INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceedings between

EMERGOFIN B.V. AND VELBAY HOLDINGS LTD.

Claimants

and

UKRAINE

Respondent

ICSID Case No. ARB/16/35

AWARD

Members of the Tribunal
Professor Zachary Douglas KC, President
Mr. John Beechey CBE, Arbitrator
Sir Michael Wood KCMG KC, Arbitrator

Secretary of the Tribunal
Dr Laura Bergamini

Date of dispatch to the Parties: 1 May 2026

Representation of the Parties in the Quantum Phase of the Arbitration

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A INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") pursuant to the Agreement on Promotion and Reciprocal Protection of Investments between the Kingdom of the Netherlands and Ukraine signed on 14 July 1994 (the "**BIT**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**").

2. The Claimants are Emergofin B.V. ("**Emergofin**"), a corporation incorporated under the laws of the Kingdom of the Netherlands, and Velbay Holdings Ltd. ("**Velbay**"), a corporation incorporated under the laws of Cyprus (collectively, the "**Claimants**"). The Respondent is Ukraine (the "**Respondent**").

3. The Claimants and the Respondent are collectively referred to as the "**Parties**." The Parties' representatives in the second phase of the arbitration and their addresses are listed above on page i.

4. On 1 July 2021, the Tribunal issued its Decision on Jurisdiction, Admissibility and Liability (the "**Decision**"),[1] reserving quantum and costs for the final phase of the proceedings. The Decision, attached to the present Award, is incorporated herein and forms an integral part of the Award. These proceedings were then suspended by mutual consent of the Parties between March 2022 and January 2026. The procedural history of the proceedings leading up to the issuance of the Decision is summarized in Annex A to the Decision while the procedural history of the second phase of the arbitration, concerning quantum and costs, is set out in Annex A to the present Award. The Parties' Requests for relief in the second phase of the arbitration are set out in Annex B to the present Award. A list of abbreviations is provided in Annex C.

B THE TRIBUNAL'S DECISION ON JURISDICTION, ADMISSIBILITY AND LIABILITY

5. In its Decision, the Tribunal defined the Claimants' various claims as follows:[2]

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1 Capitalised terms not defined in the present Award have the meanings ascribed to them in the Decision.
2 Decision, §§6-20.

6. The Claimants submitted that "*Ukraine's failure to reform the single-buyer model in the Ukrainian wholesale electricity market, coupled with its failure to reinstate differential electricity pricing and followed by the discriminatory implementation of CMU Instruction No. 1855-p in favour of ZTMK (the implementation of which was denied to ZAlK)*"[3] constituted a violation of Article 3 of the BIT. More specifically, the three elements set out in that summary were said to constitute a breach of Article 3(2) (the obligation to accord FET and refrain from impairing the management of the Claimants' investments in an unreasonable and discriminatory manner), whereas "*[t]aken on its own*" the "*partial implementation of CMU Instruction No. 1855-p in favour of ZTMK*"[4] was said to breach Article 3(1) (the obligation to accord the Claimants' investments treatment no less favourable than the treatment accorded to Ukrainian investments) and the "*failure to implement CMU Instruction No. 1855-p in favour of ZAlK*"[5] is said to breach Article 3(4) (the obligation to observe any obligation entered into with regard to Claimants' investments). Finally, the Claimants said that "*Ukraine's failure to implement its own laws taken in conjunction with its failure to reinstate differential electricity tariffs despite the numerous concessions extorted from Claimants between 2010 and 2011 ultimately caused the annihilation of the economic value (and therefore, the indirect expropriation) of Claimants' investment in ZAlK in late 2011/early 2012*",[6] and thus constitutes a breach of Article 6 (on expropriation). The Tribunal referred to the various aspects of this claim under the designation "***Electricity Pricing Claim***".

7. Next, the Claimants maintained that the judgments of the Ukrainian courts leading to the judicial rescission of the 2006 ZAlK SPA and the renationalisation of Velbay's 68.01% stake under that agreement constituted a denial of justice and thus a breach of Article 3(2) of the BIT and customary international law.[7] Furthermore, the "*outcome*" of the renationalisation was also said to constitute an illegal expropriation of the same investment and thus a breach of Article 6.[8] The Tribunal referred to the elements of this claim under the designation "***Renationalisation Claim***".

8. The Claimants asserted that Velbay was deprived of its rights as a shareholder in ZAlK as a result of its representatives being blocked from participation at the extraordinary general shareholder meeting on 23 September 2016 and the annual general shareholder meeting

3 Claimants' Reply, §582.
4 Claimants' Reply, §582.
5 Claimants' Reply, §582.
6 Claimants' Reply, §583.
7 Claimants' Reply, §584.
8 Claimants' Reply, §585.

on 18 April 2017 by the SPFU acting in collusion with ZAlK's management and the Khortitskiy Regiment in circumstances where the local police did not intervene.[9] According to the Claimants, this conduct violated two elements of Article 3(2): the obligation to accord FET as well as the obligation to accord full protection and security. The Claimants also maintain that this conduct amounted to an expropriation of their shareholding in ZAlK. The Tribunal referred to the various aspects of this claim under the designation "***Shareholder Interference Claim***".

9. Finally, the Claimants maintained that on 16 September 2016, "*Ukraine placed one of Claimants' fact witnesses as well as other related legal entities on an economic sanctions list, without any notice or explanation*",[10] and then, on April 2018, adopted a presidential decree to place both Velbay and Emergofin on the same list again without notice or explanation.[11] The Claimants say that this conduct violated Article 3(2) of the BIT (obligation to accord FET).[12] The Tribunal referred to the various aspects of this claim under the designation "***Sanctions Claim***".

10. The dispositive part of the Tribunal's Decision was as follows:[13]

> 621. The Tribunal hereby adjudges and declares that:
>
> 621.1. It has jurisdiction over the dispute and the claims submitted to it to the extent that the constituent elements of such claims arose after 22 September 2005 save that the Claimants' claim for moral damages is outwith its jurisdiction and/or is inadmissible;
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> 621.2. All the Claimants' other claims are admissible;
>
> 621.3. In relation to the Electricity Pricing Claim, the Claimants' claims based upon Articles 3(1), 3(2), 3(4) and 6 of the BIT or otherwise are dismissed;
>
> 621.4. In relation to the Renationalisation Claim, the Claimants' claims based upon Article 3(2) and 6 of the BIT are upheld;
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> 621.5. In relation to the Shareholder Interference Claim, the Claimants' claim based upon Article 3(2) (fair and equitable treatment)

9 Claimants' Reply, §586.
10 Claimants' Reply, §586; Claimants' Memorial, §§614-631.
11 Claimants' Reply, §587.
12 Claimants' Reply, §587.
13 Decision, §621.

is upheld whereas their claims based upon Articles 3(2) (full protection and security) and 6 (expropriation) are dismissed;

621.6. In relation to the Sanctions Claim, the Claimants' claim based upon Article 3(2) is upheld whereas their claim based upon Article 6 is dismissed;

621.7. In relation to the Miscellaneous Claims, to the extent that such claims have not been withdrawn by the Claimants, they are dismissed.

621.8. All other claims are dismissed.

621.9. The issues of damages (if any) and costs are reserved for a Final Award.

11. In more expanded terms, the Tribunal found that the Claimants had suffered a denial of justice in defending the Ukrainian Prosecutor's claim for recission of the 2006 ZAlK SPA in the Ukrainian courts, which was consummated on 11 March 2015 when Velbay exhausted the remedies available in the Ukrainian system of the administration of justice. This was the violation of Article 3(2) of the Treaty in respect of the Renationalisation Claim. Next, the transfer of Velbay's stake of 68.01% of the shares in ZAlK to the SPFU on 9 June 2015 further to the Kyiv Commercial Court's judgment of 22 March 2012, which was tainted by a denial of justice, constituted an expropriation for the purposes of Article 6 of the Treaty.[14]

12. In respect of Velbay's remaining stake of 29.54% of the shares in ZAlK, the Tribunal also found that the Respondent had violated the fair and equitable standard of treatment in Article 3(2) of the Treaty in respect of the SPFU's collusion with the Khortitskiy Regiment in preventing Velbay's representatives from participating in the 2016 EGM and the 2017 AGM in violation of Velbay's rights as a shareholder in ZAlK (the Shareholder Interference Claim).[15] Finally, the Tribunal found that the Respondent had further breached the fair and equitable standard of treatment when it issued the 2018 Sanctions Decision, because there was no stated or objectively ascertainable link between the purpose and scope of the 2018 Sanctions Decision and the Claimants (the Sanctions Claim).[16] All other claims were dismissed.

14 Decision, §§461, 466, 467.
15 Decision, §538.
16 Decision, §602.

C DAMAGES AND INTEREST

C.1 The Parties' Positions on Damages before the Decision

13. In their Memorial, the Claimants asserted distinct claims for lost profits for the Respondent's failure to reinstate differential electricity pricing as well as for the fair market value ("**FMV**") of ZAlK at the date of the alleged expropriation.[17] In the context of the latter claim, the Claimants excluded the "*costs approach*", because, according to their quantum expert, "*it assumes valuation of the business if its assets were liquidated and not the value of the business as a going concern*".[18] The Claimants noted that their valuation of the FMV of ZAlK was predicated on "*ZAlK's hypothetical financial results had it benefited from the differential electricity pricing to which it was entitled*".[19]

14. In its Counter-Memorial, the Respondent made the following assertion:

> [A]bsent the Tribunal finding that the Respondent's electricity policy as applied to ZAlK is a measure going to the creeping expropriation of the Claimants' investment, ZAlK's value at 22 March 2012 is, on the Claimants' valuation methodology, nil. This is because ZAlK was loss making in the Actual Position in 2010 and 2011, and applying [redacted] valuation methodology to a loss making company results in a valuation of nil.[20]

15. The Respondent's quantum expert made the same point.[21]

16. The Claimants then decided, in their Reply, to provide further alternatives "*in case only part of Claimants' legal case were to succeed*".[22] Those alternatives were articulated as follows:

> - Should the Tribunal consider that the only breach by Ukraine relates to the failure to reinstate differential electricity pricing for ZAlK and to allow ZAlK to eventually benefit from reasonably and freely set electricity prices (through bilateral contracts): profits lost due to the excessive electricity prices imposed on ZAlK from 2005 to March 2012 assuming differential pricing and from March 2012 up to the date of the award assuming reasonably and freely set electricity prices, together with the fair market value (the "**FMV**") of ZAlK assuming reasonably and freely set

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17 Claimants' Memorial, §758 et seq.

18 Claimants' Memorial, §768, citing [redacted] First Expert Report, §102.

19 Claimants' Memorial, §742.

20 Respondent's Counter-Memorial, §697. See also: Respondent's Counter-Memorial, §4.

21 [redacted] Expert Report/1, §3.24.

22 Claimants' Reply, §863.

electricity prices as at the date of the award to cover these lost profits for the future;

- Should the Tribunal consider, in addition to the failure to reinstate differential electricity pricing, that the denial of access to the shareholders' meetings as from 2016 depriving Claimants of any power as shareholders of ZAlK amounted to a breach: profits lost due to the excessive electricity prices imposed on ZAlK from 2005 to March 2012 assuming differential pricing and from March 2012 up to 23 September 2016 assuming reasonably and freely set electricity prices, together with the FMV of ZAlK as at 23 September 2016 assuming reasonably and freely set electricity prices; and

- Should the Tribunal consider, in addition to the failure to reinstate differential electricity pricing, that the sanctions amounted to a breach: profits lost due to the excessive electricity prices imposed on ZAlK from 2005 to March 2012 assuming differential pricing and from March 2012 up to 24 May 2018 assuming reasonably and freely set electricity prices, together with the FMV of ZAlK as at 24 May 2018 assuming reasonably and freely set electricity prices.[23]

17. All these scenarios have one element in common: they were premised on the Tribunal upholding the Claimants' Electricity Pricing Claim. In the event, the Tribunal rejected that claim in its Decision and thus none of these scenarios can be applied.

18. To these three scenarios, however, the Claimants added a fourth in the passage that immediately follows in their Reply:

> In addition, in order to provide the Tribunal with an alternative methodology for the calculation of Claimants' damages, Claimants have instructed [redacted] to calculate Claimants' sunk costs and to carry out a cost-based valuation of their investment as at 22 March 2012, 23 September 2016, 24 May 2018 and at 6 September 2019 (as a proxy for the date of the award). It is Claimants' position that, similar to the FMV valuation, the cost-based valuation comes in addition to lost profits compensating for the historical loss of revenues due to Ukraine's imposition of excessively high electricity prices.[24]

19. Although this costs-based valuation is said to be advanced "*in addition*" to the lost profits claim related to the Electricity Pricing Claim, the relationship between a costs-based valuation and the other claims advanced by the Claimants was not explained. Nor was this

23 Claimants' Reply, §863 (emphasis in the original).
24 Claimants' Reply, §864.

alternative valuation expressly said to be a response to the point that the Respondent made in its Counter-Memorial that the FMV of ZAlK would be nil if the Claimants were to fail on their Electricity Pricing Claim.

20. In its Rejoinder, the Respondent reiterated that the FMV of ZAlK would be nil if the Tribunal were to reject the Electricity Pricing Claim.[25] In relation to the alternative costs-based valuation advanced by the Claimants in their Reply and quantified by [redacted] in his Second Expert Report, the Respondent first took issue with the calculation itself in so far as it allegedly included intra-company loans.[26] It then made the following more general point about the validity of this alternative valuation:

> [redacted] cost-based valuations are not indicative of the market value of the Claimants' interest in ZAlK in the But For Scenario. In short, calculating the amount of money the Claimants have allegedly spent on their investment in ZAlK and applying a rate of return based on the five-year US treasury rate or the Metals & Mining Index provides no indication of what a buyer would have been willing to pay for ZAlK.[27]

21. Nothing further was said about this alternative cost-based valuation and its relationship to the various claims asserted by the Claimants.

22. On the first day of the Hearing, the Claimants positively asserted that the cost-based valuation "*is to cater for a situation where the Tribunal finds there was no electricity pricing breach, but there was expropriation in March of 2012*".[28] As far as the Tribunal can discern, this was the first time when the relationship between the Electricity Pricing Claim and the cost-based valuation was articulated. The Respondent did not further engage with this point at the Hearing.

23. This was the state of the Parties' pleadings when the Tribunal came to adjudge the Respondent's liability in respect of the Claimants' various claims. The Claimants had, very late in the day, clarified that their costs-based valuation was pleaded as a loss flowing from the expropriation of the Claimants' shares in ZAlK in the event that the Electricity Pricing Claim were to be rejected. And the Respondent, perhaps unsurprisingly given the

25 Respondent's Rejoinder, §7.
26 Respondent's Rejoinder, §713.
27 Respondent's Rejoinder, §713 (footnote omitted).
28 Hearing Transcript, 1 November 2020, pp. 125-6 ([redacted]). See also: Claimants' Opening Presentation, Slides 296, 338.

evolution of the Claimants' case on this alternative valuation, had barely joined issue with the legal aspects of that damages claim.

24. It was for these reasons that the Tribunal resolved to render a Decision on Jurisdiction, Admissibility and Liability and then request further submissions from the Parties on quantum in light of the particular findings on liability. The Tribunal thus stipulated in its Decision that:

> The Claimants' case on quantum was premised entirely upon establishing the Respondent's liability for the Electricity Pricing Claim. No alternative scenarios were considered in any detail by the parties in the event, as the Tribunal has decided, that the Claimants were to fail in respect of the Electricity Pricing Claim, but succeed in respect of other claims. In these circumstances, the Tribunal has resolved to issue this Decision on Jurisdiction, Admissibility and Liability and then, in consultation with the parties, direct that a final phase of this arbitration be dedicated to the issues of quantum (if any) and costs.[29]

25. The Tribunal considered that it was prudent to request further submissions from the Parties on quantum after it had decided the issues of liability, given the striking lack of attention given to scenarios in which the Electricity Pricing Claim might be dismissed. The Tribunal indicated in its Decision that "*[it] has made no finding [on whether] the Claimants are entitled to any damages in respect of any prejudice caused to their investment by the Respondent's breaches of the BIT or the quantification of any such damages*" which "*issues were reserved to the next phase of the arbitration and to any Final Award.*"[30] At the same time, however, it had always been open to the Claimants to develop their case on those scenarios during the course of the proceedings leading to the Decision and both Parties had worked on the assumption that the Tribunal would render a single award dealing with liability and quantum issues at the same time. Furthermore, the Respondent had clearly put the Claimants on notice, both in its Counter-Memorial and Rejoinder, that its position was that there would be no entitlement to damages in the event that the Electricity Pricing Claim were to be dismissed. In these circumstances, the Tribunal considered that it would be appropriate to have a

29 Decision, §618.
30 Decision, §619.

single round of further submissions and that no further evidence or legal authorities should be put on the record without the leave of the Tribunal.

C.2 The Tribunal's Decision on Damages

26. At a general level, the Parties agree on the basic principle of full reparation applicable in this case,[31] which has the objective of restoring the situation that would have existed had the internationally wrongful act not taken place.[32] The Parties' disagreement essentially relates to what the principle of full reparation requires in the circumstances of this case. To resolve this disagreement, the Tribunal will consider each loss pleaded by the Claimants corresponding to each distinct asset comprising their investment in Ukraine and deal with the Parties' submissions on damages following the Tribunal's Decision in the course of setting out its reasoning.

(i) Velbay's 68.01% stake in ZAlK

27. Velbay acquired 68.01% of ZAlK pursuant to the 2006 ZAlK SPA dated 24 March 2006.[33] As previously summarised, the Tribunal concluded in its Decision that the Claimants had suffered a denial of justice in defending the Ukrainian Prosecutor's claim for recission of the 2006 ZAlK SPA in the Ukrainian courts, which was consummated on 11 March 2015 when Velbay exhausted the remedies available in the Ukrainian system for the administration of justice. This was the violation of Article 3(2) of the Treaty in respect of the Renationalisation Claim. Next, the transfer of Velbay's stake of 68.01% of the shares in ZAlK to the SPFU on 9 June 2015 further to the Kyiv Commercial Court's judgment of 22 March 2012, which was tainted by a denial of justice, constituted an expropriation for the purposes of Article 6 of the Treaty.

28. The Respondent maintains that *"ZAlK had no economic value by late 2011/early 2012"* such that "*the Respondent's later actions can have caused no financial losses to the Claimants*".[34] The Respondent also rejects the Claimants' case on the recovery of its sunk costs because "*the principle of full reparation, […] is aimed at restoring the situation that would have existed had the internationally wrongful act not taken place […] and therefore it would at most entail returning to the Claimants the market value of their shares immediately prior to their expropriation*".[35] As the market

31 Claimants' Supplemental Submission on Quantum, §9; Respondent's Reply on Quantum, §13.
32 Claimants' Supplemental Submission on Quantum, §§9-10; Respondent's Reply on Quantum, §51.
33 Decision, §4.
34 Respondent's Reply on Quantum, §46.
35 Respondent's Reply on Quantum, §51.

value of the shares at that time was nil, it follows, on the Respondent's case, that no compensation can be awarded.

29. The Tribunal does not accept the Respondent's analysis on this point. For a breach of an investment treaty obligation to generate liability on the part of the State, there must be a causal link to a loss to the claimant's investment. The causal link in this case is satisfied, because there is no doubt that Velbay was deprived of its ownership of 68.01% of the shares in ZAlK on 9 June 2015 when the Kyiv Commercial Court's judgment of 22 March 2012, which was tainted by a denial of justice, was enforced by the SPFU. The breach of the Treaty thus caused the loss of Velbay's 68.01% stake in ZAlK. The quantification of that loss is then a separate issue and different approaches are legally permissible, including an assessment of the market value of those shares immediately before the date of the breach. But that is not the only approach to quantification that is legally permissible. If it were, then the institution of private property would be vulnerable, because it would be open to a State to confiscate property without remedial consequences so long as that property had no market value at the time of the confiscation.

30. It follows that by insisting that the breach of Treaty must be causally linked to a loss assessed on the basis of a hypothetical market transaction at the date of the breach, the Respondent is conflating loss (and the causal link to the breach) with the assessment of damages, and is also assuming that a market valuation is the only approach to this assessment, which is not the case.

31. In its Decision, the Tribunal stated that the "*essential foundation*" of its conclusion that there had been a denial of justice was "*the Kyiv Commercial Court's deciding on a basis that was not pleaded in substance by the Prosecutor and the resulting inability of Velbay to address or respond to the key propositions relied upon by the Court to substantiate its decision*".[36] It will be recalled that the Court upheld a claim by the Prosecutor based on Article 651 of the Ukrainian Civil Code (recission for material breach) in circumstances when the Prosecutor had pleaded a claim based on Article 652 (recission for a material change in circumstances). As the Tribunal noted in its Decision, this also had remedial consequences: clause 133 of the State Privatisation Program for 2000-2002, which only applies in cases of a material breach, now prevents Velbay from claiming the return of the purchase price of the shares until there is a resale of ZAlK (which at the time of the Decision had not occurred and the Parties have

[36] Decision, §461.

not informed the Tribunal of any change in position since).[37] The Tribunal further noted in its Decision that by upholding a claim for recission for material breach, "*the Court was able to avoid an analysis of the question of the rebalancing of interests under Article 652(3)*"—which applies to a claim for recission for a change in material circumstances.[38]

32. Article 652(3) of the Ukrainian Civil Code reads:

> When rescinding a contract as a consequence of a material change in circumstances, the court upon the demand of any of the parties shall determine the consequences of rescission of the contract by proceeding from the need for a just distribution of expenses between the parties incurred by them in connection with the fulfilment of this contract.[39]

33. What Article 652(3) envisages in essence is some form of restitution. The direct consequence of the Respondent's denial of justice is that Velbay was deprived of the opportunity to request restitutionary remedies from the Court.

34. Restitutionary remedies are also available in international law and this is the essence of how the Claimants plead their case on quantum based on "*sunk costs*":

> But for Ukraine's international law violation as confirmed by the Tribunal based on these factual elements, Velbay would have been able to obtain the restitution of costs spent in reliance of the 2006 ZAlK SPA, namely the purchase price paid for the Majority Stake as well as the amount of the Capital Investments made by Velbay as performance of the (rescinded) 2006 ZAlK SPA.[40]

35. The Tribunal agrees that quantification based upon some form of restitutionary damages is appropriate in this case. First, as the Tribunal has just explained, it reflects how the Ukrainian courts should have approached the matter, had they adjudicated the actual claim that had been pleaded by the Prosecutor based upon Article 652 of the Ukrainian Civil Code for recission based on a change in circumstances.[41] Second, there is no doubt that

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37 Decision, §457.

38 Decision, §458.

39 Article 652(3) in Annex D to the Decision.

40 Claimants' Supplemental Submission on Quantum, §29.

41 The Respondent has objected to the Claimants' theory of quantum based on Article 652 of the Ukrainian Civil Code as impermissibly late and novel: Respondent's Reply on Quantum, §63. For the avoidance of doubt, the Tribunal is not upholding a claim based upon Article 652 of the Ukrainian Civil Code but rather endorsing a principle of restitutionary damages as it exists in international law. The reference to Article 652 of the Civil Code in the Tribunal's reasoning is confirmatory in the sense that it would appear that international law and domestic law are aligned, which is hardly surprising given the international law of remedies is largely derived from general principles of law common to domestic legal systems.

the Respondent assigned importance (and therefore value) to regaining control over Velbay's stake in ZAlK. This explains the considerable artifices used by the Prosecutor and the Respondent's judicial system to achieve that result: avoiding the arbitration clauses in the 2006 ZAlK SPA, failing to acknowledge the SPFU's official position that Velbay had no obligations to perform under the same agreement (making a finding of material breach logically impossible), and then deciding the Prosecutor's claim on a basis that was neither pleaded, nor advanced. The Tribunal thus agrees with the Claimants' point that "*Ukraine has assigned value to the fact of owning the Majority Stake and exercising full control over ZAlK*".[42]

36. The Claimants have claimed by way of restitution of sunk costs both the purchase price that Velbay paid for the 68.01% stake in ZAlK in 2006 (USD 71,000,000) as well as the capital investments it subsequently made, which totalled USD 148,120,632.[43]

37. The unjust enrichment of the Respondent in benefitting from both the purchase price for Velbay's 68.01% stake and the shares themselves following the transfer to the SPFU on 9 June 2015 is manifest. The Tribunal sees no impediment to awarding the Claimants the sum of USD 71,000,000 as restitutionary damages. There is no evidence that this price paid by Velbay was not a fair reflection of the value of the shares at the relevant time and hence the Respondent's argument that its reimbursement would indemnify the Claimants against poor investment decisions[44] is not accepted by the Tribunal. The position in relation to the capital investments made subsequent to the purchase of the shares is, however, more complex.

38. The Claimants' original market-based valuation of their shareholding in ZAlK leading to a claim for damages in excess of USD 1 billion was premised upon success in the prosecution of their Electricity Prices Claim. That valuation assumed that if Ukraine had subsidized ZAlK's electricity costs as it was allegedly required to do in order to act in conformity with its obligations under the Treaty, then ZAlK would have had substantial market value by the time that the breach of the Treaty occurred. That valuation has been discarded owing to the dismissal of the Electricity Prices Claim and the case theory underpinning it. It follows that the Respondent cannot be blamed, in a legal sense, for the deterioration of ZAlK's value over the course of the Claimants' investment. The question

42 Claimants' Supplemental Submission on Quantum, §11.
43 Claimants' Supplemental Submission on Quantum, §32.
44 Respondent's Reply on Quantum, §50.

then arises: why did the Claimants inject vast resources (USD 148,120,632) into a company that, admittedly with the benefit of some, but not much, hindsight, was destined to fail unless ZAlK's electricity costs could be significantly reduced (on their own valuation case)? The Tribunal cannot, based on the evidence on the record, reconstruct the Claimants' strategic thinking pertaining to the problem of ZAlK's electricity costs following Velbay's acquisition. The Respondent has, moreover, emphasized throughout the arbitration that at least three problems afflicted ZAlK and none of them was attributable to the actions of the Respondent:

38.1 ZAlK was inefficient due its use of outdated Soderberg smelting technology;

38.2 RUSAL decided to reduce production in ZAlK to one out of four potlines in the wake of the global financial crisis; and

38.3 RUSAL decided to stop production of primary aluminium at ZAlK in 2011 and instead focused on wire rod.[45]

39. In the absence of intervening acts causing prejudice to ZAlK for which the Respondent is responsible, the Tribunal considers that the Claimants' losses incurred subsequent to Velbay's acquisition must remain where they lie. The award of the Claimants' sunk costs in the form of their capital investments following Velbay's purchase of the shares in ZAlK would essentially shift the consequences of the Claimants' own decisions to the Respondent.

40. For these reasons, the Tribunal declines to award the Claimants restitutionary damages for the capital investments they made after Velbay acquired the 68.01% stake in ZAlK in 2006.

41. Finally, it should be noted for the sake of completeness that the Respondent, in its final submission following the Decision, sought to question whether Velbay had actually paid USD 71 million for its stake in ZAlK in the absence of "*copies of confirmation of the relevant SWIFT transfers*".[46] The Tribunal notes that the USD 71 million figure is stated in the 2006 ZAlK SPA and it is improbable that Velbay's counterparty, AvtoVAZ Invest, would have agreed to part with its shares in ZAlK had it not received the contractually stipulated consideration for the same. The Tribunal also considers that it was far too late for this evidential point to be raised in the Respondent's final submission after the Decision had

45 Respondent's Reply on Quantum, §45.
46 Respondent's Reply on Quantum, §97 (footnote omitted).

been rendered: the Parties and the Tribunal had proceeded on the uncontested basis that the purchase price for the shares had been paid by Velbay during the course of the entire arbitration.

(ii) Velbay's 29.54% stake in ZAlK

42. Velbay acquired a further 29.54% of the shares in ZAlK pursuant to a separate sale and purchase agreement dated 21 November 2006.[47] As previously summarised, in respect of Velbay's 29.54% shareholding, the Tribunal found that the Respondent had violated the fair and equitable standard of treatment in Article 3(2) of the Treaty in respect of the SPFU's collusion with the Khortitskiy Regiment in preventing Velbay's representatives from participating in the 2016 EGM and the 2017 AGM in violation of Velbay's rights as a shareholder in ZAlK (the Shareholder Interference Claim). Finally, the Tribunal found that the Respondent had further breached the fair and equitable standard of treatment when it issued the 2018 Sanctions Decision, because there was no stated or objectively ascertainable link between the purpose and scope of the 2018 Sanctions Decision and the Claimants (the Sanctions Claim). All other claims were dismissed.

43. The aforementioned claims were limited to Velbay's 29.54% shareholding in ZAlK, because by the time the Respondent's conduct in breach of the Treaty occurred the Claimants had already been deprived of their 68.01% stake.

44. The Tribunal found that the interference with Velbay's rights as a shareholder did not constitute an expropriation, because there was no permanent deprivation of Velbay's shares in ZAlK or other proprietary interests associated with that shareholding.[48] There was also no permanent deprivation associated with the 2018 Sanctions Decision given that the decision was quashed by the Supreme Court of Ukraine on 11 August 2020;[49] once again the effect was to prevent Velbay from exercising its rights as a shareholder during the time when the sanction was in force.[50] Following the Decision, the Claimants asserted that Velbay's 29.54% shareholding "*has no value*" because "*the SPFU rules as a monarch*".[51] These allegations are not substantiated by the factual record available to the Tribunal and

47 Decision, §7.
48 Decision, §541.
49 Decision, §605.
50 Decision, §541.
51 Claimants' Supplemental Submission on Quantum, §39.

the Parties did not elect to supplement that record once the suspension of this arbitration was lifted.

45. Once again, the Claimants seek to quantify their damages on the basis of a sunk costs approach and claim the amount of the purchase price for Velbay's 29.54% shareholding, which is USD 9,547,436. On this occasion, however, the Tribunal cannot accept that the Claimants are entitled to restitutionary damages based upon the amount paid for the shareholding. The loss caused by the breaches of the Treaty in respect of Velbay's 29.54% shareholding in ZAlK was the temporary interference with its rights as a shareholder to participate in the corporate affairs of the company (in particular to participate in the 2016 EGM and the 2017 AGM with reference to the Shareholder Interference Claim and the extraordinary general meeting of 1 November 2018 with reference to the Sanctions Claim). Velbay retained title to the shares throughout the relevant period and the interference with their participatory rights was temporary. In these circumstances, there has been no unjust enrichment of the Respondent and restitutionary damages in the form of an award of the purchase price paid for the shares would not be appropriate. Moreover, the Claimants in any case have failed to articulate a viable methodology for assessing compensation for this temporary interference with their shareholding in ZAlK.

C.3 The Tribunal's Decision on Interest

46. The Tribunal has concluded that the Claimants are entitled to USD 71,000,000 as restitutionary damages for Velbay's 68.01% shareholding in ZAlK and that entitlement arose when the expropriation occurred on 9 June 2015 when the shares were transferred to the SPFU.

47. The Claimants have claimed interest from "*the date the principal sum should have been paid until the date the obligation to pay is fulfilled*" with such interest being compounded annually.[52] They submit that the rate should be the 5-year US Treasury Rate for pre- and post-award interest.[53]

48. Although the Respondent concedes that interest may constitute a form of reparation in certain circumstances, it disputes the Claimants' entitlement to interest on sunk costs in

52 Claimants' Supplemental Submission on Quantum, §10. See also : Claimants' Supplemental Submission on Quantum, §47.

53 Claimants' Supplemental Submission on Quantum, §34.

this case as well as the compounding of the interest.[54] It also contests using the rate of the 5-year US Treasury Rate as "*there is no evidence to suggest that the Claimants would have earned the 5-year US treasury rate had they invested the amount of their claimed damages at the time of the relevant breaches*".[55] It did not propose an alternative rate.

49. The legal foundation for the Tribunal's power to award interest is not in dispute. The Tribunal accepts that the Claimants are entitled to interest on the principal sum of USD 71,000,000 from the date that they were entitled to the payment of that sum—9 June 2015—on the basis that the Claimants would have been in a position henceforth to earn a return on that principal had it been restored to them on that date. In other words, the entitlement to interest is an essential element of the principle of full reparation. The Tribunal, however, subjects this finding to the following caveat. This arbitration was suspended by the mutual agreement of the Parties shortly after the commencement of the armed conflict between Russia and Ukraine on 24 February 2022. That suspension was maintained by the mutual agreement of the Parties until 6 January 2026. The Tribunal considers in all the circumstances of this case and the situation in Ukraine that it would be appropriate to suspend the accrual of interest from the date of the commencement of the armed conflict (24 February 2022) until the date of this Final Award. Interest will then start to run again from the date of this Final Award until payment.

50. The Tribunal accepts the Claimants' submission that the 5-year US Treasury Rate is appropriate, because it is a risk-free benchmark rate that is neutral and reflects a market-based cost of money. The Tribunal also considers that the interest should be compounded annually to reflect the commercial reality that any interest that accrued would have been reinvested. This is likely to have been the case for a large and sophisticated group such as UC RUSAL plc, to which the Claimants belong.

51. In conclusion, the Claimants are entitled to interest at the 5-year US Treasury Rate, compounded annually, on the principal sum of USD 71,000,000 from 9 June 2015 until 24 February 2022 and then from the date of this Final Award until payment by the Respondent.

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54 Respondent's Reply on Quantum, §101.

55 Respondent's Reply on Quantum, §106.

D COSTS

D.1 The Parties' positions

52. The Claimants submit that they should be entitled to a costs award in their favour as they "*largely prevailed over Ukraine in these arbitral proceedings*" given that their Renationalisation Claim, Shareholder Interference Claim and Sanctions Claim were upheld in relation to some of the alleged breaches of the Treaty.[56] The Claimants say that 68% of their legal fees and 55% of the experts' fees and expenses were devoted to these claims.[57] The Claimants also note that they prevailed on jurisdiction and admissibility.[58]

53. The Claimants invoke Ukraine's "*dilatory tactics*", its decision to desist from cross-examining [redacted] less than a week before the Hearing (which the Claimants maintain resulted in approximately [redacted] in wasted legal costs), its "*obstructive*" conduct in relation to the Claimants' document requests and its "*last minute changes in its factual case*" to justify an apportionment of costs in their favour.[59] Finally, the Claimants submit that Ukraine's refusal to pay its share of the arbitration costs should also be taken into account.[60]

54. The Claimants claim a total of [redacted] and [redacted] in legal fees and expenses and [redacted] in experts' fees and expenses. The Claimants also advanced the entirety of the advance on costs requested to date from the ICSID Secretariat amounting to [redacted].[61] The Claimants finally claim interest on an award of costs.[62]

55. The Respondent counters by emphasising that the Tribunal rejected the Electricity Pricing Claim, on which the Claimants' primary quantum case for over USD 1 billion exclusively depended.[63] The Respondent further highlights the fact that the Claimants' alternative quantum case based on sunk costs was only presented for the first time in their Reply and amounts to only 20% of the amount initially claimed.[64] According to the Respondent, these factors justify an order that costs should follow the event such that the Claimants should be required to bear the costs of the proceedings and to pay Ukraine's costs.[65] The

56 Claimants' Cost Submissions, §§12-13.
57 Claimants' Cost Submissions, §16.
58 Claimants' Cost Submissions, §17.
59 Claimants' Cost Submissions, §§23-27.
60 Claimants' Cost Submissions, §§28-29.
61 Claimants' Cost Submissions, §§31-33.
62 Claimants' Cost Submissions, §33 fn. 52 and §37.
63 Respondent's Costs Submission, §§18-19.
64 Respondent's Costs Submission, §20.
65 Respondent's Costs Submission, §21.

Respondent also invokes the Claimants' procedural conduct as justifying an award in its favour: the Claimants failed to file their Memorial at the scheduled time and thus caused the original timetable to be abandoned entirely;[66] they filed an application for provisional measures and an *ad hoc* request for document production, both of which were rejected by the Tribunal;[67] they engaged in a "*blatant fishing expedition*" in filing 106 document production requests;[68] the Electricity Pricing Claim was added to the Claimants' case relatively late in the proceedings and the substance of that case then changed on multiple occasions;[69] the Claimants abandoned several claims in the course of the arbitration;[70] and, they failed to properly articulate their case on quantum in the event that the Electricity Pricing Claim were to be rejected.[71]

56. The Respondent also contests the Claimants' statement that they prevailed on jurisdiction and admissibility by noting that it succeeded on certain aspects of its jurisdiction and admissibility arguments (including its objections that the Claimants did not indirectly control shares in ZAlK before 22 September 2005 and that the claim for moral damages was outside the Tribunal's jurisdiction or inadmissible).[72]

57. The Respondent claims a total of [redacted] in legal fees, [redacted] in expert fees and costs and a further [redacted] in expenses.[73]

D.2 The Tribunal's Decision on Costs

58. The Tribunal's power to award costs is set out principally in Article 61(2) of the ICSID Convention and Rule 28 of the ICSID Arbitration Rules. The former provides as follows:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

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66 Respondent's Costs Submission, §§23-29.
67 Respondent's Costs Submission, §§30-32.
68 Respondent's Costs Submission, §§33-36.
69 Respondent's Costs Submission, §§37-42.
70 Respondent's Costs Submission, §§43-44.
71 Respondent's Costs Submission, §§45-48.
72 Respondent's Reply on Costs, §§9-15.
73 Respondent's Costs Submission, §49.

59. Rule 28 provides:

> (1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:
>
> (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;
>
> (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.
>
> (2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.

60. The costs of these arbitration proceedings, from their beginning to the present Award, including the Tribunal's fees and expenses, the administrative fees of ICSID and direct expenses are as follows:

Arbitrators' fees and expenses	
President	USD 330,519.39
Co-arbitrator	USD 84,758.08
Co-arbitrator	USD 70,809.13
ICSID's administrative fees	USD 440,000.00
Direct expenses	USD 83,335.14
Total	**USD 1,009,421.74**

61. The above costs have been paid out of the advances on costs requested from the Parties. These advances were paid in full by the Claimants, as the Respondent indicated on several

occasions that it was unable to pay its share. As a result, the Claimants have paid to date USD 1,049,980.00.[74]

62. The Tribunal notes at the outset that the Claimants have succeeded in establishing their Renationalisation Claim, Shareholder Interference Claim and Sanctions Claim and an entitlement to restitutionary damages in the amount of USD 71,000,000 plus interest. Whilst the Claimants would assert that this constitutes sufficient "*success*" to justify a costs-follow-the-event approach, the Tribunal is not persuaded that this would be appropriate. The Tribunal agrees with the Respondent that the Electricity Pricing Claim was central to the Claimants' case, given that it was the sole route to a very substantial award of damages based upon a market valuation of ZAlK of some USD 1,116,900,000. The Tribunal has ultimately awarded a small fraction of that total amount claimed (around 6%). In terms of complexity and the resources expended, the Electricity Pricing Claim also occupied centre stage, necessitating a substantial amount of document disclosure and expert evidence. The Tribunal shares the Respondent's scepticism about the Claimants' estimates of their own costs allocated to this claim and considers that it is more likely that it was the claim involving the highest allocation of resources among those pleaded by the Claimants.

63. The Tribunal makes no criticism of the conduct of either Party and their lawyers and advisors in these proceedings and the Tribunal is well aware of the challenges facing legal teams in a case as complex and politically sensitive as this one. Nonetheless, as a factor to take into account in the allocation of costs, the Tribunal must recall that the Claimants, in lieu of filing their Memorial at the prescribed deadline, instead filed a document production request coupled with a request for preliminary measures. Both requests were denied and the schedule for the arbitration had to be abandoned in its entirety at that early stage of the proceedings. The Tribunal then dismissed a large number of the 106 document requests that the Claimants eventually submitted as being overly broad.

64. In terms of the reasonableness of the Claimants' costs, the Tribunal notes that they are considerably less than the Respondent's own costs and hence it is difficult in these circumstances for the Respondent to make good a submission that the Claimants' costs are excessive.

74 The remaining balance will be reimbursed to the Claimants who paid all the advances on costs requested by ICSID.

65. Taking all these factors into account, the Tribunal has resolved to award the Claimants a portion of their own costs in the sum of [redacted] as well as the Respondent's half of the arbitration costs that the Claimants have been compelled to pay on account of the Respondent's default, amounting to [redacted]. The Tribunal further orders that interest will accrue at the same rate as for the principal sum of damages from the date of this Award and compounded annually until payment.

E FINAL AWARD

66. The Tribunal makes the following orders:

66.1 The Respondent shall pay to the Claimants USD 71,000,000 as restitutionary damages in respect of the Renationalisation Claim based upon Articles 3(2) and 6 of the BIT;

66.2 The Respondent shall pay to the Claimants interest on the above amount at the 5-year US Treasury Rate, compounded annually from 9 June 2015 until 24 February 2022 and then from the date of this Award until payment by the Respondent;

66.3 The Respondent shall pay to the Claimants [redacted] and [redacted] as a contribution towards the legal costs and the arbitration costs in these proceedings;

66.4 The Respondent shall pay to the Claimants interest on the above amount at the 5-year US Treasury Rate, compounded annually from the date of this Award until payment by the Respondent.

66.5 All other claims and relief are rejected.

[Signature]

Sir Michael Wood KCMG KC
Arbitrator

Date: 30 April 2026

Mr John Beechey CBE
Arbitrator

Date:

Professor Zachary Douglas KC
President of the Tribunal

Date:

[Signature]

Sir Michael Wood KCMG KC
Arbitrator

Date:

Mr John Beechey CBE
Arbitrator

Date: 1 May 2026

Professor Zachary Douglas KC
President of the Tribunal

Date:

Sir Michael Wood KCMG KC
Arbitrator

Date:

Mr John Beechey CBE
Arbitrator

Date:

[Signature]

Professor Zachary Douglas KC
President of the Tribunal

Date: 30 April 2026

ANNEX A

Procedural History of the Second Phase of the Arbitration[75]

1. On 1 July 2021, the Tribunal issued its Decision on Jurisdiction, Admissibility and Liability (the "**Decision**"). By letter of the same date, the Tribunal requested the Parties to confer and submit a joint proposal for the subsequent phase of the arbitration.

2. On 26 July 2021, the Respondent provided comments on the Tribunal's letter of 1 July 2021, to which the Claimants responded on 9 August 2021.

3. On 17 August 2021, the Tribunal provided further guidance on the nature and scope of the assistance that it required from the Parties on issues of quantum to allow them to confer and submit a joint proposal for the calendar of the proceedings.

4. On 31 August 2021, the Parties provided separate timetable proposals.

5. On 1 September 2021, the Tribunal set the procedural calendar and format for the written exchanges between the Parties. The Tribunal also indicated that, following receipt of the Parties' submissions, it would assess whether it would be assisted by reply submissions, clarifications, a short hearing by video-conference, or a combination thereof, and would communicate its directions to the Parties. The Tribunal further indicated that it would issue directions in respect of costs at a later date, in consultation with the Parties.

6. On 29 September 2021, the Claimants sought leave to introduce new factual exhibits and legal authorities.

7. On 30 September 2021, the Tribunal granted the Claimants' request for leave to produce new legal authorities and invited the Respondent to provide observations on the Claimants' request for leave to produce new factual exhibits, which it did on the same date.

8. On 1 October 2021, the Tribunal rejected the Claimants' request for leave to produce new factual exhibits.

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75 The procedural history of the proceedings leading up to the issuance of the Decision on Jurisdiction, Admissibility and Liability is summarized in Annex A thereto.

9. On the same date, the Claimants submitted their Supplementary Submission on Quantum, together with legal authorities CL-339 through CL-342 ("**Supplementary Submission on Quantum**").

10. On 1 November 2021, the Respondent submitted its Reply to the Claimants' Supplementary Submission on Quantum, together with legal authority RL-179 ("**Reply on Quantum**").

11. On 3 November 2021, the Claimants requested leave to address new arguments made by the Respondent in its Reply on Quantum. The Respondent provided its comments on the Claimants' request on 8 November 2021.

12. On 10 November 2021, the Tribunal informed the Parties that it intended to deliberate on the issues arising in the quantum phase of the arbitration and that it would revert to the Parties thereafter should it require further assistance, including in respect of the matters raised in the Claimants' letter of 3 November 2021.

13. On 24 November 2021, the Tribunal informed the Parties that it did not require further assistance and invited them to liaise with a view to agreeing upon a timetable for the filing of simultaneous costs submissions.

14. On 26 November 2021, the Parties informed the Tribunal of their agreed timetable for the filing of costs submissions, which was subsequently amended by agreement on 16 December 2021 and 10 January 2022.

15. On 22 December 2021, the Parties filed their respective submissions on costs, together with legal authorities CL-343 through CL-351 on behalf of the Claimants and RL-180 through RL-184 on behalf of the Respondent (respectively, the "**Claimants' Submission on Costs**" and the "**Respondent's Submission on Costs**").

16. On 21 January 2022, the Parties filed their respective replies on costs (respectively, the "**Claimants' Reply on Costs**" and the "**Respondent's Reply on Costs**"). The Claimants accompanied their reply with legal authorities CL-352 through CL-355.

17. On 8 March 2022, the Tribunal informed the Parties that it was considering suspending the proceedings in light of the situation in Ukraine and invited the Parties to provide their views thereon.

18. The Claimants indicated their agreement to a suspension of the proceedings on 9 March 2022; the Respondent confirmed its agreement on 15 March 2022.

19. On 23 March 2022, the Tribunal invited the Parties to agree on mutually acceptable terms and duration for the suspension.

20. On 18 April 2022, ICSID inquired whether the Parties had reached an agreement on the terms and duration of the suspension. On the same date, the Parties informed the Tribunal that they had agreed to suspend the proceedings until 30 June 2022.

21. On 2 May 2022, the Tribunal took note of the Parties' agreement to suspend the proceedings.

22. Between 30 June 2022 and 9 May 2025, the Parties agreed, through successive exchanges of correspondence, to eight consecutive extensions of the suspension of the proceedings.

23. On 15 May 2025, the Tribunal invited the Parties to provide their observations on when the arbitration could realistically resume.

24. On 26 May 2025, the Parties informed the Tribunal that the suspension should not exceed January 2026 and would lift automatically on 6 January 2026.

25. On 5 September 2025, the Parties confirmed their agreement to extend the suspension of the proceedings until 6 January 2026, which the Tribunal endorsed on the same date.

26. On 8 January 2026, the Tribunal noted that the suspension of the proceedings had automatically lapsed on 6 January 2026 and informed the Parties that it intended to render its Award as soon as practicable. The Tribunal further invited the Parties to indicate whether there were any matters on which they considered the Tribunal should be updated, within the limited scope of the issues remaining pending. On the same date, ICSID requested the Parties to make advance payments to cover the costs incurred and to be incurred in the proceedings.

27. On 16 January 2026, the Parties confirmed that there were no matters requiring the Tribunal's attention.

28. On 2 February 2026, the Respondent informed ICSID that it was unable to make the requested advance payment.

29. On 19 February 2026, ICSID acknowledged receipt of the Claimants' payment of its share of the advance on costs.

30. On 21 April 2026, the Tribunal declared the proceedings closed.

<u>ANNEX B</u>

The Parties' Requests for Relief

1. The Claimants' Requests for Relief

1. In their Supplementary Submission on Quantum, the Claimants request that the Tribunal:

i. Award Velbay and Emergofin financial compensation in the total amount of USD 228,668,068.00 for material damages divided as follows:

a. Award Velbay and Emergofin compensation in the total amount of USD 219,120,632.00 for the Denial of Justice;

b. Award Velbay and Emergofin compensation in the total amount corresponding to the difference between USD 219,120,632.00 and the compensation awarded for the Denial of Justice (sub-paragraph 47(i)(a) above) for the Judicial Expropriation;

c. Award Velbay and Emergofin compensation in the total amount of USD 9,547,436.00 for the Shareholder Interferences;

d. Award Velbay and Emergofin compensation in the total amount corresponding to the difference between USD 9,547,436.00 and the compensation awarded for the Shareholder Interferences (sub-paragraph 47(i)(c) above) for the Sanctions;

ii. Award Velbay and Emergofin pre-award interest on the above amount from 11 March 2015 (on amounts awarded under sub-paragraph 47(i)(a) above) or 9 June 2015 (on amounts awarded under sub-paragraph 47(i)(b) above) and/or 23 September 2016 or, 18 April 2017 (on amounts awarded under sub-paragraph 47(i)(c) above) and/or 14 May 2018 (on amounts awarded under sub-paragraph 47(i)(d) above) until the date of the award at the rate of the 5-year U.S. Treasury annual rate, compounded annually;

iii. Award Velbay and Emergofin post-award interest on all of the above amounts from the date of the award until the date of full payment of the award at the rate of the 5-year U.S. Treasury annual rate, compounded annually;

iv. Award Velbay and Emergofin compensation on such other basis as the Tribunal may deem to be warranted; and

v. Award Velbay and Emergofin the amount of the legal fees and costs incurred in these proceedings.[76]

2. In their Cost Submissions, the Claimants request that:

> […] Ukraine be ordered to bear Claimants' total incurred costs in relation to this arbitration in an amount of [redacted] and [redacted] or such lesser amount as the Tribunal considers, in the exercise of its discretion taking into account the foregoing reasons, appropriate. Claimants also request that interest be applied to all amounts awarded for costs from the date of the award until the date of payment in full, at the 5-year U.S. Treasury annual rate, compounded annually.[77]

2. The Respondent's Requests for Relief

3. In its Reply on Quantum, the Respondent request that the Tribunal:

> […] declare that the Claimants are not entitled to the damages they seek, or any damages.[78]

4. In its Cost Submission, the Respondent seeks that:

> […] 100 per cent of the legal fees and expenses that it has incurred in defending the claims brought against it in this arbitration, in the amount of [redacted]. For the same reasons, the Respondent submits that the Claimants should bear the costs of the arbitration in their entirety.[79]

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76 Claimants' Supplemental Submission on Quantum, §47.
77 Claimants' Cost Submissions, §37.
78 Respondent's Reply on Quantum, §109.
79 Respondent's Costs Submission, §52.

<u>ANNEX C</u>

List of Selected Abbreviations/Defined Terms

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
BIT	Agreement on Promotion and Reciprocal Protection of Investments between the Kingdom of the Netherlands and Ukraine signed on 14 July 1994 entered into force on 1 June 1997
C-[#]	Claimants' Exhibit
CL-[#]	Claimants' Legal Authority
Claimants	Emergofin B.V. and Velbay Holdings Ltd.
Claimants' Memorial	Claimants' Memorial dated 27 March 2018
Claimants' Rejoinder	Claimants' Rejoinder on Jurisdiction dated 19 May 2020
Claimants' Reply	Claimants' Reply dated 13 September 2019
Claimants' Reply on Costs	Claimants' Reply on Costs dated 21 January 2022
Claimants' Submission on Costs	Claimants' Submission on Costs dated 22 December 2021
Decision	Decision on Jurisdiction, Admissibility and Liability issued on 1 July 2021
Emergofin	Emergofin B.V.
FMV	Fair market value
Hearing	Hearing on Jurisdiction and Merits held from 1 to 6 November 2020
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
R-[#]	Respondent's Exhibit
Respondent or Ukraine	Ukraine

Respondent's Counter-Memorial	Respondent's Counter Memorial dated 15 March 2019
Respondent's Rejoinder	Respondent's Rejoinder dated 18 March 2020
Respondent's Reply on Costs	Respondent's Reply on Costs dated 21 January 2022
Respondent's Submission on Costs	Respondent's Submission on Costs dated 22 December 2021
Reply on Quantum	Respondent's Reply on Quantum dated 1 November 2021
RL-[#]	Respondent's Legal Authority
Supplementary Submission on Quantum	Claimants' Supplementary Submission on Quantum dated 1 October 2021
Transcript D#/P# (Speaker)	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 15 March 2017
Velbay	Velbay Holdings Ltd.
ZAlK	Zaporozhye Aluminium Combine Open Joint Stock Company

ANNEX

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceedings between

EMERGOFIN B.V. AND VELBAY HOLDINGS LTD.

Claimants

and

UKRAINE

Respondent

ICSID Case No. ARB/16/35

DECISION ON JURISDICTION, ADMISSIBILITY AND LIABILITY

Members of the Tribunal
Professor Zachary Douglas QC, President
Mr John Beechey CBE, Arbitrator
Sir Michael Wood KCMG, Arbitrator

Secretary of the Tribunal
Dr Laura Bergamini

Date of dispatch to the Parties: 1 July 2021

REPRESENTATION OF THE PARTIES

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Ms Elise Edson
Ms Sandrina Antohi
Ms Anna Guillard Sazhko
Professor Emmanuel Gaillard (until 10 February 2021)
Dr Yas Banifatemi (until 10 February 2021)
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and

International Disputes Office
Ms. Anna Tyshchenko
Ms. Yuliia Dikhtiievska
Ministry of Justice
13, Horodetskogo Street
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Ukraine

All the participants in this arbitration wish to express their profound sadness at the passing of a great advocate, arbitrator, professor, colleague and friend, Emmanuel Gaillard. For many of us his appearance as lead advocate for the Respondent *at the hearing in November 2020 was to be our last memory of him.*

TABLE OF CONTENTS

A INTRODUCTION TO THE DISPUTE

1. The aluminium production plant now owned by Zaporozhye Aluminum Combine Open Joint Stock Company ("**ZAlK**") was the largest such plant in Europe when it was constructed in 1933. It is the only producer of primary aluminium, aluminium alloys and technical grade silicone in Ukraine and thus is of strategic importance to the Ukrainian economy. The plant has the capacity to produce 263,000 metric tonnes of alumina per year. ZAlK employs more than 5,000 people.

2. ZAlK was state-owned until 2001. That year, a privatisation auction for 68.01% of the Government's shares was won by CJSC AvtoVAZ-Invest, a subsidiary of the major Russian automobile manufacturer OJSC AvtoVAZ, which produces the "*Lada*" brand of cars. A privatisation agreement between the State Property Fund of Ukraine ("**SPFU**") and CJSC AvtoVAZ-Invest was signed on 8 February 2001.[1] That agreement required AvtoVAZ-Invest, in addition to paying the purchase price for the shares, to make certain investments in ZAlK.

3. United Company RUSAL p.l.c. ("**UC RUSAL**") is one of the leading producers of aluminium and alumina in the world, operating ten aluminium smelters, seven alumina refineries and five bauxite mines. Through its affiliates, it employs over 62,000 people worldwide. Velbay Holdings Ltd ("**Velbay**"), a Cypriot company, and Emergofin B.V. ("**Emergofin**"), a Dutch company, are two such affiliates (the "**Claimants**").

4. On 24 March 2006, Velbay acquired its most significant stake in ZAlK (68.01% of the shares) from AvtoVAZ-Invest on the basis of a sale and purchase agreement ("**2006 ZAlK SPA**").[2] The purchase price for the shares was USD 71,000,000 and Velbay assumed the investment obligations that AvtoVAZ-Invest had entered into with the SPFU under the 2001 agreement. The transaction was subject to the requirements of the Ukrainian privatization law and it was duly approved by the SPFU. Velbay had previously acquired its first tranche of 9.54% of the shares in ZAlK from ZAT and TOV Arlan-Met on 7 July 2005

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1 C-5, Agreement on Purchase of Shares of Zaporozhye Alumina and Aluminium Complex OJSC No КПП-307 Between State Property Fund of Ukraine and AvtoVAZ-Invest Closed Joint Stock Company, 2001; C-327, Agreement on Purchase of Shares of Zaporozhye Alumina and Aluminium Complex OJSC No КПП-307 Between State Property Fund of Ukraine and AvtoVAZ-Invest Closed Joint Stock Company, 2001.

2 C-3, Purchase and Sale Agreement between Closed Joint Stock Company AvtoVAZ Invest and Velbay Holdings Limited relating to the Sale Shares of Zaporozhye Aluminium Combine Open Joint Stock Company (the ZAlK SPA), 24 March 2006.

under two share purchase agreements,[3] and subsequently acquired a further stake of 29.54% of the shares in ZAlK in November 2006.[4] At some point in 2005, Velbay became wholly-owned and controlled by Emergofin (the parties disagree about the precise timing).

5. The dispute concerns Ukraine's treatment of ZAlK. The various claims advanced by the Claimants under the Agreement on Promotion and Reciprocal Protection of Investments between the Kingdom of the Netherlands and Ukraine of 14 July 1994 (the "**BIT**") are summarised in the next section. The arbitration is brought under the ICSID Convention and the ICSID Arbitration Rules. The procedural history of the arbitration is set out in Annex A to this Decision.

B SUMMARY OF THE CLAIMANTS' CLAIMS

6. The Tribunal summarises in this section the claims advanced by the Claimants and relies primarily upon the Claimants' pleaded case in their Reply for this purpose. The Tribunal makes no findings in this section, nor does it consider the Respondent's defences to these claims. The Tribunal will place particular emphasis on the timing of the constituent elements for the alleged breaches in respect of the claims as this will be relevant to the Tribunal's subsequent examination of its jurisdiction. The Tribunal will provide its own classification of the Claimants' claims based not upon the identity of the obligations in the BIT (or customary international law) that are said to have been breached but rather on the factual matrices alleged to support the various breaches.

B1 Electricity Pricing Claim

7. The Claimants submit that "*Ukraine's failure to reform the single-buyer model in the Ukrainian wholesale electricity market, coupled with its failure to reinstate differential electricity pricing and followed by the discriminatory implementation of CMU Instruction No. 1855-p in favour of ZTMK (the implementation of which was denied to ZAlK)*"[5] constitute a violation of Article 3 of the BIT. More specifically, the three elements set out in that summary are said to constitute a breach of Article 3(2) (the obligation to accord FET and refrain from impairing the management of the Claimants' investments in an unreasonable and discriminatory manner), whereas

3 C-36, Securities sale agreement No K-1/168/3588 between ZaporozhAluminTorg Ltd. and Velbay, 7 July 2005, and C-37, Securities sale agreement No K-1/169/3593 between Arlan-Met Ltd. and Velbay, 7 July 2005.

4 C-38, Sales and purchase Agreement between [redacted]. and Velbay, 21 November 2006.

5 C's Reply, §582.

"*[t]aken on its own*" the "*partial implementation of CMU Instruction No. 1855-p in favour of ZTMK*"[6] is said to breach Article 3(1) (the obligation to accord the Claimants' investments treatment no less favourable than to Ukrainian investments) and the "*failure to implement CMU Instruction No. 1855-p in favour of ZAlK*"[7] is said to breach of Article 3(4) (the obligation to observe any obligation entered into with regard to Claimants' investments). Finally, the Claimants say that "*Ukraine's failure to implement its own laws taken in conjunction with its failure to reinstate differential electricity tariffs despite the numerous concessions extorted from Claimants between 2010 and 2011 ultimately caused the annihilation of the economic value (and therefore, the indirect expropriation) of Claimants' investment in ZAlK in late 2011/early 2012*",[8] and thus constitutes a breach of Article 6 (on expropriation).

8. The Tribunal will henceforth refer to the various aspects of this claim under the designation "*Electricity Pricing Claim*". The timing of the constituent elements of this claim, as formulated by the Claimants, is summarised below:

9. First, the Claimants rely on the fact that differential electricity pricing was put in place for ZAlK in 2002[9] and that this was before Sual International Ltd ("**SUAL**") acquired indirect control of ZAlK via AvtoVAZ-Invest in June 2004 (and thus, according to the Claimants, the beginning of their investment in ZAlK as Emergofin is said to be an affiliate of SUAL).

10. Second, the Claimants say that differential electricity pricing was then abolished on 23 February 2005.[10]

11. Third, CMU Instruction No 1566-p was then adopted on 10 December 2008, which called upon various state authorities to approve "*a procedure for calculating retail prices of the electricity used by enterprises producing primary aluminium for process needs only, depending on fluctuations in the prices of the products of the above enterprises in the global market*".[11]

12. Fourth, those state authorities approved a tariff calculation procedure for the State Enterprise "*Zaporozhye Titanium-Magnesium Plant*" ("**ZTMK**") on the basis of CMU

6 C's Reply, §582.
7 C's Reply, §582.
8 C's Reply, §583.
9 Precisely as a result of C-58, Resolution of Cabinet of Ministers of Ukraine No 795, 10 June 2002, and C-168, Order of Ministry of Industrial Policy of Ukraine No 312, 10 July 2002.
10 As a result of C-185, Resolution of Cabinet of Ministers of Ukraine No 143, 23 February 2005.
11 C-103, Resolution of Cabinet of Ministers of Ukraine No 1566-p, 10 December 2008.

Instruction No 1566-p on 16 February 2009.[12] The Claimants maintain that ZTMK was in "*like circumstances*" to ZAlK.

13. Fifth, in the period 2009-2011, those state authorities failed to implement CMU Instruction No 1566-p in respect of ZAlK.

B2 Renationalisation Claim

14. The Claimants maintain that the judgments of the Ukrainian courts leading to the judicial rescission of the 2006 ZAlK SPA and the renationalisation of Velbay's 68.01% stake under that agreement constitutes a denial of justice and thus a breach of Article 3(2) of the BIT and customary international law.[13] Furthermore, the "*outcome*" of the renationalisation is also said to constitute an illegal expropriation of the same investment and thus a breach of Article 6.[14]

15. Consistent with the Claimants' nomenclature, the Tribunal will henceforth refer to the elements of this claim under the designation "*Renationalisation Claim*".

16. The Claimants allege that the denial of justice and expropriation of Velbay's 68.01% shareholding in ZAlK occurred on 22 March 2012, which is when the 2006 ZAlK SPA was rescinded by the Kyiv Commercial Court at first instance.[15] The other critical events were the judgment of the Kyiv Commercial Court accepting jurisdiction despite the arbitration clause in the 2006 ZAlK SPA on 29 September 2009,[16] the decision of the same court upholding the judicial recission of the 2006 ZAlK SPA on 22 March 2012 (as already mentioned),[17] the exhaustion of the appeals against that judgment by the decision of the Supreme Court of Ukraine on 11 March 2015,[18] and, finally, the transfer of Velbay's 68.01% stake in ZAlK to the SPFU on 9 June 2015.[19]

B3 Shareholder Interference Claim

17. The Claimants assert that Velbay was deprived of its rights as a shareholder in ZAlK as a result of its representatives being blocked from participation at the extraordinary general

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12 C-105, Procedure No 126 "*On Confirmation of the Guidelines for Retail Pricing of Electricity Used by Titanium Sponge Production Facilities for Process Needs*", 16 February 2009.
13 C's Reply, §584.
14 C's Reply, §585.
15 C's Memorial, §722; C's Reply, §836.
16 C-236, Kyiv Commercial Court of Appeals, Case No 48/448, Resolution, 29 September 2009.
17 C-333, Kyiv Commercial Court, Case No 48/448-13/364, Judgment, 22 March 2012.
18 C-14/C-334, Supreme Court of Ukraine, Case No 48/448-13/364, Judgment, 11 March 2015.
19 C-21, ZAlK Limited Statement of Securities Account, 6 June 2015.

shareholder meeting on 23 September 2016 and the annual general shareholder meeting on 18 April 2017 by the SPFU acting in collusion with ZAlK's management and the Khortitskiy Regiment in circumstances where the local police did not intervene.[20] According to the Claimants, this conduct violates two elements of Article 3(2): the obligation to accord FET as well as the obligation to accord full protection and security. The Claimants also maintain that this conduct amounts to an expropriation of their shareholding in ZAlK.

18. The Tribunal will henceforth refer to the various aspects of this claim under the designation "*Shareholder Interference Claim*".

B4 Sanctions Claim

19. The Claimants maintain that, on 16 September 2016, "*Ukraine placed one of Claimants' fact witnesses as well as other related legal entities on an economic sanctions list, without any notice or explanation*",[21] and then, on 2 May 2018, adopted a presidential decree to place both Velbay and Emergofin on the same list,[22] again without notice or explanation.[23] The Claimants say that this conduct violates Article 3(2) of the BIT (obligation to accord FET).[24]

20. The Tribunal will henceforth refer to the various aspects of this claim under the designation "*Sanctions Claim*".

B5 Miscellaneous Claims

21. In addition to the four principal claims outlined above, the Claimants have asserted various other claims in their Memorial which have not been given significant attention in their further pleadings and at the hearing. Some of them have been formally withdrawn. The Tribunal will deal with these under the rubric of "*Miscellaneous Claims*". In summary, the Miscellaneous Claims relate to the Claimants' following allegations: (i) Ukraine's refusal of a land lease to LLC Glukhovskiy Quartzite Quarry ("**GQQ**"); (ii) the Ukrainian Tax Authorities' refusal to apply VAT exemptions in favour of ZAlK; (iii) the launch of criminal investigations against individuals affiliated with the Claimants in 2015; (iv) the failure of Ukrainian authorities to protect ZAlK from a raid by the Aidar Batallion; and (v) the raid of

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20 C's Reply, §586.

21 C's Reply, §586; C's Memorial, §§614-631.

22 C-452, National Security and Defence Council of Ukraine, Decision On the Imposition and Cancellation of Special Personal Economic and Other Restrictive Measures (Sanctions), 2 May 2018.

23 C's Reply, §587.

24 C's Reply, §587.

the Investigative Department of Financial Investigations of Interregional Main Department of the State Fiscal Service of Ukraine on ZAlK's offices.

C THE STRUCTURE AND SCOPE OF THIS DECISION

22. This Decision deals with jurisdiction, admissibility and liability. Quantum (if any) and costs are reserved for a Final Award.

23. This Decision sets out the Tribunal's own analysis and findings in respect of the factual record and the issues of law within the context of each aspect of the dispute submitted to it (jurisdiction, the admissibility of the claims and each of the claims and defences). All the parties' arguments on the facts and law are considered by the Tribunal to the extent necessary to dispose of the issues in dispute.

24. This Decision is supplemented by the following annexes:

    24.1. Annex A: Procedural History of the Arbitration;

    24.2. Annex B: The Parties' Requests for Relief;

    24.3. Annex C: List of Abbreviations;

    24.4. Annex D: Relevant Provisions of the Ukrainian Civil Code.

D JURISDICTION AND ADMISSIBILITY

25. Jurisdiction in this case is asserted on the basis of the BIT and the ICSID Convention.

26. The Respondent has raised several objections to the jurisdiction of the Tribunal:

> First, Emergofin's alleged indirect shareholdings in ZAlK, LLC ZaporizhAlyuminTorg ("ZAT") and GQQ are not covered by the BIT (A). Second, the Claimants have failed to show that Emergofin had control over its alleged investment in ZAlK or ZAT during the relevant period (B). Third, the Claimants have failed to show that Velbay was controlled by Emergofin during the relevant period (C). Fourth, Velbay's contingent liabilities do not qualify as an investment (D). Fifth, certain claims advanced by the Claimants do not meet the mandatory notification and negotiation requirement under Article 9 of the BIT (E). Sixth, certain claims advanced by the Claimants are not capable of violating the BIT

even on a *prima facie* basis (F). Seventh, the Tribunal does not have jurisdiction to award non-material or moral damages (G).[25]

27. Before each of these objections is considered in turn, the Tribunal will describe the aspects of its jurisdiction that are not in dispute. It transpires that there is an uncontested field of jurisdiction in this case that is sufficient to enable the Tribunal to adjudicate at least some of the Claimants' claims.

D1 The undisputed scope of the Tribunal's jurisdiction

28. First, the Netherlands and Ukraine have consented to the international arbitration of investment disputes under the ICSID Convention in Article 9 of the BIT, which came into force on 1 June 1997.[26] The ICSID Convention came into force for the Netherlands on 14 October 1966 and for the Ukraine on 7 July 2000.[27] There is no question that the dispute submitted to the Tribunal arose after these dates.

29. Second, Emergofin is a legal person constituted under the law of the Netherlands[28] and, to the extent that it has acquired an investment in Ukraine, is capable of being a Dutch national investor in Ukraine for the purposes of Article 1(b)(ii) of the BIT and Article 25 of the ICSID Convention.

30. Third, from the moment it acquired shares in ZAlK, Velbay qualified as a Dutch investor in Ukraine in accordance with Article 1(b)(iii) of the BIT, which defines "*national*s" of either Contracting Party to include: "*legal persons not constituted under the law of that Contracting Party but controlled by natural persons as defined in [i] or by legal persons as defined in [ii] above.*" The latter are defined as "*legal persons constituted under the law of that Contracting Party*". By application of these provisions, Emergofin, which is a legal person constituted under the law of the Netherlands,[29] controls Velbay (although the timing of that control is disputed), which is a legal person constituted in Cyprus;[30] and Velbay ultimately acquired 97.55% of the shares in the Ukrainian company ZAlK (the timing for the incremental acquisitions is disputed and will be considered separately below). There is no dispute that these shares constitute an

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25 R's Counter-Memorial, §275.
26 CL-1, Agreement on promotion and reciprocal protection of investments between the Kingdom of the Netherlands and Ukraine, 14 July 1994.
27 CL-2, List of Contracting States and Other Signatories of the ICSID Convention, 12 April 2016.
28 C-315, Emergofin Articles of Incorporation, 21 February 2000.
29 C-315, Emergofin Articles of Incorporation, 21 February 2000.
30 C-23, Velbay Certificate of Incorporation, 18 April 2005.

investment within the meaning of Article 1 of the BIT and Article 25 of the ICSID Convention.[31]

31. It follows that Velbay is considered to be a Dutch national investor in Ukraine for the purposes of the BIT and Article 25 of the ICSID Convention and thus has the capacity to submit a dispute to arbitration in its own name under Article 9 of the BIT. What is contested is the timing for Emergofin's control of Velbay and the timing for Velbay's acquisition of its stakes in ZAlK and the significance of this for the Tribunal's jurisdiction *ratione temporis* over some (but not all) of the Claimants' claims.

32. Fourth, Emergofin and Velbay accepted Ukraine's unilateral offer to arbitrate in Article 9 of the BIT when they filed their Request for Arbitration on 25 October 2016. The notification requirements in Article 9 of the BIT (which include a three-month period for amicable settlement) were satisfied at least in relation to the dispute as described in the Claimants' Notice of Dispute sent to Ukraine on 8 December 2015.[32] There is a controversy in relation to whether some (but not all) of the Claimants' claims have been properly notified in accordance with Article 9 of the BIT; the Respondent does not, however, take issue with the Renationalisation Claim in this respect.[33]

33. Fifth, it is common ground between the parties that there is a "*legal dispute*" "*arising directly out of*" an investment and that consent to arbitration has been made "*in writing*" for the purposes of Article 25 of the ICSID Convention.

D2 The Issue Concerning the Timing of Velbay's Protected Investments in ZAlK

34. The contested issue concerning the timing of (i) Emergofin's control of Velbay and (ii) Velbay's acquisition of its stakes in ZAlK is relatively narrow and will be dealt with now.

35. The Tribunal will first assess when Velbay acquired its shareholdings in ZAlK under the proviso that an acquisition by Velbay could not give rise to a protected investment in Ukraine under the BIT unless and until Velbay came under the control of Emergofin so that Velbay can qualify as a Dutch national for the purposes of the BIT.

31 The other alleged investments made by the Claimants are considered below, namely: (i) claims to money by Velbay; (ii) Emergofin's indirect shareholding in ZAT; and (iii) Emergofin's indirect shareholding in GQQ. C's Memorial, §§431-442.

32 C-25, Notice of Dispute, 8 December 2015.

33 R's Counter-Memorial, §317.

36. Velbay acquired a total of 97.55 % of the shares in ZAlK at three different points in time as follows.

37. Velbay agreed to purchase its first tranche of 20% of the shares in ZAlK from ZAT and TOV Arlan-Met on 7 July 2005 under two share purchase agreements.[34] The Respondent does not appear to contest that date (subject to its argument concerning control by Emergofin over Velbay at that time which will be considered later).

38. Velbay agreed to purchase its second tranche of 68.01% of the shares in ZAlK from AvtoVAZ-Invest on 24 March 2006 under the 2006 ZAlK SPA.[35] The Claimants maintain that the acquisition was complete on that date,[36] whereas the Respondent argues that this did not occur until 13 April 2006, when the transaction closed upon Velbay's final payment and when Velbay became the registered owner.[37] Although it is unlikely to be material to the outcome of the dispute, the Tribunal prefers the Respondent's interpretation, which is confirmed by the terms of the 2006 ZAlK SPA, which contemplates a "*Closing Date*" involving the transfer of the shares subsequent to the signature of the 2006 ZAlK SPA,[38] and the Reconciliation Deed that records that Velbay made the final payment to AvtoVAZ-Invest on 13 April 2006.[39]

39. Velbay agreed to purchase its third tranche of 9.54% of the shares in ZAlK from [redacted] on 21 November 2006 under a share purchase agreement of that date.[40] Once again, the Claimants maintain that Velbay acquired the shares on that date,[41] whereas the Respondent argues that Velbay only became the owner of the shares sometime in the first quarter of 2007.[42] The Tribunal prefers the Respondent's position: the share purchase agreement contemplated that the closing of the transaction would occur at some point after signature; furthermore, two public documents from a Ukrainian database containing information on stock market participants ("**SMIDA**") confirm that Velbay was not the registered owner of

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34 C-36, Securities sale agreement No K-1/168/3588 between ZaporozhAluminTorg Ltd. and Velbay, 7 July 2005, and C-37, Securities sale agreement No K-1/169/3593 between Arlan-Met Ltd. and Velbay, 7 July 2005.

35 C-3, Energy Strategy of Ukraine through 2030, approved by Instruction of Cabinet of Ministers of Ukraine, No 145-p (as amended), 15 March 2006; C's Memorial, §432.

36 C's Final Submission, §24.

37 R's Reply to C's Final Submission, §18(b).

38 C-3, Energy Strategy of Ukraine through 2030, approved by Instruction of Cabinet of Ministers of Ukraine, No 145-p (as amended), 15 March 2006.

39 C-4, Reconciliation Deed between AvtoVAZ-Invest and Velbay Holdings Limited, 14 April 2006.

40 C-38, Sales and purchase Agreement between [redacted] and Velbay, 21 November 2006.

41 C's Final Submission, §26.

42 R's Reply to C's Final Submission, §18(c).

this tranche of ZAlK's shares as of 31 December 2006 but was as of 1 April 2007—and thus became the registered owner at some point during the interval.[43] The Claimants have taken issue with the Respondent's late submission of these two documents as well as their probative value;[44] the Tribunal does not place definitive reliance upon them but simply records that they corroborate the position under the share purchase agreement itself. Once again, the precise date is unlikely to be material to the resolution of the dispute.

40. The Respondent has conceded that Emergofin was in control of Velbay from 22 September 2005 onwards when Emergofin was entered into the share register as the owner of Velbay.[45] It follows that there is potentially jurisdiction over any claims relating to Velbay's shareholding in ZAlK at least from 22 September 2005 onwards (obviously the size of the shareholding at different times may be relevant to quantum if liability were to be upheld). This means that the Tribunal, subject to its consideration of the Respondent's remaining objections, has jurisdiction *ratione temporis* over the Renationalisation Claim, the Shareholder Interference Claim and the Sanctions Claim. It also has jurisdiction *ratione temporis* over some, but not all, of the elements of the Electricity Pricing Claim.

D3 The Issue Concerning the Claimants' Investments in ZAlK Prior to 22 September 2005

41. The contested issue in respect of the existence and timing of investments in ZAlK prior to 22 September 2005 is relevant only to jurisdiction *ratione temporis* in respect of the Electricity Pricing Claim. The alleged breaches in respect of all the other claims arose after this date.

42. There are two aspects to this issue. The first relates to the timing of Emergofin's control over Velbay. The Claimants say that Velbay was already controlled by Emergofin as of 7 July 2005 when Velbay first acquired its 20% shareholding in ZAlK even if Emergofin only acquired the shares of Velbay on 22 September 2005.[46] The second aspect of the dispute concerns the Claimants' contention that Emergofin indirectly had an interest in the 97.55 % shareholding in ZAlK through a chain of companies from 2004 until 2005-6 (when that stake was then acquired by Velbay in different instalments).[47]

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43 R-266, SMIDA Website, Information on persons holding 5% or more of shares in ZAlK as at 31 December 2006; R-267, SMIDA Website, Information on persons holding large blocks of shares in ZAlK as at 1st quarter 2007.

44 Claimants' letter to the Tribunal, 18 December 2020.

45 R's Reply to C's Final Submission, §18(a); C-503, Corporate Register, Velbay Holdings Ltd., 29 June 2017.

46 C's Reply, §531.

47 C's Memorial, §§61-65.

The timing of Emergofin's control over Velbay

43. In respect of the first aspect, the Claimants maintain that Emergofin exercised control over Velbay from the date of Velbay's incorporation in Cyprus on 18 April 2005.[48] The Tribunal notes that control in this context is irrelevant until 7 July 2005, when Velbay acquired 20% of ZAlK's shares (and thus arguably made an investment in Ukraine) but will consider the evidence relied upon by the Claimants from 18 April 2005 onwards. According to the Claimants, during the period between 18 April 2005 and 22 September 2005, "*professional service providers held Velbay's shares on behalf of Emergofin for the purpose of carrying out formalities*".[49] The Claimants maintain that control during this period is evidenced by the fact that, "*on 23 May 2005, Velbay issued a power of attorney to* [redacted]*, who also held powers of attorney from* [redacted] *and* [redacted]*, which Emergofin controlled*".[50]

44. The Claimants have nonetheless conceded,[51] and the Respondent has emphasised,[52] that Velbay's shares were owned by the following entities or persons between 18 April 2005 and 22 September 2005: [redacted].[53] As the Respondent has correctly noted, there is no evidence on the record that these entities or persons held their shares in Velbay on behalf of Emergofin. The Claimants are essentially asking the Tribunal to infer simply from the fact that Velbay, [redacted] and [redacted] all granted a power of attorney to [redacted] at various times, and from the fact that Emergofin allegedly controlled [redacted] and [redacted], that by implication it must have also controlled Velbay. First, for reasons that will be explained below, the Tribunal does not accept that the Claimants have proved that Emergofin controlled [redacted] and [redacted]. Second, even if the Claimants could establish that Emergofin controlled [redacted] and [redacted], the simple fact that the same individual was issued a power of attorney does not begin to establish control over Velbay. [redacted] did not give testimony in this arbitration and the Tribunal has been provided with no information about this individual. It is possible that he is an agent of Emergofin but it is equally possible that he also a "*professional service provider*" (as the Claimants describe [redacted]

48 C's Rejoinder on Jurisdiction, §88.
49 C's Rejoinder on Jurisdiction, §88.
50 C's Rejoinder on Jurisdiction, §88.
51 C's Rejoinder on Jurisdiction, FN 117.
52 R's Reply to C's Final Submission, §18(a).
53 C-503, Corporate Register, Velbay Holdings Ltd., 29 June 2017.

[redacted] and thus not linked to Emergofin at all. There is also no evidence on the record that Emergofin instructed [redacted] to do anything in relation to Velbay.

45. The Tribunal is concerned here with the question of whether Emergofin was in a position to exercise control over Velbay before 22 September 2005 (at which point Emergofin acquired all the shares in Velbay and undoubtedly could exercise control as the owner of Velbay). Control can, of course, be exercised in the absence of ownership but the burden of proof falls upon Emergofin to establish that, on the balance of probabilities, it was in a position to exercise that control at the relevant time or that it did in fact exercise control at that time. At the present phase of the arbitration, the Tribunal has to make a definitive ruling upon this jurisdictional issue: there is no question at this stage of applying a *prima facie* test or other less demanding standard of proof. As previously stated, there is no evidence that Emergofin exercised control over Velbay in fact before 22 September 2005. Whether or not it was nevertheless in a position to do so depends upon whether a legal mechanism was in place to facilitate Emergofin's control over Velbay. A legal mechanism of control between two corporate entities requires a certain number of formal steps to be undertaken under the relevant corporate law or laws applicable to those entities. Emergofin has adduced a document to demonstrate that [redacted] had been provided with a power of attorney to act on behalf of Velbay but no document has been produced to confirm that Emergofin had the legal power to give binding instructions to [redacted] in respect of Velbay. Control is thus not established.

The existence of Emergofin's indirect interest in ZAlK prior to Velbay's acquisitions from 2004 until 2005-6

46. The Tribunal will now deal with the second aspect of the aforementioned jurisdictional dispute relating to the Claimants' contention that Emergofin indirectly had an interest in the 97.55 % shareholding in ZAlK through a chain of companies from 2004 until 2005-6 (when that stake was acquired by Velbay in different instalments).[54] This indirect interest was said to be structured as follows:[55]

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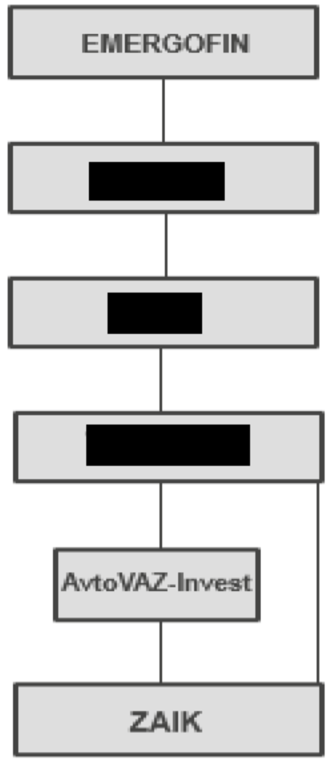
54 C's Memorial, §§61-65.

55 R's Reply to C's Final Submission, §11.



47. The Claimants say that they had control over the shares in ZAlK through this corporate structure from some point in 2004. The Respondent is correct that the Claimants must establish control at each link of the chain.[56] At the hearing, the Respondent focused on the link between [redacted] and [redacted] to demonstrate that the Claimants had failed to prove the chain of control. In their final written pleading on this issue filed after the hearing, the Claimants referred to twelve documents to establish that [redacted] controlled [redacted] at the relevant time: Exhibits C-124, C-55, C-283, C-518, C-532, C-533, C-534, C-537, C-541, C-542, C-543, and C-544.[57] Elsewhere in their previous pleadings, the Claimants also referred to Exhibits C-170 and C-173.[58]

48. The Respondent has criticized the Claimants' approach to this evidence on the basis that it is cited but not analysed. This criticism is justified. There is no assessment in the Claimants' multiple pleadings on jurisdiction of how this evidence establishes control. The Tribunal will now provide its own assessment.

56 R's Reply to C's Final Submission, §12.
57 C's Final Submission, Annex 2, Comment #3.
58 C's Rejoinder on Jurisdiction, §§98-99.

The corporate chart prepared by SUAL Group

49. Exhibit C-124 appears to be an internal corporate chart produced by the SUAL Group as of 30 September 2005. Most of the chart has been redacted. The chart is described by the Claimants as the "*centrepiece of Claimants' factual evidence*".[59] The purported link between [redacted] and [redacted] as set out in the chart is far more complicated than the scheme depicted above as it purports to represent the situation before a restructuring in 2006. Several additional entities have been inserted in the chain between [redacted] and [redacted], and there is no explanation accompanying the chart, nor a witness with direct knowledge of these matters to elaborate upon its contents. The Claimants argue that their witness, [redacted], who was not called by the Respondent for cross-examination, had "*knowledge of the structure of Claimants' investments in Ukraine during the period of 2005-2006, as shown in his written testimony*".[60] The Claimants refer to paragraphs 11-13 and 24 of [redacted] first witness statement in this respect. These paragraphs make no reference to the chart prepared by SUAL Group or indeed to any other evidence. [redacted] was ultimately the [redacted]. He was never employed at [redacted] and thus is very unlikely to have had any first-hand knowledge of the structure of offshore companies in the SUAL Group in 2005. There is no suggestion that he had any role in preparing the chart exhibited as C-124 or in setting up the offshore companies reflected in that chart. [redacted] evidence is important in respect of many issues relating to the merits, but it has not been established that he would have had any direct knowledge in respect of the jurisdictional issues now under discussion.

50. The Claimants have stated that there is no reason to doubt that the chart at Exhibit C-124 should be considered to be "*reliable proof of the facts it states; that is SUAL's and Emergofin's shareholdings and beneficial interests in Ukraine as at 30 September 2005*".[61] The Tribunal disagrees. The Claimants have the burden of proving that a legal mechanism existed at the relevant time for [redacted] to exercise control over [redacted]. An internal chart with a line drawn to connect [redacted] to a number of entities including [redacted] does not establish the existence of a legal mechanism of control. What is required is evidence that the body or individual authorised to act on behalf of [redacted] was able to give binding instructions to the body or individual authorized to act on behalf of [redacted]. Such evidence would typically be in the

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59 C's Final Submission, §17.
60 C's Final Submission, §39.
61 C's Final Submission, §17.

nature of corporate documents that satisfy the formal requirements under the relevant applicable law.

Evidence of [redacted]'s ownership of [redacted]

51. Exhibit C-170 is a "*Written Resolution of the Sole Director*" of [redacted] dated 2 June 2004. It makes no reference to [redacted] It records that [redacted] is [redacted] of [redacted] and that [redacted] is the Secretary.

52. Contrary to the Claimants' submission, this document does not evidence [redacted]'s alleged beneficial ownership of [redacted].[62]

Powers of attorney issued to [redacted]

53. Exhibit C-518 is a "[redacted] of Velbay dated 11 April 2006. It makes no reference to [redacted] or [redacted]. It records that the [redacted] revoked the power of attorney granted to [redacted]

54. Exhibit C-532 is a "[redacted]" of [redacted] dated 11 April 2006. It makes no reference to [redacted]. It records that [redacted] revoked the power of attorney granted to [redacted]

55. Exhibit C-533 is a "[redacted] of [redacted] dated 11 April 2006. It makes no reference to [redacted]. It records that [redacted] revoked the power of attorney granted [redacted]

56. Contrary to the Claimants' submission,[63] the fact that a certain individual received a power of attorney to act on behalf of Velbay, [redacted] and [redacted] at different times does not prove that [redacted] controlled [redacted].

The appointment of [redacted]

57. Exhibit C-534 records the appointment of [redacted] of [redacted] on 22 April 2004. It makes no reference to [redacted].

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62 C's Rejoinder on Jurisdiction, §98.

63 C's Rejoinder on Jurisdiction, §99.

58. Exhibit C-537 records that [redacted] were granted powers of attorney to act on behalf of [redacted] on 6 November 2006. It makes no reference to [redacted]. Contrary to the Claimants' submission,[64] the fact that [redacted] authorized [redacted] does not establish that Gray controlled [redacted].

[redacted] of [redacted] and [redacted]

59. Exhibit C-538 is a [redacted] of Gray dated 24 May 2004. It makes no reference to [redacted]. It records that [redacted].

60. Even if [redacted] and [redacted] shared [redacted] this does not establish that [redacted] controlled [redacted].

The role of [redacted]

61. According to the Claimants, a number of documents establish that [redacted] "*was affiliated with, and acted on behalf of, UC RUSAL, ZAT and* [redacted]".[65]

62. Exhibit C-55 is a Decision of [redacted], dated 22 August 2017. The Claimants refer to page 11 of that Decision, but there is no mention of [redacted] (The Tribunal has only found one reference to [redacted], [redacted])

63. Exhibit C-173 is a Share Sale and Purchase Agreement dated 19 August 2004 between Zaporozhskiy Asset Management Centre and [redacted]. [redacted] is recorded as being the representative of [redacted] on the basis of a power of attorney issued on 3 August 2004.

64. Exhibit C-283 is the minutes of the General Meeting of Shareholders of ZAlK on 24 April 2014, which record that [redacted]

64 C's Rejoinder on Jurisdiction, §98.
65 C's Rejoinder on Jurisdiction, §99.

65. Exhibit C-541 is a Share Transfer Agreement that was certified by a notary on 22 August 2005. It records that [redacted]

66. Exhibit C-542 is a power of attorney issued to [redacted] by [redacted] on 3 August 2004. Exhibit C-543 is a new power of attorney on the same terms issued on 28 January 2005. Exhibit C-544 is a power of attorney issued by [redacted] to [redacted] on wider terms on 28 November 2006. There is no mention of [redacted] in any of these documents.

67. The Tribunal does not accept that [redacted] various roles in relation to [redacted], ZAT and ZAlK establish that [redacted] had control over [redacted].

Tribunal's conclusion

68. The Tribunal concludes that the Claimants have failed to establish that they indirectly controlled shares in ZAlK in the period 2004 to 2005-6 through a corporate structure that included [redacted] and [redacted]. It is unnecessary for the Tribunal to assess the evidence pertaining to the other links in the corporate chain: a failure to establish control in respect of one level of the corporate chain is fatal to Emergofin's overall assertion of control over shares in ZAlK through this corporate structure. It follows that the first time that the Claimants can establish a protected investment in ZAlK is on 22 September 2005. At that date Emergofin acquired the shares in (and thus control over) Velbay such that Velbay, which by that time had a 20% shareholding in ZAlK, became a Dutch national with a protected investment in Ukraine under the BIT.

69. This conclusion only impacts upon the Tribunal's jurisdiction *ratione temporis* over the Electricity Pricing Claim in so far as certain elements of that claim are alleged to have occurred prior to 22 September 2005. The Tribunal will explore the consequences of this when it considers the Electricity Pricing Claim on the merits.

70. At the hearing, the Respondent's counsel asserted that the Claimants' corporate structure involving a large number of offshore companies was designed to avoid paying tax (or seek tax advantages) or to defraud shareholders.[66] The Tribunal wishes to record that it has been presented with no evidence concerning the reasons for the Claimants' adoption of such a corporate structure and thus there is no basis to draw any inference of an improper purpose.

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[66] Transcript D1/PP173, 204 ([redacted].

D4 The Respondent's objections to jurisdiction

71. The Tribunal will now address the Respondent's jurisdictional objections.

Are Emergofin's indirect shareholdings in ZAlK, ZAT and GQQ covered by the BIT?

72. The Respondent submits that the BIT does not expressly specify that investments held indirectly can qualify for protection in contradistinction with many other investment treaties and the Dutch Model BIT (1993) itself, which contains the qualifiers "*directly or indirectly*" that are omitted in the BIT.[67] The Claimants counter that the broad language describing the various assets that may constitute an investment, as well as the inclusion within the definition of a Dutch national in Article 1(b) of an entity controlled by a Dutch national, confirms that indirect investments are protected under the BIT.[68]

73. This objection is redundant for different reasons in respect of each distinct investment.

74. First, in relation to Emergofin's alleged indirect shareholding in ZAlK, the Tribunal has found that Emergofin has not established that it had control over shares in ZAlK until it acquired Velbay on 22 September 2005, and which, in turn, had agreed to purchase 20% of ZAlK's shares on 5 July 2005. By virtue of Emergofin's control over Velbay, Velbay became a Dutch national with an investment in Ukraine pursuant to Article 1(b)(iii) of the BIT and thus appears as a claimant in its own right in these proceedings. There is no question of Velbay holding shares in ZAlK indirectly: throughout the relevant period it was the direct, registered shareholder of ZAlK.[69] Prior to 22 September 2005, as a result of the Tribunal's finding on the lack of evidence of Emergofin's control over shares in ZAlK through the corporate chain depicted above, the question of whether an indirect shareholding can constitute a protected investment in the abstract is moot.

75. Second, in relation to Emergofin's alleged indirect shareholding in ZAT and GQQ, it is clear from the Tribunal's summary of the Claimants' claims (and the section on Miscellaneous Claims) that no claim is being advanced in respect of these alleged investments as of the

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67 R's Counter-Memorial, §§276-284.

68 C's Reply, §§537-543.

69 The Respondent confirmed at the hearing that the "*indirect objection*" does not apply to Velbay as of 22 September 2006 onwards: Transcript D2/P365 ([redacted]).

closure of the hearing. Whether or not those shareholdings are protected by the BIT is therefore moot.[70]

Have the Claimants failed to show that Emergofin had control over its alleged investment in ZAlK or ZAT during the relevant period?

76. The Tribunal has already ruled on the issue of whether Emergofin had control over its alleged investment in ZAlK in the period before Velbay acquired its stakes in ZAlK. The Tribunal's conclusion is that Emergofin did not have control over shares in ZAlK through the corporate chain depicted above.

77. In relation to the alleged investment in ZAT, the Claimants have withdrawn any claim in respect of ZAT and hence this issue is moot.[71]

Have the Claimants failed to show that Velbay was controlled by Emergofin during the relevant period?

78. The Tribunal has already ruled on this issue. Velbay was controlled by Emergofin from 22 September 2005 onwards: in other words, at the point in time at which Emergofin acquired the shares in Velbay, but not before.

Do Velbay's contingent liabilities qualify as an investment?

79. The Claimants submit that Velbay guaranteed intra-group loans made by Judson Trading to ZAlK from 2007 onwards and this qualifies as a "*claim to money*" for the purposes of Article 1(a)(iii) of the BIT.[72] According to the Claimants, those liabilities are in the sum of USD 144,093,906.[73]

80. The Respondent argues that Velbay's guarantee of loans made by Judson Trading to ZAlK is a contingent liability and as such does not qualify as "*claims to money*" or an "*asset*" of Velbay under the BIT.[74]

81. The Claimants responded by asserting that the loans provided by Judson Trading to ZAlK were actually provided on behalf of Velbay and that is the reason they qualify as an

70 The Claimants confirmed at the hearing that they are not pursuing any claim in relation to the Glukhovskiy Quartzite Quarry: Transcript D1/PP151-152 ([redacted].

71 It is not entirely clear whether the claim for moral damage in relation to the raid in ZAT (see C's Memorial, §745(3)) has been withdrawn; in any case the Tribunal finds for the reasons set out below that the claim for moral damages is outwith its jurisdiction or inadmissible.

72 C's Memorial, §§436-438; C's Rejoinder on Jurisdiction, §§104-113.

73 C's Memorial, §437.

74 R's Counter-Memorial, §303.

investment by Velbay.[75] The Respondent countered by claiming that there was no proof of this: the loan documents identify Judson Trading as the "*creditor*" or "*lender*" and Velbay as a "*surety*";[76] and in one loan document, Velbay is not even mentioned.[77] The Respondent further points to [redacted] Witness Statement, in which he states that Velbay acted as a surety for the loans.[78]

82. The Claimants, in their Rejoinder on Jurisdiction, pointed to evidence that was not subsequently contradicted by the Respondent at the hearing, to the effect that the loan agreements in question make clear that the purpose of the loans was to allow Velbay to fulfil its investment obligations under the 2006 ZAlK SPA (under which it became the assignee of the obligations originally entered into by AvtoVAZ-Invest upon the privatization of ZAlK).[79]

83. For instance, the Loan Agreement of 11 May 2009 between ZAlK (the Borrower), Judson Trading (the Lender) and Velbay (the Surety)[80] records in its preamble that:

> In accordance with Agreement of Purchase of PJSC 'ZALK' No. KPP-307 dated 08/02/2001, Velbay Holdings Limited, Cyprus, being assignee of obligations of CJSC 'AVTOVAZ-Invest' under the Agreement, will invest USD 200 mln in modernisation and development of the Combine within five years.

84. The "*[Loan] Facility Purpose*" is then described as:

> Financing of programs of development of PJSC 'ZALK' under investment obligations of the SURETY [i.e. Velbay] and for financing of working capital (purchase of raw materials and supplies, cost of electric power, transport cost, salary payment etc.)

85. What, in the Tribunal's view, puts the matter beyond serious doubt is that the SPFU itself, in its auditing of Velbay's compliance with its investment obligations under the 2006 ZAlK SPA, accepted amounts provided Judson Trading as amounts paid in satisfaction of Velbay's obligations. For instance, the Act of Current Inspection of 27 July-29 July 2010 records that

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75 C's Reply, §533.

76 R's Rejoinder, §297; referring to C-106, Loan agreement between ZAlK, Judson Trading and Velbay No JT-ZAlK/L-0509-384, 11 May 2009; C-107, Loan agreement between ZAlK, Judson Trading and Velbay No JT-ZAlK/L-000-000/01L, 25 November 2009; and C-320, Loan agreement between ZAlK, Judson Trading and Velbay No JT-ZAlK/L-0211-001, 18 February 2011.

77 R's Rejoinder, §297; referring to C-319, Loan agreement between ZAlK, Judson Trading and Velbay No JT-ZAlK/L-0507-78, 21 May 2007.

78 [redacted] §§19, 35; R's Opening Statement Presentation, p46.

79 C's Rejoinder on Jurisdiction, §§109-110.

80 C-106, Loan agreement between ZAlK, Judson Trading and Velbay No JT-ZAlK/L-0509-384, 11 May 2009.

USD 31,500,000 was contributed to ZAlK's working capital from 9 June 2009 until 22 January 2010,[81] which corresponds precisely with the aggregate amount of the loan facility established by the Loan Agreement of 11 May 2009 referred to above.[82]

86. The evidence thus demonstrates that the amounts provided by Judson Trading to ZAlK were amounts paid on behalf of Velbay in satisfaction of its investment obligations under the 2006 ZAlK SPA. Those contributed funds therefore constitute a further investment on the part of Velbay in ZAlK for the purposes of Article 1 of the BIT.

87. The Respondent further criticised the Claimants for failing to advance any claim in respect to this part of its investment,[83] to which the Claimants responded that "*[t]he amounts invested through the Judson Trading Loans form part of the Claimants' overall investment in ZAlK that was unlawfully expropriated by Ukraine*".[84]

88. The Tribunal is satisfied that, for the purposes of jurisdiction, Velbay's investments in ZAlK (i.e. the purchase of shares and the contribution of capital) are sufficiently connected such that a claim advanced in relation to Ukraine's alleged conduct towards ZAlK is capable of encapsulating both types of investments.

Do certain claims advanced by the Claimants fail to meet the notification and negotiation requirement under Article 9 of the BIT?

89. Article 9 of the BIT reads, in relevant part:

> 1. Any dispute between either Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Party shall as far as possible be settled by the parties to the dispute in amicable way.
>
> 2. If such disputes cannot be settled within a period of three months from the date at which either party to the dispute requested amicable settlement, the dispute shall at the request of the national concerned be submitted to an arbitral tribunal.

90. The Respondent says that "*the Claimants did not comply with the notification and negotiation requirements in relation to a number of their claims*"[85] and that the Claimants are submitting

81 C-328, Act of Current Inspection of Fulfilment of the Terms and Conditions of the Agreement of Sale and Purchase of the Stock of Shares of Zaporozhye Alumina & Aluminium Complex, 29 July 2010.

82 C-106, Loan agreement between ZAlK, Judson Trading and Velbay No JT-ZAlK/L-0509-384, 11 May 2009, Clause 2.1.

83 R's Rejoinder, §297, FN 606.

84 C's Rejoinder on Jurisdiction, §113.

85 R's Rejoinder, §299.

different disputes to this Tribunal.[86] But Article 9 is not concerned with "*claims*" but with a "*dispute*". These concepts are far from identical. The classic definition of a "*dispute*" from the PCIJ in *Mavrommatis Palestine Concessions* is "*a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons*".[87] In Article 9 the only indication as to the requisite content of a "*dispute*" is that it must "*concern[] an investment*" of the foreign national in question. A "*dispute*" is a concept that is broader that a "*claim*". An investment treaty claim is founded on a specific legal obligation. A claim crystallizes when conduct attributable to the relevant Contracting Party breaches one of the obligations in the BIT and causes damage to the foreign national's investment. The foreign national may have a dispute with the relevant Contracting Party concerning its investment before a claim actually crystallizes, such as when the foreign national complains about measures that the Contracting Party has declared that it will adopt in the future.

91. The Claimants' "*Notice of Dispute*" filed on 8 December 2015[88] states that a dispute had arisen for the purposes of Article 9 of the BIT and that the three-month period for amicable settlement was triggered as of that date. It refers to Emergofin and Velbay as the "*Entities*" that made an investment in ZAlK, which amounted to a 68.01% shareholding in 2006 and asserts that they "*made substantial investments thereafter*". The Notice of Dispute states that:

> The Ukrainian authorities have interfered with the Entities' peaceful enjoyment of their investment. For instance, the Prosecutor General's Office of Ukraine ("PGO") acting on behalf of the State Property Fund of Ukraine ("SPF") that had approved the acquisition in 2006, brought proceedings before the Ukrainian courts seeking the termination of the share purchase agreement governing the acquisition of the Entities' 68.01% stake in ZAlK and the transfer of that stake back into State ownership.
>
> The Ukrainian courts have ordered the transfer of the 68.01 % stake to State ownership without any compensation for the Entities. By stripping the Entities of this stake and their control over ZAlK in this way, the Ukrainian authorities have destroyed the Entities' investment.[89]

92. It is true that this description of the dispute expressly refers only to one of the claims that have been presented to the Tribunal: the Renationalisation Claim. The Shareholder Interference Claim and the Sanctions Claim are not alluded to in the Notice of Dispute for

86 R's Counter-Memorial, §§318-320.
87 RL-23, *The Mavrommatis Palestine Concessions (Greece v Great Britain)*, PCIJ Rep. Series A. – No 2, Judgment, 30 August 1924, p11.
88 C-25, Notice of Dispute, 8 December 2015.
89 C-25, Notice of Dispute, 8 December 2015.

an obvious reason: the events that are said to have given rise to those claims had not yet occurred at the time the notice was filed.[90] These two claims are not independent "*disputes*" for the purposes of Article 9 for they relate to the same investment and, on the Claimants' case, represent a further escalation in the measures taken by the Ukrainian authorities against that investment. Whether or not the Claimants are right about this is irrelevant at this stage: it is sufficient that there is a clear nexus between the claims that have been advanced in this arbitration and the dispute that was presented in the Notice of Dispute. The Tribunal cannot accept the Respondent's proposition that these three different claims are separate "*disputes*".[91]

93. The purpose of Article 9(1) and (2) is to avoid having to resort to international arbitration at all to resolve the dispute between the parties through notification and then an attempt at amicable settlement. If that has proven to be impossible, and an international arbitration is underway, then it makes sense that all aspects of the dispute should be resolved by the judicial forum that has been created by the parties for that very purpose. There would be no utility in activating separate procedures for amicable settlement of different elements of the dispute in parallel to the international arbitration because if any settlement is to be reached while an arbitration is pending then the negotiators will need to address all the elements of the dispute. Indeed, the possibility of an amicable settlement might be said to be facilitated by the fact that all such elements have hitherto been identified, defined and channelled to a single forum.

94. There is, therefore, no plausible reason for interpreting Article 9 to mean that new claims arising in respect of the same investment and connected with the underlying dispute should be subjected to a distinct notification and amicable settlement procedure under Article 9. There is one dispute even if there are multiple claims arising at different times.

95. It is possible that a new dispute may arise or be raised involving the same claimant and the same respondent State, but relating to a different investment or unrelated to the underlying dispute that had previously been notified and submitted to international arbitration. In such a case it would be appropriate to insist upon a separate procedure for notification and amicable settlement under Article 9 and indeed the submission of that unrelated dispute to the existing tribunal would require the consent of both parties given that the jurisdictional

90 The Miscellaneous Claims are not referred to either but they either arose after the Notice of Dispute or have been withdrawn by the time of the hearing.

91 Transcript D6/P1110 ([redacted]).

mandate in Article 9 extends only to the resolution of a single dispute. If there are multiple disputes between the parties that are unrelated then each party has the right to insist on the constitution of separate tribunals to adjudicate them under the terms of Article 9. This further confirms the importance of the distinction between a dispute and claims arising out of that dispute. If the Shareholder Interference Claim and the Sanctions Claim were properly characterised as independent disputes, then separate tribunals would have to be constituted to determine those disputes pursuant to Article 9 unless all the parties to this arbitration consented to their submission to this Tribunal. Neither party has advanced that thesis and for good reason: this is a case of multiple claims relating to a single dispute.

96. The Respondent has placed particular emphasis on the fact that the Electricity Pricing Claim was not referred to in the Notice of Dispute or, indeed, in the Claimants' subsequent Request for Arbitration, despite the fact that the elements of that claim reach back to 2002 and the claim no doubt arose as it is now pleaded well before those filings were made (i.e. unlike the Shareholder Interference Claim and the Sanctions Claim).

97. The question is whether the factual and legal predicates of the Electricity Pricing Claim are so distinct that it amounts to a separate dispute that is not covered by the Notice of Dispute filed by the Claimants on 8 December 2015.

98. The Tribunal is not persuaded that the Electricity Pricing Claim amounts to a separate dispute. There is no doubt that the claim is directed towards alleged prejudice caused by the Respondent to the Claimants' investment in ZAlK. The Notice of Dispute leaves open the full range of measures that the Claimants describe as having caused prejudice to their investment in ZAlK. Is that lack of precision fatal for the purposes of Article 9?

99. One must not lose sight of the purpose of Article 9(1) and (2). The Notice of Dispute informed the Respondent that there was a dispute concerning the Claimants' investment in ZAlK as a result of the Ukrainian authorities' interference with it. An example of that interference was then provided. It is inconceivable that, if *bona fide* negotiations had then taken place and an amicable settlement had been reached, Ukraine would then have been exposed to a further claim relating to events that had already occurred. In other words, the parties would have identified the particulars of their grievances and would have settled only on the basis of a full and final release of all existing claims.

100. The purpose of Article 9(1) and (2) is not for a claimant to provide the respondent with a draft settlement agreement; it is to inform the respondent about the broad contours of the dispute and to commit to *bona fide* negotiations to try to resolve that dispute so that international arbitration might be avoided. A notice of dispute is not a formal pleading and it is inappropriate for tribunals to be overly prescriptive as to its contents unless the treaty text is more exacting. It marks the starting point of what might be a lengthy process (the parties could be expected to extend the period for negotiations if progress is being made)—and no more than that. It is not the final word on the grievances that need to be addressed for the parties to waive definitively their future recourse to international arbitration.

101. What the Respondent is really complaining about is that the Claimants waited until filing their Memorial to advance the Electricity Pricing Claim. That is a legitimate complaint that raises a much broader question concerning the lack of prescriptive rules of pleading for investment treaty arbitrations. Claimants often modify their case substantially from one pleading to the next and respondents are in turn compelled to answer new iterations of an evolving case; respondents also withhold important elements of their defence until late in the proceedings with similar consequences. Whilst this pattern of conduct can theoretically be penalized by a tribunal in a decision on costs, that step is rarely taken and in any case it is a blunt instrument for dealing with such a pervasive and pernicious problem, which should be a central concern in any reform of the arbitration rules.

102. In the present case, the Claimants' delay in raising the Electricity Pricing Claim until their Memorial was within their rights under Article 46 of the ICSID Convention and it has not prejudiced the Respondent in any material sense in this arbitration.

103. The Respondent also takes issue with the Claimants' performance of the requirement "*as far as possible*" to settle its dispute with Ukraine.[92] The Tribunal notes at the outset that this language in Article 9(1) is directed to *both* parties and obviously it is an obligation of conduct rather than result that gives rise to a limited field of justiciable issues before a tribunal, which is not in a position to conduct an inquiry into each party's sincerity and determination in seeking an amicable settlement and to attribute blame for any failure. In the present case, it appears that the Claimants proposed an in-person meeting at a neutral venue (i.e. outside Ukraine), whereas the Respondent cited bureaucratic and budgetary constraints in declining

92 R's Rejoinder, §320.

that proposal in favour of a telephone or videoconference.[93] In the event, no meeting took place, and each party accuses the other of a lack of willingness to pursue settlement discussions in good faith. The Tribunal must simply record that an attempt at opening settlement discussions was made but the parties failed to make any progress in that direction. Neither party is compelled to expend significant time and resources on negotiations pursuant to Article 9 if the parties individually or collectively assess the prospect of a settlement to be remote or barely conceivable in the circumstances.

104. The Tribunal therefore dismisses this objection.

Are certain claims not capable of violating the BIT even on a prima facie *basis?*

105. The Respondent maintains that three claims advanced by the Claimants do not satisfy a *prima facie* threshold of plausibility for a violation of the BIT and thus should be dismissed for lack of jurisdiction:

a. The Claimants' claim that the initiation of the court case terminating the Privatisation Agreements allegedly violates the FET standard;

b. The Claimants' alleged "full physical security and protection" claims; and

c. The Claimants' claim that the court decisions terminating the Privatisation Agreements allegedly "expropriated the Claimants' 68.01% ZAlK Stake".[94]

106. This objection is redundant at this stage of the proceedings. The assessment that the facts as pleaded by a claimant are *prima facie* capable of constituting a violation of a treaty obligation is undertaken at a preliminary phase of the arbitration in proceedings where issues of jurisdiction/admissibility have been bifurcated from issues of liability. Such an assessment is necessary, in the face of a corresponding objection by a respondent, to ensure that a tribunal does not embark upon the merits phase of the arbitration in respect of claims that are plainly not within its jurisdictional mandate. Embarking upon a merits phase is an affirmative exercise of adjudicative power and thus it is appropriate, at the preliminary phase, to inquire whether there is a sufficient legal basis to ascribe that power to the tribunal where it is contested.

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93 R's Rejoinder, §320; C's Rejoinder on Jurisdiction, §§141-142.

94 R's Rejoinder, §323.

107. In the present case, the Respondent did not request bifurcation. The consequence of this decision is that the Tribunal has been exercising its adjudicative power throughout in directing the parties to plead their claims and defences on the merits and in reaching this juncture at which those claims and defences are ripe for disposal. The parties have thus acquiesced to the Tribunal exercising its adjudicative power in this way and the mischief that the *prima facie* test of jurisdiction is designed to address does not arise.

108. At this stage of the proceedings, at which the claims and defences have been fully pleaded on the merits, there is no utility in conducting a *prima facie* assessment of anything: the claims either succeed or fail on the basis of the evidential record and the submissions on the law and the Tribunal's decision in respect of them will be *res judicata*. A claim dismissed on the merits may also conceivably be a claim that would not have passed the *prima facie* test of jurisdiction but at this juncture that is beside the point for the parties have acquiesced in the final disposal of the claims by the Tribunal.

Does the Tribunal have jurisdiction to award non-material or moral damages?

109. The Claimants have requested that the Respondent be ordered to pay USD 5,000,000 as "*non-material or moral damages*" in addition to any "*material damages*" that are awarded by the Tribunal in the event that the Respondent's liability is upheld.[95] The elements of this claim for damages are described as follows:

> (i) the damages to Claimants and their representatives' reputation due to the numerous criminal investigations abusively initiated by Respondent, including in relation to extremely grave offences such as terrorism or organized crime; and
>
> (ii) the physical and psychological harm suffered by Claimants' representatives in ZAlK's management and shareholders' meetings, who experienced threats but also actual harm to their physical integrity, to their freedom and to their property.[96]

110. The Claimants also add a third element: "*the maliciousness of Respondent's harassment of Claimants' representatives, aimed at preventing Claimants from properly presenting their case in this very arbitration*".[97]

111. The Respondent has objected to the Tribunal's jurisdiction to award non-material or moral damages on the basis that the exclusive object of the investment protection obligations in

95 C's Memorial, §752.
96 C's Memorial, §750.
97 C's Memorial, §751.

the BIT is an investment—the protections do not extend to investors or their representatives.[98] For instance, Article 3(2) of the BIT reads: "*Each Contracting Party shall ensure fair and equitable treatment of the <u>investments</u> of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such <u>investments</u> full physical security and protection*". Furthermore, the dispute resolution clause in Article 9(1) also limits the jurisdiction of a tribunal to disputes "*concerning an <u>investment</u>*".[99]

112. Thus, according to the Respondent, both the Tribunal's jurisdictional mandate and the scope of the substantive obligations are directed to an "*investment*", which is a bundle of material rights.

113. The Claimants maintain that this objection does not relate to the Tribunal's jurisdiction at all;[100] in the alternative, they submit that an award of non-material damages is necessary in order to achieve full reparation for Ukraine's violations of the BIT[101] and that the jurisprudence confirms the power of tribunals to do so in investment treaty arbitrations[102] and in other contexts.[103] In relation to the text of the BIT itself, they place particular emphasis on the wording in Article 3(2) concerning the "*the [operation,] management, maintenance, use, enjoyment or disposal*" of investments and submit that this extends the protection of the BIT beyond material interests.[104]

114. The Tribunal begins its analysis by considering the legal nature of this objection. The formulation of the jurisdictional mandate in Article 9, which refers to a dispute "*concerning an investment*", appears to create a limitation upon a tribunal's power to adjudicate a claim for non-material damages. The claims submitted in the context of a dispute must have a nexus with the investment. This is consistent with the object of protection of each and every investment obligation in the BIT: the object of protection is exclusively an investment; it is not the investor or its representatives. An investment is defined as "*every kind of asset*" with a non-exhaustive list of examples in Article 1 of the BIT. An "*asset*" cannot conceivably be interpreted to encompass the personal rights of someone who owns or control that asset

98 R's Counter-Memorial, §339.
99 R's Counter-Memorial, §339, FN 533. (Emphasis added.)
100 C's Rejoinder on Jurisdiction, §153.
101 C's Rejoinder on Jurisdiction, §§154-155.
102 C's Rejoinder on Jurisdiction, §156.
103 C's Rejoinder on Jurisdiction, §159.
104 C's Rejoinder on Jurisdiction, §157.

(i.e. an investor or representatives of an investor). The Claimants argue that the language of Article 3(2) may suggest otherwise.

115. The right to the "*operation, management, maintenance, use, enjoyment or disposal*" of "*investments*" (replaced by the adverb "*thereof*" in the text of Article 3(2)) are rights attaching to the ownership of an asset comprising an investment. In the civil law tradition, one speaks of the "*triad of ownership*" that includes the right to possess, use and dispose of an asset and this concept appears to be extended in the text of Article 3(2). This text is not directed to the protection of the personhood of the owner but to the protection of the rights *in rem* vested in the owner in respect of an asset.

116. An asset, according to Black's Law Dictionary, can be defined as follows:

> 1. An item that is owned and has value. 2. (pl.) The entries on a balance sheet showing the items of property owned, including cash, inventory, equipment, real estate, accounts receivable, and goodwill. 3. (pl.) All the property of a person (esp. a bankrupt or deceased person) available for paying debts.[105]

117. Whichever of these definitional variations is preferred, it is clear that rights or interests attaching to the personhood of the owner or controller of an asset, such as right to enjoy one's reputation or to be protected against physical or psychological harm, are not encompassed by the concept of an "*asset*" and thus an "*investment*". As an "*investment*" is the object of protection for each of the substantive obligations in the BIT, it follows that, as a matter of substantive law, the scope of the obligations is limited to the protection of the asset(s) comprising the investment. The concept of "*full reparation*" cannot expand the scope of the substantive protection afforded by each obligation. A breach of an investment protection obligation may require full reparation in damages in respect of the harm caused to the asset(s) comprising the investment, but it cannot extend to harm caused to a person or thing outside the field of protection conferred by the investment protection obligation itself.

118. This conclusion is mandated by a good faith interpretation of the text of the substantive obligations in the BIT in accordance with Article 31 of the Vienna Convention. The limitation of a tribunal's jurisdictional mandate to disputes "*concerning an investment*" is consistent with the limited scope of the investment protection obligations: it reinforces the

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105 7th edn, p112.

truism that an arbitral tribunal is not a court of general jurisdiction but rather has a limited mandate to pronounce upon a prescribed range of issues.

119. That leaves the existing jurisprudence. In relation to the investment treaty awards cited by the Claimants, no tribunal has to date considered this question from first principles. Some tribunals[106] appear to have been impressed by the decision of the U.S.-German Mixed Claims Commission in *The Lusitania*. The Commission in that case was vested with jurisdiction to decide claims on behalf of American nationals for losses resulting from "*death or from personal injury or from loss of, or damage to, property, sustained in the sinking of the Lusitania*" (a British ocean liner sunk by a German U-boat in 1915). The Commission found that damages for "*mental suffering*" could be awarded, which is hardly controversial given the references to personal injury and death in the constituent instrument. No tribunal in the investment treaty context has focused on this critical distinction. In other cases, no argument was raised in respect of the tribunal's power to award damages for non-material harm,[107] and in others the point was affirmed without any analysis.[108]

120. The Tribunal concludes that a claim for non-material or moral damages is outwith its jurisdiction given the formulation of the consent to arbitration in Article 9 or, alternatively, is inadmissible in the context of an investment treaty arbitration where the object of the substantive obligation of protection forming the basis of the claim is an investment (in other words the substantive law of the obligation does not permit such a claim). It may be possible in some cases to recover damages based upon evidence of reputational harm to an *investment*, but no such claim has been pleaded here.

121. A final point needs to be made about punitive or exemplary damages in this context. The Claimants in this case have been careful to affirm that they are not seeking punitive or exemplary damages under the guise of moral or non-material damages.[109] At the same time, the Claimants have not advanced any evidence at all to substantiate the harm or the quantification of damages for that alleged harm. Indeed, it appears to be a common

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106 CL-134, *Desert Line Projects v The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008; CL-136, *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Award, 28 March 2011, §§329-332.

107 CL-211, P. Dumberry, S. Cusson, "Wrong Direction: 'Exceptional Circumstances' and Moral Damages in International Investment Arbitration", *The Journal of Damages in International Arbitration*, Vol.1, No 2 (2014), §289.

108 CL-105, *Bernhard von Petzold and others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Award, 28 July 2015, §§920-922. The Claimants have additionally cited but not analysed certain cases arising from UNCLOS and the ECHR: C's Rejoinder on Jurisdiction, §159, FN 254. The Tribunal has examined these cases but does not see their relevance to the issue under discussion.

109 C's Rejoinder on Jurisdiction, §155.

denominator in the cases where claims of moral damages have been made that a round figure of several million dollars is asserted without further elaboration. Upholding claims on this basis is tantamount to awarding punitive or exemplary damages, which an international tribunal has no jurisdiction to do under general principles.[110] All claims for compensatory damages must be founded upon evidence of the harm suffered, whether material or non-material (psychological harm, for instance, is typically proven with the assistance of medical expert evidence in domestic courts). The endorsement of claims for damages that are not grounded upon evidence of actual harm exits the realm of compensatory damages and is instead a mechanism for punishing the respondent according to a tribunal's subjective appreciation of the gravity of its conduct.

E THE ELECTRICITY PRICING CLAIM

E1 Introduction

122. The production of aluminium requires a significant amount of electricity. Typically aluminium smelters have been constructed in close proximity to cheap sources for the production of electricity such as hydroelectric power plants. The cost of electricity is the main component of the cost of producing aluminium. The Claimants' case on its Electricity Pricing Claim is that the Respondent's refusal to reinstate differential electricity prices (which would allow ZAlK's electricity tariff to track the price of aluminium on the London Metal Exchange) or to introduce a market reform to allow industrial operators to negotiate with producers of electricity directly and conclude bilateral agreements, led to ZAlK's economic demise.[111] According to the Claimants, ZAlK could not survive in circumstances where the cost of electricity increased by 94% between 2005 and 2008.[112]

E2 Factual background to the claims

ZAlK's consumption of electricity

123. ZAlK's management had long recognized that significant investment in the modernization of the plant was necessary to increase production (an increase of 50-57% was anticipated) and to cut its electricity consumption (by 17-20%).[113] When ZAlK was privatized and

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110 J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002) p 219.

111 C's Reply, §4.

112 [redacted], §50.

113 R-32, Letter No ИМ-25 from ZAlK to President of Ukraine, 16 February 2000.

AvtoVAZ-Invest acquired its 68.01% stake in 2001, it was observed that, in comparison with modern plants, the consumption by ZAlK's electrolysis units was "*worse than modern performance by 20 to 25%*" and that "*if LME prices were to fall significantly, the Company's products may have a negative rate of profitability*".[114] The key issue was ZAlK's outdated Söderberg smelting technology, which in terms of environmental footprint and energy consumption was inferior to the more advanced pre-baked anode technologies.[115]

Preferential pricing

124. On 28 April 1998, the Cabinet of Ministers of Ukraine ("**CMU**") issued Resolution No 580 "*On the Reduced Energy Tariff for ZAlK*" ("**CMU Resolution No 580**"). This resolution provided for a preferential fixed energy price for ZAlK (USD 0.01 for 1 kW/hour) for the period 1 May 1998 to 1 May 2003.[116] This was later abolished on 16 August 1999.[117] According to the Respondent, ZAlK never actually enjoyed this beneficial fixed tariff because ZAlK did not comply with the payment conditions under the resolution.[118] This appears to be confirmed by contemporaneous documents.[119] Thus the Tribunal rejects the Claimants' assertion in their Memorial[120] that ZAlK benefited from a preferential fixed tariff as of 1998. (The Claimants do not appear to have pursued this point in their Reply.)

Differential pricing

125. On 10 June 2002, the CMU issued Resolution No 795 "*On ensuring the competitiveness of enterprises producing primary aluminium, aluminium alloys and titanium*" ("**CMU Resolution No 795**"). This new regulation linked the price of electricity for ZAlK (as well as for the State Enterprise ZTMK) to the fluctuation of prices for aluminium on the London Metal Exchange.[121] The Claimants describe this as a "*differential*" electricity pricing regime as opposed to a "*preferential*" regime due to this linkage with the prices of the products that ZAlK actually produced.[122] This description is common ground between the parties.

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114 R-43, Concept of Development for ZAlK, prepared by AvtoVAZ-Invest, 2000.
115 [redacted] Expert Report, §9.
116 C-166, Resolution of Cabinet of Ministers of Ukraine No 580, 28 April 1998.
117 C-167, Resolution of Cabinet of Ministers of Ukraine No 1485, 16 August 1999.
118 R's Counter-Memorial, §214.
119 R-29, Letter No 05-211/8-7660 from Department of Material Production Finances to Department of Foreign Debt, 18 May 1999; R-30, Letter No 9/2-2-2545 from Ministry of Industrial Policy of Ukraine to Cabinet of Ministers of Ukraine, 25 October 1999.
120 C's Memorial, §25.
121 C-58, Resolution of Cabinet of Ministers of Ukraine No 795, 10 June 2002.
122 C's Memorial, §38.

126. The stated purposes of CMU Resolution No 795 was to ensure a minimum level of profitability for ZAlK. The National Energy Regulatory Commission ("**NCRE**") was instructed to devise a mechanism to compensate Zaporozhyeoblenergo OJSC (the regional distribution company) for the losses it would incur in supplying ZAlK electricity at the differential rate.[123]

127. Pursuant to CMU Resolution No 795, on 10 July 2012 the Ministry of Industrial Policy issued Order No 312 by which the procedure for calculating electricity prices by NCRE on a monthly basis was established.[124]

128. On 30 July 2002, the NCRE issued Resolution No 833, approving the procedure envisaged by the Ministry of Industrial Policy's Order No 312.[125] The NCRE also issued Resolution No 757, which set forth the mechanism for compensating Zaporozhyeoblenergo for its possible losses.[126] Thereafter, the NCRE issued monthly resolutions setting tariffs for ZAlK, with the first tariff taking effect from 10 August 2002.[127] Zaporozhyeoblenergo then charged ZAlK for consumed electricity on the basis of the tariffs fixed by the NCRE.

129. The NCRE expressed some disquiet about these measure in their Annual Reports. In 2002, the NCRE observed that the tariffs being extended to ZAlK and ZTMK were 30-35% lower than those being charged to other consumers in the same category (Category 1).[128] This led to an additional burden on the wholesale market price of 0.5%, with subsidies to cover Zaporozhyeoblenergo's losses amounting to UAH 46.6 million.[129] The NCRE set itself the following task in 2003: "*stage-by-stage elimination of cross subsidising some consumers at the expense of others by increasing the electricity tariff for the general population to the extent commensurate to the increase of real income and social benefits, and elimination of subsidised tariffs for some industrial consumers with the corresponding reduction in subsidies to energy supplying companies and optimisation of the wholesale electricity market price.*" [130] In its 2003 Report, the NCRE put the annual losses for Zaporozhyeoblenergo due to the supply of electricity to ZAlK and ZTMK at the differential rate at UAH 125 million, which resulted in an increase to the wholesale electricity price of 1%.[131] In 2004, NCRE recorded that Zaporozhyeoblenergo's annual losses due to the

123 C-58, Resolution of Cabinet of Ministers of Ukraine No 795, 10 June 2002.
124 C-168, Order of Ministry of Industrial Policy of Ukraine No 312, 10 July 2002.
125 R-51, NCRE Resolution No 833, 30 July 2002.
126 R-50, NCRE Resolution No 757, 10 July 2002.
127 R-52, NCRE Resolution No 845, 31 July 2002.
128 R-56, Report on activities of NCRE in 2002, approved by NCRE Resolution No 272, 31 March 2003.
129 R-56, Report on activities of NCRE in 2002, approved by NCRE Resolution No 272, 31 March 2003.
130 R-56, Report on activities of NCRE in 2002, approved by NCRE Resolution No 272, 31 March 2003.
131 R-61, Report on activities of NCRE in 2003, approved by NCRE Resolution No 294, 30 March 2004.

supply of electricity to ZAlK and ZTMK at the differential rate amounted to UAH 138 million, which led to an increase of the wholesale market price of 0.75%.[132]

130. CMU Resolution No 795 was repealed on 23 February 2005, along with a large number of other existing resolutions, "*[i]n order to create the equitable basis for the competitive environment and prevent any loss of income and unsound budget expenditure*".[133] It had been identified for repeal in CMU Resolution No 315 "*On the Results of Social Economic Development of Ukraine in 2003 and Implementation Status of the Programme of Activities of the Cabinet of Ministers of Ukraine*" of 11 March 2004.[134]

131. Later, in January 2006, the NCRE explained in a letter to the State Committee for Regulatory Policy that the repeal of CMU Resolution No 795 was enacted "*in execution of the [enumerated] legal acts providing for elimination of cross-subsidisation of electricity consumers*".[135]

132. In order to mitigate the potential hardship to ZAlK as a result of the abolition of CMU Resolution No 795, the NCRE extended Category 1 tariffs to ZAlK,[136] which had the effect of reducing ZAlK's electricity price by 25%.[137] But for this measure, ZAlK would have reverted to a Category 2 consumer after the repeal of CMU Resolution No 795 and thus have been subject to higher electricity prices. This measure remained applicable until 1 January 2010, when ZAlK's level of electricity consumption fell below the threshold for a Category 1 consumer.

Unified pricing

133. On 15 August 2005, the CMU issued Resolution No 745 "*Transition to unified power supply tariffs for consumers*" ("**CMU Resolution No 745**"). Pursuant to this resolution, the NCRE was recommended to apply unified tariffs for electricity sold to each class of consumers as of 1 September 2005.[138]

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132 R-67, Report on activities of NCRE in 2004, approved by NCRE Resolution No 199, 25 March 2005.
133 C-185, Resolution of Cabinet of Ministers of Ukraine No 143, 23 February 2005.
134 R-60, Resolution of Cabinet of Ministers of Ukraine No 315, 11 March 2004.
135 R-71, Letter No 02-30-13/471 from NCRE to State Committee of Ukraine for Regulatory Policy and Entrepreneurship, 31 January 2006.
136 R-68, NCRE Resolution No 493, 30 June 2005.
137 R-87, Letter from NCRE to Ministry of Fuel and Energy of Ukraine, 20 June 2008.
138 C-186, Resolution of Cabinet of Ministers of Ukraine, No 745, 15 August 2005.

The timing of the Claimants' investment in ZAlK

134. It will be recalled that the first time that the Claimants can establish a protected investment in ZAlK is on 22 September 2005. At that date Emergofin acquired the shares in (and thus control over) Velbay such that Velbay, which by that time had a 20% shareholding in ZAlK, become a Dutch national with a protected investment in Ukraine under the BIT. It follows that, at the date of the investment, ZAlK was not benefitting from differential electricity pricing (it had been repealed on 23 February 2005) and the Claimants would have been on notice that the pricing regime had changed on at least three occasions (moving from preferential pricing, to differential pricing, to unified pricing), with the repeal of CMU Resolution No 795 being anticipated as early as 11 March 2004 in CMU Resolution No 315 "*On the Results of Social Economic Development of Ukraine in 2003 and Implementation Status of the Programme of Activities of the Cabinet of Ministers of Ukraine*".[139]

The Claimants lobby for a reinstatement of differential pricing for ZAlK

135. The Claimants say that they "*alerted the Ukrainian authorities about the risks posed by the abolition of the 2002 Differential Electricity Pricing Regime for ZAlK*" immediately after the abolition of CMU Resolution No 795. They rely on the Report of [redacted] on "*Development of the Aluminium Industry of Ukraine*", dated 14 November 2005.[140] It is not entirely clear who instructed and paid for this consulting work. The Report is "*prepared for the Government of Ukraine*" but the project itself was "*initiated*" by [redacted]'s "*client*", who remains unnamed. A slide presentation dated the same day refers to "*SUAL Holding*" on the front page and that is likely to be the "*client*" in question.[141] The main thrust of [redacted]'s report is that the abolition of differential electricity pricing had a very significant impact on ZAlK's operational efficiency.

136. ZAlK and SUAL also made direct representations to the Government of Ukraine about the impact of the abolition of differential pricing on ZAlK. To this end, ZAlK's [redacted] wrote to [redacted] on 6 April 2005,[142] and SUAL's [redacted] wrote

139 R-60, Resolution of Cabinet of Ministers of Ukraine No 315, 11 March 2004.

140 C's Memorial, §§133-134.

141 C-151, [redacted], Powerpoint presentation, 14 November 2005.

142 [redacted].

to the President of Ukraine on 28 July 2005.[143] In response, the President of Ukraine requested on 14 September 2005 that various state officials "*consider and make decision [sic] on the possibility of the setting up of the electricity tariff formation mechanism with due account for the specific features of the aluminium production*".[144] The responsible state officials acted upon this instruction and various materials were prepared on the subject of changing the regime for electricity pricing for energy-intensive industries.[145]

137. In furtherance to the instruction of the President, the Prime Minister established a working group in September/October 2005 with the NCRE, the Ministry of Energy and the Ministry of Industrial Policy.[146] The first meeting between this working group and ZAlK appears to have taken place on 19 October 2005.[147]

138. According to the Claimants, on 7 November 2005, the Minister of the Economy, A.P. Yatsenyuk, send a draft resolution calling for the reinstatement of differential pricing for the production of aluminium.[148] The only record of this document is in a summary compiled by ZAlK.[149] Nonetheless, ZAlK's letters to the [redacted] and to the Minister of Industrial Policy of Ukraine of 26 December 2005 make reference to that letter.[150] The Claimants have asked the Tribunal to draw an adverse inference from the non-disclosure of the aforementioned draft resolution.[151] The Tribunal is prepared to assume that the Minister of the Economy did call

143 This is recorded in a registry of documents: C-188, ZAlK, Registry of documents regarding the differential energy tariffs provided to the CMU, committees of the VRU, the NSDCU, and the MoE, the Ministry of Industrial Affairs, the Ministry of Energy and the NCRE, 11 January 2006.

144 C-188, ZAlK, Registry of documents regarding the differential energy tariffs provided to the CMU, committees of the VRU, the NSDCU, and the MoE, the Ministry of Industrial Affairs, the Ministry of Energy and the NCRE, 11 January 2006.

145 C-188, ZAlK, Registry of documents regarding the differential energy tariffs provided to the CMU, committees of the VRU, the NSDCU, and the MoE, the Ministry of Industrial Affairs, the Ministry of Energy and the NCRE, 11 January 2006.

146 C-188, ZAlK, Registry of documents regarding the differential energy tariffs provided to the CMU, committees of the VRU, the NSDCU, and the MoE, the Ministry of Industrial Affairs, the Ministry of Energy and the NCRE, 11 January 2006.

147 C-188, ZAlK, Registry of documents regarding the differential energy tariffs provided to the CMU, committees of the VRU, the NSDCU, and the MoE, the Ministry of Industrial Affairs, the Ministry of Energy and the NCRE, 11 January 2006.

148 C's Memorial, §149; C-188, ZAlK, Registry of documents regarding the differential energy tariffs provided to the CMU, committees of the VRU, the NSDCU, and the MoE, the Ministry of Industrial Affairs, the Ministry of Energy and the NCRE, 11 January 2006.

149 C-188, ZAlK, Registry of documents regarding the differential energy tariffs provided to the CMU, committees of the VRU, the NSDCU, and the MoE, the Ministry of Industrial Affairs, the Ministry of Energy and the NCRE, 11 January 2006.

150 [redacted].

151 Claimants' Opening Presentation, Slides Nos 60 and 61.

for the reinstatement of differential pricing for the production of aluminium. For the reasons that follow, however, this is not material to its ultimate decision on liability.

139. A further meeting was held on 5 June 2006 between, *inter alia*, representatives of the Ministry of Industrial Policy and ZAlK.[152] One of the proposals was "*[t]o consider expedient carrying out further work towards the establishment of economically justified tariffs for the production of primary aluminium and its alloys for [ZAlK]*".[153]

140. The Claimants maintain that ZAlK's financial situation became precarious during this time due to the cost of electricity. On 14 December 2007, the [redacted] wrote to ZAlK in the following terms:

> At the instruction of the President of Ukraine, we are hereby informing you that your letter No. 011-282 dated 03/12/07 regarding establishment of an economically justified electricity rate for Open Joint-Stock Company Zaporozhye Aluminium Smelter has been considered.
>
> We share your concerns and believe it to be unacceptable that an enterprise having strategic importance to the economy of the State is being destroyed.
>
> The President of Ukraine requested [the] Prime Minister of Ukraine to intervene and resolve the situation, and instructed that you be notified of the results.[154]

141. On 7 February 2008, ZAlK wrote to certain Deputies of the Ukrainian Parliament (Verkhovna Rada), informing them of recent developments. The following description was given of a meeting that took place on 31 January 2008:

> On 31 January, a meeting was held at the initiative of the First Vice Prime Minister, Mr O.V. Turchynov, in the Ministry of Fuel and Energy, with the participation of representatives of the Ministry of Industrial Policy of Ukraine, Ministry of Fuel and Energy of Ukraine, National Energy Regulation Commission of Ukraine, OJSC ZAlK and enterprise's principal shareholder UC (United Company) RUSAL, to decide on the formulation of electricity tariffs for OJSC ZAlK. Unfortunately, the management of the Ministry of Fuel and Energy represented by the Minister of Fuel and Energy, Mr Yu.V. Prodan, took a special position based on the meeting results not to grant special tariffs to the enterprise

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152 C-76, Minutes of the meeting of the Ministry of Industrial Policy of Ukraine regarding further development of ZAlK, 5 June 2006.

153 C-76, Minutes of the meeting of the Ministry of Industrial Policy of Ukraine regarding further development of ZAlK, 5 June 2006.

154 [redacted].

> and proposed that the issue be resolved by making amendments to the Law of Ukraine On Electric Power Industry.[155]

142. On 7 March 2008, the NCRE wrote to the Zaporozhye Regional State Administration and City Council in relation to ZAlK's electricity tariff and stated that:

> Setting the electricity tariff below the economically reasonable level of the single retail tariff would give rise to the need to compensate for the losses of Zaporozhyeoblenergo OJSC by including them in the wholesale market price (the monthly amount of subsidy certificates being approximately UAH 30 mln). In return, this would result in increasing the wholesale market price by approximately 1.5%.[156]

143. On 24 March 2008, the Ministry of Economy wrote to members of the Zaporozhia Regional Council who had raised an issue concerning the abolition of differential pricing for ZAlK. The Ministry explained the following:

> If the retail electricity tariff is set for ZAlK OJSC at a level lower than the single retail electricity tariff, this would result again in the need to compensate for the losses suffered by energy suppliers from supplying electricity to ZAlK OJSC through a mechanism of subsidies (according to the National Commission for Regulation of the Electricity Sector the monthly amount of subsidy certificates would be approximately UAH 30 million, excluding VAT), so that the wholesale market price would rise additionally each month by more than 1%, and the respective additional increase in the common retail tariff would reach 0.9 percent.[157]

144. ZAlK wrote a further letter to the Prime Minister of Ukraine, Yulia Tymoshenko, on 11 June 2008, alerting her to the precarious financial situation of ZAlK and the possibility that it would have to shut down its operations as a result of what it considered to be unreasonable electricity prices that did not take "*into account the world practice of the electricity price formation for aluminium smelters*".[158] At some point thereafter the Prime Minister gave an instruction to establish another working group to consider this issue. A meeting was held on 14 August 2008.[159] Representatives of ZAlK, the Ministry of Industrial Policy, the Ministry of Economy, the Ministry of Energy, the NCRE, the SPFU, the State Administration of Zaporozhye Region, State Enterprise for the Production of Aluminium and Packaging

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155 C-194, Letter No 011-147 from [redacted] to the Members of Parliament from Zaporozhye Region, 7 February 2008.

156 R-84, Letter No 1458/09/17-08 from NCRE to Zaporozhye Regional State Administration and Zaporozhye City Council, 7 March 2008.

157 R-85, Letter No 43-24/128 from Ministry of Economy of Ukraine to Zaporozhye Regional Council, 24 March 2008.

158 C-164, Letter No 011-650 [redacted] to Y. V. Tymoshenko (Prime Minister of Ukraine), 11 June 2008.

159 C-206, Minutes of the meeting of the working group, 14 August 2008.

Materials, ZTMK and State Enterprise Ukrainian Industrial External Expertise attended the meeting. The minutes of the meeting record the following:

> Representatives of the Ministry of Fuel and Energy and the NERC noted that current energy laws in Ukraine do not allow use of differential pricing, and that nuclear power facilities are slated to make the switch to direct contracting only in 2010. Any decision proposed by the task force and supported by the Ukrainian Government must be codified by law.[160]

145. The Deputy Minister of Economy noted that "*[t]he issue of electricity rates for PJSC ZAlK must be resolved as soon as possible, and therefore the Ministry of Economy may support the implementation of a differential energy rate for the concerned plants*" subject to certain enumerated conditions.[161]

146. The situation at ZAlK, in the meantime, continued to deteriorate. On 5 September 2008, ZAlK wrote to the Prime Minister of Ukraine warning the Government that ZAlK could be forced to stop working within one month.[162]

147. On 14 October 2008, the CMU adopted Resolution No 925, recommending that the NCRE freeze electricity tariffs at October 2008 rates for a number of enterprises in the metallurgical and chemical sectors (including ZAlK).[163] When that measure lapsed in April 2010, the tariff was frozen at November 2009 rates from May 2010 until 30 June 2010.[164] The NCRE later estimated that this measure for mining and metallurgical enterprises increased the wholesale market price by almost 30%, amounting to a cross-subsidy by other consumers of UAH 1.533 billion.[165]

The Cabinet of Ministers issues Instruction No 1566-p

148. On 10 December 2008, the CMU issued Instruction No 1566-p "*Issues of Primary-Aluminium and Titanium-Sponge Enterprises during a Financial and Economic Crisis*"[166] ("**CMU Instruction No 1566-p**"). The first two paragraphs of this instruction provide as follows:

> 1. The Ministry of Industrial Policy jointly with the Ministry of Economy, Ministry of Fuel and Power-Generating Industry, and National Electrical Power-Generating Regulatory Commission (NEPGRC) shall approve

160 C-206, Minutes of the meeting of the working group, 14 August 2008.
161 C-206, Minutes of the meeting of the working group, 14 August 2008.
162 C-208, Letter No 011-922 from [redacted] to Y. V. Timoshenko (Prime Minister of Ukraine), 5 September 2008.
163 R-90, Resolution of Cabinet of Ministers of Ukraine No 925, 14 October 2008.
164 R-102, Resolution of Cabinet of Ministers of Ukraine No 289, 24 March 2010; R-105, NCRE Resolution No 537, 13 May 2010.
165 R-141, Letter No 9/26/47-18 from NCRE to Ministry of Justice of Ukraine, 7 March 2018.
166 C-103, amended, Resolution of Cabinet of Ministers of Ukraine No 1566-p, 10 December 2008.

> within two weeks a procedure for calculating retail prices of the electricity used by enterprises producing primary aluminium for process needs only, depending on fluctuations in the prices of the products of the above enterprises in the global market.
>
> 2. The NEPGRC shall set forth a compensatory mechanism for possible losses of energy suppliers related to electricity supply to the enterprises producing primary aluminium and titanium sponge at a price calculated in accordance with the procedure specified in clause 1 hereof.

149. The only two companies covered by this instruction were ZAlK and ZTMK (which produces titanium sponge). Together with CMU Instruction No 1566-p, on 12 December 2008, the President of Ukraine, V.A. Yushchenko, also submitted the Draft Law "*On Amendments to Article 17 of the Law of Ukraine 'On Electricity'*" to the Verkhovna Rada and described it as "*urgent for extraordinary consideration by the Verkhovna Rada of Ukraine*"[167] The Draft Law provided that retail electrical energy prices for nonferrous metal industry enterprises (which included ZAlK) would be determined on the basis of the fluctuations in prices for their products on the world market.[168]

150. The Explanatory Note to the Draft Law gives the following summary of the purpose of the proposed amendments to the Law of Ukraine "*On Electricity*":

> The Draft Law was developed to restore differential tariffs for electricity used for technological needs by plants with a high energy consumption, based on the world practices for these plants' products, while ensuring a minimum level of their production profitability.
>
> First, it concerns non-ferrous metallurgy plants; in particular, OJSC Zaporozhye Industrial Aluminium Plant (ZALK) and the state owned company Zaporozhye Titanium and Magnesium Combine (ZTMK).
>
> OJSC ZALK is the only producer of primary aluminium and technical silicon, and the Zaporizhzhia Titanium and Magnesium Combine produces titanium semi-finished products. The feature of these plan[t]s is their high energy intensity and sharp fluctuations of the world prices for their products.
>
> From June 2002 to February 2005, the Cabinet of Ministers of Ukraine adopted an appropriate procedure for establishing electricity prices for such entities.
>
> Comparing the dynamics of the price changes on the above companies' products, during the 9 months of the current year, as compared to the

167 C-220, Letter from V. A. Yuschenko (President of Ukraine) to the Verkhovna Rada of Ukraine, 12 December 2008.

168 C-219, Draft Law No 3475 "*On Amendments to Article 17 of the Law of Ukraine On Electricity*", 12 December 2008.

> 2005 level, the price for aluminium has increased by 49.5% and for electricity - by 91.4%. The share of electricity in the cost of production of aluminium increased over the corresponding period from 39.5% to 45.5%. As the result, the production of technical silicon was stopped in 2006 with the annual production of 8,500 tonnes.
>
> From October 2007 to September 2008, OJSC ZALK had a negative cumulative financial result due to the current electricity price formation system. In 2007, the tariff for OJSC ZALK amounted to 5.2 cents per kWh. At this time, according to the analytical report of the state owned company Ukrainian Industry Expertise (Ukrpromzovnishekspertiza), the electricity tariffs for the aluminium industry in Norway amounted to 3.7 cents per kWh, in the USA - 3.3, in Canada - 3.2, in Russia – 2[.]9.
>
> Under such conditions, manufacturers of primary aluminium, aluminium alloys and titanium were impeded to compete with foreign manufacturers of similar products having considerably lower tariffs for electricity.
>
> The worldwide practice shows that aluminium producers may purchase electricity at the prices ensuring the profitability of these generating companies and primary aluminium producers allowing to address budget issues and provide social guarantees to employees.
>
> Today, the automotive, power, aircraft building, packaging, cable and space industries of Ukraine depend on the aluminium industry.[169]

151. Neither CMU Instruction No 1566-p, nor the Draft Law, was ever implemented.

152. The Tribunal has been presented with a document entitled "*Conclusion on the Draft Law of Ukraine 'On Amendments to Clause 17 of the Law of Ukraine 'On Electricity''*", which appears to have been drafted by a parliamentary committee (the "*general conclusion*" of the document calls for the rejection of the Draft Law "*according to the results of the consideration in the first reading*"). A reason provided for this rejection was that the Draft Law envisaged the allocation of subsidies to specific companies and thus raised the possibility of difficulties under the WTO Agreement on Subsidies and Countervailing Measures:

> In accordance with the WTO Agreement, targeted subsidies provided by a WTO member may cause other WTO members' imposition of restrictive anti-subsidy measures, if these subsidies have a negative impact on the economy of other WTO members.
>
> In this regard, we draw attention to the fact that the documents accompanying the Draft do not provide sufficient justification in favour

169 C-221, Explanatory note on the Draft Law No 3475, 12 December 2008.

> of the fact that the practical implementation of its provisions would not cause any foreign countries' application of these anti-subsidy measures.[170]

153. On 12 January 2009, ZAlK wrote to the Ministry of Industrial Policy with a model for differential electricity tariffs for ZAlK, which included an average production profitability of 7.5%.[171]

154. The Ministry of Industrial Policy enacted Procedure No 126 "*On Confirmation of the Guidelines for Retail Pricing of Electricity Used by Titanium Sponge Production Facilities for Process Needs*" on 16 February 2009. This applied to ZTMK only.[172]

155. The Ministry of Industrial Policy stated in its letter to the CMU on 9 February 2009 that it was about to approve Procedure No 126 in relation to ZTMK and, in a hand-written note on the latter, explained the reason for this:

> Considering the state status of State enterprise [ZTMK], the Ministry of Industrial Policy of Ukraine took the decision to approve first of all the Procedure for SE ZTMK.[173]

156. The Claimants say that this amounts to discrimination, and the Tribunal will return to that allegation in due course. It is necessary to record, however, that the same letter goes on to state:

> The part of the Procedure concerning open joint-stock company Zaporozhye Alumina and Aluminium Complex [i.e. ZAlK] is processed by us jointly with NCRE without delay.[174]

157. The Ministry of Industrial Policy thereafter prepared a draft procedure for ZAlK as it had undertaken to do. The draft that was ultimately circulated to the various ministries and state organs concerned was dated 9 June 2009.[175] The Respondent has not been able to locate a copy of the draft procedure.[176]

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170 C-222, Conclusion on the Draft Law No 3475 "*On Amendments to Article 17 of the Law of Ukraine On Electricity*", 12 December 2008.

171 C-391. Letter No. 011-10 from [redacted] to V.S. Novitskiy (Minister of Industrial Policy of Ukraine), 12 January 2009.

172 C-105, Procedure No 126 "*On Confirmation of the Guidelines for Retail Pricing of Electricity Used by Titanium Sponge Production Facilities for Process Needs*", 16 February 2009.

173 C-223, Letter No 9/7-1-171 from V. Nemilostyvyi (Ministry of Industrial Policy of Ukraine) to the Cabinet of Ministers of Ukraine, 9 February 2009.

174 C-223, Letter No 9/7-1-171 from V. Nemilostyvyi (Ministry of Industrial Policy of Ukraine) to the Cabinet of Ministers of Ukraine, 9 February 2009.

175 Referred to in C-225, Letter No 01/13-0808 from Yu. Prodan (MFEU) to the Ministry of Industrial Policy of Ukraine, 10 July 2009.

176 R's Rejoinder, §93.

158. The Minister of Fuel and Energy, Mr Prodan, provided his comments on the draft procedure on 10 July 2009 to the Ministry of Industrial Policy. First, he stated that the draft did "*not contain the grounds for the introduction of the minimal tariff*". Second, one of the conditions for the application of wholesale tariffs under the draft was the absence of debt, however, ZAlK had a debt to Zaporozhyeoblenergo. Third, the provision of a subsidy to certain consumers like ZAlK prejudiced the energy generating companies, who were already in a very precarious situation. According to the Minister, November 2008 it was no longer possible for the National Commission of Electric Power Industry to fix tariffs to compensate for losses arising from the supply of energy to subsidised consumers; thus: "*The issue of establishing discounted fares for electricity to certain categories of consumers must be solved prudently, taking into account their impact on the end result of activity of energy enterprises.*" The letter concluded by saying that the Ministry of Fuel and Energy did not approve the draft procedure.[177]

159. Also on 10 July 2009, the Ministry of Industrial Policy of Ukraine noted in a letter that the NCRE had only approved the draft procedure for 25% of the total aluminium production volume at ZAlK due to "*the impossibility of compensation in full for the losses that are likely to be incurred by regional electricity distribution companies as a result of electricity supplies to the enterprise at the price set according to the Procedure*".[178]

160. The Ministry of Economy, in contrast, communicated its approval of the draft procedure to ZAlK on 25 September 2009.[179]

161. The NCRE, on 21 October 2009, wrote to the Ministry of Fuel and Energy and noted that the draft procedure had not yet been approved and that the NCRE could not endorse a differential electricity tariff for ZAlK until the procedure had been approved. The NCRE also noted that it had approved the "*Order o[n] Compensating Losses of Zaporozhyeoblenergo OJSC from Supply of Electric Power to Enterprises which Manufacture Primary Aluminium and Sponge Titanium*".[180] The Claimants maintain that this letter evidences NCRE's approval of the draft procedure but that is not reflected in the document itself.[181]

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177 C-225, Letter No 01/13-0808 from Yu. Prodan (MFEU) to the Ministry of Industrial Policy of Ukraine, 10 July 2009.

178 R-100, Letter No 14/6-2-1252 from Ministry of Industrial Policy of Ukraine to Cabinet of Ministers of Ukraine, 10 July 2009.

179 C-226, Letter No 3701-25/662 from the MEU to [redacted] 25 September 2009.

180 C-227, Letter No 6959/09/17-09 from [redacted] (NCRE) to the MFEU, 21 October 2009; C-228, NCRE Resolution No 279, 5 March 2009.

181 C's Memorial, §192.

162. Another inter-ministerial working group was formed in 2010 to consider the issue of ZAlK's electricity pricing.

163. A meeting took place on 1 April 2010 between representatives of the Ministry of Industrial Policy, the Zaporozhye Region State Administration, ZTMK and ZAlK. [redacted] stating:

> [redacted] of ZAlK OJSC, also supported the need to implement urgently the differentiated tariffs. Moreover, he noted that bringing into force the Procedure for calculating electricity tariffs for enterprises did not solve the problem, but was a temporary measure. In order to resolve the issues, it is necessary to initiate amendments to the Law of Ukraine "On Electricity".[182]

164. [redacted] wrote to the Prime Minister on 17 August 2010 with reference to a meeting that took place on 14 July 2010. He noted that the NCRE and the Ministry of Finance did not favour the adoption of a differential tariff for ZAlK.[183] [redacted] made a number of proposals which he explained would lead to a level of profitability of 10% for ZAlK.[184]

165. On 21 February 2011, the NCRE wrote to the CMU stating that it could not agree with the original proposal for ZAlK's electricity tariff that would be "*less than half the wholesale market price*". The NCRE instead proposed a model entailing the "*loss-free operation of ZAlK*" by fixing the tariff at the level of Category 1 consumers with a 10% discount. Apparently ZAlK did not accept this model.[185]

166. Another meeting took place with ZAlK on 25 March 2011. The minutes of that meeting record the following:

> Head of NCRE Department [redacted] informed the participants that the Commission had developed an economic model to recover the Company by using an efficient marketing and raw material supplier selection policy, and by setting the electricity rate for the Company at the level of Voltage Type I less 10 percent.
>
> However, OJSC ZAlK was not content with said terms.

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182 R-103, Minutes of meeting on resolving problems and ensuring sustainable operations of enterprises engaged in production of primary aluminium and titanium sponge, 1 April 2010.

183 C-232, Letter No 01-20-32/10 from [redacted] to N. Ya. Azarov (Prime Minister of Ukraine), 17 August 2010.

184 C-232, Letter No 01-20-32/10 from [redacted] to N. Ya. Azarov (Prime Minister of Ukraine), 17 August 2010.

185 R-111, Letter No 1203/09/17-11 from NCRE to Cabinet of Ministers of Ukraine, 21 February 2011.

> Taking into account the above, the NCRE suggested that the Company should develop and implement an innovation and investment project using up-to-date energy efficiency technologies, which may be a condition to set a reduced rate for electricity by making amendments to the Law of Ukraine "On the Electric Power Industry".
>
> The representative of the Ministry of Fuel and Energy informed the participants that it is technically possible to supply power to OJSC ZAlK at the rate of DP NAEK Energoatom.
>
> [redacted] of OJSC ZAlK [redacted] stressed the necessity to set the reduced electricity rate for the company and accepted the suggestion of the meeting participants to analyse the economic efficiency of the fulfilment of the required conditions (the development of the primary aluminium processing process, the launching of foil rolling works, the repayment of the loan taken against guarantees of the Government to purchase foil rolling equipment).[186]

167. The Claimants now maintain that the proposals made at this meeting were "*unfair and arbitrary*"[187] but the minutes paint a different picture of what appears to be one constructive proposal being declined by ZAlK and another accepted by ZAlK as worth exploring further.

168. On 18 March 2011, the Ministry of Economy formulated another proposal, which would have required ZAlK to agree to invest in energy-saving technologies.[188]

169. On 25 March 2011, another meeting took place to discuss ZAlK's electricity pricing at which a number of further proposals were made.[189] The Claimants describe these proposals by the authorities as "*constructive*".[190]

170. On 26 October 2011, the CME repealed CMU Instruction No 1566-p for both ZAlK and ZTMK.[191] One of the reasons for the repeal was given as "*taking of actions to carry out the economic reforms under 'Electric Energy Sector' direction and facilitate elimination [of] cross-subsidisation and step-by-step establishment of economically justified electricity tariffs for industrial consumers*".[192]

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186 C-233, Minutes of the working group meeting on examination of problematic issues of the operation of OJSC ZAlK, 25 March 2011.

187 C's Memorial, §201.

188 R-5, Letter No 3701-25/81 from Ministry of Economy of Ukraine to ZAlK, 18 March 2011.

189 C-233, Minutes of the working group meeting on examination of problematic issues of the operation of OJSC ZAlK, 25 March 2011.

190 C's Reply, §331.

191 R-114, Instruction of Cabinet of Ministers of Ukraine "*On Repeal of Certain Instructions of the Cabinet of Ministers of Ukraine*", No 1063-p, 26 October 2011.

192 R-116, Explanatory Note to Draft Instruction of Cabinet of Ministers of Ukraine "*On Repeal of Certain Instructions of the Cabinet of Ministers of Ukraine*", 2011.

171. The Respondent maintains that the global demand for aluminium by that stage had increased rapidly such that prices had returned to pre-financial crisis levels by the first quarter of 2011.[193] This appears to be confirmed by the data[194] as well as by RUSAL's annual report for 2010.[195]

E3 Claim for breach of Article 3(2) of the BIT for failure to apply differential electricity pricing to ZAlK

172. Article 3(2) of the BIT prescribes the Respondent's obligations to accord FET to the Claimants' investment and "*not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal*" of their investment.

173. The Claimants' case on the Respondent's breach of Article 3(2) due to its failure to apply differential electricity pricing to ZAlK breaks down into four elements:

173.1. It contravened the obligation as part of the FET standard "*to ensure a predictable and stable legal framework for Claimants' investment*".[196] According to the Claimants, CMU Resolution No 795, which envisaged differential pricing correlated to the price of aluminium products on the London Metal Exchange, provided a predictable and stable regime,[197] whereas after its abolition in 2005, "*ZAlK was subject to the vagaries of the electricity market and faced increasing electricity prices over the coming years with no correlation to the price for aluminium*";[198]

173.2. "*The abolition of differential pricing under CMU Resolution No. 795 […] was arbitrary*";[199]

173.3. "*[The] failure to implement CMU Instruction No.* [1566]*-p to ZAlK was arbitrary and discriminatory*";[200] the Respondent failed to implement CMU Resolution No 1566-p in respect of ZAlK, despite that fact that it was a mandatory instruction to the relevant Ukrainian state authorities;[201] the Respondent discriminated against ZAlK by adopting differential pricing for ZTMK in Procedure No 126 pursuant to CMU Resolution No

193 R's Rejoinder, §101.
194 R-260, Demand and Supply Data, Bloomberg, 7 January 2020.
195 [redacted]-13, pp11-12.
196 C's Memorial, §583.
197 C's Memorial, §586.
198 C's Memorial, §588.
199 C's Reply, §681.
200 C's Reply, §686.
201 C's Memorial, §§595-596.

1566-p and failing to do so for ZAlK, while at the same time imposing conditions on ZAlK that were not demanded of ZTMK;[202]

173.4. In their Reply, the Claimants raised a fourth element which was that they were entitled to rely on a "*promise*" or "*commitment*" to liberalise the electricity market that would permit ZAlK to negotiate electricity contracts directly with suppliers, failing which they were entitled to expect a continuation of differential pricing.[203]

174. Each of these elements of the claim for a breach of Article 3(2) of the BIT will now be considered in turn.

First claim: failure to ensure a predictable and stable legal framework for the Claimants' investment

175. The Claimants argue that "*[i]t is uncontroversial that the stability, predictability, and consistency of the host State's legal order is a component of the fair and equitable treatment standard*".[204] The Tribunal does not agree.

176. The obligation to accord fair and equitable treatment creates a regime of fault-based liability in respect of damage caused to foreign investments by the exercise of sovereign powers. The abuse of sovereign power by acting in an arbitrary or discriminatory manner fits within this paradigm, as does the failure to accord fundamental rights of due process. The same can be said for breach of legitimate expectations. The element of fault enters the analysis of legitimate expectations because even if an investor's expectation is legitimate and has been disappointed, it is still necessary to inquire as to whether the proper balance has been struck between the public interest being pursued by the state's measure as against the unfairness caused to the investor. (That is a factor taken into consideration in all systems of law recognising the concept of legitimate expectations and reliance upon that concept in international investment law could only be justified on the basis that it is a general principle of law.)

177. The concept of legitimate expectations is no doubt inspired by general notions of good governance, and transparency, predictability and consistency feature prominently among those. But it is one thing to create a cause of action with compensatory consequences in law for the breach of an objective standard, and it is quite another to identify the abstract

202 C's Memorial, §§597-598.
203 C's Reply, §§28, 57, 74-76, 77, 246, 679, 680, 699.
204 C's Memorial, §559.

ideas that justify the existence of that standard in the first place. Those abstract ideas do not, on their own account, supply a legal foundation for imposing a secondary obligation upon a state to pay compensation.

178. Another way of putting this point is simply to ask how a threshold for wrongful conduct in the form of non-transparent, non-predictable or inconsistent acts or omissions might be elaborated? No tribunal has ever offered a structured or principled account of how liability is to be assessed by reference to these ideals of good governance. It cannot simply be a case of we know it when we see it. What is actionable non-transparent conduct? How is a causal link to be established between that non-transparent conduct and damage to the investment?

179. Apart from these methodological problems that stem from transforming abstract ideals of good governance into grounds of fault-based liability, there is also the question of the normative source of an obligation of transparency, predictability and consistency that is actionable in damages. It has never been suggested that this obligation forms part of customary international law. Nor does such a cause of action exist in other legal systems and thus it cannot possibly have the status of a general principle of law that can inform the interpretation of the FET standard (unlike the concept of legitimate expectations). Nor are these ideals of good governance commonly found in the textual formulation of the FET standard in investment treaties (and certainly do not appear in Article 3(2) of the BIT in this case).

180. Some tribunals have inferred that the FET standard includes an obligation of transparency, predictability and consistency from the preambular statement in the relevant investment treaty.[205] For instance, the preamble to the Argentina/USA BIT reads, in part: "*Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources[…]*". It is fallacious, however, to assert that because the FET standard is desirable in order to maintain a stable framework for investment, the concept of an "*unstable framework for investment*" becomes an actionable ground for liability under the FET standard. Following the same logic, if a state failed to demonstrate "*maximum effective use of economic resources*" that would also be a breach of the FET standard. More generally, the existence of all the obligations of investment protection in an investment treaty contribute to the reduction of sovereign risk and therefore to the

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205 CL-75, *Occidental Exploration and Production Company v The Republic of Ecuador*, LCIA Case No UN3467, Final Award, 1 July 2004, §183; CL-81, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006, §124.

encouragement of foreign investments; this idea is reflected in another preambular statement in the same BIT: "*[r]ecognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties*". But that does not mean that the non-stimulation of the flow of private capital is actionable under the same obligations of investment protection, any more than it means that any harm caused by the actualization of sovereign risk is compensable in damages (that would be the equivalent of an insurance policy).

181. These preambular statements are statements of policy. There are not statements of legal principle. They are not designed or intended to supply elements of a cause of action for damages against the host state. They are representations of the economic advantages that might be expected to flow from adherence to the rule of law in the treatment of foreign investments.

182. In the Netherlands/Ukraine BIT under consideration in this case, the relevant preambular statement reads:

> Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment of investment on reciprocal basis will serve this aim.

183. This is a statement of policy setting out the expected benefits of agreeing to accord fair and equitable treatment to covered investments. It cannot be read as suggesting that the failure to stimulate flow of capital and technology, for instance, becomes actionable under the FET standard.

184. Apart from the tribunals that have relied on a preambular statement to incorporate stability, predictability and consistency into the FET standard, the Respondent is correct[206] that the other precedents relied upon by the Claimants are actually grounded on a concept of legitimate expectations, even if these general ideals of good governance are mentioned in the reasoning.[207]

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206 R's Counter-Memorial, §449.

207 CL-82, *Duke Energy Electroquil Partners and Electroquil S.A. v Republic of Ecuador*, ICSID Case No ARB/04/19, Award, 18 August 2008, §340; CL-83, *Murphy Exploration and Production Company International v Republic of Ecuador [II],* PCA Case No 2012-16 (formerly AA 434), Partial Final Award, 6 May 2016, §249; CL-150, *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No ARB/01/3, Award, 22 May 2007, §262.

185. In conclusion, the Tribunal dismisses this first claim on the basis that, as a matter of law, "*the stability, predictability, and consistency of the host State's legal order*" is not an actionable component of the FET standard in Article 3(2) of the BIT.

Second claim: the abolition of differential pricing under CMU Resolution No 795 was arbitrary

186. Following the abolition of CMU Resolution No 795 in January 2005, ZAlK was subjected to electricity prices set centrally by the NCRE.[208]

187. The Claimants' expert described the impact of this regulatory change on ZAlK in the following terms:

> ZAlK's electricity prices increased from $0.035/kwh in 2005 to $0.068/kwh in 2008, a 94% increase in three years. These prices were as much as 93% greater than the average electricity prices <u>for the top 10 aluminum producing countries. This significant variance in electricity prices, and corresponding aluminum electricity costs, explains the vast majority of the primary aluminum cost of sales variance between ZAlK and the industry averages</u>.[209]

188. The Respondent has defended the Claimants' claim on the basis, *inter alia*, that it had a consistent policy of moving towards the abolition of cross-subsidies in the wholesale electricity market. There is indeed considerable evidence on the record of this arbitration that Ukraine had identified the problem of cross-subsidies at an early stage of its transition to a market economy and had maintained a consistent policy of seeking to eliminate them.

189. On 26 September 2001, the CMU issued Instruction No 451-p "*On Approval of the Action Plan on Long-Term Tariff Policy for the Wholesale Electricity Market of Ukraine*", which included the following goal:

> 7. Ensure a reduction in the amount of cross-subsidisation of energy consumers through:
>
> abolition of existing subsidies related to payment for energy discounts for specific categories of consumers (except the general population), and preventing the provision of such subsidies in the future at the expense of other energy consumers
>
> […]

208 C's Memorial, §§586-587.
209 [redacted], §50.

> abolition of the mechanism of compensating the costs incurred by energy suppliers from energy supply to specific categories of consumers[.][210]

190. Various state entities were tasked with implementing these directives: the NCRE, the Ministry of Fuel and Energy, the Ministry of Economy, the Ministry of Industrial Policy, the Ministry of Justice and Energorynok State Enterprise.

191. On 16 November 2002, the CMU issued the "*Concept of Functioning and Development of the Wholesale Electricity Market of Ukraine*", which was attached to CMU Resolution No 1789[211] (the "**2002 WEM Concept**"). This document referred to cross-subsidies in the following way:

> to ensure such level of electricity prices for consumers that would reimburse all reasonable costs of production, transit and supply, rendering impossible the practice of cross-subsidising some consumers at the expense of others, and of some suppliers at the expense of others through the wholesale electricity price[.][212]

192. The CMU's 2003 Action Plan likewise called for the "*termination of cross-subsidising consumers of energy carriers*".[213]

193. On 27 December 2005, the President of Ukraine issued Order No 1863/2005, directing the NCRE to "*review the procedure for calculating retail electricity tariffs in order to gradually limit the practice of cross-subsidisation*".[214]

194. On 15 March 2006, the CMU announced the "*Energy Strategy of Ukraine through 2030*", which called for the "*elimination of cross-subsidising in fuel and energy sector*".[215]

195. On 27 July 2006, the CMU adopted an Action Plan for the 2006 to 2010 period, outlining the steps to be taken towards implementation of the Energy Strategy of Ukraine.[129] One such

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210 R-63, Instruction of Cabinet of Ministers of Ukraine No 451-p (as amended by Instruction of Cabinet of Ministers of Ukraine No 380-p), 17 June 2004.

211 C-345; previously exhibit in the Respondent's Counter-Memorial as R-53, "*Concept of Functioning and Development of the Wholesale Electricity Market of Ukraine*", attached to Resolution of the Cabinet of Ministers of Ukraine No 1789, 16 November 2002.

212 R-53, "*Concept of Functioning and Development of the Wholesale Electricity Market of Ukraine*", attached to Resolution of the Cabinet of Ministers of Ukraine No 1789, 16 November 2002.

213 C-360, Action Plan of Cabinet of Ministers of Ukraine Openness, Efficacy, Efficiency, 15 March 2003.

214 R-69, Order of President of Ukraine No 1863/2005, 27 December 2005.

215 R-72, Energy Strategy of Ukraine through 2030, approved by Instruction of Cabinet of Ministers of Ukraine, No 145-p (as amended), 15 March 2006.

step involved *"[b]ringing, in a gradual manner, retail tariffs for electricity and natural gas into line with the economically justified level of their production and transportation costs*".[216]

196. On 27 September 2007, the President of Ukraine issued Order No 921/2007, again listing "*preventing cross-subsidisation*" among the policy objectives to be pursued by the State.[217]

197. On 30 May 2008, the National Security and Defence Council of Ukraine approved a "*Conceptual Framework for State Policy on Ensuring Efficient Use of Fuel and Energy Resources (Energy Efficiency)*", which also called for the "*termination of cross-subsidisation*".[218]

198. On 16 January 2008, the CMU adopted an Action Plan entitled "*Ukrainian Break-Through: For People, not for Politicians*", again calling for action to be taken to "*liquidate cross-subsidisation and create economic incentives for efficient and sparing electricity consumption*".[219]

199. On 2 June 2010, the Committee on Economic Reforms under the President of Ukraine announced its five-year programme for economic reforms entitled "*Prosperous Society, Competitive Economy, Effective State*". That report identifies one of the reasons for the "*poor condition of the energy sector*" as "*numerous distortions in pricing and rates/tariff formation in the energy market (economically unjustified rates for energy generation and transmission, practice of cross-subsidizing between groups of consumers and consumers from various sectors). These distortions do not provide economic incentives neither for producers, nor for consumers to improve energy efficiency*".[220] The "*necessary steps*" included:

> – abolishment of the moratorium for power prices increase;
>
> – liquidation of cross-subsidies:
>
> - liquidation of the pricing mechanism of subsidizing all categories of industrial and communal consumers[.]

200. The position of the various concerned ministries of the Government of Ukraine on the question of cross-subsidies can also be gleaned from their reaction to a draft CMU Resolution "*On reducing the level of single electricity tariffs for industrial enterprises*" circulated by the

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216 R-74, Instruction of Cabinet of Ministers of Ukraine "*On Approving the 2006 to 2010 Action Plan for Implementing the Energy Strategy of Ukraine through 2030*", No 436-p, 27 July 2006.

217 R-80, Order of President of Ukraine No 921/2007, 27 September 2007.

218 R-86, Decision of National Security and Defence Council of Ukraine approving "*Conceptual Framework for State Policy on Ensuring Efficient Use of Fuel and Energy Resources (Energy Efficiency)*", 30 May 2008.

219 R-82, Programme of activities of Cabinet of Ministers of Ukraine "*Ukrainian Break-Through: For People, Not For Politicians*" approved by Resolution of Cabinet of Ministers of Ukraine No 14, 16 January 2008.

220 R-106, Committee on Economic Reforms under President of Ukraine, Programme of Economic Reforms 2010–2014, 2 June 2010.

CMU on 30 August 2006. The draft Resolution, if adopted, would have reduced electricity tariffs for industrial consumers such as ZAlK by 10%.

201. On 12 September 2006, the Ministry of Fuel and Energy of Ukraine rejected the draft Resolution for the following reasons:

> Introducing discounts on electricity tariffs for industrial enterprises with an average monthly electricity consumption for technological needs exceeding 50 million KWh would result in an inefficient use of electricity and a potential increase in its consumption by these enterprises. Thus, energy expenditure would be the key incentive for industrial enterprises, instead of energy saving […]
>
> Such a mechanism is proposed to be implemented at the expense of subsidies and, in particular, by changing the subsidy structure (reducing subsidies to the population and introducing subsidies to industrial enterprises), i.e., through cross-subsidising, which is contrary to the global practice and international recommendations. The cross-subsidising between consumers of energy sources adversely affects the country's economy in general. For the time being, the Ministry of Fuel and Energy, acting jointly with interested ministries and departments, is taking a set of measures to eliminate the imbalance between the established tariffs and prices and actual costs of production, transmission and supply of electricity, and to bring the energy source prices and tariffs for all categories of consumers to an economically justified level.
>
> Moreover, it should be mentioned that applying the maximum levels of electricity use with the granting of discounts may result in creation of artificial associations of enterprises (holdings), whose purpose will be to reach the consumption of electricity in the amount established for a subsidised tariff.
>
> Furthermore, reducing electricity tariffs for the mentioned category of consumers may result in a violation and give rise to antidumping investigations by importing countries regarding the products exported by domestic industrial enterprises that consume electricity, in particular, metallurgical enterprises. The outcome of such investigations may be restricting importation or introducing an import duty, which would have adverse effects on the competitiveness of Ukrainian producers on the global market.[221]

202. On 15 September 2006, the Ministry of Finance, also rejected the same draft Resolution:

> Granting a tariff discount to a certain group of consumers would automatically result in increasing the tariffs for other Class 1 and Class 2 consumers. Increasing volumes of cross-subsidisation (between Class 1 consumers) would distort transparent market mechanisms of tariff

221 R-75, Letter No 01/13-0596 from Ministry of Fuel and Energy of Ukraine to NCRE, 12 September 2006.

> formation in the electricity sector, and would have adverse effects on the investment attractiveness of this sector in general.[222]

203. The Tribunal accepts, on the basis of this evidence, that the Respondent had committed to a policy, at least from 2001 onwards, for the abolition or reduction of cross-subsidies in the wholesale electricity market. But was the repeal of differential pricing, and the cross-subsidy that it represents, arbitrary to the level of delictual conduct under Article 3(2) of the BIT? The Tribunal recalls the statement of the tribunal in *Cargill v Mexico*, which it endorses:

> [A]n actionable finding of arbitrariness must not be based simply on a tribunal's determination that a domestic agency or legislature incorrectly weighed the various factors, made legitimate compromises between disputing constituencies, or applied social or economic reasoning in a manner that the tribunal criticizes.
>
> […] [A]rbitrariness may lead to a violation of a State's duties […] but only when the State's actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an unexpected and shocking repudiation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law policy for an ulterior motive.[223]

204. There is no dispute that the maintenance of differential pricing for the benefit of ZAlK and ZTMK represented a subsidy to those enterprises. There may be disagreement about the exact quantum of that subsidy but it will be recalled that the NCRE as early as 2002 had noted that the tariffs being extended to ZAlK and ZTMK were 30-35% lower than those that were being charged to consumers in the same category (Category 1).[224] This led to an additional burden on the wholesale market price of 0.5%, with subsidies to cover Zaporozhyeoblenergo's losses amounting to UAH 46.6 million.[225] In its 2003 Report, the NCRE put the annual losses for Zaporozhyeoblenergo at UAH 125 million, which resulted in an increase to the wholesale electricity price of 1%.[226]

205. The Claimants do not advance a case that they had a legitimate expectation that differential pricing would be extended to ZAlK based upon clear and unequivocable representations by the Ukrainian Government. In the absence of such representations, the Claimants' claim really amounts to a complaint that the Respondent should have allocated its finite resources

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222 R-76, Letter No 31-15020-03/1-22/19267 from Ministry of Finance of Ukraine to NCRE, 15 September 2006.

223 RL-69, *Cargill, Inc. v United Mexican States*, ICSID Case No ARB(AF)/05/2, NAFTA, Award, 18 September 2009, §§292-293.

224 R-56, Report on activities of NCRE in 2002, approved by NCRE Resolution No 272, 31 March 2003.

225 R-56, Report on activities of NCRE in 2002, approved by NCRE Resolution No 272, 31 March 2003.

226 R-61, Report on activities of NCRE in 2003, approved by NCRE Resolution No 294, 30 March 2004.

in a different way. That cannot be the basis of violation of the FET standard. Governmental decisions concerning the allocation of subsidies are quintessentially polycentric: they involve weighing up competing interests and factors and invariably rest upon a calculus of compromise. There are also external restraints upon those decisions in the form of international agreements such as the WTO Agreement on Subsidies and Countervailing Measures given the distorting effects that subsidies may have on trade. This issue was raised during the process for considering differential pricing as set out above. There is nothing on the record that suggests that the repeal of differential pricing or the policy of pursing the abolition or reduction of cross-subsidies in the wholesale electricity market was arbitrary in the sense described above. There is nothing to suggest that the policy was manifestly irrational or motivated by prejudice against ZAlK or the Claimants. Indeed, as previously described, the Respondent introduced at least two measures to assist ZAlK to mitigate the effects of the increase of electricity prices over the relevant period.[227] The Tribunal rejects this claim for breach of Article 3(2) of the BIT.

206. The Claimants raise a further argument that, whilst CMU Resolution No 795 was revoked in 2005, the Ministry of Industrial Policy's Order No 312 "*On Approval of the Procedure for Determining the Levels of Retail Electricity Prices to Ensure the Competitiveness of Enterprises Producing Primary Aluminium, Aluminium Alloys and Titanium*",[228] which implemented CMU Resolution No 795 by establishing a procedure for calculating the electricity prices for ZAlK and ZTMK, remained in force. According to the Claimants' expert, CMU Decree No 143 "*On Amending and Repealing of Some Decisions of the Cabinet of Ministers of Ukraine*", which revoked CMU Resolution No 795 on 23 February 2005, did not automatically revoke Order No 312 because "*[it] could have only been terminated by the Ministry of Industrial Policy, the authority that issued it. The Ministry of Industrial Policy terminated it only in February 2009*".[229]

207. The Claimants' expert reasons that "*ZAlK could have a legally protected interest in the proper application of Order and Procedure 312 during the stated period*"[230] such that "*it would be necessary under Ukrainian law to consider whether Procedure 312 represented a benefit to ZAlK, and whether ZAlK had an aspiration to use it. If the answers to both of these questions are affirmative, one may positively state*

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227 R-87, Letter from NCRE to Ministry of Fuel and Energy of Ukraine, 20 June 2008; R-102, Resolution of Cabinet of Ministers of Ukraine "*On Certain Issues of Stabilising Functioning of Enterprises of Chemical Sector and Mining and Metallurgical Industry*", No 289, 24 March 2010; R-105, NCRE Resolution "*On Amendments to NCRE Resolution dated 27.10.2008 No 1240*", No 537, 13 May 2010.

228 C-168, Order of Ministry of Industrial Policy of Ukraine No 312, 10 July 2002.

229 [redacted] §54.

230 [redacted] §60.

that the non-application of Order and Procedure 312 would also constitute a violation of ZAlK's legally protected interest."[231]

208. The Respondent's position is that the failure to repeal Order No 312 was an administrative oversight and cannot be the source of any rights for ZAlK after CMU Resolution No 795 ceased to have effect.[232]

209. The Tribunal cannot accept that ZAlK had any rights that might be capable of attracting the protection of the BIT under Article 3(2) by virtue of the fact that the umbrella enactment (CMU Resolution No 795) was repealed but the specific procedure giving effect to that enactment was not (Order No 312). There is no evidence on the record that ZAlK ever tried to invoke its alleged rights under the subsisting Order No. 312 after CMU Resolution No 795 was repealed. Moreover, as is implicit in the analysis of the Claimants' expert, it is by no means certain that the Ukrainian courts would have recognized such alleged rights as a "*legally protected interest*" in the circumstances—and in any event ZAlK never tested the proposition by making a claim to that effect. As a general principle it would be very surprising indeed if Order No 312, which was enacted pursuant to the authority of CMU Resolution No 795, could found a "*legally protected interest*" of any sort once that authority was withdrawn.

Third claim: the failure to implement CMU Instruction No 1566-p to ZAlK was arbitrary and discriminatory

210. The Claimants say that CMU Resolution No 1566-p was mandatory for implementation by the designated ministries and it was a breach of the FET standard to fail to do so.[233]

211. The Claimants' expert refers to Articles 116(9) and 117 of the Constitution of Ukraine to establish that CMU Resolution No 1566-p was mandatory for implementation.[234] The expert does not, however, suggest that ZAlK would have a remedy under Ukrainian law to compel the Ministry of Industrial Policy, the Ministry of Fuel and Energy and the Ministry of Economy to implement CMU Resolution No 1566-p or to seek damages for its non-implementation. The Respondent is likely to be correct that the consequences of any failure to implement CMU Resolution No 1566-p would have to be addressed as between the

231 [redacted] §61.
232 R's Counter-Memorial, FN 351.
233 C's Memorial, §595.
234 [redacted], §79.

Council of Ministers and the relevant state bodies.[235] ZAlK was not, in other words, privy to an obligation in this respect.

212. The Claimants' expert further opines that this omission was discriminatory because CMU Resolution No 1566-p was implemented in respect of ZTMK and hence this was a violation of Ukrainian law, which guarantees equal treatment and protection from discrimination of business entities.[236] In advancing this argument, the expert does not take into account the fact that ZTMK never actually benefited from differential pricing under CMU Resolution No 1566-p. In these circumstances the Tribunal cannot draw conclusions about whether the alleged discrimination was actionable under Ukrainian law.

213. The Claimants' argument in any event appears to rest on the proposition that the failure of the Ministry of Industrial Policy, the Ministry of Fuel and Energy and the Ministry of Economy to implement CMU Resolution No 1566-p as was required under Ukrainian law is an element demonstrating the arbitrariness of the Respondent's conduct in the context of applying the international FET standard. The Tribunal is persuaded that this is a relevant factor that needs to be weighed against the justifications that were provided at the time for the non-implementation of CMU Instruction No 1566-p.

214. CMU Instruction No 1566-p was issued by Prime Minister Tymoshenko and it consists of four paragraphs. The first paragraph reads:

> 1. The Ministry of Industrial Policy jointly with the Ministry of Economy, Ministry of Fuel and Power-Generating Industry, and National Electrical Power-Generating Regulatory Commission (NEPGRC) shall approve within two weeks a procedure for calculating retail prices of the electricity used by enterprises producing primary aluminium for process needs only, depending on fluctuations in the prices of the products of the above enterprises in the global market.[237]

215. There is no doubt that this simple instruction required a significant amount of work on the part of the designated state organs to devise an appropriate pricing mechanism. Moreover, as this instruction only spelt out the general principle of differential pricing, those state organs retained a considerable amount of discretion in elaborating that mechanism in terms

235 R's Rejoinder, §478.

236 [redacted], §81.

237 C-103, amended, Resolution of Cabinet of Ministers of Ukraine No 1566-p, 10 December 2008.

of the size of the discount to be granted as well as the assumed level of profitability for ZAlK.

216. A draft procedure for ZAlK was prepared by the Ministry of Industrial Policy further to CMU Instruction No 1566-p. The Respondent was unable to find and produce this draft procedure in response to the Claimants' document production request and the Claimants request that the Tribunal draw an adverse inference. The Tribunal is prepared to assume that the draft procedure envisaged differential pricing for ZAlK along the same lines as for ZTMK. But in the Tribunal's estimation, it was perfectly reasonable for the other State organs named in CMU Instruction No 1566-p to voice their concerns about the draft procedure prepared by the Ministry of Industrial Policy. The Claimants have criticised the substance of these concerns and in particular the reasons provided by the Minister for Fuel and Energy, Mr Prodan.[238] They summarize their criticisms as follows:

> - It was not credible for Minister Prodan to argue that the Draft ZAlK Tariff Calculation Procedure (which Claimants have not seen) did not contain the grounds for introducing the differential tariff. Indeed, it beggars belief that the NCRE and the Ministry of Economy would have adopted such a deficient Procedure.
>
> - It was nonsensical for Minister Prodan to argue that ZAlK did not fulfill the mandatory pre-condition of carrying no debt towards Zaporizhoblenergo. This was not a precondition for the Draft ZAlK Tariff Calculation Procedure to be enacted (as it was not for Order No. 126 to be enacted in favour for ZTMK).
>
> - It was incorrect for Minister Prodan to assert that the provision of benefits to ZAlK would negatively impact "energy generating enterprises." Minister Prodan must have confused "energy generating enterprises" with "energy supply companies", who alone were potentially affected by differential tariffs.
>
> - It was false for Minister Prodan to aver that the NCRE no longer had the possibility to include all costs to compensate for losses in the wholesale electricity market tariff. In any event, the ZAlK/ZTMK Compensation Procedure adopted by the NCRE only adopted differential pricing for the one potline that remained in service in 2008.

238 C-225, Letter No 01/13-0808 from Yu. Prodan (MFEU) to the Ministry of Industrial Policy of Ukraine, 10 July 2009.

- It was inapposite for Minister Prodan to complain about the state of energy generating companies. There was no obvious link between them and ZAlK's situation.[239]

217. The Claimants conclude by stating that "*[a]ll of these reasons were spurious*".[240]

218. Leaving to one side the colourful language used to describe Minister Prodan's reasons for rejecting the draft pricing procedure, the Claimants' complaints are in fact within the realm of policy disagreements with the approach taken by the Ministry for Fuel and Energy, an approach that it consistently maintained over the years leading up to this particular proposal.

219. It is certainly true that the Tribunal is not in a position to assess the first reason criticised by the Claimants because the Respondent has not been able to locate the draft procedure. The Respondent has said that this refers to the Ministry's requests for clarification as to the level at which the Ministry of Industrial Policy had fixed the tariffs in the draft procedure,[241] given that [redacted] had at one stage requested a tariff to allow ZAlK to achieve a level of profitability of at least 10%.[242] But the letter cited as evidence is dated after Minister Prodan's letter and hence cannot be relied upon to substantiate this point. The Tribunal cannot, therefore, speculate as to what Minister Prodan had in mind when he criticised the draft as not containing the grounds for the introduction of the minimal tariff, and he was not put forward as a witness.

220. In relation to the other reasons advanced by Minister Prodan, however, the Tribunal cannot agree that they were generally "*spurious*" or "*nonsensical*" or "*false*" or "*incorrect*". It is not for this Tribunal to second-guess Ukraine's policies for wholesale electricity pricing and still less to substitute the Ministry of Fuel and Energy's reasons with its own view as to whether or not it would have been desirable to adopt the draft procedure for ZAlK in all the circumstances. The reasons provided by Minister Prodan do not reveal arbitrariness or discrimination towards ZAlK but rather his judgment about the negative consequences that would follow the adoption of the draft procedure.

221. For instance, it was perfectly rational for Minister Prodan to raise the issue of ZAlK's outstanding debt to Zaproizhiaoblenergo whether or not this was a condition for ZTMK

239 C's Reply, §692.
240 C's Reply, §693.
241 R's Rejoinder, §483(a).
242 C-232, Letter No 01-20-32/10 from [redacted] to N. Ya. Azarov (Prime Minister of Ukraine), 17 August 2010.

under its procedure on pricing. ZTMK in fact never received a differential electricity tariff for the very reason that it had failed to clear its debts. In addition, ZTMK was a state enterprise and thus the State was ultimately responsible for its debts—thus distinguishing the situation in respect of ZAlK.

222. Next, the reference to "*electricity generating companies*" does not necessarily amount to a "*confusion*" on the part of Minister Prodan because the cross-subsidisation causes wholesale and retail electricity prices to rise, which in turn contributes to non-payment by electricity customers to the *oblenergos*, who then face difficulties in paying the single buyer, which then leads to non-payment to the electricity generators. Cross-subsidisation has impacts right up the chain of actors.

223. It cannot be seriously disputed that the reintroduction of a differential electricity tariff for ZAlK would come at a significant cost in the form of a subsidy: the NCRE had estimated in June 2008 that it would cost UAH 40 million (USD 8.6 million) per month. This cost would have come at the time of the global financial crisis, which led to a deep economic recession in Ukraine. There are also perfectly rational reasons for a government to be reluctant to provide specific enterprises with a subsidy as this entails removing the incentive to invest in more efficient technology to reduce energy costs. The Tribunal therefore rejects this claim for breach of Article 3(2) of the BIT.

Fourth claim: failure to continue differential pricing while reform allowing bilateral electricity agreements was pending

224. The Claimants allege a breach of Article 3(2) on the basis that Ukraine failed to implement the reform contemplated in the 2002 WEM Concept, which provided for a transition toward a market model allowing for the conclusion of bilateral electricity agreements.[243] They further submit that "*[p]ending the implementation of this promise [i.e. the reform], it was reasonable for any investor to rely on the continued application of the differential tariff regime*".[244]

225. More concretely, according to the Claimants:

> In fact, pending the full transition of the Ukrainian wholesale electricity market towards a market model that would allow for the conclusion of bilateral electricity agreements, the maintenance of differential electricity pricing (which under the existing market system meant that the cost of tariff differentiation would be absorbed through increases in the

243 C's Reply, §§679, 699.
244 C's Reply, §680.

> wholesale market price) was the bare minimum needed for ZAlK's economic survival.[245]

226. The Claimants referred to the 2002 WEM Concept for the first time in their Reply.[246] The document is entitled "*Concept of Functioning and Development of the Wholesale Electricity Market of Ukraine*", which was attached to CMU Resolution No 1789 of 16 November 2002.[247] The Respondent says that the Claimants discovered this document for the first time as an exhibit to the Respondent's Counter Memorial. Whether or not that is indeed the case, it is clear that the Claimants raised an argument based upon this document, and the concept of bilateral contracts or agreements, for the first time in their Reply.

227. There is no doubt that Ukraine had committed to the regulatory goal to introduce a competitive market for bilateral electricity purchase contracts in the 2002 WEM Concept, as the Claimants maintain.[248] The NCRE's report on its activities in 2006 certainly confirms this objective. It noted that the 2002 WEM Concept "*defined short- and medium-term prospects of the Ukrainian electricity market development – a gradual transition from the operating model of the 'single buyer' market to a full-scale competitive electricity market – the market of bilateral contracts with a balancing market, which ensures the matching of supply and demand for uncontracted volumes of electricity.*"[249]

228. The report also recognises the challenges that lay ahead in implementing this objective:

> The transition to a new market model involves a radical change in the structure and rules of the market and should be carefully prepared. In addition, it is necessary to undertake significant work on the training of the personnel of the electricity market to work in a new market and during transition period. Failure to fully implement the measures will lead to destabilization of the electricity market, which, in turn, can lead to crisis in other sectors of the economy.[250]

229. The report set out the specific steps that were planned over the 2007-2008 period:

> During 2007-2008, the basic normative acts concerning the structure and rules of functioning of the new model of the market should be developed, as well as the identified ways of transition from the current to perspective market model.

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245 C's Reply, §93.

246 C's Reply, §68.

247 C-345; previously exhibited in the Respondent's Counter-Memorial as R-53, "*Concept of Functioning and Development of the Wholesale Electricity Market of Ukraine*", attached to Resolution of the Cabinet of Ministers of Ukraine No 1789, 16 November 2002.

248 C's Reply, §§75-76.

249 C-374, Report on activities of NCRE in 2006, approved by NCRE Resolution No 317, 22 March 2007.

250 C-374, Report on activities of NCRE in 2006, approved by NCRE Resolution No 317, 22 March 2007.

At the first stage, which will start in March 2007 and will last for 5 months, the current organizational structure of the industry as well as the issues and the objectives of the transition to new model of the market will be determined, possible options for building a prospective market model will be developed. Based on this analysis, a final decision will be made with regard to a market model and the transition paths, and only then will work on the development of the basic rules, codes and agreements regulating the functioning of the electricity market start, namely:

- Market rules for the market of bilateral contracts;
- Code of Balancing and Settlements;
- Code of networks;
- Code of distribution networks;
- Auxiliary Services Market Rules;
- Rules of actions in cases of insolvency of suppliers and generating companies;
- Credit guarantee rules for the balancing market;
- Rules of registration of market participants, contracts and points of record;
- Electricity accounting code;
- An example of bilateral contracts;
- Agreement on access to the transmission system;
- Agreement on access to the distribution system;
- Market monitoring rules.[251]

230. The NCRE's report on its activities in 2007 listed the same tasks for implementation over the 2008-9 period.[252]

231. The Government's "*Energy Strategy of Ukraine through 2030*", which was approved by CMU Instruction No 145-p of 15 March 2006, also states that the creation of a market for bilateral

251 C-374, Report on activities of NCRE in 2006, approved by NCRE Resolution No 317, 22 March 2007.
252 C-384, Report on activities of NCRE in 2007, approved by NCRE Resolution No 488, 27 March 2008.

electricity purchase/sale agreements was part of the model envisaged by the 2002 WEM Concept.[253]

232. There is, therefore, ample evidence on the record that Ukraine had committed to a policy of liberalization of the wholesale electricity market and the introduction of the possibility of concluding bilateral electricity contracts between suppliers and industrial consumers. There is, however, no evidence that ZAlK or the Claimants ever raised this reform with the Ukrainian Government during the relevant period. The only contemporaneous document referenced by the Claimants[254] was entitled "*Internal Notes for presentation on Aluminium Industry and Electricity Tariffs*", dated 24 January 2006.[255] This document is a draft of an internal note and refers to "*allow[ing] direct contracts with power plants to be concluded at free prices*" as one of the ways of increasing the competitiveness of the metallurgical industry in the abstract, but the actual proposal in the document, as seen from the "*conclusions*" section, is to introduce differential pricing.

233. Whether or not the Claimants or ZAlK raised the prospect of bilateral contracts with the Ukrainian Government contemporaneously is, nevertheless, of secondary importance. The question for the Tribunal is whether, having committed to a policy of liberalisation of the electricity market and the related prospect of concluding bilateral contracts with suppliers in 2002, the Respondent violated Article 3(2) of the BIT by failing to complete this reform or to accord differential pricing to ZAlK while the implementation of that reform was pending.

234. It is not clear which of the elements of Article 3(2) the Claimants are invoking to make good this claim. There could be no legitimate expectation that the reform contemplated by the 2002 WEM Concept would be completed by a particular date: this was a highly complex policy initiative that would have necessitated a large number of regulatory steps for implementation. Nor could there be a legitimate expectation that differential pricing would be maintained so long as the market liberalisation reform was pending: there is no evidence of any such representation being made to ZAlK or the Claimants by anyone in the Ukrainian Government.

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253 R-72, Energy Strategy of Ukraine through 2030, approved by Instruction of Cabinet of Ministers of Ukraine, No 145-p (as amended), 15 March 2006.

254 C's Reply, §§128, 679.

255 C-370, ZAlK, Internal Notes for presentation on Aluminium Industry and Electricity Tariffs, 24 January 2006.

235. It is also difficult to fathom how the Respondent's conduct could have impaired the "*operation, management, maintenance, use, enjoyment or disposal*" of the Claimants' investment for the purposes of the second limb of Article 3(2). The plain meaning of this provision is that there must be some interference with the investment by state measures that qualify as "*unreasonable*" or "*discriminatory*". This limb of Article 3(2) is not a licence to complain about the reasonableness of any state measure simply on the basis that it has had an impact on the *value* of an investment; there must be an interference with the enumerated rights associated with the investment (the right to operate, manage, maintain, use, enjoy or dispose). An international tribunal hearing an investment treaty dispute is not a forum to debate the reasonableness or otherwise of macroeconomic or microeconomic policies in the abstract: for a claim to be actionable under this limb of Article 3(2) there must be a degree of proximity as between the impugned state measure and specific rights attaching to an investment. Investment values are continuously altered by state measures—a decision to raise interest rates is an obvious example—but there is no legal nexus between that act of state and investment rights protected by the BIT.

236. That leaves the general ground of arbitrariness under the FET standard. The Tribunal cannot accept that the failure to introduce a highly complex reform to liberalise the electricity market in Ukraine can be actionable as arbitrary conduct under the FET standard. This Tribunal is not an advisory board on market reforms or an arbiter of liberalisation policies; the Tribunal is rather mandated to determine whether the Respondent's conduct is delictual as failing to meet the minimum standards for the exercise of sovereign powers as inspired by the rule of law. The Tribunal concludes that there is simply no cognisable claim for breach of Article 3(2) of the BIT on the basis of a failure to introduce a liberalised model of bilateral contracts for the wholesale electricity market in Ukraine.

E4 Claim for breach of Article 3(1) of the BIT for applying Resolution No 1566-p to ZTMK but not to ZAlK

237. Article 3(1) of the BIT reads:

> Each Contracting Party shall in its territory accord to investments of nationals of the other Contracting Party treatment which is not less favourable than that which it accords to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the nationals concerned.

238. The elements of the Claimants' claim for national treatment under Article 3(1) are as follows.

239. First, the Claimants maintain that ZAlK and ZTMK were in like circumstances for the following reasons:

> Both were metal producers in Ukraine in energy-intensive industries. Both sold commodities. Both had benefitted from the 2002 Differential Electricity Pricing Regime. Both were beneficiaries of CMU Resolution No. 1566-p.[256]

240. Second, ZTMK was singled out for more favourable treatment because it was a State-owned company and therefore a "*national*" of the Respondent.[257]

241. Third, the Ministry of Fuel and Energy's justification for treating ZTMK differently from ZAlK was unfair and unreasonable:

> First, the Ministry of Fuel and Energy argued that implementing CMU Resolution No. 1566-p to ZAlK would allegedly have a negative effect on electricity producers. This argument ignored the fact that the effect on electricity producers was the same whether ZAlK or ZTMK were the beneficiaries of the differential electricity regime.[258]
>
> Second, the Ministry of Fuel and Energy cited ZAlK's then outstanding debts to Zaporozhyeoblenergo power as a reason not to implement the differential tariff. Doing so, the Ministry of Fuel and Energy turned a blind eye to the fact that ZTMK also had debts towards Zaporozhyeoblenergo.[259]

242. For the Claimants to have a cognisable claim under the national treatment provision in Article 3(1) of the BIT, ZTMK must have received treatment more favourable than that accorded to ZAlK. "*Treatment*" is not an abstract concept: a tangible benefit of some sort must have been accorded to ZTMK in circumstances when it was not accorded to ZAlK. As the tribunal stated in *S.D. Myers, Inc v Government of Canada*: "*The word 'treatment' suggests that practical impact is required to produce a breach of Article 1102 [national treatment], not merely a motive or intent that is violation of Chapter 11.*"[260] If the benefit is not tangible in this way, then it would be impossible to determine that ZAlK has suffered a corresponding loss, and damage is a necessary element of any claim founded upon an investment treaty obligation.

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256 C's Memorial, §655.

257 C's Memorial, §657, referring to C-223, Letter No 9/7-1-171 from V. Nemilostyvyi (Ministry of Industrial Policy of Ukraine) to the Cabinet of Ministers of Ukraine, 9 February 2009.

258 C's Memorial, §657.

259 C's Memorial, §657.

260 CL-130, *S.D. Myers Inc v Canada*, UNCITRAL, Partial Award, 13 November 2000, §254; RL-98, *Apotex Holdings Inc. and Apotex Inc. v United States of America*, ICSID Case No ARB(AF)/12/1, NAFTA, Award, 25 August 2014, FN 14.

243. Whilst a procedure for ZTMK to benefit from differential pricing was adopted, it was never implemented because a condition for ZTMK to do so was that it must discharge its debts to Zaporozhyeoblenergo first.[261] It never did so. ZTMK therefore never benefited from differential pricing calculated in accordance with CMU Instruction No 1566-p and continued to pay for electricity on the same basis as ZAlK.[262] CMU Instruction No 1566-p was then repealed on 26 October 2011 for both ZAlK and ZTMK without either of them ever having received the benefit of differential electricity pricing.

244. In this circumstances, there is no actionable discrimination for the purposes of Article 3(1) of the BIT and therefore the claim is dismissed.

E5 Claim for breach of Article 3(4) by failing to observe obligations in CMU Instruction No 1566-p

245. Article 3(4) of the BIT reads: "*Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.*"

246. The Claimants maintain that CMU Resolution No 1566-p created obligations to ZAlK's benefit and failure to implement constitutes breach of the "*umbrella clause*" in Article 3(4).[263]

247. The Tribunal cannot accept that the Prime Minister's directions in CMU Resolution No 1566-p to the relevant Ministries to develop a procedure for differential pricing for "*enterprises producing primary aluminium*" created obligations to ZAlK that could be enforced under Ukrainian law and protected from interference under Article 3(4) of the BIT. ZAlK is not, moreover, in any sense privy to those directions; there is no "*obligation*" that has been "*entered into*" by Ukraine "*with regard to*" ZAlK. As Professor Crawford has remarked: "*[I]t is a confusion to equate a state law or regulation with an obligation entered into by the state […]. The enactment of a law by a state, whether it is specific or general, is not the entry by the state into an obligation distinct from the law itself.*"[264] Whilst it may be possible to extend the scope of the umbrella clause to specific administrative acts that grant rights or privileges to specific investments such that the state in essence assumes an obligation towards those investments (such as under a licence or concession), it is impossible to extend that principle to the present case, where the

261 C-103, Resolution of Cabinet of Ministers of Ukraine No 1566-p, 10 December 2008.
262 R's Rejoinder, §88; R-141, Letter No 9/26/47-18 from NCRE to Ministry of Justice of Ukraine, 7 March 2018.
263 C's Memorial, §669.
264 RL-132, J. Crawford, *Treaty and Contract in Investment Arbitration*, 24(3) Arb. Intl. 351 (2008), p370.

normative impact of CMU Resolution No 1566-p, if any, was between the Prime Minister and the relevant Ministries.

248. Further, the directions under CMU Resolution No 1566-p were formulated as a request to the relevant Ministries to develop a procedure for extending differential pricing to enterprises such as ZAlK. CMU Resolution No 1566-p does not, therefore, generate specific rights or privileges at even a rudimentary level. It is an instruction to engage in a process. It provides no guidance as to what conditions should apply for granting differential pricing, or how the tariff should be calculated or the period during which the tariff should apply.

249. The Tribunal dismisses this claim based upon Article 3(4) of the BIT.

E6 Claim for creeping expropriation under Article 6 by refusing to reinstate differential electricity pricing for ZAlK

250. Article 6 of the BIT reads:

> Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with:
>
> a. The measures are taken in the public interest and under due process of law;
>
> b. The measures are not discriminatory or contrary to any undertaking which the Contracting Party which take such measures may have given;
>
> c. The measures are taken against just compensation. […]

251. In the title to the section dealing with this claim, the Claimants state that "*Ukraine's Illegal Refusal to Reinstate Differential Electricity Pricing for ZAlK Constituted a Creeping Expropriation of Claimants' Investment in ZAlK*"[265] but then conclude this section by referring to the Renationalisation Claim and submitting that: "*Considered in the aggregate, all these hostilities must be considered as distinct but interrelated steps in the incremental or creeping expropriation of Claimants' entire investment in ZAlK[…]*"[266] It is, therefore, not entirely clear whether the Claimants say that the failure to reinstate differential pricing is an expropriation in its own right or only in

[265] C's Memorial, title above §691.
[266] C's Memorial, §703.

conjunction with the Renationalisation Claim. The Tribunal will nonetheless consider the claim in relation to differential pricing on its own merits.

252. The Claimants maintain that ZAlK's right to differential electricity pricing constituted a "*[s]ignificant part of the business*" of ZAlK.[267] But for the reasons that Tribunal has already advanced, ZAlK never had the right to differential electricity pricing. It was therefore impossible for the Respondent to have expropriated something that never formed part of the bundle of rights comprising the Claimants' investment.

253. The Claimants have attempted to square this circle by maintaining that ZAlK held a vested right in the 2002 differential electricity pricing regime under CMU Resolution No 795 after it was repealed in 2005, because Order No 312 remained in force until 2009.[268] But for the reasons already given, the Tribunal cannot accept that ZAlK had any rights that might be capable of attracting the protection of the BIT by virtue of the fact that Order No 312 was not repealed due to an administrative oversight. ZAlK never asserted any rights under Order No 312 and the Tribunal is far from convinced that a Ukrainian court would have endorsed any such claim if one had been made.

254. The Tribunal dismisses this claim based upon Article 6 of the BIT.

F THE RENATIONALISATION CLAIM

F1 Introduction

255. The Claimants advance a claim for denial of justice (either on the basis of the FET obligation in Article 3(2) of the BIT or customary international law),[269] which they say was consummated when the Kyiv Commercial Court rendered its judgment upholding the recission of the 2016 ZAlK SPA on 22 March 2012.[270] In addition, they say that the "*outcome*" of the renationalization constitutes an illegal expropriation of the same investment and thus a breach of Article 6 of the BIT.[271]

256. The Claimants maintain that the following alleged conduct of the Ukrainian courts violated international law: (a) the assumption of jurisdiction over claims that were subject to

267 C's Memorial, §691.
268 C's Memorial, §693.
269 C's Reply, §584.
270 C-333, Kyiv Commercial Court, Case No 48/448-13/364, Judgment, 22 March 2012.
271 C's Reply, §585.

arbitration in the SPAs;[272] (b) the failure to consider the SPFU's verification reports from 2007 onwards;[273] (c) the substitution of the Prosecutor's cause of action based on Article 652 with a cause of action based on Article 651;[274] and (d) the manipulation of the composition system for judicial panels for the High Commercial Court of Ukraine and bias demonstrated by [redacted] public statement.[275]

257. Those elements are the elements that the Tribunal has extracted itself from the Claimants' voluminous pleadings. This has not been a straightforward exercise. Whilst the Respondent goes too far in its characterization of these pleadings as "*present[ing] a disorderly set of random allegations*"[276] in respect of a claim for denial of justice, it is true that there has been a change of emphasis in each pleading (and at the hearing) and a lack of precision about the core elements of the impugned conduct.

258. As a result, there is another set of more peripheral elements relating to the denial of justice claim that the Claimants have raised during the course of the proceedings, which the Tribunal will address at the end of its analysis of the aforementioned core elements. The Tribunal deals with these additional elements in this way because, on its view of the applicable law, they are not capable of altering its conclusions on liability for this claim.

259. The Tribunal will now (i) set out the legal framework of analysis applicable to the claims, (ii) provide its own factual overview of the steps in the various judicial proceedings in chronological order, then (iii) examine the specific conduct alleged to have violated international law and finally (iv) draw conclusions on whether the claims succeed or fail.

F2 The legal framework of analysis

The elements of a denial of justice

260. A denial of justice occurs when a foreign national has suffered a procedural injustice, according to the standards of international law, in seeking to vindicate a substantive right within an adjudicative procedure for which the state is responsible in international law. Although it is often said that a denial of justice is concerned exclusively with procedure, the

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272 C's Memorial, §213; C's Reply, §193; R's Rejoinder, §§167-170; Transcript D1/P92 [redacted].

273 C's Memorial, §§482, 490-497; C's Reply, §619.

274 C's Memorial, §§481, 530-538; C's Reply, §616; C's Opening Statement, p228; Transcript D1/P94 [redacted].

275 C's Memorial, §§481, 539-540; C's Reply, §§625-626; C's Opening Statement, p228; R's Rejoinder, §§181-182; Transcript D1/PP97-99 ([redacted]).

276 R's Rejoinder, §363.

substantive rights in play and the substantive outcome generated by the adjudicative procedure provide essential context for the assessment of whether a procedural injustice has occurred. For instance, the prejudice caused by delay to a foreign national detained in custody awaiting a verdict in criminal proceedings will be more severe than delay in a civil case in which the foreign national is seeking damages. An international tribunal might be justified in concluding that a denial of justice has occurred in the former situation but not in the latter even though the delay measured in years of judicial inactivity was exactly the same: this is coherent, because the substantive rights at play in each case are very different.

261. The importance of the substantive rights at issue and the substantive outcome generated by the adjudicative procedure is self-evident for another reason: no litigant complains about the procedure if the substantive outcome is in its favour. A claimant seeking reparation for a denial of justice impugns the national adjudicative procedure, because, and only because, its substantive rights have been denied in a manner that it considers to be unjust.

262. In the present case the substantive rights at issue are Velbay's contractual rights under the 2006 ZAlK SPA, and, on that basis, its 68.01% shareholding in ZAlK. The substantive outcome of the adjudicative procedure was that Velbay's contractual rights were rescinded and, as a result, it had to relinquish its shareholding in ZAlK. More specifically, in terms of the reasoning deployed to justify this outcome, Velbay says that the Ukrainian courts adjudged that it was in breach of its refinancing obligation to the State under the 2006 ZAlK SPA despite the fact that, contrary to the parties' intentions, it was the State, and not ZAlK, that ultimately received the object of the financing—the Foil Equipment. In other words, ZAlK (and therefore Velbay) was found liable to pay for something that it never received; whereas the State was held to be entitled both to the Foil Equipment and the full value of the Foil Equipment in cash.

263. Velbay thus maintains that the substantive outcome of the adjudicative procedure was manifestly unfair. To make good its claim for denial of justice, however, it must establish that this substantive outcome was the product of a procedural injustice according to the standards of international law. The reverse side of the coin is that there is no denial of justice if the substantive outcome was merely the result of an incorrect application of

Ukrainian law or other substantive error. An international tribunal does not sit as a court of appeal on questions of national law.[277]

264. Both parties accept that the gravamen of a denial of justice is a violation of the fundamental principles of due process.[278] The Respondent further submits that "*there is little utility in providing a long list of denial of justice cases*" because "*[c]ataloguing judicial conduct based on whether it is capable or not of constituting a denial of justice is an unhelpful exercise considering that each case turns on its own facts and circumstances*".[279] There is some truth in this statement. Whilst it would be reassuring to have a precedent on all fours with the present case in terms of the judicial record and the allegations of violations of due process, such a precedent does not exist and it would be facile to expect otherwise, given the complexity of the issues that were litigated in the Ukrainian courts in the context of the Renationalisation Claim. At the end of the day there is simply no substitute for a meticulous examination of the judicial record to ascertain whether the substantive outcome of the proceedings was the product of a manifest lack of due process. The conclusory statements of international courts and tribunals in their assessment of the judicial record in other cases are of very limited value.

265. Velbay must also establish that the substantive outcome it is seeking to impugn was the product of the Ukrainian system of adjudication and not simply an individual court decision.[280] The substantive right in question must be finally denied and not capable of reinstatement as part of the normal functioning of that system. The corollary of this

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277 CL-52, *Iberdrola Energia S.A. v The Republic of Guatemala*, ICSID Case No ARB/09/5, Award, 17 August 2012, §502; CL-49, *Robert Azinian, Kenneth Davitian, & Ellen Baca v The United Mexican States*, ICSID Case No ARB(AF)/97/2, Award, 1 November 1999, §99; CL-48, *Mondev International Limited v United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2012, §127; CL-50, *The Loewen Group, Inc. and Raymond L. Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, Award, 26 June 2003 ("*Loewen*"), §51; CL-69, *Waste Management, Inc. v United Mexican States ("Number II")*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, §129; RL-110, *Philip Morris Brands Sàrl et al. v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award, 8 July 2016 ("*Philip Morris*"), §500; RL-123, *Chevron and TexPet v Ecuador*, PCA Case No 2009-23, Second Partial Award on Track II, 30 August 2018, §8.37; RL-101, *Mamidoil Jetoil Greek Petroleum Products Société Anonyme SA v Republic of Albania*, ICSID Case No ARB/11/24, Award, 30 March 2015, §764; R-21, §57.

278 RL-99, *Flughafen Zürich AG and Gestión e Ingenería IDC SA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/19, Award, 18 November 2014, §639; RL-43, *Loewen Group, Inc. and Raymond L. Loewen v United States of America*, ICSID Case No ARB(AF)/98/3), NAFTA, Mexico's Second 1128 Submission, 9 November 2001, §§123, 132; CL-39, Jan Paulsson, *Denial of Justice in International Law* (2005), Cambridge University Press, p7.

279 R's Rejoinder, §346.

280 RL-123, §§7.117, 8.36; RL-110, *Philip Morris*, §§499, 503; CL-54, *Pantechniki S.A. Contractors & Engineers (Greece) v The Republic of Albania*, ICSID Case No ARB/07/21, Award, 30 July 2009, §96; CL-50, *Loewen*, §154; CL-63, *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*, UNCITRAL, Award, 23 April 2012 §273; RL-109, *Corona Materials LLC v Dominican Republic*, ICSID Case No ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR CAFTA, 31 May 2016, §254.

requirement is that Velbay must demonstrate that it has resorted to all available remedies afforded by the Ukrainian system of adjudication unless such resort would be futile. This is not a matter of controversy in the present case: Velbay, together with ZAlK, resorted to all available remedies at all levels of the Ukrainian judicial hierarchy. The path that Velbay has taken in terms of seeking judicial remedies and the consideration that was given to Velbay's procedural complaints are nonetheless considered in detail in the sections that follow.

The relationship between the denial of justice claim and other claims advanced by the Claimants

266. The predicate conduct for a denial of justice is acts and omissions of adjudicative power, as opposed to prescriptive or enforcement powers, taking the familiar tripartite classification that is provided by the doctrine of jurisdiction in international law.

267. In the investment treaty context, if a claimant's investment has been prejudiced by an exercise of enforcement power and then the claimant suffers a denial of justice in seeking redress, then the international wrong occurs either when that enforcement power was exercised (if that rises to the level of a breach of a treaty standard in its own right) or when the claimant has exhausted the remedies provided by the system of adjudication for a denial of justice, or both (in the sense that two international wrongs may have occurred).

268. The scenario in the present case is quite different. The denial of justice is alleged to have occurred in judicial proceedings where Velbay was defending its investment from potential deprivation. In the event that Velbay is successful in establishing a denial of justice, the international wrong would have occurred at the moment when Velbay exhausted the remedies provided by the Ukrainian judicial system. That was on 11 March 2015, when the Supreme Court of Ukraine rendered its decision and thus when Velbay's remedies were exhausted.[281] It follows that the Tribunal disagrees with the Claimants' pleaded case to the extent that they assert that a breach of the BIT occurred on 22 March 2012, when the Kyiv Commercial Court (i.e. the court of first instance) rendered its judgment upholding the Prosecutor's claim for judicial recission of the 2006 ZAlK SPA.

269. The Claimants have also made a claim for "*judicial expropriation*" at the same point in time (22 March 2012). This claim is unsustainable, because an expropriation requires the exercise of enforcement power to effect the permanent deprivation of property rights. There was no exercise of enforcement power by the Kyiv Commercial Court when it rendered its

281 C-14/C-334, Supreme Court of Ukraine, Case No 48/448-13/364, Judgment, 11 March 2015.

judgment on 22 March 2012. This judgment was but one step in an adjudicative procedure and if Velbay seeks to impugn an aspect of that adjudicative procedure, then it must be through the mechanism of a claim for denial of justice.

270. Indeed, Velbay retained its 68.01% shareholding in ZAlK before and after 22 March 2012 during the pendency of the litigation before the Ukrainian courts. It was only after this litigation had concluded that Velbay was compelled, on the basis of Ukraine's exercise of enforcement power, to transfer its shares to the SPFU on 9 June 2015.[282] That is when the impact of the denial of justice, if any, was felt. The Claimants advance a claim for "*illegal expropriation*" at that point in time and that is admissible in the sense that there was undoubtedly an act of enforcement power behind the transfer of shares. Whether or not this was "*illegal*" in turn depends on whether the order to transfer the shares rested upon a Ukrainian court judgment that was the product of a denial of justice. The enforcement of a judgment that is tainted in this way would be an international wrong; in contradistinction, the enforcement of a judgment that is unimpeachable from an international law perspective would not be.

F3 Overview of the judicial proceedings

271. In this section the Tribunal relies exclusively on the factual record of this case to make its assessment of the judicial proceedings and other matters relevant to the Renationalisation Claim.

The issue of the ownership of the aluminium foil manufacturing equipment

272. On 11 July 2003, the Ordzhonikidze District Court of Zaporozhye rendered its Decision on a claim filed by [redacted] against a decision of the Management Board of ZAlK.[283] [redacted] had standing both as a shareholder and a member of the Management Board. The decision of the Management Board being challenged was its decision of 25 June 2003 to sell its aluminium foil manufacturing equipment ("**Foil Equipment**") to ALUTEC Inc. [redacted] submitted that the Foil Equipment was actually owned by the State and therefore was not ZAlK's to sell. ZAlK defended the claim on the basis that the Foil Equipment was listed as an asset on its books, thus confirming its ownership. The equipment was valued at USD 50 million.

282 C-21, ZAlK Limited Statement of Securities Account, 6 June 2015.
283 C-147, Order of Ordzhonikidze District Court of Zaporozhye, 11 July 2003.

273. The District Court found that the Foil Equipment had not been transferred to ZAlK when it was privatized in 1999. The Foil Equipment had been delivered to State Company Zaporozhye Alumina and Aluminium Complex in the period from August 1997 to December 1998 using the State's funds and was not later transferred to the privatized entity ZAlK.[284]

274. On 11 October 2004, the SPFU and the Ministry of Industrial Policy of Ukraine issued an Order by which they recognized that the Foil Equipment did not belong to ZAlK and should be transferred to the Ministry of Industrial Policy within one month. They stipulated that a state enterprise should be established to manage this property.[285] The next day, on 12 October 2004, the Ministry of Industrial Policy issued an Order to establish that state enterprise and appointed various personnel including its Acting CEO.[286]

275. On 17 November 2004, the Ministry of Industrial Policy of Ukraine signed a Delivery-Acceptance Certificate for the Foil Equipment. It valued the Foil Equipment as at 1 October 2004 as UAH 375,972,408.22.[287]

276. On 2-3 March 2005, the SPFU issued its "*Act of the Current Inspection of Fulfilment of the Terms and Conditions of the Agreement of Sale and Purchase of the Parcel of Shares of Zaporozhye Alumina & Aluminium Complex*".[288] This document recorded that the "*financing of long-term liabilities of the Company under the Loan Agreement*" had not occurred. The document makes reference to the "*Buyer's explanation as to failure to fulfil the refinancing terms and conditions*" enclosed with the report but this is not included in the copy of the document on the record of this arbitration.

277. On 7 April 2005, the SPFU approved a procedure for "*Appealing the Results of the Rewiew of the Compliance with the Terms of the Sale-Purchase Agreement of Privatisation Object in the State Privatisation Body*".[289]

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284 The legal correctness of the Court's conclusion was affirmed by an independent Institute for Legal Issues: C-174, Yaroslav the Wise Institute for Legal Issues, Expert Opinion No 02-11/03, 28 November 2003.

285 C-61, Order of State Property Fund of Ukraine and the Ministry of Industrial Policy of Ukraine No 2129/514, 11 October 2004.

286 C-62, Order of Ministry of Industrial Policy of Ukraine No 525, 12 October 2004.

287 C-366, Ministry of Industrial Policy of Ukraine, Delivery-Acceptance Certificate, 17 November 2004.

288 C-148, State Property Fund of Ukraine, Act of the Current Inspection of Fulfilment of the Terms and Conditions of the Agreement of Sale and Purchase of the Parcel of Shares of Zaporozhye Alumina & Aluminium Complex, 2-3 March, 2005.

289 R-180, The SPFU "*On Approval of Procedure for Appealing the Results of the Review of the Compliance with the Terms of the Sale-Purchase Agreement of Privatisation Object in the State Privatisation Body*", No 878, Provision 3.10, 7 April 2005.

278. On 7 December 2005, the SPFU wrote to the Cabinet of Ministers pursuant to the latter's inquiry concerning the "*establishment of a business entity for production of aluminium foil*".[290] The SPFU recalled that it was a condition of the privatization tender and the sale and purchase agreement of 8 February 2001 that the winning bidder, AvtoVAZ-Invest, refinance the long-term obligations under the loan agreement in the amount of USD 76.45 million. It was recorded that the overdue debt to the state amounted to USD 78,341,785.13. The letter then continued:

> In addition, during 2002-2004, it was recognised by court rulings that CJSC AvtoVAZ-Invest had no obligation to refinance this debt, and by court determination the investor was forbidden both to perform any refinancing actions and provide investment guarantees.
>
> In such circumstances, the Ministry of Finance of Ukraine believes that in the event of establishment of a state company with participation of the state, particularly in the form of a business entity, ZALK OJSC may be released from obligations under the loan agreement; CJSC AvtoVAZ-Invest may be released from the obligations under the sale and purchase agreement.
>
> In this regard, the Ministry of Finance, by letter No 31-05120-03-27/7678 dated April 27, 2005, contacted the Prosecutor's Office of the Zaporozhye Region with a suggestion to review the state of collection of overdue loan debts of ZALK OJSC to the state by the prosecution and state tax service authorities in court.
>
> In view of the foregoing, the State Property Fund supports the suggestion of the Ministry of Economy of Ukraine (letter No 83-43/ 1168 dated November 30, 2005) on the consideration of the establishment of a business entity based on the State Company for Production of Aluminium Foil and Packaging Materials with the participation of ZALK OJSC only after the issue of determining the owner of equipment and the debtor obliged to refinance loan funds received against the guarantees of the Government of Ukraine for the purchase of the foil rolling equipment are settled in court.

279. On 21-22 December 2005, the SPFU issued its next "*Act of the Current Inspection of Fulfilment of the Terms and Conditions on the Agreement of Sale and Purchase of the Stock of Shares of Zaporozhye Alumina and Aluminium Complex*".[291] Once again, it was recorded that the financing obligations had not been fulfilled but this time it is noted that "*[w]ith an available court injunction*

290 C-368, Letter No 48533/3-1-05 from [redacted] to the Cabinet of Ministers of Ukraine, 7 December 2005.

291 C-149, State Property Fund of Ukraine, Act of the Current Inspection of Fulfilment of the Terms and Conditions on the Agreement of Sale and Purchase of the Stock of Shares of Zaporozhye Alumina and Aluminium Complex, 21-22 December 2005.

regarding Refinancing of the Company's long-term liabilities under the Loan Agreement, the terms of Refinancing will be counted as of termination of its validity."

The judicial recission of the 1997 Loan Agreement for the Foil Equipment

280. On 25 December 2005, ZAlK wrote to Ukreksimbank formally requesting that the 1997 Loan Agreement be rescinded, given that ZAlK had never acquired the Foil Equipment.[292] The request was:

> To rescind the Loan Agreement No 145, 1997 entered into between Zaporozhye Alumina and Aluminium Complex OJSC and State Export-Import Bank of Ukraine OJSC that acted on behalf of the Company on the basis of an Agency Agreement dated September 19, 2006.

281. No response was received to this request. ZAlK then commenced judicial proceedings before the Kyiv Commercial Court and filed its Statement of Claim on 12 April 2006.[293] The Statement of Claim records that ZAlK never became the owner of the Foil Equipment, which remained in state ownership, and hence could not be responsible for repaying the funds provided by Ukreksimbank to Fata European Group Srl:

> Since the claimant (ZPAP OJSC) cannot ensure fulfilment of the target use of the loan and does not receive a loan directly from the defendant (Ukreksimbank OJSC), and settlements under the Contract of July 27, 1993 were carried out by the defendant to fulfil the obligations of the SE ZPAP for the equipment acquired in the state property, the claimant sent a proposal to the defendant to rescind the loan agreement No 14 / 02-145.
>
> 4. According to Art. 374 of the Central Committee of the Ukrainian Soviet Socialist Republic, one party (the creditor) must transfer the money to the other party (the borrower) into ownership. In addition, in accordance with Articles 1046, 1054 of the Civil Code of Ukraine under a loan agreement, the bank (the creditor) must transfer the money to the other party (the borrower) into ownership.
>
> However, according to clause 3 of the loan agreement No 14 / 02-145 ZPAP OJSC was not transferred the funds: Ukreksimbank OJSC without the transfer of money into the ownership of ZPAP OJSC independently carried out the transfer of its existing state budget funds to the equipment exporter.

292 C-175, Letter No 14/02-145 from [redacted] to Ukreximbank, 25 December 2005.

293 C-176, ZAlK, Statement of Claim, Case No 2/241, 12 April 2006.

282. As these paragraphs recognize, no funds had moved from Ukreksimbank to ZAlK. There was no restitution of any monies required. ZAlK thus simply asked the Court to rescind the Loan Agreement.

283. In parallel with the Statement of Claim, ZAlK wrote to Velbay on 18 April 2006 requesting the satisfaction of the refinancing obligation.[294] Whilst the Respondent interprets this as recognition on ZAlK's part that the termination of the 1997 Loan Agreement would not extinguish Velbay's refinancing obligation,[295] the Tribunal considers it to be far more likely that ZAlK was simply preserving its position in the event that its claim to rescind the 1997 Loan Agreement was not successful. Indeed, ZAlK never again pursued Velbay in relation to this obligation.

284. On 30 June 2006, the Kyiv Commercial Court rendered its judgment.[296] The Court set out the critical background facts that the Tribunal has independently confirmed by the analysis of the documents up until this point of time:

> On 28.05.97, Zaporizhzhya Aluminium Works OJSC and State Export-Import Bank of Ukraine OJSC entered into Loan Agreement No. 14/02-145 […] Clause 2.6 of Loan Agreement No. 14/02-145 provides that the loan shall be extended to the Borrower by the Lender for the purpose of financing the cost of a contract. According to Clause 2.7, the contract consists of a foreign trade contract dated 27.07.93 and addenda Nos. 1-10 thereto, entered into between Zaporizhzhya Aluminium Works State Enterprise and the Italian firm Fata European Group S.r.l. for the sale and purchase of aluminium casting and rolling equipment for the manufacturing of food product packaging.
>
> The equipment was delivered by the said Italian firm during the period from August 1997 to December 1998; consequently, upon the corporatization of the enterprise […] the said equipment was not contributed toward the authorized capital of ZAlK OJSC.
>
> […]
>
> According to the transfer balance sheet, the rights and obligations associated with the performance of the contract dated 27.07.93 did not pass to ZAlK OJSC, which is supported by Expert Opinion No. 02-11/03 of the Yaroslav the Wise Institute of Law dated 28.11.2003, according to which ZAlK OJSC is not the legal successor of ZAlK SE with respect to the rights and obligations under ZAlK SE's contract with the firm Fata

294 R-73, Letter No 26.02 from ZAlK to Velbay, 18 April 2006.

295 Transcript D2/P226 ([redacted].

296 C-335, Commercial Court of Kyiv, Case No 2/241, Judgment, 30 June 2006.

European Group S.r.l. dated 27.07.93, and by the respondent's comments in the response to the claim.

Under joint Order No. 2129/514 of the State Property Fund of Ukraine and the Ministry of Industrial Policy of Ukraine dated 11.10.2004, the latter was assigned "functions associated with managing the property (equipment for the production of aluminium foil and packaging materials) that was acquired using public funds and was not contributed toward the authorized capital of ZAlK OJSC".

Pursuant to Order No. 525 of the Ministry of Industrial Policy of Ukraine dated 12.10.2004, the State Enterprise for the Production of Aluminium Foil and Packaging Materials was formed on the basis of state property that was acquired using public funds and was not contributed toward the authorized capital of ZAlK OJSC.

The said order also created a property transfer and acceptance commission, which, according to the transfer and acceptance certificate dated 17.11.2004, conducted an inspection of state property – equipment for the production of aluminium foil and packaging materials, recorded on the balance sheet of Zaporizhzhya Aluminium Combine OJSC and transferred to the balance sheet of the State Enterprise for the Production of Aluminium Foil and Packaging Materials – and transferred the aluminium foil manufacturing equipment, with a book value of UAH 151,835,481.00, to the balance sheet of the State Enterprise for the Production of Aluminium Foil and Packaging Materials.

[…]

In light of the foregoing, at the time of entering into Loan Agreement No. 14/02-145 of 28.05.97, the claimant was proceeding from the understanding that the aluminium foil manufacturing equipment had been contributed to toward the authorized capital of ZAlK OJSC. It later became clear, however, that the equipment delivered during the period from August 1997 to December 1998 was not contributed toward the authorized capital of ZAlK OJSC and remained the property of the state. According to Article 652 of the Civil Code of Ukraine, in the event of a fundamental change in the circumstances that the parties relied on when entering into an agreement, the agreement may be rescinded through the courts.

Consequently, since payments under the contract dated 27.07.93 were made by the respondent in performance of the obligations of ZAlK SE in relation to equipment that was acquired for state ownership and was [sic] not contributed toward the authorized capital of ZAlK OJSC, the latter has no business interest in the performance of the loan agreement by the parties thereto.

285. The Court therefore ruled:

To grant the claim in full.

> To rescind Loan Agreement No. 14/02-145 of 28.05.97, entered into between Zaporizhzhya Aluminium Works Open Joint-Stock Company and State Export-Import Bank Open Joint-Stock Company.

286. On 10 August 2006, the SPFU updated the Cabinet of Ministers in relation to the situation concerning the Foil Equipment:

> At present the issues related to foil rolling equipment and repayment of debts under loan agreement №14/02- 145 of 28.05.97 between OJSC "ZAlK" and the State Export-Import Bank of Ukraine, secured by sovereign guarantees (hereinafter – the "Loan Agreement") have not been resolved.
>
> This situation is due to review of several legal actions brought by OJSC "ZAlK" and Velbay Holdings Limited (Cyprus) (holder of a controlling stake, bound under purchase agreement […] of 08.02.2001. Specifically, the Commercial Court of Kyiv granted OJSC "ZAlK"'s claims against OJSC "State Export-Import Bank of Ukraine" in case No.2/241 and ruled to void the Loan Agreement. This ruling hasn't entered into force since it is being challenged on appeal by Ukreksimbank and the Prosecutor General's Office.
>
> At the same time, the relevant state agencies have taken preliminary measures to allow the situation to be resolved immediately as soon as the courts rule on the foil rolling equipment. Specifically, as part of the work being done by the inter-agency work group created under Order No. 11 (28.03.06) of the Ministry of Industrial Policy, a number of meetings were held on future use of the foil rolling equipment and arranging for repayment of outstanding debts under the Loan Agreement and attended by representatives of the State Property Fund of Ukraine, Ministry of Industrial Policy, Ministry of Finance, Prosecutor General's Office, SBU, and OJSC "ZAlK."
>
> Based on the agreements reached during these meetings, OJSC "ZAlK" prepared four potential options for use of the foil rolling equipment and sent them for review by the SPFoU, Ministry of Economics, Ministry of Industrial Policy, Ministry of Finance, and Ministry of Justice under letter No.26.02.3. dated 17.07.06. Preliminary analysis showed that the key differences in the proposed options is the source of funds to pay off debt under the Loan Agreement.
>
> […]
>
> The first step in all of the options is transfer of the debt under the Loan Agreement to the state-owned enterprise created using the foil rolling equipment, which the Fund believes makes any final decision on the matter unacceptable until the court proceedings are completed.
>
> As of today, state agencies have not finished their preliminary analysis of the proposals. Instead, as was already communicated, no option for use of the foil rolling assets can be put into motion before the court

> proceedings regarding the status and ownership of the property are completed.[297]

287. On 22 September 2006, the Kyiv Commercial Court of Appeal rendered its decision dismissing the appeal against the judgment of the Kyiv Commercial Court.[298] The Court of Appeal noted that the Commercial Court had based its decision on the fact that "*according to articles 611, 652 of the Civil Code of Ukraine, article 188 of the Commercial Code of Ukraine the claimant may rescind the disputed agreement in connection with a change in the circumstances of its conclusion, in particular: the Claimant does not have to reimburse the Defendant's costs, related to repayment of the loan for the equipment, which does not belong to it; the Defendant defaulted on its obligations under the disputed agreement; the Claimant may rescind the agreement for the reasons, which it believes are material.*" The Court of Appeal also found as follows:

> The Commercial Court of Appeal also agrees with the position of the Commercial Court of first instance, according to which subsequent fulfilment of the agreement would violate the ratio of the parties' ownership interests and would deprive the interested party (claimant) of the things on which it relied when entering into the agreement. In particular, when entering into Loan Agreement No 14/02-145, the claimant assumed that according to its clauses 2.6, 2.7, the loan is provided to the borrower by the lender for financing of the contract dated July 27, 1993 for sale of the aluminium casting and rolling equipment for production of packaging for food products, i.e. for development and functioning of production operations and generation of relevant benefits. However, since the above equipment was taken from it, the borrower's ownership interests were violated, and the borrower was deprived of the things it relied upon when entering into the agreement.

288. The High Commercial Court then gave its judgment on an appeal from the Kyiv Commercial Court of Appeal on 23 November 2006.[299] The High Commercial Court summarized the basis for the lower court decisions as follows:

> Court decisions were based on the fact that according to articles 611, 652 of the Commercial Code of Ukraine, article 188 of the Commercial Code of Ukraine, the claimant may rescind a disputable contract because of change in the circumstances, which the parties relied on when entering into the contract; in particular, the claimant does not have to reimburse the defendant's losses connected with repayment of the loan for the equipment which, as it turned out, is a state property and was withdrawn from the claimant's economic control.

297 C-88, Letter from the State Property Fund of Ukraine to the Cabinet Ministers of Ukraine, 10 August 2006.

298 C-336, Kyiv Commercial Court of Appeal, Case No 2/241, Judgment, 22 September 2006.

299 C-337, High Commercial Court of Ukraine, Case No 2/241, Judgment, 23 November 2006.

289. The High Commercial Court found:

> The Judicial Panel agrees that subsequent fulfilment of the agreement would violate the ratio of the parties' ownership interests and would deprive the interested party (claimant) of the things on which it relied when entering into the agreement. In particular, when entering into Loan Agreement No 14/02-145, the claimant assumed that according to its clauses 2.6., 2.7 the loan shall be provided to the borrower by the lender for financing the contract dated July 27, 1993 for sale of the aluminium casting and rolling equipment for production of packaging for food products, i.e. for development and functioning of manufacturing operations and generation of relevant benefits. However, since the above equipment was taken from it, the borrower's ownership interests were violated, and the borrower was deprived of the things on which it relied when entering into the agreement.
>
> The Judicial Panel believes that the arguments set out in the cassation representation, according to which rescission of the loan agreement would upset the balance of ownership interest of the parties, State Export-Import Bank of Ukraine OJSC, which, in turn, would result in the need to repay the loan and make other payments by the state and the bank because of this, are incorrect. First of all, clause 3 of article 652 specifies upsetting the balance and deprivation of the interested party of the things on which it relied when entering into the agreement, and the Defendant is not an interested party in rescission of the agreement; second, there is nothing illogical in the fact that the bank and the state would reimburse the cost of the loan used to purchase the equipment, which remained in the state ownership and was not used by the claimant; third, the bank was not deprived of the right or possibility to offer to the created state Company (which would operate using the state-owned equipment in order to generate profit) to enter into relevant loan agreement.

The SPFU's reaction to the judicial recission of the 1997 Loan Agreement

290. On 19 March 2007, the [redacted] wrote to the Prime Minister of Ukraine concerning the situation at ZAlK.[300] The letter opens with the warning that the State may have to repay the debt under the 1997 Loan Agreement:

> The State Property Fund of Ukraine informs you about the possible creation of prerequisites for causing damages to the economic interests of the State in the amount of 76.45 million US dollars, as a result of the adoption by the Ministry of Industrial Policy of Ukraine of the decision by issuing the order No. 2129/514 of 11 October 2004 "On the Use of State Property" on the incorporation of the State Enterprise Aluminum

300 [redacted].

> Foil Plant (Zaporozhye) on the basis of foil rolling equipment of the Italian company FATA.

291. The letter suggests that, due to the Ministry of Industrial Policy's decision to take control of the Foil Equipment, apparently contrary to the Prime Minister's previous instructions, the State may be liable to pay the debt under the 1997 Loan Agreement:

> However, the Ministry of Industrial Policy of Ukraine, contrary to the instruction of the Prime Minister of Ukraine dated 27 September 2004, without an approval of the Cabinet of Ministers of Ukraine, issued an order of 11 October 2004 .2129/514 on the Use of State Property, on the basis of which the State Enterprise for the Production of Aluminum Foil and Packaging Materials was registered.
>
> On June 30, 2006, at the claim of the owner of the controlling stake in OJSC ZALK, the Commercial Court of Kyiv – referring to the recognition by the State authorities of the foil rolling equipment as State property – rendered a judgement rescinding the Loan Agreement between OJSC ZALK and Ukreximbank. The said decision was upheld by the resolutions of the Kyiv Court of Appeal of 22.09.2006 and the High Commercial Court of Ukraine of 23.11.2006.
>
> Thus, the aforementioned actions of the Ministry of Industrial Policy of Ukraine led to the actual transfer to the State Budget of the issue of repayment of a loan of USD 76.45 million issued under Government guarantee.

292. In that letter, the SPFU requested that consideration be given to a range of possible actions to protect the State's interests, including:

> To consider the possibility of initiating court proceedings for invalidation of the agreement of sale and purchase of the share of JSC ZALK No. KPP-307 dated 08.02.01 due to the existing circumstances surrounding the foil rolling equipment and the loan agreement, in view of the considerations in the course of determination the initial value of the specified stake of OJSC ZALK.

293. On 20-22 March 2007, the SPFU in its Act of Inspection once again reported that ZAlK had not complied with its financing obligations under the 1997 Loan Agreement.[301] Velbay appealed that assessment on 26 March 2007.[302] On 17 April 2007, the SPFU dismissed that

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301 C-150, State Property Fund of Ukraine, Act of Current Inspection of Fulfilment of the Terms and Conditions of the Agreement of Sale and Purchase of the Stock of Shares of Zaporozhye Alumina & Aluminium Complex, 20-22 March 2007.

302 C-376, Letter No 10-23-6155 from [redacted] to [redacted] 17 April 2007.

appeal without giving reasons, but notified Velbay that, in accordance with the applicable procedures, a Commission for Appeal at the SPFU would now consider the appeal.

294. On 10 May 2007, the SPFU wrote to the Cabinet of Ministers and referred to its previous verification of Velbay's performance of its obligations under the 2006 ZAlK SPA as well as Velbay's appeal in respect of the SPFU's assessment concerning Velbay's failure to comply with its financing obligations.[303] The SPFU referred again to the possibility of seeking the termination of the 2006 ZAlK SPA and noted that it had requested the Ministry of Justice's analysis of that possibility. The SPFU then stated:

> It should be noted that the opinion of the Ministry of Justice of Ukraine regarding the issue raised is very important, since, according to agreement No KPP-307 dated February 8, 2001, disputes should be resolved in the International Arbitration Court at the Chamber of Commerce and Industry, which is quite costly. Therefore, there is a possibility for the state to incur significant losses in case of losing this case. In addition, availability of an opinion of the Ministry of Justice of Ukraine on the issue would significantly strengthen the Commission's position in claiming debts pre-arbitration.

The clarification ruling in respect of the judicial recission of the 1997 Loan Agreement

295. On 11 July 2007, the Kyiv Commercial Court, upon an application from ZAlK, gave a clarification ruling in respect of its Judgment of 30 June 2006 in respect of the following issues:[304]

> Were ZAlK's liabilites under Agreement No 14/02-145 dated May 28, 1997 discharged; is ZALK OJSC regarded as the successor of Zaporozhye Alumina and Aluminium Complex State Company as regards fulfilment of its rights and liabilities under the Contract for Supply of Aluminium Casting and Rolling Equipment for Production of Package for Food Products, entered into on July 27, 1993 between Zaporozhye Alumina and Aluminium Complex State Company and Fata European Group S.r.l. (Italy)[; whether] the Cabinet of Ministers of Ukraine, the Ministry of Finance of Ukraine and State Export-Import Bank of Ukraine OJSC have the right to demand from Zaporozhye Alumina and Aluminium Complex OJSC to repay the money provided by them before September 22, 2006 in order to fulfil obligations under Loan Agreement No 14/02-145 dated May 28, 1997.

296. The Commercial Court reasoned:

303 C-377, Letter No 10-23-7436 from [redacted] to the Cabinet of Ministers of Ukraine, 10 May 2007.

304 C-156, Kyiv Commercial Court, Case No 2/241, Clarification ruling, 11 July 2007.

> Parts 3 and 4 of article 653 of the Civil Code of Ukraine establish that if an Agreement is rescinded in court, relevant liabilities should be modified or terminated after the court's resolution regarding rescission of the Agreement becomes effective. The Parties cannot demand to return whatever was fulfilled by them prior to modification or rescission of the Contract, unless the Contract or applicable laws stipulate otherwise.
>
> Therefore, starting from September 22, 2006, after the resolution of the Kyiv Commercial Court dated June 30, 2006 regarding case No 2/241 became effective, all obligations of ZALK OJSC under Loan Agreement No 14/02-145 were terminated.

297. The Commercial Court then ruled:

> 1. Starting from September 22, 2006, after the resolution of the Kyiv Commercial Court dated June 30, 2006 regarding case No 2/241 became effective, all liabilities of Zaporozhye Alumina and Aluminium Complex OJSC under Loan Agreement No 14/02-145 dated May 28, 1997 were terminated.
>
> 2. Zaporozhye Alumina and Aluminium Complex OJSC is not regarded as the successor of Zaporozhye Alumina and Aluminium Complex State Company as regards fulfilment of its rights and liabilities under the Contract for Supply of Aluminium Casting and Rolling Equipment for Production of Package for Food Products, entered into on July 27, 1993 between Zaporozhye Alumina and Aluminium Complex State Company and Fata European Group S.r.l. (Italy).

The change of position of the SPFU in respect of Velbay's refinancing obligation

298. The Commission for Appeal at the SPFU rendered its decision on 30 October 2007.[305] Its conclusion in respect of Velbay's refinancing obligation was as follows:

> 2. Hold that as a result of the court decisions regarding the rescission of the loan agreement No. 14/02-145 dated 28/05/1997, the obligations of the owner of the block of shares regarding the refinancing of the obligations of the company under the loan agreement are fulfilled, in full compliance with the interpretation of the said term in the text of the sales and purchase agreement, namely: by means of "...termination of ...the real effective obligations of the company under the loan agreement."
>
> In that extent, the Fund has no leverage on the matter of debt settlement under the said foreign trade contract.

299. The relevant section of the Commission's decision reads:

> 1.2. Conclusion of Clause 3.5.2. of the Act will be revised to read as follows: "Fulfilled. The obligations of the company are terminated due to

[305] C-338, Minutes of Meeting of Commission of State Property Fund, 30 October 2007.

> the decision of the Commercial Court of Kyiv dated 30/06/2006 on rescission of the loan agreement No. 14/02-145 dated 28/05/1997"[.] According to resolutions of Kyiv Commercial Court dated September 22, 2006 and the Supreme Economic Court of Ukraine dated November 23, 2006, the said ruling was held unchanged.
>
> The Resolution of the High Commercial Court of Ukraine dated February 1, 2007 in case No.2/241 denied the commencement of cassation proceeding for the review of resolution of the High Commercial Court of Ukraine dated November 23, 2006. The ruling is final and binding."

300. On 31 March 2009 to 2 April 2009, the SPFU conducted its review of compliance with the terms of the 2006 ZAlK SPA.[306] In respect of the refinancing obligation under the Loan Agreement, the following was noted:

> In fact: performed. Obligation of the company is terminated in connection with the ruling of the Kyiv Commercial Court of June 30, 2006 on the termination of the loan agreement No 14/02-145 dated May 28, 1997.
>
> The Resolutions of the Kyiv Commercial Court of Appeal of September 22, 2006 and the High Commercial Court of November 23, 2006 upheld the ruling.
>
> The Supreme Court of Ukraine by its Decree of February 1, 2007 refused to initiate the cassation proceedings to revise the Resolution by the High Commercial Court of Ukraine of November 2, 2006 regarding case No 2/241. The Decree is final and not subject to appeal.

301. Likewise, on 27-29 July 2010, the SPFU once again rendered its periodical report on the fulfilment of the 2006 ZAlK SPA[307] and recorded that the refinancing obligation under the Loan Agreement had been completed due to the termination of the obligations by the decision of the Kyiv Commercial Court of 30 June 2006, which had been subsequently upheld by the superior courts.

The Claimants' submission on the political motivation behind the alleged change in policy towards Velbay

302. The Claimants maintain that the Prosecutor actively started to "*investigate*" Velbay's fulfilment of its financing obligation under the 2006 ZAlK SPA shortly before the second government of Ms Yulia Tymoshenko was formed.[308] They point to a letter dated 3 December 2007 from the Secretariat of the President of Ukraine to the Prosecutor General's

[306] C-178, State Property Fund of Ukraine, Act of Current Inspection of Fulfilment of the Terms and Conditions of the Agreement of Sale and Purchase of the Stock of Shares of ZAlK, 31 March-2 April 2009.

[307] C-328, Act of Current Inspection of Fulfilment of the Terms and Conditions of the Agreement of Sale and Purchase of the Stock of Shares of Zaporozhye Alumina & Aluminium Complex, 29 July 2010.

[308] C's Reply, §187.

Office, which, following a rather neutral recitation of the key facts, ended with the following direction: "*In view of the above, we are asking you to investigate (within your competence) relevant issues on their merits, take actions according to applicable laws and inform the Secretariat of the President of Ukraine of the results.*"[309]

303. Apart from this (near) coincidence of dates, there is no evidence on the record to establish a direct link between the return of Ms Yulia Tymoshenko to government and the Prosecutor's actions towards Velbay and the Tribunal declines to infer one on this basis. It agrees with the Respondent that "*[t]here is nothing nefarious here*".[310]

The Prosecutor seeks the judicial recission of the 2001 ZAlK SPA and the 2006 ZAlK SPA

304. After requesting various documents from the SPFU and the Ministry of Finance,[311] the Prosecutor filed its Statement of Claim on 26 January 2008 to rescind 2001 ZAlK SPA and the 2006 ZAlK SPA.[312] The Prosecutor recognized that the 1997 Loan Agreement had been rescinded by the Kyiv Commercial Court and, as a result:

> Therefore, as of today, it is impossible to comply with the obligations under the loan agreement in view of a material change in the circumstances on which the parties relied when entering into the agreement of sale-purchase of shares, namely, the rescission of the loan agreement.[313]

305. The Statement of Claim will be analysed in further detail below.

The judicial proceedings relating to the arbitration clauses in the 2001 ZAlK SPA and the 2006 ZAlK SPA

306. On 9 February 2008, the Kyiv Commercial Court gave its ruling "*On Return of the Statement of Claim*"[314] previously filed by the Prosecutor on the basis that, *inter alia*, Article 17.3 of the 2001 ZAlK SPA and Article 10.8(b) of the 2006 ZAlK SPA contained arbitration clauses providing for the referral of disputes to the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine. Thus, by application of Article 12 of

309 C-9, Letter from [redacted] (Secretariat of the President of Ukraine) to the GPOU, 3 December 2007.
310 Transcript D2/P230 [redacted]).
311 R-81, Letter No 05/1/3-16885-03 from General Prosecutor's Office to State Property Fund of Ukraine, 27 December 2007; R-83, Letter No 05/1/3-16885-03 from General Prosecutor's Office to Ministry of Finance of Ukraine, 22 January 2008.
312 C-179, General Prosecutor's Office of Ukraine, Statement of Claim, 26 January 2008.
313 C-179, General Prosecutor's Office of Ukraine, Statement of Claim, 26 January 2008.
314 C-382, Kyiv Commercial Court, Case No 05-5-45/1432, Ruling, 9 February 2008.

the Commercial Procedure Code of Ukraine, the Kyiv Commercial Court had no jurisdiction over the claims submitted by the Prosecutor.

307. On 26 February 2008, the Prosecutor filed an appeal against this ruling of the Kyiv Commercial Court.[315] There were two principal grounds for the appeal. The first was that:

> According to Article 30 of the Law of Ukraine 'On Privatisation of State Property', any disputes regarding privatisation of the state property, other than those arising from public legal relations and covered by the jurisdiction of administrative courts, will be resolved by a commercial court in the manner provided by the Commercial Procedure Code of Ukraine.
>
> Thus, according to the law, any disputes regarding privatisation of the state property of Ukraine are not required to be considered by International Commercial Arbitration Courts and will be resolved by commercial courts.

308. The second principal ground was that the Prosecutor was not a party to either SPA and, therefore, was not bound by the arbitration clauses therein.

309. On 16 April 2008, the Kyiv Commercial Court of Appeal quashed the ruling of the Kyiv Commercial Court on the grounds that had been pleaded by the Prosecutor.[316]

310. Velbay filed a Cassation Appeal on 16 May 2008.[317] One of the grounds of that appeal is that it was not properly informed of the existence of the hearings either before the Kyiv Commercial Court or the Kyiv Commercial Court of Appeal (indeed the respective judgments record that no representative of Velbay was present). Velbay affirmed the continued validity of the arbitration agreements and requested that they be enforced.

311. On 5 August 2008, the High Commercial Court of Ukraine ruled that the case must be reconsidered by the Kyiv Commercial Court, because, *inter alia*, no ruling had been made on the validity or otherwise of the arbitration agreements.[318]

312. The Kyiv Commercial Court, upon its re-examination of the case in a judgment of 2 September 2008, determined principally by reference to Article 30 of the Law of Ukraine "*On Privatisation of State Property*" and Article 12 of the Commercial Procedure Code, that "*if*

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315 C-383, Kyiv Commercial Court of Appeal, Case No 05-5-45/1432, 26 February 2008.

316 C-385, Kyiv Commercial Court of Appeal, Case No 05-5-45/1432, Ruling, 16 April 2008.

317 C-386, High Commercial Court of Ukraine, Case No 05-5-45/1432, Cassation appeal submitted by Velbay, 16 May 2008.

318 C-387, High Commercial Court of Ukraine, Case No 05-5-45/1432, Ruling, 5 August 2008.

the contract on privatisation of the state property is not of a public legal nature and is not referred to the administrative court's jurisdiction, under the art. 12 CPC it may be transferred by the parties to arbitration in presence of arbitration agreement, which provides for transfer to the arbitration of all current disputes which have arisen or could possibly arise between them in relation to any specific legal relations, despite of the fact whether they were of contractual nature or not."[319] The Court found that the Prosecutor had not demonstrated that the arbitration agreements were in any way invalid and that the principal claims fell within the scope of those arbitration agreements. It followed that the Court had no jurisdiction over them.

313. The Prosecutor appealed that decision on 2 October 2008.[320] It stated that the SPAs were property privatization contracts and therefore not covered by the list of disputes that can be referred to arbitration in Article 1 of the International Commercial Arbitration Law of Ukraine. Moreover, it submitted that the Prosecutor was not a party to the SPAs.

314. On 20 October 2008, the Kyiv Commercial Court of Appeal rejected the Prosecutor's appeal on the basis that it was filed outside the prescribed deadline.[321] The Prosecutor then appealed this decision.[322] The appeal was dismissed by the High Commercial Court of Ukraine on 17 March 2009.[323]

315. On 16 April 2009, the Prosecutor filed a Cassation Appeal against the decision of the High Commercial Court of 17 March 2009.[324] That appeal was successful and the Supreme Court remitted the case back to the Kyiv Commercial Court of Appeal by its decision of 30 June 2009.[325] The Kyiv Commercial Court of Appeal found, on 29 September 2009, that the "*current legislation of Ukraine does not provide for examination of disputes on privatisation of the state property of Ukraine in International commercial arbitration court, and such cases should be examined by the commercial courts*" and that the Prosecutor is not bound by the arbitration agreements in question.[326] The case on the merits was thus remitted to the Kyiv Commercial Court. Velbay appealed that decision.[327] That appeal was dismissed by the High Commercial Court of Ukraine on 7 December 2009.[328] A Cassation Appeal was filed by Velbay and ZAlK on

319 C-235, Kyiv Commercial Court, Case No 48/448, Ruling, 2 September 2008.
320 C-388, Kyiv Commercial Court of Appeal, Case No 05-6-48/851, Appeal, 2 October 2008.
321 C-389, Kyiv Commercial Court of Appeal, Case No 05-6-48/851, Ruling, 20 October 2008.
322 C-390, High Commercial Court of Ukraine, Case No 05-6-48/851, Cassation appeal, 20 November 2008.
323 C-392, High Commercial Court of Ukraine, Case No 05-6-48/851, Ruling, 17 March 2009.
324 C-394, Supreme Court of Ukraine, Case No 05-6-48/851, Cassation appeal, 16 April 2009.
325 C-395, Supreme Court of Ukraine, Case No 05-6-48/851, Ruling, 30 June 2009.
326 C-236, Kyiv Commercial Court of Appeals, Case No 48/448, Resolution, 29 September 2009.
327 C-397, High Commercial Court of Ukraine, Case No 05-6-48/851, Cassation appeal, 28 October 2009.
328 [redacted]-2, High Commercial Court of Ukraine, Case No 48/448, Resolution, 7 December 2009.

12 January 2010[329] and 14 January 2010 respectively.[330] It was rejected by the Supreme Court on 18 February 2010.[331]

The courts proceed to hear the Prosecutor's claim for judicial recission of the SPAs on the merits

316. Meanwhile, the Kyiv Commercial Court resolved to commence the proceedings on the merits of the Prosecutor's claim on 25 December 2009.[332] On 7 April 2010, the Court granted the Prosecutor's request for provisional measures to prohibit Velbay from alienating its 68.01% shareholding in ZAlK and to arrest those shares.[333] ZAlK appealed that decision and the appeal was dismissed by the Kyiv Commercial Court of Appeal on 8 June 2010;[334] its appeal to the High Commercial Court of Ukraine was dismissed on 4 August 2010.[335]

317. ZAlK filed its defence on the merits of the case on 1 September 2010,[336] and a supplemental defence on 29 October 2010.[337]

318. On 27 December 2010, the Kyiv Commercial Court dismissed the Prosecutor's claim for judicial recission on the merits.[338]

319. The Prosecutor filed an appeal against that decision on 6 January 2011.[339] ZAlK filed its defence on 29 April 2011.[340]

320. Kyiv Commercial Court of Appeal then upheld the Prosecutor's appeal on 17 May 2011 by reversing the 27 December 2010 judgment of the Kyiv Commercial Court and ordering the recission of the SPAs and the transfer of Velbay's shares in ZAlK to the SPFU.[341]

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329 C-400, Supreme Court of Ukraine, Case No 05-6-48/851, Cassation appeal, 12 January 2010.
330 C-401, Supreme Court of Ukraine, Case No 05-6-48/851, Cassation appeal, 14 January 2010.
331 C-403, Supreme Court of Ukraine, Case No 05-6-48/851, Ruling, 18 February 2010.
332 C-399, Kyiv Commercial Court, Case No 48/448, Decision on the commencement of the proceedings, 25 December 2009.
333 C-180, Kyiv Commercial Court, Case No 48/448, Order for Securing the Claim, 7 April 2010.
334 C-406, Kyiv Commercial Court of Appeal, Case No 48/448, Ruling, 8 June 2010.
335 C-408, High Commercial Court of Ukraine, Case No 48/448, Ruling, 4 August 2010.
336 C-182, ZAlK, Statement of Defence, Case No 48/448, 1 September 2010.
337 C-183, ZAlK, Written Submission No 3, Case No 48/448, 29 October 2010.
338 C-330, Kyiv Commercial Court, Case No 48/448, Judgment, 27 December 2010.
339 C-409, Kyiv Commercial Court of Appeal, Case No 48/448, Appeal, 6 January 2011.
340 C-242, Kyiv Commercial Court of Appeal, Case No 48/448, Statement of defence of ZAlK, 29 April 2011.
341 C-331, Kyiv Commercial Court of Appeal, Case No 48/448, Judgment, 17 May 2011.

321. ZAlK filed a cassation appeal on the same day[342] (and filed additional submissions on 25 June 2011).[343] Velbay filed its cassation appeal on 6 June 2011.[344]

322. The High Commercial Court of Ukraine rendered its judgment on 30 August 2011.[345] It quashed the decision of the Kyiv Commercial Court of Appeal of 17 May 2011 and remanded the case to the Kyiv Commercial Court with instructions to consider certain specific issues.

323. On 13 September 2011, the Kyiv Commercial Court ordered the parties to submit written submissions taking into account the issues raised by the High Commercial Court of Ukraine in its judgment of 30 August 2011.[346]

324. ZAlK filed written submissions on 11 October 2011,[347] 23 October 2011,[348] 24 January 2012[349] and 23 February 2012.[350] The Prosecutor filed written submissions on 12 October 2011[351] and 8 November 2011.[352]

325. The Kyiv Commercial Court rendered its judgment on 22 March 2012.[353] This is the key judgment for the Renationalisation Claim and the Tribunal will consider it in detail in the sections that follow as well as the written submissions before that Court. The Court ordered the recission of the SPAs and the transfer of Velbay's shares in ZAlK to the SPFU and the application of section 133 of the State Privatisation Program for 2000-2002 and also terminated the proceedings against AvtoVAZ-Invest.

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342 C-411, High Commercial Court of Ukraine, Case No 48/448, Cassation appeal submitted by ZAlK, 17 May 2011.
343 C-413, High Commercial Court of Ukraine, Case No 48/448, Additional cassation appeal, 25 June 2011.
344 C-412, High Commercial Court of Ukraine, Case No 48/448, Cassation appeal, 6 June 2011.
345 C-332, High Commercial Court of Kyiv, Case No 48/448, Judgment, 30 August 2011.
346 C-333, Kyiv Commercial Court, Case No 48/448-13/364, Judgment, 22 March 2012.
347 C-316, Kyiv Commercial Court of Appeal, Case No 48/448, Written Submission of ZAlK, 11 October 2011.
348 C-324, ZAlK, Case No 48/448-13/364 (remanded), Written Submission No 2, 23 October 2011.
349 C-325, ZAlK, Case No 48/448-13/364, Written submission No 3, 24 January 2012.
350 C-246, Kyiv Commercial Court, Case No 48/448-13/364, ZAlK's Written Submission No 4, 23 February 2012.
351 C-317, GPOU, Case No 48/448-13/364, Written submissions, 12 October 2011.
352 C-415, Kyiv Commercial Court, Case No 48/448-13/364, written submissions submitted by Deputy Prosecutor General, 8 November 2011.
353 C-333, Kyiv Commercial Court, Case No 48/448-13/364, Judgment, 22 March 2012.

The appeals against the Kyiv Commercial Court's judgment of 22 March 2012

326. ZAlK filed an appeal on 2 April 2012.[354] The Prosecutor did not file a defence to the appeal. The Kyiv Commercial Court of Appeal dismissed the appeal on 23 May 2012.[355]

327. The Prosecutor applied for interim measures against Velbay to prevent it from alienating its shares in ZAlK on 10 May 2012.[356] These were granted on 23 May 2012 by the Kyiv Commercial Court of Appeal,[357] but later quashed by the High Commercial Court on 29 October 2014.[358]

328. On 25 May 2011, ZAlK filed a cassation appeal against the 23 May 2012 decision of the Kyiv Commercial Court of Appeal.[359] Velbay did the same on 12 June 2012.[360] Once again, the Prosecutor filed no defence to the appeals.

329. On 30 July 2012, ZAlK filed a submission on the violation of its rights in the pending proceedings under the European Convention on Human Rights before the High Commercial Court of Ukraine.[361]

330. The High Commercial Court rejected ZAlK's and Velbay's cassation appeals on 29 October 2014.[362]

331. On 29 October 2014, an application was filed by ZAlK and Velbay before the Supreme Court of Ukraine seeking revision of the High Commercial Court's judgment.[363] The Prosecutor filed submissions in response on 19 December 2014.[364] On 11 March 2015, the Supreme Court of Ukraine rendered its judgment rejecting the application.[365]

332. Once again, the Tribunal will carefully analyse these appeal judgments and the submissions before the courts in the sections that follow.

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354 C-340, ZAlK, Written Submission, Case No 48/448-13/364 (remanded), 2 April 2012.
355 C-341, Kyiv Commercial Court of Appeals, Case No 48/448-13/364, Resolution (remanded), 23 May 2012.
356 C-111, Kyiv Commercial Court of Appeal, Application of the GPOU, 10 May 2012.
357 C-341, Kyiv Commercial Court of Appeals, Case No 48/448-13/364, Resolution (remanded), 23 May 2012.
358 C-118, High Commercial Court of Ukraine, Case No 48/448-13/364, Ruling, 29 October 2014.
359 C-245, High Commercial Court of Ukraine, ZAlK's Cassation Appeal, 24 May 2012.
360 C-287, Velbay, Case No 48/448-13/364, Cassation Appeal, 12 June 2012.
361 C-318, High Commercial Court of Ukraine, Case No 48/448-13/364, ZAlK's Written Submission, 30 July 2012.
362 [redacted]-5, High Commercial Court of Ukraine, Case No 48/448, Resolution, 29 October 2014.
363 C-14/C-334, Supreme Court of Ukraine, Case No 48/448-13/364, Judgment, 11 March 2015.
364 C-426, Supreme Court of Ukraine, Case No 48/448-13/364, Written submissions submitted by Prosecutor General's Office of Ukraine, 19 December 2014.
365 C-14/C-334, Supreme Court of Ukraine, Case No 48/448-13/364, Judgment, 11 March 2015.

333. On 9 June 2015, Velbay's 68.01% stake in ZAlK was transferred to the SPFU.[366]

F4 Analysis of the impugned conduct

First ground: failure to give effect to arbitration agreements

334. The Claimants maintain, as an element of their denial of justice claim, that the Ukrainian courts improperly failed to give effect to the arbitration clauses in the SPAs and therefore improperly asserted jurisdiction over the merits of the Prosecutor's claim for recission of the SPAs.

335. The Kyiv Commercial Court of Appeal, in its decision overturning the Kyiv Commercial Court's judgment of 2 September 2008 (by which that Court upheld the application of the arbitration clause in the 2006 ZAlK SPA), referred to three provisions to justify its conclusion that the dispute could not be referred to arbitration.

336. The first was Article 1 of the Law on International Commercial Arbitration, which reads:

> Article 1. Scope of application
>
> […]
>
> 2. Pursuant to an agreement of the parties, the following disputes may be referred to international commercial arbitration:
>
> - disputes arising out of contractual and other civil law relationships that arise in the course of international commerce and other forms of international commercial relations provided that the place of business of at least one of the parties to such relations is located outside Ukraine, and also
>
> - disputes arising between enterprises with foreign investment and international associations and organizations established in the territory of Ukraine; disputes between the participants of such entities; as well as disputes between such entities and other subjects of the law of Ukraine.
>
> […]
>
> 4. The present Law does not interfere with any other law of Ukraine <u>providing that certain disputes may not be submitted to arbitration or may be submitted to arbitration according to provisions other than those of the present Law</u>.[367]

[366] C-21, ZAlK Limited Statement of Securities Account, 6 June 2015.
[367] R-13, Law of Ukraine on International Commercial Arbitration No. 4002-XII dated 24 February 1994.

337. The Court failed to quote the phrase in subsection 4 of Article 1 that is underlined above. As will become clear, this appears to be of some significance, because the clear meaning of this phrase is that, whilst arbitration is permissible in respect of the types of disputes in Article 1(2), this is subject to any other Ukrainian law that may exclude arbitration in respect of such disputes.

338. The next provision relied upon by the Court is Article 12 of the Civil Procedure Code, which reads:

> The following issues are under the jurisdiction of the commercial courts:
>
> 1) cases in disputes arising during the conclusion, amending, termination and execution of the commercial contracts, including in respect of the privatization of property, and on other grounds, except for:
>
> > disputes on privatization of the state housing fund;
> >
> > disputes arising from agreement of the standards and specifications;
> >
> > disputes concerning price regulation for the products (goods), as well as tariffs for services (performance of works), if these prices and tariffs in accordance with the legislation cannot be established by agreement of the parties;
> >
> > disputes arising from the public-legal relations and assigned to the competence of the Constitutional Court of Ukraine and administrative courts;
> >
> > other disputes, the settlement of which in accordance with the laws of Ukraine and the international treaties of Ukraine is assigned to the authority of other bodies;
>
> 2) bankruptcy cases;
>
> 3) cases on the statements of the bodies of the Antimonopoly Committee of Ukraine, the Accounting Chamber on issues referred to their jurisdiction by the legislative acts;
>
> 4) cases arising out of corporate relations in disputes between a company and its participant (founder, shareholder), including the retired participant, as well as between the participants (founders, shareholders) of the companies related to the foundation, activity, management and termination of this company, except for labour disputes.
>
> <u>The dispute that is under the jurisdiction of commercial courts may be submitted by the parties to the arbitral tribunal (arbitration court), except for disputes regarding the invalidation of acts, as well as disputes arising during conclusion, amending, termination and performance of the</u>

> <u>economic contracts related to the satisfaction of state needs, and disputes, stipulated in paragraph 4 of part one of this article.</u>[368]

339. Once again, the Court omitted to quote or otherwise refer to the underlined passage (in fact it only quoted from the very first paragraph). Again this is significant, because it appears to be relevant to the question before the Court.

340. Finally, the Court quoted Article 30 of the Law "*On the State Privatisation Programme*":

> Article 30. Disputes in relation to the state property privatization
>
> Disputes in relation to the state property privatization, except for the disputes arising from the legal public relationships and referred to the jurisdiction of administrative courts, shall be resolved by commercial courts in a manner provided for by the Code of Commercial Procedure of Ukraine.[369]

341. The Court then moved to its analysis of these provisions and its conclusion on the arbitrability of disputes arising out of agreements on the privatization of property, which is stated in one sentence:

> In such circumstances current legislation of Ukraine does not provide for examination of disputes on privatisation of the state property of Ukraine in International commercial arbitration court, and such cases should be examined by the commercial courts.

342. The Tribunal has grave doubts as to whether this conclusion follows from the three provisions that are referred to by the Court, especially if the omitted text is taken into account. Article 1(2) of the Law on Commercial Arbitration appears to allow the dispute in question to be referred to arbitration, subject to any other law taking a contrary position (i.e. by "*providing that certain disputes may not be submitted to arbitration*"). Article 12 of the Civil Procedure Code also expressly envisages that commercial disputes, including those relating to the privatization of property, can be submitted to the commercial courts and, by virtue of that, can also be submitted to arbitration.

343. That leaves Article 30 of the Law "*On Privatisation of State Property*". The Court provides no analysis of the meaning of this provision. The Respondent's legal expert interprets this provision as a mandatory instruction that privatization disputes must be resolved by the commercial courts (i.e. such that arbitration is excluded).

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368 C-238, Commercial Procedure Code of Ukraine No 1798-XII, 6 November 1991. (Emphasis added.)

369 C-237, Law of Ukraine No 1723-III, 18 May 2000.

344. The Tribunal finds this interpretation difficult to follow.

345. First, Article 30 appears to be concerned with the division of competences within the Ukrainian judiciary: it divides privatization disputes between those that are to be referred to the commercial courts and those that are referred to administrative courts (disputes arising from legal public relationships). Article 30 can be read harmoniously with Article 12 of the Civil Procedure Code: as Article 30 stipulates that all but a special category of privatization disputes are to be referred to the commercial courts, Article 12 confirms that privatization disputes are to be resolved by the commercial courts (subsection 1) and, as such, can also be referred to arbitration (final paragraph). The Respondent's expert is compelled to submit that there is a conflict between Article 30 and Article 12 of the Civil Procedure Code by labelling the former as "*lex specialis*" such that it displaces Article 12.

346. Second, the Respondent's expert places great emphasis on what she characterizes as mandatory language in Article 30 "*shall be resolved*"[370]—this was described as the "*decisive element*".[371] But if the legislative intention were really to make the jurisdiction of the commercial courts exclusive in this sense, it is surprising that express words to that effect were not chosen. Article 1(4) of the Law on Commercial Arbitration seems to require more than an implication (and a tenuous one at that) to exclude commercial disputes from arbitration. Moreover, from a public policy perspective, it would be more important to ensure that disputes arising from "*legal public relationships*" should be resolved by the administrative courts, than to compel the submission of disputes arising out of civil or commercial relationships to the commercial courts. And yet there is no apparent mandatory language in respect of the jurisdiction of the administrative courts in Article 30.

347. Third, the SPFU signed both the 2001 ZAlK SPA and the 2006 ZAlK SPA and purported to bind itself to commercial arbitration on both occasions. The SPFU is the state organ most directly concerned with the interpretation and application of the Law on Privatization and its understanding at the time was obviously that privatization disputes arising under those agreements could be referred to arbitration. Moreover, immediately before the Prosecutor filed its claim seeking the recission of the 2006 ZAlK SPA, the SPFU had taken

370 [redacted]

371 Transcript D4/P704 [redacted]).

the position in correspondence with the Cabinet of Ministers that the dispute would have to be referred to arbitration in accordance with the arbitration clause.[372]

348. Fourth, neither the Commercial Court of Appeal, nor the Respondent's expert, cited any other authority in support of the position that Article 30 excludes the arbitration of privatization disputes by implication.

349. The Respondent's expert[373] placed particular emphasis on the fact that bankruptcy disputes are within the exclusive jurisdiction of the commercial courts (and are thus not arbitrable), despite the lack of any express language to that effect in Article 6(1) of the Law of Ukraine "*On Restoring Solvency of the Debtor or Declaring Bankruptcy*", which reads: "*[c]ommercial courts have jurisdiction over bankruptcy cases and such cases should be considered at the domicile of the debtor*". The reason for the universal rule that certain types of bankruptcy disputes are not arbitrable is well known: the objective of a bankruptcy process is to maximise the value of the insolvent party's assets and to protect the interests of third party creditors by way of a structured, centralized and transparent process. This is not possible if stakeholders or creditors are free to enforce claims against the insolvent party in different judicial fora (including arbitration) in an uncoordinated, decentralized and non-transparent fashion. There is an overriding public policy reason why bankruptcy cases are not arbitrable. The Respondent's expert has not demonstrated that such cases are not arbitrable in Ukraine simply by virtue of the formulation in Article 6(1) of the Law of Ukraine "*On Restoring Solvency of the Debtor or Declaring Bankruptcy*". Nor has the Respondent's expert suggested that there is an overriding public policy reason why the civil law aspects of privatization disputes should not be arbitrable—indeed, according to the expert, arbitration has been expressly permitted for such disputes since 2016.[374]

350. The Kyiv Commercial Court of Appeal also found that, in addition to the dispute being non-arbitrable, the Prosecutor was also not bound by the arbitration agreement as it was an "*independent part[y]*".[375] The Court referred to Article 29 of the Commercial Procedure Code of Ukraine to justify this conclusion. That provision reads:

> Article 29. Participation of a prosecutor in consideration of the cases

372 C-377, Letter No 10-23-7436 from [redacted] to the Cabinet of Ministers of Ukraine, 10 May 2007.

373 [redacted].

374 Transcript D4/P702 [redacted]

375 C-236, Kyiv Commercial Court of Appeals, Case No 48/448, Resolution, 29 September 2009.

> The prosecutor takes part in the proceedings under its claims, and may also intervene in the case that was initiated under the claim of other persons at any stage of the proceedings to represent the interests of a citizen or a state. To intervene in the case, the prosecutor may file an appeal or cassation petition, a petition for review the court decision under the new circumstances, or to inform the court and take part in the proceedings initiated by a claim of other persons.
>
> In case of acceptance by a commercial court of a statement of claim filed by the prosecutor on behalf of the state represented by a body authorized to exercise the functions of the state in legal relations in dispute, the mentioned body shall acquire the status of a plaintiff.
>
> The prosecutor informs in writing the commercial court of its participation in the case that was already initiated and in the court hearing - it informs in oral form.
>
> The prosecutor taking part in the case has duties and exercises the rights of a party, except the right to conclude a settlement agreement.
>
> The prosecutor's waiver of the claim filed by it does not deprive the plaintiff of the right to demand settlement of the dispute on the merits.
>
> The plaintiff's waiver of the claim filed by the prosecutor in the interests of the state does not deprive the prosecutor of the right to maintain the claim and to demand settlement of the dispute on merits.[376]

351. The Tribunal reads this provision as meaning that the Prosecutor has the procedural right to intervene on behalf of the state body that is competent in relation to the legal relations in dispute. That state body in the present case is the SPFU, which is the signatory to the 2006 ZAlK SPA and the arbitration clause within it. According to Article 29, it is the SPFU that has the status as the "*plaintiff*"—not the Prosecutor. The Respondent's expert agrees with this[377] and the Constitutional Court has confirmed it.[378] Article 29 envisages that the Prosecutor can file a statement of claim "*on behalf of*" the relevant state body. Consistent with this prescription, the Prosecutor expressly stated in its Statement of Claim that "*[g]iven that the State Property Fund of Ukraine represents the interests of the State, a claim is served on its behalf*".[379] Article 29 also states that "*[t]he prosecutor taking part in the case has duties and exercises the rights of a party, except the right to conclude a settlement agreement*". One of the duties of the SPFU was to accept that disputes should be referred to arbitration pursuant to clause 10.8(b)

376 C-238, Commercial Procedure Code of Ukraine, No 1798-XII, 6 November 1991.

377 [redacted].

378 [redacted] Presentation, Slide 5.

379 C-179, General Prosecutor's Office of Ukraine, Statement of Claim, 26 January 2008.

of the 2006 ZAlK SPA. It is not clear to the Tribunal why the Prosecutor is not, therefore, under the same obligation by virtue of Article 29 of the Commercial Procedure Code.

352. There is no analysis of Article 29 provided in the decision of the Kyiv Commercial Court of Appeal. The Respondent's expert attaches significance to the final two paragraphs of Article 29, which provide, in essence, that the Prosecutor is not bound by any settlement of the claim by the relevant state organ and vice versa.[380] But the expert says nothing about the provision that immediately precedes these paragraphs, which states that the Prosecutor has the same rights and obligations as a party. The fact that there is a carve-out for the settlement of a claim, where the interests of the Prosecutor and the state organ may not coincide, surely does not mean that the Prosecutor is then at liberty to pick and choose which provisions of a contract it wishes to enforce and to avoid. If the Respondent's expert's interpretation of Article 29 were correct, then the consequence would be that an arbitration agreement in any contract with a state organ in Ukraine would be subject to abrogation if the Prosecutor stepped in to make a claim or defence on the basis of that contract and desired to avoid arbitration.

353. The Respondent's expert sought to answer this point by opining that the Prosecutor can only intervene if the state's interests have been violated such that the opportunity to intervene is circumscribed.[381] Indeed Article 2(2) of the Commercial Procedure Code provides:

> The prosecutor, who files an action with a commercial court in the interests of the State, independently determines in a statement of claim the violation of the interests of the State, provides reasons why such interests require protection, and also indicates the authority authorised by the State to perform the relevant functions in the disputed relationship.[382]

354. It does not appear, however, that the Kyiv Commercial Court of Appeal undertook any assessment as to whether the threshold of the State's interests being violated had been satisfied on the facts of the case.

355. Even on the assumption that the Respondent's expert is correct about the legality of the Prosecutor's avoidance of the arbitration clause in the 2006 ZAlK SPA in this case on the basis of its independent status, that does not mean that it is acceptable from an international

380 [redacted]
381 [redacted]
382 R-7, Commercial Procedure Code of Ukraine, No 1798-XII, 6 November 1991.

legal stand point. The ambiguities concerning the role of the Prosecutor in civil proceedings in Ukraine have attracted serious international criticism.[383]

356. In conclusion, the Tribunal is persuaded that the Kyiv Commercial Court's judgment of 2 September 2008 in upholding the application of the arbitration clauses in the SPAs is on firmer ground than the judgment of the Kyiv Commercial Court of Appeal, which came to the opposite result. That, however, is not tantamount to a breach of international law: the Tribunal is not sitting as a court of appeal on questions of substantive Ukrainian law. The Tribunal nonetheless considers it relevant to its overall assessment that the Kyiv Commercial Court of Appeal omitted to cite the critical passages of two of the three legislative texts that it relied upon to justify its conclusion, where those passages could be interpreted as directly undermining that conclusion. The Tribunal also considers it relevant to take into account the injustice that may be occasioned to a private litigant in proceedings against a state entity in Ukraine if the Prosecutor is effectively permitted to enforce and to avoid provisions of the same contract in stepping into the shoes of that state entity. Whether or not such injustice manifested itself in this case will depend upon the Tribunal's assessment of the other grounds; indeed the procedural position of the Prosecutor is relevant to the Second Ground to which the Tribunal now turns.

Second ground: failure to consider the official position of the SPFU

357. The High Commercial Court of Ukraine, in its judgment of 30 August 2011, instructed the Kyiv Commercial Court, when the case was remanded to it, to take into account the SPFU's Acts of Inspection, which were in essence an audit of compliance with the terms of the 2006 ZAlK SPA.[384] ZAlK had drawn the Court's attention to the fact that the SPFU had recognized that Velbay's refinancing obligation had been terminated as a result of the Kyiv Commercial Court's decision of 30 June 2006 in several submissions before the Ukrainian courts.

358. In its submissions of 11 October 2011 in the remanded case before the Commercial Court, ZAlK had quoted from the decision of the SPFU's Commission of 30 October 2007, which had been approved by the [redacted] on 2 November 2007:

> As a result of the court decisions regarding the rescission of the loan agreement No. 14/02-145 dated 28/05/1997, the obligations of the

[383] C-240, European Commission for Democracy Through Law (Venice Commission), Joint Opinion on the Draft Law on the Public Prosecutor's Office, 14 October 2013.

[384] C-332, High Commercial Court of Kyiv, Case No 48/448, Judgment, 30 August 2011.

> owner of the block of shares regarding the refinancing of the obligations of the company under the loan agreement are fulfilled in full compliance with the interpretation of the said term in the text of the sales and purchase agreement, namely: by means of "... termination of ... the real effective obligations of the company under the loan agreement."[385]

359. ZAlK also referred to the SPFU's Acts of Inspection for 2009 and 2010, where it was noted that ZAlK's financing obligation had been fulfilled by reason of the Kyiv Commercial Court's decision of 30 June 2006.[386]

360. In the Prosecutor's submissions of 12 October 2011, it stated in relation to this point:

> It should also be noted that the case files contain reports of regular audit of fulfilment of the terms of OJSC ZAlK share sales and purchase agreements which were issued by the State Property Fund of Ukraine and dated 19-21/11/2001, 18-21/06/2002, 25-27/06/2003, 18-20/11/2003, 30/03-02/04/2004, 02-03/03/2005, 21-22/12/2005, 20-22/03/2007 and 31/03-02/04/2009, and in which it is stated that the terms of the share sales and purchase agreements are not fulfilled as regards refinancing of debt under the loan agreement dated 28/05/1997, preservation of production level, making investments, provision of investment guarantees, fulfilment of the job preservation plan and untimely performance of paragraph 9.2 of the collective agreement.[387]

361. This submission from the Prosecutor is partially false and also misleading. There is no reference to the decision of the Commission of the SPFU, by which ZAlK's appeal in respect of the 2007 report had been upheld such that from that time onwards, the SPFU recognized that ZAlK had "*fulfilled*" its financing obligation in respect of the 1997 Loan Agreement in so far as the latter had been rescinded. Hence the Prosecutor's representation to the contrary in respect of the SPFU's Acts of Inspection of 2007 and 2009 is false. There is also no mention of the 2010 Act of Inspection, which is identical to the previous Acts in this respect.

362. The Kyiv Commercial Court recognized that it was instructed by the High Commercial Court to take into account the SPFU's Acts of Inspection. The Court did so by referring to the Acts issued from 2002-2007 and noted that Velbay's financing obligation had not been complied with, along with other obligations relating to investment. As noted above, this is incorrect in relation to 2007. In relation to 2009 and 2010, the Court said:

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385 C-316, Kyiv Commercial Court of Appeal, Case No 48/448, Written Submission of ZAlK, 11 October 2011.
386 C-316, Kyiv Commercial Court of Appeal, Case No 48/448, Written Submission of ZAlK, 11 October 2011.
387 C-317, GPOU, Case No 48/448-13/364, Written submissions, 12 October 2011.

> The report of the current inspection carried out on 31.03-02.04.2009 established that the terms of the agreement for the sale and purchase of shares in ZAlK OJSC were being performed. Similar information was recorded in the report on the current inspection on 27-29.07.2010.[388]

363. This is the extent of the Kyiv Commercial Court's consideration of this issue in its judgment. No reference was made to the SPFU's decision of 30 October 2007 or to the specific language in the amended 2007, 2009 and 2010 Acts of Inspection which recognized that Velbay's refinancing obligation had been "*fulfilled*".

364. The official position of the SPFU was critically important in this litigation. One of ZAlK's arguments was that no claim for recission could be made by the SPFU, because it was not a party to the 2006 ZAlK SPA (which was between AvtoVAZ-Invest CJSC and Velbay)—it had only approved that agreement. To meet this argument, the Court reviewed the relevant provisions of the Law of Ukraine "*On the Privatization of State Property*" and stated that "*the State Property Fund of Ukraine is and shall remain a direct participant in relations upon both the original and subsequent alienation of the privatized asset as the authority responsible by law for monitoring the parties' implementation of their obligations under the privatization agreement*". Assuming the Court's decision is correct on this point, and the SPFU was a party to the 2006 ZAlK SPA and therefore had standing to demand the recission of that agreement under Article 652 of the Civil Code, its own official regulatory position as to whether or not there was a breach of the 2006 ZAlK SPA was obviously of paramount importance, as it was the state body with exclusive competence to monitor an investor's compliance with the terms and conditions of a privatization agreement. Not only did the Court fail to engage with the official position of the SPFU that Velbay was not in breach of the refinancing obligation because the 1997 Loan Agreement had been rescinded by the Kyiv Commercial Court, but the Court did not examine the basis upon which the Prosecutor could be entitled to take a different position to the SPFU, given that the Prosecutor itself had no standing as a party to the 2006 ZAlK SPA.

365. ZAlK had consistently raised this point in its pleadings: as the SPFU has exclusive competence over monitoring compliance with sale and purchase agreements, the Prosecutor had no basis to go behind the SPFU's position on whether compliance had occurred.[389]

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388 C-333, Kyiv Commercial Court, Case No 48/448-13/364, Judgment, 22 March 2012.
389 C-182, ZAlK, Statement of Defence, Case No 48/448, 1 September 2010.

366. The Respondent's expert is correct that it was open to the Kyiv Commercial Court to make its own assessment of whether the SPFU's Acts of Inspection were valid because "*acts/decisions of the SPFU, like the acts/decisions of any other State body, are subject to challenge*".[390] The problem here, however, is that nobody was challenging them. The Prosecutor had never pleaded that the SPFU's official position was wrong or invalid—no doubt because this was irrelevant to the claim for recission based on a change of material circumstances under Article 652 (see the analysis under Third Ground below).

367. The Tribunal is persuaded that these omissions were not by inadvertence. The High Commercial Court had specifically instructed the Kyiv Commercial Court to deal with this matter and the Kyiv Commercial Court simply paid lip service to that instruction without providing any analysis of its significance to the case.

368. This is further confirmed by the manner in which the Court concluded that Velbay had breached its refinancing obligation. Obviously it could not rely upon the SPFU's own official position that there was no refinancing obligation to breach. So instead it drew an inference that Velbay had nonetheless breached the obligation by the fact that there was no Final Inspection Report on the case file, which under the terms of clause 3.2 of the 2006 ZAlK SPA was to be signed by the parties to that agreement once all outstanding obligations had been performed. The reason that there was no Final Inspection Report on the case file was that there were other investment obligations outstanding that had nothing to do with the refinancing obligation and the audit of those investment obligations was an ongoing process. Moreover, given that the SPFU's position in its Acts of Inspection since 2007 was that the refinancing obligation was no longer outstanding, it is clear that the same position would be reflected in any Final Inspection Report. The Court's reliance on the absence of a Final Inspection Report to establish a breach of the refinancing obligation, while at the same time ignoring the SPFU's actual official position confirming the absence of any breach, demonstrates a manifest lack of judicial propriety. Following the Court's logic, there would be evidence of Velbay's breach of the 2006 ZAlK SPA the day after it signed it because of the absence of a Final Inspection Report. Hence Article 3.2(b) of the 2006 SPA reads:

> (b) After the Buyer performs in full the Outstanding Commitments taking into account possible amendments, the Buyer and the SPF will sign the Act of Final Inspection (the "Final Act"). The Final Act is to be compiled in accordance with a form approved by the SPF Order or with other form approved by the SPF as of the execution of such act. <u>The Outstanding</u>

[390] [redacted] §95.

Commitments shall be considered fulfilled from the moment of their full and proper fulfilment.

369. The underlined sentence confirms that if the SPFU had considered that an obligation of Velbay had been fulfilled at any stage of the contractual relationship, then it would not somehow remain unfulfilled until an Act of Final Inspection could be signed.

370. The Tribunal must now consider whether these flaws were remedied upon appeal.

371. One of the points raised in ZAlK's appeal to the Kyiv Commercial Court of Appeal[391] was the failure of the Kyiv Commercial Court to take into account the documents reflecting the SPFU's official position that Velbay's refinancing obligation had been discharged.[392] The Commercial Court of Appeal rendered its judgment on 23 May 2012.[393] It is largely a verbatim reproduction of the judgment rendered by the Kyiv Commercial Court. There is no consideration of ZAlK's appeal grounds in the judgment. ZAlK then filed a cassation appeal against that judgment on 24 May 2012, repeating its earlier appeal grounds.[394] Velbay also filed a cassation appeal based on the same grounds.[395] On 29 October 2014, the High Commercial Court of Ukraine rendered its judgment in the cassation appeal.[396] It said the following about the SPFU's official position in its Acts of Inspection:

> The lower courts have established pursuant to the requirements of Article 43 of the Code of Commercial Procedure of Ukraine that, during the term of Agreement 1 and Agreement 2, the State Property Fund of Ukraine, in pursuance of the provisions of Articles 7, 27 of the Law of Ukraine On State Property Privatization carried out routine inspections of fulfillment of the terms and conditions of the agreement for sale and purchase of the shareholding in ZAlK OJSC. In this connection, the courts studied the following regular verification reports that had been issued before the occurrence of the disputed legal relationship, namely: dated 18 June 2002-21 June 2002, dated 25 June 2003-27 June 2003 and 18 November 2003-20 November 2003, dated 30 March 2004-2 April 2004, dated 2 March 2005-3 March 2005 and 21 December 2005-22 December 2005, dated 20 March 2007- 22 March 2007, which established that the buyers had not complied with the terms and conditions of Agreement 1 and Agreement 2 in respect of making investments and refinancing the company's long-term obligations under the Loan Agreement.[397]

391 C-340, ZAlK, Written Submission, Case No 48/448-13/364 (remanded), 2 April 2012.
392 C-340, ZAlK, Written Submission, Case No 48/448-13/364 (remanded), 2 April 2012.
393 C-341, Kyiv Commercial Court of Appeals, Case No 48/448-13/364, Resolution (remanded), 23 May 2012.
394 C-245, High Commercial Court of Ukraine, ZAlK's Cassation Appeal, 24 May 2012.
395 C-287, Velbay, Case No 48/448-13/364, Cassation Appeal, 12 June 2012.
396 [redacted]-5, High Commercial Court of Ukraine, Case No 48/448, Resolution, 29 October 2014.
397 [redacted]-5, High Commercial Court of Ukraine, Case No 48/448, Resolution, 29 October 2014.

372. The High Commercial Court of Ukraine's consideration of this issue is more egregious than the Kyiv Commercial Court's judgment. First, the reference to the 2007 Act of Inspection is false, because that audit was amended by the decision of the Commission for Appeal of the SPFU of 30 October 2007[398] to reflect the position that Velbay had been discharged from its refinancing obligation. Second, there is no reference to that decision, which had been specifically referred to by ZAlK in its cassation appeal and in its previous submissions before the lower courts. Third, the High Commercial Court neglected to refer to the 2009 and 2010 Acts of Inspection, which expressly include language to the effect that the SPFU considers that the refinancing obligation had been discharged. Even the Kyiv Commercial Court had referred to those audits, albeit in a purely formal manner. The Supreme Court's judgment of 11 March 2015 does not consider this issue.[399]

373. The Ukrainian Courts' failure to give an accurate account of the evidence relating to the SPFU's Acts of Inspection, coupled with the omission to provide any legal analysis of the relevance of that evidence to the disposal of the case at hand, reveals judicial bias towards Velbay. There is no other credible explanation for this conduct on the basis of the record before the Tribunal.

Third ground: the change of the foundation of the claim by the court

374. The Kyiv Commercial Court's finding that Velbay had in fact breached the refinancing obligation was critical to its ultimate decision on rescission based on Velbay's material breach of the 2006 ZAlK SPA in accordance with Article 651 of the Civil Code. The question is, however, whether the Prosecutor had actually pleaded a claim for rescission under Article 651 based upon a material breach by Velbay of the 2006 ZAlK SPA and, more importantly for the purposes of international review, whether Velbay had an adequate opportunity to respond to such a claim in accordance with its basic due process rights that are protected by the BIT and international law.

375. Before the Tribunal sets out its comprehensive review of the record, it is important to make one observation on the structure of the relevant provisions of the Civil Code. Article 651 serves as both an umbrella provision for the remaining Articles 652-654 concerned with the change or rescission of a contract as well as a containing one of the distinct grounds for

398 C-338, Minutes of Meeting of Commission of State Property Fund, 30 October 2007.
399 C-14/C-334, Supreme Court of Ukraine, Case No 48/448-13/364, Judgment, 11 March 2015.

rescission, which is a material breach of a contract. Article 651 thus has a generic title "*Grounds for Change or Recission of Contract*".[400]

376. Subsection 1 of Article 651 provides that a change or rescission of a contract is only permitted upon agreement of both parties unless otherwise established by the contract or by law. That provision applies to all grounds for change or rescission.

377. Subsection 2 of Article 651 then states that a contract may be changed or rescinded by the decision of a court upon the demand of one of the parties when there is a material breach of the contract by the other party and in other instances established by the contract or by a law. Subsection 2 thus introduces one possible ground for a court's rescission of a contract (material breach) but also states that there may be other grounds under the contract itself or in a law. One further such ground is contained in Article 652, which deals with rescission by the court on the basis of a material change of circumstances.

378. A copy of the parties' agreed translation of Articles 651-653 is included as Annex D to this Decision.

379. The Prosecutor's Statement of Claim was filed on 26 January 2008.[401] The Tribunal recalls that a substantial number of steps in the litigation occurred between that time and the Kyiv Commercial Court's decision of 30 August 2011; nonetheless, it was this Statement of Claim that was the basis for the adjudication of the merits of the dispute.

380. In its Statement of Claim, the Prosecutor recognized that the 1997 Loan Agreement had been rescinded by the Kyiv Commercial Court in 2006 and, as a result:

> Therefore, as of today, it is impossible to comply with the obligations under the loan agreement in view of a material change in the circumstances on which the parties relied when entering into the agreement of sale-purchase of shares, namely, the rescission of the loan agreement.[402]

381. Thus, before the Prosecutor sets out its justification for its claim, its conclusion based upon its recital of the relevant facts is that there has been a material change of circumstances. The Prosecutor then set out the various relevant legal provisions: Article 27(5) of the Law of Ukraine "*On the Privatisation of State Property*" and Articles 651-652 of the Civil Code. These

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400 Transcript D3/P587 ([redacted]); Transcript D4/PP737-738 ([redacted]).
401 C-179, General Prosecutor's Office of Ukraine, Statement of Claim, 26 January 2008.
402 C-179, General Prosecutor's Office of Ukraine, Statement of Claim, 26 January 2008.

provisions are simply quoted verbatim. Then the Prosecutor provides its analysis of the applicable law to the facts:

> The agreement of sale and purchase of the shares of ZAlK OJSC dated 08.02.2001 should be rescinded, because, when entering in the agreement, one of the parties – the State Property Fund of Ukraine, acting on behalf of the State as a State privatization authority – relied on compliance by AvtoVAZ-Invest CJSC with the obligations to refinance the long-term commitments of ZAlK OJSC under the loan agreement No. 14/02-145 dated 28.05.1997. When concluding [the agreement] the parties did not have grounds for non-compliance with the obligations they undertook and to believe that the refinancing will not be made.
>
> Moreover, concluding the agreements, the parties were not able to foresee the rescission of the loan agreement.
>
> Also, the State Property Fund of Ukraine, acting with all its prudence, was not able to eliminate such change in the circumstances.
>
> The Agreement of 24.03.2006 contains the provision regarding the compliance with obligations under the privatization agreement. Having agreed to entering into it, the State Property Fund of Ukraine relied on the company's VELBAY HOLDINGS LIMITED compliance with its obligations to refinance the long-term commitments of ZAlK OJSC under the loan agreement No. 14/02-145 dated 28.05.1997.
>
> A failure of AvtoVAZ-Invest CJSC and the company VELBAY HOLDINGS LIMITED to comply with the obligations to refinance the loan agreement disrupts the balance of property interests of the parties, namely, of the State Property Fund of Ukraine, because the obligations of AvtoVAZ-Invest CJSC and the company VELBAY HOLDINGS LIMITED to refinance the loan agreement were taken into account while determining the value of the block of shares when the agreement of 08.02.2001 was concluded and while giving consent to conclude the agreement of 24.03.2006. Non-compliance with these obligations materially changes the conditions on which the agreements were entered, including the determination price at which the block of shares of ZAlK OJSC was sold. Moreover, the above, in its turn, would necessitate the repayment of the loan and other payments by the State.
>
> Current law of Ukraine does not provide that a party to an agreement, in the present case it is the State Property Fund of Ukraine, should be responsible for a change in material circumstances resulting in a failure of other parties to the agreement – CJSC AvtoVAZ-Invest and the company VELBAY HOLDINGS LIMITED – to comply with the obligations they undertook under the sale-purchase agreements.
>
> According to Article 652 of the Civil Code of Ukraine, if an agreement is rescinded because of a fundamental change in circumstances, the court, at the request of any of the parties, shall determine the consequences of rescission of the contract based on the need for fair distribution among

> the parties of the costs incurred by them due to performance of the said agreement.
>
> According to Article 653 of the Civil Code of Ukraine, in case of rescission of an agreement, an obligation shall be terminated starting from the moment when the consent to rescind an agreement was reached, unless otherwise is established by an agreement. In case an agreement is rescinded by the court decision, the obligations are terminated from the moment the court decision rescinding an agreement enters legal force.[403]

382. As these passages show unequivocally, the claim for rescission is grounded upon a material change of circumstances and thus Article 652 of the Civil Code. Article 651 is not even mentioned in these passages dealing with the analysis of the claim. The Respondent has placed much significance on the fact that Article 651 is quoted before the analysis, but that provision is not referred to again and there is no consideration of rescission on the ground of material breach in the Prosecutor's analysis that followed. The mere recitation of Article 651 is consistent with the fact that it is a chapeau provision for Article 652.

383. Finally, when the Prosecutor deals with the question of whether the Civil Code applies to its claim *ratione temporis*, it says:

> Given that the relations of the parties with regard to entering into a sale-purchase agreement of 8 February 2001 arose before 1 January 2004, and regarding the compliance with the obligations they continued to exist after the Civil Code of Ukraine had entered into force (i.e. after 1 January 2004), there are all grounds to apply <u>article 652</u> of the Civil Code of Ukraine to the legal relations regarding the compliance with obligations set out in the privatization agreement in case of rescission of the agreement of 8 February 2001.[404]

384. Once again, as this passage demonstrates, the sole basis of the claim was a material change of circumstances founded upon Article 652 of the Code.

385. The Tribunal endorses the testimony provided by the Claimants' expert under cross-examination on the structure of the Prosecutor's Statement of Claim:

> Under Ukrainian law, and I believe perhaps in many other jurisdictions, it goes as follows. The plaintiff or claimant is obliged to set out the material circumstances, the facts of life that represent his grievance, and then it is obliged to substantiate its claims on the basis of the law. It should cite the respective provisions of law that confirm its position that it is in the

403 C-179, General Prosecutor's Office of Ukraine, Statement of Claim, 26 January 2008.

404 C-179, General Prosecutor's Office of Ukraine, Statement of Claim, 26 January 2008. (Emphasis added.)

aggrieved position, and it has the rights of claims because of the past factual circumstances that are stated before.

[…]

Then, according to this legal substantiation rule in Ukraine, people are obliged to go from the general to special, and they may not go and jump right to the special rule of law. They are obliged to find the general rule of law. And as I explained in my presentation, [Article] 651 is a general rule of law that provides opportunity to parties to rescind the agreement, and it says how they can rescind, on what basis they can rescind, and so on and they said okay, we have this substantiation pursuant to Part V of Article 27 of the law of Ukraine on the privatisation. Then, according to Article 651 we can rescind, and then they go into the lengthy discussion and substantiation, legal substantiation, on the basis of *lex specialis* of [Article] 652. They have a wide road opened by [Article] 651 and then they went on the more narrow specific road of [Article] 652. And they put the facts of life that they enlisted at the beginning of the Statement of Claims into the contents of this legal substantiation under *lex specialis* in [Article] 652.[405]

386. ZAlK filed its defence on 1 September 2010.[406] Throughout that document, ZAlK repeated its understanding that the claim for rescission was based upon Article 652 alone. There is no mention of Article 651 and rescission on the ground of material breach. Indeed, in one passage, ZAlK notes: "*[T]he Deputy Prosecutor General substantiates the claims on rescission of the agreement dated 08/02/2001 with the material change of the circumstances on which the parties relied when concluding the agreement (Art. 652 of the CC of Ukraine), but not violation of the contractual obligations.*"[407]

387. At no point did the Prosecutor seek to join issue with that characterization or supplement its claim for rescission based on a change of material circumstances under Article 652 with a claim based on a material breach under Article 651.

388. When the claim was remanded to the Kyiv Commercial Court, the parties had further opportunities to make submissions to the court. ZAlK did so on 11 October 2011.[408] Once again, ZAlK's sole focus in its submissions was the Prosecutor's claim for rescission based on a material change of circumstances in Article 652: "*The Deputy Prosecutor General*

405 Transcript D3/PP647-649 ([redacted]).
406 C-182, ZAlK, Statement of Defence, Case No 48/448, 1 September 2010.
407 C-182, ZAlK, Statement of Defence, Case No 48/448, 1 September 2010.
408 C-316, Kyiv Commercial Court of Appeal, Case No 48/448, Written Submission of ZAlK, 11 October 2011.

substantiates his claim on rescission of the contract dated 08.02.2001 as a material change which guided the parties at the point of execution of the contract (Article 652 CC of Ukraine)."[409]

389. The Prosecutor filed its supplemental submissions on 12 October 2011.[410] The Prosecutor explained the basis of its claim for rescission as follows:

> The claim of the Prosecutor's Office to rescind the OJSC ZAlK share sales and purchase agreements was substantiated by citing Articles 651 and 652 of the Civil Code of Ukraine by a fundamental change of the circumstances that the parties relied upon in entering into those agreements.
>
> Such a fundamental change of circumstances is that by the decision of the Kyiv Commercial Court dated 30/06/2006 that was upheld by the courts of appellate and cassation instances the claim of OJSC ZAlK was granted, and Loan Agreement No. 14/02-145 that was made on 28/05/1997 between OJSC ZAlK and OJSC State Export-Import Bank acting as a financial agent of the Cabinet of Ministers of Ukraine for attracting and refinancing foreign loans, was rescinded.
>
> Pursuant to Article 27(5) of the Law of Ukraine On Privatisation of State Property, on demand of one of the parties a sales and purchase sales and purchase agreement may be rescinded or nullified by a court decision if the other party fails to fulfil the obligations provided for by the sales and purchase agreement within an established term.
>
> As stated in the Statement of Claim, the OJSC ZAlK share sales and purchase agreement dated 08/02/2001 between the State Property Fund of Ukraine and CJSC AvtoVAZ-Invest should be rescinded as one of the parties, namely, the State Property Fund of Ukraine acting on behalf of the State as a government privatisation body, expected at the time of its conclusion that CJSC AvtoVAZ-Invest would fulfil its obligations to refinance the long term liabilities of OJSC ZAlK under Loan Agreement No. 14/02-145 dated 28/05/1997.
>
> However, at the time of conclusion of the sales and purchase agreement the parties had no grounds for not fulfilling their obligations and considering that refinancing would not be performed. In addition to it, they could not foresee that the loan agreement would be rescinded. The State Property Fund of Ukraine, demonstrating its reasonable diligence, failed to eliminate such change in the circumstances.

390. The only reference in this passage to Article 651 is in the first paragraph where the Prosecutor explains that it "*cited*" Article 651 in its Statement of Claim but, as the paragraph makes clear, this was in the context of substantiating its claim based on "*a fundamental change*

409 C-316, Kyiv Commercial Court of Appeal, Case No 48/448, Written Submission of ZAlK, 11 October 2011.
410 C-317, GPOU, Case No 48/448-13/364, Written submissions, 12 October 2011.

of the circumstances that the parties relied upon in entering into those agreements". The rest of the document makes no further reference to Article 651 and nowhere in the document is rescission based on a material breach even mentioned. Instead, the Prosecutor provides further elaboration in respect of the various elements of Article 652:

> Failure of CJSC AvtoVAZ-Invest and VELBAY HOLDINGS LIMITED to fulfil their obligations to refinance the loan agreement disrupts the balance of property interests of the parties, namely, those of the State Property Fund of Ukraine as when determining the value of the holding of shares during conclusion of the agreement dated 08/02/2001 and giving the consent to conclude the agreement dated 24/03/2006, account was taken of the obligations of CJSC AvtoVAZ-Invest and VELBAY HOLDINGS LIMITED to refinance the loan agreement. Failure to fulfil those obligations changes materially the terms on which the agreements were concluded, including determination of the price at which the holding of OJSC ZAlK shares was sold. In addition to it, the aforesaid will necessitate, in its turn, repayment of the loan and payment of other payments by the State.[411]

391. This passage is concerned with the requirement in Article 652(2)(3), which addresses the disruption of the balance of property interests of the parties. The Prosecutor then goes on to explain the consequences of rescission under Article 652:

> Article 652 of the Civil Code of Ukraine also provides that in the event of rescission of a contract as a result of a fundamental change of circumstances, the court, upon request of either party, shall determine the consequences of rescission of the contract, proceeding from the necessity of fair distribution of costs between the parties which such parties incurred in connection with performance of such contract.[412]

392. The Prosecutor's supplemental submission was filed one day after ZAlK's supplemental submission. The Prosecutor then filed "*Submissions in Response to OJSC ZAlK's Submission*" on 8 November 2011.[413] It appears to be almost identical to the previous supplemental submission filed on 12 October 2011. There is certainly no elaboration of any claim for rescission based upon a material breach in Article 651.

393. The Respondent's expert opined that the Prosecutor pleaded claims based on Article 651 and 652 "*in the alternative*".[414] The Tribunal does not agree. Apart from the lack of any

411 C-317, GPOU, Case No 48/448-13/364, Written submissions, 12 October 2011.
412 C-317, GPOU, Case No 48/448-13/364, Written submissions, 12 October 2011.
413 C-415, Kyiv Commercial Court, Case No 48/448-13/364, written submissions submitted by Deputy Prosecutor General, 8 November 2011.
414 [redacted]

substantiation for a claim based on Article 651, there is also no language in any of the Prosecutor's pleadings suggesting that multiple claims were being made "*in the alternative*".

394. The Kyiv Commercial Court upheld a claim for rescission based exclusively upon a material breach of contract under Article 651. The Court simply noted at the outset that:

> The claim is based on provisions of Article 651 of the Civil Code of Ukraine (rescission of a contract due to a material breach of the terms of the contract) and Article 652 of the Civil Code of Ukraine (rescission of a contract due to a fundamental change in the circumstances on which the parties relied when entering into the contract), which, in the opinion of the prosecutor, gives rise to legal grounds for restoring state ownership of the privatized property pursuant to Section 133 of the State Privatization Program for 2000-2002.[415]

395. The rest of the Court's judgment focused on a claim based upon material breach under Article 651. The Court does not give any reference to a pleading where such a claim was raised.

396. The Court held that the rescission of the 1997 Loan Agreement by the Kyiv Commercial Court in 2006 "*does not mean that the borrower was released from its obligation to repay its Loan debt which arose prior to the rescission of the said Loan Agreement*".[416] The Court reasoned that:

> In addition, as indicated by the courts' decisions in Case No. 2/241, Loan Agreement No. 14/02-145 of 28.05.1997 was rescinded by the court on the basis of Article 652 of the Civil Code of Ukraine due to a fundamental change in the circumstances on which the parties relied when entering into the agreement. According to Article 652(3) of the Civil Code of Ukraine, in the event that a contract is rescinded as a result of a fundamental change in circumstances, the court, at the request of any of the parties, shall determine the consequences of rescission of the contract based on the need for fair distribution among the parties of the costs incurred by them in connection with performing the said contract. The court decisions in Case No. 2/241 did not define any specific consequences of the rescission of Loan Agreement No. 14/02-145 of 28.05.1997. Thus, the general provision applies regarding the legal consequences of rescission of a contract provided for by Article 653(3) of the Civil Code of Ukraine, according to which if a contract is rescinded by the courts, the obligations are terminated from the moment the court decision on rescinding the contract enters into legal force.

397. Thus, in the Court's estimation, although the 1997 Loan Agreement had been rescinded by the Kyiv Commercial Court in 2006, ZAlK's obligation to pay the loan had arisen before

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415 C-333, Kyiv Commercial Court, Case No 48/448-13/364, Judgment, 22 March 2012.

416 C-333, Kyiv Commercial Court, Case No 48/448-13/364, Judgment, 22 March 2012.

the date of rescission and thus remained valid and binding. That, in turn, meant that Velbay's refinancing obligation under the 2006 ZAlK SPA also remained valid and binding. This was despite the fact that: (i) ownership of the Foil Equipment had always vested in the State; (ii) ZAlK had never received any funds from Ukreximbank under the 1997 Loan Agreement; (iii) Ukreximbank had never sought to enforce ZAlK's purported obligations under the 1997 Loan Agreement since it was rescinded in 2006; and (iv) the SPFU had concluded that Velbay was not liable under the 2006 ZAlK SPA in respect of the refinancing obligation given that the 1997 Loan Agreement had been rescinded.

398. The Respondent has defended the Kyiv Commercial Court's decision by reference, *inter alia*, to the principle of *jura novit curia*. In order to engage with that defence, the Tribunal must say something about the substantive reasoning that the Kyiv Commercial Court deployed to justify its conclusion. The analysis that follows is <u>not</u> for the purpose of reviewing the correctness or otherwise of the decision on matters of Ukrainian substantive law. It is rather to explore the extent to which Velbay (and ZAlK) were prejudiced by not having the opportunity to make submissions on the points that the Kyiv Commercial ultimately relied upon in deciding to rescind the 2006 ZAlK SPA on the basis of Article 651 (material violation of contract) rather than Article 652 (material change of circumstances). At one end of the spectrum, if the Court merely relied upon an axiomatic rule of law in circumstances free of controversy then the prejudice to Velbay would obviously be limited. But, at the other end of the spectrum, if the legal reasons underlying the decision are novel, untested or otherwise controversial, then the inability properly to engage with those reasons in advance because they were absent in the Prosecutor's pleadings becomes more critical in terms of procedural fairness.

399. The reasoning for the Kyiv Commercial Court's judgment of 2012 can be summarized as follows. ZAlK, in the proceedings leading to the judicial recission of the 1997 Loan Agreement, did not file a request under Article 652(3) of the Civil Code to annul any obligations that had accrued prior to the recission. As a result, the default provision in Article 653(2) applies, which is that recission only terminates obligations after the court's decision. Given that ZAlK's full amount of indebtedness to Ukreximbank under the 1997 Loan Agreement had arisen prior to its judicial recission in 2006, it follows that ZAlK's obligation to pay Ukreximbank remained valid and enforceable. Consequently, Velbay's refinancing obligation under the 2006 ZAlK SPA also remained valid and enforceable. As Velbay had not paid the amount of ZAlK's indebtedness to Ukreximbank, Velbay was in

material breach of the 2006 ZAlK SPA and hence the contract could be rescinded on that basis pursuant to Article 651.

400. This reasoning raises several issues that the Tribunal will now assess in order to evaluate the possible prejudice caused to Velbay in circumstances where it had no advance opportunity to engage with these points in the exchange of pleadings with the Prosecutor.

401. First, it follows from this reasoning that the recission of the 1997 Loan Agreement by the Kyiv Commercial Court in 2006 had no practical effect, because ZAlK's obligation to pay the entirety of the amount of the loan had accrued before the Court rescinded the 1997 Loan Agreement. The Respondent's expert, in defending the correctness of the judgment of 2012, confirmed that this was also her position.[417] But it seems strange, to say the least, that the Kyiv Commercial Court's decision in 2006, which was upheld on appeal, actually had no practical effect. The parties to the 1997 Loan Agreement certainly did not think so: ZAlK considered that it had been fully discharged; Ukreximbank did not seek to enforce what would be a subsisting right to claim the amount of the loan; and the SPFU eventually also accepted that Velbay's refinancing obligation had also been discharged as a result of the Kyiv Commercial Court's decision.

402. Furthermore, the extant court decisions relating to the recission of the 1997 Loan Agreement appear to be based upon the assumption that all ZAlK's obligations had been terminated. The Kyiv Commercial Court of Appeal, in its judgment of 22 September 2006 dismissing the appeal against the Kyiv Commercial Court's decision to rescind the 1997 Loan Agreement, noted that: "*the Claimant does not have to reimburse the Defendant's costs, related to repayment of the loan for the equipment, which does not belong to it*".[418] The High Commercial Court then gave its judgment on an appeal from the Kyiv Commercial Court of Appeal on 23 November 2006 and stated, in similar terms:[419] "*the claimant does not have to reimburse the defendant's losses connected with repayment of the loan for the equipment which, as it turned out, is a state property and was withdrawn from the claimant's economic control*". That Court also confirmed that: "*there is nothing illogical in the fact that the bank and the state would reimburse the cost of the loan used to purchase the equipment, which remained in the state ownership and was not used by the claimant*". In the subsequent clarification proceedings, the Kyiv Commercial Court said: "*Therefore, starting from September 22, 2006, after the resolution of the Kyiv Commercial Court dated June 30, 2006 regarding case*

417 Transcript D4/PP784-785 [redacted].
418 C-336, Kyiv Commercial Court of Appeal, Case No 2/241, Judgment, 22 September 2006.
419 C-337, High Commercial Court of Ukraine, Case No 2/241, Judgment, 23 November 2006.

No 2/241 became effective, all obligations of ZALK OJSC under Loan Agreement No 14/02-145 were terminated."[420]

403. The parties' experts have debated whether some of these statements are conclusive or otherwise from the perspective of a Ukrainian court and the Tribunal need not resolve that issue. It suffices simply to point out that the existing record of judicial decisions relating to the 1997 Loan Agreement would not have put any reasonable person on notice that ZAlK's entire indebtedness to Ukreximbank under that agreement was, as a matter of law, actually persisting after the judicial recission (on the assumption that the Kyiv Commercial Court's reasoning is correct). And, as previously stated, none of the parties concerned had acted on that basis either.

404. The Tribunal must here briefly deal with a point raised by the Respondent's expert to the effect that Ukreximbank has in fact taken the position that ZAlK's debt remains outstanding:

> As regards ZAlK, it continues to be liable for the accrued and unfulfilled obligations that it had under the 1997 Loan Agreement at the date of termination of that agreement. This follows from Article 653 of the Civil Code and is, I am told, the position adopted by Ukreximbank (the creditor under the 1997 Loan Agreement).[421]

405. The evidence for Ukreximbank's position that is cited is a letter dated 10 January 2020—almost eight years after the Kyiv Commercial Court's decision to rescind the 2006 ZAlK SPA[422] and fourteen years after the Kyiv Commercial Court rescinded the 1997 Loan Agreement. The letter is not on Ukreximbank's letterhead. It is difficult not to infer that this letter was prepared with this arbitration in mind. It would be surprising if any claim by Ukreximbank against ZAlK at this stage would not be time-barred.

406. Second, the Respondent's expert accepts that the consequences of the recission of a contract, in terms of which particular obligations are terminated, are not expressly regulated by Articles 653(2) and (3). Hence the Kyiv Commercial Court's conclusion that these default provisions operate to confirm the continued validity of ZAlK's obligation to pay Ukreximbank the full amount of its indebtedness rests upon an interpretation of these provisions that does not follow from their express terms. It is inevitable in such a situation

420 C-156, Kyiv Commercial Court, Case No 2/241, Clarification ruling, 11 July 2007. (Emphasis added.)
421 [redacted] §73.
422 C-333, Kyiv Commercial Court, Case No 48/448-13/364, Judgment, 22 March 2012.

that judicial practice will be important and the Kyiv Commercial Court did refer to a decision of the Supreme Court of Ukraine of 19 December 2011 in Case No 3-136gs11[423] in support of its interpretation. That case involved a contract whereby the claimant (TOV "Technotorg-Leasing") acquired ownership of a tractor which it then leased to the respondent (the private agricultural enterprise "Im. Shevchenko") for a term of three years. About half-way through this term, the contract was rescinded by consent of the parties and the tractor was returned to the claimant. At the time the contract was rescinded, the respondent had only paid a small fraction of the required lease payments. The Supreme Court held that, despite the rescission, the claimant had a subsisting right to demand that the respondent pay the amount that it still owed up until the date of the rescission.

407. The Kyiv Commercial Court's reliance upon this decision and its application to the facts of the decision before it was at the very least controversial. The obvious point that could have been made in response is that it was perfectly just for the respondent agricultural enterprise to have to pay for the benefit it had received under the contract prior to its rescission (i.e. the use of the tractor). In the present case, however, the situation was entirely different: ZAlK had received no benefit under the 1997 Loan Agreement. The Kyiv Commercial Court's decision had the effect of requiring ZAlK to pay for something that it had never received.

408. The Respondent's expert is thus incorrect in surmising that the principle in this Supreme Court decision and others that were rendered after the Kyiv Commercial Court's judgment of 2012 are applicable because "*after all, Ukreximbank lent money to ZAlK and Ukreximbank possesses a right to seek that money back*".[424] ZAlK never received any money under the 1997 Loan Agreement. This is indeed common ground between the parties.[425] It is also common ground that, as a result, there is no unjust enrichment on the part of ZAlK.[426]

409. The parties' experts have debated the merits of a line of cases that appear to be consistent with the decision of the Supreme Court of Ukraine of 19 December 2011 in Case No 3-136gs11 that was cited by the Kyiv Commercial Court.[427] It is not for the Tribunal to pass judgment on them in terms of their fidelity to the letter and spirit of Article 653 of the Civil

423 R-115, Resolution of Supreme Court of Ukraine, 19 December 2011.

424 [redacted], §71.

425 Transcript D2/P366 ([redacted]. [redacted] appeared to accept that ZAlK was never put in funds at the hearing: Transcript D4/P786 ([redacted]

426 Transcript D6/P1118 ([redacted]

427 [redacted]

Code. The Tribunal's concern, rather, is the prejudice caused to Velbay in not being afforded an opportunity to point out what distinguished the situation in the present case from the one addressed by the Supreme Court in its decision of 19 December 2011.

410. Indeed, it would appear that all the cases referred to by the parties' experts address what might be called a situation of unjust enrichment.[428] In other words, a creditor was allowed to recover amounts based on the contract prior to its judicial recission because otherwise the debtor would have been enriched at the creditor's expense (in many cases that would have been the use of loaned funds without payment of interest).[429] The mechanism to redress an unjust enrichment was a breach of contract claim. In other legal systems it would be a claim for unjust enrichment on the basis that the contract would be void *ab initio*. Whether or not this court practice in Ukraine is to be read as creating a general and inflexible rule for all cases (including where there is no unjust enrichment) is surely a matter for debate and yet any debate was foreclosed by the Kyiv Commercial Court's reliance upon the Supreme Court's decision without that decision, or the principle derived from it, ever having been raised by or with the parties.

411. Third, it is also important to appreciate the novelty of the reasoning deployed by the Kyiv Commercial Court in respect of the remaining steps towards its conclusion. The Respondent's expert accepted that there is no judicial decision (at least none brought to the attention of this Tribunal) confirming the Kyiv Commercial Court's reasoning that where a contract is rescinded under Article 652 then, in the absence of any request for a "*just distribution of expenses between the parties*" under Article 652(3), Article 653(3) applies, such that any obligations arising before the recission remain valid and enforceable after the recission.[430] The Claimants' expert rigorously contested the correctness of the approach: he opined that the express language of Article 652(3) says nothing about the termination of any obligations or the legal consequences of recission; rather it is concerned about achieving a fair distribution of the property of the parties (and hence there would have been no reason for ZAlK to have made any request under Article 652(3) in the proceedings leading to the

428 R-119, Ruling of High Specialised Court of Ukraine for Civil and Criminal Matters, Case No 6-5200ск12, 11 May 2012 (creditor able to recover interest and penalties due under loan agreement before recission); R-124, Resolution of High Commercial Court of Ukraine, Case No 5010/2403/2011-14/120, 22 July 2015; R-147, Legal Position issued by Supreme Court of Ukraine, Case No 548/981/15-ц, 13 June 2018; R-256, Resolution of Commercial Cassation Court of the Supreme Court of Ukraine, Case No 1/503-9/147, 29 October 2019.

429 [redacted]

430 Transcript D4/P752 [redacted]

recission of the 1997 Loan Agreement). Furthermore, the Claimants' expert opined that, pursuant to Article 653(2), all the obligations of the parties are terminated.[431]

412. The Respondent's expert also accepted that none of the judicial decisions applying Article 653 (as referred to above) was doing so on the basis of a change of material circumstances in Article 652.[432] The Kyiv Commercial Court's decision appears to be unique in this light. Again, it is not the function of the Tribunal to take a side in the debates between the parties' experts on substantive points of Ukrainian law; but it is important to understand that the Court was not applying the principle of *jura novit curia* in respect of settled and uncontroversial rules of law.

413. Fourth, the Kyiv Commercial Court's reasoning and conclusions leave some significant questions unanswered and those questions remain unanswered even after the lengthy debates of the parties' experts during the course of this arbitration.

414. As Velbay's refinancing obligation under the 2006 ZAlK SPA was parasitical upon ZAlK's payment obligation to Ukreximbank under the 1997 Loan Agreement, the former only subsists if the latter remains valid and enforceable. But neither the Kyiv Commercial Court in its 2012 decision, nor the Respondent in these arbitration proceedings, explained the mechanics of how Ukreximbank's theoretical right to recover ZAlK's debt under the 1997 Loan Agreement could be actualized. The Tribunal asked the Respondent's expert the following questions at the hearing:

> PRESIDENT: […] [N]ow we get to the judgment on rescission of the Loan Agreement. I just want to understand your position in respect of what impact that actually had on the rights and obligations of the parties under that Agreement. Because, if I understand your position correctly, and assuming that the full amount of the loan was due before the court's decision to rescind the Agreement, my understanding of your position is that there was no impact at all.
>
> [redacted] Yes. That is my understanding of that decision, based and premised.
>
> PRESIDENT: So in theory, a few weeks after that decision, Ukreximbank could have brought proceedings against ZAlK and demand the full amount of the loan?

431 [redacted]

432 Transcript D4/PP753-754 ([redacted]

> [redacted]: Yes, if all conditions for bring that satisfied, which I see should be here.
>
> PRESIDENT: Would that be a claim for breach of contract?
>
> [redacted] Yes.
>
> PRESIDENT: So, despite the rescission, you would still bring, taking your position, you would still bring a claim after that rescission on the basis of a breach of contract --
>
> [redacted]: Breach of undertaking, an undertaking or obligation was not performed and on that basis, it remained to be performed. So the legal basis is non-performance of the obligations.[433]

415. If Ukreximbank really had brought proceedings against ZAlK for breach of contract a few weeks after the Kyiv Commercial Court's 2006 decision on the recission of the 1997 Loan Agreement (on the assumption that that decision had no impact), then surely ZAlK could have simply defended Ukreximbank's claim on the basis of the same material change in circumstances that was found to exist in the Kyiv Commercial Court's decision? That material change of circumstances persists to this day: ZAlK never received the Foil Equipment that was the reason for assuming the corresponding obligation under the 1997 Loan Agreement. In other words, if the Kyiv Commercial Court and the Respondent are correct in their interpretation of Article 653(3), what would prevent ZAlK from invoking Article 652 once again by way of defence or counterclaim to Ukreximbank's theoretical claim for breach of contract, and this time requesting the Court to annul the accrued obligations under the 1997 Loan Agreement pursuant to Article 652(3), which the Respondent has said throughout was open to ZAlK to do in the actual proceedings leading to the recission of the 1997 Loan Agreement?

416. The fact that this all seems rather circular perhaps, once again, points to the reality that the Kyiv Commercial Court's judgment of 2012 rested upon a series of controversial legal propositions, none of which had been debated by the litigants before the Court. This undoubtedly prejudiced Verbay's rights of due process.

417. Once again, the Tribunal must now consider whether this prejudice was remedied on appeal.

433 Transcript D4/PP783-784 ([redacted]. The Claimants' expert also confirmed that the cause of action would be for breach of contract in separate proceedings in response to the same question from the Tribunal: Transcript D3/PP660-661.

418. ZAlK's appeal to the Kyiv Commercial Court of Appeal on 2 April 2012[434] raised the ground that the Kyiv Commercial Court "*changed the grounds of the claim indicated by the Deputy Prosecutor General in the statement of claim and supported by the prosecutor in the court proceedings*":

> In particular, the claims of the Deputy Prosecutor General of Ukraine were based on a fundamental change in the circumstances which the parties relied on when entering in an agreement (article 652 of the Civil Code of Ukraine), and not on a material breach of the provisions of an agreement.[435]

419. ZAlK then quotes at length from the Prosecutor's Statement of Claim and supplementary submissions of 12 October 2011 to demonstrate that the sole basis of the claim for rescission was a material change of circumstances under Article 652. ZAlK concludes that the Court violated Articles 4-3, 22 and 83 of the Civil Procedure Code of Ukraine "*because only a claimant is entitled to change the grounds for the claim before the court starts considering the merits of a case*".[436]

420. Before addressing the appellate procedure further, the Tribunal considers that it is significant that the Prosecutor did not file a response to ZAlK's appeal grounds either before the Kyiv Commercial Court of Appeal[437] or the High Commercial Court of Ukraine. If the Prosecutor had in fact raised a claim based on a material breach of contract, then it would have been quite straightforward for the Prosecutor to respond to ZAlK's appeal grounds by referring to the relevant document that it had filed before the Court. The Prosecutor did not file a defence to the appeal but it did make an application to the Commercial Court of Appeal for interim measures on 10 May 2012.[438]

421. The Commercial Court of Appeal rendered its judgment on 23 May 2012.[439] It is largely a verbatim reproduction of the judgment rendered by the Kyiv Commercial Court. There is no consideration of ZAlK's appeal grounds in the judgment. ZAlK then filed a cassation appeal against that judgment on 24 May 2012, repeating its earlier appeal grounds.[440] Velbay also filed a cassation appeal based on the same grounds.[441] On 29 October 2014, the High Commercial Court of Ukraine rendered its judgment in the cassation appeal.[442] Once again, the Prosecutor filed no defence to the cassation appeal. The High Commercial Court of

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434 C-340, ZAlK, Written Submission, Case No 48/448-13/364 (remanded), 2 April 2012.
435 C-340, ZAlK, Written Submission, Case No 48/448-13/364 (remanded), 2 April 2012.
436 C-340, ZAlK, Written Submission, Case No 48/448-13/364 (remanded), 2 April 2012.
437 C-341, Kyiv Commercial Court of Appeals, Case No 48/448-13/364, Resolution (remanded), 23 May 2012.
438 C-111, Kyiv Commercial Court of Appeal, Application of the GPOU, 10 May 2012.
439 C-341, Kyiv Commercial Court of Appeals, Case No 48/448-13/364, Resolution (remanded), 23 May 2012.
440 C-245, High Commercial Court of Ukraine, ZAlK's Cassation Appeal, 24 May 2012.
441 C-287, Velbay, Case No 48/448-13/364, Cassation Appeal, 12 June 2012.
442 [redacted]-5, High Commercial Court of Ukraine, Case No 48/448, Resolution, 29 October 2014.

Ukraine makes a single reference to this appeal ground concerning the allegation that the Kyiv Commercial Court had changed the basis of the claim:

> As appears from the statement of claim on a case file, while specifying a cause of action, the Deputy Prosecutor General, acting for and on behalf of the state, represented by the State Property Fund of Ukraine, refers, inter alia, to the requirements of Article 651 of the Civil Code of Ukraine, according to which, an agreement can be changed or rescinded by a judgment upon demand of either party in the event of the other party's material breach and/or in other cases provided for by agreement or law. Therefore, there is no foundation for the allegations made by the cassation applicants that the lower courts breached Articles 4-3, 22 and 83 of the Code of Commercial Procedure of Ukraine when granting claims that Agreement 1 and Agreement 2 should be rescinded for the reasons of their being outside the limits of the claims, by changing, at its own discretion, the cause of action, the right to which is enjoyed by the claimant.[443]

422. As the Tribunal has previously stated, the sole reference in the Prosecutor's Statement of Claim to Article 251 is its verbatim quotation. The Statement of Claim contains no analysis of that provision, nor does it attempt to apply that provision to the facts of the case.

423. An appeal to the Supreme Court was then filed by ZAlK. The Prosecutor filed submissions to the Supreme Court on 19 December 2014.[444] The Tribunal understands that the complaint under consideration cannot serve as a basis for appeal before the Supreme Court and, in any event, the appeal grounds are not in the record of the arbitration. In any event, the Prosecutor did not address it in its submissions. The Prosecutor did affirm that "*the trial court, appeal and cassation instances granted the stated claims of the prosecutor on rescission of the contracts on purchase and sale of the block of shares of OJSC ZAlK proceeding exclusively from the directions under art. 651 of the Civil Code of Ukraine which regulates the legal relations concerning the contract rescission due to material breaches of the contract terms*".[445] The Prosecutor did not affirm, however, that it had ever raised a claim for rescission under Article 651 for material breach.

424. On 11 March 2015, the Supreme Court of Ukraine rendered its 3-page judgment dismissing the appeal.[446] There is no consideration of this ground.

443 [redacted]-5, High Commercial Court of Ukraine, Case No 48/448, Resolution, 29 October 2014.

444 C-426, Supreme Court of Ukraine, Case No 48/448-13/364, Written submissions submitted by Prosecutor General's Office of Ukraine, 19 December 2014.

445 C-426, Supreme Court of Ukraine, Case No 48/448-13/364, Written submissions submitted by Prosecutor General's Office of Ukraine, 19 December 2014.

446 C-14/C-334, Supreme Court of Ukraine, Case No 48/448-13/364, Judgment, 11 March 2015.

425. In conclusion, the Kyiv Commercial Court decided to rescind the 2006 ZAlK SPA on a legal basis that had not been pleaded, in substance, by the Prosecutor before the Court. Whilst the Tribunal must give significant deference to the Court's ability to apply the principle of *jura novit curia*, that deference cannot override Velbay's basic due process rights, which include the ability to contest the essential elements of the claim being made against it. The Kyiv Commercial Court's legal reasoning in upholding the recission of the 2006 ZAlK SPA on the basis of Article 651 of the Civil Code was in many respects novel and at least controversial, which is important context for assessing the prejudice caused to Velbay in being deprived of the opportunity to confront the principal arguments relied upon by the Court.

Fifth ground: unlawful changes to the composition of judges and the statement by [redacted]

426. The Claimants submit that impropriety relating to the cassation appeal brought by ZAlK and Velbay against the Kyiv Commercial Court's 2012 decision to rescind the 2006 ZAlK SPA must be inferred from the fact that the composition of the panel of the High Commercial Court that was considering Velbay's and ZAlK's cassation appeal changed twenty-one times.[447] They claim that at least eleven of those re-compositions occurred "*irregularly*" in the sense that the automated system for the allocation of judges was not used.[448]

427. The automated system for the allocation of judges, envisaged by Article 2-1 of the Commercial Procedure Code, ensures that judges are selected randomly. A Regulation on the Automated Workflow System of the Court was established for this purpose.[449] The Respondent is correct to note, however, that such Regulation does not by its terms mandate the use of the automated system for appointments in all circumstances.[450] According to the Respondent's expert:

> In accordance with Section 3.1.6 of the Regulation on Allocation of Cases, where a case was to be heard on cassation by a panel of judges of the High Commercial Court, the automated system appointed a judge-rapporteur (taking into account his specialisation and the particularity of the given

[447] C's Memorial, §280; C's Reply, §210.
[448] C's Memorial, §280; C's Reply, §211.
[449] R-108, Regulation on Automated Workflow System of the Court, approved by Decision No 30 of Council of Judges of Ukraine, 26 November 2010.
[450] R's Counter-Memorial, §§427-432.

> case) and the remaining members of the panel followed automatically by virtue of being members of the same panel as the judge-rapporteur.[451]

428. The Claimants' expert objects to this interpretation of the Regulation on the basis that it might contradict the principle of the random selection of judges in the Commercial Procedure Code.[452] But the Tribunal agrees with the Respondent's expert that this is the plain meaning of the Regulation.

429. The Claimants' expert opined that there were eight instances of procedural irregularities in the re-composition of the High Commercial Court considering Case No 48/448-13/364.[453] The Respondent's expert answers that in all these instances, "*the re-composition of the judicial panel in question was required to substitute a judge who was not a judge-rapporteur (and was going on or returning from vacation or sick leave) and therefore, pursuant to Sections 3.1.7 and 3.1.12 of the Regulation on Allocation of Cases, there was no need to use the automated system*."[454] The Tribunal agrees with the Respondent's expert that this is the correct interpretation of the Regulation.

430. Perhaps more importantly, the Respondent's expert notes that none of the re-compositions, save for the last one, had any impact on the ultimate decision of the High Commercial Court because they occurred during a period when there was no consideration of the merits of the case. It would appear that the Claimants' expert has no objection to the manner in which the final re-composition was conducted.[455]

431. The Claimants also alleges that the three judges who were ultimately selected to hear Velbay's cassation appeal before the High Commercial Court had a record of judicial impropriety. They point to the fact that the judges in question—[redacted]—were later declared unfit to serve on the new Supreme Court established after judicial reforms in 2016. That declaration was made by the Public Integrity Council, which was established to determine whether prospective candidates for the Supreme Court complied with professional ethics and integrity criteria.

432. In its report on [redacted], the Public Integrity Council noted that the Prosecutor General's Office was investigating a scheme whereby the principle of the random selection of judges had been systematically violated at the High Commercial Court. The primary

451 [redacted]
452 [redacted]
453 [redacted]
454 [redacted]
455 [redacted]

mechanism behind this scheme was the introduction of 45 specialisations of judges (which were in large part "*artificial*" and "*duplicative*"); it would seem that this facilitated the designation of cases to particular judges. Thus it was established by the Prosecutor that during the period of 1 January 2011 until 1 May 2014, there were 10,546 occurrences of a distribution of a case to a specific judge (as a unique option) and 10,816 occurrences where incorrect information was entered into the system to manipulate the automated allocation system. The Prosecutor had established that all three judges were among those to whom cases were distributed in violation of the law. Whilst the Council was careful to note that it was not accusing [redacted] and her two colleagues of direct participation in the crime under investigation, it noted that "*such practice could only exist in the High Commercial Court with express or tacit consent of the judges of the Court neglecting the principle of independence of a judge*".[456] The [redacted] during the relevant period, [redacted], was later arrested on 12 September 2019 in connection with this practice and other alleged crimes.[457] The Council also reasoned that [redacted] had done nothing over a long period of time to put an end to this illegal practice and "*showed no respect for the principle of the independence of judges*". The Council also listed the various assets belonging to [redacted] and concluded: "*the discrepancy between the value of the property and the income of the family raises reasonable doubts about the locality of the source of funds used to purchase any such property*".[458] In the Council's assessment, [redacted] "*fails to make the criteria of integrity and professional ethics*".[459]

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456 [redacted].

457 [redacted].

458 [redacted].

459 [redacted]

433. According to other documents on the record of this arbitration, the Public Integrity Council came to the same conclusion in relation to [redacted].[460] The document that the Claimants have submitted to establish the same fact in relation to [redacted] is not conclusive.[461]

434. During the process of [redacted] application to be a judge on the Supreme Court, she was interviewed by the High Qualification Commission of Judges on 7 June 2017. A representative of the Public Integrity Council was also in attendance and gave a report on the Council's negative findings in respect of the candidate. In the course of answering questions in relation to the allocation of judges at the High Commercial Court, [redacted] made the following remark:

> [redacted][462]

435. The Respondent was asked at the hearing whether it wished to comment on this statement given that it had declined to do so in its pleadings. The Respondent stated that its "*position is that it is a factual statement about the outcome of the case*".[463]

436. The Tribunal cannot conclude from the fact that [redacted] and [redacted] were declared not to meet the ethical standards for elevation to the Supreme Court that the judgment they rendered in Velbay's cassation appeal several years earlier is in some way tainted. It is true that the Public Integrity Council was critical of their conduct during a period that coincided with their tenure on the High Commercial Court and their judgment in question. But this is not direct evidence of impropriety in relation to the specific cassation appeal under consideration. More troubling is the statement made by [redacted]. The Tribunal has not had an opportunity to hear from [redacted] herself as to what she intended to convey by this statement. On the one hand, it might be interpreted as merely a statement of fact as to the outcome of Velbay's cassation appeal. That is the Respondent's position in this arbitration. On the other hand, it might be also be inferred that [redacted]

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460 [redacted]; [redacted]

461 [redacted].

462 [redacted]

463 Transcript D6/P1127 ([redacted]).

[redacted]. Either way, it was an inappropriate remark to have made. The Tribunal does not, however, consider that it has great significance to its overall assessment of the Respondent's liability under international law. The fact of the matter is that High Commercial Court did nothing to redress the procedural irregularities that infected the decision of the Kyiv Commercial Court. That is plain from the face of the judgment in the cassation appeal. Whether or not the High Commercial Court was motivated by bias or not is not irrelevant but it is peripheral.

F5 The Tribunal's conclusions on liability

437. The Tribunal will now make its global assessment of the proceedings in order to determine whether the procedural irregularities, which have been described in the foregoing sections, were productive of a denial of justice in international law. There is, however, a preliminary point that must be addressed relating to the Respondent's defence.

The Respondent's defence of the fairness of the substantive outcome in the proceedings before the Ukrainian courts

438. As already stipulated at the outset, Velbay's case about the substantive outcome in the proceedings before the Ukrainian courts is that, in essence, it was found liable to pay for something that it (or ZAlK) had never received—the Foil Equipment.

439. The Respondent has challenged this account by pleading that the Claimants were on notice when Velbay signed the 2006 ZAlK SPA that the Foil Equipment did not belong to ZAlK and hence Velbay must be taken to have accepted that the refinancing obligation was not contingent upon ZAlK's ownership of the Foil Equipment.[464]

440. The Tribunal is not persuaded by the Respondent's argument.

441. First, this argument has never been adopted by any Ukrainian court in the proceedings relating to the Renationalisation Case. If the Respondent were correct, then that would have been a possible route to enforcing the refinancing obligation against Velbay as a matter of the proper construction of the 2006 ZAlK SPA. But this was not the basis for the Ukrainian court judgments that the Claimants seek to impugn.

[464] R's Rejoinder, §§107-126; 175.

442. Second, the argument is implausible on its own merits. AvtoVAZ-Invest signed the 2001 ZAlK SPA on 8 February 2001. It is beyond doubt that, at that point in time, all the relevant parties were operating under the assumption that the Foil Equipment belonged to ZAlK. The 2001 ZAlK SPA included an obligation to invest USD 200 million in ZAlK over five years and to pay the USD 76,450,000 debt to Ukreximbank under the 1997 Loan Agreement.

443. It was not until 11 July 2003 that the Ordzhonikidze District Court of Zaporozhye decided that the Foil Equipment actually belonged to the State and not ZAlK.

444. The Respondent's argument is that by 24 March 2006, when Velbay entered into the 2006 ZAlK SPA, it was, or should have been, on notice that the Foil Equipment had been found to belong to the State and hence it must have agreed to take on the repayment of the debt to Ukreximbank as an absolute obligation that did not depend upon ZAlK obtaining title to the Foil Equipment.

445. If the Respondent were correct, that would mean that the terms of ZAlK's privatization had become more onerous for Velbay in comparison to AvtoVAZ-Invest to the tune of USD 76,450,000. In other words, Velbay would have been entering into a deal in which it was significantly, even drastically, worse off than AvtoVAZ-Invest: the latter was going to have the benefit (through its investment in ZAlK) of Foil Equipment valued at USD 76,450,000, whereas the former was going to get nothing for the same sum. If this really were the deal that Velbay had entered into, one would expect to see express recognition of the significant modification of the deal in the text of the 2006 ZAlK SPA. But there is nothing. To the contrary, there is express recognition in clause 6.3(b) that if ZAlK's obligations under the 1997 Loan Agreement were to be terminated, then Velbay's obligation to pay the debt to Ukreximbank under the 1997 Loan Agreement would also be terminated.

446. It is true that the 1997 Loan Agreement was rescinded only on 30 June 2006 by the Kyiv Commercial Court.[465] But it would have been obvious to anyone in the months prior to that decision that the 1997 Loan Agreement was going to suffer that fate for otherwise ZAlK would be liable to pay back a loan for something that it never received. Before Velbay had signed the 2006 ZAlK SPA, ZAlK had already wrote to Ukreximbank formally requesting that the 1997 Loan Agreement be rescinded on this basis on 25 December 2005.[466]

465 C-335, Commercial Court of Kyiv, Case No 2/241, Judgment, 30 June 2006.

466 C-175, Letter No 14/02-145 from [redacted] to Ukreximbank, 25 December 2005.

447. Taking the most favourable interpretation of the Respondent's argument: perhaps it might be said that Velbay knew, when it signed the 2006 ZAlK SPA, that ZAlK's obligations under the 1997 Loan Agreement that had fallen due for performance prior to its recission by the Kyiv Commercial Court on 30 June 2006 would continue to subsist after the recission, such that Velbay would not be protected by clause 6.3(b) of the 2006 ZAlK SPA, as was found by the Kyiv Commercial Court on 22 March 2012. But that argument is flawed. Regardless of whether the Kyiv Commercial Court's basis for decision is substantively correct, the Respondent accepts that such a consequence could have been avoided entirely through the simple device of ZAlK requesting a declaration that its obligations accruing both before and after the judicial recission be terminated. Indeed, the Respondent portrayed ZAlK's failure to do as tantamount to professional negligence.

448. The Tribunal adds that the legal argument that the Kyiv Commercial Court relied upon in its judgment of 22 March 2012 to justify its conclusion that ZAlK had persisting obligations under the 1997 Loan Agreement despite its judicial recission had never been raised by anyone prior to that judgment (including the SPFU, Ukreximbank and the Prosecutor) and the practical result of that conclusion was that the judicial recission of the 1997 Loan Agreement was devoid of any effect at all (insofar as ZAlK's payment obligations had accrued in full prior to the recission). Needless to say, these are not matters that could have been reasonably contemplated at the time Velbay entered into the 2006 ZAlK SPA either.

Assessment of the alleged instances of procedural injustice

449. The Tribunal will first consider the Ukrainian courts' decision not to refer the Prosecutor's claim for recission of the SPAs to international arbitration. Although the Tribunal has doubts as to whether the Kyiv Commercial Court of Appeal was correct in finding that the dispute presented by the Prosecutor's Statement of Claim was not arbitrable as a dispute relating to privatization under Ukrainian law, it cannot be said that the interpretation favoured by the Kyiv Commercial Court of Appeal is devoid of any rational basis such that procedural impropriety (in terms of manifest judicial bias) might be inferred. The Tribunal does not hold that the Court's refusal to give effect to the arbitration agreement in clause 10.8(b) of the 2006 ZAlK SPA therefore amounted to a denial of justice.

450. The Tribunal is no more persuaded by the conclusion of the Kyiv Commercial Court of Appeal to the effect that the Prosecutor was not, in any case, bound by the arbitration agreement because it was not a party to it. Even accepting that the Prosecutor may have

standing to intervene to represent the State's interests in a contractual dispute, it would seem improbable that the Prosecutor could be in a better contractual position than the state entity which is the actual party to the contract. This would be the case if the Prosecutor could simultaneously deny the application of some parts of the contract to it (i.e. the arbitration clause) and enforce other parts of the contract (i.e. Velbay's refinancing obligation). It would mean, in effect, that any state entity which has signed a contract with an arbitration clause could avoid that clause by requesting the Prosecutor to intervene on its behalf to prosecute or defend contractual claims pursuant to the contract, so long as the "*State's interests*" had been prejudiced. Once again, the Tribunal cannot say that there was no rational basis for the Ukrainian courts' decision on this point and hence it declines to uphold a claim for denial of justice on this ground alone. It is, however, a relevant factor in assessing the fairness of other aspects of these proceedings.

451. The Prosecutor was permitted by the Ukrainian courts to avoid the arbitration clause in the 2006 ZAlK SPA on the basis that it was independent of the SPFU as the party to that agreement and represented the State's interests more broadly. But then the Prosecutor was permitted to bring a claim as a party to that agreement. The Ukrainian courts purported to uphold a claim based upon Article 651(2) of the Civil Code, which reads:

> A contract may be changed or rescinded by decision of a court upon the demand of one of the parties when there is a material violation of the contract by the other party and in other instances established by the contract or by a law.

452. If the Prosecutor was not a party to the arbitration clause in the 2006 ZAlK SPA, then logically it could not be a party to that agreement for the purposes of a claim for rescission under Article 651 either. But the Ukrainian courts upheld a claim based upon Article 651 (notwithstanding that the Prosecutor had never pleaded such a claim).

453. This impact of the Prosecutor's rather contradictory procedural position was compounded by the fact that the actual State party to the 2006 ZAlK SPA—the SPFU—had repeatedly taken an official position to the effect that there was no breach by Velbay of its refinancing obligation. As the Tribunal has found in its analysis of the Second Ground, the Ukrainian courts dealt with this inconvenient truth by ignoring it. This makes the failure to engage with the evidence of the SPFU's official position, which was emphasized time and time again

by ZAlK and Velbay, rather egregious.[467] Nowhere in any Ukrainian court decision is there an explanation of how the Prosecutor can at once be a "*party*" for the purposes of invoking Article 651 and at the same time maintain a claim on a basis that the actual party—the SPFU—has officially repudiated. If one adds the fact that the Prosecutor was earlier found not to be a party to the arbitration clause in the contract, then the injustice caused by the conduct examined under the Second Ground comes into sharp focus.

454. The Tribunal has already concluded, in its examination of the Third Ground, that the Court's decision to rescind the 2006 ZAlK SPA on the basis of Article 651 (material breach of contract), which was a legal basis never invoked in substance by the Prosecutor, deprived Velbay of the opportunity to engage with the legal propositions that underpinned the Court's reasoning. This was particularly prejudicial in the context of this case because those propositions were, at least to some extent, both novel and controversial. The Court's approach, furthermore, allowed it to sidestep certain defences that ZAlK and Velbay had consistently raised in respect of the only claim pleaded by the Prosecutor on the basis of Article 652 (material change of circumstances).

455. First, Article 652(2)(3) requires, for a successful claim of rescission for material change in circumstances, that "*the fulfillment of the contract would violate the correlation of property interests of the parties and deprive the interested party of that which he counted on when concluding the contract*". Clause 6.3 of the 2006 ZAlK SPA expressly provided that if ZAlK's obligations under the 1997 Loan Agreement were to terminate, then so would Velbay's refinancing obligation under the 2006 ZAlK SPA. As ZAlK submitted, this meant that the SPFU was prepared to enter into the 2006 ZAlK SPA notwithstanding that Velbay's refinancing obligation may be extinguished in certain circumstances.[468] The Court avoided having to deal with this defence by upholding a claim based upon Article 651. It did, however, express a view on clause 6.3 that is untenable. The Respondent is correct that this was ultimately not critical for the Court's decision based on Article 651,[469] but nonetheless it is an insight into the lack of impartiality with which the Court approached these issues:

> First of all, the court points out that Agreement No. 2 does not contain any provisions similar to the provision contained in Clause 3.3 of

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467 The failure to consider critical evidence in respect of the issue to be decided has been the basis of international liability for denial of justice in CL-53, *The Case of the "Orient"*, 1893, p3230; and for breach of Article 6 of the ECHR in CL-178, *Khamidov v Russia*, ECHR Case No 72118/01, Chamber Judgment, 15 November 2007, §§173-174.

468 C-316, Kyiv Commercial Court of Appeal, Case No 48/448, Written Submission of ZAlK, 11 October 2011.

469 R's Rejoinder, §178.

> Agreement No. 1 that would provide for the possibility of terminating the obligations of the Buyer of the block of shares to refinance the liabilities of ZAlK OJSC under Loan Agreement No. 14/02-145 of 28.05.1997. For instance, subclause ( ) [sic] of Clause 6.3 of Agreement No. 2 establishes that should obligations of ZAlK OJSC under the Loan agreement be restructured, postponed, spread out, suspended or stayed in accordance with applicable laws of Ukraine, then the refinancing obligations of the Buyer (Company) shall be considered restructured, postponed, spread out, suspended or stayed accordingly. Thus, the cited provision of Agreement No. 2 suggests that the parties did not provide for the possibility of terminating liabilities under the Loan Agreement (the agreement only speaks of the possibility of staying or suspending such liabilities, which gives rise to different legal consequences, since the terms "staying" and "suspending" only refer to the possibility of temporary non-performance of an obligation and not final release from its performance). [Translator's note – the Court quotes the text of the Ukrainian version of Agreement No. 2][470]

456. Despite earlier concluding that the Buyer's obligations under the 2001 ZAlK SPA were duplicated in the 2006 ZAlK SPA, the Court nonetheless found that there was a material difference in the scope of clause 3.3 of the former and clause 6.3 of the latter by focusing on an ambiguity in the Ukrainian version of clause 6.3 notwithstanding that the English version expressly refers to the possibility of the 1997 Loan Agreement being "*terminated or halted*". It appears from the signature page of the 2006 ZAlK SPA that it was prepared in English and then translated into Ukrainian.[471]

457. <u>Second</u>, the Prosecutor relied upon clause 133 of the State Privatisation Program for 2000-2002 to determine the consequences of rescission in its pleadings.[472] ZAlK repeated on several occasions that this provision only applies in cases of rescission for material breach and hence could not be invoked for a claim for rescission for a material change in circumstances.[473] Once again, by upholding a claim grounded on Article 651, the Court avoided having to confront this issue, which the Prosecutor never appears to have addressed. As a result of the application of clause 133 of the State Privatisation Program for 2000-2002, Velbay cannot have the purchase price returned to it until there is a re-sale of ZAlK (which had still to occur at the time of writing this Decision).

470 C-333, Kyiv Commercial Court, Case No 48/448-13/364, Judgment, 22 March 2012.

471 C-333, Kyiv Commercial Court, Case No 48/448-13/364, Judgment, 22 March 2012.

472 C-317, GPOU, Case No 48/448-13/364, Written submissions, 12 October 2011.

473 C-182, ZAlK, Statement of Defence, Case No 48/448, 1 September 2010; C-316, Kyiv Commercial Court of Appeal, Case No 48/448, Written Submission of ZAlK, 11 October 2011.

458. Third, the Court was able to avoid an analysis of the question of the rebalancing of interests under Article 652(3) and thus it failed to engage with the manifest unfairness of compelling a party to pay for something for which it has never had the benefit.

459. As previously explained in respect of the Third Ground, the fact that the Prosecutor had never in substance pleaded a case on the basis of Article 651 caused serious prejudice to Velbay as it was never afforded an opportunity to confront the central propositions of the reasoning that led the Kyiv Commercial Court to rescind the 2006 ZAlK SPA. Those propositions were to some extent novel and also controversial. No reasonable litigant in the shoes of Velbay could have foreseen that the Court would have decided on the basis of these propositions by reference to the earlier court decisions relating to the recission of the 1997 Loan Agreement (which suggested that ZAlK's obligation to pay the indebtedness to Ukreximbank had been terminated) as well as the subsequent conduct of all the relevant parties (no attempt to enforce such an obligation to pay was ever made).

460. Finally, in relation to the Fourth Ground, the Tribunal cannot conclude, on the available evidence, that the High Commercial Court hearing Velbay's appeal of the decision of the Kyiv Commercial Court was constituted in a manner that violated Ukrainian law on the basis that the random selection of judges was not followed. And even if there had been a breach of the Ukrainian procedural rules in this respect, that would not necessarily be censured under the standards of international law. Of more concern is that fact that two of the judges, [redacted], were subsequently found by the Ukrainian authorities to be unfit for judicial office in the new Supreme Court based upon prior misconduct. But that does not inexorably point to a violation of ethical standards in the particular appeal before the High Commercial Court under consideration. Finally, [redacted] inappropriate statement about the outcome of the particular appeal certainly does not instil confidence about the impartiality of that judge in the appeal. This is a factor that the Tribunal may take into account in its overall assessment, albeit that it cannot be decisive without more evidence about the context for the statement.

461. The Tribunal's overall assessment is that Velbay has suffered a denial of justice in the process of defending the Prosecutor's claim for recission of the 2006 ZAlK SPA in the Ukrainian judicial system. The conduct analysed under the Third Ground—the Kyiv Commercial Court's deciding on a basis that was not pleaded in substance by the Prosecutor and the resulting inability of Velbay to address or respond to the key propositions relied upon by the Court to substantiate its decision—is the essential foundation of the Tribunal's

conclusion. The Tribunal is, moreover, convinced that this conduct was the result of a deliberate stratagem rather than the inadvertent consequence of the Court's approach to adjudicating the Prosecutor's claim. This inference is confirmed by the conduct described under the Second Ground—the Court's failure to engage with the SPFU's official position on Velbay's performance of its obligations under the 2006 ZAlK SPA. The same can be said in relation to the appellate proceedings with respect to the Second Ground where there was even an instance of a direct misrepresentation of SPFU's position. The conduct described in the First Ground—denying the application of the arbitration clause in the 2006 ZAlK SPA on a tenuous basis—is not proof in itself of systemic bias against Velbay in the court proceedings but it is consistent with it, especially when coupled with [redacted] statement as analysed under the Fourth Ground.

The peripheral aspects of the Claimants' denial of justice claim

462. The Tribunal must finally tie up the loose ends and address what it has characterized as the peripheral elements of the Claimants' denial of justice claim.

463. The Claimants seek to impugn the alleged failure of the Kyiv Commercial Court to take into account the mandatory instructions of the High Commercial Court when the case was remitted to the former.[474] In particular, the Claimants maintain that the Kyiv Commercial Court failed to establish "*whether the Aluminium Foil Equipment was included in the authorised capital of ZAlK or whether it constituted State property*" and to "*'pay attention' to the content of the SPFU verification reports*".[475] The latter issue is subsumed within the Second Ground set out above. In relation to the former issue, the Kyiv Commercial Court did acknowledge that the Foil Equipment was state property; what the Claimants are really complaining about is the alleged failure to draw the proper legal conclusions from that acknowledgment.[476] It is not the function of an international tribunal hearing a denial of justice claim to substitute the reasoning deployed by the national court with its own reasoning. To the extent the Claimants are complaining about an alleged breach of Ukrainian procedural law on the basis that the Kyiv Commercial Court failed to comply with directions that are binding under

474 C's Memorial, §483 et seq; C's Reply, §§205, 616; R's Rejoinder, §370. The Respondent maintains that the Court did address each of the points raised by the instructions: R's Counter-Memorial, §§388-393.

475 C's Memorial, §§484-485.

476 C's Memorial, §500: "*Having made this factual finding, the Kyiv Commercial Court drew no conclusions from the fact that the Aluminium Foil Equipment was in State ownership*."

Article 111-12(1) of the Commercial Procedure Code of Ukraine,[477] that is not relevant to the Tribunal's analysis unless it is capable of sustaining a denial of justice, which it is not.

464. The Claimants also take issue with the Kyiv Commercial Court's interpretation of Article 6.3(b) of the 2006 ZAlK SPA.[478] As previously noted, the Respondent is correct that this interpretation was strictly unnecessary for the Court's ultimate conclusions based upon Article 651 of the Civil Code, which rested on the idea that ZAlK's obligations under the 1997 Loan Agreement had not terminated such that clause 6.3(b) did not apply.[479]

465. The Claimants also maintain that the Prosecutor's initiation of the proceedings for judicial recission was in-and-of itself a violation of the FET standard in Article 3(2) of the BIT.[480] They maintain that, on the one hand, the SPFU had taken the official position that Velbay had discharged its refinancing obligation, but on the other hand, the SPFU—through the Prosecutor—then reversed its official position by seeking judicial recission of the 2006 ZAlK SPA on the basis that the nullity of the refinancing obligation constituted a fundamental change of circumstances under Article 652 of the Civil Code.[481] The Tribunal has already considered the unfairness generated by the Prosecutor's procedural position in the court proceedings in this section and under the Second Ground. The mere initiation of legal proceedings by the Prosecutor, however, cannot be a violation of international law. International law expects a national legal system to dispense justice by observing certain minimum standards. It does not expect that a national legal system will confer an immunity from litigation upon foreign nationals even if those instituting that litigation are advancing unmeritorious arguments or are motivated by bad faith (whether or not that was the case here).

Tribunal's conclusion on liability in respect of the Renationalisation Claim

466. The Tribunal concludes that a denial of justice was consummated on 11 March 2015 when the Supreme Court dismissed Velbay's final appeal. This amounted to a breach of the FET standard under Article 3(2) of the BIT.

467. The Tribunal further concludes that the transfer of Velbay's shares on 5 June 2015, which was in furtherance of executing a judgment tainted by a denial of justice, constituted an

477 C's Memorial, §488.
478 C's Memorial, §§506-521; C's Reply, §615.
479 R's Rejoinder, §§178, 369.
480 C's Memorial, §§600-607.
481 C's Memorial, §§600-607.

unlawful expropriation under Article 6 of the BIT. No compensation for Velbay's shares has ever been paid or offered by the Respondent during the subsequent six years as at the date of this Decision.

G SHAREHOLDER INTERFERENCE CLAIM

G1 Introduction

468. The Claimants argue that Velbay's rights as a shareholder in respect of a 29.54% stake in ZAlK were interfered with in breach of the FET standard as well as the full protection and security standard in Article 3(2) of the BIT.

469. After Velbay's stake of 68.01% had been transferred back to the SPFU, Velbay remained the second largest shareholder in ZAlK by virtue of the 29.54% stake in question.[482] Velbay's management rights attaching to that stake in ZAlK were two seats (of seven) on ZAlK's Supervisory Board and one seat (of four) on the Audit Committee. Prior to their dismissal at the 2016 EGM, Velbay's representatives on the Supervisory Board were [redacted] and [redacted] whereas its representative on t[redacted].[483] Moreover, by virtue of ZAlK's Articles of Association, Velbay had an effective veto over the company's actions in respect of certain matters at the Supervisory Board level, as well as at the General Meeting.[484]

470. According to the Claimants, the SPFU convened an Emergency General Meeting in September 2016 ("**2016 EGM**") and an Annual General Meeting in April 2017 ("**2017 AGM**") with the object of illegally appropriating full control over ZAlK with the assistance of the "*Khortitisky Regiment*" and the management of ZAlK in physically preventing Velbay's representatives from attending those meetings.[485] The Khortitsky Regiment, according to the Claimants, is [redacted]

482 C's Memorial, §308.
483 Transcript D1/PP104-105 [redacted].
484 C's Memorial, §609.
485 C's Memorial, §§608-613.
486 C's Memorial, FN 430.
487 [redacted]

471. Before the Tribunal turns to its assessment of the factual record in respect of the Shareholder Interference Claim, it must address the significance of the witness testimony provided by [redacted] on behalf of the Claimants. [redacted] was the only witness presented by either party with direct knowledge of the events surrounding the 2016 EGM and the 2017 AGM: he was physically present on both occasions. The Respondent nevertheless declined to call [redacted] for cross-examination at the hearing. Although the Tribunal does not simply accept [redacted] evidence in its entirety as a result of the Respondent's election, the Tribunal does consider that [redacted] evidence is probative in relation to the matters that will now be discussed and, especially where that evidence is corroborated by the documentary record, it is entitled to significant weight.

G2 Factual assessment of the events surrounding the 2016 EGM and the 2017 AGM

Events prior to the 2016 EGM

472. It will be recalled in the context of the Renationalisation Claim that Velbay's 68.01% stake in ZAlK was transferred to the SPFU on 9 June 2015. ZAlK received a letter on 22 June 2015 stating that the SPFU was now the owner of the plant.[488] The letter also stipulated that the SPFU would be sending an advisor, [redacted], to visit ZAlK in o[redacted]

[redacted]

> [redacted].[489]

[redacted]:[redacted]

[redacted].

[488] C-158, Letter No 10-25-11143 from [redacted] (SPFU) to ZAlK, 22 June 2015.

[489] [redacted]

474. On 14 August 2015, ZAlK's general shareholders meeting was held—the first following the transfer of Velbay's 68.01% stake in ZAlK to the SPFU. [redacted] like many other employees of ZAlK, had a small shareholding in ZAlK and thus attended the meeting.[490] On the agenda was the election of new members of ZAlK's Supervisory Board and Audit Committee. The SPFU was entitled to five seats on the Supervisory Board, whereas Velbay was entitled to two; they were filled by [redacted][491]

475. Another general meeting for ZAlK took place on 21 April 2016.[492] 34 shareholders and their representatives attended the meeting, representing 98.6% of the total shares. A new Supervisory Board was elected at that meeting, but Velbay's two representatives on the board remained unchanged.[493]

The events surrounding the 2016 EGM

476. An emergency general meeting was called by the SPFU for 23 September 2016.[494]

477. [redacted] recalls arriving at the plant between 9 am and 10 am at the same time as [redacted].[495] According to [redacted]:

> [redacted]

478. The documents on the record show that the Khortitskiy Regiment had sent an "*application for holding of a peaceful public assembly*" the day before, on 22 September 2016, to the Zaporozhye City Council, which states that between 50-100 citizens would assemble before the central entrance of ZAlK between 8 am and 12 pm.[496] [redacted]". The timing of the assembly was thus planned to coincide with the arrival of shareholders to attend the emergency general meeting, for which registration was scheduled from 10 am to 11:30 am,

490 [redacted]
491 [redacted]
492 C-278, Minutes No 21 of ZAlK's General Shareholders Meeting, 21 April 2016; [redacted].
493 C-278, Minutes No 21 of ZAlK's General Shareholders Meeting, 21 April 2016.
494 [redacted]-36, Notification on the General Shareholders' Meeting of ZAlK, 23 September 2016.
495 [redacted]
496 R-131, Letter No 117 from Khortitsky Regiment to Zaporozhye City Council, 22 September 2016.

with the meeting itself to commence at 12 pm.[497] Indeed, [redacted] testifies that the Khortitskiy Regiment cleared its blockade precisely after 11:30 am, by which time it was no longer possible to register for the meeting.[498] Moreover, as the video evidence shows unequivocally, this was not merely a public protest outside ZAlK which could have taken place in the large courtyard in front of the main entrance without in anyway impeding access to the main entrance. This was instead an organized blockade of the main entrance of ZAlK with the obvious (and admitted) purpose of preventing certain shareholders from attending the 2016 EGM.

479. A police report positively confirmed that the Khortitskiy Regiment was at the scene.[499] The video evidence that has been submitted onto the record shows approximately two-dozen men in military fatigues standing in front of the main entrance of ZAlK.[500] On the window of the main entrance there was a large poster notifying shareholders that they had to pass through this main entrance to attend the 2016 EGM. A person speaking on behalf of the men in battle fatigues (this appears to be [redacted]) engaged in a conversation with someone who appeared to be a shareholder wishing to enter the premises. The exchange was as follows:

[redacted]

[redacted]

[redacted]

480. One of the persons standing in the immediate vicinity to those having this exchange appears to be a member of the Ukrainian police force.[503]

481. It is also clear from other video evidence that the entrance for vehicle access was also closed by a large gate.[504] A security guard appears on the internal side of the gate, whereas several

497 [redacted]-36, Notification on the General Shareholders' Meeting of ZAlK, 23 September 2016.

498 [redacted]

499 C-434, Letter No 32-a.3/41/32/02-2016 from Patrol Division of Patrol Police Department to [redacted] 26 October 2016.

500 C-41, video footage captured in front of ZAlK's premises, 23 September 2016.

501 [redacted].

502 [redacted].

503 See also the photo at C-291, photo of Police at ZAlK 2016 EGM, 23 September 2016.

504 C-344, video footage captured in front of ZAlK's premises, 23 September 2016.

men in military fatigues are standing in front of the gate on the external side. The security guard confirmed that he was under instructions from [redacted] not to open the gate.

482. The [redacted], gave a statement that was reported in a newspaper the next day on 24 September 2016:

> [redacted]

483. The documents also confirm [redacted] statement that [redacted] called the police.[506] The police report recorded that a complaint had been received at 10:45 am to the effect that the applicant "*had not been permitted to come in [to the central entrance of ZAlK] by unknown people wearing camouflage*".[507] According to the police report dated the same day, a number of officers went to the scene but "*found no violations of public order or any obstructions of access control*".[508] A later police report stated that the Khortitskiy Regiment "*were holding a peaceful meeting of citizens*".[509] The police report noted that "*the door was locked from the inside and the representatives of the peaceful meeting didn't prevent the Claimer [*[redacted]*] from entering inside*".[510] Velbay's complaint to the police also confirmed the same: the entrance to ZAlK was also locked from the inside.[511]

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505 [redacted]

506 C-292, Police Report of Senior Inspector of Police Sub Division of Voznesenivskyi Police Division re 23 September 2016 EGM, 24 September 2016.

507 C-429, Police Report, No 22392 of Inspector of Police Sub Division of Voznesenivskyi Police Division regarding 2016 EGM, 23 September 2016; C-281, National Police of Ukraine, Department of Information and Coordination, Letter No 27/04-1360d to [redacted]3 October 2016.

508 C-292, Police Report of Senior Inspector of Police Sub Division of Voznesenivskyi Police Division re 23 September 2016 EGM, 24 September 2016. See also: C-429, Police Report, No 22392 of Inspector of Police Sub Division of Voznesenivskyi Police Division regarding 2016 EGM, 23 September 2016, and C-430, Internal Police Report of Inspector of Police Sub-Division of Voznesenivskyi Police Division regarding 2016 EGM, 23 September 2016.

509 C-434, Letter No 32-a.3/41/32/02-2016 from Patrol Division of Patrol Police Department to [redacted], 26 October 2016.

510 C-434, Letter No 32-a.3/41/32/02-2016 from Patrol Division of Patrol Police Department to [redacted] 26 October 2016.

511 C-433, Velbay's complaint on internal investigation and taking of disciplinary actions against policemen, 20 October 2016.

484. [redacted] also called the National Securities and Stock Market Commission of Ukraine to inform them of the situation.[512]

485. Only two persons were able to access ZAlK and register for the 2016 EGM: [redacted] and [redacted] [redacted].[513] Only [redacted] had the right to vote at the meeting. At the time, ZAlK had 2296 shareholders with voting rights.[514] [redacted] were refused registration.

486. There is video evidence of [redacted] explaining to a few dozen disgruntled shareholders outside the ZAlK premises that they would not be able to participate in the shareholders' meeting because they did not register in time. Judging by the exchanges, this took place after registration had closed (11:30 am) but before the shareholders' meeting itself (12 pm). One shareholder stated that the registration commission for the shareholders' meeting has the right to extend the registration and it should do so. [redacted] answered: "*It has the right, but the minutes have already been signed at 11:30 am[…]*"[515]

487. Another shareholder asked [redacted] how she was able to get into the premises. [redacted] answered: "*Through the gate at 9am.*"[516] This was obviously made possible with the acquiescence of the Khortitskiy Regiment, who had planned to be stationed outside the gate from 8 am onwards.[517] This was also an hour before registration was due to commence. [redacted] testified that, when he finally gained entry to ZAlK after the blockade had lifted, he saw [redacted]'s car parked on ZAlK's premises.[518] He also stated that entry through the vehicle gate was "*normally only allowed for members of ZAlK's management or people otherwise authorized by the General Director of ZAlK*".[519]

488. In relation to [redacted]'s conduct, the Respondent says that: "*There is nothing unusual, however, about someone arriving one hour early to an important meeting, especially when it is recalled that the SPFU was the body that called the 2016 AGM and therefore was responsible for setting up the venue.*"[520] The

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512 C-282, Letter No 13/5/21252 from I. Nazarchuk (National Securities and Stock Market Commission of Ukraine) to [redacted] 11 October 2016.

513 [redacted]

514 R-223, Minutes of the Registration Commission on the Results of the Registration of the Participants of the Extraordinary General Meeting of Shareholders at Zaporozhye Aluminium Combine, 23 September 2016.

515 C-431, video footage captured inside ZAlK's premises, 23 September 2016.

516 C-431, video footage captured inside ZAlK's premises, 23 September 2016.

517 R-131, Letter No 117 from Khortitsky Regiment to Zaporozhye City Council, 22 September 2016.

518 [redacted]

519 [redacted]

520 R's Rejoinder, §192(a).

Tribunal does not find this explanation to be persuasive: [redacted] arrived an hour before registration for the meeting was even due to commence. And as the evidence shows, the preparations for the meeting appear to have been quite rudimentary.

489. The 2016 EGM was to took place in a meeting room in ZAlK's premises. There is video evidence of this meeting as well.[521] Some of the shareholders who had not registered nevertheless attended the meeting and can be heard to be complaining about the process. The meeting took place in complete darkness save for a torch light. The participants were all standing in a huddle.[522] The only person casting any votes was [redacted]. When the meeting finished the participants exited through a room with natural light. According to the minutes of the meeting, it lasted 35 minutes and only one participant had the right to vote (evidently this was [redacted]). Resolutions were passed to terminate the powers of the members of the Supervisory Board and the Audit Committee and to replace them with new members, as well as to introduce changes to the Articles of Association.[523]

490. [redacted] described the meeting in the following terms:

> [redacted][524]

491. This account is corroborated by the video evidence previously cited.

492. Velbay filed a complaint with the National Security and Stock Market Commission on 28 September 2016 in respect of its treatment at the 2016 EGM.[525]

493. [redacted] also filed a complaint against the policemen who attended the scene of the extraordinary shareholders meeting at ZAlK's premises on 20 October 2016. In particular, [redacted] complained that the police officers had not

521 C-432, video footage captured inside ZAlK's premises, 23 September 2016.
522 C-239, Photo-ZAlK AGM, 23 September 2016.
523 C-42, Minutes of the General Shareholder Meeting, 23 September 2016.
524 [redacted]
525 C-282, Letter No 13/5/21252 from I. Nazarchuk (National Securities and Stock Market Commission of Ukraine) to [redacted] 11 October 2016.

detected any obstacle to access to the building and therefore had taken no action. According to [redacted] he had been denied access by the presence of the Khortitskiy Regiment.[526] The police report had noted that the entrance had been locked from the inside such that [redacted] had not actually been prevented from entering the premises.[527]

494. Velbay, along with other shareholders, filed a claim before the Commercial Court of Zaporozhye Region on 31 October 2016 seeking to invalidate the decisions adopted at the 2016 EGM on several grounds, including the fact that Velbay's representative and other shareholders had been prevented from attending the meeting.[528] That complaint was dismissed by the Commercial Court of Zaporozhye on 12 December 2017 on the basis that it had not been established that Velbay's representative had been denied access to register for the 2016 EGM. The Court found that the police officers giving testimony had not recorded any facts of disorder and that the [redacted] had testified that only a peaceful demonstration had taken place involving the Khortitskiy Regiment. Finally the Court was impressed that two shareholders were able to register to participate at the 2016 EGM, thus refuting the allegation that the other shareholders were prevented from doing so.[529]

495. Velbay's appeal to the Commercial Court of Appeals was dismissed on 19 March 2018,[530] as was an appeal to the Supreme Court on 20 June 2018.[531] Judge Mamalui of the Supreme Court filed a dissenting opinion in which he was highly critical of the lower court's dismissal of the evidence concerning the inability of Velbay to attend the 2016 EGM. In particular, he noted that the police had confirmed in their reports that the entrance to ZAlK had been closed from the inside.[532]

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526 C-433, Velbay's complaint on internal investigation and taking of disciplinary actions against policemen, 20 October 2016.

527 C-434, Letter No 32-a.3/41/32/02-2016 from Patrol Division of Patrol Police Department to [redacted], 26 October 2016.

528 C-295, Claim against ZAlK regarding the invalidation of the Shareholders Decision of 23 September 2016, 31 October 2016.

529 C-296, Zaporozhye Commercial Court of Appeals, Case No 908-2905-15, Judgment, 12 December 2017.

530 R-142, Resolution of Donetsk Commercial Court of Appeal, Case No 908/2906/16, 19 March 2018.

531 R-148, Resolution of the Supreme Court of Ukraine, Case No 908/2905/16, 20 June 2018.

532 C-453, Supreme Court of Ukraine, Case No 908/2905/16, Dissenting Opinion of Judge Mamalui, 20 June 2018.

The events surrounding the 2017 AGM

496. The 2017 AGM took place on 18 April 2017. Once again there is video evidence of the situation outside the main entrance to ZAlK.[533] This time there is a larger number of men in battle fatigues from the Khortitskiy Regiment—perhaps more than four dozen—who on this occasion appear to be checking the identity papers of those wishing to enter the building.[534] This is confirmed by [redacted] evidence:

> [redacted]

497. The Khortitskiy Regiment had sent a "*Notification about holding of a peaceful public assembly*" to the Zaporozhye City Council on 14 April 2017 from 12 pm to 4 pm "*at the central entrance*" [redacted].[536]

498. Once again [redacted] called the police at 1:16 pm to complain that the men in camouflage were not permitting shareholders to access the building.[537] Other individuals, including a member of Parliament, also called the police with the same complaint.[538] [redacted] then called the police again at 2:03 pm with the same complaint and noting that the police had come to the scene in the interim. He further stated that registration for shareholders was due to close at 2:30 pm.[539]

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533 C-305, video footage of the Khortitskiy Regiment at ZAlK, 18 April 2017; C-438, video footage captured in front of ZAlK's premises, 18 April 2017.

534 See also photo: C-443, ZAlK 2017 EGM, 18 April 2017; C-304, photographs of the Khortitskiy Regiment at ZAlK (2017 AGM), 18 April 2017.

535 [redacted]

536 R-135, Letter No 172 from Khortitsky Regiment to Zaporozhye City Council, 14 April 2017.

537 C-440, Police Report No 9845 from Voznesenivskyi Police Division (Vp) of Dniprovskyi Police Department of the Main National Police Office (Hunp) In Zaporozhye Region, 18 April 2017; [redacted].

538 C-441, Police Report No 9847 from Voznesenivskyi Police Division (Vp) of Dniprovskyi Police Department of the Main National Police Office (Hunp) In Zaporozhye Region, 18 April 2017; C-442, Police Report No 9850 from Voznesenivskyi Police Division (Vp) of Dniprovskyi Police Department of the Main National Police Office (Hunp) In Zaporozhye Region, 18 April 2017; C-314, Report CO No 9845 from Voznesenivskyi Police Division (Vp) of Dniprovskyi Police Department of the Main National Police Office (Hunp) In Zaporozhye Region, 18 April 2017.

539 C-310, National Police of Ukraine, Department of Information and Coordination, Letter No 804/03/2-2017 to [redacted], 28 April 2017.

499. [redacted] called the police a third time at 2:19 pm, informing them that a police car arrived at the scene but then turned around and left.[540] A report of the Voznesenivskyi Police Division noted that:

> [redacted]

500. A press article from the next day, on 19 April 2017, published a statement from [redacted]:

> [redacted]

501. Other press articles contain photographs confirming that the Khortytsky Regiment were checking the identification of anyone seeking entry into the ZAlK building. According to the Claimants, several press articles have pictures of [redacted] showing his identification and being denied access to the meeting by the Khortytsky Regiment.[543] The Tribunal cannot confirm the identity of that person based on the evidence submitted, but there is no doubt an individual pictured in the articles was required to show his identification to the men wearing camouflage uniforms. The Tribunal also records that the Respondent has not contested the identification of the individual in the photographs as [redacted].

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540 C-312, Report CO No 9852 from Voznesenivskyi Police Division (VP) of Dniprovskyi Police Department of the Main National Police Office (Hunp) In Zaporozhye Region, 18 April 2017.

541 [redacted].

542 [redacted].

543 [redacted]; [redacted]; [redacted] [redacted]; [redacted] [redacted]; [redacted].

502. On 22 May 2017, Velbay filed a claim with the National Securities and Stock Market Commission asserting that its shareholder rights had been violated by the SPFU at the 2017 AGM. The Commission, on 27 June 2017, concluded that the 2017 AGM was held in breach of Article 38 of the Law of Ukraine on Shareholding Companies because ZAlK had failed to allow Velbay to make proposals for the agenda of the meeting or for candidates to be elected.[544] According to that provision, proposals from shareholders holding, in aggregate, 5 percent or more of the shares in the company have to be included in the draft agenda automatically.[545]

503. On 26 May 2017, Velbay filed a claim seeking to invalidate the decisions adopted at the general meeting of shareholders before the Commercial Court of Zaporozhye Region on the ground, *inter alia*, that Velbay's representative was prevented from entering the building, as well as ZAlK's failure to include Velbay's proposals for the agenda or for candidates to be elected.[546] Velbay's application was denied on 25 October 2017. The Court accepted, consistent with the determination by the National Securities and Stock Market Commission, that Velbay's right to propose items on the agenda of the 2017 AGM and to propose candidates for nomination in accordance with Article 38 had been violated. The Court nonetheless found that this was not a ground to invalidate the resolutions adopted at the 2017 AGM for various reasons: a quorum had been established for the 2017 AGM (68.8% of the total number of voting shares); a resolution on the termination of the powers of the chairman and members of the Supervisory Board was not adopted (thus making Velbay's proposal on the same moot—although the Court did not extend this reasoning to the appointment of the Audit Committee, which was voted on); Velbay could have requested the convocation of an extraordinary general meeting of shareholders to consider the items it wished to place on the agenda of the 2017 AGM but failed to do so; and Velbay had failed to propose an alternative candidate in respect of its request for the termination of the functions of the current General Director of ZAlK and hence this action was taken "*for the purpose of disrupting the company's […] operations*".[547] The Court also dismissed Velbay's complaint that it had been denied access to the 2017 AGM. Despite considering some of the evidence that has been recited above (e.g. photographic evidence and police records),

544 C-126, Letter from [redacted] (National Securities and Stock Market Commission) to [redacted] 27 June 2017.

545 C-126, Letter from [redacted] (National Securities and Stock Market Commission) to [redacted]), 27 June 2017.

546 C-297, Commercial Court of Zaporozhye Region, Velbay's Statement of Claim, 26 May 2017.

547 C-285, Commercial Court of Zaporozhye, Case No 908/1120/17, Judgment, 25 October 2017.

the Court reasoned that Velbay's had not proven that its representative had been denied access to the building in which the 2017 AGM had been held. The Court was impressed by the fact that 22 shareholders had been able to register (as recorded in the minutes), thus refuting the possibility that Velbay had been denied access.[548]

504. Velbay appealed the judgment and the Donetsk Commercial Court of Appeal dismissed that appeal on 13 February 2018 on similar grounds.[549] The Supreme Court also dismissed Velbay's appeal.[550]

G3 Tribunal's assessment of the Claimants' claim for breach of the FET and full protection and security standards in Article 3(2) of the BIT and claim for expropriation under Article 6 of the BIT

Introduction

505. The Claimants' FET claim focuses on the actions of the SPFU and in particular the alleged collusion with the Khortitsky Regiment and ZAlK's management in preventing Velbay's representatives from attending the 2016 EGM and the 2017 AGM, whereas the full protection and security claim is directed to the misfeasance or nonfeasance of the Ukrainian police force in failing to ensure that Velbay's representatives were not impeded from exercising their rights to attend the meetings.

506. It is important at the outset to be clear about the nature of the prejudice that is alleged in respect of Velbay's 29.54% shareholding in ZAlK: the prejudice is said to be the inability of Velbay's representatives to participate in the 2016 EGM and the 2017 AGM and thus exercise Velbay's rights to participate in the corporate affairs of ZAlK. There is no dispute that a shareholder has such a right under Ukrainian law and that such rights attaching to a shareholding are protected by the BIT.

507. The Respondent and its expert on Ukrainian corporate law have, to some extent, defended this claim by demonstrating that, even if Velbay's representatives had attended, then the SPFU, as the majority and controlling shareholder by that stage, would have ultimately been able to pass the resolutions that it sought to pass at the 2016 EGM and the 2017 AGM. In other words, they have sought to show that the "*impact*" of Velbay's non-participation was negligible in terms of the ultimate substantive outcome. The Tribunal does not consider

548 C-285, Commercial Court of Zaporozhye, Case No 908/1120/17, Judgment, 25 October 2017.
549 C-290, Donetsk Appellate Commercial Court, Case No 908/1120/17, Resolution, 13 February 2018.
550 R-146, Resolution of the Supreme Court of Ukraine, Case No 908/1120/17, 12 June 2018.

that that can be an answer to the Claimants' claim in this respect. It is obvious that minority shareholders will not, in the final analysis, be able to block resolutions proposed by a majority shareholder if they are passed in accordance with the applicable law. But that does not mean that their right to participate in the debates concerning those resolutions is somehow rendered nugatory or without legal value. Whether or not a shareholder is able to exercise control over the company can be relevant to issues of quantum (e.g. by the inclusion of a "*control premium*" in valuation), but the Tribunal does not understand how the fact that the SPFU would have succeeded in the end in implementing its programme for ZAlK by virtue of its majority control can be a defence to this claim.

508. The point can be illustrated by reference to one matter that the SPFU put on the agenda of the 2016 EGM: an amendment to ZAlK's Articles of Association to remove the provision whereby certain matters before the Supervisory Board could only be adopted by a 6 out of 7 member majority.[551] This provision effectively gave Velbay a right of veto over proposals made by the SPFU at the level of the Supervisory Board in respect of a number of important matters affecting ZAlK (as it was entitled to have two seats on that board). The SPFU wanted to eliminate this right of veto by an amendment to the Articles of Association. If Velbay had been present at the 2016 EGM, it would have been able to block that resolution because amendments to the Articles of Association required a qualified vote of 75%.[552]

509. The Respondent's expert makes two principal points.

510. First, according to the Respondent's expert, the provision under discussion was "*highly unusual*" and the default rule under the JSC Law is for decisions to be passed by a simple majority of the supervisory board.[553] This may be true but it is irrelevant: the fact remains that Velbay had certain rights entrenched in ZAlK's Articles of Association and the SPFU wanted to remove them. Velbay had a right to participate and vote at the meeting at which that would be on the agenda.

511. Second, the Respondent's expert opines that: "*even if Velbay's representatives voted against a resolution of the Supervisory Board, the SPFU or the Supervisory Board itself would be able to convene an EGM and with the 68% vote of the SPFU adopt decisions vetoed by Velbay's representatives at the Supervisory Board level.*"[554] Again, this may be true but the fact that Velbay's veto right might

551 C-276, Articles of Association, Art. 11.7, 2015.
552 C-276, Articles of Association, Art. 10.36, 2015.
553 [redacted]/1, §22.
554 [redacted], Opening Presentation, Slide 12.

ultimately be defeated if the matter before the Supervisory Board were to be put to a General Meeting of Shareholders does not make that veto right legally worthless, nor does undermine the importance of Velbay's right to participate in the meetings at which the matter in question would be on the agenda.

512. There are further issues that the Tribunal must address in this introduction. Both parties through their experts on Ukrainian corporate law have entered into lengthy debates about the regularity or otherwise of the 2016 EGM and the 2017 AGM from a Ukrainian law perspective. In relation to the 2016 EGM, they have considered whether Velbay was provided with a proper opportunity to review the documents relevant to the adoption of decisions at the 2016 EGM; whether the venue for the 2016 AGM was changed inappropriately; and whether there was a failure to publish the minutes of the meeting within 10 days. In relation to the 2017 AGM, the experts debated whether ZAlK unlawfully refused to include the various proposals for the agenda submitted by Velbay (this was ultimately found to be the case by the Ukrainian courts).

513. None of these matters is said by the Claimants to breach Article 3 individually, nor are they said to amount to a breach collectively. These irregularities were raised by Velbay before the Ukrainian courts but, as the Respondent has pointed out,[555] there is no claim for denial of justice made in respect of those judicial proceedings. In these circumstances, the Tribunal does not see the utility in conducting its own assessment of whether these various alleged irregularities in the procedures followed for the 2016 EGM and the 2017 AGM were violations of the applicable Ukrainian corporate law.

514. The gravamen of the Shareholder Interference Claim for breach of Article 3 is that Velbay's representatives were prevented from participating at the 2016 EGM and the 2017 AGM. To this the Tribunal will now turn.

Were Velbay's representatives prevented from participating at the 2016 EGM and the 2017 AGM?

515. The Tribunal has no doubt on the basis of the factual record that Velbay's representatives were prevented from participating in the 2016 EGM and the 2017 AGM and hence Velbay was denied its rights as a shareholder in this respect. The Claimants have established that: the Khortitsky Regiment effectively blockaded the main entrance to ZAlK during the registration times for both meetings; the objective of that blockade was to deny access to

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555 R's Rejoinder, §204.

the Russian shareholders, and in particular representatives of [redacted], to those meetings; and the entrance to ZAlK was also locked from the inside as well at least with the acquiescence of ZAlK's management. There is also no doubt that [redacted] were present outside the entrance of ZAlK for both meetings for one purpose only—to participate at those meetings—and ultimately they were unable to do so for no other reason than the blockade.

516. The Respondent's defence on this point is that there is no evidence to suggest that [redacted] were physically prevented from entering ZAlK and that the assemblies by the Khortitsky Regiment were peaceful.[556] The Respondent is correct that there is no evidence that [redacted] were repelled from entering ZAlK's premises by force; but the video and photographic evidence leaves no doubt that the purpose of the Khortitsky Regiment's formation in rows in front of ZAlK's entrance was to prevent anyone from entering (at the 2016 EGM) or to screen those seeking to enter (at the 2017 AGM). The presence of these numerous men in battle fatigues was clearly designed to intimidate and the Tribunal's assessment of the evidence is that a reasonable person would have been intimidated. The Tribunal accepts [redacted] testimony on this point:

> [redacted][557]

517. As for the Respondent's point that the assemblies by the Khortitsky Regiment were "*peaceful*": the Tribunal agrees in the sense that force or violence were not used but that is only because the intimidation worked. As previously stated, if the Khortitsky Regiment had been motivated simply to protest the fact of Velbay's shareholding in ZAlK, they could have staged their protest in the large courtyard outside ZAlK's entrance without impeding access to ZAlK in any way. But as the Khortitsky Regiment's leader stated expressly, the objective was not simply to protest (in fact that does not appear to have been the objective at all) but rather to block the participation of [redacted] [redacted] at the 2016 EGM

556 R's Counter-Memorial, §159.

557 [redacted]

and the 2017 AGM. The formation of the Khortitsky Regiment into rows directly in front of the main entrance to ZAlK leaves no doubt about that objective.

What was the role of the SPFU?

518. None of the foregoing conclusions of fact, however, necessarily implicates Ukraine as a matter of international law. Although the Claimants have advanced some arguments to support the attribution of the acts of the Khortitsky Regiment and ZAlK's management to Ukraine, it will suffice to say for the time being that there are serious difficulties with that position. No doubt in recognition of those difficulties, the Claimants have, for the purposes of their FET claim, focused on the role of the SPFU, whose acts as a state organ are undoubtedly attributable to Ukraine. Their case is that the SPFU conspired with the Khortitsky Regiment and ZAlK's management to prevent Velbay's representatives from participating in the 2016 EGM and the 2017 AGM and thus exercising its rights as a shareholder of ZAlK.

519. The Tribunal will thus start with an analysis of the SPFU's acts and then deal with the question of attribution for the Khortitsky Regiment and ZAlK's management only if necessary.

520. The Respondent's principal defence is that there is no evidence that actions of the Khortitsky Regiment and/or ZAlK's management were "*orchestrated by the State Property Fund*".[558] The Tribunal disagrees.

521. It is important to have in mind the type of evidence that is likely to be available in this situation. It is not surprising that the Claimants have relied primarily on circumstantial evidence that the SPFU conspired with the Khortitsky Regiment and ZAlK's management to prevent Velbay's representatives from attending the 2016 EGM and the 2017 AGM. Those involved in the alleged conspiracy would not have been motivated to leave an official paper trail. If there were discussions between the protagonists, then they are likely to have been oral. In this respect it is significant that the Respondent has offered no witness of fact to refute the Claimants' case. In additional to the SPFU's representatives, there were several members of the police force who were at the scene at different times. Furthermore, as the

558 R's Counter-Memorial, §160.

majority and controlling shareholder of ZAlK, it would have been open to the Respondent to seek the testimony of key members of ZAlK's management.

522. The Tribunal now turns to the circumstantial evidence that has already been set out in the previous sections.

523. First, it is important to set the scene by describing the SPFU's *modus operandi* in relation to Velbay's remaining 29.54% stake in ZAlK after the SPFU had been vested with Velbay's 68.01% (as described in the Renationalisation Claim).

524. [redacted] described his encounter with [redacted] (an "*advisor*" to the SPFU) in June 2015 and this account has not been challenged by the Respondent, nor has [redacted] been tendered as a witness. [redacted]'s overture to [redacted] and his colleagues with the assistance of Ukrainian military personnel was clearly aimed at intimidation.

525. [redacted]

526. [redacted]

[redacted]

559 [redacted].
560 [redacted].
561 [redacted].

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

527. Neither of these incidents had any direct impact upon Velbay's ability to exercise its rights as a shareholder. They shed light, however, on the plausibility of the Claimants' theory of a conspiracy between the SPFU, the Khortitskiy Regiment and ZAlK's management to block the participation of Velbay's representatives from attending the 2016 EGM and 2017 AGM. These incidents demonstrate that the SPFU was willing to resort to unconventional means to impede Velbay's influence on ZAlK's affairs.

528. <u>Second</u>, the Khortitskiy Regiment's presence outside the entrance of ZAlK was evidently timed to coincide precisely not only with the days on which the 2016 EGM and the 2017 AGM were held but also with the very hours when the registration for shareholders was open. This indicates that the Khortitskiy Regiment had received precise information about the 2016 EGM and the 2017 AGM. (At the time of the registration for the 2016 AGM, members of the Khortitskiy Regiment were also equipped with a list of shareholders and photographs as a means to screen those wishing to enter ZAlK's premises to attend the meeting.) At the 2016 EGM, the timing of the SPFU's representative's arrival, [redacted], and the fact that [redacted] car was parked inside the secured compound is also significant. [redacted] stated that she arrived at 9 am—a full hour before the registration was due to commence. [redacted] was evidently allowed to pass through the Khortitskiy Regiment's cordon (they had given notice that they would be present from 8 am onwards) and through the security gate for vehicles. This required coordination with the Khortitskiy Regiment and ZAlK's management—the internal parking spaces were normally reserved for ZAlK's management only. Both the security gate for vehicles and the front entrance to ZAlK were then locked from the inside at some point thereafter before registration was due to commence: the video evidence shows that the ZAlK security guard manning the security

562 [redacted]

gate for vehicles confirming that he was under instructions from the General Director of ZAlK not to open the gate; and the police reports (and court decisions) confirm that the front entrance of ZAlK was locked from the inside.

529. The Tribunal infers from these facts that there must have been close coordination between the SPFU (and in particular [redacted]), the Khortitskiy Regiment and ZAlK's management. If, as the Respondent maintains, there was in fact no coordination, then one would have to surmise that [redacted], after she entered ZAlK's premises at 9 am, simply waited inside for two-and-a-half hours until the registration closed (11:30 am), oblivious to the fact that ZAlK's entrance had been locked from the inside and the Khortitskiy Regiment had blockaded the entrance from the outside, and not curious enough to investigate why no other shareholder had presented him or herself for registration. Her conduct when she emerged from inside the building after 11:30 am suggests otherwise. The video evidence shows [redacted] calmly answering the questions from bewildered and disgruntled shareholders and expressing no surprise that they had been unable to register. She was also able to cite the relevant provisions of Ukrainian corporate law in confirming that the period for registration could not be extended so that the shareholders might attend.

530. Again, it is significant that neither [redacted], nor anyone else from the SPFU, was presented as a witness in this arbitration. The Tribunal did ask Respondent's counsel at the hearing whether or not attempts had been made to secure [redacted]'s testimony as a witness: it was stated that the Ministry of Justice had attempted to contact [redacted] through the SPFU but that [redacted] had left the relevant department of the SPFU and there were no contact details [redacted].[563]

531. It is also significant that Velbay's representatives were prevented from participating on two separate occasions—the 2016 EGM and the 2017 AGM—in almost identical circumstances involving the positioning of the Khortitsky Regiment outside the same entrance to ZAlK. This further suggests that the interference was not spontaneous or uncoordinated on either occasion.

532. Third, the objectives of the SPFU and the Khortitskiy Regiment were aligned. For instance, in respect of the 2016 EGM, it is clear that the main reason behind the SPFU's decision to call that meeting was to pass resolutions that would remove Velbay's remaining influence

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563 Transcript D6/P1131 ([redacted]).

over the Supervisory Board of ZAlK by eliminating its right of veto in ZAlK's Articles of Association and removing its representatives from the Supervisory Board. The SPFU could not have done that if Velbay had been present at the 2016 EGM and voted against those resolutions. The Khortitskiy Regiment was present during the time for registering at the meeting for the avowed purpose of preventing Velbay's representatives from attending. As the video evidence makes clear, their presence did not take the form of a public protest in the sense that no slogans were shouted or banners displayed. Instead, the Khortitskiy Regiment calmly positioned itself in rows to create a barrier outside the very entrance through which the shareholders of ZAlK were supposed to pass in order to register for the 2016 EGM. This was an operation planned and executed for the specific purpose of preventing Velbay's representatives from attending the 2016 EGM; it was not a "*public protest*" against the fact of there being a Russian shareholder in ZAlK.

533. The same alignment of objectives can be inferred between the SPFU and ZAlK's management. After Velbay's 68.01% stake in ZAlK had been transferred to the SPFU, the latter procured the appointment of a new CEO, [redacted] on 16 December 2015.[564] [redacted] testifies, and as the actions of ZAlK confirm, ZAlK's management was hostile to Velbay's representatives and associates after it came under the SPFU's control.[565] [redacted] was ultimately dismissed by ZAlK's CEO and, for instance, ZAlK's management refused on a spurious basis to include Velbay's proposals for items on the agenda of the 2017 AGM and candidates for nomination, as was later confirmed by the Ukrainian courts.

534. It is possible, of course, that despite sharing the same objective to eliminate Velbay's influence in ZAlK, the SPFU, the Khortitskiy Regiment and ZAlK's management were acting entirely independently on the days of the 2016 EGM and the 2017 AGM when Velbay's representatives were denied access to those meetings. The Tribunal does not consider, on the balance of probabilities, that that is what actually happened. Their actions were clearly coordinated, as set out previously.

535. Finally, there is in fact some direct evidence of collusion between the SPFU and the Khortitskiy Regiment to block Velbay's representatives from participating at the 2016 EGM. The Tribunal returns to the statement of the [redacted]

564 [redacted]
565 [redacted]

[redacted], [redacted]:

[redacted]

536. The Claimants maintain that the reference to [redacted] is a reference to the Khortitskiy Regiment,[567] whereas the Respondent labels it a "*vague statement*" that "*fails utterly to substantiate the Claimants' case*".[568]

537. The Tribunal considers that this is quite clearly a reference to the Khortitskiy Regiment; indeed the underlined statement makes no sense otherwise. [redacted] notes that there were [redacted] that the SPFU could not approve but that [redacted]

566 [redacted]

567 C's Reply, §379.

568 R's Counter-Memorial, §160.

[redacted] at which a number of [redacted] were adopted. The [redacted] in question thus had some instrumental role in the progress of the general meeting of shareholders and the only [redacted] that had any such instrumental role from the evidence available were the citizens of the Khortitskiy Regiment.

Claim for breach of the FET standard in Article 3(2) of the BIT

538. The Tribunal is satisfied on the balance of probabilities by reference to the evidential record in this arbitration that the SPFU colluded with the Khortitskiy Regiment and ZAlK's management to prevent Velbay's representatives from participating in the 2016 EGM and the 2017 AGM in violation of Velbay's rights as a shareholder in ZAlK. Furthermore, the SPFU was more likely than not to have been the directing party in respect of this collusion: for instance, it was the SPFU that called the 2016 EGM for the dominant purpose of passing resolutions that would diminish Velbay's influence over ZAlK's affairs and it was the SPFU that would not have been able to achieve that purpose without the assistance of the Khortitskiy Regiment and ZAlK's management in physically preventing Velbay's representatives from attending.

539. The SPFU's conduct as a state organ is attributable to the Respondent. That conduct amounts to a conspiracy to use unlawful methods to exclude a shareholder from participating at the EGM and AGM. This amounts to a breach of the FET standard in Article 3(2).

Claim for breach of the full protection and security standard in Article 3(2) of the BIT

540. The Tribunal is not satisfied that the Claimants have discharged their burden of proof in relation to the claim for full protection and security. The evidence undoubtably shows that the Ukrainian police force did not intervene directly to ensure that Velbay's representatives had unimpeded access to ZAlK's premises on the days of the 2016 EGM and the 2017 AGM. But Claimants have not provided the Tribunal with any account or analysis of what the police force should have done in this situation (either by reference to the applicable laws and regulations or by expert testimony as to what best practice would have entailed or both). The 2016 EGM and the 2017 AGM were private meetings held on a private premises and Velbay's representatives were there to exercise their private law rights as a shareholder. The Tribunal cannot simply assume in these circumstances that the Ukrainian police force was obliged to intervene directly to ensure that Velbay's representatives were able to register for the meetings. In other words, there is an important aspect of this claim that was not

explored by the Claimants and hence there is a missing link for establishing liability for breach of the full protection and security standard. This claim is therefore dismissed.

Claim for expropriation under Article 6 of the BIT

541. The Claimants maintain that "*Velbay suffered a significant impairment*" of its rights as a shareholder by its exclusion from the 2016 EGM and the 2017 AGM, even though it retains title to the 29.54% shareholding in ZAlK in question.[569] Although it is possible to conceive that a permanent deprivation of the rights attaching to shares (such as the rights to participate in the management of the company by voting at shareholders' meetings) could constitute an expropriation, the Tribunal is not persuaded that there has been a permanent deprivation in this case on the basis of Velbay's exclusion from the 2016 EGM and the 2017 AGM. The Tribunal therefore dismisses this claim.

H THE SANCTIONS CLAIM

H1 Introduction

542. Ukraine first imposed sanctions on individuals and entities associated with the Claimants in 2016 and then, in 2018, Velbay and Emergofin were themselves placed on the list of sanctioned entities, which had the effect of preventing Velbay from participating in ZAlK's extraordinary general meeting of 1 November 2018. The Claimants maintain that there was no legitimate basis for the sanctions and that they were adopted in violation of Ukrainian law. The Supreme Court of Ukraine eventually quashed the sanctions against Velbay and Emergofin on that basis in its decision of 11 August 2020. The Claimants advance a claim for breach of Article 3(2) of the BIT (arbitrary conduct) as well as for breach of Article 6 (expropriation).

H2 Factual and legal context for the sanctions

The decisions imposing sanctions

543. On 31 August 2016, the Cabinet of Ministers of Ukraine issued Instruction No 639-P by which it proposed to sanction a number of natural persons and legal entities in the following terms:

> Due to the continuing armed aggression of the Russian Federation against Ukraine, facilitation and financing by it of terrorist activity in Ukraine,

569 C's Reply, §§845-848.

> which led to violation of the territorial integrity of Ukraine, rights and liberties of its citizens, temporary occupation of a part of its territory, numerous casualties, real and potential threats to national interests, national security and sovereignty of Ukraine[.][570]

544. Further to Instruction No 639-P, on 16 September 2016, the NSDCU issued a decision to impose sanctions on a large number of individuals and legal entities including three representatives of Velbay ([redacted] and two affiliates of Velbay [redacted] ("**2016 Sanctions Decision**").[571] The decision on sanctions entered into force pursuant to a Decree of the President of Ukraine for a duration of one year.[572]

545. The reasons provided for these sanctions in respect of these individuals and affiliates were:

> [redacted]

546. That was the extent of the reasons provided for the imposition of the sanctions.

547. On 2 May 2018, the NSDCU adopted a decision "*On the Imposition and Cancellation of Personal Special Economic and Other Restrictive Measures (Sanctions)*".[574] This decision extended the aforementioned sanctions by an additional three years and imposed new sanctions on Velbay and Emergofin. No reasons were given for the inclusion of Velbay and Emergofin on the list of sanctioned entities.

548. The decision was then implemented by the President on 14 May 2018 by Decree No 126/2018 ("**2018 Sanctions Decision**").[575] The sanctions were to remain in place for three years. No reasons for the sanctions were given in that decree either.

549. According to the 2018 Sanctions Decision, the restrictions linked to the sanctions were as follows:

> 1) blocking of assets, being temporary restriction of a person's rights to use and dispose of his property;

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570 R-130, Instruction of Cabinet of Ministers of Ukraine No 639-p, 31 August 2016.

571 C-40, Decision of the National Security and Defense Council of Ukraine, 16 September 2016.

572 C-44, Decree of the President of Ukraine, No 467/2016, 17 October 2016.

573 [redacted].

574 C-452, National Security and Defence Council of Ukraine, Decision On the Imposition and Cancellation of Special Personal Economic and Other Restrictive Measures (Sanctions), 2 May 2018.

575 R-145, Decision of the National Security and Defence Council of Ukraine "*On the Application of Personal Special Economic and Other Restrictive Measures (Sanctions)*", as approved by Order of President of Ukraine No 126/2018 (as amended), 14 May 2018.

> 2) restriction of trading operations;
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> 3) preventing the repatriation of capital outside Ukraine;
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> 4) suspending the fulfilment of economic and financial obligations;
>
> 5) prohibiting from engaging in public procurement of goods, works and services from state-owned legal entities being residents of a foreign state and legal entities, in whom a foreign state holds a share of the authorised capital, as well as public procurement from other business entities who sell goods, works and services originating from a foreign state on which sanctions have been imposed in accordance [the Law of Ukraine "On Sanctions"];
>
> 6) prohibiting fully or partially from making transactions with respect to securities issued by the persons who have been sanctioned under [the Law of Ukraine "On Sanctions"];
>
> 7) prohibiting from issuing permits or licenses of the National Bank of Ukraine for investing in a foreign state, placing currency valuables on accounts and deposits on the territory of a foreign state;
>
> 8) prohibiting from transferring technologies or intellectual property rights.

550. The NSDCU adopted a further decision on 19 March 2019 by which the previous decision was affirmed and this was also brought into effect by a Decree of the President (No 82/2019).[576]

The Ukrainian Law on Sanctions

551. The principal normative act regulating sanctions in Ukraine, and the legislation that is referred to in the decisions sanctioning the Claimants, is the Law "*On Sanctions*" No 1644-VII. Article 3(1) sets out the ground for imposing sanctions:

> 1) activities of a foreign state, a foreign legal entity or an individual or other persons posing real and/or potential threats to the national interests, national security, sovereignty and territorial integrity of Ukraine; promoting terrorist activity and/or violating the rights and freedoms of human and citizen, the interests of the society and the state; leading to occupation of territory, expropriation or restriction of property rights, the creation of obstacles to sustainable economic development or to the full implementation of rights and freedoms of citizens of Ukraine;
>
> 2) resolutions of the General Assembly and the United Nations Security Council;

576 C-487, National Security and Defense Council of Ukraine, Decision, 19 March 2019.

> 3) resolutions and regulations of the Council of the European Union;
>
> 4) violations of the Universal Declaration of Human Rights, the Charter of the United Nations.[577]

552. Article 3(2) then sets out the principles upon which the imposition of sanctions must be based:

> Sanctions shall be imposed based on the principles of legality, transparency, objectivity, consistency with purpose, and effectiveness.

The reasons provided for the sanctions

553. The Respondent maintains,[578] and the Claimants' legal expert appears to accept,[579] that the Law on Sanctions does not impose a duty to provide the reasons underlying a decision to sanction an individual or legal entity. The Claimants' expert, however, qualifies his statement with the following observation:

> Ukrainian law is clear in that sanctions can only be imposed in accordance with the provisions on the Sanctions Law. In order to respect that law, not only must the NDSCU rely on valid grounds in imposing sanctions, but the NDSCU must also consider the effect of imposing such sanctions. It follows that this requires an objective analysis with respect to imposing sanctions by the State authorities.[580]

554. The Supreme Court has, in an unrelated case but in line with this requirement, requested that the State organ imposing sanctions provide documents to evidence the grounds for the sanctions.[581] Indeed, the Tribunal finds it difficult to reconcile the requirements set out in Article 3(2) of the Law on Sanctions (including the principles of "*legality*" and "*transparency*") with the notion that no reasons at all need to be provided to the sanctioned person or entity. Be that as it may, the Tribunal's mandate is limited to establishing the minimum standards of international law in relation to the exercise of the sovereign power to sanction individuals and entities.

555. The Supreme Court judgment clarified that Velbay first learned about the imposition of sanctions during the 2018 EGM.[582]

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577 R-120, Law of Ukraine No 1644-VII, 14 August 2014.

578 R's Rejoinder, §230.

579 [redacted]

580 [redacted]

581 [redacted]-83, Supreme Court of Ukraine, Case No 9901/259/19, Ruling, 20 June 2019.

582 C-545, Ruling of the Supreme Court of Ukraine, Case No 9901/215/19, 11 August 2020.

556. As previously stated, no reasons for the sanctions on Velbay or Emergofin were provided in the Decision of the NSDCU of 2 May 2018 "*On the Imposition and Cancellation of Personal Special Economic and Other Restrictive Measures (Sanctions)*"[583] or in the Decree of the President on 14 May 2018 No 126/2018 that implemented that decision.[584]

557. The Respondent has sought to draw upon other sources to supply these reasons. First, it refers to the Motion of the President of Ukraine of 5 June 2019 to the Administrative Court of Cassation of the Supreme Court,[585] which confirmed, for the first time it seems, that the proposal to include Velbay and Emergofin in the sanctions list was made by [redacted]. This information was not contained in any official communication to Velbay or Emergofin at the time they were placed on the sanctions list; indeed their letters to [redacted] went unanswered and to the extent that the Ukrainian authorities that did reply, they refused to reveal which authority had in fact requested the sanctions against the Claimants.

558. Second, the Respondent refers to the press release that accompanied the DSDCU's decision of 2 May 2018.[586] It reads:

> The sanctions are imposed on the initiative of the Cabinet of Ministers of Ukraine, the Security Service of Ukraine, the National Bank of Ukraine for three years or indefinitely to individuals and legal entities which are involved in Russian aggression against Ukraine, preparing and conducting illegal voting in the occupied Crimea within the framework of the presidential elections, representatives of the Russian occupation administration in Crimea, militants of Russian armed groups in the occupied territory of Donetsk and Luhansk regions, etc.
>
> Also, sanctions were imposed on persons who are involved in information and cyber attacks against our country, in unlawful actions against Ukrainian citizens which are illegally detained in Russia, on members of the State Duma and members of the Federation Council of the Federal Assembly of the Russian Federation, etc. In addition, the sanctions applied in previous years were extended.

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583 C-452, National Security and Defence Council of Ukraine, Decision On the Imposition and Cancellation of Special Personal Economic and Other Restrictive Measures (Sanctions), 2 May 2018.

584 R-145, Decision of the National Security and Defence Council of Ukraine "*On the Application of Personal Special Economic and Other Restrictive Measures (Sanctions)*", as approved by Order of President of Ukraine No 126/2018 (as amended), 14 May 2018.

585 C-489, Motion of the President of Ukraine, Case No 9901/215/19, 5 June 2019; R's Rejoinder, §239.

586 R-240, National Security and Defence Council of Ukraine, Press Release, "*National Security and Defence Council of Ukraine imposed sanctions on legal entities and individuals involved in Russian aggression against Ukraine*", 2 May 2018; R's Rejoinder, §239.

559. These broad justifications purported to apply generally to the hundreds of individuals and entities placed on the sanctions list; they are not reasons that are specific to Velbay and Emergofin and there is no allegation in this case that these entities were engaged in any of the activities mentioned in the press release.

The impact of the sanctions on Velbay

560. The effect of these sanctions was to prevent Velbay from exercising its rights as a shareholder in ZAlK. This is confirmed by the decision of the National Securities Commission No 1707 of 13 October 2015, which states:

> 2) if any 'asset freezing' sanction is imposed:
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> […]
>
> during the sanction period:
>
>> when any lists of security holders are made for the purposes of general meetings of any joint stock company, list the sanctioned holders on whom said sanction is imposed as holders of non-voting shares;
>>
>> when any lists of security holders are made for the purposes of distribution of any dividends (income) on securities or securities redemption, list the sanctioned holders on whom said sanction is imposed as persons under the 'asset freezing' sanction;[587]

561. The same decision also states that a sanctioned shareholder cannot receive dividends while the sanctions are in force (accumulated dividends are paid to the shareholder once the sanctions are lifted).

562. According to the Claimants, Velbay was not, therefore, able to vote at the 2018 Emergency General Meeting of ZAlK[588] or to have its proposals for the agenda[589] or for candidates for ZAlK's governing bodies[590] automatically included as would otherwise be the case pursuant to Article 38(5) of the Law "*On Joint Stock Companies*". This appears to be confirmed by the SPFU's letter to Velbay on 13 November 2018, where it is stated that as a result of the sanctions in place in respect of Velbay, "*the Fund had no legal basis to include the proposals submitted*

587 C-427, National Securities and Stock Market Commission, Decision No 1707, 13 October 2015.

588 C-462, Minutes No 24 of ZAlK's Extraordinary General Sharholders Meeting, 1 November 2018.

589 C-457, Velbay's Proposal to the Agenda of the Extraordinary General Meeting of Shareholders of ZAlK, 5 October 2018.

590 C-458, Velbay's Nomination of candidates to the bodies of ZAlK, 18 October 2018; C-459, Velbay's Nomination of additional candidates to the bodies of ZAlK, 18 October 2018; C-460, Velbay's Nomination of new candidates to the Bodies of ZAlK, 22 October 2018.

by Velbay Holdings Limited in the draft agenda of ZALK Extraordinary General Meeting held on November 1, 2018."[591]

Velbay's inquires as to the reasons for the sanctions

563. In December 2018, the Claimants requested an explanation from a number of different Ukrainian authorities as to the reasons for which they had been placed on the sanctions list. The following table sets out the responses received, if any, from those authorities:[592]

State Authority	**Velbay**	**Emergofin**
NSDCU	**No reply**	**No reply**
President of Ukraine Petro Poroshenko	**No reply**	**No reply**
Cabinet of Ministers of Ukraine	**No reply**	**No reply**
Ministry of Foreign Affairs of Ukraine	Replied on 10 January 2019[661]	**No reply**
Ministry of Justice of Ukraine	Replied on 17 January 2019[662]	Replied on 25 January 2019[663]
National Bank of Ukraine	Replied on 22 December 2018[664]	**No reply**
State Property Fund of Ukraine	Replied on 16 January 2019[665]	Replied on 18 January 2019[666]
Security Service of Ukraine	**No reply**	**No reply**
Ministry of Economic Development and Trade of	Replied on 22 January 2019[668]	

564. None of the replies received from the various Ukrainian authorities provided any substantive reasons for the sanctions. Common to the responses from the National Bank of Ukraine,[593] Ministry of Foreign Affairs,[594] Ministry of Economic Development and Trade,[595] the

591 C-463, Letter from [redacted] (State Property Fund of Ukraine) to [redacted], 13 November 2018.
592 C's Reply, §508.
593 C-480, Letter from [redacted] (National Bank of Ukraine) to Velbay Holdings Ltd., 22 December 2018.
594 C-481, Letter from [redacted] (Ministry of Foreign Affairs) to Velbay Holdings Ltd., 10 January 2019.
595 C-485, Letter from [redacted] (Ministry of Economic Development and Trade of Ukraine) to Velbay Holdings Ltd., 22 January 2019.

Ministry of Justice[596] and the SPFU[597] was the statement that these authorities had neither requested that the Claimants be put on any sanctions list, nor were they otherwise competent to request that they be removed from the list. In none of these letters did the authority in question specify which Ministry or governmental department had in fact requested the imposition of sanctions in relation to the Claimants. The Claimants were thus left with no means of knowing which authority had requested the sanctions and therefore no possibility of applying for their removal. Pursuant to Articles 5(6) and 5(7) of the Law on Sanctions, sanctions may be altered or cancelled only by the State authority by which they were imposed.[598]

565. According to the Claimants, it was only when the representative of the President of Ukraine made an application on 3 June 2019 for the NSDC to intervene in the court proceedings relating to Velbay's complaint before the Cassation Administrative Chamber of the Supreme Court[599] that it was revealed that it was [redacted] that applied to the NSDC to put the Claimants on the sanctions list. This appears to be confirmed by the Supreme Court's decision.

Velbay's court challenges in relation to the 2018 Sanctions Decision

566. In December 2018, Velbay lodged a claim before the Commercial Court of the Zaporozhye Region seeking the invalidation of the decisions adopted at the 2018 EGM on the basis that, *inter alia*, the classification of its shares as non-voting was unlawful as was the refusal to include its proposals on the agenda.[600] This claim was rejected at all judicial levels, essentially for the reason that those measures were taken consistent with the Law on Sanctions.[601]

567. Velbay then challenged the lawfulness of the Presidential Decree that brought the 2018 Sanctions Decision into force before the Administrative Court of Cassation of the Supreme

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596 C-483, Letter from [redacted] (Ministry of Justice of Ukraine) to Velbay Holdings Ltd., 17 January 2019; C-486, Letter from [redacted] (Ministry of Economic Development and Trade of Ukraine) to Velbay Holdings Ltd., 25 January 2019.

597 C-482, Letter from [redacted] (Deputy Head, State Property Fund of Ukraine) to Velbay Holdings Ltd., 16 January 2019; C-484, Letter from [redacted] (Deputy Head, State Property Fund of Ukraine) to Emergofin B.V., 18 January 2019.

598 R-120, Law of Ukraine No 1644-VII, 14 August 2014.

599 C-489, Motion of the President of Ukraine, Case No 9901/215/19, 5 June 2019.

600 R-251, Decision of Commercial Court of the Zaporozhye Region, Case No 908/2753/18, 25 April 2019.

601 R-251, Decision of Commercial Court of the Zaporozhye Region, Case No 908/2753/18, 25 April 2019; R-253, Resolution of Central Commercial Court of Appeal, Case No 908/2753/18, 12 August 2019; R-255, Resolution of Commercial Court of Cassation of the Supreme Court of Ukraine, Case No 908/2753/18, 16 October 2019.

Court of Ukraine on 25 April 2019.[602] On 20 May 2019, the Administrative Court formally opened the proceedings.[603]

568. The Supreme Court upheld Velbay's claim on 11 August 2020 and declared that the imposition of the sanctions had been unlawful.[604]

569. The foundation for the imposition of sanctions on Velbay and RUSAL, according [redacted], was summarized by the Court as follows:

> [redacted][605]

570. The Court found that there was [redacted] relating to [redacted].[606] Such materials were thus deemed to be inadmissible as evidence in support of the sanctions.[607] With respect to such materials as were admissible, the Court stated:

> [redacted].[608]

571. The Court's conclusion based upon the evidence before it was as follows:

> [redacted]

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602 C-500, Supreme Court of Ukraine, Case No 9901/215/19, Administrative claim submitted by Velbay, 25 April 2019.

603 C-501, Supreme Court of Ukraine, Case No 9901/215/19, Ruling, 20 May 2019.

604 C-545, Ruling of the Supreme Court of Ukraine, Case No 9901/215/19, 11 August 2020.

605 C-545, Ruling of the Supreme Court of Ukraine, Case No 9901/215/19, 11 August 2020.

606 C-545, Ruling of the Supreme Court of Ukraine, Case No 9901/215/19, 11 August 2020.

607 C-545, Ruling of the Supreme Court of Ukraine, Case No 9901/215/19, 11 August 2020.

608 C-545, Ruling of the Supreme Court of Ukraine, Case No 9901/215/19, 11 August 2020.

[redacted]

572. Following the Supreme Court's Decision, Velbay sought to reopen the proceedings relating to its complaint before the Commercial Court of the Zaporozhye Region that its exclusion from voting at the 2018 EGM and the refusal to submit its proposals to the agenda were unlawful. The Commercial Court of the Zaporozhye Region refused Velbay's application on the basis that the Court could not have known at the time of its original decision that the Presidential Decree, which imposed the sanctions on Velbay, was unlawful. The Court also referred to the absence of any evidence that the Supreme Court's Decision had come into force.[610]

573. On 9 November 2020, the Central Appeal Commercial Court overturned the decision of the Commercial Court of the Zaporozhye Region and ruled that Velbay's claim should proceed.[611] The Tribunal has no information as to whether that claim was successful at the time of this Decision.

H3 Tribunal's assessment of Claimants' claim for breach of Article 3(2) of the BIT

574. The Claimants' principal claim in respect of the 2018 Sanctions Decision is that it amounts to "*arbitrary conduct*"[612] for the purposes of the FET standard in Article 3(2) of the BIT. No specific prejudice has been pleaded in relation to the 2016 Sanctions Decision and the Tribunal understands that only the 2018 Sanctions Decision forms the basis of a claim in respect of Article 3(2) of the BIT.[613]

575. Arbitrary conduct was defined by the Chamber of the International Court of Justice in *ELSI* as "*not so much something opposed to a rule of law, as something opposed to the rule of law*".[614] The rule of law is an abstract concept but is nevertheless at the heart of every judicial decision that seeks to impose limits on the exercise of state power by reference to fundamental values. Rather than search for platitudes in international cases to elucidate the content of the rule of law, however, the Tribunal considers that it is more fruitful to examine decisions

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609 C-545, Ruling of the Supreme Court of Ukraine, Case No 9901/215/19, 11 August 2020.

610 C-553, Ruling of the Commercial Court of Zaporozhye Region, Case No 908/2753/18, 16 October 2020.

611 C-554, Ruling of the Central Commercial Court of Appeal of Dnipro, Case No 908/2753/18, 9 November 2020.

612 C's Reply, §739.

613 C's Reply, §673. The allegation in the Claimants' Memorial that the 2016 Sanctions Decision was part of a claim for harassment (§ 626) appears to have been dropped in their Reply. In any case, only the 2018 Sanctions Decision was directed at Velbay and its rights as a shareholder of ZAlK.

614 CL-87, *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)*, ICJ rep 15, Judgment, 20 July 1989, §128.

specifically concerned with the proper limitations on the state's power to impose sanctions. The Tribunal thus invited the parties to append and make submissions on this jurisprudence. In response they filed cases from the European Court of Human Rights, the European Court of Justice and the United Nations Human Rights Commission, as well as some domestic cases in which the relationship between the State's power to sanction and the sanctioned person's fundamental rights were considered.

576. All these decisions were made under specific legal regimes and none of them was made in the context of the FET standard as it appears in Article 3(2) of the BIT. This Tribunal has a limited mandate to apply Article 3(2) and it is plainly correct that the same factual scenario relating to a sanction might provoke judicial censure in one context but not in another and the differences between the legal regimes cannot be ignored.

577. The Tribunal nonetheless considers that a close analysis of cases that deal with the actual problem under consideration—the international limits of the State's power to impose sanctions—is a more promising source for elucidating the factors relevant to adjudging liability under Article 3(2) in this context than consulting a thesaurus for synonyms of "*arbitrary*".

578. Of the numerous judicial decisions filed by both parties, only one relates to sanctions on Russian entities in response to the Russian Federation's actions to destabilise Ukraine. This is the Judgment of the General Court (Sixth Chamber) of the European Union in *Joint-Stock Company "Almayz-Antey" Air and Space Defence Corp. v Council of the European Union* ("**Almayz-Antey**").[615] This was a decision filed by the Respondent. It is illuminating to begin the analysis with this case as it deals with the same context as the Respondent's 2018 Sanctions Decision.

579. In *Almayz-Antey*, the Council of the European Union adopted sanctions in response to Russia's actions in undermining or threatening the territorial integrity, sovereignty and independence of Ukraine from March 2014 onwards. In 31 July 2014, Decision 2014/512/CFSP was adopted to increase the costs associated with Russia's actions and to introduce targeted restrictive measures concerning the areas of access to capital markets, defence, dual-use goods and sensitive technologies, including in the energy sector. The

615 RL-178, *Joint-Stock Company "Almaz-Antey" Air and Space Defence Corp., formerly OAO Concern PVO Almaz-Antey v Council of the European Union*, Case T-515/15, EU:T:2018:545, Judgment, 13 September 2018 ("*Almaz-Antey*").

applicant company was listed in Annex IV to this Decision together with the information: "*state-owned enterprise; arms, ammunition, research*".[616] Likewise, the Council also adopted Regulation No 833/2014 on the same day with a similar scope and the applicant company was listed in Annex IV to that Regulation.

580. On 31 July 2015, the Council informed the applicant company in response to its letter of 19 May 2015 that it would remain subject to the sanctions.

581. The Court examined the obligation to state reasons in Article 296 TFEU and Article 41(2)(c) of the EU Charter. The statement of reasons "*must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the person concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case*".[617] The Court found that it was possible to understand from the information provided alongside the applicant company's name in Annex IV to the Decision that it was sanctioned, because it was a Russian State-owned enterprise operating in the defence and armaments sector.[618] It followed that the reasons were sufficient.

582. In respect of the right to effective judicial protection, the Court said that this requires that "*the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining disclosure of those reasons, without prejudice to the power of the court having jurisdiction to require the authority concerned to disclose that information, so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court having jurisdiction, and in order to put the latter fully in a position to review the lawfulness of the decision in question*".[619] The Court found that the Council complied with the obligation to provide the evidence upon which it relied when it responded to the applicant company's request of 19 May 2015 by furnishing certain documents in its possession.

583. Finally, in relation to the substantive justification for sanctioning the applicant company, that company had argued that it was in no way responsible for the destabilization of Ukraine and thus the Council had made an error in its assessment. The Court reasoned that the applicant company was sanctioned on account of its status as a Russian enterprise operating

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616 RL-178, *Almaz-Antey*, §18.
617 RL-178, *Almaz-Antey*, §83.
618 RL-178, *Almaz-Antey*, §95.
619 RL-178, *Almaz-Antey*, §102.

in the field of defence and armaments rather than on the basis of any link to the Russian Federation's actions to destabilise the situation in Ukraine.[620] There was a reasonable relationship between the sanctions and the objective pursued by the Council in adopting them, which was to increase the costs to be borne by the Russian Federation for its actions to undermine Ukraine's territorial integrity, sovereignty and independence. In any case, the Council noted that the applicant company was a manufacturer of arms which it supplied to the Russian army which, in turn, supplied heavy weaponry to separatists in eastern Ukraine, thereby contributing to the destabilization of Ukraine.[621]

584. There are some important insights from the *Almayz-Antey* decision that are relevant to the present case. The first is that, to the extent any international obligation to provide reasons for sanctions exists, it is very limited in scope. The obligation is discharged if the sanctioned entity is able to ascertain a specific basis for the application of the sanction in its particular case. In *Almayz-Antey*, the reasons were stated as "*state-owned enterprise; arms, ammunition, research*" and this was sufficient to allow the applicant company to deduce that it was sanctioned on the ground that it was state-owned by Russia and was active in the armaments sector.

585. The obligation to state reasons in *Almayz-Antey* was said to derive from Article 296 TFEU and Article 41(2)(c) of the Charter, which are obviously not applicable in this case. It follows from the Court's analysis, however, that the obligation to state reasons is intertwined with the right to effective judicial protection and the right of defence, which is undoubtedly a common denominator for all the international regimes under consideration as well as Article 3(2) of the BIT. As was stated in *Council of the European Union v Bamba*: "*the purpose of the obligation to state the reasons on which an act adversely affecting an individual is based, which is a corollary of the principle of respect for the rights of the defence, is, first, to provide the person concerned with sufficient information to make it possible to ascertain whether the act is well founded or whether it is vitiated by a defect which may permit its legality to be contested before the European Union judicature and, second, to enable that judicature to review the legality of that act*".[622]

586. In the present case, the Claimants were initially hampered in their quest to have the sanctions removed, because no information at all was provided in the 2018 Sanctions Decision as to

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620 RL-178, *Almaz-Antey*, §124.

621 RL-178, *Almaz-Antey*, §128.

622 CL-329, *Council of the European Union v Nadiany Bamba*, Case C-417/11 P, CJEU, Judgment of the Court (Third Chamber), 15 November 2012 ("*Bamba*"), §49. See also: CL-333, *Ghasem Nabipour and others v Council of the European Union*, Case T-58/12, Judgment of the General Court (Fourth Chamber), 12 December 2013.

the reasons for the sanctions and the state authority that had proposed them. According to the Ukrainian Law on Sanctions, only the state authority that proposed the sanctions has the power to remove them and the Claimants were compelled to write to all the possible candidate state authorities to ascertain which one was responsible. Only those state authorities that were prepared to confirm that they were not involved in the proposal for sanctioning the Claimants responded to the Claimants' inquiries. Not until the Claimants challenged the Presidential Decree that imposed the sanctions was it revealed that it was [redacted] that applied to the NSDC to put the Claimants on the sanctions list.

587. Ultimately, however, the Claimants were successful in seeking judicial review of the 2018 Sanctions Decision before the Supreme Court and hence the remedy provided by the Ukrainian justice system was adequate, even though the failure to provide reasons or identify the state authority with the power to remove the sanctions no doubt delayed or hindered the Claimants' recourse to that remedy. This does not, however, rise to the level of a breach of Article 3(2) of the BIT.

588. The question is then whether the substantive justification for imposing sanctions on the Claimants in the first place was arbitrary. This requires an assessment as to whether there was a reasonable connection between the general purpose of the sanctions and the particular decision to impose sanctions on the Claimants. In *Almayz-Antey*, one of the specific grounds for introducing sanctions against Russia included limiting its access to the defence industry. As the Court reasoned, the applicant company was a manufacturer of arms which it supplied to the Russian army which, in turn, supplied heavy weaponry to separatists in eastern Ukraine, thereby contributing to the destabilisation of Ukraine.[623]

589. In the present case, no reasons specific to the Claimants were given in the 2018 Sanctions Decision (the reasons provided in the 2016 Sanctions Decision to sanction Velbay's representatives and/or affiliates were not adopted in the 2018 Sanctions Decision in respect of Velbay and Emergofin). The Tribunal will nonetheless examine the more general statements that preceded or accompanied that decision. Instruction No 639-P of the Cabinet of Ministers of Ukraine of 31 August 2016 sets out the general purpose of the sanctions as follows:

[623] RL-178, *Almaz-Antey*, §128.

> Due to the continuing armed aggression of the Russian Federation against Ukraine, facilitation and financing by it of terrorist activity in Ukraine, which led to violation of the territorial integrity of Ukraine, rights and liberties of its citizens, temporary occupation of a part of its territory, numerous casualties, real and potential threats to national interests, national security and sovereignty of Ukraine[.][624]

590. The only other information available about the purpose of the sanctions against the Claimants is the press release that accompanied the DSDCU's decision of 2 May 2018 (as set out above).[625]

591. It is true that Article 3(1) of the Law on Sanctions, which is the general legislation on sanctions and does not apply to any particular event or circumstance, is broader than these statements in conferring powers on the Ukrainian Government to impose sanctions. But this general power-conferring provision must be secondary in the Tribunal's assessment of the link between the specific sanctions imposed upon the specific entities in question. The aforementioned statements revealed the aims and purposes and scope of the specific sanctions in question. The fact that the Ukrainian Government may have adopted sanctions for different aims and purposes with a different scope under the Law on Sanctions is irrelevant. Broader sanctions entail broader political responsibility for imposing them and States are generally very careful to balance the aims and purposes of any sanctions with the political consequences that flow from any escalation of the dispute that is likely to follow.

592. What a State cannot do, consistent with Article 3(2) of the BIT, is impose sanctions for a particular stated purpose and scope in an official public enactment, and then cast the net further on an *ad hoc* basis depending on the particular motivations of the executive organs empowered give effect to that enactment. That would be arbitrary and contrary to the rule of law. In the Tribunal's assessment, this is was happened in this case. There is not even an allegation in these arbitration proceedings that the Claimants meet any of the criteria in the official documents relevant to the 2018 Sanctions Decision. There is no allegation that the Claimants were involved in any aspect of the "*Russian aggression against Ukraine*" or any of the other acts set out in Instruction No 639-P of the Cabinet of Ministers of Ukraine of 31 August 2016 or the press release that accompanied the DSDCU's decision of 2 May 2018. There is, moreover, no information from any official source that would allow the Claimants

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624 R-130, Instruction of Cabinet of Ministers of Ukraine No 639-p, 31 August 2016.

625 R-240, National Security and Defence Council of Ukraine, Press Release, "*National Security and Defence Council of Ukraine imposed sanctions on legal entities and individuals involved in Russian aggression against Ukraine*", 2 May 2018; R's Rejoinder, §239.

to join the dots between these documents and the 2018 Sanctions Decision that included them on the list of sanctioned entities.

593. In this respect it is significant that [redacted]. [redacted]

[redacted]

594. [redacted] Indeed, the Supreme Court would later hold that "*no circumstances were found that could serve as a basis for imposing sanctions against the claimant in accordance with clause 1, part 1 of Article 3 of Law No 1644-VI1 [i.e. the Ukrainian Law on Sanctions]*".

595. This question of the requisite link between the publicly stated purpose and scope of a sanctions decision and the particular individual or entity listed as being subject to the restrictive measures has been considered in a large number of international decisions. In *Bank Melli Iran v Council of the European Union*,[627] for instance, the applicant bank contested its inclusion in a list of sanctioned entities promulgated by the Council in furtherance to a UN

626 [redacted].

627 CL-327, *Bank Melli Iran v Council of the European Union*, Case T-390/08, Court of First Instance, Judgment (Second Chamber), 14 October 2009 ("*Bank Melli*").

Security Council resolution adopting restrictive measures against persons and entities involved in nuclear proliferation. The Council had given the following reasons for its inclusion:

> Providing or attempting to provide financial support for companies which are involved in or procure goods for Iran's nuclear and missile programmes (AIO, SHIG, SBIG, AEOI, Novin Energy Company, Mesbah Energy Company, Kalaye Electric Company and DIO). Bank Melli serves as a facilitator for Iran's sensitive activities. It has facilitated numerous purchases of sensitive materials for Iran's nuclear and missile programmes. It has provided a range of financial services on behalf of entities linked to Iran's nuclear and missile industries, including opening letters of credit and maintaining accounts. Many of the above companies have been designated by [Security Council] Resolutions 1737 and 1747.[628]

596. The applicant bank was unable to rebut this substantive justification for the imposition of restrictive measures.[629] In another decision, the Court considered whether individual managers at Melli Bank, which was sanctioned on the basis that it was wholly owned by Bank Melli Iran, fell within the scope and purpose of the Council's decision on sanctions.[630] The Court concluded that the Council had wrongly adopted the restrictive measures in relation to such individuals on the basis of the criteria covering persons providing support for nuclear proliferation or persons acting on behalf of or at the direction of an entity involved in nuclear proliferation.[631] The link between those criteria and the managers of Melli Bank had not been established.[632]

597. The Responded has cited *Bosphorus Hava Yollari Turizm ve Ticaret AS v Ministry for Transport, Energy and Communications, Ireland and the Attorney General* in this context.[633] In that case, Bosphorus Airways (a Turkish company) had leased two aircraft owned by the Yugoslav national airline, the terms of which provided Borphorus Airways with complete control over the day-to-day operation of the aircraft. One of the aircraft was impounded on the basis of a Community Regulation that implemented a UN Security Council resolution calling for sanctions against the Federal Republic of Yugoslavia in the context of the massive human rights violations taking place in the Republic of Bosnia-Herzegovina. Bosphorus Airways

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628 CL-327, *Bank Melli,* §12.
629 CL-327, *Bank Melli,* §69.
630 CL-334, *Ali Sedghi and Ahmad Azizi v Council of the European Union*, Case T-66/12, Judgment of the General Court (First Chamber), 4 June 2014 ("*Sedghi*").
631 CL-334, *Sedghi*, §84.
632 See, as an another example, CL-335, *Council of the European Union v Bank Mellat*, Case C-176/13 P, CJEU, Judgment of the Court (Fifth Chamber), 18 February 2016.
633 RL-177, *Bosphorus Hava Yollari Turizm ve Ticarret AS v Minister for Transport, Energy and Communication, Ireland and the Attorney General*, Case C-84/95, EU:C:1996:312, Judgment, 30 July 1996 ("*Bosphorus*").

argued that although the Yugoslav national airline remained the owner of the aircraft, the fact that day-to-day control had been transferred to it under the lease agreement should remove the aircraft from the scope of the sanctions. The Court held:

> [T]he use of day-to-day operation and control, rather than ownership, as the decisive criterion for applying the measures prescribed by the first paragraph of Article 8 of Regulation No 990/93 would jeopardize the effectiveness of the strengthening of the sanctions, which consist in impounding all means of transport of the Federal Republic of Yugoslavia and its nationals, including aircraft, in order further to increase the pressure on that republic. The mere transfer of day-to-day operation and control of means of transport, by a lease or other method, without transferring ownership would allow that republic or its nationals to evade application of those sanctions.[634]

598. In considering the proportionality of the measure, the Court further stated that: "*Any measure imposing sanctions has, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions.*"[635]

599. The *Bosphorus* case is distinguishable from the present case because it cannot be said that there was a direct target for a sanction within the stated scope and purpose of the 2018 Sanctions Decision and that the Claimants were necessarily joined as parties to the particular sanction to give it efficacy. In *Bosphorus* there existed that precise type of link: a sanction against the owner of the aircraft necessarily applied to the lessee of the same aircraft.

600. As a matter of international law, it was open to Ukraine to adopt sanctions against any entities operating in Ukraine simply on the basis that they are beneficially owned by a Russian individual or entity. That course of action was not pursued by Ukraine, which instead elected to target those individuals and entities with direct links to the "*Russian aggression against Ukraine*". In *Almayz-Antey*, the relevant sanctions decision of the Council of the European Union specified that entities conducting certain activities such as "*defence*", whether or not directly linked to Russian's intervention in Ukraine, fell within the scope of the sanctions. In other words, the status of the applicant company as a state-owned manufacturer of armaments was sufficient to bring it within the scope of the sanctions. There was no equivalent in the justifications provided by Ukraine in relation to the 2018 Sanctions Decision and, moreover, it would be difficult to formulate a rationale for sanctioning [redacted]

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634 RL-177, *Bosphorus,* §18.
635 RL-177, *Bosphorus,* §22.

[redacted] based on status unless the purpose was simply to impose restrictive measures on any Russian individual or Russian-controlled entity operating in Ukraine, which was manifestly not the stated scope of the 2018 Sanctions Decision.

601. The other international cases cited by the parties are less pertinent to the issues that this Tribunal has to decide. Several cases concern a State's obligation to afford due process when implementing decisions concerning the imposition of sanctions on individuals and entities taken by the UN Security Council. It has been argued that, by virtue of Article 103 of the UN Charter, the State's obligation to give effect to resolutions adopted by the UN Security Council prevail over any other international obligations (such as the right to a fair trial in Article 6 of the ECHR or similar rights under the Charter of the EU).[636] But this issue is irrelevant to the present case as the sanctions were not adopted by a resolution of the UN Security Council.

602. Returning to the present case, the Tribunal has concluded that the Respondent's 2018 Sanctions Decision, to the extent that it imposed restrictive measures upon the Claimants, was arbitrary and in breach of Article 3(2) of the BIT, because there was no stated or objectively ascertainable link between the purpose and scope of the 2018 Sanctions Decision and the Claimants.

H4 Tribunal's assessment of the Claimants' claim for expropriation under Article 6 of the BIT

603. It is not clear whether the Claimants are asserting an independent claim for an expropriation of Velbay's rights as a shareholder under Article 6 of the BIT by reason of the 2018 Sanctions Decision.[637] The Tribunal thus deals with this claim out of an abundance of caution.

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636 CL-328, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P, C-415/05 P, CJEU, Judgment of the Court (Grand Chamber), 3 September 2008, §§298-299. The appeal to the Grand Chamber was dismissed: CL-331, *European Commission and others v Kadi*, Joined Cases C-584/10 P, Case C-593/10 P, Case C-595/10 P, CJEU, Judgment of the Court (Grand Chamber), 18 July 2013. See also: CL-327, *Bank Melli*; CL-329, *Bamba*; CL-332, *Council of the European Union and others v Fulmen, Fereydoun Mahmoudian*, Case C-280/12 P, CJEU, Judgment of the Court (Fifth Chamber), 28 November 2013. CL-326, *Al-Dulumi & Montana Management Inc v Switzerland*. See, in the Canadian context: CL-337, *Abdelrazik v Canada*, Federal Court of Ottawa, No T-727-08, Judgment, 4 June 2009. In the UK context: CL-338, *Ahmed and Al. v The United Kingdom*, UKSC 2, Judgment, 27 January 2010.

637 C's Reply, §§849-850 (which suggest no such claim) contra C's Reply, §20.

604. The 2018 Sanctions Decision both *de jure* and *de facto* had a temporary impact on Velbay's rights as a shareholder in ZAlK.

605. Article 5(5) of the Law on Sanctions requires that any decision on sanctions must specify the duration for which the sanctions are to apply[638] and in the case of the 2018 Sanctions Decision it was three years.[639] By its own terms, therefore, the 2018 Sanctions Decision was to expire on 2 May 2021. In the interim, however, the Supreme Court quashed the 2018 Sanctions Decision by its judgment of 11 August 2020. It follows that the 2018 Sanctions Decision remained in effect and had an impact on Velbay's rights as a shareholder in ZAlK, from 14 May 2018 until 11 August 2020. Whilst Velbay has suffered prejudice during that period, there has been no permanent deprivation of its rights as a shareholder. As a permanent deprivation of property rights is an essential condition for an expropriation under Article 6 of the BIT, this claim must be dismissed.

I MISCELLANEOUS CLAIMS

606. The Claimants have at various times in the arbitration pleaded several miscellaneous claims that the Tribunal will now address. The titles adopted in this section reflect the Claimants' formulation of their allegations against the Respondent.

I1 Ukraine's Refusal of a Land Lease to GQQ

607. In their Memorial, the Claimants alleged that, as a result of the 2016 Sanctions Decision, the Prosecutor of the Sumy Region decided in February 2018 to orchestrate the denial of GQQ's request for a renewal of a land lease permit that was necessary to carry out its quartzite mining activities on the grounds that GQQ was an affiliate of UC RUSAL (a sanctioned entity).[640] In their Reply, the Claimants stated that they have no "*further comments*" at that stage on this particular claim.[641] At the hearing, the Claimants confirmed that they were not pursuing this claim[642] and, therefore, the Tribunal says nothing more about it.

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638 R-120, Law of Ukraine No 1644-VII, 14 August 2014.

639 R-143, U.S. Department of Treasury, Press Release, "*Treasury Designates Russian Oligarchs, Officials, and Entities in Response to Worldwide Malign Activity*", 6 April 2018.

640 C's Memorial, §§632-634.

641 C's Reply, FN 2.

642 Transcript, D1/P152 ([redacted]).

I2 The Ukrainian Tax Authorities Refused to Apply VAT Exemptions in Favour of ZAlK

608. The Claimants maintain in their Memorial[643] and Reply[644] that the Ministry of Finance refused to issue VAT refunds to ZAlK in disregard of the 2006 Recission Judgment, because it considered ZAlK's debt to the State to have been subsisting thereafter. The Respondent interpreted these pleadings as omitting to state a claim for a breach of the BIT in respect of this allegation.[645] At the hearing, the Claimants confirmed that no claim for liability was being advanced in relation to the allegation concerning the refusal to issue VAT refunds to ZAlK,[646] which was rather to be considered by the Tribunal as part of the "*factual matrix in the case*".[647]

I3 Ukraine Launched Spurious Criminal Investigations against Individuals Affiliated with the Claimants in 2015

609. In their Memorial, the Claimants alleged that in January 2015, the Ukrainian authorities launched a number of criminal investigations against individuals affiliated with the Claimants that were "*suddenly and dramatically accelerated in August 2017*".[648] The Claimants maintained that the purpose of such criminal investigations was to harass the Claimants.[649] The Respondent addressed this allegation in its Counter Memorial.[650] The Claimants stated in their Reply that they would not comment further on this claim.[651] At the hearing, the Claimants confirmed that they were no longer advancing this claim,[652] and, therefore, the Tribunal says nothing more about it.

I4 Failure of Ukrainian Authorities to Protect ZAlK from a Raid by the Aidar Batallion

610. According to the Claimants, 15 armed and uniformed members of the "*Aidar Battalion*"—a volunteer armed militia that was created during the war in Eastern Ukraine in 2014—raided the premises of ZAlK on 9 November 2015.[653] The Claimants rely on a report from Amnesty International to assert that the Aidar Battalion operated under the command of

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643 C's Memorial, §§105-107.
644 C's Reply, §175.
645 R's Counter-Memorial, FN 5; R's Rejoinder, §9.
646 Transcript, D1/P152 [redacted]
647 Transcript, D1/P152 [redacted]
648 C's Memorial, §294.
649 C's Memorial, §§294-302, 371-398.
650 R's Counter-Memorial, §§136-139.
651 C's Reply, FN 2.
652 Transcript, D1/P153 [redacted]).
653 C's Memorial, §290.

the Ukrainian security forces at the relevant time.[654] The Claimants maintain that the failure of the Ukrainian authorities to take action against the Aidar Battalion in respect of this raid is a breach of the obligation to afford full protection and security in Article 3(3) of the BIT.[655]

611. The Respondent's defence to this claim was that the Ukrainian authorities responded swiftly to the incident by sending some 60 policemen to the site, who negotiated the withdrawal of the Aidar Battalion from the premises hours later on the same day. The Sokol Special Division was also deployed to storm the building if required.[656] For this information, the Respondent relies upon the same press reports cited by the Claimants in their Memorial.[657] The Respondent also stated that a pre-trial criminal investigation was launched into the actions of the Aidar Battalion at ZAlK by the Zaporozhye Prosecutor's Office and referred to a letter from the Head Office of the National Police in the Zaporozhye Region to that effect.[658] That letter confirmed the existence of the pre-trial investigation and stated that, pursuant to Article 222(1) of the Criminal Procedure Code of Ukraine, further details of the investigation cannot be released.

612. The Claimants responded in their Reply that the actions of the Respondent did not comply with the due diligence standard pursuant to the obligation to afford full protection and security, because "*under Ukraine's own admission, an official investigation was launched at the request of the Deputy Minister of Justice Government Agent on 12 December 2017*"[659]—i.e. three years after the raid. But no such admission was in fact made by the Respondent and the document relied upon by the Claimants does not support their argument.[660]

613. The Claimants also maintain that the Respondent did not contest that the Aidar Battalion was under the command of the Ukrainian security forces at the relevant time and hence the Respondent should be liable for the attack itself and not just the failure to investigate and punish the perpetrators of the attack.[661] This is also not the case. The Respondent did

654 C's Memorial, §290; C-117, Amnesty International Briefing, *Ukraine: Abuses and war crimes by the Aidar Volunteer Battalion in the north Luhansk region*, 8 September 2014.

655 C's Memorial, §§643, 647-648.

656 R's Counter-Memorial, §141.

657 C-119, Press Report, *V Zaporozhye zahvatili Aluminievyi Combinat (The Aluminium Combine in Zaporozhye was taken over)*, Vsia Vlast, 9 November 2014; C-120, Press Report, *V Zaporozhye pitalis zakhvat' ZAlK? (In Zaporozhye they tried to raid ZAlK?)*, Panoptikon, 10 November 2014.

658 R-140, Letter No 13664/01/6-2017 from Head Office of National Police in Zaporozhye Region to Deputy Minister of Justice of Ukraine, 19 December 2017.

659 C's Reply, §779.

660 R-140, Letter No 13664/01/6-2017 from Head Office of National Police in Zaporozhye Region to Deputy Minister of Justice of Ukraine, 19 December 2017.

661 C's Reply, §778.

contest the Claimants' allegation that the Aidar Battalion was operating under the command of the Ukrainian security forces and noted that the only evidence relied upon by the Claimants was a single report from Amnesty International, which does not deal with the specific incident in question.[662] Indeed, the fact that the press reports cited by the Claimants indicate that the Sokol Special Division of the Ukrainian army was at the scene and ready to storm the building if the Aidar Battalion refused to vacate the premises peacefully tends to contradict the hypothesis that the raid was carried out on the instructions of the Respondent. The Tribunal dismisses this allegation as unsupported by the evidence.

614. In respect of the principal allegation that the Respondent failed to afford full protection and security by neglecting to investigate and prosecute those responsible for the raid, the Tribunal accepts the Respondent's justification for not producing documents further to the Claimants' request in relation to the pending pre-trial investigation: it is legitimate that information at this stage of the investigation remains confidential. The Tribunal further observes that, as confirmed by the evidence relied upon by the Claimants, there was no report of any physical injuries or damage to property as a result of the raid, which lasted approximately six hours. The fact that a significant number of policemen attended the scene and compelled the members of the Aidar Battalion to leave the premises of ZAlK peacefully without causing injury to person or property, coupled with the presence of the Sokol Special Division, which was ready to intervene with force if necessary, testifies to a successful policing operation. The Tribunal cannot condemn the Respondent's actions as a breach of the obligation to provide full protection and security in these circumstances and it dismisses this claim.

I5 The Raid of the IDFI on ZAlK's Offices

615. According to the Claimants, the Investigative Department of Financial Investigations of Interregional Main Department of the State Fiscal Service of Ukraine ("**IDFI**") conducted a raid on the offices of ZAlK on 1 July 2015 as part of an investigation into ZAlK's VAT liability for the period November to December 2010.[663] The Claimants rely exclusively on the witness evidence of [redacted] in respect of this incident, who describes a heavy-handed armed intervention, coupled with the detention of employees and the confiscation of a large volume of documents.[664] The Claimants further submit that the reasons for the

662 R's Rejoinder, §576.
663 C's Memorial, §649.
664 [redacted].

authorization for the raid provided in the decision of the investigating judge on 26 June 2015[665] "*were very general in nature*" and thus "*do[] not establish the legitimacy of the investigation and the measures undertaken by the IDFI in conducting the raid*".[666] The Claimants claim that this raid violates the obligation of full protection and security in Article 3(3) of the BIT.

616. The Tribunal notes, at the outset, that [redacted] was not present at ZAlK at the time of the raid and he expressly caveats his testimony to that effect.[667] [redacted] various observations about the modalities of the raid are thus hearsay and the individuals whom he cites as providing him with the details did not appear as witnesses in this arbitration. Although the Tribunal is prepared to give some weight to [redacted] hearsay evidence it cannot accept it as discharging the Claimants' burden of proof in respect of the matters alleged without any corroborating evidence. The Tribunal dismisses this claim on that basis.

J CONCLUSION

617. The Claimants have prevailed in establishing the Respondent's liability on certain grounds under the BIT relating to the Renationalisation Claim, the Shareholder Interference Claim and the Sanctions Claim, whereas the Electricity Pricing Claim and the Miscellaneous Claims have been dismissed.

618. The Claimants' case on quantum was premised entirely upon establishing the Respondent's liability for the Electricity Pricing Claim. No alternative scenarios were considered in any detail by the parties in the event, as the Tribunal has decided, that the Claimants were to fail in respect of the Electricity Pricing Claim, but succeed in respect of other claims. In these circumstances, the Tribunal has resolved to issue this Decision on Jurisdiction, Admissibility and Liability and then, in consultation with the parties, direct that a final phase of this arbitration be dedicated to the issues of quantum (if any) and costs. If desired and upon their joint application, the parties will also be afforded a period of time to attempt to reach a negotiated settlement of the outstanding matters before any such final phase is commenced.

619. Whilst the Tribunal has made findings in respect of liability which are premised on the existence of prejudice to the Claimants' investment (a necessary element for a cause of action

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665 R-122, Ruling of Investigating Judge of Solomiansky District Court of Kyiv, 26 June 2015.

666 C's Reply, §786.

667 [redacted]

based on an obligation under the BIT), the Tribunal has made no finding that the Claimants are entitled to any damages in respect of any prejudice caused to their investment by the Respondent's breaches of the BIT or the quantification of any such damages. Those issues are reserved to the next phase of the arbitration and to any Final Award.

620. The Claimants have hitherto advanced a case on quantum that has been fully defended by the Respondent with the assistance of experts on both sides, who submitted extensive reports and were cross-examined at length at the hearing. That case has failed on account of the Renationalisation Claim being dismissed. The Tribunal reserves its decision on costs entirely in this Decision but simply notes at this stage that it will hear submissions on the relevance of this factor for the apportionment of costs in any Final Award.

K DECISION

621. The Tribunal hereby adjudges and declares that:

621.1. It has jurisdiction over the dispute and the claims submitted to it to the extent that the constituent elements of such claims arose after 22 September 2005 save that the Claimants' claim for moral damages is outwith its jurisdiction and/or is inadmissible;

621.2. All the Claimants' other claims are admissible;

621.3. In relation to the Electricity Pricing Claim, the Claimants' claims based upon Articles 3(1), 3(2), 3(4) and 6 of the BIT or otherwise are dismissed;

621.4. In relation to the Renationalisation Claim, the Claimants' claims based upon Article 3(2) and 6 of the BIT are upheld;

621.5. In relation to the Shareholder Interference Claim, the Claimants' claim based upon Article 3(2) (fair and equitable treatment) is upheld whereas their claims based upon Articles 3(2) (full protection and security) and 6 (expropriation) are dismissed;

621.6. In relation to the Sanctions Claim, the Claimants' claim based upon Article 3(2) is upheld whereas their claim based upon Article 6 is dismissed;

621.7. In relation to the Miscellaneous Claims, to the extent that such claims have not been withdrawn by the Claimants, they are dismissed.

621.8. All other claims are dismissed.

621.9. The issues of damages (if any) and costs are reserved for a Final Award.

[Signature]

Sir Michael Wood KCMG
Arbitrator

Date: 29 June 2021

Mr John Beechey CBE
Arbitrator

Date:

Prof. Zachary Douglas QC
President of the Tribunal

Date:

[Signature]

Sir Michael Wood KCMG
Arbitrator

Date:

Mr John Beechey CBE
Arbitrator

Date: 29 June 2021

Prof. Zachary Douglas QC
President of the Tribunal

Date:

Sir Michael Wood KCMG
Arbitrator

Date:

Mr John Beechey CBE
Arbitrator

Date:

[Signature]

Prof. Zachary Douglas QC
President of the Tribunal

Date: 29 June 2021

<u>ANNEX A</u>

Procedural History of the Arbitration

1. On 25 October 2016, ICSID received a request for arbitration from the Claimants against Ukraine (the "**Request**").

2. On 9 November 2016, the Acting Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Acting Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

3. On 22 and 23 November 2016, following several exchanges, the Parties agreed upon a method for constituting the Tribunal, providing that the Tribunal should consist of three arbitrators, one arbitrator appointed by each party and the third, presiding arbitrator to be appointed by agreement of the two co-arbitrators, in consultation with the Parties.

4. On 29 November 2016, the ICSID Secretariat also noted that the Claimants had appointed Mr John Beechey CBE as arbitrator in this case and informed the Parties that it would proceed to seek Mr Beechey's acceptance of his appointment. Mr Beechey accepted his appointment on 1 December 2016.

5. Following several exchanges, on 12 January 2017, the Respondent appointed Sir Michael Wood KCMG as arbitrator in this case. Sir Michael accepted his appointment on 13 January 2017.

6. On 10 March 2017, the co-arbitrators informed the ICSID Secretariat that they had appointed Professor Zachary Douglas QC as President of the Tribunal.

7. On 15 March 2017, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Dr Laura Bergamini, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal. The Parties were later

informed that Ms Aurélia Antonietti, ICSID Senior Legal Counsel, would serve as Secretary of the Tribunal during Dr Bergamini's maternity leave.

8. The Tribunal is composed of Professor Zachary Douglas QC, a national of Australia, President, appointed by the co-arbitrators; Mr John Beechey CBE, a national of the United Kingdom, appointed by the Claimants; and Sir Michael Wood KCMG, a national of the United Kingdom, appointed by the Respondent.

9. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 26 April 2017 by teleconference.

10. On 8 May 2017, the Tribunal issued Procedural Order No. 1 providing, *inter alia*, directions on the subsequent conduct of the arbitration and the procedural timetable for the proceedings. In accordance with the procedural timetable, revised on 31 May 2017, the Claimants were to file their memorial by 26 September 2017.

11. On 22 September 2017, the Claimants filed a request for provisional measures and document production, together with factual exhibits C-34 through C-57 and legal authorities CL-5 through CL-32 (the "**Application**"). In the Application, the Claimants requested that the Tribunal: (i) recommend provisional measures relating to pending domestic criminal investigations, (ii) issue an emergency order pending the determination of the Application, (iii) order the Respondent to produce the documents listed in Annex A to the Application, (iv) order the Respondent to grant the Claimants access to the premises of ZAlK, and (v) modify the procedural timetable allowing the Claimants to file their memorial after receiving the requested documents.

12. On 24 September 2017, the Respondent commented on the Application and requested that the Claimants be ordered to file their memorial as scheduled.

13. On 25 September 2017, the Tribunal rejected the Claimants' requests for an emergency order and a postponement of the filing of the memorial and reserved its decision on the other aspects of the Application.

14. On 27 September 2017, the Claimants further particularized their request for an extension of the time limit for filing their memorial and requested that the Tribunal order the immediate production of the documents listed in Annex A to the Application.

15. On the same date, the Tribunal fixed the time limits within which the Respondent was to provide its observations on the Claimants' letter of 27 September 2017 and its response to the Application.

16. On 29 September 2017, the Respondent requested that the Tribunal reject the Claimants' request for an extension of time, and that it defer the consideration of the Claimants' request for production of documents to the document production phase.

17. On 2 October 2017, the Tribunal directed the Claimants to file their memorial on 4 October 2017, indicating that the Claimants would be able to supplement their case (by reference to the documents listed in Annex A to the Application) in the second round of written submissions.

18. On 3 October 2017, the Claimants requested that the Tribunal reconsider its decision of 2 October 2017. They reiterated the requests set forth in their letter of 27 September 2017 and indicated that they were not able to file their memorial on 4 October 2017.

19. By communications of 3 and 4 October 2017, the Parties confirmed their availability for a possible hearing on the Claimants' Application on 8 November 2017 in Paris.

20. On 4 October 2017, the Tribunal informed the Parties that it did not intend to reconsider its decision. The Tribunal further indicated that, should the Claimants maintain their position that their memorial could not be filed on 4 October 2017, it would be compelled to vacate the schedule fixed in Procedural Order No. 1 and refashion the procedure to start with the disclosure phase before the first round of written pleadings.

21. On the same date, the Claimants confirmed that they were not able to submit their memorial on 4 October 2017.

22. On 5 October 2017, the Respondent requested that the Tribunal maintain its order that the Claimants file their memorial, with an appropriate adjustment of the deadline.

23. On 6 October 2017, the Claimants responded to the Respondent's letter of 5 October 2017. On the same date, the Tribunal confirmed its decision of 4 October 2017 and invited the Parties to revert to the Tribunal with their proposals for the new procedural timetable.

24. On 16 October 2017, the Parties submitted their respective proposals for the new procedural timetable.

25. On 18 October 2017, the Respondent filed its reply to the Claimants' request for provisional measures and production of documents, together with factual exhibits R-1 through R-4 and legal authorities RL-1 through RL-13 (the "**Reply on PM"**). In its Reply on PM, the Respondent requested that the Tribunal reject the Application in its entirety.

26. On 20 October 2017, the Tribunal transmitted to the Parties the agenda for the hearing of 8 November 2017 and a provisional procedural timetable to be finalized at the hearing. The Tribunal also set forth the procedure leading up to the hearing and fixed the time limit for the filing of the Claimants' requests for document production.

27. On 24 October 2017, the Claimants filed their requests for production of documents, together with factual exhibits C-58 through C-135.

28. On 25 October 2017, the Claimants submitted five additional factual exhibits in support of the Application (factual exhibits C-136 through C-140).

29. On 30 October 2017, the Respondent submitted one additional factual exhibit in support of the Reply on PM (updated exhibit R-4).

30. On 1 November 2017, the Claimants filed a skeleton argument summarizing the key aspects of their case and their response to the Reply on PM, as well as a schedule including a brief explanation of the relevance of the exhibits filed on 25 October 2017.

31. On 6 November 2017, the Respondent filed a skeleton argument summarizing the key aspects of its case and its response to the Claimants' skeleton argument, as well as a schedule including a brief explanation of the relevance of the updated exhibit filed on 30 October 2017.

32. On 8 November 2017, a hearing on provisional measures (the "**Hearing on Provisional Measures**") was held at the World Bank's premises in Paris. The Parties presented *inter alia* oral pleadings on the Application, which were recorded and transcribed as provided in Procedural Order No. 1. At the end of the Hearing on Provisional Measures, the Parties and the Tribunal agreed upon a revised procedural timetable.

33. On 14 November 2017, the Tribunal transmitted to the Parties the approved revised procedural timetable applicable to the proceedings.

34. On 5 December 2017, the Tribunal issued its Decision on the Claimants' Request for Provisional Measures, rejecting the Claimants' Application in its entirety and reserving the issue of costs for the Award.

35. On 3 January 2018, the Tribunal transmitted to the Parties the schedule ruling on the Claimants' requests for document production.

36. Following an exchange between the Parties, on 5 March 2018, the Tribunal set out some general directions on issues of disclosure of documents in the expectation that such directions might serve to narrow the disputes between the Parties regarding the production of documents.

37. On 28 March 2018, the Claimants filed their Memorial (the "**C's Memorial**") dated 27 March 2018, [redacted]

38. On 16 April 2018, the Tribunal endorsed the amendments to the procedural timetable jointly agreed by the Parties (subsequently revised on 18 April 2018).

39. On 6 July 2018, the Respondent transmitted its requests for production of documents to the Claimants and the Tribunal.

40. On 9 July 2018, the Tribunal and the Parties held a conference call during which the Parties and the Tribunal discussed the Respondent's requests for production of documents.

41. On 20 and 24 July 2018, the Respondent provided clarifications requested by the Tribunal during the conference call of 9 July 2018.

42. On 27 July and 3 August 2018, respectively, the Claimants filed their objections to the Respondent's requests for production of documents and the Respondent filed its response to the Claimants' objections and asked the Tribunal to rule on certain of its requests.

43. On 23 August 2018, the Tribunal ruled on the Respondent's requests for production of documents.

44. On 6 September 2018, the Respondent provided clarifications and documentation regarding the steps undertaken to obtain certain documents from ZAlK.

45. On 10 September 2018, the Claimants responded to the Respondent's letter of 6 September 2018.

46. Following further exchanges between the Parties on 11 and 14 September 2018, on 17 September 2018, the Tribunal decided to uphold the Respondent's document requests Nos. 4-10 as amended by the Respondent on 14 September 2018.

47. On 4 January 2019, the Respondent informed the Tribunal that it was not in a position to file its counter memorial within the prescribed time-limit, and consequently, on 7 January 2019, requested amendments of the procedural timetable.

48. On 9 and 11 January 2019, the Parties provided their comments on the Respondent's communication of 4 January 2019 and its request to amend the procedural timetable.

49. On 11 January 2019, the Tribunal rejected the Respondent's requested modifications to the procedural timetable and invited the Parties to liaise in order to produce an alternative proposal that would leave at least three months between the filing of the Respondent's Rejoinder and the start of the hearing.

50. On 18 January 2019, the Parties informed the Tribunal that they were conferring on an alternative timetable and requested an extension until 23 January 2019 to revert. On the same date, the Tribunal granted the requested extension.

51. On 23 January 2019, the Parties informed the Tribunal that they could not reach an agreement upon a revised procedural timetable and detailed their respective positions.

52. On 24 January 2019, the Tribunal informed the Parties that, in view of the Respondent's failure to file its counter memorial by the prescribed deadline and the Claimants' position in this respect, absent any changes, the Tribunal would be left with no choice but to vacate the hearing dates of 4-15 November 2019. The Tribunal further invited the Parties to liaise upon a new schedule for the proceedings.

53. On 8 February 2019, the Parties informed the Tribunal that they had not been able to reach an agreement on a new procedural timetable.

54. Following several exchanges between the Parties and the Tribunal, on 25 February 2019, the Parties submitted a revised procedural timetable.

55. On 28 February 2019, the Tribunal issued Procedural Order No. 2, taking note of the Parties' agreement to modify the procedural timetable and attaching the revised procedural timetable as an Annex A to Procedural Order No. 2. According to the revised procedural timetable, the Hearing was to take place from 22 June to 3 July 2020.

56. On 15 March 2019, the Respondent filed its Counter Memorial (the "**R's Counter-Memorial**") t[redacted]

57. By email of 5 September 2019, the Parties informed the Tribunal that they agreed to extend the time limits for filing the Claimants' reply (until 13 September 2019) and the Respondent's rejoinder (until 13 March 2020). On 6 September 2019, the Tribunal endorsed the Parties' proposed amendments to the timetable.

58. On 14 September 2019, the Claimants filed their Reply (the "**C's Reply**") dated 13 September 2019, t[redacted]

59. On 12 March 2020, the Parties informed the Tribunal that they had agreed to extend the time limits for filing the Respondent's rejoinder (until 18 March 2020) and the Claimants' rejoinder on jurisdiction (until 4 May 2020).

60. On 17 March 2020, due to the restrictions in force because of the COVID-19 pandemic, the Claimants sought an adjournment and a rescheduling of the hearing at the earliest available date starting in the fall of 2020. On the same date, the Respondent sought leave (granted on 18 March 2020) to respond to the Claimants' message after filing its rejoinder.

61. On 18 March 2020, the Respondent filed its Rejoinder (the "**R's Rejoinder**"), t[redacted]

[redacted]

62. On 20 March 2020, the Respondent informed the Tribunal that it would proceed to contact the Claimants with a view to reaching a mutually agreeable solution on the possible rescheduling of the hearing.

63. On 23 March 2020, the Tribunal provided its own reflections on the current COVID-19 pandemic situation to assist the Parties in their discussions, considering *inter alia* that it would be very unlikely that the scheduled hearing could proceed as originally planned. The Tribunal further invited the Parties to revert to the Tribunal with their observations as soon as possible, but no later than 27 March 2020, at least regarding the question of whether the in-person hearing should be vacated.

64. By respective letters of 27 March 2020, the Parties informed the Tribunal that they had been unable to reach an agreement on the possible dates and format of the hearing. The Claimants further indicated that they intended to call all of the Respondent's experts for cross-examination.

65. On 30 March 2020, given the uncertainties attending the evolution of the COVID-19 pandemic, the Tribunal vacated the hearing dates for June 2020 and invited the Parties to exchange schedules on their availability, both in person and remotely, for a hearing between 31 August and 23 December 2020. The Tribunal further indicated that it would make a proposal to the Parties for the rescheduling and format of the hearing based on the Parties' schedules. The Tribunal also invited the Respondent to indicate whether it intended to call any of the Claimants' fact or expert witnesses by 3 April 2020.

66. On 3 April 2020, the Respondent confirmed that it intended to call for cross-examination at the hearing all of the Claimants' fact and expert witnesses except for [redacted]

67. On 13 April 2020, the Parties submitted their respective schedules indicating their availability for a hearing in the fall of 2020.

68. On 15 April 2020, the Claimants submitted unsolicited comments on the Respondent's schedule of availability and requested an extension of the time limit to file their rejoinder on jurisdiction until 25 May 2020.

69. On the same day, the Tribunal invited the Respondent to provide its observations on the Claimants' correspondence, which the Respondent did on 16 April 2020.

70. On 16 April 2020, the Tribunal informed the Parties that it was prepared to grant the Claimants an extension until 15 May 2020 for filing their rejoinder on jurisdiction "*in recognition of the logistical difficulties that the strict confinement creates in preparing a written submission*." Later the same day, the Tribunal proposed to hold a teleconference call with the Parties to discuss the hearing scheduling.

71. On 21 April 2020, the Tribunal held a teleconference call with the Parties. Following the conference call, the Tribunal invited the Parties to reserve the dates of 21 and 22 October 2020 and 2 to 6 November 2020 for a possible hearing (in-person or by video-conferencing, if need be) until the Tribunal's final determination of the hearing dates.

72. On 27 and 28 April 2020, the Parties exchanged further correspondence regarding the rescheduling and the organization of the hearing.

73. On 7 May 2020, the Claimants uploaded to BOX a joint chronological list of factual exhibits, as requested by the Tribunal.

74. On 15 May 2020, the Claimants requested an extension until 19 May 2020 to file their rejoinder on jurisdiction owing to the circumstances surrounding the COVID-19 pandemic. The Tribunal granted the Claimants' request on the same day.

75. On 18 May 2020, the Parties exchanged further correspondence regarding the scheduling of the hearing.

76. On 19 May 2020, the Claimants submitted their Rejoinder on Jurisdiction (the "**C's Rejoinder**"), together with Annex 1, factual exhibits C-518 through C-544 and legal authorities CL-241 through CL-318.

77. On 6 June 2020, the Tribunal confirmed that (i) the hearing would take place during the week of 2 to 6 November 2020; (ii) the Tribunal would endeavor to hold it in-person according to the Parties' preference; and (iii) the hearing would proceed by video-conference if the Tribunal considered that an in-person hearing would not be practicable due to measures relating to COVID-19 in place in the relevant countries.

78. Upon request by the Tribunal, on 22 June 2021, the Parties confirmed their preference to hold in reserve 31 October and 1 November 2020 as possible dates for the hearing.

79. On 17 September 2020, the Tribunal circulated an agenda for the pre-hearing organizational conference and informed the Parties that, in view of the current COVID-related restrictions in place in the relevant jurisdictions, it considered that preparations should be made for the conduct of the hearing by videoconference.

80. On 22 September 2020, the Tribunal held a pre-hearing organizational conference with the Parties.

81. By letter of 24 September 2020, the Tribunal noted that during the pre-hearing organizational conference, the Parties had reached an agreement that the hearing should be held remotely by videoconference. The Tribunal also provided its decision on three procedural issues on which the Parties had not reach an agreement.

82. On 1 and 5 October 2020, the Parties exchanged their comments on the possible hearing schedule.

83. On 7 October 2020, the Tribunal transmitted draft Procedural Order No. 3 to the Parties and invited them to liaise in order to agree on the remaining open points and revert to the Tribunal by 12 October 2020, which the Parties did.

84. On 13 October 2020, the Tribunal issued Procedural Order No. 3 concerning the organization of the hearing.

85. By letter of 14 October 2020, the Claimants sought leave to adduce into the record a number of factual exhibits and legal authorities.

86. On 20 October 2020, the Respondent objected to the Claimants' request arguing *inter alia* that the request did not meet the threshold of "*exceptional circumstances*" set forth in paragraph 16.3 of Procedural Order No. 1.

87. On 22 October 2020, the Tribunal ruled on the Claimants' request of 14 October 2020.

88. On 23 October 2020, the Claimants submitted exhibits C-545 through C-552, legal authorities CL-319 through CL-324, and an amended translation of exhibit C-156.

89. On the same date, the Respondent transmitted to the Tribunal a letter from the Respondent's quantum expert, [redacted]orrecting certain figures and passages of his second expert report.

90. On 26 October 2020, the Respondent informed the Tribunal that it would not call [redacted]or cross-examination at the hearing. On the same date, the Claimants reserved their right to claim costs and fees incurred for the preparation of [redacted] cross-examination and sought leave to conduct his direct examination as described in Procedural Order No. 3.

91. On the same date, the Tribunal requested the Claimants to confirm that [redacted] would testify remotely at the hearing, which the Claimants did on 27 October 2020.

92. On 27 October 2020, the Respondent confirmed that it would provide comments on the documents filed by the Claimants on 23 October 2020 at the hearing and requested that the Tribunal deny the Claimants' proposal to call [redacted] for direct examination.

93. On 28 October 2020, the Tribunal denied the Claimants' request to call [redacted] for direct examination and confirmed that it had no questions to pose to [redacted] at the hearing.

94. On 30 October 2020, the Tribunal transmitted to the Parties a hearing protocol.

95. A hearing on jurisdiction and the merits was held from 1 to 6 November 2020 by videoconference (the "**Hearing**"). The following persons attended the Hearing:

Tribunal:

Professor Zachary Douglas QC	President
Mr John Beechey CBE	Arbitrator
Sir Michael Wood KCMG	Arbitrator

ICSID Secretariat:

Ms Ella Rosenberg	Legal Counsel
Ms Maria-Rosa Rinne	Paralegal
Ms Céline Pommier	Paralegal

For the Claimants:

Mr Tim Portwood	Bredin Prat SAS
Mr Raed Fathallah	Bredin Prat SAS
Ms Marina Weiss	Bredin Prat SAS
Mr Shane Daly	Bredin Prat SAS

Ms Laura Fadlallah	Bredin Prat SAS
[redacted]	[redacted]

For the Respondent:

Professor Emmanuel Gaillard	Shearman & Sterling LLP
Ms Jennifer Younan	Shearman & Sterling LLP
Mr Rudolf Simone-Pont	Shearman & Sterling LLP
Ms Elise Edson	Shearman & Sterling LLP
Ms Mariia Tsarova	Shearman & Sterling LLP
Ms Marija Sobat	Shearman & Sterling LLP
Ms Anna Guillard Sazhko	Shearman & Sterling LLP
Ms Irina Nazarova	Engarde Attorneys at Law
Mr Dmytro Donenko	Engarde Attorneys at Law
Ms Hanna Tyshchenko	Ministry of Justice of Ukraine
Ms Yuliia Dikhtiievska	Ministry of Justice of Ukraine

Court Reporters:

Ms Diana Burden	Diana Burden, Court reporting
Ms Laurie Carlisle	Carlisle Reporting

Interpreters:

Ms Julia Poger
Ms Ludmila Davis
Mr Boris Kovaltchouk

96. During the Hearing, the following persons were examined:

On behalf of the Claimants:

[redacted]	[redacted]

On behalf of the Respondent:

[redacted]	[redacted]

97. On 11 November 2020, the Tribunal wrote to the Parties regarding the filing of their final submissions, the corrections to the transcripts, and the filing of a translation into English of Articles 651 to 653 of the Ukrainian Civil Code.

98. The Claimants filed their final submission on 23 November 2020 together with Annexes I and II, and two excel tables titled "*Zalk Damages Model* [redacted] *with Amendments*". Further to the Tribunal's instructions of 22 October 2020, the Claimants sought leave to submit two court rulings rendered in Case No. 908/2753/18 on 16 October and 9 November 2020.

99. On 4 December 2020, the Parties filed their proposed corrections to the transcripts.

100. On 7 December 2020, the Respondent filed its Reply to the Claimants' Final Submission, together [redacted] The Respondent also requested leave to file, as exhibits R-266 and R-267, two documents from the Stock Market Infrastructure Development Agency of Ukraine ("**SMIDA**") regarding Velbay's shareholding in ZAlK. On the same date, the Respondent also objected to the Claimants' proposed corrections to the transcript of the cross-examination [redacted]

101. On 10 December 2020, the Claimants responded to the Respondent's communications of 7 December 2020.

102. On the same date, the Parties submitted a translation into English of Articles 651 to 653 of the Ukrainian Civil Code authored by Professor William E. Butler. The Claimants clarified that they accepted Professor Butler's translation except for his use of the terms "*dissolution*"/"*dissolve*" and submitted an amended translation.

103. On 11 December 2020, the Claimants filed the rulings rendered in Case No. 908/2753/18 as exhibits C-553 and C-554 and sought to leave to submit an additional ruling rendered in Case No. 9901/215/19 on 11 August 2020.

104. On 14 December 2020, the Tribunal issued a decision addressing the Parties' requests to add new documents to the record and the translation of Articles 651-653 of the Ukrainian Civil Code.

105. On 17 December 2020, the Respondent filed exhibits R-266 and R-267.

106. On 18 December 2020, the Parties confirmed that they reached an agreement on the corrections to be made to the transcripts.

107. On the same date, the Claimants submitted comments on exhibits R-266 and R-267, objecting to the probative value of SMIDA documents and to the timeliness of the Respondent's new argument that the relevant date for determining Velbay's ownership of the additional 9.54% shareholding in ZAlK is the date of the closing of the share purchase agreement. According to the Claimants this argument "*should not be allowed as a matter of principle*" as the Claimants were "*left without a meaningful opportunity to gather and submit rebuttal evidence*."

108. On 18 December 2020, the Respondent confirmed, *inter alia*, that it agreed with the Claimants' amended translation of Articles 651-653 of the Ukrainian Civil Code "*on the understanding that the use of the terms 'rescission/rescind' is without prejudice to the question of the legal consequences that follow from 'rescission' under Ukrainian law*."

109. On 22 December 2020, the Claimants submitted, as exhibit C-555, a court ruling issued in Case No. 9901/215/19 on 23 November 2020.

110. On 27 December 2020, the court reporter transmitted to the Parties and the Tribunal the revised transcripts.

111. On 2 February 2021, the President of the Tribunal conveyed a disclosure to the Parties.

<u>ANNEX B</u>

The Parties' Requests for Relief

1. The Claimants' Requests for Relief

112. In their Memorial, the Claimants request that the Tribunal:

a. Declare that it has jurisdiction over Velbay's and Emergofin's claims;

b. Hold that Ukraine has committed a denial of justice against Claimants, in violation of customary international law;

c. Hold that Ukraine has breached its obligations under Article 3(2) of the Treaty;

d. Hold that Ukraine has breached its obligations under Article 3(1) of the Treaty;

e. Hold that Ukraine has breached its obligations under Article 3(4) of the Treaty;

f. Hold that Ukraine has breached its obligations under Article 6 of the Treaty;

g. Award Velbay and Emergofin compensation in the total amount of no less than USD 829,098,000 for material damages;

h. Award Velbay and Emergofin pre-award interest on the above amount from 22 March 2012 until the date of the award at the rate of the 5-year U.S. Treasury annual rate, compounded annually;

i. Award Velbay and Emergofin compensation in the total amount of no less than USD 5,000,000 for moral damages;

j. Award Velbay and Emergofin post-award interest on all of the above amounts from the date of the award until the date of full payment of the award at the rate of the 5-year U.S. Treasury annual rate, compounded annually;

k. Award Velbay and Emergofin compensation on such other basis as the Tribunal May deem to be warranted; and

l. Award Velbay and Emergofin the amount of the legal fees and costs incurred in these proceedings.

113. In their Reply, the Claimants request that the Tribunal:

a. Declare that it has jurisdiction over Velbay's and Emergofin's claims;

b. Declare that Velbay's and Emergofin's claims are admissible;

c. Hold that Ukraine has committed a denial of justice against Claimants, in violation of customary international law;

d. Hold that Ukraine has breached its obligations under Article 3(2) (first sentence) of the Treaty;

e. Hold that Ukraine has breached its obligations under Article 3(2) (last sentence) of the Treaty;

f. Hold that Ukraine has breached its obligations under Article 3(1) of the Treaty;

g. Hold that Ukraine has breached its obligations under Article 3(4) of the Treaty;

h. Hold that Ukraine has breached its obligations under Article 6 of the Treaty;

i. Award Velbay and Emergofin compensation in the total amount of no less than USD 1,089,100,000 for material damages;

j. Award Velbay and Emergofin pre-award interest on the above amount from 22 March 2012 until the date of the award at the rate of the 5-year U.S. Treasury annual rate, compounded annually;

k. Award Velbay and Emergofin compensation in the total amount of no less than USD 5,000,000 for moral damages;

l. Award Velbay and Emergofin post-award interest on all of the above amounts from the date of the award until the date of full payment of the award at the rate of the 5-year U.S. Treasury annual rate, compounded annually;

m. Award Velbay and Emergofin compensation on such other basis as the Tribunal May deem to be warranted; and

n. Award Velbay and Emergofin the amount of the legal fees and costs incurred in these proceedings.

2. The Respondent's Requests for Relief

114. In its Counter Memorial, the Respondent requests that the Tribunal issue an award:

(i) Dismissing the Claimants' claims on the grounds that the Tribunal lacks jurisdiction to entertain them;

(ii) In the alternative, dismissing the Claimants' claims referred to in paragraph 321 [of the Counter Memorial] on the grounds that they are inadmissible;

(iii) In the alternative, dismissing the Claimants' claims on the merits in their entirety;

(iv) In the alternative, declaring that the Claimants are not entitled to the damages they seek, or to any damages;

(v) Ordering the Claimants to separately and together pay all costs incurred in connection with these arbitration proceedings including their own costs, the costs of the arbitrators and ICSID, as well as the legal and other expenses incurred by the Respondent including the fees of its legal counsel, experts and consultants on a full indemnity basis, plus interest thereon at a reasonable rate; and

(vi) Granting such further relief against the Claimants as the Tribunal deems fit and proper.

115. In its Rejoinder, the Respondent requests that the Tribunal issue an award:

a. Dismissing the Claimants' claims on the grounds that the Tribunal lacks jurisdiction to entertain them;

b. In the alternative, dismissing the Claimants' claims referred to in paragraph **Error! Reference source not found.** [of the Rejoinder] above on the grounds that they are inadmissible;

c. In the alternative, dismissing the Claimants' claims on the merits in their entirety;

d. In the alternative, declaring that the Claimants are not entitled to the damages they seek, or to any damages;

e. Ordering the Claimants to separately and together pay all costs incurred in connection with these arbitration proceedings including their own costs, the costs of the arbitrators and ICSID, as well as the legal and other expenses incurred by the Respondent including the fees of its legal counsel, experts and consultants on a full indemnity basis, plus interest thereon at a reasonable rate until the date of full payment; and

f. Granting such further relief against the Claimants as the Tribunal deems fit and proper.

<u>ANNEX C</u>

List of Selected Abbreviations/Defined Terms

2002 WEM Concept	"*Concept of Functioning and Development of the Wholesale Electricity Market of Ukraine*", attached to Resolution of the Cabinet of Ministers of Ukraine No 1789, 16 November 2002
2006 ZAlK SPA	Purchase and Sale Agreement between Closed Joint Stock Company AvtoVAZ-Invest and Velbay Holdings Limited relating to the Sale Shares of Zaporozhye Aluminium Combine Open Joint Stock Company, 24 March 2006
2016 EGM	Emergency General Meeting convened by the SPFU in September 2016
2016 Sanctions Decision	Decision of the National Security and Defence Council of Ukraine dated 16 September 2016
2017 AGM	Annual General meeting convened by the SPFU in April 2017
2018 Sanctions Decision	Decision of the National Security and Defence Council of Ukraine "*On the Application of Personal Special Economic and Other Restrictive Measures (Sanctions)*", as approved by Order of President of Ukraine No 126/2018 (as amended) dated 14 May 2018
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
BCG	Boston Consulting Group
BIT	Agreement on Promotion and Reciprocal Protection of Investments between the Kingdom of the Netherlands and Ukraine signed on 14 July 1994 entered into force on 1 June 1997
C-[#]	Claimants' Exhibit
CL-[#]	Claimants' Legal Authority
Claimants	Emergofin B.V. and Velbay Holdings Ltd.
CMU	Cabinet of Ministers of Ukraine

CMU Instruction No 1566-p	Instruction No 1566-p "*Issues of Primary-Aluminium and Titanium-Sponge Enterprises during a Financial and Economic Crisis*" dated 10 December 2008
CMU Resolution No 580	Resolution No 580 "*On the Reduced Energy Tariff for ZAlK*" dated 28 April 1998
CMU Resolution No 745	Resolution No 745 "*Transition to unified power supply tariffs for consumers*" dated 15 August 2005
CMU Resolution No 795	Resolution No 795 "*On ensuring the competitiveness of enterprises producing primary aluminium, aluminium alloys and titanium*" dated 10 June 2002
C's Final Submission	Claimants' Final Submission dated 23 November 2020
C's Memorial	Claimants' Memorial dated 27 March 2018
C's Rejoinder	Claimants' Rejoinder on Jurisdiction dated 19 May 2020
C's Reply	Claimants' Reply dated 13 September 2019
Emergofin	Emergofin B.V.
Foil equipment	Aluminium foil manufacturing equipment
GQQ	Glukhovskiy Quartzite Quarry LLC
Hearing	Hearing on Jurisdiction and Merits held from 1 to 6 November 2020
Hearing on Provisional Measures	Hearing on provisional measures held on 8 November 2017
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
IDFI	State Fiscal Service of Ukraine
NCRE	National Energy Regulatory Commission
NSDCU	National Security and Defence Council of Ukraine
R-[#]	Respondent's Exhibit

Respondent or Ukraine	Ukraine
R's Counter-Memorial	Respondent's Counter Memorial dated 15 March 2019
R's Final Reply	Respondent's Reply to the Claimants' Final Submission dated 7 December 2020
R's Rejoinder	Respondent's Rejoinder dated 18 March 2020
RL-[#]	Respondent's Legal Authority
SMIDA	Ukrainian database containing information on stock market participants
SPFU	State Property Fund of Ukraine
SUAL	SUAL International Ltd.
Transcript D#/P# (Speaker)	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 15 March 2017
UC RUSAL	United Company RUSAL p.l.c.
Velbay	Velbay Holdings Ltd.
ZAlK	Zaporozhye Aluminium Combine Open Joint Stock Company
ZTMK	State Enterprise "*Zaporozhye Titanium-Magnesium Plant*"

<u>ANNEX D</u>

Relevant Provisions of the Ukrainian Civil Code

Article 651. Grounds for Change or Rescission of Contract

1. A change or rescission of a contract shall be permitted only with the consent of the parties unless established otherwise by the contract or by a law.

2. A contract may be changed or rescinded by decision of a court upon the demand of one of the parties when there is a material violation of the contract by the other party and in other instances established by the contract or by a law.

That violation by a party of a contract shall be material if as a consequence of the harm caused by this the other party is deprived to a significant extent of that which they counted on when concluding the contract.

3. In the event of a unilateral renunciation of the contract in full or partially, if the right to such renunciation is established by the contract or by a law, the contract shall be respectively rescinded or changed.

Article 652. Change or Rescission of Contract in Connection with Material Change of Circumstances

1. In the event of a material change of circumstances by which the parties were guided when concluding the contract, a contract may be changed or rescinded with the consent of the parties unless established otherwise by the contract or arises from the essence of the obligation.

A change of circumstances shall be material if they changed so much that if the parties could have foreseen this, they would not have concluded the contract or would have concluded it on other conditions.

2. If the parties have not reached agreement on bringing the contract into conformity with the circumstances which materially changed, or the rescission thereof, the contract may be rescinded, and on the grounds established by paragraph four of the present Article — changed by decision of a court upon the demand of an interested party when the following conditions are simultaneously present:

(1) at the moment of concluding the contract the parties proceeded from the fact that such a change of circumstances would not ensue;

(2) the change of circumstances is conditioned by causes which the interested party could not eliminate after they arose with all concern and attentiveness which were required from it;

(3) the fulfillment of the contract would violate the correlation of property interests of the parties and deprive the interested party of that which he counted on when concluding the contract;

(4) it does not arise from the essence of the contract or customs of business turnover that the risk of the change of circumstances is borne by the interested party.

3. When rescinding a contract as a consequence of a material change of circumstances, the court upon the demand of any of the parties shall determine the consequences of rescission of the contract by proceeding from the need for a just distribution of expenses between the parties incurred by them in connection with the fulfillment of this contract.

4. A change of a contract in connection with a material change of circumstances shall be permitted by decision of a court in exceptional instances if rescission of the contract is contrary to social interests or entails harm to the parties significantly exceeding the expenditures necessary to fulfill the contract on the conditions changed by the court.

Article 653. Legal Consequences of Change or Rescission of Contract

1. In the event of a change of a contract, the obligations of the parties shall change in accordance with the changed conditions relating to the subject-matter, place, and periods of fulfillment, and so on.

2. When a contract is rescinded, the obligations of the parties shall terminate.

3. When a contract is changed or rescinded, the obligation shall change or terminate from the moment of reaching an arrangement concerning the change or rescission of the contract unless established otherwise by the contract or conditions by the character of the change thereof. If a contract is changed or rescinded in a judicial proceeding, the obligation shall change or terminate from the moment of entry of the decision of the court concerning the change or rescission of the contract into legal force.

4. The parties shall not have the right to demand the return of that which was fulfilled by them under an obligation before the moment of the change or rescission of the contract unless established otherwise by the contract or by a law.

5. If a contract is changed or rescinded in connection with a material violation of the contract by one of the parties, the other party may demand compensation of losses caused by the change or rescission of the contract.

Стаття 651. Підстави для зміни або розірвання договору

1. Зміна або розірвання договору допускається лише за згодою сторін, якщо інше не встановлено договором або законом.

2. Договір може бути змінено або розірвано за рішенням суду на вимогу однієї із сторін у разі істотного порушення договору другою стороною та в інших випадках, встановлених договором або законом.

Істотним є таке порушення стороною договору, коли внаслідок завданої цим шкоди друга сторона значною мірою позбавляється того, на що вона розраховувала при укладенні договору.
3. У разі односторонньої відмови від договору у повному обсязі або частково, якщо право на таку відмову встановлено договором або законом, договір є відповідно розірваним або зміненим.

Стаття 652. Зміна або розірвання договору у зв'язку з істотною зміною обставин

1. У разі істотної зміни обставин, якими сторони керувалися при укладенні договору, договір може бути змінений або розірваний за згодою сторін, якщо інше не встановлено договором або не випливає із суті зобов'язання.

Зміна обставин є істотною, якщо вони змінилися настільки, що, якби сторони могли це передбачити, вони не уклали б договір або уклали б його на інших умовах.

2. Якщо сторони не досягли згоди щодо приведення договору у відповідність з обставинами, які істотно змінились, або щодо його розірвання, договір може бути розірваний, а з підстав, встановлених частиною четвертою цієї статті, - змінений за рішенням суду на вимогу заінтересованої сторони за наявності одночасно таких умов:

1) в момент укладення договору сторони виходили з того, що така зміна обставин не настане;

2) зміна обставин зумовлена причинами, які заінтересована сторона не могла усунути після їх виникнення при всій турботливості та обачності, які від неї вимагалися;

3) виконання договору порушило б співвідношення майнових інтересів сторін і позбавило б заінтересовану сторону того, на що вона розраховувала при укладенні договору;

4) із суті договору або звичаїв ділового обороту не випливає, що ризик зміни обставин несе заінтересована сторона.

3. У разі розірвання договору внаслідок істотної зміни обставин суд, на вимогу будь-якої із сторін, визначає наслідки розірвання договору виходячи з необхідності справедливого розподілу між сторонами витрат, понесених ними у зв'язку з виконанням цього договору.

4. Зміна договору у зв'язку з істотною зміною обставин допускається за рішенням суду у виняткових випадках, коли розірвання договору суперечить суспільним інтересам або

потягне для сторін шкоду, яка значно перевищує затрати, необхідні для виконання договору на умовах, змінених судом.

Стаття 653. Правові наслідки зміни або розірвання договору

1. У разі зміни договору зобов'язання сторін змінюються відповідно до змінених умов щодо предмета, місця, строків виконання тощо.

2. У разі розірвання договору зобов'язання сторін припиняються.

3. У разі зміни або розірвання договору зобов'язання змінюється або припиняється з моменту досягнення домовленості про зміну або розірвання договору, якщо інше не встановлено договором чи не обумовлено характером його зміни. Якщо договір змінюється або розривається у судовому порядку, зобов'язання змінюється або припиняється з моменту набрання рішенням суду про зміну або розірвання договору законної сили.

4. Сторони не мають права вимагати повернення того, що було виконане ними за зобов'язанням до моменту зміни або розірвання договору, якщо інше не встановлено договором або законом.

5. Якщо договір змінений або розірваний у зв'язку з істотним порушенням договору однією із сторін, друга сторона може вимагати відшкодування збитків, завданих зміною або розірванням договору.