister of Economy concerning the Register of Producers and Importers that are Required to Create and Maintain Mandatory Stocks of Liquid Fuels, setting out the requirements for keeping a register of the producers and importers that were at that time required to create and maintain mandatory stocks of liquid fuels;[22]
- Ordinance no. 758 of the Minister of Economy Concerning the Detailed List of Liquid Fuels Subject to Mandatory Stocking, providing for the identification of fuels with Polish nomenclature and classification;[23]
- Ordinance no. 759 of the Minister of Economy concerning the Detailed Method of Determining Quantities of, and Creating, Mandatory Stocks of Liquid Fuels held by Producers and Importers and Detailed Rules for, and the Method of, Emergency Utilization of the Stocks, setting forth, *inter alia*, that a company is required to create and maintain as stocks a quantity of liquid fuels representing at least seven days of its average production and/or imports less exports, sufficient to ensure that at the end of 2008 the quantity of stocks represents 76 days of its average production and/or imports less exports.[24]

65. On 10 February 2004, J&S Holding Limited was incorporated in Cyprus as a limited liability company.[25]

66. On 1 May 2004, the Respondent became a member of the EU.

67. In 2005, J&S Holding Limited changed its name to J&S Group Limited.[26]

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22 Annex CA-55.

23 Annex CA-56.

24 Annex CA-57.

25 Annex C-32.

26 Annex C-33.

68. On 1 July 2005, the Act of 1 July 2005 on the Change of the Act on State Reserves and Obligatory Fuels Reserves (the "2005 Act") was adopted.[27] According to this Act, which amended the NRA, all companies that had previously been obliged to maintain obligatory liquid fuel reserves in the amount equivalent to a seven-day average or production or imports would subsequently have to increase those stocks annually, in an amount to be specified in a forthcoming regulation.[28]

69. On 3 October 2005, J&SE sought permission from the Minister of Economy to maintain some of its mandatory reserves in another EU member state.[29]

70. On 2 November 2005, the Minister of Economy refused J&SE's request on the ground that Poland had not concluded the necessary bilateral agreements.[30]

71. On 19 December 2005, the Regulation of the Minister of Economy no. 2240 concerning the transitional schedule for accumulation of mandatory stocks was adopted.[31]

72. On 23 December 2005, Ordinance no. 2219 of the Minister of Economy Concerning the Detailed List of Liquid Fuels Subject to Mandatory Stocking was adopted. It identifies the fuels by nomenclature and classification (Annex CA-60).

73. On 11 January 2006, Ordinance no. 50 of the Minister of Economy Concerning the Register of Producers and Importers that are Required to Create and Maintain Mandatory Stocks of Liquid Fuels was adopted (Annex CA-61).

74. On 8 February 2006, officers from the Polish internal security agency ("ABW") undertook an inspection of J&SE's Warsaw offices.[32] According to Claimant,

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27 Annex CA-58.

28 Annex CA-58 , Article 2.

29 Annex C-124.

30 Annex C-125.

31 SoC, ¶ 188; Annex CA-59.

the purpose of this inspection was to collect documentation relating to ABW's then on-going investigations against a person who was, according to Claimant, unrelated to J&SE.[33]

75. On 12 May 2006, Regulation no. 642 of the Minister of Economy on the Detailed Manner of Establishing and Determining the Amounts of Obligatory Liquid Fuels Reserves was adopted.[34] Paragraph 6(1) of this Regulation specifies that producers and suppliers shall increase their reserves in accordance with the schedule contained in the Regulation adopted on 19 December 2005. Paragraph 10(2) sets out the time limit of 30 September 2006 for the establishment of mandatory reserves in accordance with paragraph 6(1).[35]

76. On 24 July 2006, the European Union Council adopted Directive 2006/67/EC imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products (the "Directive"),[36] which codified Council Directive 68/414/EEC of 20 December 1968.[37] 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".[38]

*b) J&SE's First EFI Application*

77. On 11 September 2006, J&SE applied to the Minister of Economy for an extension of the deadline (an "Exemption from Increasing" or "EFI") expiring on 30 September 2006 for increasing mandatory reserves to 66 days average

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32 Witness Statement of Jarek Astramowicz, ¶ 27.

33 First Witness Statement of Grzegorz Zambrzycki, ¶¶ 18–19.

34 Annex CA-62.

35 Annex CA-62.

36 Annex C-6.

37 SoC, ¶ 184.

38 SoC, ¶ 184, referring to Annex C-6.

internal daily consumption;[39] it sought an extension until 31 December 2007[40] (the "First EFI Application").

78. On 29 September 2006, the Minister of Economy refused J&SE's First EFI Application on the ground that J&SE had applied for an EFI for a period longer than the maximum of one year and for "formal defects".[41]

79. On 10 October 2006, J&SE applied to the Minister of Economy for a re-hearing of its First EFI Application and amended its application to ask for an EFI for a period of one year only, until 30 September 2007.[42]

80. On 3 November 2006, J&SE expanded on its application by letter.[43]

81. On 23 November 2006, by Decision no. 42/10/2006, the Minister of Economy revoked his decision of 29 September 2006 and denied the amended application for an EFI.[44]

*c) J&SE's Second EFI Application*

82. On 12 December 2006, J&SE filed another application for an EFI, this time seeking to extend the quarterly deadline of 31 December 2006 to 31 March 2007[45] (the "Second EFI Application").

83. On 31 December 2006, J&SE had not increased its reserves to the level stipulated in the legislation.[46]

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39 Evidence of Grzegorz Zambrzycki, Transcript 238/21–22.

40 SoC, ¶ 295, referring to Annex C-138.

41 Decision No. 39/09/2006, Annex C-140.

42 Annex C-141.

43 Annex C-143.

44 Annex C-144.

45 Annex C-145; SoC, ¶ 311.

46 SoC, ¶ 311; SoD, ¶ 42.

84. On 11 January 2007, J&S Group Limited (formerly J&S Holding Limited) changed its name to Mercuria Energy Group Limited.[47]

85. On 11 January 2007, by Decision no. 3/01/2007 the Minister of Economy denied J&SE's 12 December 2006 application for an EFI.[48]

86. On 22 January 2007, J&SE filed an application to the Minister of Economy for re-hearing of its application of 12 December 2006.[49]

87. On 16 February 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")[50] was adopted. The MRA replaced the provisions of the NRA relating to mandatory stocks of liquid fuels.[51]

88. Pursuant to the MRA, the failure to comply with the duty to create and maintain the obligatory reserve of 76 days average daily import or production of fuel by 31 December 2008 would entail a fine of 250% of the value of the shortfall.[52]

89. On 22 February 2007, by Decision no. 4/02/2007, the Minister of Economy denied J&SE's 22 January 2007 application for rehearing of the Second EFI Application.[53]

90. On 26 February 2007, OLPP wrote to the Minister regarding OLPP's provision of storage to J&SE.[54]

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47 Annex C-34.

48 Annex C-149.

49 Annex C-151.

50 Annex C-9; Annex RA-115.

51 Annex C-9; Annex RA-115.

52 Annex C-9; Annex RA-115, Articles 5(2), 63(2).

53 Annex C-154.

54 Annex R-22.

91. On 27 March 2007, J&SE filed an appeal against the Minister's decision of 22 February 2007 with the Warsaw Administrative Court.[55] J&SE withdrew its appeal on 13 July 2007.[56]

92. On 24 April 2007, the following regulations were adopted under the MRA:

- Regulation no. 546 of the Minister of Economy of 24 April 2007 on a Detailed List of Petroleum Resources and Products Covered by the System of Emergency Stocks;[57]
- Order no. 547 of the Minister of Economy of 24 April 2007 on Detailed Manner of Creating and Maintaining Mandatory Petroleum or Fuels Reserves, and Determining their Amounts;[58]
- Regulation no. 548 of the Minister of Economy of 24 April 2007 on the Register of Producers and Traders Obliged to Accumulate and Maintain Compulsory Stocks of Crude Oil and Fuels;[59]
- Regulation no. 549 of the Minister of Economy of 24 April 2007 on the Detailed Manner of Decreasing the Amount of Mandatory Petroleum and Fuel Reserves.[60]

*d) Prosecution of J&SE*

93. On 31 May 2007, ARM wrote to J&SE noting a shortfall in J&SE's first quarter mandatory reserves, based on material filed with ARM by J&SE, and calling on J&SE to increase its mandatory reserves within 30 days, failing which proceedings would be issued for the imposition of a fine.[61]

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55 SoC, ¶ 320, referring to Annex C-159.

56 Annex C-164.

57 Annex CA-64.

58 Annex CA-65.

59 Annex CA-66.

60 Annex CA-67.

61 SoC, ¶ 369, referring to Annex C-160.

94. On 8 June 2007, J&SE requested a meeting with ARM to present its "current situation as regards mandatory reserves".[62]

95. On 14 June 2007, Wiesław Górski of ARM met with J&SE.[63]

96. On 13 July 2007, J&SE discontinued its appeal (see ¶ 91 above) to the Warsaw Administrative Court.[64]

97. Between 31 July 2007 and 2 August 2007, ARM carried out an *ad hoc* audit in order to assess the volume of J&SE's mandatory reserves as at 30 June 2007.[65] According to the subsequent report, the auditors found that J&SE's deficit was as follows:

- diesel oil : 132,546.487 $m^3$;
- unleaded petrol : 28,702.648 $m^3$.[66]

98. On 20 August 2007, these figures were confirmed in a Post-Audit Statement.[67] The Post-Audit Statement gave J&SE until 11 September 2007 to rectify the shortfall.[68]

99. On 11 September 2007, J&SE informed ARM by letter about increases to its mandatory reserves of fuels since 30 June 2007 and about on-going negotiations between J&SE and PERN, PKN Orlen and OLPP.[69]

100. On 17 September 2007, ARM issued a Notice of Administrative Proceedings to J&SE, informing it that proceedings had been instituted for the purposes of

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62 Annex C-161; SoC, ¶ 369.

63 Górski Transcript, 1405/4.

64 SoC, Annex C-164.

65 SoC, ¶¶ 374–375.

66 Annex C-166, pages 3–4.

67 Annex C-167.

68 SoC, ¶ 378; Annex C-167, page 2.

69 Annex C-169.

imposing a financial penalty under Article 63(1) of the MRA.[70] The Notice invited J&SE to file "[a]ny motions or comments" within fourteen days. It also stated that the dossier was available for review at ARM.[71]

101. On 3 October 2007, J&SE filed a Motion asking ARM for 21 additional days to supplement the evidentiary record.[72]

102. On 9 October 2007, J&SE wrote to the Minister of Economy, stating that PERN was in fact holding 100,000 Mt of crude oil for J&SE but that PERN was refusing to give written confirmation of that fact.[73]

103. On 10 October 2007, ARM denied J&SE's request for 21 additional days to supplement the evidentiary record and instead granted J&SE until 15 October 2007.[74]

104. On 15 October 2007, J&SE filed its Pleading in the Case of Imposing a Financial Penalty, in which, *inter alia*, it requested discontinuance of the proceedings for imposing a financial penalty, and also sought a further period of 21 days to submit additional evidence.[75]

*e) Imposition of the First Financial Penalty*

105. On 16 October 2007, the Decision of the President of Material Reserves Agency No BOA-0250-2c/07 on imposing a fine was issued by the President of ARM (the "First Financial Penalty").[76] It imposed on J&SE a fine of PLN

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70 Annex C-171; SoC, ¶ 380.

71 Annex C-171.

72 Annex C-174.

73 SoC, ¶ 429, referring to Annex C-176.

74 Annex C-177.

75 SoC, ¶¶ 431–434, referring to Annex C-179.

76 Annex C-11.

461,695,807.24, equivalent at the time to "in excess of US$ 200 million"[77] for failure to comply with its mandatory reserves obligations.

106. On 30 October 2007, J&SE filed an appeal with the Minister of Economy against the decision imposing the First Financial Penalty.[78]

107. On 27 November 2007, the Chairman of ARM provided an opinion to the Minister of Economy concerning J&SE's appeal.[79]

108. On 13 December 2007, a "legal advisory team appointed by ARM" provided an opinion on J&SE's appeal.[80]

109. On 14 December 2007, by "Decision no. 13/12/2007", the Minister of Economy, Mr. Pawlak, reversed the President of ARM's decision imposing the First Financial Penalty.[81]

110. ARM did not appeal the Minister's decision.[82]

111. By 31 December 2007, J&SE had achieved the appropriate levels of mandatory stocks.[83]

112. In 2008, Poland joined the IEA.

*f) Proceedings for Imposition of the Second Financial Penalty*

113. On 5 February 2008, ARM sent to J&SE a Notice of the Commencement of Administrative Proceedings with respect to re-imposition of a fine on J&SE.[84]

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77 SoC, ¶ 435.

78 Annex C-186.

79 Annex C-189; SoC, ¶ 458.

80 SoC, ¶ 463; Annex C-191.

81 Annex C-12.

82 SoC, ¶ 468.

83 SoC, ¶ 477; SoD, ¶¶ 75 and 151; Annex R-8; Annex R-89.

84 SoC, ¶ 496; Annex C-196.

J&SE was granted fourteen days to file any motions or comments,[85] which deadline was subsequently extended to 22 February 2008.[86]

114. On 14 February 2008, Mr. Pawlak appeared before a meeting of the *Sejm* Economic Committee to explain why he had reversed the decision imposing the First Financial Penalty.[87]

115. On 15 February 2008, J&SE filed a Motion in the Proceedings with ARM, seeking to have the proceedings discontinued on the ground that they had been invalidly commenced.[88]

116. On 22 February 2008, J&SE requested that ARM consider evidence from the proceedings ended by the decision of 14 December 2007, and proposed that ARM consider additional evidence, including witness evidence.[89]

117. On 7 March 2008, J&SE wrote to ARM requesting, *inter alia*, that ARM: recommend a location for storage; recognize stored oil in PERN's tanks as mandatory reserves of J&SE; and give J&SE a permit to increase reserves in diesel oil instead of petrol.[90]

*g) Imposition of the Second Financial Penalty*

118. On 3 April 2008, the Decision of the President of the Material Reserves Agency No. BPR-0250-2C/08 on Imposing a Fine was issued by ARM (the "Second Financial Penalty"). It imposed on J&SE a fine of PLN 461,695,807.26 for

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85 Annex C-196.

86 SoC, ¶ 496; Annex C-197.

87 SoC, ¶ 477; Annex C-22.

88 SoC, ¶ 499; Annex C-200.

89 SoC, ¶ 500; Annex C-202.

90 SoC, ¶ 503; Annex C-209.

failing to meet its obligations to create and maintain mandatory reserves as at 11 September 2007.[91]

119. On 17 April 2008 J&SE submitted an appeal against the decision imposing the Second Financial Penalty to the Minister of Economy.[92]

120. On 13 May 2008, the Minister of Economy requested that ARM provide explanations in connection with J&SE's claims.[93]

121. On 20 May 2008 ARM sent the requested explanations.[94]

122. On 5 June 2008, Decision No. 23/06/08 was issued by the Minister of Economy, reversing the appealed decision of ARM only as to the part concerning the amount of the fine imposed on J&SE, and imposing a lesser fine of PLN 452,045,537.36.[95] The Second Financial Penalty as amended was based on a calculation taking into consideration an average selling price of petrol and diesel oil charged by J&SE on 2 August 2007.[96]

123. On 23 June 2008, J&SE lodged an appeal with the Warsaw Administrative Court against the Minister of Economy's decision of 5 June 2008.[97]

*h) Execution of the Second Financial Penalty*

124. On 23 June 2008, a "Reminder" was issued by ARM to J&SE demanding full payment of the Second Financial Penalty as amended by the Minister of Economy "within seven days from the date of delivery of this reminder".[98] On

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91 SoC, ¶ 505; Annex C-13.

92 SoC, ¶ 522; Annex C-214.

93 SoC, ¶ 525; Annex C-216.

94 SoC, ¶ 525; Annex C-220.

95 SoC, ¶ 534; Annex C-14.

96 Annex C-14.

97 SoC, ¶ 551; Annex C-227.

98 SoC, ¶ 552; Annex C-15.

the same day, J&SE wrote to ARM stating that the Second Financial Penalty was not due, given that the decision imposing it was still subject to appeal.[99]

125. Also on 23 June 2008, Mercuria wrote to the Prime Minister of Poland requesting that he suspend payment of the Second Financial Penalty pending J&SE's appeal and Mercuria's forthcoming arbitration proceedings.[100] On the same day, J&SE wrote to the Minister of Economy seeking suspension of the execution of the Minister's 5 June 2008 decision.[101]

126. On 25 June 2008, J&SE wrote to the Minister of Economy requesting a hearing concerning the aforementioned application for suspension of the execution of the 5 June 2008 decision.[102]

127. On 25 June 2008, Jozef Aleszczyk, President of ARM, was dismissed by the Prime Minister.[103]

128. On 30 June 2008, J&SE paid the Second Financial Penalty.[104] Mercuria transferred to J&SE the sum of US$ 212.9 million to enable it to pay the Second Financial Penalty.[105]

*i) Later Events*

129. On 21 July 2008, according to Claimant, J&SE cancelled its plans for a 2008 IPO offering on the Warsaw stock exchange.[106]

130. On 23 December 2008, the Warsaw Administrative Court quashed the appealed decision of the Minister of Economy of 5 June 2008.[107]

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99 SoC, ¶ 553; Annex C-226.

100 SoC, ¶ 554; Annex C-19.

101 C-PHB, ¶ 155; Annex R-105.

102 SoC, ¶ 555; Annex C-228.

103 SoC, ¶ 65; Annex C-430.

104 SoC, ¶ 577.

105 SoC, ¶ 574; Annex C-371.

106 SoC, ¶ 831; Annex C-431.

131. On 26 March 2009, both the Minister of Economy and J&SE appealed the judgment of the Warsaw Administrative Court to the Polish Supreme Administrative Court.[108]

132. On 20 October 2009, the Supreme Administrative Court dismissed both appeals.[109] As a result, the ruling of the Warsaw Administrative Court entered into force.

133. Subsequent to the judgment of the Supreme Administrative Court, ARM reinstated proceedings against J&SE.[110]

134. On 26 February 2010, by Decision No. B0-025-2C/10, ARM discontinued the administrative proceedings on imposing a financial penalty on J&SE due to the expiration of a limitation period.[111]

B. J&SE's Negotiations with OLPP, PKN Orlen, PERN and Grupa Lotos

*a) OLPP*

135. In July 2006, J&SE and OLPP were negotiating a ticketing agreement that, according to Claimant "would have permitted J&S Energy to fulfil the entirety of its mandatory reserves obligations for the foreseeable future".[112]

136. On 18 August 2006, OLPP withdrew from negotiations for the ticketing agreement.[113]

137. On 7 September 2006, OLPP confirmed by letter to J&SE that it would not offer ticketing facilities to J&SE.[114]

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107 Annex C-236.

108 Annex R-6; Annex R-7.

109 SoD, ¶ 308; Annex R-11.

110 SoD, ¶ 311; Annex R-16

111 SoD, ¶ 311; Annex R-16.

112 C-PHB, ¶ 43, footnotes omitted.

113 C-PHB, ¶ 45.

138. Between 24 and 28 November 2006, J&SE and OLPP exchanged emails regarding OLPP's available storage capacity.[115] The Parties disagree about the significance of this exchange of emails (see ¶¶ 350 to 356 below).

139. On 26 February 2007, OLPP wrote to the Ministry of Economy, informing the Ministry that it intended to meet a request from J&SE for diesel storage "by assigning for this purpose the capacities acquired in 2007 under construction of new capacities covered by the OLPP investment plan for that year".[116] The Parties disagree as to the meaning of OLPP's 26 February 2007 letter (see ¶¶ 342 to 356 below).

*b) PERN*

140. In December 2006, J&SE contacted PERN, seeking its agreement to transport oil to the Solino salt caverns.[117] Negotiations concerning such agreement continued from April to August 2007 but did not result in the signature of such agreement.[118]

141. In August 2007, PERN, having physically received from J&SE 50,000 Mt of crude oil pumped in August 2007 and 100,000 Mt of crude oil pumped in September 2007, declined to confirm to ARM that it held the 100,000 Mt of crude oil reserves for J&SE.[119]

142. PERN signed the storage contract in respect of the 100,000 Mt of crude oil, referred to in ¶ 141 above, on 22 October 2007.[120]

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114 C-PHB, ¶ 45, referring to Annex R-100.

115 C-PHB, ¶ 56, referring to Annex R-153.

116 Annex R-22, quoted at C-PHB, ¶ 64.

117 SoC, ¶ 309.

118 See, e.g., SoC, ¶¶ 336-351.

119 C-PHB, ¶ 87, referring to SoC, ¶¶ 412–418.

120 C-PHB, ¶ 87, referring to SoC, ¶¶ 419–423; SoRy, ¶ 109.

*c) PKN Orlen*

143. On 2 April 2007, PKN Orlen and J&SE entered into a crude oil storage agreement regarding storage in the IKS Solino salt caverns.[121]

144. In April 2007, J&SE commenced negotiations with PKN Orlen for a separate processing agreement.[122]

145. Claimant submits that on 10 August 2007, J&SE attempted to pump crude oil into the Solino salt caverns.[123] On 16 August 2007 PKN Orlen refused to accept the crude oil.[124]

146. Claimant states that in September 2007, PKN Orlen informed J&SE that it would only enter a processing annex with J&SE "if JSSI – J&S Energy's crude oil trading sister company – amended its long term supply contract with PKN Orlen, to PKN Orlen's clear commercial advantage".[125]

147. On 30 October 2007, PKN Orlen having failed to produce an executed processing annex, Mr. Zambrzycki and Mr. Astramowicz of J&SE travelled to PKN Orlen's headquarters "with powers of attorney expressly authorizing [Mr. Astramowicz] to amend the JSSI long-term supply agreement".[126]

148. Claimant states that PKN Orlen officials "intimated that [the annex] had been signed", but that after waiting many hours for the conclusion of a PKN Orlen Board Meeting on 30 October 2007, the representatives of J&SE "were informed by senior PKN Orlen officials who had been present at the Management Board meeting that Mr. Kownacki – PKN Orlen's CEO and PiS appointee to the Management Board – had received a phone call, following

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121 C-PHB, ¶ 94, referring to SoC, ¶¶ 321–325; SoRy, Section I.B.2.

122 C-PHB, ¶ 97.

123 C-PHB, ¶ 94.

124 C-PHB, ¶ 94, referring to SoC, ¶¶ 351–354, 391.

125 C-PHB, ¶ 98, referring to SoC, ¶¶ 398–403.

126 C-PHB, ¶ 99.

which he announced, to the surprise of many PKN Orlen Management Board members, that PKN Orlen would not be handing over the processing Annex".[127]

*d) Grupa Lotos*

149. On 11 October 2007, J&SE wrote to Grupa Lotos seeking a storage and processing contract for 150,000 $m^3$ of crude oil.[128]

150. On 16 October 2007, Grupa Lotos informed J&SE that it would not enter into a storage and processing contract with J&SE, stating, *inter alia*, that it did not have any processing capacity available.[129]

## V. SUMMARY OF PARTIES' POSITIONS AND RELIEF SOUGHT

151. Claimant alleges that Respondent's conduct toward Claimant's investment, J&SE, has caused Claimant to suffer significant losses. Claimant alleges that Respondent's conduct violates the obligations in Article 10(1) of the ECT: to accord Claimant's investment fair and equitable treatment; not to impair Claimant's investment by unreasonable measures; not to impair Claimant's investment by discriminatory measures; and to accord Claimant's investment the most constant protection and security.

152. In the Statement of Claim, Claimant alleged that Respondent had violated the obligation in Article 13 of the ECT not to expropriate Claimant's investment. This allegation was subsequently removed from Claimant's pleadings and is not pursued.[130]

153. The most recent version of Claimant's Prayer for Relief appears in its Post-Hearing Brief:

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127 C-PHB, ¶ 99, referring to SoC, ¶¶ 453–454; SoRy, ¶ 98; to evidence of Claimant's witnesses and to written evidence submitted by Respondent.

128 Annex C-238; SoC, ¶ 389.

129 Annex C-239; SoC, ¶ 389.

130 Reply, ¶ 473.

For all the reasons set forth in the present Post-hearing Brief and in the Statements of Claim and Reply, the Claimant respectfully requests the Arbitral Tribunal to:

(1) declare that the Respondent has breached Article 10(1) ECT; and

(2) order the Respondent to pay to the Claimant:

a. compensation in the amount of not less than US$ 53,889,425 in respect of harm related to the capital transfer; and

b. compensation in the amount of not less than US$ 166,341,793 in respect of loss of J&S Energy value; and

c. compensation in the amount of not less than US$ 33,284,256 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 on the above sums at the rate of Mercuria's ROIC, constituting US$ 134,329,565 to December 31, 2010, or alternatively at the Polish Government's dollar borrowing rate, constituting US$ 39,705,867 to December 31, 2010; and

g. such further amounts of interest as may accrue until the date of the Award; and

(3) order the Respondent to pay post-award interest at the rate of LIBOR plus 2%; and

(4) 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

(5) order any such further relief as it may deem appropriate.[131]

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[131] C-PHB, ¶ 358.

154. Respondent denies that it has breached its obligations in either Article 10(1) or Article 13 of the ECT.

155. The most recent version of Respondent's Prayer for Relief appears in its Post-Hearing Brief, in which Respondent sought the following:

> (a) a declaration that [Poland] has not breached Article 10(1) of the ECT, more specifically that [Poland] has not:
>
> (i) impaired Mercuria's investment through discriminatory or unreasonable measures by:
>
> (A) refusing to grant exemptions; or
>
> (B) by imposing a financial penalty on JSE;
>
> (ii) breached the obligation to accord Mercuria's investment fair and equitable treatment, more specifically by:
>
> (A) orchestrating a campaign of harassment against Mercuria's Investment;
>
> (B) refusing to grant Mercuria's Investment exemptions from its obligation to comply with mandatory provisions of Polish law;
>
> (C) imposing a financial penalty on Mercuria's Investment;
>
> (D) executing the financial penalty imposed on Mercuria's Investment;
>
> (E) not following due process in the imposition [and execution] of the financial penalty on Mercuria's Investment; or
>
> (iii) breached the obligation to accord Mercuria's Investment the most constant protection and security; and
>
> (b) a declaration that Poland has not breached Article 13(1) of the ECT, more specifically the obligation not to expropriate Mercuria's Investment;
>
> (c) a declaration that Poland is not obliged to pay Mercuria compensation in respect of any of the alleged breaches of the ECT or any associated interest;
>
> (d) an order that Mercuria should pay the entire costs of the arbitration, including, but not limited to, all legal costs and

> disbursements, all other professional fees, the fees and expenses of the Tribunal any other costs associated with hearings in these proceedings, plus interest; and
>
> (e) an order of any such further relief as it may deem appropriate.[132]

## VI. INTRODUCTION TO THE TRIBUNAL'S ANALYSIS AND APPLICABLE LAW

### A. Energy Charter Treaty

156. The dispute resolution clause pursuant to which Claimant commenced these proceedings appears at Article 26 of the ECT, which relevantly provides:

> (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 can not 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
>
> (c) in accordance with the following paragraphs of this Article.
>
> (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).

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[132] R-PHB, ¶ 603.

> (ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.
>
> (c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).
>
> (4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:
>
> …
>
> (c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.
>
> …
>
> (6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.
>
> ….[133]

157. Claimant originally alleged that it had been injured by violations of Articles 10(1) and 13 of the ECT.[134] Article 10(1), and Article 13, so far as is material, read as follows:

> 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

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133 Annex C-1.

134 SoC, ¶¶ 210, 603–736.

> 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[135]
>
> (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.[136]

158. These provisions stipulate the standard of treatment that Contracting Parties are obliged to accord to investments. The stipulations concern the conduct of the State. Violations of the obligations must arise from conduct that is imputable to the State and is incompatible with the stipulated standards of treatment. Violations do not arise from the mere fact that an investor has sustained a loss in respect of its investment. The ECT is a guarantee against treatment incompatible with the treaty standards: it is not a guarantee against all investment losses.

159. The terms in which the standards of treatment are set out in Articles 10(1) and 13(1) are familiar in international law, and they appear in hundreds of bilateral investment treaties. Nothing in the ECT, or the Final Act of the European Energy Charter Conference at which it was adopted, indicates any intention to

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[135] The Tribunal notes that Claimant does not pursue its claim under Article 13 of the ECT.

[136] Annex C-1.

give these familiar terms a meaning that is different from that which they have generally in international law. Nothing indicates that they are intended to establish standards that would render unlawful the reasonable pursuit in good faith of fair and equitable government policies in conformity with national and international law.

160. The Tribunal considers that investment protection regimes aim to ensure that investors can go about their lawful business without fear of arbitrary, discriminatory, or unfair, inequitable or unreasonable interference from the host State; but the regime aims equally to ensure that governments may go about the business of governing fairly in accordance with the law without fear of incurring liability under the ECT.

161. Claimant explicitly stated that it did not claim that Polish law was itself in breach of the ECT.[137] The question in this case is therefore whether Respondent, exercising its powers under Polish law, acted in a manner that (i) violated the obligations under Article 10(1), and (ii) thereby caused injury to Claimant. The Tribunal notes that Claimant does not pursue its claim for breach of Article 13(1) of the ECT.[138]

B. Provisions of Polish Law on Mandatory Reserves

162. In 1996, the NRA was passed into law, introducing an obligation on entities who produced or imported more than 200,000 tonnes of liquid fuels per year to maintain mandatory stocks of such fuels, calculated for each entity on the basis of its average daily production or importation.[139]

163. In 2001, the Act of September 6, 2001 on Amendment of the Act on State Reserves and Obligatory Fuel Stocks (the "2001 Act") extended the obligation

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137 Transcript, 1991/9–19.

138 Reply, ¶ 473.

139 See ¶¶ 58-59 above; SoC, ¶ 183; SoD, ¶ 25; Annex C-234, ¶ 3.1, referring to Article 15(1) of the NRA, which does not appear in the consolidated version of the NRA as produced as Annex CA-52.

to maintain mandatory stocks to all importers and producers.[140] The 2001 Act entered into force on 1 January 2002.[141]

164. The 2001 Act and associated regulations required ARM to hold 14 days' worth of mandatory stocks, and required all producers and importers to hold 76 days' worth of mandatory stocks by the end of 2008.[142]

165. Producers and importers who had been required by the original NRA to maintain mandatory stocks were required to increase their stocks on a quarterly basis in order to reach the levels imposed by the 2001 Act.[143]

166. By contrast, producers and importers who had not been obliged by the original NRA to hold mandatory stocks (such as J&SE) would have to hold only 7 days' worth of stocks prior to the end of 2008. At that time, however, they too would be required to hold the full 76 days' worth of mandatory stocks.[144]

167. The relevant provisions of the NRA were amended again in 2005 by the Act of 1 July 2005 on the Change of the Act on State Reserves and Obligatory Fuels Reserves (the "2005 Act").[145] The 2005 Act amended the NRA by, *inter alia*, making all importers and producers subject to the requirement of increasing their mandatory stocks on a quarterly basis.[146]

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[140] Annex CA-53, Article 1, referring to Article 16(1) of the NRA; SoD, ¶ 29; SoC, ¶ 185; Annex C-234, ¶ 3.1.

[141] See ¶ 62 above; Annex CA-53, Article 4; SoD, ¶ 29.

[142] See ¶¶ 62-64 above; Annex CA-53, Article 1, referring to Article 15(1) of the NRA; SoC, ¶ 185; SoD, ¶ 29; Annex C-234, ¶ 3.1.

[143] Annex CA-54; SoC, ¶ 185; SoD, ¶ 30.

[144] Annex CA-53, Article 2(3); SoC, ¶ 186; SoD, ¶ 31.

[145] Annex CA-58; SoC, ¶ 188; SoD, ¶ 33.

[146] SoC, ¶ 189; Annex CA-58, Article 1, referring to Article 15(5) of the NRA; Annex CA-59; SoD, ¶ 33.

168. J&SE's obligation to make quarterly increases began on 30 September 2006, pursuant to paragraph 10(2) of the Ordinance of the Minister of the Economy of 12 May 2006.[147]

169. The NRA, as amended, allowed the Minister of Economy to grant temporary exemptions from the obligation to increase mandatory stocks in certain circumstances ("Exemptions from Increasing" or "EFIs"). Article 16(6) provided:

> In especially justified cases, the minister in charge of the economy, at the request of the entrepreneur, may permit, based on a decision, for temporary not increasing the obligatory liquid fuel reserves, whereas the period cannot be longer than a year.[148]

170. In 2007, the NRA was replaced by the Mandatory Reserves Act of 16 February 2007 (the "MRA"), which entered into force on 7 April 2007.[149] New regulations regarding the calculation of reserves were made on 24 April 2007.[150]

171. The MRA introduced a new fixed penalty for failure "to comply with the duty to create and maintain the obligatory reserves discussed in Article 5 (…) within the required time and to the required amount", such penalty being fixed by law at 250% of the value of the shortfall.[151]

172. Article 71(4) of the MRA included targets for mandatory reserves, as had the NRA: 66 days' worth of the previous year's imports on 1 July 2007; 73 days' worth of the previous year's imports on 31 December 2007, and 76 days' worth

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147 Annex CA-62; Annex C-234, ¶ 3.1; SoC, ¶ 189; SoD, ¶ 33.

148 Annex CA-58.

149 Annex C-9; SoC, ¶ 191; SoD, ¶ 51; Annex C-234, ¶ 3.1.

150 SoC, ¶ 192; Annex C-234, ¶ 3.1.

151 Annex C-9, Article 63(1); Annex C-234, ¶ 3.1; SoC, ¶ 194.

of the previous year's imports on 31 December 2008.[152] To these amounts were to be added an additional 10% to account for transportation and other losses.[153]

173. As did its predecessor, the NRA, the MRA authorizes the Minister of Economy to grant EFIs.[154] Under the MRA, however, a regulation was made specifying the occurrences that would satisfy the requirement of "particularly well-founded circumstances".[155] Section 12 of the Regulation of the Minister of Economy of 24 April 2007 on Detailed Manner of Creating and Maintaining Mandatory Petroleum or Fuels Reserves and Determining their Amounts, provides:

> The producer and trader obliged to create reserves may apply to the Minister for the Economy for the permission for temporary not increasing the reserves, in case of the occurrence of:
>
> 1) the producer's installation breakdown making processing of petroleum impossible for a period not shorter than 10 days;
>
> 2) random events or other unpredictable circumstances making meeting the obligation impossible;
>
> 3) shortages of petroleum and fuels on the world oil market, making meeting the obligation of creating reserves impossible.[156]

174. The Tribunal notes that while the English translation of Article 16(6) of the NRA refers to "especially justified cases"[157] and the English translation of Article 5(7) of the MRA refers to "particularly well-founded circumstances",[158] the Polish text is identical.[159]

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152 Annex C-9, Article 71(3)–(4), referred to at SoC, ¶ 195.

153 Annex C-9, Article 3(4).

154 Annex C-9, Article 5(7).

155 Annex C-9, Article 5(7); Regulation of the Minister of Economy of 24 April 2007 on Detailed Manner of Creating and Maintaining Mandatory Petroleum or Fuels Reserves, and Determining their Amounts, Annex CA-65, § 12.

156 Annex CA-65, § 12.

157 Annex CA-58, Article 16(6).

158 Annex C-9, Article 5(7).

159 In each case, "W szczególnie uzasadnionych przypadkach".

175. Entities covered by the provisions of the MRA may engage other entities to store fuels for them.[160]

176. A regulation made under the MRA provides that an entity required to hold stocks of petroleum products may hold up to 55% of them as crude oil.[161] However, if the entity is an importer the crude oil stocks must be the subject of a processing contract, and that processing contract must be approved by ARM.[162]

177. The MRA makes provision for entities to store up to 5% of their mandatory stocks in EU states outside Poland[163], but at all relevant times Poland did not have a bilateral agreement with any other EU state enabling this to occur.[164]

C. The Structure of the Award

178. On the basis of the Parties' submissions and arguments, the Tribunal's analysis is structured as follows:

- Five preliminary points:

  - the fact that Claimant does not allege that Polish law per se violates the ECT (see below, Section VII.A);

  - the relevance of alleged political and media campaigns against J&SE and JSSI (see below, Section VII.B)

  - the relevance of third party conduct to Claimant's case against Respondent (see below, Section VII.C);

  - storage capacity in Poland (see below, Section VII.D); and

  - burden of proof (see below, Section VII.E);

- A detailed analysis of each alleged ECT breach:

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160 Annex C-9, Articles 10–11; SoC, ¶ 197; SoD, ¶ 56.

161 Annex CA-65; Article 7(1)(1)(a); SoC, ¶ 198; SoD, ¶ 58.

162 Annex C-9, Article 11(3)–(4), (7); SoC, ¶ 199; SoD, ¶ 58.

163 Annex C-9, Article 9(3); SoC, ¶ 200.

164 SoC, ¶ 200; SoD, ¶ 59.

- failure to accord fair and equitable treatment (see below, Section VIII);

- impairment by unreasonable (see below, Section IX) and discriminatory measures (see below, Section X); and

- failure to accord full protection and security (see below, Section XI);

- Conclusion;[165]

- Costs;[166] and

- The Tribunal's decisions.[167]

179. The Tribunal shall now proceed to evaluate the Parties' submissions. In its analysis below, the Tribunal has not only considered the positions of the Parties as summarized in this Award, but also their numerous detailed arguments in their written memorials and made at the Hearing. To the extent that these arguments are not referred to expressly, they must be deemed to be subsumed in the analysis. The Tribunal's decisions are based on the entire record in this case.

## VII. PRELIMINARY ISSUES

### A. No Allegation that Polish Law Violates ECT

180. Claimant states that it does not allege that Polish mandatory reserves law violates the ECT.[168]

181. However, Claimant's position is not as clear as it might at first seem.

182. Claimant submits that at all time Respondent (acting through ARM or the Minister of Economy) had discretion as to how it would apply Polish mandatory

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165 Section XII.

166 Section XIII.

167 Section XIV.

168 Transcript, 1991/9-19.

reserves law. For example, Claimant states that Respondent had "full discretion in relation to the initiation of proceedings and implementation of penalties".[169]

183. Claimant states that if Claimant is wrong about the existence of discretion, and if the law does "prescribe (…) strict liability" as Respondent submits, then the law would itself be "manifestly unfair" and Poland could not justify its actions in reliance on that law, in accordance with principles of state responsibility.[170] Claimant refers in this regard to the sections of its Reply dealing with the initiation of proceedings and the imposition of penalties.[171]

184. This specific point was not pursued by either Party in later pleadings.

185. However, it emerged again during the Hearing, in the context of Claimant's allegations that some of the provisions of Poland's mandatory reserves law, including the fine set at the value of 250% of the mandatory reserves shortfall, are disproportionate.[172]

186. Counsel for Claimant submitted:

> It does not mean that this law has no relevance for you and this was the question, it has relevance as a fact, as the backdrop, as the factual matrix against which you will assess the behaviour of the Polish Government because it is now established that all parties, including the Government, was [sic] aware of the disproportionate effect of that law and it is, I would say, in view of this that you will have to assess that against us but again our claim is the treatment to which we were subjected.[173]

187. Thus, it appears to be Claimant's position that there is discretion under Poland's mandatory reserves law, but that if the Tribunal finds that there is no such discretion, then Claimant alleges in the alternative that Poland's mandatory reserves law itself breaches the ECT at least because of the disproportionate

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169 SoRy, ¶ 532.

170 SoRy, ¶ 532.

171 SoRy, ¶ 532, referring to SoRy, Sections I.C and III.A.

172 Transcript, 1991/12–15.

173 Transcript, 1991/24–1992/9.

nature of the fine imposed for a shortfall. This matter is addressed in the context of Claimant's allegations of breach of the fair and equitable treatment obligation at ¶¶ 440, 500 and 536 below.

B. Alleged Political and Media Campaigns against J&SE and JSSI

188. Claimant alleges that political and media campaigns against J&SE and its sister company, JSSI, "paved the way for [ECT] breaches by providing Polish office holders and the executives of State-controlled companies with the motive and opportunity to curry favour with their political superiors."[174]

189. Claimant specifically acknowledges in its Reply that it "does not claim that these political and media campaigns themselves constitute breaches of the ECT."[175]

190. Rather, Claimant alleges that the alleged political and media campaigns, together with the "antagonism of Polish businessmen and State officials",[176] "set the scene for a non-stop raft of inspections, the ABW raid in February 2006, and, ultimately, the unfair imposition of two financial penalties."[177]

191. The Tribunal understands from the submissions referred to in ¶¶ 188-190 above that Claimant does not contend that its allegations regarding political and media campaigns could, if proven, establish that other conduct of Respondent was in breach of Article 10(1) of the ECT in the event that such latter conduct would not otherwise have constituted a breach of Article 10(1).

192. Accordingly, the Tribunal has taken note of Claimant's allegations of fact concerning political and media campaigns against J&SE and JSSI,[178] and of

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174 SoRy, ¶ 437.

175 SoRy, ¶ 437.

176 SoRy, ¶ 436.

177 SoRy, ¶ 436.

178 See, e.g.: SoC, Section III.A; SoRy, Section VI.

Respondent's responses to those allegations,[179] only as forming part of the factual background to Claimant's allegations of breach of the ECT.

C. Relevance of Third Party Conduct

193. Claimant submits that Respondent should have taken into account the conduct of third parties when making decisions whether to grant EFIs, commence proceedings and impose financial penalties.[180]

194. Claimant does not allege that any relevant acts of third parties—specifically, OLPP, Grupa Lotos, PERN and PKN Orlen—are attributable to Respondent under international law,[181] although Claimant does submit that at all relevant times Respondent controlled the management of those companies.[182]

195. Claimant argues that it was impossible for J&SE to obtain storage without the co-operation of OLPP, PERN and PKN Orlen because those companies dominated Poland's market for storage, and that those companies did not co-operate with J&SE.[183]

196. Respondent submits that the conduct of third parties could be relevant, if at all, only at the stage of applying for an EFI, and not at later stages of the administrative process.[184]

197. Further, Respondent submits that Claimant has not shown how, in the absence of an attribution claim, ownership and control of third parties is relevant to its case.[185]

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179 See, e.g.: SoD, Section VII; SoRj, Section II.I.

180 See, e.g., C-PHB, ¶¶ 2–3; SoC, ¶¶ 660, 668,680.

181 SoRy, ¶ 463.

182 C-PHB, ¶¶ 37–40.

183 C-PHB, ¶¶ 32–33.

184 SoRj, ¶ 376.

185 SoRj, ¶ 265.

198. Respondent submits that it did not exert management control over OLPP, PERN, PKN Orlen or Grupa Lotos, and that any such exertion of operational control would have been contrary to Polish law.[186] Respondent further submits that "[t]he fact that individual company officers may have had political connections does not imply State control over such entities".[187]

199. It is evident from paragraphs 193 to 195 above, and from Claimant's pleadings as a whole, that Claimant's allegations regarding third party conduct are wide-ranging and inextricably linked with its arguments about the availability of storage for mandatory stocks in Poland over the relevant period.

200. The Tribunal finds that although Claimant's factual allegations regarding third party conduct are broad, the manner in which the Tribunal must take Claimant's allegations into account is more circumscribed. As Claimant has not alleged that the acts of OLPP, Grupa Lotos, PERN or PKN Orlen are attributable to Respondent, those acts can only be relevant, if at all, to the extent that Claimant alleges that knowledge of them should have influenced Respondent's conduct at a particular point in time.

201. The exception to the position stated in ¶ 200 relates to Claimant's allegation that Respondent directly participated in PKN Orlen's decision not to provide a signed processing Annex to J&SE in October 2007. This allegation, that "[t]he only possible conclusion [from the circumstances] is that the Respondent interfered in this aspect of J&S Energy's negotiations with PKN Orlen, such that the Annex was withheld from J&S Energy",[188] is addressed in ¶ 475 below.

202. Accordingly, the allegations regarding third party conduct are considered as they arise in the context of Claimant's specific allegations of wrongful conduct on the part of Respondent in breach of the Article 10(1) ECT obligation to accord fair and equitable treatment (see Section VIII below).

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186 R-R-PHB, ¶ 19, referring to SoD, Section VIII.

187 R-R-PHB, ¶ 19.

188 SoRy, ¶ 99.

D. Storage Capacity in Poland

203. The Parties disagree about the existence of storage capacity in Poland during the period 2006 - 2008.

204. Claimant alleges, in the context of J&SE's EFI applications and the decisions taken to prosecute J&SE in September 2007 and February 2008 that there was "at all material times (…) a deficit of storage space in the Republic of Poland".[189]

205. This factual allegation is related to the allegations regarding third party conduct referred to above, in that Claimant alleges that "full compliance with the MRA's mandatory reserves obligations [was] unrealistic without the cooperation of State-controlled companies" due to the alleged storage deficit.[190]

206. Because Claimant does not allege that a deficit of storage capacity in Poland itself constitutes a breach of the ECT, the relevance of any shortage arises only where Claimant alleges that the knowledge of such shortage should have influenced Respondent's conduct at a particular point in time.

207. Accordingly, Claimant's allegations regarding storage capacity are considered as they arise in the context of Claimant's specific allegations of wrongful conduct on the part of Respondent in breach of the Article 10(1) ECT obligations to accord fair and equitable treatment and not to discriminate.

208. For this reason, while the Tribunal has had regard to the written and in-person evidence of the expert witnesses for both Parties, it will be seen in Sections VIII and X below that in the context of Claimant's specific allegations of breach it has not been necessary to refer to that evidence.

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189 SoC, ¶ 659; see also SoC, ¶ 668.

190 SoC, ¶ 668; see also SoC, ¶ 659.

E. Burden of Proof

209. The Tribunal observes that this case was commenced by Claimant under the SCC Arbitration Rules, and is governed by those Rules.[191] The SCC Arbitration Rules in force when this arbitration was commenced were the Arbitration Rules 2007. They contain no provision as to burden of proof.

210. Also applicable to this arbitration is the Swedish Arbitration Act 1999, by virtue of Section 46 of that Act, and that Act, too, contains no provision dealing with burden of proof.

211. The Tribunal, accordingly, applies the principle, which is well-established, that the party who alleges a violation of international law giving rise to State responsibility (in this case, violation of the ECT) bears the burden of proving its allegation.[192]

## VIII. FAIR AND EQUITABLE TREATMENT

A. Introduction

212. This section deals with Claimant's allegation that Respondent's treatment of J&SE breached the obligation in Article 10(1) of the ECT to "accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment". "Fair and equitable treatment" is not defined in the ECT.

213. Subsection B briefly sets out the relevant submissions of the Parties, as argued in their pleadings and at the Hearing.

214. Subsection C contains the Tribunal's analysis of Mercuria's claims.

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[191] Procedural Order No. 1, ¶ 1.1.

[192] See Bin Cheng, *General Principles of Law applied by International Courts and Tribunals*, at page 302 et seq (1987).

B. The Parties' Submissions

*a) Claimant*

215. As discussed below (see ¶¶ 225 to 227), Claimant alleges that Respondent's conduct toward J&SE taken as a whole from February 2006 onwards breached the fair and equitable treatment obligation in Article 10(1) of the ECT.

216. Claimant also alleges that specific elements of Respondent's conduct breached the obligation, namely: (i) the alleged harassment of J&SE; (ii) the rejection of J&SE's First EFI Application; (iii) the rejection of J&SE's Second EFI Application; (iv) the decisions to prosecute J&SE which led to imposition of the First and Second Financial Penalties; (v) the imposition of the First Financial Penalty; (vi) the imposition of the Second Financial Penalty; and (vii) the execution of the Second Financial Penalty.

217. Claimant states that the meaning of fair and equitable treatment, "depend[s] on the specific circumstances of the case at hand".[193] Claimant goes on to state that it is a "standard encompassing such fundamental standards as good faith, due process, non discrimination, and proportionality".[194]

*b) Respondent*

218. Respondent denies that its conduct toward J&SE from February 2006 onwards, taken as a whole, breached the fair and equitable treatment obligation in Article 10(1) of the ECT.

219. Further, it denies Claimant's allegations that specific elements of its conduct breached that obligation.

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[193] SoC, ¶ 638, quoting Professor Schreuer, CA-72, page 64.

[194] SoC, ¶ 638, quoting expert opinion of Judge Schwebel in *MTD Equity Sdn. Bhd. And MTD Chile S.A. v Republic of Chile*, ICSID, Case No. ARB/01/7, Award, May 25, 2004, Annex CA-22, ¶ 109.

220. In addition, Respondent argues that to the extent that any of its conduct could in isolation be considered a breach of the obligation to accord Claimant fair and equitable treatment, that conduct was made good through its provision of a court system that allowed Claimant, through J&SE, to litigate its grievances.

221. Respondent describes the fair and equitable treatment standard as "general and imprecise", but notes that writers and Tribunals have attempted to identify specific principles included within the standard.[195] Respondent cites Professors Dolzer and Schreuer as having identified the following: transparency, stability and protection of the investor's legitimate expectations; compliance with contractual obligations; procedural propriety and due process; good faith; and freedom from coercion and harassment.[196]

C. The Tribunal's Analysis

222. The Tribunal notes that the Parties made extensive submissions as to the proper interpretation of the obligation to accord fair and equitable treatment pursuant to Article 10(1) of the ECT.[197]

223. The Tribunal finds, however, having reviewed those submissions, that very few of the disagreements between the Parties regarding the proper interpretation of the fair and equitable treatment standard need to be resolved in order for the Tribunal to resolve the matters before it. Accordingly, the Tribunal will discuss those submissions only as they are relevant to the Tribunal's analysis of specific issues.

224. The Tribunal considers that in the context of this case, where the challenged conduct arises from the application of a State's administrative law in the context of energy policy, the following statement of the tribunal concerning the fair and

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195 SoD, ¶ 382.

196 SoD, ¶ 382, referring to RA-61, pages 133–147.

197 See, e.g., SoC, ¶¶ 636-646, 685; SoRy, ¶¶ 474-502; SoD, ¶¶ 381-423, 444-449; SoRj, ¶¶ 326-344.

equitable treatment obligation under the Netherlands/Czech Republic BIT in the case of *Saluka v Czech Republic* is apposite:

> A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies *bona fide* by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.
>
> Finally, it transpires from arbitral practice that, according to the "fair and equitable treatment" standard, the host State must never disregard the principles of procedural propriety and due process and must grant the investor freedom from coercion or harassment by its own regulatory authorities.[198]

225. The Tribunal notes that Claimant's principal case is that "the entire treatment to which it was subjected from February 2006 onwards constitutes a breach of Article 10 ECT".[199]

226. However, Claimant also states that "[t]his does not mean that certain acts, taken in isolation, do not also themselves constitute a separate breach of the ECT".[200] The Tribunal notes that Claimant's Prayer for Relief, as set out in its Post-Hearing Brief, seeks a declaration simply that "Respondent has breached Article 10(1) ECT", rather than separate declarations concerning separate acts of wrongdoing.

227. Claimant submits that other tribunals considering alleged breaches of investment treaties have assessed the "cumulative effect" of the entirety of a

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198 *Saluka Investments B.V. v. The Czech Republic*, Permanent Court of Arbitration (*Netherlands-Czech and Slovak Republic BIT*), Partial Award, 17 March 2006 ("*Saluka v. Czech Republic*"), Annex CA-28, ¶¶ 307-308, footnote omitted.

199 C-PHB, ¶ 260.

200 C-PHB, ¶ 260.

respondent's conduct.[201] Further, Claimant states that international law recognizes that composite acts may constitute breach of an international obligation.[202]

228. Respondent states that it "disagrees with such a sweeping statement and submits that the Tribunal must analyze carefully what harm was actually caused by the specific measures found to be in breach of the ECT (if any)".[203]

229. The Tribunal agrees with Claimant's submission that the cumulative effect of Respondent's conduct may be considered as part of the Tribunal's analysis of whether there has been a breach of Article 10(1). However, the effect of the Tribunal's finding is not to obviate the need for careful analysis of causation in the event that breach is established.

230. In this section, the Tribunal will consider Claimant's allegations largely in chronological order, as set out in paragraph 216 above. The Tribunal also considers Claimant's allegation that Respondent's conduct in its entirety, from February 2006 onwards, constituted a breach of one or more obligations contained in Article 10(1) of the ECT (see ¶¶ 568-571 below).

*a) Alleged Harassment of J&SE*

231. Claimant's allegations of breach of the fair and equitable treatment standard as a result of harassment suffered by J&SE fall into four categories: (i) excessive inspections; (ii) the ABW raid; (iii) the threat to J&SE's trading licence; and (iv) "Orlengate".[204]

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201 C-PHB, ¶ 262, referring to *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. Arb. V079/2005, Final Award, 12 September 2010.

202 C-PHB, ¶ 264, referring to Article 15 of the ILC Articles.

203 R-R-PHB, ¶ 81.

204 The section of the Statement of Claim dealing with Claimant's allegations of harassment, Section IV.B.1, includes at ¶ 656 an allegation that "Respondent's campaign of enforcement action was unfair and inequitable and thus in violation of Article 10(1) of the ECT." To the extent that this allegation concerns conduct beyond that addressed in this Section VIII.C.a), it

232. The Tribunal will consider each category of alleged harassment in turn.

233. (i) *Inspections*. According to Claimant, more than 300 inspections of J&SE's premises have been conducted since 1996, and Claimant submits that their "sheer number (…) precludes their characterization as routine enforcement action".[205] Claimant submits that the investigations of J&SE were "accompanied by repeated deliberately false and defamatory statements in the press".[206]

234. As to the latter point, the Tribunal notes Claimant's submission that the statements made by politicians and others to the media, in which J&SE was presented in a negative light, do not of themselves constitute harassment, but "paved the way" for other breaches.[207] As explained in ¶¶ 188-192 above, the Tribunal does not consider the making of such statements as a separate ground on which breach of the fair and equitable treatment is alleged, but does still take the statements as part of the factual background to Claimant's other allegations of breach.

235. Regarding the allegedly excessive number of inspections, Respondent submits that "the vast majority of inspections were routine tax and fire & safety reviews"[208] and that Claimant has presented no evidence that the inspections were politically motivated.[209] Further, Respondent submits that Claimant "has failed to demonstrate how [the] inspections affected its day-to-day functioning or to establish that the impact was serious enough to constitute a violation of international law".[210]

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forms part of the Tribunal's consideration of Claimant's other allegations of breach of fair and equitable treatment in Sections VIII.C.b)-VIII.C.i) below.

205 SoRy, ¶ 459.

206 SoRy, ¶ 518.

207 SoRy, ¶¶ 435–437; SoC, ¶¶ 444–455.

208 R-PHB, ¶ 451.

209 R-PHB, ¶ 453.

210 SoRj, ¶ 417.

236. Respondent denies the allegation that over 300 inspections took place, submitting rather that Claimant's table[211] shows that 204 inspections took place, in Warsaw and in other parts of Poland, over the period 1996-2008.[212] Further, Respondent submits that the 204 items listed in Claimant's table are inspection protocols and that as some inspections resulted in more than one protocol, the number of inspections must have been less than 204.[213]

237. The Tribunal recalls the *Saluka v. Czech Republic* tribunal's statement of the fair and equitable treatment standard, set out at ¶ 224 above. In particular, the Tribunal has regard to the question whether the matters pleaded by Claimant, and the evidence adduced by it, establish that Respondent's conduct was not "reasonably justifiable by public policies"[214] or impinged upon Claimant's or J&SE's "freedom from coercion or harassment by [the State's] regulatory authorities."[215]

238. The Tribunal does not consider that the number of inspections, taken alone, establishes that J&SE was harassed by Poland's regulatory authorities, nor that the inspections were not reasonably justifiable.

239. Claimant has not presented evidence to support its allegation that the inspections were politically motivated, rather than motivated by rational public policy. (Claimant's allegations regarding the ABW Raid are considered separately, see ¶¶ 245-252 below.)

240. The Tribunal considers that, as a matter of principle, the conduct of inspections by State regulatory authorities may be shown to constitute harassment, and thus a breach of the obligation to accord fair and equitable treatment, even if the improper motivation of those ordering the inspections has not been established.

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211 Annex C-653,

212 R-PHB, ¶ 448.

213 R-PHB, ¶ 449.

214 *Saluka v. Czech Republic,* Annex CA-28, ¶ 307.

215 *Saluka v. Czech Republic*, Annex CA-28, ¶ 308.

241. Thus, it is necessary to look at the evidence regarding the manner in which the inspections were carried out. Mr. Zambrzycki stated that until early 2006 the investigations were carried out in a "mostly courteous and cooperative" manner.[216] However, he also stated that the inspections were "so frequent that they have become a continuous feature of J&S Energy's business activities."[217] In his evidence at the Hearing, Mr. Zambrzycki responded to a question from the Tribunal, asking whether the inspections "were a nuisance but not an harassment".[218] Mr. Zambrzycki replied:

> Well, the way the (inaudible) of the fire inspectors, right, you cannot say that that was harassment but the number of them, the frequency was kind of harassment.[219]

242. On the matter of tax inspections, Counsel for Respondent asked Mr. Zambrzycki whether he thought that the existence of a so-called "fuel mafia", active in tax fraud, might lead to a higher number of tax inspections in the fuel sector than in other sectors:

> *MR ZAMBRZYCKI:* Well, I did not find out the reason why they came to us because in most of the cases they were coming to look for the transactions with companies from so-called mafia which never existed in our books. So actually they were coming to look for the documents of transactions with company we never co-operate and they were still coming and coming.
>
> *MR KRUZEWSKI:* How would they know if they did not check?
>
> *MR ZAMBRZYCKI:* That is very simple. Because they come. They get a list from our bookkeepers. They give us a name and they find out the [sic] there is nothing and they go and they come back again after a month and asking the same questions and again they did not get anything so they go and they come again and they ask about the same questions.

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216 First Witness Statement of Grzegorz Zambrzycki, ¶ 16.

217 First Witness Statement of Grzegorz Zambrzycki, ¶ 15.

218 Transcript 524/16-17.

219 Transcript 524/18-21.

> So I understand that they may assume that we did not do any transactions on the last occasion, maybe something happened on this occasion, well, you know, that looked to me a little bit strange.
>
> *MR KRUZEWSKI*: I would suspect that if they came as you described now, second time, that visit lasted very shortly and you would just send them away, would you?
>
> *MR ZAMBRZYCKI*: Not very shortly but usually an hour, two hours.
>
> *MR KRUZEWSKI*: So that was not very burdensome for you?
>
> *MR ZAMBRZYCKI*: Well, a couple of people had to stop their work and do printouts for them.[220]

243. The Tribunal considers that the evidence placed before it by Claimant does not suggest an improper purpose motivating the inspections complained of, nor that the manner in which inspections were conducted was unreasonable. The Tribunal considers that, in the absence of a showing of either an improper purpose leading to the ordering of inspections, or unreasonable conduct of those inspections, Claimant cannot make out a breach of fair and equitable treatment based on an allegation of harassment.

244. Accordingly, the Tribunal holds that Claimant has not met its burden of showing that the conduct of the inspections between 1996 and 2008 breached Respondent's obligation to accord fair and equitable treatment. The Tribunal considers the 2006 ABW Raid separately below.

245. (ii) *The ABW Raid.* Claimant alleges that the ABW Raid of 8 February 2006 referred to at ¶ 74 above constituted harassment of J&SE, while Respondent denies this, contending that the raid was conducted for a proper purpose.[221]

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220 Transcript 522/1 – 523/8.

221 SoD, ¶ 345; SoRj, ¶ 290.

246. The evidence from the Parties is conflicting as to the hardship imposed by this raid and the circumstances in which it was ordered and then commented upon by the Government.[222]

247. For example, while Claimant suggests that the decision to raid the offices of J&SE was linked to the holding of a press conference marking the Government's first 100 days in office,[223] and the Government's desire to "display a corporate scalp",[224] Respondent contends that the raid was conducted for a proper purpose, namely the investigation of the Polish "fuel mafia", and was only one of a series of raids carried out on numerous entities, including PKN Orlen and Grupa Lotos.[225]

248. The Tribunal notes that Claimant does not dispute that the "raid was ordered as part of an investigation against the fuel mafia (…) and (…) fulfilled various domestic Polish technical requirements",[226] but argues that the timing of the raid and misrepresentations made about it to the public and the media by the Government show that it was "a politically motivated public relations manoeuvre intended to boost the Government's popularity at the expense of J&S Energy."[227]

249. As to the hardship said to have been occasioned, the Tribunal notes that there are significant discrepancies between the letter written to ABW by Mr. Zambrzycki after the ABW Raid[228] and the account Mr. Zambrzycki gave in his written and oral evidence[229] regarding the manner in which the ABW Raid was

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222 See, *e.g.*, SoC, ¶¶ 160, 164; SoRy, ¶¶ 457–458; SoD, ¶¶ 345, 424–427; SoRj, ¶¶ 290, 458.

223 SoC, ¶160.

224 First Witness Statement of Grzegorz Zambrzycki, ¶30, referred to at SoC, ¶164.

225 SoD, ¶¶ 345-346.

226 SoRy, ¶ 458.

227 SoRy, ¶ 458.

228 Annex R-19; see SoRj, ¶¶ 292–295.

229 First Witness Statement of Grzegorz Zambrzycki, ¶¶ 17–31; Second Witness Statement of Grzegorz Zambrzycki, ¶ 80; Transcript 197/1 – 232/3.

conducted and the number of persons who participated in it. The Tribunal need not reconcile those discrepancies.

250. The Tribunal finds that, even if Mr. Zambrzycki's written and oral evidence, rather than his contemporaneous letter, represents a more accurate account of the ABW Raid, Claimant has not established that the ABW Raid constituted "harassment"[230] or that it was not "reasonably justifiable by public policies",[231] as referred to by the *Saluka v. Czech Republic* tribunal in its statement of the fair and equitable treatment standard, with which statement this Tribunal agrees.[232]

251. The Tribunal has had regard to the evidence submitted by Claimant regarding the press conference allegedly held by the Prime Minister on the day of the ABW Raid, and the presence of journalists at J&SE's premises prior to commencement of the ABW Raid.[233] The Tribunal considers that these factors do not necessitate a conclusion that the ABW Raid constituted "harassment" or was not "reasonably justifiable by public policies", as referred to in ¶ 250 above.

252. In reaching its conclusion, the Tribunal has had regard to the undisputed size and importance of the criminal investigation into the fuel mafia of which the ABW Raid formed part. The Tribunal finds that Claimant has not met its burden of proving that the ordering and conduct of the ABW Raid breached the obligation to accord fair and equitable treatment. Accordingly, Claimant has not made out its case under this head of argument.

253. (iii) *Threat to J&SE's trading licence.* According to Claimant, the Central Anticorruption Bureau ("CBA") threatened to revoke J&SE's trading licence.[234]

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230 *Saluka v. Czech Republic*, Annex CA-28, ¶ 308.

231 *Saluka v. Czech Republic,* Annex CA-28, ¶ 307.

232 See ¶ 224 above.

233 See, for example, SoC, ¶¶ 160-165.

234 SoC, ¶¶ 157, 582–587; SoRy, ¶ 461.

This alleged threat, which Claimant said was contained in the CBA's report of 26 June 2008 (the "CBA Report"), was the subject of Claimant's Addendum to its Request for Interim Measures, filed in the present arbitration on 27 October 2008.

254. Respondent denies that the CBA Report contained any such threat to withdraw J&SE's trading licence.[235]

255. Having reviewed the cited section of the CBA report, and the Parties' submissions thereon,[236] the Tribunal finds that the reference to the circumstances in which a trading licence can be revoked can be read as a simple statement of fact, as an outlining of the options available to the regulator. While it is possible that it was intended as more than a statement of fact, as a threat, this is not clear on the face of the document and Claimant has not met its burden of proof by establishing such intention by other means.

256. (iv) *Orlengate.* Claimant alleges that the Polish authorities tried to prevent JSSI concluding a contract with PKN Orlen in 2002 by arresting the president of the Management Board of PKN Orlen.[237]

257. Claimant's submissions do not establish how the alleged wrongdoing could be said to infringe Mercuria's rights regarding its Investment, J&SE, given that JSSI was the party seeking to contract with PKN Orlen.[238]

258. Accordingly, the Tribunal holds that, as Respondent submits,[239] these allegations cannot form the basis of a claim of breach of fair and equitable treatment against Respondent.

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235 SoD, ¶ 352.

236 Annex C-16; Annex C-229; SoC, ¶ 585; SoRy, ¶¶ 460–461; SoD, ¶ 352.

237 SoC, ¶¶ 118–134.

238 SoC, ¶¶ 118–134.

239 SoD, ¶ 324.

259. (v) *Conclusion.* The Tribunal finds that Claimant has not shown that any of the measures to which it referred as a "campaign of harassment" amounts to a breach of the obligation to accord fair and equitable treatment pursuant to Article 10(1) of the ECT.

260. As the Tribunal has stated, at ¶ 229 above, it agrees with Claimant that the cumulative effect of various elements of Respondent's conduct may be considered as part of the Tribunal's analysis of whether there has been a breach of the fair and equitable treatment obligation.

261. The Tribunal further concludes that the evidence before it does not establish a wrongful purpose on the part of Respondent, nor any other aggravating factor that would suggest that actions that, viewed individually, were not wrongful, took on a wrongful character when assessed cumulatively.

*b) Rejection of J&SE's First EFI Application*

262. The Parties agree that the Minister of Economy had discretion under Article 16(6) of the NRA to determine what constituted an "especially justified case", allowing him to grant an EFI for a period of not more than one year.[240]

263. Claimant states that the Minister's rejection of J&SE's first application for an EFI (the "First EFI Application") was unfair on the following grounds: (i) it was based on an incorrect statement of principle, asserting that logistics reasons could not form the basis of a successful EFI application; (ii) it wrongly ignored J&SE's arguments regarding lack of access to storage space; (iii) alternatively, if (which is denied) the rejection was based on information from OLPP regarding the availability of storage, the Minister failed to give J&SE the opportunity to comment on that information and thus breached Respondent's obligation to accord procedural fairness and due process; and (iv) there was no reason to deny the application, as Poland was at all relevant times compliant with its EU reserves obligations.

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[240] SoRy, ¶¶ 199–200; SoRj, ¶ 434.

264. Respondent denies that the Minister's rejection of J&SE's First EFI Application breached the fair and equitable treatment obligation in Article 10(1) of the ECT.[241]

265. The Tribunal notes that Claimant's allegations regarding J&SE's First EFI Application relate to that application as amended by the application for rehearing dated 10 October 2006, the original application having been rejected for technical reasons on 29 September 2006.[242]

266. Before considering each of Claimant's allegations in turn, the Tribunal wishes to state clearly the manner in which it has understood Claimant's allegations regarding Respondent's rejection of J&SE's First EFI Application.

267. The Tribunal notes that at SoC, ¶ 660, Claimant alleges that, in denying J&SE's First and Second EFI Applications, Respondent "failed properly to take into account that, besides the dearth of storage space in Poland, State-controlled companies such as PKN Orlen (see Sections III.D.5, III.D.7 and III.E.1(d) *supra*), PERN (see Sections III.D.8 and III.E.1(b)(3) supra) and OLPP (see Section III.D.3 *supra*) repeatedly obstructed J&S Energy's attempts to procure storage facilities." The Tribunal considers that in the context of Claimant's allegations regarding the failure to grant the First EFI Application, only the alleged conduct of OLPP is relevant, and that such conduct is addressed in the context of Claimant's allegations that Respondent wrongly ignored J&SE's arguments regarding lack of storage space (see ¶¶ 284 to 291 below).

268. Further, the Tribunal notes that at SoC, ¶ 662, Claimant alleges that "the alleged restraints by which the Minister of Economy claimed to be bound were of his own making", and that the Minister had "full discretion regarding the modification, and indeed the enforcement, of its Regulations". The paragraph goes on to state that "[i]t was precisely this discretion that the Minister of Economy *did* exercise in respect of PKN Orlen". The Tribunal considers that

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241 See, for example, R-PHB, ¶¶ 229-240.

242 SoC, ¶ 298; Annex C-140.

the allegation in SoC ¶ 662 is properly addressed in the context of Claimant's argument that the Minister's refusal to grant the EFI Applications was discriminatory as evidenced by the grant of an EFI to PKN Orlen: see ¶¶ 616 to 648 below.

269. To the extent that a similar argument is made at SoRy, ¶ 525 without any reference to the treatment of PKN Orlen, stating only that "the Minister had full discretion at all times regarding the modification and enforcement of [the] Regulations", the argument is not developed further by Claimant and the Tribunal considers that Claimant has not met its burden.

270. The Tribunal notes that Claimant's allegations that the Minister's interpretation "lacked transparency and consistency" (SoC, ¶ 663; see also SoRy, ¶ 526) are addressed, as to the first part (decision of principle that logistical difficulties could not form the basis for an EFI) at ¶¶ 273 to 283 of this Award, and as to the second part (other companies granted EFIs on the basis of logistical difficulties) in the context of Claimant's discrimination case at ¶¶ 612 to 707 below.

271. Finally, the Tribunal notes that in so far as Claimant's allegation (SoC, ¶¶ 698-699) of breach of due process through failure to admit or give due consideration to evidence refers to Respondent's conduct in relation to the First EFI Application, that allegation is addressed as part of the Tribunal's analysis in subsections (i)-(iii) below.

272. The Tribunal now considers Claimant's claims under this head of alleged breach, as set out in ¶ 263 above.

273. (i) *Rejection based on incorrect statement of principle.* Claimant alleges that the Minister purported to refuse J&SE's First EFI Application on the basis that in

principle, logistics reasons "such as limitation of free storage capacities" were not grounds on which an EFI could be granted.[243]

274. According to Claimant, rejection of the First EFI Application on that basis was unfair and inequitable because Respondent's witnesses have admitted that lack of storage capacity can be (and could then have been) a basis for a positive decision.[244]

275. Respondent denies that the Minister's rejection of the First EFI Application was based on a principle that lack of storage facilities could not constitute a ground for the granting of an exemption.[245] Rather, the Minister used the phrase "logistic limitations related to free storage capacities, such as the limitation of rendering the so-called ticketing services" to draw a distinction between limitations related to storage capacity and a "lack" of storage capacity.[246]

276. Respondent submits that if such an "absolute lack of storage capacity" were made out, such would "[persuade] the Minister to grant an exemption, and then only for a short period".[247]

277. The Tribunal finds it useful to set out the content of the Minister's decision at some length. Having noted that, pursuant to Article 16(6) of the NRA, the Minister may "in exceptional, duly justified circumstances (…) give a permit for temporary cessation to increase mandatory reserves of liquid fuels for a period not exceeding one year", the decision explains the circumstances in which the Minister would find that the requirement of duly justified circumstances had been met:

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243 C-PHB, ¶ 178.

244 C-PHB, ¶¶ 180–181, referring to the testimony of Mr. Maciej Woźniak, Transcript, 1586/1–15.

245 SoRj, footnote 487.

246 SoRj, ¶ 89.

247 R-PHB, ¶ 277.

> Such permit to suspend the extension of mandatory reserves of fuels may apply to the situations when an entrepreneur has temporarily suspended his business activity which is subject to the obligation of creation and maintenance of mandatory reserves of liquid fuels or when extraordinary circumstances have occurred, which prevent an entrepreneur from creation of mandatory reserves of liquid fuels in required quantities, justifying temporary release of an entrepreneur from the obligation to increase such reserves. Such exceptional, duly justified circumstances in which the Minister of Economy may give a permit for temporary cessation to increase mandatory reserves of liquid fuels may include the events of force majeure being out of control of an entrepreneur and unpredictable due to the low probability of their occurrence (catastrophes, breakdowns, failures, terrorist attacks, natural disasters and other events caused by destructive forces of nature).[248]

278. The decision then sets out the reserves J&SE is obliged to hold as of 31 December 2006, and J&SE's actual reserves as of 3 November 2006. The decision further describes J&SE's attempts to establish reserves, including Naftobazy's (OLPP's) withdrawal from negotiations for a ticketing contract, in September 2006, attempts to agree contracts with PKN Orlen regarding storage of diesel oil and crude oil, and an agreement with IVG Terminal Silesia Sp. z o.o. to store liquid fuels.[249]

279. The decision goes on to explain that the Minister considered that J&SE had not established the existence of circumstances justifying the grant of an EFI:

> However, the logistics reasons, such as limitation of free storage capacities and limitation of the possibility to render the so called "ticketing" services in consequence of disruptions in supplies of liquid fuels to the domestic market cannot be regarded as a reasonable excuse for taking a positive decision as regards cessation to increase mandatory reserves.
>
> The situation described above reflects the risk inherent in the business activity of trade in liquid fuels. An entrepreneur, being aware of his statutory obligations as regards creation of reserves, should plan all activities related thereto well in advance.

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248 Annex C-144, page 3.

249 Annex C-144.

> Any arrangements with entrepreneurs who provide services of storage of liquid fuels or the so called "ticketing" services, should be made in the form of appealable preliminary contracts or guarantee agreements containing transparent clauses regarding financial liabilities of the parties for non-performance of their obligations before concluding a final agreement. The risk of conducting business activity not caused by the reasons being out of control of the company or by force majeure shall not be transferred to the State, and, additionally, the State could lay itself open to the charge that it fails to fulfil the obligations under the Treaty of Accession and the Community law.[250]

280. The Tribunal considers that the first part of Claimant's argument, that the Minister's decision was based on a principle that logistics reasons could not form the basis for a finding that "exceptional, duly justified circumstances" existed and, thus, the basis for the grant of an EFI, has not been made out.

281. Read in the context of the Minister's entire decision, the Tribunal finds that the better view is that the "logistics reasons" to which the Minister's decision refers are not any and all logistics reasons, but are those that in the Minister's view could have been overcome by better forward planning on the part of the applicant – for example, by the applicant's having entered into "appealable preliminary contracts or guarantee agreements". In other words, that the Minister's conclusion was that compliance with J&SE's mandatory stocks requirements was not impossible for reasons "out of control of [J&SE]".[251]

282. For the reason stated in ¶ 281 above, it is unnecessary for the Tribunal to consider here the second part of Claimant's argument, that the Minister applied the principle that no logistic reason could ever form a basis for the grant of an EFI, to J&SE but not to other entities.

283. As a result, Claimant has not under this head of argument established a breach of the obligation to afford fair and equitable treatment.

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250 Annex C-144, pages 3–4.

251 Annex C-144.

284. (ii) *J&SE's arguments about availability of storage were ignored.* Claimant alleges that the Minister wrongfully ignored J&SE's submission in its First EFI Application that it had "encountered large problems in securing storage facilities necessary to maintain [its] stocks".[252]

285. Before proceeding to consider the substance of the allegation stated in ¶ 284 above, the Tribunal notes Claimant's broad allegation that the refusal to grant the First EFI Application "failed properly to take into account the fact that at all material times there was a deficit of storage space in the Republic of Poland" and that it was "repeatedly made known to the Respondent" that without third party cooperation, J&SE would not be able to comply fully with the MRA (SoC, ¶659; see also SoRy, ¶¶ 522-523). In the context of the factual allegations referenced by that paragraph of the Statement of Claim (SoC, Sections III.D and III.E), the Tribunal considers that the only factual allegations relevant to this head of alleged breach are those relating to information included in J&SE's First EFI Application, such that the allegation of breach in the Statement of Claim is properly dealt with by the Tribunal's analyzing the allegation as stated in ¶ 284 above, drawn from Claimant's Post-Hearing Brief.

286. It is to consideration of that allegation that the Tribunal now turns.

287. In its First EFI Application, having stated that its previous applications to hold stocks in another European country had been denied due to the absence of bilateral agreements, and that OLPP had suddenly withdrawn from arrangements for a ticketing agreement, J&SE stated that "as of today [J&SE] is not able to meet the obligation to accumulate and store adequate amounts of liquid fuel stocks, despite taking actions in advance aiming at renting relevant storage facilities and purchasing adequate quantities of liquid fuel stocks".[253]

288. The application of 11 September 2006 included as an attachment, amongst other things, a letter from OLPP (then "Naftobazy") dated 7 September 2006 that

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252 C-PHB, ¶¶ 176-181, referring to Annex C-138.

253 Annex C-138.

forms part of the record of these proceedings as Annex C-249 and Annex R-100.

289. The Tribunal notes that OLPP's letter states that OLPP would not offer J&SE a ticketing service. The letter goes on to state, "[h]owever, we still upkeep our offer for letting to J&S company storage capacities for mandatory stocks in the requested volume".[254]

290. Respondent submits that "JSE had been offered the opportunity to store its mandatory reserves at OLPP's facilities" and that, as a result, "there was no reason to find that there was an 'especially justified case' for an Exemption from Increasing".[255]

291. The Tribunal finds that J&SE's application, by including the 7 September 2006 letter from OLPP, suggested that while a ticketing service would not be provided, OLPP was willing to store the amount of fuel in respect of which J&SE had sought a ticketing agreement. Given that the supporting documentation thus provided by J&SE to the Minister in fact suggested that storage, though not through a ticketing agreement, was available, the Tribunal holds that Claimant has not met its burden of proving that the Minister ignored J&SE's arguments about the availability of storage.

292. (iii) *Denial of due process.* Claimant states that the Minister's decision contains no reference to OLPP's having offered storage to J&SE, and must be taken not to have been based on that point, given Mr. Woźniak's testimony that "as a rule" all evidence material to the making of the decision would be included in the decision.[256] However, if, which is denied, "the Minister did base his decision

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254 Annex R-100.

255 SoRj, ¶ 91.

256 C-PHB, ¶ 184, referring to Transcript 1565/21–1566/3.

on information provided by OLPP (…) J&S Energy was deprived of the opportunity to review that evidence or respond to these grounds".[257]

293. Claimant in this regard refers to a letter from OLPP to the Ministry of Economy dated 9 November 2006, submitting that if the Minister's decision was in fact based on that letter, the decision would have constituted a denial of due process because J&SE was not given an opportunity to comment on it.[258]

294. Respondent submits that there can have been no denial of due process because the 9 November 2006 letter merely confirmed the position set out in OLPP's 7 September 2006 letter to J&SE, submitted by J&SE to the Minister.[259]

295. In relevant part, OLPP's letter of 9 November 2006 states, referring to the decision not to offer J&SE a ticketing agreement:

> In view of the investment demands we are facing, acceptance of J&S's proposal would have been unrealistic. The fact of our earlier involvement in cooperation on the ticket service with another operator functioning in the fuel market was not without its significance either.
>
> We would also like to mention that the refusal concerned only the service of storing fuel in the ticket system, and not the service of storing fuel that is our customer's property. In all our conversations with J&S' representatives, we emphasized our readiness to provide the necessary storage capacities for the company.[260]

296. The Tribunal finds that the information sought and obtained by the Minister from OLPP was merely confirmatory of the information provided by J&SE to the Minister in its application of 11 September 2006. On that basis, the Tribunal finds that it was not unfair for the Minister not to have informed J&SE that he was in contact with OLPP. Noting the statement concerning the fair and

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257 C-PHB, ¶ 185.

258 C-PHB, ¶ 185.

259 R-PHB, ¶¶ 266–267, referring to Annex R-20, OLPP's letter of 9 November 2006 to the Ministry of Economy.

260 Annex R-20.

equitable treatment standard that the Tribunal has considered apposite in this case, namely that of the *Saluka v. Czech Republic* tribunal, the Tribunal finds that the Minister's conduct has not been shown to have "manifestly violate[d]"[261] the requirement of "transparency",[262] nor has it been shown to evidence "disregard [for] the principles of procedural propriety and due process".[263] Thus, Claimant has failed to meet its burden under this head of argument.

297. (iv) *Poland's compliance with EU obligations.* Claimant submits that Respondent had no reason to deny J&SE's First EFI Application because, even if the First EFI Application had been granted, Poland would have remained in compliance with its EU reserves obligations.[264]

298. Respondent submits, responding to Claimant's submission on this point in the context of ARM's imposition of the First Financial Penalty that "[w]hilst it might not technically be necessary for all producers and importers to maintain the foreseen reserves in order for Poland to be compliant with its international (i.e. EU and IEA) reserves obligations, any leniency in enforcing the domestic reserves requirements would encourage free-riding by non-compliant producers/importers to the detriment of those that do comply".[265]

299. The Tribunal agrees with Respondent's submission. The fact that Poland was not in breach of its EU (or IEA) reserves obligations does not show that it was unreasonable to take a strict approach in order to remain in compliance, given the risk that a less-strict approach "would encourage free-riding".[266]

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261 See ¶ 224 above, referring to *Saluka v. Czech Republic,* Annex CA-28, ¶ 307.

262 See ¶ 224 above, referring to *Saluka v. Czech Republic,* Annex CA-28, ¶ 307.

263 See ¶ 224 above, referring to *Saluka v. Czech Republic,* Annex CA-28, ¶ 308.

264 SoC, ¶ 661; see also SoRy, ¶ 524.

265 R-PHB, ¶ 359.

266 R-PHB, ¶ 359.

300. The Tribunal finds that a failure by the Minister to have taken Poland's compliance with its international obligations into account as a reason for not commencing proceedings does not constitute unfair or inequitable treatment.

301. (v) *Conclusion.* On the basis of the evidence before it, the Tribunal concludes that the Minister's rejection of J&SE's First EFI Application, on the grounds that compliance with J&SE's mandatory stocks obligation was not impossible for reasons out of J&SE's control, was not unreasonable.

302. The Tribunal holds that Claimant has not made out a breach of the fair and equitable treatment obligation in relation to the Minister of Economy's rejection of J&SE's First EFI Application.

*c) Rejection of Second EFI Application*

303. Claimant alleges that the Minister's rejection of the original version of J&SE's Second EFI Application on 11 January 2007 was unfair and inequitable on the same grounds as those on which the rejection of the First EFI Application was unfair and inequitable.[267] That is: (i) it was based on an incorrect statement of principle, that logistics reasons could not form the basis of a successful EFI application;[268] (ii) it "disregarded J&S Energy's substantive submissions regarding the dearth of storage and the measures it was taking to mitigate the same";[269] in the alternative, (iii) J&SE was denied due process because it was not informed of the evidence on which the Minister's decision was based;[270] and (iv) there was no reason to deny the application, as Poland was at all relevant times compliant with its EU reserves obligations.[271]

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267 C-PHB, ¶ 191.

268 C-PHB, ¶¶ 191-192.

269 C-PHB, ¶¶ 191-192.

270 C-PHB, ¶¶ 191-192.

271 SoC, ¶ 661.

304. Claimant submits that the Minister's 22 February 2007 rejection of J&SE's application for rehearing of the Second EFI Application was also unfair and inequitable in that the Minister: (i) failed to take account of the fact that there was insufficient storage available at OLPP and IVG; (ii) failed to take account of the fact that the option of J&SE storing its stocks in the form of crude oil could not be put in place until the end of the first quarter of 2007, due to restrictions on PERN's ability to pump the oil;[272] alternatively, (iii) failed to accord procedural fairness in that J&SE was never informed of OLPP's 26 February 2007 letter to the Ministry or of telephone conversations that Respondent alleges took place between the Ministry and OLPP prior to the sending of that letter;[273] and (iv) had no reason to deny the application, as Poland was at all relevant times compliant with its EU reserves obligations.[274]

305. The Tribunal will address each of Claimant's allegations in turn, first the allegations regarding the original version of the Second EFI Application, and then the allegations regarding the application for rehearing of the Second EFI Application.

306. Before proceeding to its consideration of the substance of Claimant's allegations, the Tribunal makes the following observations regarding its understanding of Claimant's pleaded case.

307. The Tribunal notes that at SoC, ¶ 660 (see also SoRy, ¶¶ 522-523), Claimant alleges that, in denying J&SE's First and Second EFI Applications, Respondent "failed properly to take into account that, besides the dearth of storage space in Poland, State-controlled companies such as PKN Orlen (see Sections III.D.5, III.D.7 and III.E.1(d) *supra*), PERN (see Sections III.D.8 and III.E.1(b)(3) supra) and OLPP (see Section III.D.3 *supra*) repeatedly obstructed J&S Energy's attempts to procure storage facilities." The Tribunal considers that in

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272 C-PHB, ¶¶ 197-206.

273 C-PHB, ¶ 207.

274 SoC, ¶ 661.

the context of Claimant's allegations regarding the failure to grant the Second EFI Application, only the alleged conduct of OLPP and PERN is relevant, and that such conduct is addressed in the context of Claimant's allegations that Respondent wrongly ignored J&SE's arguments regarding lack of storage space and delay in the PERN pipeline (see ¶¶ 321-332, 335-361 below).

308. Further, the Tribunal notes that at SoC, ¶ 662, Claimant alleges that "the alleged restraints by which the Minister of Economy claimed to be bound were of his own making", and that the Minister had "full discretion regarding the modification, and indeed the enforcement, of its Regulations". The paragraph goes on to state that "[i]t was precisely this discretion that the Minister of Economy *did* exercise in respect of PKN Orlen". The Tribunal considers that the allegation in SoC ¶ 662 is properly addressed in the context of Claimant's argument that the Minister's refusal to grant the EFI Applications was discriminatory as evidenced by the grant of an EFI to PKN Orlen: see ¶¶ 616 to 648 below.

309. To the extent that a similar argument is made at SoRy, ¶ 525 without any reference to the treatment of PKN Orlen, stating only that "the Minister had full discretion at all times regarding the modification and enforcement of [the] Regulations", the argument is not developed further by Claimant and the Tribunal considers that Claimant has not met its burden.

310. Claimant's allegations that the Minister's interpretation "lacked transparency and consistency" (SoC, ¶ 663; see also SoRy, ¶526) are addressed, as to the first part (decision of principle that logistical difficulties could not form the basis for an EFI) at ¶¶ 313-319 of this Award, and as to the second part (other companies granted EFIs on the basis of logistical difficulties) in the context of Claimant's discrimination case at ¶¶ 612 to 707 below.

311. Finally, the Tribunal notes that in so far as Claimant's allegation (SoC, ¶¶ 698-699) of breach of due process through failure to admit or give due consideration to evidence refers to Respondent's conduct in relation to the Second EFI

Application, that allegation is addressed as part of the Tribunal's analysis in subsections (i)(i)-(iii) and (ii)(i)-(iii) below.

312. The Tribunal now considers Claimant's allegations as set out in ¶¶ 303-304 above, in turn.

*(i)* Original version of Second EFI Application

313. (i) *Rejection of the original version of the Second EFI Application based on incorrect statement of principle.* Claimant makes essentially the same submissions in this regard as its makes regarding the Minister's rejection of the First EFI Application.[275]

314. In the original version of its Second EFI Application, J&SE stated, *inter alia*:

> Due to a lack of improvement and continuous large problems to secure storage facilities necessary to maintain relevant stocks of fuels (letter of IVG Terminal SILESIA Sp. o.o. of 29 November 2006), we have decided to replace a part of the required quantity of compulsory fuels stocks in crude oil.[276]

315. Having set out its current holdings and expected holdings as at the end of 2006, J&SE stated:

> At present, it seems that it is most difficult to store a suitable quantity of crude oil. We are finalizing an agreement for storing crude oil at the IKS Solino storage facilities, thanks to which we would meet our obligations concerning strategic reserves. We have obtained a written promise for financial support necessary to purchase the required quantities of crude oil. However, it is the access to the transmission line on the route Adamowo-salt caverns in Inowrocław that constitutes the essence of the problem. We have already finished a number of negotiations with the owner of an oil pipeline system, i.e. PERN, during which we obtained information that by the end of 2006 there was no such a possibility according to the scheduled transmission plan. Such possibilities appear in the first quarter of the next year. Relevant

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275 C-PHB, ¶¶ 191-192.

276 Annex C-145, page 1.

> negotiations are being conducted in this area which will end with signing a relevant agreement.[277]

316. The decision of 11 January 2007 restates the introductory paragraphs of the decision of 23 November 2006.[278] Having set out J&SE's supplies to the Polish market over the period January - November 2006, and its required holdings as at 31 December 2006, the decision states:

> The logistics reasons, such as limitation of free storage capacities and, in consequence, the limitation of the so called "ticketing" services cannot be regarded as a reasonable excuse for taking a positive decision as regards cessation to increase mandatory reserves.
>
> The situation described above reflects the risk inherent in the business activity of trade in liquid fuels. An entrepreneur, being aware of his statutory obligations as regards creation of reserves should plan all activities related thereto well in advance. Any arrangements with entrepreneurs who provide services of storage of liquid fuels or the so called "ticketing" services should be made in the form of appealable preliminary contracts or guarantee agreements containing transparent clauses about financial liabilities of the parties for non-performance of their obligations before concluding a final agreement. The risk related to the form of conducting business activity shall not be transferred to the state authority.[279]

317. Claimant argues that the fact that the Minister does not refer to the facts of J&SE's Second EFI Application, and in particular does not refer to OLPP or PERN, further indicates that the original version of the Second EFI Application was rejected on grounds of principle.[280]

318. Respondent denies that the original version of the Second EFI Application was rejected on the ground of principle alleged by Claimant.[281]

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277 Annex C-145, page 2. The original version of the Second EFI Application included various annexes. These are not attached to Annex C-145.

278 Annex C-144.

279 Annex C-149, page 3.

280 C-PHB, ¶ 193.

281 See, for example, SoRj, footnote 487.

319. The Tribunal finds that the Minister's decision of 11 January 2007 did not reject the Second EFI Application on the grounds that logistics reasons could not form the basis for grant of an EFI. The Tribunal reaches this finding for the same reasons as identified at paragraphs 280 to 282 above regarding the rejection of the First EFI Application,

320. The Tribunal finds that the failure on the part of the Minister to refer to the facts of the Second EFI Application is a separate issue, and that matter is dealt with at ¶¶ 321-332 below.

321. (ii) *Alleged disregard of J&SE's substantive submissions in the original version of the Second EFI Application.*[282] J&SE's original application referred to a "lack of improvement and continuous large problems to secure storage facilities necessary to maintain relevant stocks of fuels"[283] but also stated that J&SE intended to store additional mandatory reserves in the form of crude oil. The application cites delays in PERN's ability to pump crude oil to IKS Solino, but does not suggest that there was a shortage of capacity for crude oil storage.

322. Respondent submits that the original version of J&SE's Second EFI Application "did not present any evidence that it was unable to obtain storage"[284] and, as such, it was not unreasonable for the Minister to conclude that J&SE had not established an "exceptionally justified case".[285]

323. The Tribunal agrees with Respondent's submission. The original version of J&SE's Second EFI Application did not establish a lack of storage capacity. The rejection of the Application does not *per se* show that J&SE's substantive submissions were ignored; it is equally consistent with the Minister taking a strict approach to the question of whether an "exceptionally justified case" has been made out. The content of J&SE's Second EFI Application was not such

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282 C-PHB, ¶¶ 191-192.

283 Annex C-145, quoted at C-PHB, ¶ 187.

284 R-PHB, ¶ 243.

285 R-PHB, ¶ 244.

that a decision to reject the Application could only have resulted from disregard of that content.

324. However, and it is a serious matter, the issue remains that the Minister's decision does not refer at all to the arguments submitted by J&SE in support of its Second EFI Application. The Tribunal thus moves to consider Claimant's arguments about denial of procedural fairness.

325. (iii) *Denial of procedural fairness.* As noted above, the Minister's decision of 11 January 2007 does not refer in terms to the submissions made by J&SE in the original version of the Second EFI Application. Rather, it essentially repeats the grounds set out in the Minister's decision of 23 November 2006, including the reference to "ticketing", which is not referred to in the original version of the Second EFI Application.

326. Respondent submits that the Minister's decision was based upon the fact that "free capacity was available and (…) a transport contract with PERN was in the making".[286] Respondent alleges that the Minister had been informed by Mr. Woźniak, director of the Department of Oil and Gas in the Ministry of Economy and at the time a member of OLPP's supervisory board, that OLPP had free capacity.[287]

327. Claimant states that there was no evidence that OLPP had storage capacity[288] and no evidence in the record to support the submission that Mr. Woźniak so briefed the Minister.[289]

328. Claimant argues that if the Minister's decision was in fact based on the existence of storage capacity at OLPP, that decision would have constituted a denial of procedural fairness because it would have been based on either (a)

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286 SoRj, ¶99.

287 SoRj, ¶ 97.

288 C-PHB, ¶ 195.

289 C-PHB, ¶ 194.

non-existent evidence; or, at least, (b) evidence which the Minister failed to make available to J&SE.[290]

329. Regarding point (a) in ¶ 328 above, Claimant argues that OLPP did not have storage capacity at the time, having been unable to meet J&SE's request for storage of a mere 23,200 $m^3$ of diesel in November 2006 (this matter is discussed in detail at ¶¶ 349-355, below).[291] Regarding point (b) in ¶ 328 above, Claimant submits that the Minister failed to make evidence regarding OLPP's storage capacity available at any stage to J&SE.[292]

330. The Tribunal finds that it is not necessary to determine, in considering Claimant's arguments regarding the rejection of the original version of the Second EFI Application, whether OLPP had storage capacity at the time.

331. This is because J&SE's own application established that the necessary storage capacity, in the form of storage for crude oil, was available, although restrictions on the availability of PERN's pipeline system would prevent J&SE from accessing that capacity immediately.

332. The Tribunal considers that the Minister's decision can properly be criticized for its failure to refer to J&SE's stated arguments and to set out the reasons for rejecting those arguments. However, again, given that J&SE's own application established that storage capacity existed in the form of crude oil storage, the shortcomings of the presentation of the Minister's decision cannot be regarded as rising to the level of a failure to accord procedural fairness that would breach the obligation to accord fair and equitable treatment.

333. (iv) *Poland's compliance with EU obligations.* Claimant submits that Respondent had no reason to deny J&SE's Second EFI Application because,

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290 C-PHB, ¶ 195.

291 C-PHB, ¶196.

292 C-PHB, ¶ 195.

even if the First EFI Application had been granted, Poland would have remained in compliance with its EU reserves obligations.[293]

334. For the reasons stated at ¶¶ 297-300 above, the Tribunal finds that failure to consider Poland's compliance with its international obligations as alleged does not constitute a breach of the fair and equitable treatment obligation.

*(ii)* Application for rehearing of Second EFI Application

335. (i) *Failure to take account of lack of storage at OLPP and IVG.* On 22 January 2007, J&SE filed an application to the Minister of Economy for re-hearing of its application of 12 December 2006.[294] The application stated, in part:

> A failure to deliver the so-called ticketing service constitutes one of the limitations making it impossible for us to meet the obligation to accumulate an appropriate level of compulsory stocks. In fact, it is the lack of available storage facilities in Poland which constitutes a factor preventing us from meeting this obligation.

336. Further, J&SE stated that it could not have predicted Poland's failure to conclude bilateral treaties to allow mandatory reserves to be held in other EU countries, or the failure of storage companies to construct sufficient infrastructure.[295] As a consequence, according to J&SE:

> [I]n the present state of affairs we may talk about Force Majeure factor which make it impossible for us to store the required quantities of fuels within an indicated period of time. Therefore, we are of the opinion that there are conditions which justify our application and which enable you to fully support it.
>
> (….)
>
> Based on our information, it is not possible at present to store an additional 113,850 $m^3$ of fuels due to a lack of available storage facilities. Both, OLPP and IVG informed us about new tank storage facilities which would become available at the turn of the

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293 SoC, ¶ 661.

294 Annex C-151.

295 Annex C-151.

> 2nd and 3rd quarter of the current year. As we informed in our previous letter, storage the remaining quantities of fuels in crude oil was the only way to meet the obligation effectively. In this case our request for extending the deadline to accumulate the required quantities is caused only by a situation in the PERN pipeline system, which, as PERN informed us, due to transfer capacities would be able to pump the required amount of 185,000 tonnes of crude oil by the end of the 1st quarter of 2007.
>
> So, for many years J&S ENERGY S.A. has been a reliable and serious trade partner for a number of entities in Poland. For a long time, we have been the third biggest company in this industry in the country. We have not avoided meeting any obligations. The present situation is unusual and is a result of circumstances which exist in our country and for which we are responsible to a small extent. So, in a wide sense of the word it is a Force Majeure situation which allows positive consideration of our application. We are doing our best to meet the obligation resulting from the act and an inability of meeting this obligation to a large extent is a result of activities and events described in international standards as Force Majeure occurrences. At present, extending the deadline to accumulate the required stocks results only from the directly available transport capacities of PERN, which from the letter of law is the sole operator of oil pipelines in Poland. [Emphasis added]

337. The 22 January 2007 application for rehearing was denied by the Minister on 22 February 2007.[296] The decision of 22 February 2007 states the circumstances in which the Minister may grant an exemption from increasing in "particularly justified cases":

> The possibility of suspending the accumulation of compulsory stocks of fuels may apply in the situation when the company temporarily suspends its business activity of compulsory accumulation and maintenance of stocks of liquid fuels or there occur important circumstances making it impossible to accumulate compulsory stocks of liquid fuels in the required amounts which justify suspension of the obligation to increase those stocks. The particularly justified cases in which the Minister of Economy may allow a temporary halt in increasing compulsory stocks of liquid fuels include external force majeure which was impossible to foresee due to the negligible probability of it occurring and whose destructive consequences are

[296] Annex C-154.

> impossible to avoid (disasters, failures, terrorist attacks, natural disasters and other events caused by natural elements or forces of nature, etc.).[297]

338. After setting out J&SE's actual stocks and the stocks it should have held as at 31 December 2006, the decision continues as follows:

> The limitation of providing the so-called ticketing services by the storage companies does not constitute a particularly justified case which would enable a positive decision to allow a halt in increasing compulsory stocks. Information shows that Operator Logistyczny Paliw Płynnych Sp. z o.o. (Logistic Operator of Liquid Fuels Ltd.) did not refuse J&S Energy SA their services of storing fuels owned by J&S Energy SA and offered access to necessary storage capacity for maintaining compulsory stocks of liquid fuels. The refusal concerned solely storage of fuels in the so-called ticketing system. Such a decision made by OLPP Sp. Z o.o. was forced by the necessity of directing financial resources into OLPP Sp. z o.o. realizing the investment tasks of development and modernization of the storage area. PERN "Przyjaźń" SA possesses an extended storage area for storing downstream crude oil; however it does not provide services of storing compulsory stocks of liquid fuels.
>
> Moreover it should be noted that the inability [sic] of crude oil downstream within the time limits required by J&S Energy SA results from the necessity of PERN "Przyjaźń" SA realizing the timetable of crude oil downstream previously fixed with the recipients. Information shows that J&S Energy SA declared their intention of crude oil pumping only on December 8th 2006 while the time required to pump the necessary amount of crude oil is about 11 days. The activities undertaken by J&S Energy SA aimed to transfer oil to IKS Solino SA salt caverns seem to be delayed.
>
> The business activity of liquid fuels management is connected with the necessity of systematic realization of tasks resulting from the applicable legal order. J&S Energy SA, being aware of its statutory obligations of accumulating stocks, should have planned in advance all the activities related to entering into applicable agreement securing access to storage capacity or agreements related with crude oil downstream.

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297 Annex C-154, page 2.

> The risk related with the kind and direction of business activity cannot be devolved to public administration authorities.[298]

339. While Claimant argues that the decision did not take into account a lack of storage available at OLPP and IVG, Respondent submits that the application for rehearing did not contain evidence, as opposed to a submission, of lack of storage capacity.[299]

340. The Tribunal notes, as per its finding at ¶ 331 above, that J&SE's application for rehearing specifically stated that crude oil storage was available, and that it applied for an exemption due to delay "caused only by a situation in the PERN pipeline system".[300]

341. The Tribunal finds, thus, that J&SE's application for rehearing did not in fact rely upon a lack of storage capacity at OLPP or IVG. It relied upon delay in being able to transport crude oil through the PERN pipeline system. On that basis, the Minister's decision cannot be faulted for a failure to address the availability of liquid fuel storage at OLPP and IVG.

342. However, there is also a question as to the other information that the Minister had about storage capacity at OLPP. For the reasons stated in ¶ 341, it is not strictly necessary for the Tribunal to consider this matter under this head of argument but, as it was argued this way by the Parties, the Tribunal does consider it.

343. Claimant states that Respondent's submission, that the application for rehearing was rejected "primarily because storage capacity remained available from OLPP",[301] is contrary to the information provided by OLPP in its letter of 26 February 2007.[302] Claimant states that "the Ministry of Economy fully

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298 Annex C-154, page 3.

299 R-PHB, ¶ 181.

300 Annex C-151.

301 SoRj, ¶¶ 102–103.

302 C-PHB, ¶¶ 204–205.

understood from OLPP's February 26, 2007 letter that OLPP had no space for J&S Energy's diesel stocks".[303]

344. As the letter is dated 26 February 2007, four days after the Minister made his decision on 22 February 2007, Claimant's submission is essentially that the Minister's conduct in seeking information from OLPP and then making a decision before receiving that information, was wrongful in light of the information contained in OLPP's letter.[304]

345. Respondent states that the 26 February 2007 letter from OLPP was confirmatory of telephone discussions between OLPP and the Ministry and that a record of those discussions would have been on the Ministry's file.[305] Thus, the information contained in the letter was taken into account, and the fact that the decision was issued before OLPP's confirmatory letter was sent does not constitute a denial of due process.

346. In the alternative, Claimant argues that if, as submitted by Respondent, the letter was confirmatory of telephone discussions between OLPP and the Ministry prior to the making of the Minister's decision, the decision failed to take that information into account.[306]

347. Respondent submits that the letter of 26 February 2007 does not indicate that there was no capacity for liquid fuel storage at OLPP, but only that OLPP was unable to meet a location-specific request made by J&SE.[307]

348. OLPP's letter of 26 February 2007, *inter alia*, states that at the end of 2006, J&SE sought to increase the stocks held in storage by OLPP by approximately 12,000 $m^3$ of unleaded petrol and approximately 23,000 $m^3$ of diesel. OLPP

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303 C-PHB, ¶ 65.

304 C-PHB, ¶¶ 199-200, 203-206.

305 R-PHB, ¶ 268.

306 C-PHB, ¶ 203 and footnote 241.

307 SoRj, ¶¶ 73-74.

stated that as at the date of the letter it had already provided the petrol storage sought. The letter states that "OLPP plans to meet the increase in mandatory stocks of diesel oil in 2007 by assigning for this purpose the capacities acquired in 2007 under construction of new capacities covered by the OLPP investment plan for that year".[308]

349. It is common ground between the Parties that the reference to the end of 2006 in OLPP's letter of 26 February 2007 is a reference to an exchange of correspondence between J&SE and OLPP in November 2006.

350. The Tribunal agrees with Respondent's submission (see ¶ 347 above) that J&SE, in its email to OLPP of 24 November 2006, "merely requested capacity in those select locations where it conducted its activities, without reference to any prior conversation with OLPP indicating a limitation on generally available capacity".[309]

351. Claimant states that in November 2006, OLPP failed to offer any diesel storage to J&SE in November 2006, while Mr. Gutowski's evidence was that OLPP would have offered capacity if it had capacity—even if J&SE had only asked about capacity in certain locations.[310]

352. The Tribunal has had regard to the submissions and evidence presented by both Parties as to whether it would have been usual for OLPP to suggest alternative storage sites in the event that a customer requested storage at a site where storage was not available.[311] In addition, the Tribunal has considered Claimant's submission that J&SE's request for storage in its email of 24 November 2006 was limited in nature due to a prior telephone conversation between representatives of OLPP and J&SE, in which OLPP informed J&SE that the

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308 Annex R-22, page 2.

309 R-R-PHB, ¶ 21.

310 C-PHB, ¶¶ 60-61; Gutowski Transcript 1528/15-1531/12.

311 See, e.g., C-PHB, ¶¶ 58-61; R-PHB, ¶ 190; C-R-PHB, ¶ 4; R-R-PHB, ¶21.

only storage it had available was in the locations that J&SE ultimately requested.[312]

353. Regarding the disputed evidence as to whether OLPP had previously advised J&SE that it only had limited capacity, the Tribunal finds that, on balance, Respondent's version of events is more likely to be correct, given that there is no mention in the emails of an earlier telephone discussion, and given Mr. Musiał's reference to the importance of particular locations in J&SE's email of 24 November 2006 as follows:

> With respect to the above, please respond to the enlargement proposal of of [sic] volumes in the above mentioned locations. I also request a proposal of deployment of the above mentioned mandatory stocks, subject to the fact, that we seek locations in which we conduct an activity.[313]

354. The Tribunal finds, regarding OLPP's policy of asking customers whether they are interested in alternative storage sites, that, although Mr. Gutowski of OLPP confirmed that OLPP's policy was to "try to meet client's expectations and (…) offer them the capacity that are located where they are located and if we do not have those, we ask them if they are interested in anything else",[314] there is nothing in the email exchange of 24–28 November 2006 to suggest that OLPP lacked storage capacity.

355. The Tribunal finds that OLPP may have had other reasons for not offering capacity in locations other than those requested by J&SE.[315] Equally, J&SE's statement in its email of 24 November 2006, "we seek locations in which we conduct an activity" may have been interpreted by OLPP as a statement that J&SE would not consider other locations.

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312 C-PHB, ¶ 55; referring to evidence of Mr. Grzegorz Zambrzycki, Transcript, 371/8-17 and 373/19-21.

313 Annex R-153, page 2.

314 C-PHB, ¶ 60, quoting from Transcript, 1529/23 – 1530/2.

315 See, for example, Mr. Gutowski's evidence regarding the relative profitability of using storage space for trading rather than mandatory reserves: Transcript, 1530/21 – 1531/12.

356. The Tribunal finds, accordingly, that Claimant has not shown that OLPP lacked storage capacity at the time of J&SE's application for rehearing of the Second EFI Application, nor that information provided to the Minister indicated that OLPP lacked such storage capacity. Consequently, the Tribunal holds that Claimant has not discharged its burden of showing that the Minister wrongfully failed to take lack of storage capacity at OLPP into account in rejecting J&SE's application for rehearing of the Second EFI Application, in breach of Respondent's obligation to accord fair and equitable treatment.

357. (ii) *Failure to take account of delay in the PERN pipeline.* As noted at ¶ 304 above, Claimant argues that the Minister failed to take this matter into account in rejecting J&SE's application for rehearing of its Second EFI Application. However, the Tribunal finds that the Minister in his decision (see ¶ 338) did take the matter into account, but considered that it was a matter attributable to J&SE's own delay in taking action to constitute its reserves, and thus not as a ground for granting an EFI.

358. The Tribunal finds that Claimant has not shown that it was unreasonable in the circumstances for the Minister to have reached the conclusion referred to in ¶ 357 above. Accordingly, Claimant has not established that the Minister's failure to grant an EFI was unfair or inequitable by reason of his alleged failure to take account of delay in the PERN pipeline.

359. (iii) *Denial of procedural fairness.* Claimant submits that J&SE was not given the opportunity to comment on the telephone conversations that allegedly took place between OLPP and the Ministry prior to the sending of OLPP's 26 February 2007 letter, nor on the letter itself, constituting a denial of due process.[316]

360. Respondent denies any breach of due process, submitting that J&SE could have looked at the file at any time and that Polish law does not require that parties

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316 C-PHB, ¶ 207.

subject to administrative decision-making be informed of their right to inspect a file.[317]

361. Claimant has not disputed the submission in Respondent's Post-Hearing Brief that J&SE was entitled to review the file, nor Respondent's submission that in Polish administrative law a party was not required to be informed of the evidence gathered.[318] The Tribunal considers that it may have been preferable if the Ministry had invited J&SE to inspect the case file, but finds that failure to do so does not constitute a denial of due process that would breach the fair and equitable treatment obligation.

362. (iv) *Poland's compliance with EU obligations.* Claimant submits that Respondent had no reason to deny J&SE's Second EFI Application because, even if the First EFI Application had been granted, Poland would have remained in compliance with its EU reserves obligations.[319]

363. Respondent submits, responding to Claimant's submission on this point in the context of ARM's imposition of the First Financial Penalty that "[w]hilst it might not technically be necessary for all producers and importers to maintain the foreseen reserves in order for Poland to be compliant with its international (i.e. EU and IEA) reserves obligations, any leniency in enforcing the domestic reserves requirements would encourage free-riding by non-compliant producers/importers to the detriment of those that do comply".[320]

364. For the reasons stated at ¶¶ 297 to 300 above, the Tribunal finds that failure to consider Poland's compliance with its international obligations as alleged does not constitute a breach of the fair and equitable treatment obligation.

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317 R-PHB, ¶¶ 264 and 270.

318 R-PHB, ¶¶ 264 and 270.

319 SoC, ¶ 661.

320 R-PHB, ¶ 359.

*(iii)* Conclusion

365. On the basis of the evidence before it, the Tribunal concludes that the Minister's rejection of J&SE's Second EFI Application, on the grounds that compliance with J&SE's mandatory stocks obligation was not impossible for reasons out of J&SE's control, was not unreasonable.

366. The Tribunal holds that Claimant has not established that rejection of J&SE's Second EFI Application breached the fair and equitable treatment obligation in the ECT.

*d) Prosecution of J&SE*

367. Claimant makes separate allegations regarding the decisions taken to prosecute J&SE, and the decisions to impose financial penalties on J&SE. There is some overlap between these categories.

368. In this subsection, the Tribunal will analyse Claimant's allegations regarding the events leading up to and including the decisions taken by ARM to prosecute J&SE in September 2007 and February 2008. In the two following subsections, the Tribunal will analyse the allegations regarding the imposition of the First Financial Penalty and the Second Financial Penalty.

369. The Tribunal will consider below Claimant's allegations regarding the following: (i) representations that ARM would not commence proceedings; (ii) ARM's decision to conduct an inspection; (iii) the setting of the post-inspection deadline; (iv) Respondent's allegedly wrongful exercise of discretion in deciding to prosecute J&SE in September 2007 in knowledge of lack of storage capacity, obstruction by State-controlled third parties, and Respondent's compliance with EU obligations; and (v) Respondent's allegedly wrongful exercise of discretion in deciding to prosecute J&SE in February 2008 in knowledge of J&SE's compliance with its mandatory stock obligations, lack of storage capacity, obstruction by State-controlled third parties, and Respondent's

compliance with EU obligations, where a final decision had already been made, and where the case file was defective.[321]

370. The Tribunal notes that in so far as Claimant's allegation (SoC ¶¶ 698-699) of breach of due process through failure to admit or give due consideration to evidence, refers to Respondent's conduct in relation to the prosecution of J&SE in 2007 or 2008, that allegation is addressed as part of the Tribunal's analysis in subsections (iv)(i)-(ii) and (v)(iii) below.

371. Respondent denies that any elements of the prosecution of J&SE regarding its failure to maintain mandatory stocks were in breach of the obligation to accord fair and equitable treatment.

*(i)* Representations that ARM would not commence proceedings

372. Claimant submits that ARM, through Mr. Górski, made representations to J&SE that ARM: (i) would not commence proceedings against J&SE while it had requests for temporary exemptions pending before the Minister;[322] would not commence proceedings against J&SE provided J&SE withdrew its appeal to the Warsaw Administrative Court;[323] and would not commence proceedings provided J&SE presented an improvement plan, being a "suitable programme or schedule for the progressive accumulation of mandatory reserves".[324]

373. Claimant states that Mr. Górski had authority to act on behalf of ARM and thus his representations bound ARM and Respondent.[325] Further, it was reasonable

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321 The Tribunal notes Claimant's allegation (SoC, ¶ 669) that Respondent undertook the second prosecution of J&SE in the knowledge that the first prosecution was discriminatory and unfair, as allegedly admitted by Minister Pawlak. The Tribunal considers that this allegation is addressed through the Tribunal's consideration of Claimant's allegations regarding the first prosecution in this Section VIII.C.d) and of Claimant's allegations regarding discrimination in ¶¶ 616-648 below.

322 SoRy, ¶¶ 341–346.

323 SoC, ¶¶ 371–374, 667; SoRy, ¶¶ 347–352, 536; First Witness Statement of Grzegorz Zambrzycki, ¶¶ 82–84.

324 SoC, ¶¶ 371–372, 667; SoRy, ¶¶ 353–356.

325 C-PHB, ¶¶ 159–173.

for J&SE to rely on Mr. Górski's representations,[326] and ARM's subsequent decision to commence proceedings against J&SE was thus contrary to J&SE's legitimate expectations and constituted unfair and inequitable treatment.[327]

374. Respondent denies that Mr. Górski made any of the alleged representations,[328] submits that Mr. Górski had no authority to bind ARM because he was not the President of ARM;[329] and argues that even if Mr. Górski had made the alleged representations, J&SE could not have relied on them, given the clear position that ARM was required to commence proceedings against entities who failed to meet their mandatory stock requirements.[330]

375. The Tribunal has had regard to the conflict between the evidence of Mr. Górski[331] and Mr. Zambrzycki,[332] as to the alleged making of representations by Mr. Górski leading to legitimate expectations ultimately disappointed by subsequent conduct on the part of ARM.

376. The Tribunal finds it unnecessary to resolve that conflict. Given the scale of J&SE's business and what was at stake, it would not have been reasonable for J&SE to rely on an oral representation made to its representative by Mr. Górski or anyone else. Not having been reduced to writing, it would not have been reasonable for J&SE to have relied upon them.

377. In conclusion, the Tribunal finds that there is no breach of the fair and equitable treatment obligation arising from the alleged representations.

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326 C-PHB, ¶ 162.

327 SoC, ¶ 667.

328 See, *e.g.*, R-R-PHB, ¶ 57; R-PHB, ¶ 76, referring to First Witness Statement of Wiesław Górski, ¶ 23; SoD, ¶¶ 228–229; SoRj, ¶ 177, referring to First Witness Statement of Wiesław Górski, ¶¶ 24–25; SoD, ¶ 234; SoRj, ¶ 182.

329 SoD, ¶ 229.

330 SoD, ¶ 229.

331 See, e.g., First Witness Statement of Wiesław Górski, ¶¶ 23-31; Second Witness Statement of Wiesław Górski, ¶¶ 5-19.

332 See, e.g., First Witness Statement of Grzegorz Zambrzycki, ¶¶ 82-84; Second Witness Statement of Grzegorz Zambrzycki, ¶¶ 3-6.

*(ii)* ARM's decision to conduct an inspection of J&SE's mandatory stocks

378. Claimant states that ARM had total discretion in deciding whether to inspect J&SE's mandatory stocks.[333]

379. Claimant argues that ARM was not obliged to carry out an inspection at all,[334] and that, given ARM's awareness of J&SE's difficulties regarding storage, ARM should have exercised its discretion not to conduct an inspection of J&SE's second quarter stocks in July/August 2007, as it had done with respect to J&SE's first quarter stocks.[335] Further, Claimant submits, based on Mr. Zambrzycki's evidence, that the inspection was ordered by someone outside of ARM.[336]

380. Respondent states that on becoming aware, through J&SE's monthly reports, that J&SE had a shortfall, ARM was obliged to conduct an inspection – it had no discretion to do otherwise.[337] In the alternative, the decision to inspect was based on J&SE's own reports, and was therefore "not arbitrary or unreasonable".[338] Respondent denies that the inspection was ordered by someone external to ARM, noting that the person who allegedly informed Mr. Zambrzycki has not been identified, and that Mr. Górski stated that the decision was not influenced by third parties.[339]

381. The Tribunal finds that ARM did have discretion as to whether or not to conduct an inspection of J&SE's second quarter 2007 stocks, as evidenced by ARM's decision not to conduct an inspection of J&SE's first quarter 2007 stocks.

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333 C-PHB, ¶ 110.

334 C-PHB, ¶ 20.

335 C-PHB, ¶¶ 111–112.

336 First Witness Statement of Grzegorz Zambrzycki, ¶ 85.

337 R-PHB, ¶ 297.

338 R-PHB, ¶ 298.

339 R-PHB, ¶¶ 299–300.

382. Given the significant shortfall shown in J&SE's reports, it was not a wrongful exercise of discretion to decide to conduct an inspection, even though ARM had on a previous occasion decided not to conduct an inspection of J&SE's first quarter stocks. The Claimant has not established that the inspection was ordered by a party extraneous to ARM.

383. In conclusion, the Tribunal finds that the decision to conduct an inspection did not breach the fair and equitable treatment obligation.

*(iii)* The post-inspection deadline

384. Claimant submits that "having carried out [the] inspection, [ARM] should have set J&S Energy reasonable deadlines within which to replenish its reserves and/or extended the same, as appropriate".[340] Failure to do so, given ARM's knowledge that it would have taken J&SE six months to replenish its stocks, constituted a breach of Article 10 of the ECT.[341]

385. Claimant alleges that more time could and should have been granted to J&SE, given that ARM knew that "any financial penalty would likely wipe out J&S Energy"[342] and in view of the time given to another company, Entity FF, to make up a shortfall.[343]

386. Claimant submits that J&SE applied for an extension "in a very strongly reasoned letter" of 11 September 2007, and that Mr. Górski at the Hearing was unable to explain why the application was denied.[344]

387. Respondent states that fixing a deadline of 21 days did not breach the obligation to accord fair and equitable treatment, because it was ARM's standard practice to give a deadline of not more than 21 days; the Supreme Chamber of Control

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340 C-PHB, ¶ 20; see also: C-PHB, ¶¶ 114-124; and C-R-PHB, ¶¶ 27–28.

341 C-PHB, ¶ 126.

342 C-PHB, ¶ 120.

343 C-PHB, ¶¶ 114–119.

344 C-PHB, ¶ 126, referring to Annex C-169; Transcript 1363/2–1367/16.

had "admonished" ARM to be more stringent; J&SE knew it had a shortfall and must have expected the audit report to reflect that; and J&SE had been in breach of its obligations for 11 months.[345] Further, there is no evidence that J&SE asked ARM for a longer period than normal for compliance prior to the issuing of the post-audit report, even though it knew the report would be issued.[346]

388. Respondent states that refusing an extension as requested by J&SE on 11 September 2007 did not breach the fair and equitable treatment obligation because: it was made on the day the deadline expired, it did not contain evidence of the impossibility of finding storage, and it did not contain a proposed new date for compliance.[347] Further, J&SE could have applied for an EFI, but chose not to.[348]

389. Respondent submits that the case of Entity FF took place prior to the Supreme Chamber of Control's recommendation to ARM that it be consistent when setting the length of deadlines, and be more stringent in enforcing the MRA.[349]

390. The Tribunal has considered the Parties' submissions regarding the deadline fully, and finds that the setting of the original three-week deadline was not unfair or inequitable. Given ARM's practice, it was entirely normal, and viewed in the context of the fact that J&SE must be taken to have been aware of its significant mandatory stock shortfall for some time, the setting of a Final Extended Deadline in line with ARM's usual practice did not breach the fair and equitable treatment obligation.

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345 R-PHB, ¶ 322.

346 R-PHB, ¶ 310.

347 R-PHB, ¶ 323.

348 R-PHB, ¶ 311.

349 R-PHB, ¶¶ 103-104, 309, referring to Annex C-163 and the evidence of Mr. Górski at Transcript 1422/13–21.

*(iv)* Respondent's allegedly wrongful exercise of discretion in commencing proceedings in September 2007

391. Claimant alleges that ARM could have decided not to prosecute J&SE in September 2007, and that it should have so decided in light of: (i) the deficit of storage space in Poland; (ii) the obstruction by State-controlled companies of J&SE's attempts to comply with its obligations; and (iii) the fact that there was no reason to take action against J&SE given that Poland remained in compliance with its EU obligations regarding mandatory energy stocks.[350]

392. Respondent states that ARM had no discretion and that the results of the inspection required ARM to commence proceedings.[351] ARM was not authorised to take into account matters regarding available storage space, obstruction by third parties[352] or Poland's compliance or otherwise with its EU obligations.

393. Further, Respondent submits that ARM's decision to open proceedings was "justified given that: (i) JSE's own monthly reports showed it to be significantly in breach of the mandatory reserves requirements and that it had been for over 11 months; (ii) the audit report confirmed it to be significantly in breach at 30 June 2007; (iii) it remained in breach at the end of the Final Extended Deadline; (iv) ARM had been admonished by the Supreme Chamber of Control to be more stringent; (vi) ARM is under a statutory obligation to apply the law; (vii) JSE's statements that it would use 'best efforts' to comply were vague and did not commit to compliance by any specific date."[353]

394. The Tribunal has had regard to the relevant provisions of the MRA concerning the circumstances in which a penalty shall be imposed. Article 63(1)(1) provides:

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350 SoC, ¶ 668; see also SoRy, ¶¶ 529, 533.

351 SoRj, ¶¶ 116, 370.

352 SoRj, ¶ 376.

353 R-PHB, ¶ 343.

> A financial penalty shall be imposed on anyone who fails to comply with the obligation to accumulate and maintain mandatory reserves, referred to in Article 5 or 24, within the prescribed time limit and in the required quantity.[354]

395. Article 64(2) of the MRA states:

> The Material Reserves Agency shall impose penalties referred to in Article 63 paragraph 1 subparagraphs 1 through 8, 18 and 20 by way of administrative decision which can be appealed against to the minister in charge of economy.[355]

396. Before addressing the question whether ARM had discretion to decide whether or not to commence proceedings in September 2007, the Tribunal analyses Claimant's arguments on the assumption that ARM did have such discretion. The Tribunal now analyses Claimant's arguments in turn.

397. (i) *Deficit of storage space.* The Polish legislation to which the Tribunal has been referred does not in terms require ARM to take lack of storage space into account in deciding to commence proceedings for breach of the obligation to maintain mandatory stocks. In light of the Tribunal's finding that objective lack of storage space was a ground on which a company could apply for an EFI, the Tribunal is not persuaded that it would have been unfair or inequitable for ARM not to have taken an alleged lack of storage capacity into account in reaching its decision to commence proceedings against J&SE. In reaching this conclusion, the Tribunal makes no finding as to whether storage was or was not available at the relevant time.

398. (ii) *Obstruction by State-controlled companies.* It is uncontested between the Parties that there is, with one exception, no relevant provision in Poland's mandatory reserves law that specifically allows or requires a decision maker to take account of the conduct of third parties and the impact of that conduct on the

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354 Annex RA-115. The translation provided by Claimant at Annex C-9 is not relevantly different, though it begins, "A fine is payable by anyone who (...)".

355 Annex RA-115. The translation provided by Claimant at Annex C-9 is not relevantly different, though it begins, "The Material Reserves Agency imposes the fined [sic] discussed (...)".

ability of a company to comply with its mandatory reserves obligations. The exception is in the context of an EFI application, where such conduct could, depending on the circumstances, fall within the "especially justified case" category.

399. Respondent submits that the conduct of third parties could only be relevant, if at all, at the stage of applying for an EFI, and not at later stages of the administrative process.[356]

400. Claimant has not made any legal submissions to support its argument that fair and equitable treatment requires a decision maker to take into account a company's argument that the reason it is not complying with its mandatory storage obligations is because of the conduct of third parties.

401. Equally, Claimant has not made any legal submissions to support its argument that, even in the absence of a claim of attribution, fair and equitable treatment requires a decision maker to take into account a company's argument that the reason it is not complying is because of the conduct of third parties controlled by the State.[357]

402. Finally, Claimant has not explained how evidence of third party conduct should have been dealt with under the mandatory reserves law, other than to say that, in the case of refusal by PKN Orlen and Grupa Lotos to provide a processing agreement, "this circumstance alone should be an excuse for us for the time it took to constitute reserves".[358]

403. The Tribunal agrees with Respondent's submission that the purpose of Poland's mandatory reserves legislation is to maintain a level of reserves within Poland

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356 SoRj, ¶ 376.

357 SoRj, ¶ 265.

358 Transcript, 2001/5–7.

such that Poland's energy security is maintained and Poland complies with its EU and IEA obligations.[359]

404. In light of this, it would undermine the purpose of the legislation to require decision makers to excuse a failure to comply whenever such failure is alleged to have been caused by the conduct of a third party.

405. In the specific cases of OLPP, Grupa Lotos, PERN and PKN Orlen as companies owned in whole or in part by Respondent, the Tribunal holds that where attribution is not alleged, it would only be unfair for Respondent not to excuse non-compliance in circumstances where Respondent has day-to-day, operational control and the conduct of the third party is wrongful in its nature, not merely obstructive in its effect.

406. As to the first point, Respondent submits that it did not exert management control over OLPP, PERN, PKN Orlen or Grupa Lotos, and that any such exertion of operational control would have been contrary to Polish law.[360] Respondent further submits that "[t]he fact that individual company officers may have had political connections does not imply State control over such entities".[361]

407. Claimant has not adduced evidence challenging Respondent's statements of Polish law, and has not alleged that Respondent's treatment of OLPP, PKN Orlen, PERN or Grupa Lotos was in general in breach of such law.

408. The Tribunal finds that Claimant has not shown that Respondent had day-to-day, operational control of OLPP, PKN Orlen, PERN or Grupa Lotos.

409. Accordingly, the Tribunal holds that Claimant has not shown that any failure by ARM to take account of third party conduct when deciding whether or not to commence proceedings against J&SE would have been unfair or inequitable.

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359 SoD, ¶¶ 15-17; SoRj, ¶ 147.

360 R-R-PHB, ¶ 19, referring to SoD, Section VIII.

361 R-R-PHB, ¶ 19.

Accordingly, the Tribunal need not address whether any conduct on the part of any of those companies was wrongful.

410. (iii) *Poland's compliance with EU obligations.* Claimant submits that Poland's energy security situation did not require ARM to prosecute J&SE because throughout the relevant period Poland was always in compliance with its EU reserves obligations (see ¶ 76 above).[362]

411. Respondent submits, responding to Claimant's submission on this point in the context of ARM's imposition of the First Financial Penalty that "[w]hilst it might not technically be necessary for all producers and importers to maintain the foreseen reserves in order for Poland to be compliant with its international (i.e. EU and IEA) reserves obligations, any leniency in enforcing the domestic reserves requirements would encourage free-riding by non-compliant producers/importers to the detriment of those that do comply".[363]

412. The Tribunal is convinced by Respondent's submission. The fact that Poland was not in breach of its EU and IEA reserves obligations does not show that it was unreasonable to take a strict approach in order to remain in compliance, given the risk that a less-strict approach "would encourage free-riding".[364]

413. The Tribunal finds, accordingly, that even if ARM had discretion in deciding whether to commence proceedings for imposing the First Financial Penalty, it would not have been required to take into account the fact that Poland was not in breach of its EU (or IEA) reserves obligations.

414. The Tribunal does not consider that a failure by ARM to have taken Poland's compliance with its international obligations into account as a reason for not commencing proceedings could constitute unfair or inequitable treatment.

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362 SoC, ¶¶ 668.

363 R-PHB, ¶ 359.

364 R-PHB, ¶ 359.

415. (iv) *Conclusion.* The Tribunal concludes that ARM's decision to commence proceedings in September 2007 was not unfair or inequitable.

416. Given the Tribunal's findings, it is not necessary to determine whether ARM in fact had discretion to decide whether or not to commence proceedings for the imposition of the First Financial Penalty.

*(v)* Respondent's allegedly wrongful exercise of discretion in commencing proceedings in February 2008

417. Claimant alleges that Respondent should have decided not to prosecute J&SE in February 2008, for the reasons set out in paragraph 391 and for the following additional reasons: (i) J&SE was by that time acknowledged by Respondent to be in full compliance with its mandatory stock obligations, and Respondent has stated that "a fine should be imposed on the basis of facts as at the day on which the fine is imposed";[365] (ii) the matter had previously been the subject of a final decision, and reopening it thus constituted an abuse of process[366] and was inconsistent with principles of double jeopardy and *res judicata*[367]; and (iii) the case file on the basis of which the second proceedings were commenced was incomplete, and "omitted to include key documentation that J&S Energy had in the past submitted for the purposes of demonstrating fulfillment of its mandatory reserves obligations,"[368] while Respondent refused to produce to J&SE certain documentation that had formed part of the file of the first prosecution.[369]

418. Respondent submits that ARM had no discretion and was required by law to commence proceedings a second time.[370]

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365 SoC, ¶ 670, referring to Annex C-22; see also SoRy, ¶ 531.

366 SoC, ¶¶ 671–672.

367 SoRy, ¶ 538.

368 SoC, ¶ 673; see also ¶¶ 497–501, 514–515; SoRy, ¶ 544.

369 SoRy, ¶ 544; SoC, ¶¶ 499-501, 514.

370 R-PHB, ¶ 373.

419. The Tribunal will deal with each of Claimant's allegations in turn.

420. (i) *Compliance with mandatory stock obligations.* Claimant argues that there was no factual basis for the fine to be applied because J&SE was, and is acknowledged by Respondent to have been, fully compliant with its mandatory stock obligations at the time proceedings were commenced in February 2008 and on the date of imposition, and the date of confirmation, of the Second Financial Penalty.[371]

421. The Tribunal notes Claimant's allegation that Mr. Pawlak, the then-Minister, acknowledged in his statements to the Parliamentary Economic Committee on 14 February 2008 that "a fine should be imposed on the basis of facts as at the day on which the fine is imposed".[372]

422. While Respondent does not dispute that J&SE was fully compliant at those points in time, it submits that for the purposes of a decision to prosecute in February 2008, it was irrelevant that J&SE was by that time in compliance with its mandatory stock obligations—the relevant date for compliance was 30 June 2007, or, at the latest, 11 September 2007, being the date of the Final Extended Deadline.[373]

423. Respondent submits that this conclusion follows from the wording of the MRA, the deterrent purpose of an administrative penalty and case law of the Supreme Administrative Court of Poland.[374] With respect to Mr. Pawlak's statement, Respondent refers to his evidence given at the Hearing, in which he stated that the reference to the "facts" should be taken to mean the evidence available as at the date of imposition of the fine.[375]

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371 SoC, ¶¶ 669.

372 SoC, ¶ 682, referring to Annex C-22.

373 SoD, ¶ 178–179, 434.

374 SoD, ¶ 270–275; R-PHB, ¶¶ 374 and 376.

375 R-PHB, ¶ 393, referring to Transcript 1732/1-16.

424. The Tribunal holds that, even if it is assumed that ARM had discretion in making its decision to prosecute, Respondent is correct that the dissuasive purpose of the mandatory reserves law would be undermined if fines were to be forgiven once an entity became compliant. The Tribunal agrees with Respondent that Mr. Pawlak clarified through his evidence at the Hearing that he considered that a penalty should be imposed based on the evidence available at the time of imposition.

425. Accordingly, the Tribunal finds that Claimant has not made out a breach of the fair and equitable treatment obligation under this head of argument.

426. (ii) *Abuse of process/res judicata.* Claimant alleges that the Minister's decision of 14 December 2007 was a final decision, and that recommencing proceedings in February 2008 "breach[ed] the universal principle of *non bis in idem*".[376]

427. Respondent submits that the subject matter of the Second Financial Penalty was not *res judicata* as a result of the quashing of the First Financial Penalty.[377] Rather, "fresh proceedings were commenced by the correct administrative organ after the Minister of Economy has quashed the decision of another administrative organ on the basis that it was not competent to decide the case".[378]

428. Respondent submits that ARM was in fact obliged to commence the second proceedings against J&SE by virtue of the Act of 17 December 2004 on the liability for violation of public finance discipline.[379]

429. The Tribunal acknowledges that the principle of *ne bis in idem* (alternatively, "*non bis in idem*") or *res judicata* may be considered universal; however, it is

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376 SoRy, ¶¶ 407–408.

377 R-PHB, ¶ 398, referring to the decision of the Warsaw Administrative Court, Annex C-263 and to the decision of the Supreme Administrative Court, Annex R-11.

378 SoD, ¶ 268.

379 SoD, ¶¶ 287–288.

far from being the case that the principle is applied identically in every jurisdiction.

430. Claimant does not argue that the commencement of proceedings for imposition of the Second Financial Penalty breached Polish domestic law regarding *res judicata*.

431. The Tribunal considers that, in the absence of evidence that ARM's decision to commence proceedings for imposition of the Second Financial Penalty constituted a breach of the domestic law of *res judicata*, Claimant has not shown that ARM's decision was unfair or inequitable under this head. Claimant does not challenge Polish law in this regard, so the Tribunal need not consider whether the application of Polish law on *res judicata* could itself have resulted in a breach of the obligation to accord fair and equitable treatment.

432. In light of its findings in ¶¶ 429-431 above, the Tribunal considers that Claimant's allegation of abuse of process regarding ARM's decision not to appeal against the Minister's 14 December 2007 decision, but to prosecute J&SE in February 2008,[380] must also be rejected.

433. (iii) *Incomplete case file.* Claimant alleges that the case file, on which the proceedings for imposition of the Second Financial Penalty by ARM was commenced, was selectively composed by ARM from some, but not all, documents in the file concerning the proceedings for imposition of the First Financial Penalty, and was thus defective.[381] In addition, Claimant alleges that certain documents sought by J&SE from ARM were not produced to it on the grounds that they did not form part of the new case file.[382]

434. Respondent rejects Claimant's allegation that the case file was defective. Respondent acknowledges that as originally constituted the file was incomplete,

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380 SoC, ¶¶ 671-672.

381 SoRy, ¶ 544, referring to SoC, ¶¶ 497-498.

382 SoRy, ¶ 544, referring to SoC, ¶ 514.

but states that it was soon regularized.[383] Respondent submits that "[n]either JSE nor the Claimant assert that there were documents relevant to the outcome of the case that were not ultimately included in the case file."[384]

435. Further, Respondent submits that the documents sought by J&SE were ultimately produced to it and that some were produced by Claimant as Annexes in this case.[385]

436. The Tribunal notes that Claimant has not asserted, as noted by Respondent,[386] that relevant documents were ultimately not included in the case file. Further, Claimant has not in its subsequent pleadings disputed Respondent's submission that the documents sought by J&SE were ultimately produced to J&SE. The Tribunal concludes that the creation of a defective case file in circumstances where the defects were subsequently corrected does not constitute unfair and inequitable treatment.

437. The Tribunal further concludes that failure to produce requested documents does not, without more, constitute unfair and inequitable treatment.

438. (iv) *Conclusion.* The Tribunal finds that Claimant has not established any breach of the obligation to accord fair and equitable treatment in connection with the commencement of proceedings for imposition of the Second Financial Penalty on J&SE.

*(vi)* Conclusion

439. In summary, the Tribunal finds that Claimant has not established any breach of the obligation to accord fair and equitable treatment in connection with the prosecution of J&SE.

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383 SoRj, ¶ 381.

384 SoRj, ¶ 381.

385 SoRj, ¶ 383.

386 SoRj, ¶ 381.

440. Given the Tribunal's findings, it is not necessary to determine whether or not ARM had discretion at any stage in the prosecution process other than at the stage of deciding whether to conduct an audit (in respect of which the Tribunal found that ARM did have such discretion, see ¶ 381 above). Accordingly, it is not necessary to consider Claimant's allegation (referred to at ¶ 183 above) that if ARM did not have discretion under Polish mandatory reserves law, that fact would have rendered Polish mandatory reserves law itself unfair and inequitable.

*e) Imposition of First Financial Penalty on J&SE*

441. Claimant submits that imposition of the First Financial Penalty by ARM on 16 October 2007 was unfair and inequitable because ARM wrongfully exercised its discretion in deciding to impose the penalty.[387]

442. Respondent denies that ARM had discretion and states that ARM was required, in the circumstances, to impose the First Financial Penalty.[388]

443. Before addressing the question whether ARM had discretion to decide whether or not to impose the First Financial Penalty, the Tribunal will analyse Claimant's arguments on the assumption that ARM did have discretion.

444. The six elements of Claimant's argument that imposition of the First Financial Penalty was a wrongful exercise of discretion in breach of Respondent's fair and equitable treatment obligation are: (i) that J&SE was in physical compliance with its mandatory stock obligations; [389] (ii) there was no legal basis for imposition of First Financial Penalty; [390] (iii) there was a lack of storage capacity in Poland; [391] (iv) obstructive conduct by State-controlled companies

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387 C-PHB, ¶¶ 127–140.

388 R-PHB, ¶ 405.

389 SoC, ¶ 677; see also SoRy, ¶ 531.

390 SoC, ¶ 678.

391 SoC, ¶ 679; see also SoRy, ¶ 529.

prevented J&SE from meeting its obligations; [392] (v) that the decision imposing the First Financial Penalty violated J&SE's right to be heard;[393] (vi) Poland's energy security status was not under threat; [394] and (vii) the imposition of the First Financial Penalty was disproportionate.[395]

445. The Tribunal notes that in so far as Claimant's allegation (SoC ¶¶ 698-699) of breach of due process through failure to admit or give due consideration to evidence refers to Respondent's conduct in relation to imposition of the First Financial Penalty, that allegation is addressed as part of the Tribunal's analysis in subsections (i)-(v) below.

446. The Tribunal now considers Claimant's allegations as stated in ¶ 444.[396]

447. (i) *Physical compliance.* Claimant submits that the fact that it had stored 150,000 Mt of crude oil in PERN's storage facilities by 25–26 September 2007 meant that ARM should not have imposed the First Financial Penalty on J&SE.[397]

448. It is common ground that on 3 October 2007, J&SE submitted a "Motion in the Proceedings on Imposing a Fine" to ARM, informing it, *inter alia*, that PERN held 150,000 Mt of crude oil for J&SE.[398] On 9 October 2007, J&SE informed ARM that PERN had refused to confirm that it was holding crude oil for J&SE, and J&SE sought 21 days to provide further evidence.[399] ARM granted J&SE

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392 SoC, ¶ 680; see also SoRy, ¶ 533.

393 SoRy, ¶ 544

394 SoC, ¶ 681.

395 SoC, ¶ 685.

396 The Tribunal notes that at SoC, ¶ 683 that Claimant alleges that Respondent unfairly refused to exercise its discretion to waive the financial penalties, "as it had done on many prior occasions, with other companies". This allegation is not further developed in Claimant's pleadings on fair and equitable treatment, and the Tribunal considers it in Section X, below, dealing with Claimant's allegations of discrimination.

397 SoC, ¶ 677.

398 Annex C-174, referred to at SoC, ¶ 426.

399 SoC, ¶ 428.

only until 15 October 2007.[400] On that date, J&SE, still without PERN's written confirmation, produced to ARM "protocols demonstrating that the oil had been pumped to Adamowo, and that it was intended to constitute mandatory reserves".[401]

449. Claimant submits that "[the] reserves were properly documented and fulfilled all formal requirements of the MRA (save for a processing agreement), with storage agreements that established the existence of those reserves on or prior to September 26, 2007".[402]

450. Respondent submits that "physical compliance" is not sufficient to satisfy a party's MRA mandatory stock obligations.[403] Article 10(1) of the MRA requires a storage agreement and Article 11(4) requires a processing agreement if the obligation to maintain fuel stocks is to be satisfied by storing crude oil instead.[404]

451. The Parties disagree as to whether J&SE had a storage agreement in place for some or all of the 150,000 Mt of crude oil at the relevant time.[405]

452. The Tribunal finds, in respect both of the 50,000 Mt and the 100,000 Mt, that whatever the proper interpretation of the nature of the requirement to produce a storage agreement, the fact remains that a processing agreement was not in place in respect of either tranche as at the date the fine was imposed, 16 October 2007.

453. Claimant has argued, with respect to J&SE's failure to have a processing agreement in place, that "[t]he only missing element was a piece of paper

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400 SoC, ¶ 430, referring to Annex C-177.

401 SoC, ¶ 432, referring to Annex C-179.

402 C-PHB, ¶ 36, footnotes omitted.

403 R-PHB, ¶ 119.

404 R-PHB, ¶¶ 121–123.

405 SoRy, ¶¶ 317, 321–322; C-R-PHB, ¶ 6 and footnote 9, referring to Annex C-357; R-PHB, ¶¶ 125–126, 353.

improperly withheld by PKN Orlen under instructions from the Polish Government."[406]

454. For the reasons stated at ¶¶ 474-475 below, the Tribunal finds that Claimant has not established any involvement of Respondent in PKN Orlen's decision not to provide J&SE with an executed processing agreement, nor has it established that Respondent would have been required to act on any knowledge it may have had regarding PKN Orlen's conduct.

455. The Tribunal has had regard to the Parties' submissions regarding Claimant's allegation that ARM, through the representations of Mr. Górski, gave J&SE additional time within which to redress its shortfall of mandatory stocks.[407]

456. While Claimant alleges that Mr. Górski agreed to accept documentation regarding the PERN reserves "in a 'later, although short, term'",[408] and refers to Mr. Górski's approval of a draft processing annex on 27 September 2007, after the supposed expiry of the Final Extended Deadline[409] it does not specifically allege the length of any extension, beyond referring to the Minister of Economy's decision quashing the First Financial Penalty. [410]

457. In that decision, the Minister criticized ARM's failure to address J&SE's efforts to constitute reserves between the Final Extended Deadline and 15 October 2007[411].

458. Claimant's Reply can be read as alleging that J&SE's efforts up to 30 October 2007 should have been taken into account—at paragraph 150 Mr. Zambrzycki is quoted as saying that "ARM was fully aware that J&S Energy made great efforts to top up and document its reserves between September 11 and October

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406 SoC, ¶ 677.

407 SoRy, ¶¶ 144–155.

408 Second Witness Statement of Grzegorz Zambrzycki, ¶ 66, quoted at SoRy, ¶ 148.

409 SoRy, ¶ 149.

410 SoRy, ¶ 152, referring to Annex C-12.

411 SoRy, ¶ 152, referring to Annex C-12.

30, 2007" and that "nobody at ARM (…) ever suggested to J&S Energy that its efforts were in vain, as the 'final' deadline was September 11, 2007".[412]

459. Bearing in mind the Minister's decision quashing the First Financial Penalty, the Tribunal finds that the latest extension for which there is any evidence is an extension until 15 October 2007.

460. The Tribunal does not consider that a failure to suggest to J&SE "that its efforts were in vain" was conduct on which J&SE could properly have relied as an extension of the deadline for a longer, unspecified time.

461. As at 15 October 2007, there was no processing agreement in place in respect of either the 50,000 Mt or the 100,000 Mt of crude oil. The reasons for the lack of a processing agreement, are discussed below.

462. The Tribunal finds that it is not necessary to decide whether ARM had discretion not to impose a fine in circumstances where J&SE was in "physical compliance" because, even if ARM had had discretion, the failure to take such "physical compliance" into account would not have been unfair or inequitable in light of the requirement imposed by Article 11(4) of the MRA that mandatory fuel reserves held as crude oil must be subject to a processing agreement.[413]

463. (ii) *No legal basis*. Claimant submits that neither the MRA nor any other applicable law "expressly contemplate[d]" the imposition of penalties during the period 7 April 2007–31 December 2008 or the imposition of penalties in respect of shortfalls during that same period.[414] Thus, according to Claimant, the First Financial Penalty was imposed without a legal basis, and contrary to Claimant's legitimate expectations.[415]

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412 Second Witness Statement of Grzegorz Zambrzycki, ¶ 68.

413 See ¶ 176 above.

414 SoC, ¶ 704.

415 SoC, ¶ 705.

464. Respondent submits (in the context of its response to Claimant's allegations regarding the Minister's decision to uphold the Second Financial Penalty but relevant also to ARM's imposition of the First Financial Penalty) that Polish case law establishes that a fine may be imposed for failure to meet a transitional (i.e., pre-31 December 2008) deadline.[416]

465. Respondent refers to Article 5 of the MRA, requiring producers and traders to maintain certain mandatory reserves[417] and Article 63(1)(1) of the MRA, stating that a fine is payable for failure to comply with Article 5.[418] Respondent states that "[a]ny other interpretation of Article 63 MRA would be unreasonable and would render the obligation to maintain mandatory reserves during the transitional period meaningless".[419]

466. In light of the evidence presented, the Tribunal holds that Claimant has not shown that Respondent's conduct, in interpreting the MRA as allowing the imposition of fines for breach of transitional obligations, and applying such fines, was unfair or inequitable. The Tribunal finds that Respondent's interpretation cannot be described as unreasonable. Claimant has not shown that it had a legitimate expectation that the law would be interpreted otherwise, and thus has not established a breach of the fair and equitable treatment obligation under this head of argument.

467. (iii) *Insufficient storage capacity.* The Tribunal has found (see ¶ 397 above), in the context of ARM's decision to prosecute J&SE in September 2007, that it was not unfair or inequitable for ARM not to have taken J&SE's allegation of lack of storage capacity into account.

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416 R-PHB, ¶ 392, referring to Judgment of the Voivodship Administrative Court in Warsaw of 23 December 2008, file no. VI SA/Wa 1567/08, Annex R-5; Judgment of the Supreme Administrative Court of 20 October 2009, file no. II GSK 380/09, English version, pages 11–12, Annex R-11.

417 SoRj, ¶ 390.

418 SoRj, ¶ 392.

419 SoRj, ¶ 394.

468. For the same reasons (namely, that Polish legislation does not in terms require ARM to take the deficit of storage space into account, and that lack of storage capacity was a ground on which an application for an EFI could be granted), the Tribunal finds that it was not unfair or inequitable for ARM not to have taken an alleged lack of storage capacity into account in reaching its decision to impose the First Financial Penalty on J&SE.

469. In any event, on the facts as pleaded by Claimant, at the time the First Financial Penalty was imposed J&SE in fact had crude oil storage available to it, as detailed in ¶¶ 447 to 449 above.

470. In light of the above, it is not necessary for the Tribunal to decide whether ARM could, as a matter of discretion, have taken capacity shortage into account when deciding whether to impose the First Financial Penalty.

471. (iv) *Obstruction by State-controlled companies.* Claimant alleges that Respondent has acknowledged, through the letter of the President of ARM to the Minister of Economy of 27 November 2007, that J&SE was making efforts to comply with its MRA obligations: "undoubtedly the punished company undertook efforts in order to bring its activity into compliance with the law".[420] Claimant alleges that Respondent was aware that the State-controlled companies OLPP, PERN and PKN Orlen were obstructing J&SE's attempts to comply with its mandatory stocks obligations.[421]

472. While, as noted above, Claimant does not argue that the conduct of OLPP, PERN and PKN Orlen can be attributed to Respondent, it submits that "the behavior of the Polish authorities should be judged against the context of their control over OLPP, PERN and PKN Orlen".[422] Further, Claimant states that "[t]he fact that the Respondent ignored the conduct of *its own companies* when

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420 C-PHB, ¶ 34, quoting from Annex C-189.

421 SoC, ¶¶ 460, 680.

422 C-PHB, ¶ 41.

imposing the financial penalties renders the Respondent's breaches of the ECT even more egregious".[423] (Emphasis in the original.)

473. Respondent denies that the conduct of third parties is a matter that ARM should have taken into account in deciding to impose a financial penalty.[424]

474. The Tribunal has already found (see ¶¶ 405 to 408 above) that, in the absence of a finding (not sought by Claimant) of attribution, the obligation to accord fair and equitable treatment could only have required Respondent to take into account the actions of companies over which it had operational control, and then only where that conduct was wrongful in nature and not merely obstructive in its effect. The Tribunal has found that Claimant has not met its burden of proving that Respondent had operational control over OLPP, PERN, Grupa Lotos or PKN Orlen and, as such, it is not necessary for the Tribunal to determine whether the conduct of any of those four entities vis-à-vis J&SE was wrongful, in the absence of direct involvement of Respondent in such allegedly wrongful third party conduct.

475. The Tribunal recalls Claimant's allegation, set out at ¶ 201 above, that Respondent was directly involved in PKN Orlen's decision not to provide J&SE with a signed processing Annex in October 2007.[425] The Tribunal notes that Respondent denies Claimant's allegation.[426] The Tribunal finds that the evidence submitted by Claimant, namely that the CEO of PKN Orlen was a member of the PiS political party and a "protégé"[427] of the Prime Minister, does not prove its allegation that the "mysterious phone call"[428] that it claims was received by PKN Orlen's CEO during the 30 October 2007 board meeting originated from a source connected to Respondent.

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423 C-PHB, ¶ 41.

424 SoRj, ¶ 376.

425 See, e.g., SoC, ¶¶ 452-453; SoRy, ¶¶ 97-99 and 466.

426 See, e.g., SoRj, ¶¶ 250-251.

427 SoRy, ¶ 466.

428 SoRy, ¶ 466.

476. Accordingly, for the purposes of this argument of Claimant, the Tribunal need not decide whether ARM had discretion or not in imposing the First Financial Penalty, because it would not have been required to take the conduct of OLPP, PERN, Grupa Lotos or PKN Orlen into account in the exercise of any discretion.

477. (v) *Violation of J&SE's right to be heard.* In its Reply, Claimant alleges a breach of the right to due process, and hence of the fair and equitable treatment obligation, in that ARM's imposition (by its President) of the First Financial Penalty violated J&SE's right to be heard and to submit evidence for the reasons identified by ARM's ad-hoc advisory team in its report of 13 December 2007,[429] and by the Minister of Economy in his decision of 14 December 2007 quashing the First Financial Penalty.[430]

478. Respondent denies Claimant's allegations, submitting that Poland at all relevant times accorded J&SE due process.[431]

479. With respect to the advisory team report of 13 December 2007, ARM's ad-hoc advisory team stated that "in the statement of reasons [of ARM's decision imposing the First Financial Penalty] there is no reference to the contents of the party's letter dated 15 October 2007, although the Material Reserves Agency had received this letter and it had been assigned by the Chairman of ARM to the competent organization unit before the decision was made." The report describes the failure to refer to the letter as being an infringement of a provision (Article 77 clause 1) of the Code of Administrative Procedure: "A public administration entity shall be obliged to collect and consider the whole evidence material in a comprehensive way."

480. J&SE's pleading of 15 October 2007,[432] referred to in the previous paragraph, had asked ARM: to require PERN to confirm that it had received 100,000 Mt of

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429 Annex C-191.

430 Annex C-12; SoRy, ¶ 544.

431 SoRj, ¶¶ 369-380.

crude oil to constitute J&SE's mandatory reserves; to require PKN Orlen to produce a signed copy of its crude oil storage agreement with J&SE and confirmation that the annex thereto had been signed; to hear oral evidence from Mr. Jarek Astramowicz, CEO of Mercuria Energy Group, confirming the pumping of crude oil to PERN; and to hear oral evidence from certain employees of PKN Orlen regarding the signing of the processing annex.

481. With respect to the Minister's decision of 14 December 2007, that decision quashes the First Financial Penalty[433] on the ground that it was issued by the President of ARM, rather than ARM itself, in breach of Polish law. Further, the Minister noted that "other provisions of the Code of Administrative Procedure were also breached."[434] Those breaches consisted of: (1) failure to evaluate, as opposed merely to stating, the entire body of evidence; (2) failure "to address the significance of the evidence concerning a change in the volume of existing reserves" between 12 September 2007 and 15 October 2007; (3) failure to take account of J&SE's requests in its letter of 3 October 2007 for more evidence to be accepted and for additional time to be granted to allow supplementation of the evidence; (4) failure to "address or take a position with respect to" the matters raised in J&SE's pleading of 15 October 2007.[435]

482. J&SE's letter of 3 October 2007,[436] referred to in the previous paragraph, asks ARM to take the evidence into account regarding the following: J&SE's purchase of crude oil in order to perform its crude oil storage contract with PKN Orlen; arrangements to pump such oil; PKN Orlen's refusal to accept crude oil for storage pursuant to its contract with J&SE; arrangements with PERN whereby PERN would store crude oil for J&SE; arrangements with OLPP for the storage of liquid fuels.

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432 Annex C-179.

433 Annex C-12.

434 Annex C-12, page 2.

435 Annex C-12.

436 Annex C-174.

483. The Tribunal finds, in respect of Claimant's allegation that it has been denied due process due to ARM/the President of ARM's violation of J&SE's right to be heard, that the failings identified by the ARM ad-hoc advisory team and the Minister, above, do not address the substance of the evidence to which J&SE wanted ARM to have regard.

484. Rather, the matters identified concern the President of ARM's having failed to indicate, one way or another, the view he took as to that evidence.

485. While an administrative decision-maker's failure to refer to evidence presented to him or her may be in some circumstances described as a failure to accord due process in breach of the fair and equitable treatment obligation in Article 10(1) of the ECT, such failure does not automatically have that result.

486. The Tribunal holds that Claimant has not shown that the administrative failures to which it has referred were such that harm was done to J&SE as a result of them. As a result, the Tribunal finds that Claimant has not shown that the administrative failures were sufficiently serious as to constitute a denial of due process on the part of Respondent.

487. Accordingly, the Tribunal finds that Claimant has not established a breach of the fair and equitable treatment obligation under this head of argument.

488. (vi) *Poland's compliance with EU obligations.* For the reasons set out at ¶¶ 410 to 414 above regarding ARM's commencement of proceedings against J&SE in September 2007, the Tribunal holds that a failure to take Poland's compliance with EU obligations into account in imposing the First Financial Penalty does not constitute a breach of the fair and equitable treatment obligation.

489. (vii) *Proportionality.* Claimant alleges that because the imposition of a penalty was "unjustified and objectively unnecessary", it was disproportionately large—"the largest (…) fine that has ever been imposed by any country on any entity

for failure to satisfy a reserves obligation".[437] Claimant submits that in light of this fact, ARM should have exercised its discretion not to impose the First Financial Penalty.

490. Claimant makes a similar argument in its Reply, submitting that imposition of "the fine" (which the Tribunal takes to be a reference to both the First and Second Financial Penalties) was unfair and inequitable because "Respondent knew [that] the fine was likely to result in the bankruptcy of J&S Energy, and thus the destruction of the Claimant's investment in Poland".[438]

491. Respondent denies Claimant's allegations on this point.[439]

492. Respondent submits that the size of the fine is set by the legislature, and that J&SE had been on notice of the size of the fine.[440] Further, that ARM had no discretion to take the matter into account in imposing the First Financial Penalty.[441]

493. At the Hearing, the Tribunal asked Counsel for Respondent whether it "might (…) not be said that fair and equitable treatment requires precisely that there should be some flexibility or discretion in the imposition of fines of [this] magnitude, given the potentially great disparity between the size of the undertakings upon which they are imposed".[442]

494. Counsel for Respondent indicated that the issue would be relevant if there were on foot a challenge to the law, but that Claimant did not challenge the law as such.[443] The Tribunal observed that Counsel for Claimant had indicated that

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437 SoC, ¶ 685.

438 SoRy, ¶ 537, referring to the 27 November 2007 letter from ARM to the Ministry of Economy, Annex C-189.

439 SoRj, ¶¶ 349-354.

440 R-PHB, ¶ 362.

441 R-PHB, ¶ 362.

442 Transcript, 2070/2–7; see also Transcript 2075/17–2076/2.

443 Transcript, 2070/11–14.

Claimant did not challenge the law, but "the way that JSE was treated", and that it "was not quite clear where one starts and the other one stops".[444] The Respondent was asked to address the point in its Post-Hearing Brief.[445]

495. In its Post-Hearing Brief, Respondent referred to the requirement under the Directive[446] that a penalty for breach of mandatory reserves obligations be "effective, proportionate and dissuasive".[447] Respondent submits that the penalty is of an "administrative and criminal nature" such that "principles of criminal law also govern the imposition and interpretation of these penalties".[448]

496. Respondent submits that the fine has a punitive purpose. This submission contrasts with that of Claimant during the Hearing that the penalty was not intended "to punish the company but to make sure the reserves are created".[449]

497. The Tribunal finds that the Claimant has not discharged its burden of showing that a failure by ARM to take into account the magnitude of the fine when deciding whether or not to impose it constituted a breach of the obligation to accord fair and equitable treatment.

498. The Tribunal need not decide whether ARM had any discretion in deciding whether to impose the fine; if ARM had discretion, it would not have been a wrongful exercise of that discretion not to take the size of the fine into account. This is because the fine's purposes included a purpose of dissuading breach of a provision that was key to the maintenance of Poland's energy security, and because the amount of the fine was set by the legislature and known to J&SE as the consequence of breach of its mandatory stocks obligation.

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444 Transcript, 2071/1–6.

445 Transcript, 2071/17–22.

446 Annex C-6.

447 R-PHB, ¶ 63, referring to Article 9 of Annex C-6.

448 R-PHB, ¶ 66, referring to the judgment of the Warsaw Administrative Court at Annex R-5 and of the Supreme Administrative Court at Annex R-11.

449 Transcript 2011/19–21.

499. (v) *Conclusion.* For the reasons stated above, the Tribunal holds that Claimant has not established a breach of the fair and equitable treatment obligation in the context of ARM's imposition of the First Financial Penalty.

500. Given the Tribunal's findings, it is not necessary to determine whether ARM in fact had discretion to decide whether or not to impose the First Financial Penalty. Accordingly, it is not necessary to consider Claimant's allegation (referred to in ¶ 183 above) that if ARM did not have discretion under Polish mandatory reserves law, that fact would have rendered Polish mandatory reserves law itself unfair and inequitable.

*f) Imposition and Confirmation of Second Financial Penalty on J&SE*

501. Claimant reiterates the same arguments in support of its case regarding the Second Financial Penalty as it makes regarding the First Financial Penalty.[450] As to those arguments, the Tribunal restates its findings in respect of the First Financial Penalty.

502. Claimant makes four additional arguments: (i) there was no factual basis for imposition or confirmation of the fine because J&SE was, and is acknowledged by Respondent to have been, fully compliant with its mandatory stock obligations on the date of imposition of the Second Financial Penalty and the date on which that penalty was confirmed by the Minister; [451] (ii) ARM's decision imposing the Second Financial Penalty, and the Minister's decision confirming the Second Financial Penalty, violated J&SE's right to be heard;[452] (iii) the Minister's decision of 14 December 2007 was a final decision, and re-opening it "breach[ed] the universal principle of *non bis in idem*";[453] (iv) the

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450 SoC, ¶¶ 675–686. Note, however, that the argument regarding "physical compliance" is in this context supplanted by the argument that J&SE was in full legal compliance with its obligations (see SoC, ¶¶ 677 and 682).

451 SoC, ¶¶ 676, 682.

452 SoRy, ¶¶ 544-549.

453 SoRy, ¶¶ 397–403, 407–408.

case file upon which the proceedings for imposition of the Second Financial Penalty was based was defective;[454] (v) the Minister confirmed the Second Financial Penalty for political reasons[455].

503. The Tribunal notes that in so far as Claimant's allegation (SoC ¶¶ 698-699) of breach of due process through failure to admit or give due consideration to evidence refers to Respondent's conduct in relation to imposition of the Second Financial Penalty, that allegation is addressed as part of the Tribunal's analysis of the imposition of the First Financial Penalty, as noted at ¶¶ 441-487 above and in subsections (ii) and (iv) below.

504. Respondent submits that neither ARM nor the Minister had discretion in deciding, respectively, to impose and uphold the Second Financial Penalty.[456]

505. According to Respondent, even if the Tribunal were to find that the Minister had discretion, the exercise of that discretion was neither "irrational [nor] capricious" in the context of Poland's energy security concerns.[457]

506. The Tribunal addresses Claimant's allegations, at ¶¶ 507-535 below, on the assumption that ARM had discretion in deciding to impose the Second Financial Penalty and that the Minister had discretion in deciding to confirm the Second Financial Penalty.

507. (i) *Compliance with mandatory stock obligations.* Claimant makes the same arguments regarding compliance as at the dates on which the Second Financial

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454 SoRy, ¶544.

455 The Tribunal considers that Claimant's generalised pleading that Respondent refused to exercise its discretion to waive the financial penalties (SoC, ¶683) is encompassed by its later pleadings that the Minister's decision to confirm the Second Financial Penalty was politically motivated. See, for example, C-PHB, ¶¶ 147–151.

456 R-PHB, ¶¶ 378–379.

457 R-PHB, ¶ 380.

Penalty was imposed and confirmed as it makes regarding ARM's decision to commence proceedings for the imposition of the Second Financial Penalty.[458]

508. Respondent denies Claimant's allegation that the Second Financial Penalty should not have been imposed, or confirmed, by reason of J&SE's compliance with its mandatory reserves obligations.[459]

509. The Tribunal makes the same finding here as it made regarding ARM's decision to commence proceedings for the imposition of the Second Financial Penalty (see ¶ 424 above).

510. Accordingly, the Claimant has not made out its alleged breach of the obligation to accord fair and equitable treatment under this head.

511. (ii) *Violation by ARM and the Minister of Economy of J&SE's right to be heard.* Claimant alleges a breach of the right to due process, and hence of the fair and equitable treatment obligation, in that ARM and the Minister of Economy failed to consider certain evidence, as identified by the Warsaw Administrative Court.[460]

512. Respondent denies Claimant's allegations of breach of due process.[461]

513. The Warsaw Administrative Court, in its decision of 23 December 2008 quashing the Minister's confirmation of the Second Financial Penalty, agreed with J&SE that both ARM and the Minister had breached the Code of Administrative Procedure by failing to hear the evidence of witnesses regarding PKN Orlen's alleged failure to produce a signed processing annex. The Court discussed the failure to accept that evidence and its consequences. The Court stated:

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458 SoC, ¶ 682.

459 R-PHB, ¶¶ 373-376; 393-394.

460 SoRy, ¶¶ 544-549, referring to Annex C-236 at page 10 and Annex R-5 at page 18.

461 SoRj, ¶¶ 367-380.

> [T]he Court found that it must agree, to a certain extent, with J&S Energy S.A. that complete disregard of the authorities of both instances of its motions for acceptance of evidence (with respect to admission of evidence in the form of witness testimony) which was to prove that a relevant annex to an agreement for the processing of crude oil was signed, such authorities restricting it [sic] actions to the analysis of a written representation made by the management board of PKN ORLEN S.A., could be regarded as breach of Art. 7 of the Code of Administrative Procedure, Art. 77, §1 of the code of Administrative Procedure and Art. 78 of the Code of Administrative Procedure.
>
> (…)
>
> In this situation one should agree with J&S Energy S.A. that the written representation of the management board of PKN ORLEN S.A. should not replace the witness testimony given in accordance with Art. 83 of the Code of Civil Procedure.
>
> On the other hand, however, the Court believes that one may, to a certain extent, share the argumentation of the Minister of Economy that in light of both the lack of clear evidence in the form of a document of the annex to the agreement for the processing of crude oil as referred to in Art. 11 of the Reserves Act, and the very clear written representation of the management board of PKN ORLEN S.A. which denies the facts claimed by J&S Energy S.A., the above events of negligence may be of no material importance to the final settlement of the case.[462]

514. The Tribunal considers that the failings identified by the Warsaw Administrative Court, as a matter of Polish law, do not address the substance of the evidence to which J&SE wanted ARM and the Minister to have regard.

515. Rather, the Warsaw Administrative Court stated that because, pursuant to Article 7 of the Code of Administrative Procedure, "the duty to take all the steps necessary for a thorough explanation of fact and dealing with the case lies with the public administration authority,"[463] neither the Minister nor ARM should have relied on a request issued to PKN Orlen as a way of establishing the facts of the case unless that was the only way to establish such facts. Further, the

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462 Annex C-236, page 15.

463 Annex C-236, page 15.

Court noted that Article 78, §1 of the Code of Administrative Procedure requires evidence to be admitted upon the request of a party "if the evidence relates to circumstances which are material to the case".[464]

516. However, the fact that a breach of Polish administrative procedure has been made out before the Polish courts does not necessarily result in a finding of a failure to accord due process such that a breach of the fair and equitable treatment obligation is established.

517. The Tribunal holds that Claimant has not shown that the administrative failures to which it has referred were such that harm was done to J&SE as a result of them. As a result, the Tribunal finds that Claimant has not shown that the administrative failures were sufficiently serious as to constitute a denial of due process on the part of Respondent.

518. Claimant has not, therefore, discharged its burden of proving that Respondent's conduct under this head of argument breached the obligation to accord fair and equitable treatment..

519. (iii) *Abuse of process/res judicata.* Claimant makes the same arguments regarding *res judicata* and *non bis in idem* regarding the imposition and confirmation of the Second Financial Penalty as it makes regarding ARM's decision to commence proceedings for the imposition of the Second Financial Penalty.[465]

520. Respondent denies Claimant's allegations for the reasons set out at ¶¶ 427-428 above.

521. The Tribunal makes the same finding here as it made regarding ARM's decision to commence proceedings for the imposition of the Second Financial Penalty (see paragraphs 429 to 432 above).

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464 Annex C-236, page 15.

465 SoRy, ¶ 538.

522. Accordingly, Claimant has not made out its alleged breach of the obligation to accord fair and equitable treatment under this head.

523. (iv) *Incomplete case file.* Claimant makes the same arguments regarding the allegedly defective case file with respect to the imposition and confirmation of the Second Financial Penalty as it makes regarding ARM's decision to commence proceedings for the imposition of the Second Financial Penalty (see ¶ 433 above).[466]

524. Respondent denies Claimant's allegations for the reasons set out at ¶ 434 above.

525. The Tribunal makes the same finding here as it made regarding ARM's decision to commence proceedings for the imposition of the Second Financial Penalty (see paragraphs 436 to 437 above).

526. Accordingly, Claimant has not made out its alleged breach of the obligation to accord fair and equitable treatment under this head.

527. (v) *Confirmation of Second Financial Penalty for political reasons.* Claimant submits that the Minister's decision to confirm the Second Financial Penalty was driven by political considerations.[467] In particular, Claimant refers to Mr. Pawlak's testimony at the Hearing in which he stated that he had "expected that [J&SE] would not pay the fine but would use all available legal remedies and that the fine would not actually be paid".[468]

528. Claimant submits that "Minister Pawlak opted for the politically expedient option: to confirm the financial penalty (…) and leave the problem to the

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466 SoRy, ¶ 544.

467 C-PHB, ¶¶ 147–151.

468 C-PHB, ¶ 149, quoting from Transcript 1792/20–23.

courts"[469] and that "at all relevant times, the Respondent knew that the financial penalty would kill J&S Energy"[470].

529. Respondent denies that the Minister's decision was driven by political considerations.[471] Respondent submits that the Minister's conduct evidences this: the Minister acknowledged the complexity of the case before him and extended the deadline for rendering his decision, which ultimately ran to 44 pages.[472]

530. Respondent also submits that the decision of the Warsaw Administrative Court, quashing the Second Financial Penalty, does not suggest anywhere that the Penalty was "politically or improperly motivated".[473]

531. Respondent concludes that, while the Court's decision found that the Minister should have taken certain evidence proffered by J&SE into account, and that the Minister made an error in recalculating the Penalty, "[t]here being no evidence of political influence, or gross impropriety, Mercuria's case of breach of the ECT must be rejected".[474]

532. The Tribunal does not interpret Mr. Pawlak's testimony, that he did not expect the Second Financial Penalty to be paid, as indicating that Mr. Pawlak confirmed the Second Financial Penalty for reasons other than those set out in his decision.

533. The Tribunal holds that Claimant has failed to discharge its burden of providing that the Minister's decision was motivated by improper considerations.

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469 C-PHB, ¶ 150.

470 C-R-PHB, ¶ 14.

471 R-R-PHB, ¶ 45.

472 R-R-PHB, ¶ 46.

473 R-R-PHB, ¶ 48.

474 R-R-PHB, ¶ 50.

534. The Tribunal finds that Claimant has not established its claim under this head of argument.

535. (v) *Conclusion.* For the reasons stated above, the Tribunal holds that Claimant has not established a breach of the fair and equitable treatment obligation in the context of ARM's imposition of the Second Financial Penalty or the Minister's confirmation of the Second Financial Penalty.

536. Given the Tribunal's findings, it is not necessary to determine whether ARM had discretion to decide whether or not to impose the Second Financial Penalty or whether the Minister had discretion to decide whether or not to confirm the Second Financial Penalty. Accordingly, it is not necessary to consider Claimant's allegation (referred to in ¶ 183 above) that if ARM or the Minister did not have discretion under Polish mandatory reserves law, that fact would have rendered Polish mandatory reserves law itself unfair and inequitable.

*g) Execution of Second Financial Penalty*

537. Claimant argues that execution of the Second Financial Penalty was "unreasonable, disproportionate and contrary to the legitimate expectations of Mercuria".[475]

538. Claimant alleges breach of the obligation to accord fair and equitable treatment in that: (i) Claimant had a legitimate expectation that the Second Financial Penalty would not be enforced until it became final and binding, which expectation was breached by Respondent; (ii) Respondent failed to suspend execution of the Second Financial Penalty; and (iii) it was unreasonable to expect such a large payment to be procured by J&SE in the short period of time granted, such that enforcement of the fine was disproportionate, and indeed contrary, to the stated goal of the fine.[476]

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[475] SoC, ¶ 687.

[476] The Tribunal notes that in ¶ 529 of the Reply, Claimant alleges that "Respondent's measures" were wrongfully taken in knowledge of "a deficit of fuel storage space in the

539. Respondent submits that "the obligation to pay the Fine did not involve the exercise of a discretion" but that "to the extent that any discretion existed with the Minister to allow, or stop or suspend the payment of the fine, his decision(s) were not arbitrary or unreasonable".[477]

540. Respondent submits that if the Tribunal were to find that the Minister had discretion to suspend the execution of the Second Financial Penalty, it should find that the Minister's conduct did not breach the ECT.[478]

541. The Tribunal will consider each of Claimant's allegations in turn.

542. (i) *Expectation that Second Financial Penalty would not be enforced until it became final and binding.* The Tribunal notes the disagreement between the Parties as to when the Second Financial Penalty became payable: Claimant submits that it was fourteen days after the expiry of the thirty-day appeal period, or after the exhaustion of all appeals against the Minister's decision.[479]

543. Respondent submits that the Minister's decision was final when it was made because it could not be appealed to a higher administrative authority.[480] Further, because the Minister's decision upheld ARM's decision (except to the extent that it reduced the penalty), the 14-day period for payment set out in ARM's

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Republic of Poland which rendered full compliance with the mandatory reserves obligations almost impossible". While "measures" is not defined, the allegation appears under a heading reading, "The Prosecution of J&S Energy, and the Imposition and Enforcement of the Fines, were in Breach of the Fair and Equitable Treatment Standard". To the extent that the allegation in SoRy ¶ 529 applies to the execution of the Second Financial Penalty, the Tribunal considers that that allegation is not made out, for the reasons stated in relation to the imposition of the First Financial Penalty at ¶¶ 467-470 above. A similar allegation is made in ¶ 533 of the Reply, regarding failure to take account of obstructive conduct on the part of third parties. To the extent that the allegation in SoRy ¶ 533 applies to execution of the Second Financial Penalty, the Tribunal considers that it is not made out, for the reasons stated in relation to the imposition of the First Financial Penalty at ¶¶ 471-476 above.

477 R-PHB, ¶¶ 421–422.

478 R-PHB, ¶ 424.

479 SoC, ¶¶ 550, 687–690.

480 R-PHB, ¶ 411, referring to Article 16(1), CAP, Annex RA-58.

decision was also upheld, with the result that the payment was due on 19 June 2008.[481]

544. Thus, while Claimant considers that the "Reminder" letter of 23 June 2008 shortened the applicable deadline for payment, seeking to make the fine payable before it was in fact final, and thus breached Claimant's legitimate expectations,[482] Respondent submits that the Reminder in fact granted J&SE an additional period of seven days, until 30 June 2008, within which to pay the Second Financial Penalty, as allowed by Polish law.[483]

545. Enforcement proceedings were not in fact commenced against J&SE: J&SE paid the Second Financial Penalty on 30 June 2007.[484]

546. In the circumstances, the Tribunal finds that Claimant has not met its burden of showing that the Second Financial Penalty was not final and non-appealable as at the date set for payment in the "Reminder" letter. Accordingly, Claimant has not made out a breach of its legitimate expectations.

547. (ii) *Unreasonable failure to suspend execution of Second Financial Penalty.* Claimant alleges that the Minister's failure to respond to J&SE's three-page letter of 23 June 2008, and to its one-page letter of 26 June 2008, the first requesting a suspension of the execution process and the second requesting an urgent hearing to consider the request in the first letter,[485] amounted to a breach of fair and equitable treatment in that Claimant was left with no choice but to

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481 R-PHB, ¶ 411.

482 SoC, ¶¶ 690-691.

483 R-PHB, ¶ 413, referring to Article 15(1) of the Act of 17 June 1966 on Enforcement Proceedings in Administration (Journal of Laws of 2005, no 299, item 1954).

484 See, e.g., C-PHB, ¶ 158; R-PHB, ¶¶ 417-418.

485 C-PHB, ¶ 155, referring to Annex R-105; Annex C-228.

pay the fine.[486]. Claimant states that due to the short time limit advised in the "Reminder", it was not practicable to appeal through the court system.[487]

548. Claimant further alleges that Respondent has admitted that the Minister had the power to suspend the execution process.[488]

549. As noted above, Respondent's primary submission is that the obligation to pay the fine did not involve the exercise of any discretion by the Minister. Respondent states that it was the administrative courts, and not the Minister, that had jurisdiction to suspend execution of the Second Financial Penalty, but Claimant's appeal to the Warsaw Administrative Court did not include a request for suspension.[489]

550. In the alternative, Respondent states that the motion that J&SE filed with the Minister was "112 pages long including attachments" and was filed "18 days after the decision was made and 4 days after JSE became to be in default" and that the Minister had had only 5 working days to consider the motion before J&SE paid the Second Financial Penalty on 30 June 2008.[490]

551. In any case, Respondent states, payment of the Second Financial Penalty rendered the application to the Minister moot.[491]

552. According to Respondent, given J&SE's late lodging of its application, the Minister's failure to decide on J&SE's application for suspension within five

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486 See, for example, SoC, ¶ 560.

487 C-PHB, ¶ 156.

488 SoC, ¶¶ 549, 692, referring to Respondent's Response to Claimant's Addendum to Request for Interim Measures dated 10 November 2008.

489 R-PHB, ¶¶ 414–415, referring to Article 61(1) of the Act of 30 August 2002 on proceedings before administrative courts.

490 R-PHB, ¶ 417, referring to the Second Witness Statement of Milosz Karpiński, ¶ 17.

491 R-R-PHB, ¶ 55.

business days did not constitute arbitrary conduct in breach of international law.[492]

553. The Tribunal finds that there are inconsistencies in Respondent's submissions regarding the Minister's power to order suspension of execution of the Second Financial Penalty. In its Post-Hearing Brief,[493] Respondent suggests that the Minister had no such power, while in its Response to Claimant's Addendum to Request for Interim Measures of 10 November 2008, and in its Statement of Defence, Respondent specifically alludes to the possibility of the Minister granting such a suspension.[494]

554. Accordingly, the Tribunal proceeds to consider Claimant's arguments on the basis that it was within the power of the Minister of Economy to order suspension of execution of the Second Financial Penalty.

555. The Tribunal notes Claimant's submission that the Minister's failure to respond to its submissions meant that J&SE was left with no choice but to pay the Second Financial Penalty. The Tribunal considers that this failure to respond could only constitute a breach of Respondent's obligation to accord fair and equitable treatment in the circumstances if there was a real possibility that the Minister's decision would have been favourable to J&SE. Otherwise, the failure to respond cannot be regarded as having been sufficiently serious as to constitute a breach of the fair and equitable treatment obligation.

556. Claimant has not established that there was such a real possibility that the decision J&SE awaited from the Minister would have been in J&SE's favour, assuming a proper consideration of J&SE's situation by the Minister.

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492 R-PHB, ¶ 425.

493 See, e.g., R-PHB, ¶¶ 416-421.

494 Respondent's Response to Claimant's Addendum to Request for Interim Measures, 10 November 2008, ¶¶ 2.22-2.23; SoD, ¶ 442.

557. Accordingly, the Tribunal finds that Claimant has failed to establish a breach of the fair and equitable treatment obligation regarding the Minister's failure to suspend the execution of the Second Financial Penalty.

558. (ii) *Unreasonable to expect payment of the Second Financial Penalty within the time allowed.* Claimant also alleges that it was unreasonable to expect such a large fine to be paid so quickly and that ARM knew that the penalty would bankrupt J&SE.[495] Claimant argues that enforcement of the fine was disproportionate "in the sense of being more onerous than was required to achieve the alleged goal it was ostensibly intended to forward: it actually defeated that proclaimed goal".[496]

559. The Tribunal considers that Claimant's submissions in this regard are the same as its submissions regarding the allegedly disproportionate nature of the penalty in the context of the decision to impose the First Financial Penalty (see ¶¶ 489-490 above). Accordingly, the Tribunal restates its reasoning and decision in relation to that earlier point (see ¶¶ 497-498 above).

*h) Denial of Due Process Allegations*

560. In Section IV.B.6 of the Statement of Claim, Claimant alleges that Respondent denied it due process in violation of the obligation to accord Claimant's investment fair and equitable treatment.[497]

561. These allegations fall into two categories: (i) Respondent's alleged failure to admit or give due consideration to evidence; and (ii) lack of legal basis for imposition of penalties during the period prior to 31 December 2008.

562. (i) *Failure to admit or give due consideration to evidence.* Claimant alleges that "Respondent consistently and repeatedly failed to give due consideration to or

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495 SoC, ¶ 693.

496 SoC, ¶ 694, see also SoC, ¶ 693.

497 SoC, ¶¶ 695-700.

to admit evidence" presented to ARM and the Minister by J&SE, in particular in regard to storage capacity, obstructive conduct by State-controlled companies and J&SE's efforts to comply, and actual compliance, with its mandatory reserves obligations.[498] Claimant refers in paragraphs 698–699 of the Statement of Claim to the factual background sections of its Statement of Claim as containing the evidence to which Respondent is alleged to have failed to give due consideration.[499] Those sections of the Statement of Claim include Claimant's factual allegations regarding Respondent's conduct in the context of the Minister's denial of the First and Second EFI Applications, imposition of the First Financial Penalty and imposition and confirmation of the Second Financial Penalty.

563. Claimant does not further particularize its allegations in the Statement of Claim. In the Reply, however, Claimant specifies the following as being "among [the] violations of J&S Energy's procedural rights: (i) imposition of the First Financial Penalty violated J&SE's right to be heard;[500] (ii) commencement of proceedings for imposition of the Second Financial Penalty was based on an incomplete case file;[501] (iii) Respondent's refusal to produce documentation related to the First Financial Penalty;[502](iv) imposition of the Second Financial Penalty violated J&SE's right to be heard;[503] and (v) confirmation of the Second Financial Penalty violated J&SE's right to be heard.[504]

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498 SoC, ¶¶ 695–700.

499 Namely, Sections III.C, III.D.1-III.D.8, and III.E.1-III.E.2.

500 SoRy, ¶ 544, referring to the report of ARM's ad-hoc legal advisory team, 13 December 2007, Annex C-191 and the Minister of Economy's decision quashing the First Financial Penalty, 14 December 2007, Annex C-12.

501 SoRy, ¶ 544, referring to SoC, ¶¶ 497-498.

502 SoRy, ¶ 544, referring to SoC, ¶ 514.

503 SoRy, ¶ 544, referring to alleged failure "to consider certain evidence, as acknowledged by the Warsaw Administrative Court", Annex C-236 at p. 10 and Annex R-5 at p. 18.

504 SoRy, ¶ 544, referring to alleged failure "to consider certain evidence, as acknowledged by the Warsaw Administrative Court", Annex C-236 at p. 10 and R-5 at p. 18.

564. The Tribunal finds that it has dealt with Claimant's allegations of denial of due process (by reference to an alleged failure to consider specified pieces of evidence) in its consideration of Respondent's conduct at specific points of the administrative proceedings.[505]

565. To the extent that Claimant's allegations in paragraphs 695–700 of the Statement of Claim go beyond those specifically-pleaded matters, the Claimant has not made out its case.

566. (ii) *Lack of legal basis for imposition of penalties.* Claimant alleges that because the MRA "does not expressly contemplate the imposition of penalties during the transitional period between its date of coming into force on April 7, 2007 and December 31, 2008", the First and Second Financial Penalties were imposed without legal basis and thus in breach of the fair and equitable treatment obligation.[506]

567. The Tribunal has addressed these allegations, and Respondent's response thereto, in the specific factual contexts in which they arose above.[507]

*i) Respondent's Conduct in its Entirety From February 2006 Onwards*

568. In subsections a)-h) above, the Tribunal has found that Claimant has not met its burden of proving that any one aspect of Respondent's treatment of J&SE, taken

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505 Regarding the alleged failure by the Minister of Economy to consider evidence before rejecting the First EFI Application, see Section VIII.C.b). Regarding the alleged failure by the Minister of Economy to consider evidence before rejecting the Second EFI Application, see Section VIII.C.c). Regarding the alleged failure of the President of ARM to consider evidence before imposing the First Financial Penalty, see Section VIII.C.e). Regarding the allegation that proceedings for imposing the Second Financial Penalty were based on an incomplete case file, see Section VIII.C.d). Regarding allegations that ARM failed to consider evidence before imposing the Second Financial Penalty, see Section VIII.C.f). Regarding allegations that the Minister failed to consider evidence before confirming the Second Financial Penalty, see Section VIII.C.f).

506 SoC, ¶¶ 701–706.

507 See ¶¶ 463-466 above.

in isolation, constituted a breach of the fair and equitable treatment obligation in Article 10(1) of the ECT.

569. As the Tribunal has stated above, the Tribunal is nonetheless able to consider separately whether the entirety of Respondent's conduct, as a cumulative matter, breached the obligation to accord fair and equitable treatment.

570. On the facts of this case, the Tribunal does not find that the cumulative effect of Respondent's actions was more than the sum of its parts. The Tribunal considers that the evidence before it does not establish a wrongful purpose on the part of Respondent, nor any other aggravating factor that would suggest that actions that, viewed individually, were not wrongful, took on a wrongful character when viewed as a whole.

571. Accordingly, the Tribunal finds that the cumulative effect of Respondent's conduct from February 2006 onwards does not breach the fair and equitable treatment obligation in Article 10(1) of the ECT.

D. Conclusion

572. For the reasons stated in this Section VIII, the Tribunal finds that Claimant has not made out any of the specific grounds on which it alleges that Respondent breached the fair and equitable treatment obligation in Article 10(1) of the ECT.

573. The Tribunal also finds that Claimant has not met its burden of proving that the entirety of Respondent's conduct from February 2006 onwards breached the fair and equitable treatment obligation in Article 10(1) of the ECT.[508]

## IX. UNREASONABLE MEASURES

574. Claimant submits that Respondent's measures have been unreasonable within the meaning of Article 10(1) for the reasons identified by Claimant in its

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[508] See ¶¶ 568-571 above.

submissions on fair and equitable treatment and discrimination.[509] Further, Claimant submits that "the standard of reasonableness for purposes of analogous provisions in other investment treaties has been given the same meaning as the fair and equitable treatment standard."[510]

575. Claimant does not make separate factual allegations regarding the alleged breach by Respondent of the obligation not to impair Claimant's investment by unreasonable measures, rather relying on its factual allegations supporting the charge of breach of the fair and equitable treatment obligation.[511]

576. Claimant and Respondent both refer to the way in which the tribunal in *AES Summit Generation Limited and AES-Tisza Eromu Kft v. Republic of Hungary* ("*AES v. Hungary*"),[512] dealt with the question of unreasonableness, although they disagree as to whether an element of "arbitrariness" is required to be shown in order for unreasonableness to be made out.

577. The Tribunal agrees with the Parties that "unreasonableness" in the context of the Article 10(1) ECT obligation not to impair an investment by unreasonable measures has the same meaning as it has in the context of a consideration whether conduct has breached the fair and equitable treatment obligation in Article 10(1) ECT.

578. Accordingly, the Tribunal finds that the Parties submissions on whether measures were "unreasonable" for the purposes of the obligation not to impair an investment by unreasonable measures may be treated as subsumed by their submissions on fair and equitable treatment and need not be considered separately.

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509 SoC, ¶ 709.

510 SoRy, ¶ 599, referring to *Saluka v. Czech Republic,* Annex CA-28, ¶¶ 460-461; *Biwater Gauff v. Tanzania,* Annex CA-44, ¶¶ 692-693; and *Rumeli v. Kazakhstan,* Annex CA-45, ¶ 679.

511 SoC, ¶ 709.

512 ICSID Case No. ARB/07/22, Award, 23 September 2010, Annex CA-156.

579. In light of the Tribunal's findings, in Section VIII above, that Claimant has not established a breach of the fair and equitable treatment obligation, it is not necessary to consider whether any challenged measure resulted in "impairment" of Claimant's investment.

## X. DISCRIMINATION

### A. Introduction

580. This section deals with Claimant's allegation that Respondent's treatment of J&SE breached the obligation in Article 10(1) of the ECT not to "impair by (…) discriminatory measures [the] management, maintenance, use, enjoyment or disposal" of Claimant's investment.

581. Subsection B discusses the Parties' submissions on the legal test to be applied and the Tribunal's conclusions as to the applicable test.

582. Subsection C briefly sets out the relevant factual submissions of the Parties as argued in their pleadings and at the Hearing.

583. Subsection D contains the Tribunal's analysis of the facts in light of the legal test set out in subsection B, with reference to the detail of the Parties' submissions as required.

### B. The Legal Test

584. The Parties and the Tribunal are in agreement that the appropriate test to apply to determine whether Mercuria's investment has been subjected to discrimination in breach of Article 10(1) of the ECT is as set out by the Tribunal in *Plama Consortium Ltd (Cyprus) v. Bulgaria* ("*Plama*"):

> With regard to discrimination, it corresponds to the negative formulation of the principle of equality of treatment. It entails

> like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds.[513]

585. Each of the four elements of the *Plama* test is considered in turn, below. The Tribunal notes that the Parties have, at various times, conflated the notions of "like persons" and "similar circumstances".[514] The Tribunal's view as to the appropriate taxonomy is set out below.

586. Two further issues, being burden of proof and Respondent's submission that other entities must have been "systematically" treated more favourably than J&SE in order to establish discrimination, are also discussed.

587. (i) *"like persons"*. As noted above, the Parties have conflated the elements of "like persons" and "similar circumstances". The Tribunal considers it preferable to examine each element separately.

588. Whether two entities may be considered to be "like persons" requires a consideration of the challenged measure and the broader facts of the case, even before the question of "similar circumstances" is addressed.

589. Respondent, considering the requirements of "like persons" and "similar circumstances" as a single factor, submits that the treatment accorded to J&SE can only be compared to the treatment accorded to "companies operating in the same sector i.e. crude oil/petroleum and which are subject to the same mandatory reserves requirement".[515]

590. Claimant, also conflating "like persons" and "similar circumstances", submits that the definition of comparator companies should be broader than that proposed by Respondent, stating that "the notion of '*like situations*' has been interpreted under the ECT to include companies that are subject to the same type of legislation or treatment, and not just companies competing in the same

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513 ICSID, Case No. ARB/03/24, Award, 27 August 2008, ¶ 184; see SoC, ¶ 606 and SoD, ¶ 450.

514 See, *e.g.*, SoRy, ¶ 560; SoD, ¶¶ 450–455.

515 SoD, ¶ 454.

sector",[516] and that in this case natural gas companies must be included because natural gas competes with some petroleum products.[517]

591. On the facts of this case, the Tribunal concludes that a "like person" to J&SE is an entity subject to the same obligations under Polish mandatory reserves law as J&SE. As will be seen below, whether this includes natural gas companies depends on the nature of the particular legal provision at issue.

592. (ii) *"similar circumstances"*. As noted above, the requirement of "similar circumstances" has not been addressed by the Parties separately from the requirement of "like persons". The Tribunal is of the view that in this case the most appropriate way of addressing the question of similar circumstances is by asking, in each case, what ARM or the Minister, as relevant, reasonably believed the entity's situation to be as regards compliance with mandatory reserves legislation.

593. (iii) *"treated in a different manner"*. Claimant does not make any submission as to the meaning of "treated in a different manner" as such. Rather, it submits that in the particular circumstances of this case, J&SE was treated in a different manner when it was denied EFIs, given that EFIs were granted to other entities in similar circumstances.[518]

594. Further, Claimant alleges that J&SE was treated in a different manner when it was "prosecuted and punished (…) when similarly situated entities were not".[519]

595. Respondent does not make a specific submission as to the meaning of "treated in a different manner" either. In its Rejoinder, Respondent adopts Claimant's approach, focusing on the result of Respondent's conduct on J&SE and other

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516 SoRy, ¶ 560.

517 SoRy, ¶ 562.

518 SoC, ¶ 611; see also SoRy, ¶ 563.

519 SoRy, ¶ 563; see also SoC, ¶ 612.

companies,[520] thus making a finding of different treatment unavoidable. In arguing against discrimination, Respondent claims that such different treatment was justified.[521]

596. The Tribunal considers that the requirement of "treated in a different manner" must focus on the conduct of the entity accused of discrimination. In this case, the question is whether ARM or the Minister, as relevant, applied consistent criteria or practice, whether dictated by legislation or in the exercise of discretion, in deciding how to proceed against J&SE and other like persons in similar circumstances.

597. (iv) *"without reasonable or justifiable grounds"*. Claimant disagrees with Respondent's submission that a measure must be "arbitrary" in order to be considered discriminatory.[522] Claimant submits that the standard in *Plama* "without reasonable or justifiable grounds" cannot be interpreted simply as a prohibition against arbitrariness.[523]

598. Respondent in its Statement of Defence indeed suggests that in order to establish a breach of the non-discrimination element of Article 10(1) of the ECT, Claimant must show that Respondent's actions were "arbitrary".[524]

599. The Tribunal in this regard agrees with Claimant's submission. There is no indication in the *Plama* decision that the *Plama* Tribunal's definition of discrimination intended to equate the phrase "without reasonable or justifiable grounds" with the ICJ's definition of "arbitrariness" in the *ELSI* case.[525]

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520 See, *e.g.*, SoRj, ¶ 479.

521 See, *e.g.*, SoRj, ¶ 482.

522 SoRy, ¶ 583.

523 SoRy, ¶ 583, referring to Annex CA-47, ¶ 184.

524 SoD, ¶¶ 471–473.

525 *Case concerning Elettronica Sicula (ELSI)*, 20 July 1989, ICJ Rep (1989) 15, Annex RA-48, ¶ 76.

600. (v) *Burden of proof.* There is no dispute that the burden is on Claimant to prove that a like entity to J&SE, in similar circumstances to J&SE, was treated differently from J&SE.[526]

601. However, Claimant submits that if Claimant proves those elements of discrimination, the burden shifts to Respondent to show, in order to escape liability, that reasonable or justifiable grounds existed for the different treatment.[527]

602. Respondent submits that it is for Claimant to show that there were no reasonable or justifiable grounds for the different treatment.[528]

603. As noted above (see ¶¶ 209 to 211), the SCC Rules and the Swedish Arbitration Act contain no specific provision regarding burden of proof, and the Tribunal, accordingly, applies the principle, which is well-established, that the party who alleges a violation of international law giving rise to State responsibility (in this case, violation of the ECT) bears the burden of proving its allegation.[529]

604. In the instant case, it is not necessary to reach a conclusion as to whether the burden of proof shifts to Respondent in these circumstances, as will be seen below. Accordingly, the Tribunal declines to reach a concluded view on this question.

605. (vi) *Whether favourable treatment of other entities must have been "systematic".* In the case of Claimant's allegations regarding: the setting of a final extended deadline; the decision to open proceedings after expiration of the final extended deadline; the decision to impose the Second Financial Penalty after cancellation of the First Financial Penalty; and the decision of the Minister of Economy to uphold the Second Financial Penalty, Respondent submits that,

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526 SoRy, ¶ 553; SoRj, ¶ 429.

527 SoRy, ¶ 553.

528 SoRj, ¶ 429.

529 See Bin Cheng, *General Principles of Law applied by International Courts and Tribunals*, at page 302 et seq (1987)

even if the Tribunal concludes that entities in like circumstances "were treated more favourably" than J&SE, "[t]o establish a breach of the ECT, Mercuria would have to show that ARM systematically treated other entities more favourably than JSE and cannot rely on just a single example".[530]

606. It may be noted that in its pleadings, Respondent does not refer to any arbitral awards or writings in support of the posited requirement for Mercuria to show that ARM and the Minister "systematically treated other entities more favourably than JSE".

607. In its Reply Post-Hearing Brief, Claimant disputes, generally, this statement by Respondent. Claimant states that "as a matter of international law, it is clear that a single instance of discrimination will suffice".[531]

608. The Tribunal has not been referred to any sources of law suggesting that to reach a finding of breach of the obligation not to discriminate in Article 10(1) of the ECT it must be shown that other entities were systematically accorded more favourable treatment, although it is plainly difficult to infer unlawful discrimination from a very small sample of cases. The Tribunal is of the view that there is no such requirement.

C. The Parties' Submissions

*a) Claimant*

609. Claimant alleges that Respondent discriminated against Claimant's investment through the following conduct: (a) the Minister of Economy failed to grant EFIs to J&SE but granted an exemption to PKN Orlen in similar circumstances;[532] (b) the Minister of Economy granted EFIs to other companies with non-

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530 R-PHB, ¶¶ 334, 386, 407 (referring to "the Minister" rather than "ARM"); see also ¶ 347, "just a few examples".

531 C-R-PHB, ¶ 25, footnote omitted.

532 SoC, ¶¶ 613–621.

petroleum energy reserves obligations;[533] (c) J&SE was fined for reserves shortfalls, but other companies with shortfalls were not fined;[534] (d) ARM executed the Second Financial Penalty against J&SE but failed to enforce fines imposed upon other entities;[535] (e) ARM recommenced administrative proceedings against J&SE in February 2008 but did not do so against Laborex Sp. Z o. o ("Laborex") in similar circumstances;[536] (f) J&SE was subjected to a discriminatory campaign of investigations;[537] and (g) the setting of a three-week final extended deadline for replenishment of J&SE's reserves was discriminatory.

*b) Respondent*

610. Respondent denies that any of the treatment accorded to J&SE was discriminatory in light of the treatment accorded to other entities.[538]

611. Further, Respondent submits that Claimant has "failed to establish the first critical characteristic of discriminatory behaviour i.e. the need for the purportedly discriminatory measure to have '*impaired*' its investment i.e. the shares it holds in JSE".[539]

D. The Tribunal's Analysis

*a) Refusal to Grant EFIs*

612. Claimant submits that "the Minister of Economy (…) systematically applied more lenient criteria to other entities seeking temporary exemptions, including

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533 SoC, ¶ 618.

534 SoC, ¶¶ 622–631.

535 SoC, ¶ 630.

536 SoC, ¶ 632.

537 SoC, ¶ 633.

538 See, for example: SoD, ¶¶ 468, 491, 495-498, 504-507; R-PHB, ¶ 325.

539 SoD, ¶ 483.

PKN Orlen, CP Energia, Shell Polska and Entities AL, BG, BO, BQ, BW, CQ, CW, CX and CZ."[540]

613. Respondent denies that the refusal to grant J&SE's requested exemptions from increasing was discriminatory, because there were "eminently logical reasonable and justifiable grounds for the differences in the treatment of [Mercuria's] investment".[541]

614. Respondent submits that the discrimination case based on the granting of Exemptions from Increasing cannot be made out:

> In sum, the Minister was justified in finding that JSE had presented no "*exceptionally justified case*" in respect of JSE's applications for Exemptions from Increasing, but finding that there was an "*exceptionally justified case*" in the other instances described there (this criterion did not apply at all to the case of CP Energia). Accordingly, his treatment of JSE was not discriminatory.[542]

615. Set out below is the Tribunal's consideration of each case in which Claimant alleges that another entity was granted more favourable treatment than was J&SE in the context of an application for an Exemption from Increasing.

616. (i) *PKN Orlen.* Claimant submits that its investment was subject to discrimination in that J&SE was denied exemptions from increasing its fuel stocks while, on 18 October 2007, PKN Orlen was granted "permission to delay the creation of 241,597 Mt of reserves until March 2008".[543] At around the same time (16 October 2007), J&SE was fined for having a shortfall of "approximately 100,000 Mt of reserves".[544]

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540 SoRy, ¶ 565.

541 SoD, ¶ 468.

542 SoRj, ¶ 486.

543 SoC, ¶ 617.

544 SoC, ¶ 617.

617. "like persons". As noted above, Claimant and Respondent both conflate the categories of "like person" and "similar circumstances". The Tribunal's determination, that an entity is a "like person" to J&SE if it was subject to the same mandatory reserves obligations as was J&SE (see ¶ 591 above) means that in the context of EFI applications, PKN Orlen and J&SE were indisputably "like persons".

618. "similar circumstances". Claimant submits that in making their applications for Exemptions from Increasing, J&SE and PKN Orlen were in similar circumstances.[545]

619. Respondent submits that PKN Orlen was not in similar circumstances to J&SE, because: (1) PKN Orlen's exemption concerned crude oil for production of refined petrochemical products, not liquid fuels;[546] (2) the obligation to hold stocks of crude oil in respect of refined petrochemical production had only recently been introduced, in March 2007;[547] (3) J&SE had been aware of its deadline for holding the "normal" level of fuel stocks since 1 August 2005;[548] (4) PKN Orlen faced difficulties in transporting and storing such a large quantity of oil;[549] (5) PKN Orlen had met its reserves requirements based on its own interpretation of those requirements;[550] (6) PKN Orlen's need for an exemption arose out of an understandable dispute between it and the Minister of Economy regarding the yield co-efficient to be used in calculating the mandatory reserves requirement;[551] (7) PKN Orlen had always been in compliance with its mandatory reserves obligations, while J&SE had not;[552] and

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545 SoC, ¶ 615.

546 SoD, ¶ 478(a).

547 SoD, ¶ 478(b)–(c).

548 SoD, ¶ 478(c).

549 SoD, ¶ 478(d).

550 SoD, ¶ 478(e).

551 SoD, ¶ 478(f).

552 SoD, ¶ 478(g).

(8) PKN Orlen's application included a detailed schedule showing how it would bring itself back into compliance[553].

620. Further, the increase in mandatory stocks required of PKN Orlen was extremely large, such that "[t]aking such an amount of oil from the market or decreasing the production of fuels so significantly would have a dramatic impact on the market".[554]

621. PKN Orlen's application for an Exemption from Increasing forms part of the record in this case[555] as does the Ministry of Economy's decision granting the exemption[556]. Claimant alleges that these documents show that PKN Orlen's application, like those of J&SE, was based on "'logistical limitations' in connection with storage and pumping capacity".[557]

622. Claimant disputes all the bases upon which Respondent argues that PKN Orlen was not in similar circumstances to J&SE in making its application for an EFI.[558]

623. The most significant disagreement between the Parties is as to Respondent's sixth point, above, namely: whether PKN Orlen was in fact taken by surprise by the Minister's determination as to the appropriate yield co-efficient to be employed in calculating reserves to be held in respect of production of refined petrochemical products.

624. The Tribunal is of the view that, in order to establish similar circumstances, Claimant must show that the Minister's interpretation of the regulation was, or should have been, expected by PKN Orlen. Otherwise, it cannot be said that

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553 SoD, ¶ 478(h).

554 SoD, ¶ 481.

555 Annex R-24.

556 Annex C-180.

557 SoC, ¶ 357.

558 See, *e.g.*, SoRy, ¶¶ 252–260.

PKN Orlen was in similar circumstances to those of J&SE, which had long been aware of its mandatory stocks obligations.

625. Accordingly, it is to this issue that the Tribunal now turns.

626. Claimant denies that there was an "understandable dispute" between the Minister and PKN Orlen regarding the yield coefficient, and submits that the choice of a higher coefficient by PKN Orlen was "a calculated business decision, which proved unsuccessful".[559]

627. Claimant states that the legislation and regulations passed in April 2007 "required PKN Orlen to calculate the volume of certain volumes of crude oil mandatory stocks in accordance with its 'yield coefficient' over the past year",[560] and that because of the mix of products made by PKN Orlen, its actual yield coefficient is lower than that of entities producing liquid fuels only.[561]

628. According to Claimant, PKN Orlen calculated its yield coefficient based on "its (higher) theoretical ratio (88%), rather than its (lower) 'unique' ratio over the past year (69%)" and that the calculation was done that way in order to reduce the amount of crude oil PKN Orlen would have to hold.[562]

629. Claimant submits that PKN Orlen had participated in consultations on the MRA before that legislation was introduced[563] and "did not feign surprise at its new obligations" in its letter to the Minister of Economy of 11 July 2007.[564]

630. Further, Claimant submits, PKN Orlen noted that "the foregoing had 'already [been] touched upon [by PKN Orlen] in the period of preparation of the act and executive regulations'".[565]

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559 SoRy, ¶ 257.

560 SoRy, ¶ 239.

561 SoRy, ¶ 240.

562 SoRy, ¶ 241.

563 C-PHB, ¶ 215.

564 C-PHB, ¶ 219, referring to Annex R-92.

631. Respondent submits that "[i]n justifying its request, Orlen stated that its inability to meet the requirements was the result of an unexpected interpretation of the MRA used by the Minister (which applied a different yield coefficient and thus calculated that a higher amount of mandatory stocks needed to be held)".[566]

632. Respondent submits that PKN Orlen "was unaware of the volume of mandatory reserves it would need to maintain under the regulation implementing the MRA until the Minister clarified that it should use a different yield co-efficient than it previously used to calculate the amount of crude oil to be held for mandatory reserves of liquid fuels".[567]

633. The regulation of 24 April 2007, implementing the MRA, was, according to Respondent, "ambiguous with regard to the calculation of the yield co-efficient applicable to Orlen's mandatory reserves for petrochemicals.[568]

634. Respondent submits that the position was only settled by the Minister's letter of 23 July 2007, after the 30 June 2007 deadline for holding the mandatory stocks.[569] Until then, PKN Orlen did not know for certain whether it should use a "technically achievable" (higher) coefficient or an "actually achieved" (lower) coefficient.[570]

635. Respondent submits that the Minister's interpretation of the regulations, resulting in the lower, actual, yield co-efficient being applied, was based on "a teleological interpretation with reference to IEA regulations that were not binding on Poland".[571]

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565 C-PHB, ¶ 216, quoting from Annex R-92, see also C-R-PHB, ¶ 23.

566 SoD, ¶ 479.

567 SoRj, ¶ 444, footnotes omitted.

568 R-R-PHB, ¶ 69.

569 SoRj, ¶ 444.

570 SoRj, ¶ 444.

571 SoRj, ¶ 445, footnotes omitted; see also R-PHB, ¶ 282.

636. Respondent further submits that "Orlen had good reason to believe that its interpretation was correct, as (i) it would be unfair for Orlen, if it had to use a lower yield coefficient and consequently maintain proportionally larger mandatory reserves than its competitors and (ii) it is an established principle of construction, that in case of doubt as to a public duty (taxes etc), an interpretation more favourable for the individual should be chosen".[572]

637. Respondent refers to the oral evidence of Miłosz Karpiński at the Hearing, in which he stated (as summarized by Respondent) that "the detailed method for calculating the mandatory reserves for crude oil had not been published until 24 April 2007, following the enactment of the MRA; [Footnote: T5/1188/6-23 (Karpiński)] those detailed methods were not subject to the consultations, so Orlen had no means of knowing them in advance".[573] Further, because the relevant articles of the executive regulation and the relevant articles of the MRA did not relate directly to petrochemical production, PKN Orlen could not have known how the Minister would interpret those provisions in PKN Orlen's particular context.[574]

638. The Tribunal considers that it is evident from PKN Orlen's letter of 11 July 2007, requesting the application of the higher yield co-efficient, that PKN Orlen was previously aware of the possibility of having to use a lower yield co-efficient—otherwise there would have been no reason to write the letter.

639. This prior knowledge was confirmed by Mr. Karpiński in his evidence at the Hearing when he stated that, prior to asking the Minister to confirm that the higher yield co-efficient was applicable, PKN Orlen had twice been informed by ARM that the lower yield co-efficient should be applied.[575]

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572 SoRj, footnote 467.

573 R-PHB, ¶ 287.

574 R-R-PHB, ¶ 69.

575 Transcript 1161/7–22.

640. While Mr. Karpiński stated that he was unable to confirm whether PKN Orlen had participated in consultations leading up to the enactment of the MRA and the Regulation of 24 April 2007,[576] the Tribunal accepts as correct Claimant's submission that the reference in PKN Orlen's letter of 11 July 2007 to matters "already touched upon [by PKN Orlen] in the period of preparation of the act and executive regulations"[577] suggests that PKN Orlen had participated in consultations.

641. However, this is not the same as saying that PKN Orlen expected, or should have expected, that the Minister would ultimately interpret the new regulations as requiring PKN Orlen to calculate its stocks by reference to a lower yield co-efficient. Claimant has not made out either of those points.

642. The Tribunal is conscious that the burden of proof here is on Claimant. The Tribunal is aware that PKN Orlen may have avoided a massive fine by reason of the Minister's decision to grant it an EFI. The Tribunal is unable to say for certain that the Minister's interpretation of the regulation was unexpected by PKN Orlen, or objectively surprising in the circumstances. However, it is for Claimant to establish similar circumstances and Claimant has not discharged its burden.

643. For the reasons stated above, the Tribunal finds that Claimant has not shown that PKN Orlen was in similar circumstances to J&SE in applying for its Exemption from Increasing.

644. Accordingly, it is not necessary for the Tribunal to reach a conclusion as to whether PKN Orlen and J&SE were treated differently and, if so, whether such different treatment was reasonable or justified.

645. As a final matter, the Tribunal notes Claimant's allegations that on 14 February 2008, Mr. Pawlak, then Minister of Economy, informed the *Sejm* Economic

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576 Transcript 1174/11–18.

577 C-PHB, ¶ 216, quoting from Annex R-92.

Committee of the grounds on which he had cancelled the First Financial Penalty against J&SE and contrasted J&SE's case with that of PKN Orlen (though it was not identified by name in the comments), noting that "[i]n the end, two completely opposite decisions were made at the same time and in similar circumstances".[578]

646. Respondent submits that the statements referred to by Claimant were made prior to Mr. Pawlak's having made a thorough analysis of the two cases.[579]

647. The Tribunal is satisfied, having read Mr. Pawlak's statement and heard his evidence at the Hearing and having considered the evidence presented by Claimant,[580] that Mr. Pawlak's statement and oral evidence represent his genuinely-held views as to the comparability of the applications for Exemptions from Increasing filed by PKN Orlen and J&SE.[581] As such, Respondent should not be considered bound by the views expressed previously by Mr. Pawlak in early 2008.

648. In conclusion, for the reasons stated above, the Tribunal finds that Claimant has not established discrimination against J&SE by reference to the treatment of PKN Orlen's application for an Exemption from Increasing.

649. (ii) *CP Energia.* Claimant alleges that discrimination is evidenced by the fact that CP Energia S.A. ("CP Energia") was granted an exemption from the obligation to maintain natural gas reserves for one year on 4 October 2007.[582] Claimant submits that in applying for an exemption, CP Energia relied on the same ground relied on by J&SE, namely "difficulty obtaining storage space".[583]

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578 SoC, ¶482, quoting from Annex C-22; See also SoC, ¶ 484 referring to a radio interview given by Mr. Pawlak on 18 February 2008.

579 SoD, ¶¶ 465-467.

580 See, e.g., Annex C-22 and Annex C-425.

581 See, e.g., Transcript 1727/2-19; Witness Statement of Waldemar Pawlak, pages 1-2.

582 SoC, ¶ 618, referring to Annex C-418, a news item from CP Energia's website.

583 SoC, ¶ 490; SoRy, ¶ 567.

650. "like persons". The Tribunal finds that, as an entity subject to the same mandatory reserves legislation as J&SE, CP Energia is a "like person" to J&SE.

651. "similar circumstances". Respondent states that, as a natural gas company, CP Energia's obligation to maintain mandatory reserves was different from that imposed on J&SE. In particular, the "especially justified case" test does not apply to entities who are obliged to hold natural gas reserves. Instead, Article 24(5) of the MRA provides that "permissions not to increase for natural gas may be granted if: (i) the applicant has fewer than 100,000 customers and (ii) the applicant imports into Poland less than 50 million $m^3$ of natural gas per year".[584] According to Respondent, "Entity CP met those conditions".[585]

652. In light of the fact that the "especially justified case" test was not the test applicable to CP Energia's EFI application, the Tribunal considers that CP Energia and J&SE were not in similar circumstances when making their respective applications.

653. Accordingly, the Tribunal finds that Claimant has not established discrimination against J&SE by reference to the treatment of CP Energia's EFI application.

654. (iii) *Entity AL*. Claimant submits that J&SE was treated less favourably than Entity AL, which was granted temporary permission not to increase diesel oil holdings on 26 June 2006.[586] Claimant states that the EFI was granted "on the grounds of (i) financial difficulties, (ii) the suspension of business activities, and (ii) the lack of available storage facilities".[587]

655. "like persons". The Tribunal finds that, as an entity subject to the same mandatory reserves legislation as J&SE, Entity AL is a "like person" to J&SE.

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584 SoRj, ¶ 465.

585 SoRj, ¶ 465.

586 Annex C-505, referred to at SoRy, ¶ 268.

587 SoRy, ¶ 269.

656. "similar circumstances". In the Rejoinder, Respondent states that Entity AL had, at the time the exemption was granted, "suspended the activity from which the obligation arose", such that Entity AL and J&SE were not in like circumstances.[588]

657. The Tribunal notes that the case of Entity AL was not discussed at the Hearing or in the Post-Hearing Briefs of the Parties.

658. Having reviewed the Minister's decision,[589] the Tribunal concludes that the fact that Entity AL had suspended the activity that gave rise to its obligation to hold mandatory stocks means that Entity AL and J&SE were not in similar circumstances when making their EFI applications. In reaching this conclusion the Tribunal has had regard to Respondent's uncontradicted statement in its Rejoinder that "[t]he volume of mandatory reserves to be maintained is established on the basis of last year's trades."[590]

659. Accordingly, the Tribunal finds that Claimant has not established discrimination against J&SE by reference to the treatment of Entity AL's EFI application.

660. (iv) *Entities BG, BQ, BW, CQ, CX.* Claimant submits that Entities BG, BQ, BW, CQ and CX were all treated more favourably than J&SE when those Entities were granted EFIs.[591] The applications for, and decisions granting, the EFIs, as well as the Parties' submissions, establish that each of those Entities had suspended, or was in the process of suspending, the business activity giving rise to its mandatory stock obligations.[592]

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588 SoRj, ¶¶ 461–462.

589 Annex C-505.

590 SoRj, footnote 495

591 Entity BG: SoRy, ¶¶ 270-274, 567-568; Entity BQ: SoRy, ¶¶ 279, 567-568; Entity BW: SoRy, ¶¶ 282, 567-568; Entity CQ: SoRy, ¶¶ 287-288, 567-568; Entity CX: SoRy,¶¶ 297-298, 567-568.

592 Entity BG: Annexes C-529 and C-532; SoRy, ¶¶ 270-274; SoRj, ¶¶ 459, 474. Entity BQ: Annexes C-509 and C-511; SoRy, ¶¶ 278-279; SoRj, ¶ 462. Entity BW: Annexes C-519 and C-520; SoRy, ¶¶ 282-284; SoRj, ¶¶ 461-462. Entity CQ: Annexes C-506 and C-507; SoRy, ¶¶

661. The Tribunal notes that the cases of Entities BG, BQ, BW, CQ and CX were not discussed at the Hearing or in the Post-Hearing Briefs of the Parties.

662. For the reason stated above in relation to Claimant's submissions regarding the treatment of Entity AL (see ¶ 658 above), the Tribunal finds that J&SE was not in similar circumstances to those of Entity BG, Entity BQ, Entity BW, Entity CQ or Entity CX when making their EFI applications.

663. Accordingly, the Tribunal finds that Claimant has not established discrimination against J&SE by reference to the treatment of the EFI applications of any of Entities BG, BQ, BW, CQ and CX.

664. (v) *Entity BO.* Claimant submits that in his decision of 24 October 2008, "[t]he Minister of Economy found that Entity BO's inability to acquire storage space was tantamount to an '*unpredictable Act of God*' which merited the granting of a permission".[593] In its application, Entity BO had (like J&SE) relied on lack of available storage facilities as its principal ground for seeking an EFI.[594]

665. "like persons". The Tribunal finds that, as an entity subject to the same mandatory reserves legislation as J&SE, Entity BO is a "like person" to J&SE.

666. "similar circumstances". Respondent states that while Entity BO's application was based on a lack of storage capacity, that entity's situation was distinguishable from that of J&SE in that "BO required storage facilities for crude oil".[595] Further, Respondent submits that when Entity BO made its EFI application, more than a year after J&SE's applications, "there were no opportunities for storage".[596]

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287-288; SoRj, ¶¶ 461-461. Entity CX: Annexes C-497, C-499 and C-500; SoRy, ¶¶ 297-298; SoRj, ¶¶ 461-462.

593 SoRy, ¶ 276, referring to Annex C-545.

594 SoRy, ¶¶ 275-276.

595 SoRj, ¶ 470, referring to Annex C-542.

596 SoRj, ¶ 485.5.

667. The Tribunal notes that the case of Entity BO was not discussed at the Hearing or in the Post-Hearing Briefs of the Parties.

668. The Tribunal has reviewed Entity BO's application[597] and the Minister's decision[598].

669. The Tribunal refers to the standard that it has considered applicable to the question whether entities were in "similar circumstances" for the purposes of considering whether J&SE was discriminated against by Respondent. As stated in ¶ 592 above, the Tribunal considers that the relevant question is what the Minister (as the EFI decision maker) reasonably believed each entity's situation to be as regards compliance with mandatory reserves legislation.

670. The Tribunal considers that on the face of the documents submitted by Claimant regarding Entity BO's application and those of J&SE, it is evident that Entity BO submitted extensive proof of its unsuccessful attempts to secure storage after its existing storage contract was cancelled by Entity BO's contractual counterparty.

671. The Tribunal finds that it was reasonable for the Minister to conclude, as his decision indicates he concluded, that it was impossible for Entity BO to comply with its mandatory stocks obligations. As stated above,[599] the Tribunal considers that in the case of J&SE's applications for EFIs, it was reasonable for the Minister to conclude, as he did, that J&SE had not established such impossibility.

672. Accordingly, the Tribunal finds that Claimant has not shown that J&SE was in similar circumstances to those of Entity BO.

673. For completeness, the Tribunal notes that Entity BO's case was decided under the MRA, and not the NRA as in the case of both of J&SE's EFI applications.

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597 Annex C-542.

598 Annex C-545.

599 See ¶¶ 301 and 365.

674. Under the MRA, as noted at ¶ 173 above, the exercise of the Minister's discretion under Article 5(7) was bounded by §12 of the regulation of the Minister of Economy of 24 April 2007, which specifically referred, *inter alia*, to "random events or other unpredictable circumstances making meeting the obligation impossible".[600] The Tribunal has been made aware of no such regulation affecting the exercise of the Minister's discretion pursuant to Article 16(6) of the NRA.[601]

675. While the Minister's mandate under Article 16(6) of the MRA refers only to "especially justified cases", the Tribunal considers that the Minister's decisions on J&SE's First and Second EFI Applications indicate that the Minister had reached the conclusion that compliance was not impossible.

676. In conclusion, the Tribunal finds that Claimant has not established discrimination against J&SE by reference to the treatment of Entity BO's EFI application.

677. (vi) *Entity CW.* Claimant submits that Entity CW applied for an EFI on the ground that there was insufficient storage capacity for LPG in Poland.[602]

678. "like persons". The Tribunal finds that, as an entity subject to the same mandatory reserves legislation as J&SE, Entity CW is a "like person" to J&SE.

679. "similar circumstances". Claimant notes that Entity CW was granted an exemption on 3 March 2008, and that the Minister of Economy stated in his decision that "the special condition required to take a positive decision in this matter and consisting in the occurrence of fortuitous events or other

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600 Annex CA-65, §12.

601 See ¶ 169 above.

602 SoRy, ¶¶ 290–292, referring to Annex C-530.

unpredictable circumstances preventing the fulfillment of the obligation of the creation of stocks was met".[603]

680. Given that J&SE's application was based on lack of storage capacity and was rejected, Claimant submits that it was in similar circumstances to Entity CW such that the granting of Entity CW's application shows discrimination on the part of Respondent.[604]

681. Claimant submits, further, that "the Minister's findings of lack of storage capacity in the context of the Entity CW's (…) [application was] based on OLPP's indications that it did not have storage capacity to offer".[605]

682. Respondent submits that Entity CW's case is distinguishable from that of J&SE.[606] The exemption granted to Entity CW was for "the first quarter of 2008, when there demonstrably were no free storage facilities for petrol, as explicitly stated by the Minister in the [Decision]".[607]

683. Respondent states:

> Prior to applying for an Exemption from Increasing, [Entities CW and CZ] approached 41 storage providers with the request to offer storage space, all of which were turned down.[608]

684. The Tribunal notes that while there is no reference in Entity CW's EFI application to Entity CW's having contacted 41 storage providers,[609] it is stated in Entity CZ's EFI application that "all the correspondence to companies which

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603 SoRy, ¶¶ 289, 293, referring to Decision No. 2/03/2008 of Minister of Economy dated 3 March 2008, Annex C-535.

604 SoRy, ¶ 295.

605 SoRy, ¶ 567.

606 SoRj, ¶ 468.

607 SoRj, ¶ 469, referring to Decision of Minister of Economy No. 2/03/2008, 3 March 2008, Annex C-535; see also SoRj, footnote 490.

608 SoRj, ¶ 469. In the footnote to this quotation, Respondent notes that the Minister confirmed with storage providers that storage was not available.

609 Annex C-530.

store gas and fuels was sent in cooperation with CW (CW is the 100% owner of CZ)".[610]

685. Entity CZ's application, dated 7 December 2007, refers to Entity CZ's having corresponded with 41 entities seeking storage and includes 41 sets of initials which appear to be the redacted names of possible providers. The application states that copies of the correspondence is included in the application, but that correspondence does not form part of the redacted version exhibited as Annex C-531. The Minister made his decision in Entity CW's case on 3 March 2008.[611]

686. Respondent submits that the Minister's approach in the case of Entity CW is consistent with his other decisions, namely, "that Exemptions from Increasing shall be granted only when no capacity is available, and then only for the time when capacity is not available". Entity CW was granted an EFI for one month, having requested an exemption of "at least one year".[612]

687. The Tribunal refers again to the standard that it has considered applicable to the question whether entities were in "similar circumstances" for the purposes of considering whether J&SE was discriminated against by Respondent. As stated in ¶ 592 above, the Tribunal considers that the relevant question is what the Minister (as the EFI decision maker) reasonably believed each entity's situation to be as regards compliance with mandatory reserves legislation.

688. The Tribunal has reviewed Entity CW's application,[613] Entity CZ's application[614] and the Minister's decision.[615] The Tribunal considers that on the face of the documents submitted by Claimant, Entity CW (together with Entity

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610 Annex C-531.

611 Annex C-535.

612 R-PHB, ¶ 276, footnoted to T7/1579/4–10, 1586/6–10 (Woźniak).

613 Annex C-530.

614 Annex C-531.

615 Annex C-535.

CZ) submitted extensive proof of its unsuccessful attempts to secure storage for LPG or its equivalent as petrol.

689. The Tribunal finds that it was reasonable for the Minister to conclude, as his decision indicates he concluded, that it was impossible for Entity CW to comply with its mandatory stocks obligation.

690. As stated above,[616] the Tribunal considers that in the case of J&SE's applications for EFIs, it was reasonable for the Minister to conclude, as he did, that J&SE had not established such impossibility.

691. Accordingly, the Tribunal finds that Claimant has not shown that J&SE was in similar circumstances to those of Entity CW.

692. For completeness, the Tribunal refers to its discussion of the MRA and NRA provisions regarding EFIs set out at ¶¶ 673-675 above.

693. In conclusion, the Tribunal finds that Claimant has not established discrimination against J&SE by reference to the treatment of Entity CW's EFI application.

694. (vii) *Entity CZ.* Claimant submits that the exemption granted to Entity CZ was based entirely on lack of storage capacity.[617] Further, that the Minister's findings in Entity CZ's case were "based on OLPP's indications that it did not have storage capacity to offer".[618]

695. "like persons". The Tribunal finds that, as an entity subject to the same mandatory reserves legislation as J&SE, Entity CZ is a "like person" to J&SE.

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616 ¶¶ 301 and 365.

617 SoRy, ¶ 567; see also SoRy, ¶ 301.

618 SoRy, ¶ 567.

696. "similar circumstances". Claimant states that Entity CZ's EFI application was, like those of J&SE, based on a lack of storage capacity.[619]

697. As in the case of Entity CW (see ¶¶ 682-683 and 686 above), Respondent submits that Entity CZ's case is distinguishable from that of J&SE because Entity CZ's EFI was granted "in the first quarter of 2008, when there demonstrably were no free storage facilities for petrol, as explicitly stated by the Minister".[620]

698. Having reviewed the Parties' submissions dealing with Entity CW, Entity CZ's application[621] and supplementary application[622] and the Minister's decision,[623] the Tribunal repeats its reasoning and conclusions regarding Entity CW at ¶¶ 684-693 above.

699. Accordingly, the Tribunal finds that Claimant has not established discrimination against J&SE by reference to the treatment of Entity CZ's application for an Exemption from Increasing.

700. (viii) *Shell Polska.* Claimant submits that Shell Polska Sp. Z o.o ("Shell Polska") was granted "a temporary permit to replace mandatory stocks of petrol with stocks in the form of diesel oil" on 27 December 2007.[624] Claimant submits that, as such, the Minister's refusal to grant an Exemption from Increasing to J&SE constituted discriminatory treatment.[625]

701. The Tribunal notes that Shell Polska's application has not been exhibited in these proceedings.

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619 SoRy, ¶ 567.

620 SoRj, ¶ 469, referring to Decision No. 4/03/2008 of Minister of Economy, 3 March 2008, Annex C-536.

621 Annex C-531.

622 Annex C-533.

623 Annex C-536.

624 SoRy, ¶ 303, referring to Decision No. 16/12/2007 of the Minister of Economy dated 27 December 2007, Annex C-567.

625 SoRy, ¶ 304.

702. "like persons". The Tribunal finds that, as an entity subject to the same mandatory reserves legislation as J&SE, Shell Polska is a "like person" to J&SE.

703. Claimant submits that Shell Polska's application was granted solely on the ground of lack of storage capacity,[626] specifically on Shell Polska's claim that it had been unable to conclude storage contracts with OLPP and PKN Orlen.[627]

704. Respondent submits that Shell Polska applied for and was granted permission to replace some of its mandatory petrol reserves with diesel reserves; it did not apply for an EFI. Accordingly, Shell Polska and J&SE were not in like circumstances.[628]

705. The Tribunal notes that the case of Shell Polska was not discussed in the Post-Hearing Briefs of the Parties. It was mentioned by Counsel for Claimant in his closing statement at the Hearing, in which he noted, "they had the same problem as us with OLPP and PKN Orlen but the result is different".[629]

706. Having reviewed the Minister's decision,[630] the Tribunal considers that in light of the fact that Shell Polska's application was for permission to replace petrol reserves with diesel reserves pursuant to Article 7(6) of the MRA (rather than Article 5(7) of the MRA or its predecessor, Article 16(6) of the NRA), Shell Polska and J&SE were not in similar circumstances when making their applications to the Minister.

707. Accordingly, Claimant has not established discrimination against J&SE by reference to the treatment of Shell Polska's application to replace petrol stocks with diesel stocks.

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626 SoRy, ¶ 568.

627 SoRy, ¶ 303.

628 SoRj, ¶ 463.

629 Transcript, 2013/17–18.

630 Annex C-567.

*b) Imposition and Execution of Financial Penalties*

*(i)* Non-imposition of fines prior to enactment of the MRA

708. Claimant submits that according to the Supreme Chamber of Control ("NIK"), "ARM has waived the imposition of no fewer than 16 fines" relating to failure to hold mandatory stocks.[631]

709. In its report, NIK noted, referring to ARM, a "lack of precisely defined rules of conduct for imposition of fines for failures to fulfil the obligations related to accumulation of stocks of fuels, which arise from the *Act on State* Reserves".[632] Further, the report referred to cases in which the President of ARM had waived imposition of a fine.[633]

710. Respondent submits that in any case where an entity breaches its obligation to maintain mandatory stocks, "proceedings are commenced against the entity and fines are imposed against those who fail to comply with their statutory duties".[634] Respondent states that "nine entities have been fined to date for breaching their obligations to maintain mandatory levels of reserves, as shown by Exhibit R 2".[635]

711. Respondent states that in the period referred to by Claimant, 2003–2006, "ARM waived the imposition of 14 fines related to mandatory stocks of liquid fuels or oil", while the other two decisions related to reserves.[636] Further, Respondent refers to the First Witness Statement of Wiesław Górski to explain why it

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631 SoC, ¶ 629, referring to Supreme Chamber of Control, Pronouncement of audit results concerning the functioning of the systems of state economic reserves and mandatory stocks of liquid fuels in Poland in the years 2003 – 2006, dated July 2007, Annex C-163. The section of the Statement of Claim in which this factual allegation appears is headed, "The prosecution of J&S Energy, and the imposition and enforcement of the financial penalties, is discriminatory". The Tribunal proceeds, based on the heading, on the assumption that Claimant alleges discrimination in relation to these waivers, although ¶ 629 does not state this in terms.

632 Annex C-163, page 30.

633 Annex C-163, page 30.

634 SoD, ¶ 495.

635 SoD, ¶ 497.

636 SoD, ¶ 498.

considers that the waiving of those fines was justified in the circumstances.[637] Mr. Górski states:

> In most of the cases (8) the penalties were not imposed because the undertakings created the required stocks by an additional deadline granted to them in the post-audit statement". In three cases the penalties were not imposed due to procedural errors. In two cases the penalties were not imposed because the undertakings erroneously interpreted the provisions. In one case the penalty was not imposed on an undertaking who created the stocks in a manner consistent with the Act, but in the form different from the one previously declared by him. Finally, in one case it was crucial that the shortage of stocks is a result of an accounting error (…).[638]

712. Respondent states that J&SE "in the case at hand" did not repair its shortfall within the time given to it by the post-audit statement, whereas "the companies with respect to which proceedings were discontinued due to the removal of shortages increased their mandatory stocks of fuels to the prescribed level immediately after the inspections and the post-audit statements, i.e. within a period of around three weeks".[639] Respondent submits that in the circumstances, a decision to waive the fine against J&SE would have been "discriminatory against JSE's competitors and other entities obliged to hold the mandatory reserves".[640]

713. Claimant describes Mr. Górski's witness statement as "self-serving", and notes that he has not identified the entities to which he refers. Claimant submits that "Respondent is therefore put to strict proof of Mr. Górski's allegations".[641]

714. In fact, neither Party has identified the entities to which the NIK report refers. Claimant bears the burden of proof in establishing discrimination, and the NIK finding is not sufficient on its own to establish that the entities therein referred

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637 SoD, ¶ 498, referring to First Witness Statement of Wiesław Górski, ¶ 46.

638 First Witness Statement of Wiesław Górski, ¶ 46.

639 SoD, ¶ 499.

640 SoD, ¶ 500, see also SoD, ¶¶ 501-503.

641 SoRy, ¶ 141.

to and J&SE were "like persons treated in a different manner in similar circumstances without reasonable or justifiable grounds".[642]

715. Accordingly, the Tribunal finds that Claimant has not established discrimination under this head of its claim.

*(ii)* Non-imposition of fines after enactment of the MRA

716. Claimant alleges that since the MRA came into force, J&SE is the only entity to have been fined in respect of a shortfall, while other entities have avoided being fined.[643]

717. (i) *PKN Orlen.* Claimant alleges that despite having been granted an EFI, "PKN Orlen (…) continued to have substantial shortages in reserves – in excess of 100,000 Mt of crude oil – well into 2008" and that "Respondent [has not] taken any notice of [that] fact".[644] No reference to documentary or other evidence is provided.

718. Respondent submits that "Orlen was never in breach of its reserves obligations and therefore was not fined".[645]

719. This argument has not been pursued by the Parties in subsequent pleadings or at the Hearing. Accordingly, the Tribunal finds that the claim is not made out.

720. (ii) *Other entities – general.* Claimant in its Reply alleges that "both ARM and the Ministry of Economy had full power to discontinue proceedings for the imposition of financial penalties and/or to quash the financial penalties themselves", and the footnote to this statement lists eleven decisions of the ARM and Minister of Economy.[646] The decisions relate to Entities AC,[647] CI,[648]

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642 *Plama*, ¶184.

643 SoC, ¶ 628.

644 SoC, ¶ 624.

645 SoRj, ¶ 227.

646 SoRy, ¶ 138, footnote 108.

647 Annex C-537.

CL,[649] DE,[650] Laborex,[651] GF,[652] and GP[653], and officers of Entities FS,[654] GC,[655] and GE,[656] Claimant does not discuss these cases further in the Reply. Claimant refers in its Post-Hearing Brief to the mention of the cases in its Reply, stating, "[i]n its Rejoinder, the Respondent failed to address any of them".[657]

721. Respondent submits that of the proceedings referred to in footnote 108 to Claimant's Reply, all except those relating to Laborex and Entity GP (also referred to as BGM Petrotrade)[658] "were proceedings for the imposition of a penalty for a different wrong, namely, failure to provide ARM with monthly reports".[659] Respondent states that "[a] number of those proceedings were discontinued because the missing reports were provided prior to imposition of the fine, and it thereby was shown that the entities in question had in fact been compliant with their mandatory reserves obligations as at the respective final extended deadlines".[660]

722. Claimant submits that the fact that the obligations breached were different from the obligation breached by J&SE is irrelevant and that "the fact remains that the curing of those breaches rendered the proceedings '*pointless*' and lacking in

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[648] Annex C-540.

[649] Annex C-538.

[650] Annex C-564.

[651] Annexes C-534; C-528.

[652] Annex C-539.

[653] Annex C-489.

[654] Annex C-527.

[655] Annex C-526.

[656] Annex C-546.

[657] C-PHB, ¶ 127.

[658] R-PHB, ¶ 364.

[659] R-PHB, ¶ 364.

[660] R-PHB, ¶ 364. The Tribunal notes that Respondent's submission in paragraph 364 of its Post-Hearing Brief, that "the entities in question had in fact been compliant", has a footnote reference that does not include the decisions concerning Entity DE (Annex C-564) and the Officer of Entity GE (Annex C-546) that were referred to in footnote 108 of Claimant's Reply.

'*legal or factual grounds for imposing such penalty*'".[661] Further, that Mr. Górski agreed that proceedings against Entities CI and AC had been discontinued because in each case the entity concerned had cured the breach, such that the proceedings had become "groundless".[662]

723. The Tribunal now considers Claimant's allegations regarding each entity in turn.

724. (iii) *Entities AC, CI, CL and GF.*

725. "like persons". As entities subject to the same mandatory reserves legislation as J&SE, the Tribunal finds that Entities AC, CI, CL and GF are "like persons to J&SE.

726. "similar circumstances". The decisions in relation to Entities AC, CI, CL and GF upon which Claimant relies all concern failure by the entities concerned to comply with the monthly reporting requirements in Article 22(1) of the MRA.

727. Respondent submits that Entities AC, CI, CL and GF were not in like circumstances to J&SE in that they were prosecuted for failure to provide monthly reports, and not for failure to maintain reserves.[663]

728. The Tribunal agrees with Respondent that in light of the fact that the decisions concern breach of a different obligation than the obligation to maintain mandatory stocks means that Entities AC, CI, CL and GF cannot be considered as having been in similar circumstances to those of J&SE regarding imposition of a financial penalty.

729. Accordingly, the Tribunal finds that Claimant has not established discrimination against J&SE by reference to the discontinuance of proceedings against Entity AC, Entity CI, Entity CL or Entity GF.

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661 C-R-PHB, footnote 14.

662 C-PHB, ¶ 128, referring to Transcript 1372/9–21.

663 R-PHB, ¶364.

730. (iv) *Entity DE*

731. "like persons". As an entity subject to the same mandatory reserves legislation as J&SE, the Tribunal finds that Entity DE is a "like person" to J&SE.

732. "similar circumstances". Proceedings were commenced against Entity DE for failure to maintain required levels of mandatory stocks in breach of the MRA.[664] The ARM decision revokes a previous decision imposing a financial penalty on the grounds that the limitation period of one year, between the finding of breach and imposition of a financial penalty, had expired prior to imposition of the financial penalty.[665]

733. Respondent does not make any specific submission regarding the circumstances of Entity DE.[666]

734. Having reviewed Annex C-564, the Tribunal concludes that Entity DE was not in similar circumstances to J&SE in the sense of the circumstances that were relevant to the making of the decision in each case. In Entity DE's case, although proceedings were brought as a result of an alleged shortfall in mandatory stocks, which is similar to J&SE's situation, in Entity DE's case the limitation period had expired prior to imposition of a financial penalty.

735. Accordingly, the Tribunal finds that Claimant has not established discrimination against J&SE by reference to the discontinuation of proceedings against Entity DE.

736. (v) *Officers of Entities FS, GC and GE.*

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664 Annex C-564.

665 Annex C-564, pages 10– 2.

666 As noted above, Respondent's submission in paragraph 364 of its Post-Hearing Brief, that "the entities in question had in fact been compliant", has a footnote reference that does not include the decisions concerning Entity DE (Annex C-564) and the Officer of Entity GE (Annex C-546) that were referred to in footnote 108 of Claimant's Reply.

737. "like persons". These three cases concern proceedings against officers of companies subject to the obligation to hold mandatory stocks. Claimant has not made any submissions as to why an officer of a company should be treated as a "like person" to J&SE. Respondent has not made any submissions as to why an officer of a company should not be considered to be a "like person" to J&SE. While doubting that the Officers of Entities FS, GC and GE could be considered "like persons" to J&SE, the Tribunal nonetheless proceeds to consider the question of "similar circumstances".

738. "similar circumstances". Proceedings were commenced against an Officer of Entity GE for failure to comply with the monthly reporting requirements in Article 22(1) of the MRA.[667] Proceedings were commenced against an Officer of Entity FS[668] and against an Officer of Entity GC[669] for failure to comply with the monthly reporting requirements in the predecessor article under the NRA, Article 191(1).

739. Respondent submits that the Officers of Entities FS and GC were not in like circumstances to J&SE in that they were prosecuted for failure to provide monthly reports, and not for failure to maintain reserves.[670] Respondent does not make a specific submission about the Officer of Entity GE.[671]

740. The Tribunal agrees with Respondent that in light of the fact that the decisions concerned breach of a different obligation from the obligation to maintain mandatory stocks means that the Officers of Entities FS and GC cannot be considered as having been in similar circumstances to those of J&SE regarding

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667 Annex C-546.

668 Annex C-527.

669 Annex C-526.

670 R-PHB, ¶364.

671 As noted above, Respondent's submission in paragraph 364 of its Post-Hearing Brief, that "the entities in question had in fact been compliant", has a footnote reference that does not include the decisions concerning Entity DE (Annex C-564) and the Officer of Entity GE (Annex C-546) that were referred to in footnote 108 of Claimant's Reply.

the imposition of a fine. By analogy, Tribunal makes the same finding regarding the Officer of Entity GE.

741. Accordingly, the Tribunal finds that Claimant has not established discrimination against J&SE by reference to the discontinuation of proceedings against Officers of Entities FS, GC or GE.

742. (vi) *Laborex*. In its Reply Post-Hearing Brief, Claimant submits that "ARM discontinued proceedings on the imposition of a financial penalty on Laborex once the company had fulfilled its reserves requirements".[672]

743. Claimant quotes ARM's decision as stating that because Laborex had fulfilled its obligations, proceedings had "[become] pointless, because of a lack of legal or factual grounds for imposing such penalty".[673]

744. "like persons". As an entity subject to the same mandatory reserves legislation as J&SE, the Tribunal finds that Laborex is a "like person" to J&SE.

745. "similar circumstances". Respondent submits that once an *in situ* inspection of Laborex was eventually performed, a small shortfall (3 $m^3$ of diesel oil) was identified.[674] But prior to publication of the post-inspection statement, Laborex "informed ARM" that it had made up the shortfall in fuel oil.[675] An application for a licence to store reserves as fuel oil was at that time pending and was later granted, after which an ARM inspection confirmed that there was no shortfall.[676]

746. Accordingly, the Tribunal considers that Claimant has not shown that Laborex and J&SE were in like circumstances as regards the curing of a shortfall in mandatory stocks, because Claimant has not shown that Laborex's fulfillment of

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672 C-R-PHB, ¶ 9.

673 C-R-PHB, ¶ 9 quoting Annex C-534.

674 R-PHB, ¶ 365.

675 R-PHB, ¶ 365.

676 R-PHB, ¶ 365.

its obligations took place after the expiration of a deadline imposed in a post-audit statement, as was the case for J&SE.[677]

747. Accordingly, the Tribunal finds that Claimant has not established discrimination against J&SE by reference to the discontinuation of proceedings against Laborex.

748. (vii) *BGM Petrotrade / Entity GP.*[678]

749. "like persons". As an entity subject to the same mandatory reserves legislation as J&SE, the Tribunal finds that BGM Petrotrade / Entity GP (hereafter, "BGM Petrotrade") is a "like person" to J&SE.

750. "similar circumstances". In the BGM Petrotrade case, according to Respondent, no "audit protocol" had been included in the case file, leading the Minister of Economy to conclude that "it should be acknowledged that the audit has not been actually conducted in the company". As a result, BGM Petrotrade was not in a "like situation" to that of J&SE.[679]

751. Having reviewed the BGM Petrotrade decision, the Tribunal agrees with Respondent's submission that BGM Petrotrade and J&SE were not in like circumstances in view of the noted absence of an audit report, ARM's failure to accord certain procedural rights to BGM Petrotrade and ARM's failure to state the legal grounds of its decision.[680]

752. Accordingly, the Tribunal finds that Claimant has not established discrimination against J&SE by reference to the discontinuation of proceedings against BGM Petrotrade.

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677 See ¶¶ 384-390.

678 Respondent refers to the entity as "BGM Petrotrade" (R-PHB, ¶ 366, referring to Annex C-489), while Claimant refers to it as "Entity GP" (SoRy, ¶ 138, footnote 108, referring to Annex C-489).

679 R-PHB, ¶ 366, referring to Annex C-489, referred to by Claimant in SoRy, ¶ 138, footnote 108, as decision on Entity GP.

680 Annex C-489, page 2.

*(iii)* Non-enforcement of fines imposed

753. In respect of penalties actually imposed, Claimant alleges that there were sixteen of these, but that only one very small fine had actually been enforced as at July 2007.[681] Respondent argues that "[o]f 16 fines referred to by the Claimant 10 were under execution when the NIK report was published (July 2007), 4 were annulled, 1 was not yet final".[682]

754. Respondent states that the execution of the Second Financial Penalty against J&SE was not discriminatory.[683] The enforcement of the fine resulted from a "consistent application of the rules which are designed to safeguard the financial interest of the Polish state".[684]

755. Respondent further states that the fact that fines have not been enforced against all entities made subject to a financial penalty does not mean that ARM's conduct was discriminatory in the particular circumstances of each case.[685]

756. The Tribunal notes that this element of Claimant's case is not discussed in Claimant's Post-Hearing Brief or in the Reply Post-Hearing Brief of either Party.

757. The Tribunal considers that Claimant has not adequately developed its submissions on this point and thus has not discharged its burden of proving that J&SE and any of the entities referred to by Claimant in paragraph 631 of its Statement of Claim were "like persons treated in a different manner in similar circumstances without reasonable or justifiable grounds".[686]

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681 SoC, ¶ 631.

682 SoD, ¶ 493; see also SoD, ¶¶ 495 and 497.

683 SoD, ¶ 504.

684 SoD, ¶ 506.

685 SoD, ¶ 504, referring to First Witness Statement of Wiesław Górski, ¶ 49.

686 *Plama*, ¶ 184.

*(iv)* Setting of the final extended deadline – Entity FF

758. Claimant submits that Entity FF was granted six months, or alternatively five weeks, to replenish its reserves shortfall.[687]

759. Claimant's arguments based on the treatment accorded to Entity FF are not presented in its pleadings as arguments about discrimination, but rather as demonstrating that ARM had more discretion in setting deadlines than Respondent claims it had.[688] However, for completeness, the Tribunal treats Claimant as having argued that the setting of a three-week final extended deadline in J&SE's case was discriminatory, particularly as Respondent has responded to Claimants allegations regarding Entity FF as though they were allegations of discrimination.

760. In its Post-Hearing Brief, Claimant submits that at the Hearing, Mr. Górski conceded that Entity FF was granted six months between receipt of an audit report and the deadline for replenishing, in which to comply with its mandatory stocks obligations.[689]

761. Respondent submits that the setting of the three-week final extended deadline in ARM's audit report in J&SE's case was not discriminatory and that to have granted a more generous deadline would have constituted positive discrimination in favour of J&SE, given that the "standard deadline was 1 to 3 weeks".[690]

762. "like persons". As an entity subject to the same mandatory reserves legislation as J&SE, the Tribunal finds that Entity FF is a "like person" to J&SE.

763. "similar circumstances". Respondent submits that Entity FF and J&SE were not in similar circumstances because: (a) Entity FF having had a shortfall of only

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687 C-PHB, ¶ 119; C-R-PHB, ¶ 31.

688 C-R-PHB, ¶¶ 30–32.

689 C-PHB, ¶ 119, referring to Transcript 1358/10–17; Annex C-495.

690 R-PHB, ¶ 325.

8.59 $m^3$ of diesel;[691] (b) the six month period for compliance arose due to an administrative error in ARM's post-audit report and furthermore, the proceedings against Entity FF were affected by fraud on the part of the company, for which its Chair was fined;[692] and (c) the case involving FF took place in 2005, whereas J&SE's case took place in 2007, "after the 2007 NIK Report, prepared during the final phase of Poland's accession negotiations with IEA", following which ARM took a stricter approach, not targeted at J&SE specifically[693].

764. The Tribunal considers that Claimant has not established that Entity FF was in similar circumstances to those of J&SE, due to the minimal nature of Entity FF's shortfall.

765. Accordingly, the Tribunal finds that Claimant has not established discrimination against J&SE by reference to the setting of the final extended deadline in the case of Entity FF.

*(v)* Execution of the Second Financial Penalty

766. Claimant describes as "ruthless" ARM's issuing of a "reminder" on 23 June 2008 requiring payment of the Second Financial Penalty within seven days.[694]

767. In its Reply, Claimant submits, as an example of J&SE having been "repeatedly accorded treatment different from that accorded to entities in like situations", that "J&S Energy was left with no choice but to effect payment of the fine despite its having filed an application for a stay (…) whereas Respondent

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691 R-PHB, ¶ 327.

692 R-PHB, ¶ 329.

693 R-PHB, ¶ 332.

694 SoRy, ¶ 423–424.

concedes that by law, no enforcement measures would normally be taken in relation to entities in similar situations".[695]

768. Respondent denies that it made a concession in the terms stated by Claimant, stating that "[f]or the avoidance of doubt, a mere application for a stay is not protection against enforcement".[696]

769. The Tribunal observes that Claimant's allegation of discrimination in relation to enforcement of the Second Financial Penalty is not further particularized in its subsequent pleadings.

770. Accordingly, the Tribunal finds that Claimant has not established any of the elements required to show discrimination (*per Plama*, ¶ 184) in relation to the enforcement of the Second Financial Penalty.

*c) Recommencement of Administrative Proceedings*

771. (i) *Laborex.* Claimant alleges that the recommencement of proceedings against J&SE in February 2008 was discriminatory in light of the treatment given to Laborex. The fine imposed on Laborex was cancelled by the Minister of Economy because "ARM had imposed said fine in breach of the Polish Code of Administrative Procedure".[697] Claimant submits that this was one of the grounds on which the Minister of Economy cancelled the First Financial Penalty against J&SE but that, while administrative proceedings were subsequently recommenced against J&SE, no further action was taken against Laborex.[698]

772. Respondent states that the decision to recommence administrative proceedings (that is, the proceedings leading to imposition of the second financial penalty) was not discriminatory, and that Claimant's reliance on proceedings commenced against Laborex is misplaced, in that after cancellation of the fine

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695 SoRy, ¶ 574, referring to SoD, ¶ 442.

696 SoRj, ¶ 493.

697 SoC, ¶ 632, referring to Annex C-163.

698 SoC, ¶ 632.

imposed on Laborex, that entity was subject to further inspections, the results of which inspections "did not necessitate imposition of the financial penalty".[699]

773. "like persons". As noted above (see ¶ 744), the Tribunal finds that Laborex and J&SE are "like persons".

774. "similar circumstances". Claimant's argument that the recommencement of proceedings against J&SE in February 2008 was discriminatory has not been pursued in subsequent pleadings.[700]

775. The Tribunal finds as a result that Claimant has not established that Laborex and J&SE were in similar circumstances in the context of ARM's decision to recommence proceedings after cancellation of a financial penalty.

776. Accordingly, the Tribunal finds that Claimant has failed to establish discrimination in relation to Respondent's decision to recommence administrative proceedings against J&SE.

777. (ii) *Entity GP / BGM Petrotrade.* Claimant submits that a fine against Entity GP was quashed and that "Respondent has supplied no documentation indicating that fresh proceedings were initiated" thereafter.[701]

778. "like persons". As an entity subject to the same mandatory reserves legislation as J&SE, the Tribunal finds that Entity GP / BGM Petrotrade is a "like person" to J&SE.

779. "similar circumstances". Respondent submits that the case of Entity GP/BGM Petrotrade is distinguishable from that of J&SE because in the case of Entity GP / BGM Petrotrade ARM had not prepared an audit report, with the result that proceedings could not be recommenced without "a fresh formal inspection".[702]

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699 SoD, ¶ 507.

700 Claimant's other allegations regarding discrimination in which it relies on treatment accorded to Laborex are addressed at ¶¶ 742-747, above.

701 SoRy, ¶ 574, referring to Annex C-489.

702 SoRj, ¶ 220; see also R-PHB, ¶ 384.

However, before an inspection could be conducted Entity GP / BGM Petrotrade was struck from the register of companies required to maintain mandatory reserves, such that ARM was no longer able to inspect it.[703]

780. The Tribunal finds that Entity GP/BGM Petrotrade was not in similar circumstances to J&SE for the purposes of considering whether failure to recommence proceedings against Entity GP/BGM Petrotrade shows discrimination against J&SE. The absence of an audit report, coupled with the impossibility of conducting another audit, made the situations of the two entities quite different.

781. Accordingly, the Tribunal finds that Claimant has not established discrimination against J&SE by reference to the decision not to recommence proceedings against Entity GP/BGM Petrotrade.

*d) Investigations*

782. Claimant submits that "the campaign of investigations to which J&S Energy has been subjected" is discriminatory and that "[i]t is inconceivable that State-controlled companies such as PKN Orlen or Grupa Lotos, for instance, would be subject to the same extreme level of enforcement activity as J&S Energy".[704]

783. Respondent denies that the investigations carried out on J&SE were discriminatory.[705] Respondent denies that the conduct of inspections of J&SE constituted discrimination, stating that "Mercuria's claim that it was subject to a high number of inspections in a discriminatory manner is without merit".[706] Further, "Claimant does not even specify what kind of inspections there were which makes it impossible for the Respondent to reasonably discuss".[707]

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703 SoRj, ¶ 220; see also R-PHB, ¶ 384.

704 SoC, ¶ 633.

705 SoD, ¶¶ 490-491.

706 SoD, ¶ 491.

707 SoD, ¶ 491.

784. In the Reply, Claimant makes a brief reference to investigations having been discriminatory, commenting (in response to Respondent's argument that Claimant's investment had not been impaired) that negative consequences suffered by Claimant could have been avoided "had the Respondent treated J&S Energy as well as other entities in like situations in enforcing those obligations, including in exercising its discretion to investigate and penalize breach, and take measures to elicit payment of any penalty".[708]

785. However, there is no particularisation in any of Claimant's pleadings of the allegation that investigations were discriminatory.

786. Accordingly, the Tribunal finds that Claimant has not established that the investigations carried out by Respondent were discriminatory.

*e) Conclusion*

787. For the reasons set out in this subsection X.D, the Tribunal concludes that Claimant has not established that Respondent discriminated against Claimant's Investment.

E. Impairment

788. The Tribunal does not need to decide whether Claimant's investment was impaired by Respondent's impugned conduct, as required by Article 10(1) of the ECT, due to its finding that Claimant has not established that Respondent discriminated against Claimant's investment.

F. Conclusion

789. For the reasons set out in this Section X, the Tribunal concludes that Claimant has not established that Respondent impaired Claimant's investment through discriminatory measures in breach of the obligation in Article 10(1) of the ECT.

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[708] SoRy, ¶ 589.

## XI. FAILURE TO ACCORD CONSTANT PROTECTION AND SECURITY

790. This section concerns Claimant's allegation that Respondent's treatment of J&SE breached the obligation in Article 10(1) of the ECT that investments "shall (…) enjoy the most constant protection and security".

791. Claimant states that "this obligation includes legal and economic protection and security, the stability of the investment framework".[709] Further, Claimant submits that "the constant protection and security obligation at Article 10(1) of the ECT was meant to protect against exactly the type of treatment to which J&S Energy has been subjected, and which has been particularised in [the sections of the Statement of Claim dealing with fair and equitable treatment and discrimination]".[710]

792. In its Statement of Claim and Reply, Claimant makes no separate allegations regarding the failure to accord constant protection and security. The obligation to accord constant protection and security is not discussed in Claimant's Post-Hearing Brief or Reply Post-Hearing Brief.

793. Respondent submits that the obligation to accord constant protection and security is not coterminous with the fair and equitable treatment obligation.[711] Respondent acknowledges that in some of the case law referred to by Claimant, administrative action not involving a physical threat has been found to constitute a breach of the obligation to accord constant protection and security. However, Respondent argues that in those cases, the "standard was breached not by just any type of administrative action, but by those that eradicated the basis on which the Investor was carrying out business in the Host State".[712]

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709 SoC, ¶ 711.

710 SoC, ¶ 713; see also SoRy, ¶ 606.

711 SoD, ¶¶ 515–523, referring to C. Schreuer, "Fair and Equitable Treatment: Interactions with Other Standards", Annex RA-87.

712 SoRj, ¶ 513, referring to *National Grid v. Argentine Republic*, Award, Annex CA-48, ¶ 189; *CME v. Czech Republic*, Partial Award, CA-16, ¶ 613; *Biwater Gauff v. Tanzania*, Award, Annex CA-44, ¶ 731.

794. Respondent acknowledges that in some circumstances, the obligation to accord constant protection and security does go beyond the obligation to accord physical protection and security, but that as such it has only been extended "to (...) require States to afford investors reasonable legal avenues to enforce their rights".[713]

795. The Tribunal holds that the proper interpretation of Claimant's submissions is that Claimant does not allege that Respondent could have, through any of its impugned conduct, breached the obligation to provide constant protection and security without also breaching the fair and equitable treatment obligation.

796. The Tribunal has found that there has been no breach of the fair and equitable treatment obligation. In light of way in which Claimant has put its case, it is, accordingly, not necessary to re-analyse the pleadings with respect to a possible breach of the obligation to provide constant protection and security.

## XII. CONCLUSION

797. The Tribunal has found that Claimant has failed to make out any of its allegations of breach of Article 10(1) of the ECT. Accordingly, it is not necessary for the Tribunal to consider the Parties' submissions on causation and damages. The Tribunal will consider the Parties' submissions on costs in the following section.

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[713] SoD, ¶ 519; see also SoRj, ¶ 515; R-PHB, ¶ 485.

## XIII. COSTS

### A. The Parties' Submissions

798. As set forth in its Cost Submission of 16 May 2011, Claimant claims as costs and legal fees of counsel the following:

| | |
|---|---|
| Invoices issued to date | Shearman & Sterling LLP<br><br>Fees (Jurisdictional Phase): € 568,795.00<br>Fees (Merits Phase): € 3,353,687.60<br><br>Costs (Jurisdictional Phase): € 28,005.74<br>Costs (Merits Phase): € 173,755.58<br><br>Weil, Gotshal & Manges LLP<br><br>Fees and costs (Jurisdictional Phase): € 4,332.85<br><br>Fees and costs (Merits Phase): € 133,758.77<br>PLN 360,873.52 |
| Invoices pending (incurred but not billed) | Shearman & Sterling LLP<br>Fees: € 9,470.00<br>Costs: € 108.59 |
| **Total** | **€ 4,271,914.13**<br>**PLN 360,873.52** |

799. Claimant also claims reimbursement by Respondent of its share of the € 722,000.00 registration fee and advance on costs already deposited with the SCC, i.e., € 361,000.00, assuming that the € 722,000.00 would be used in its entirety.

800. According to Claimant, its total fees and costs in connection with its claim are:

| Description of Cost | | Amount |
|---|---|---|
| Legal fees and costs of Shearman & Sterling LLP | | € 4,133,822.51 |
| Legal fees and costs of Weil, Gotshal & Manges LLP | | € 138,091.62 and PLN 360,873.52 |
| Navigant Consulting, Inc. | Professional Fees | € 1,327,162.50 |
| | Costs | € 58,894.70 |
| Downstream B.V. | Professional Fees | € 168,350.00 |
| | Costs | € 7,363.69 |
| Fees of MAArt Translation Agency | | PLN 112,801.46 |
| Registration Fee to SCC | | € 1,500.00 |
| Advance on Costs to SCC | | € 359,500.00 |
| Jurisdictional Hearing Expenses (Crowne Plaza Hotel) | | € 1,230.00 |
| Evidentiary Hearing Expenses (Hotel Métropole) | | € 42,187.14 |
| Briault Reporting Ltd. | Fees and Costs (Jurisdictional Hearing) | GBP 1,273.80 |
| | Fees (Evidentiary Hearing) | GBP 11,780.00 |
| | Costs (Evidentiary Hearing) | GBP 3,250.00 |
| Expenses of Ms. Anna Noël (Evidentiary Hearing) | | € 206.00 and CHF 374.00 |
| **Total** | | **€ 6,238,308.16**<br>**GBP 16,303.80**<br>**PLN 473,674.98**<br>**CHF 374.00** |

801. Based on the foregoing, the total costs allegedly incurred by Claimant for which it seeks reimbursement are € 6,238,308.16, GBP 16,303.80, PLN 473,674.98 and CHF 374.00, which amounts Claimant requests the Tribunal to order Respondent to pay.

802. As set forth in its Cost Submission of 16 May 2011, as corrected in its reply submission of 23 May 2011, Respondent claims the fees and expenses that it has incurred in the arbitration, being according to Respondent:

| Cost | Amount in original currency | Amount in EUR |
|---|---|---|
| Legal fees and expenses of Clifford Chance LLP and Clifford Chance, Janicka, Krużewski, Namiotkiewicz i wspólnicy sp. k. | **PLN 9 524 680,20** | EUR 2 423 397,76 |
| Expenses paid by client, including: | | |
| - travel and accommodation expenses of PGSP | **PLN 21,955.54** | EUR 5,586.22 |
| - costs of translation borne by PGSP | **PLN 11,912.08** | EUR 3,030.83 |
| - costs of translation borne by MoE | **PLN 41,074.72** | EUR 10,450.78 |
| - costs borne in connection with the hearing on the merits (catering, conference rooms, translation equipment) | **EUR 20,546.10** | EUR 20,546.10 |
| - fees and expenses of interpreters at the hearing on the merits | **PLN 28,431** | EUR 7,233.80 |
| - reimbursement of Ms. Anna Noël travel and accommodation expenses | **EUR 206** and **CHF 374** | EUR 206 and EUR 298.20 |
| - organisation of Mr. Górski's cross-examination in Warsaw | **PLN 2,952** | EUR 751.09 |
| - Briault Reporting Services Ltd fees and expenses associated with the hearing on the merits (including VAT in the amount of GBP 3,006.00) | **GBP 18,036** | EUR 20,671.63 |
| - catering at the hearing on jurisdiction | **EUR 480** | EUR 480 |
| - Briault Reporting Services Ltd. fees and expenses associated with the hearing on jurisdiction | **GBP 1,273.80** | EUR 1,459.94 |
| Fees and expenses of expert witness: | | |
| - Purvin & Gertz Inc. | **GBP 84,749.11** | EUR 97,133.65 |
| - The Brattle Group | **GBP 235,852.40** | EUR 270,317.94 |
| - VAT paid on both | **PLN 328,984** | EUR 83,704.55 |
| Expenses of Poland's witnesses to attend the hearing: | | |
| - Mr. Pawlak | **PLN 4,001.59** | EUR 1,018.14 |
| - Mr. Gutowski | **PLN 4,464.97** | EUR 1,136.04 |
| - Mr. Woźniak | **PLN 4,390.63** | EUR 1,117.12 |
| - Mr. Karpiński | **PLN 11,816.53** | EUR 3,006.52 |
| Advance on costs to SCC | **EUR 361,000** | EUR 361,000 |

| | | |
|---|---|---|
| TOTAL | EUR 382,232.10<br>GBP 339,911.31<br>PLN 9, 984,663.26<br>CHF 374 | EUR 3,312,546.32 |

803. Respondent claims the fees and expenses that it alleges that it has incurred in this arbitration in the amounts of (i) € 382,232.10; (ii) GBP 339,911.31; (iii) PLN 9,984,663.26; and (iv) CHF 374.00.

804. In its reply submission of 23 May 2011, Claimant requests the Tribunal to dismiss Respondent's request for costs, and to award Claimant its full fees and costs from the jurisdictional and the merits phases as set out above. Claimant relies on Article 44 of the SCC Arbitration Rules, which refers to the "outcome of the case." Claimant contends that it has already prevailed in the jurisdictional phase and that it is confident that it will also prevail in the merits phase.

805. In its reply submission of 23 May 2011, Respondent objects to Claimant's request that Respondent should bear in full all fees and costs that Claimant has incurred in the jurisdictional and merits phases. Respondent relies also on Article 44 of the SCC Arbitration Rules, referring to "reasonable costs." Respondent questions the reasonableness of Claimant's costs, noting they are approximately twice those of Respondent, although it is not clear that twice the amount of work was done on Claimant's behalf or, if done, why it was necessary. Respondent also objects to the claim relating to the legal services of Weil, Gotshal & Manges LLP, contending that this firm was not counsel on the record in these arbitral proceedings. Respondent submits that should the Tribunal dismiss Claimant's claims wholly or partially, Claimant should bear its own costs and fees, as well as those of Respondent.

B. The Tribunal's Analysis

806. The SCC Arbitration Rules (2007) distinguish between the "Costs of the Arbitration" (Article 43) and the "Costs incurred by a party" (Article 44).

807. According to Article 43(1), the "Costs of the Arbitration" consist of

(i) the Fees of the Arbitral Tribunal;

(ii) the Administrative Fee of the SCC Institute;

and

(iii) the expenses of the Arbitral Tribunal and the SCC Institute.

808. In conformity with the provisions of Article 43(2), the SCC Board of Directors has determined the Costs of Arbitration at € 566,646.55 and CHF 7,239.10 (exclusive of VAT). The SCC Board of Directors has set the SCC Institute's Administrative Fee at the maximum level of € 60,000.

809. The amount of € 566,646.55 and CHF 7,239.10 includes the following determination by the SCC Board of Directors regarding the Arbitral Tribunal's fees and expenses:[714]

| Arbitrator | Fees | Expenses | Totals |
|---|---|---|---|
| Professor Tercier | € 225,000 | € 6,448<br>CHF 7,239.10<br>€ 1,500 | € 232,948<br>CHF 7,239.10 |
| Professor van den Berg | € 135,000 | € 2,493.55 | € 137,493.55 |
| Professor Lowe | € 135,000 | € 1,205 | € 136,205 |
| Totals | € 495,000 | € 11,646.55<br>CHF 7,239.10 | € 506,646.55<br>CHF 7,239.10 |

810. Article 43(5) provides:

> Unless otherwise agreed by the parties, the Arbitral Tribunal shall, at the request of a party, apportion the Costs of the Arbitration between the parties, having regard to the outcome of the case and other relevant circumstances.

811. Article 44, on which both Parties rely, provides:

> Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award, or an award under Article 39, upon the request of a party, order one party to pay any reasonable costs incurred

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[714] Here set forth in compliance with Article 43(3) of the SCC Arbitration Rules.

> by another party, including costs for legal representation, having regard to the outcome of the case and other relevant circumstances.

812. Both Article 43(5) and 44 refer to "the outcome of the case and other relevant circumstances" for the apportioning of the Costs of the Arbitration and the award of costs of the other party, respectively. Claimant relies on the "outcome of the case," whilst Respondent stated that all costs should be awarded in its favour. Neither Party refers "other relevant circumstances."

813. The Tribunal understands that the "outcome of the case" refers to an award of costs in favour of the successful party (also referred to as the principle of "costs follow the event"). In the present case, Claimant was successful with respect to the jurisdictional phase, whilst Respondent prevailed in the merits phase. Accordingly, Claimant is to be awarded the costs of the jurisdictional phase and Respondent the costs of the merits phase.

814. As regards the Costs of the Arbitration (Article 43 of the SCC Rules), the question is how those costs should be allocated between the jurisdictional phase and the merits phase. A large part of the Costs of Arbitration is constituted by the fees of the members of the Tribunal. An indicator for the allocation of the Costs of Arbitration therefore is the time spent by the members of the Tribunal in each phase. Accordingly, the Tribunal assesses the percentage of the Cost of Arbitration of the jurisdictional phase at 25% and of the merits phase at 75%. As mentioned above, the total Costs of the Arbitration are € 566,646.55 and CHF 7,239.10 exclusive of VAT.

815. Thus, Respondent is to bear 25% of the Costs of the Arbitration, and Claimant is to bear 75% of those Costs. Claimant has informed the Tribunal that it is registered for VAT in Cyprus. Respondent, being a State, is not registered for VAT. Accordingly, to Respondent's share of the Costs of the Arbitration shall be added EUR 3,750 in respect of Swedish VAT (25%) on the SCC's Administrative Fee. Claimant is thus finally liable for € 45,000 of the Administrative Fee of € 60,000, while Respondent is finally liable for € 18,750 of that Fee.

816. As regards the Costs incurred by a party (Article 44 of the SCC Rules), Respondent objects that Claimant's counsel fees are not reasonable. The Tribunal needs to deal with that objection only insofar as the jurisdictional phase is concerned because Claimant's costs are to be awarded for that phase alone (see paragraph 813 au-dessus). In that respect, Respondent's objection must be rejected. Claimant claims € 568,795.00 for fees and 28,005.74 for costs, whilst Respondent appears to have incurred Euro equivalent of PLN of 716,669.61 for fees and costs during the jurisdictional phase.[715]

817. On the other hand, the Respondent is correct that Claimant has not sufficiently justified the fees and costs of Weil, Gotshal & Manges LLP, and the Tribunal will discard those fees and costs in its cost award.

818. The fees and costs claimed by Claimant in relation to the jurisdictional phase (i.e., € 568,795.00 and 28,005.74) are, in the opinion of the Tribunal, reasonable.[716]

819. Accordingly, Claimant is to be awarded the fees and costs of the jurisdictional phase in an amount of (568,795.00+28,005.74=) € 596,800.74.

820. As regards the merits phase, Respondent's legal fees and expenses are (2,423,397.27–716,669.61=) € 1,796,728.15. The other costs of Respondent are expenses paid by the client, fees and expenses of expert witnesses and expenses of Respondent's witnesses to attend the hearing (see table at paragraph 802 au-dessus). All those expenses appear to concern the merits phase, with the exception of two line items (catering at the hearing on jurisdiction and court reporting, 480.00+1,459.94= € 1,939.94). The total expenses of Respondent for

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[715] See the list of invoices set forth in Annex 1 to Respondent's Cost Submission of 16 May 2011, as updated on 23 May 2011. The Euro equivalent of PLN of 716,669.61 is the sum of the invoices during the period 18 September 2008 through 6 January 2010, the date of the Award on Jurisdiction being 24 December 2009.

[716] The Parties claim the fees and costs in various currencies. For reasons of simplicity, the Tribunal follows the Party's conversions in Euro and awards the fees and costs in Euro only.

the merits phase therefore are € 526,208.62,[717] which costs the Tribunal considers reasonable.

821. Accordingly, Respondent is to be awarded the fees and costs of the merits phase in an amount of (1,796,728.15+526,208.62=) € 2,322,936.77.

822. After deduction of Claimant's award of its fees and costs of the jurisdictional phase (€ 596,800.74, see paragraph 819 au-dessus) from Respondent's award of its fees and costs of the merits phase (€ 2,322,936.77, see paragraph 821 au-dessus), Claimant owes Respondent € 1,726,136.03 on account of the Costs incurred by a party as contemplated by Article 44 of the SCC Rules.

823. Both Parties claim interest on the Costs of the Arbitration and Costs incurred by a party. On the basis of its discretionary power to determine and award costs, the Tribunal determines that the interest accrues on the amount payable by Claimant to Respondent in respect of the Costs of the Arbitration and Costs incurred by a party at a rate of three months Euribor plus 1%, compounded quarterly, as of the date of this Award until the date of payment in full.

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[717] The calculation is based on the table at paragraph 802 above: the total amount claimed is € 3,312,546.32. In order to arrive at the expenses that can be awarded, an amount of € 2,786,337.70 is to be deducted. That amount consists of the legal fees and expenses (2,423,397.76), catering at the hearing on jurisdiction (480.00), court reporting at the hearing on jurisdiction (1,459.94) and advance on costs to SCC (361,000.00).

## XIV. DECISIONS

824. For the foregoing reasons, the Tribunal unanimously renders the following decisions:

1. DECLARES that Respondent did not breach Article 10(1) of the ECT;

2. DISMISSES Claimant's claim that Respondent pay it compensation and interest;

3. NOTES that Claimant's allegation of breach of Article 13 of the ECT concerning expropriation has been withdrawn;

4. DETERMINES:

   (a) that the Parties are jointly and severally liable to pay the Costs of the Arbitration;

   (b) that, as between the Parties, Respondent is to bear 25% of the Costs of the Arbitration and Claimant is to bear 75% of those Costs;

   (c) that the Costs of Arbitration are as follows:

   - The Fee of Professor Pierre Tercier amounts to € 225,000 and compensation for expenses € 7,948 and CHF 7,239.10, in total € 232,948 and CHF 7,239.10;

   - The Fee of Professor Albert Jan van den Berg amounts to € 135,000 and compensation for expenses € 2,493.55, in total € 137,493.55;

   - The Fee of Professor Vaughan Lowe amounts to € 135,000 and compensation for expenses € 1,205, in total € 136,205;

   - The Administrative Fee of the SCC amounts to € 60,000, plus VAT of 25% on Respondent's deemed share (25%) of that Fee, i.e. € 3,750, thus totalling € 45,000 in respect of which Claimant is finally liable and € 18,750 in respect of which Respondent is finally liable;

   (d) that concerning the Costs incurred by a party, Claimant is to be awarded the fees and costs of the jurisdictional phase in an amount of EUR 596,800.74 and that Respondent is to be awarded the fees and costs of the merits phase in an amount of EUR 2,322,936.77; consequently Claimant owes Respondent EUR 1,726,136.03 on account of the Costs incurred by a party;

(e) that, in light of the foregoing determinations, Claimant is liable to pay interest to Respondent on the amounts owed in respect of the Costs of the Arbitration and Costs incurred by a party at a rate of three months Euribor plus 1%, compounded quarterly, as of the date of this Award until the date of payment in full;

5. NOTES that a Party may bring an action against the award regarding the decision on the fees of the arbitrators within three months from the date upon which the party received the award, and that such action shall be brought before the District Court of Stockholm; and

6. REJECTS all claims for further or other relief.

Place of Arbitration: Stockholm
Date: 22. Dec. 2014

For the Arbitral Tribunal:

Pierre Tercier, Chairman

Albert Jan van den Berg, Arbitrator

Vaughan Lowe, QC, Arbitrator