SVEA HOVRÄTT
Avdelning 02
Rotel 020104

DOM
2012-07-02
Stockholm

Mål nr
T 611-11

KÄRANDE
National Joint-Stock Company "Naftogaz of Ukraine" (Naftogaz)
6 B Khmelnitskogo Street
01001 Kiev
Ukraina

Ombud: Advokaterna Bengt Åke Johnsson och Ola Nilsson samt
jur.kand. Linda Kahver
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SVARANDE
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Ombud: Advokaterna Harald Nordenson och Christina Waering
Setterwalls Advokatbyrå AB
Box 1050
101 39 Stockholm

SAKEN
Ogiltighet och klander av skiljedom

BERÖRD SKILJEDOM
Separate award (särskild skiljedom) meddelad i Stockholm den 19 oktober 2010 i Stockholms Handelskammares Skiljedomsinstituts skiljeförfarande V 007/2008 (se bilaga A)

HOVRÄTTENS DOMSLUT

1. Hovrätten avslår Naftogaz talan.

2. Naftogaz ska ersätta IUGAS för rättegångskostnader i hovrätten med 2 719 709 kr och 72 457 USD, varav 2 600 000 kr avser ombudsarvode. På beloppen 2 719 709 kr och 72 457 USD ska också betalas ränta enligt 6 § räntelagen från dagen för hovrättens dom till dess betalning sker.

Postadress	Besöksadress	Telefon	Telefax	Expeditionstid
Box 2290 103 17 Stockholm	Birger Jarls Torg 16	08-561 670 00 08-561 675 00 **E-post**: svea.avd2@dom.se www.svea.se	08-561 675 09	måndag – fredag 09:00-15:00

PARTERNAS AVTAL

Naftogaz är ett aktiebolag som är helägt av den ukrainska staten. Naftogaz är det ledande bolaget inom olje- och gasindustrin i Ukraina. IUGAS är ett italienskt aktiebolag. IUGAS ägs av två bolag inom den italienska koncernen F.I.S.I., som är en grupp av bolag verksamma på energimarknaden.

I december 2003 ingick Naftogaz och IUGAS ett avtal benämnt *Natural Gas Supply Agreement from 2004 to 2013.* När hovrätten i det följande skriver om ”avtalet” är det detta avtal mellan Naftogaz och IUGAS om leverans av naturgas som avses, om det inte framgår något annat. Naftogaz har uppfattningen att avtalet aldrig har blivit bindande mellan parterna. Den frågan är dock avgjord av skiljenämnden och ska inte omprövas av hovrätten.

I den bifogade skiljedomen citeras avtalstexten i valda delar. Huvuddragen av avtalet är följande.

Avtalet löper från den 1 januari 2004 till och med den 31 december 2013. Det går ut på att Naftogaz ska sälja naturgas av turkmeniskt, kazakiskt, uzbekiskt och/eller ukrainskt ursprung till IUGAS. Gasen ska levereras av Naftogaz till en mätstation för gas vid gränsen mellan Ukraina och Slovakien, där den tas emot av IUGAS. Leveransmängden bestäms månadsvis utifrån en skriftlig begäran från IUGAS före aktuell leverans-månad, men ska maximalt uppgå till 1,3 miljarder kubikmeter per månad och sammanlagt maximalt 13 miljarder kubikmeter för hela avtalsperioden. Ett pris för gasen, 110 USD per 1 000 kubikmeter naturgas, finns angivet i en bilaga till avtalet. Avtalet föreskriver också att parterna ska enas om en mekanism för ändring av priset genom tilläggsavtal i händelse av en betydande förändring av gaspriset på den europeiska marknaden.

I ett avsnitt om parternas ansvar finns bestämmelser om skadestånd och vite. Här regleras bland annat att Naftogaz ska betala vite till IUGAS på visst sätt om den mängd naturgas som levererats är mindre än den angivna mängden i IUGAS skriftliga begäran

om leverans. På motsvarande sätt finns en bestämmelse om att IUGAS ska utge vite till Naftogaz om IUGAS underlåter att ta emot den överenskomna mängden gas.

Avtalets bestämmelser om tvistlösning anger i korthet att en tvist som inte kan lösas genom förhandlingar ska avgöras av Stockholms Handelskammares Skiljedomsinstitut och att skiljenämnden ska bestå av tre skiljemän. I bestämmelsen om skiljeförfarande finns en hänvisning till svensk materiell rätt. I en annan artikel i avtalet finns också en separat bestämmelse om att avtalet lyder under svensk materiell rätt.

IUGAS har med början i maj 2007 gjort skriftliga framställningar om leverans av gas. Inga gasleveranser enligt avtalet har skett hittills.

SKILJETVISTEN

Här sammanfattas skiljetvisten i de delar som är av störst relevans för målet i hovrätten. För en fullständig redogörelse av parternas talan och skiljenämndens bedömningar hänvisas till skiljedomen på engelska (bifogas utan de inlagor benämnda *Pre-trial Statements* som bilagts skiljedomen). Hovrätten har vid redogörelsen av uppgifter från skiljedomen använt sig av en översättning av domen till svenska som har getts in av Naftogaz.

IUGAS påkallade skiljeförfarande mot Naftogaz i januari 2008. I käromålet yrkade IUGAS att skiljenämnden skulle fastställa att avtalet är giltigt och att Naftogaz är skyldigt att leverera naturgas till IUGAS i enlighet med villkoren i avtalet. IUGAS yrkade också att Naftogaz skulle förpliktas att leverera cirka 1,3 miljarder kubikmeter naturgas och betala vite med drygt 80 miljoner USD till IUGAS. Naftogaz yrkade för sin del att skiljenämnden skulle avvisa IUGAS talan samt fastställa att avtalet är ogiltigt och att inga rättigheter eller skyldigheter finns under avtalet.

I en gemensam skrift till skiljenämnden begärde parterna efter en tids handläggning att skiljenämnden skulle dela upp förfarandet i två delar, där den första fasen skulle resultera i en särskild skiljedom som sedan skulle följas av en slutlig skiljedom. Skiljenämnden beslutade om handläggning i enlighet med parternas överenskommelse.

Den närmare innebörden av denna uppdelning var att skiljenämnden i en särskild skiljedom skulle pröva huruvida avtalet är giltigt och i kraft och om skiljenämnden är behörig att döma i tvisten, samt om Naftogaz i sådant fall är skyldigt att leverera naturgas till IUGAS i enlighet med villkoren i avtalet. Utifrån den bedömningen skulle också prövas om Naftogaz är skyldigt att erlägga avtalsvite till IUGAS för icke fullgjorda leveranser och är skyldigt att betala skadestånd till IUGAS. Om Naftogaz hade framgång med sina invändningar skulle förfarandet avslutas efter den första fasen genom en slutlig skiljedom. För det fall skiljenämnden fastställde att avtalet är giltigt och i kraft och att Naftogaz är skyldigt att leverera gas och/eller erlägga viten och/eller skadestånd till IUGAS skulle förfarandet fortsätta till den andra fasen, där skiljenämnden ska fastställa storleken på sådana viten och/eller skadestånd i en slutlig skiljedom.

Naftogaz hade under skiljeförfarandets första fas ett antal olika invändningar mot IUGAS talan, bland annat att avtalet inte är ett bindande avtal, att något giltigt avtal aldrig har kommit till stånd mellan parterna och att avtalet i vart fall har upphört att gälla eller av olika skäl ändå inte kan göras gällande mot Naftogaz. I det senare hänseendet åberopade Naftogaz bland annat att Naftogaz ska befrias från sina kontraktuella skyldigheter eftersom fullgörelse av avtalet är omöjlig på grund av den ukrainska lagstiftningen. Vidare anförde Naftogaz att fullgörelse av avtalet skulle strida mot ukrainsk public policy (ordre public). Naftogaz hade också flera invändningar mot att Naftogaz skulle vara skyldigt att utge avtalsvite och skadestånd, bland annat att IUGAS underlåtit att reklamera utebliven leverans på rätt sätt. Andra invändningar var att vitesbestämmelsen är oskälig och ska åsidosättas eller jämkas enligt 36 § avtalslagen samt att viten inte, som IUGAS gjorde gällande, kan beräknas på de maximala mängder gasleverans som anges i avtalet.

I den särskilda skiljedomen, som alltså är det avgörande som hovrättens prövning avser, blev skiljenämndens bedömning att avtalet är giltigt och att fullgörelse av avtalet inte är förhindrad av någon av de omständigheter som gjorts gällande av Naftogaz. Naftogaz ansågs därför skyldigt att leverera gas till IUGAS i enlighet med villkoren i avtalet (se sammanfattningen på s. 86 i skiljedomen).

Det kan tilläggas att det framgår av skiljedomen att nämnden bedömt att Naftogaz inte var skyldigt att fullgöra avtalet förrän efter slutet av år 2006 (skiljedomen s. 69). Anledningen till detta var de extrema omständigheter som rådde vid ingåendet av det så kallade trepartsavtalet (se mer om det avtalet nedan vid beskrivningen av den ukrainska gasmarknaden).

I frågan om vite ansåg skiljenämnden att IUGAS förlorat sin rätt till viten avseende den första och andra begäran om leverans, i maj och juli 2007, på grund av sena reklamationer. Beträffande övriga begärda leveranser fanns en rätt till viten. Skiljenämnden fann att beräkningen av viten ska baseras på mängden gas som faktiskt begärts och inte utifrån de maximala volymer av gas som anges i avtalet. Nämnden fann vidare att Naftogaz inte är skyldigt att utge skadestånd på någon av de grunder som gjorts gällande av IUGAS.

I domslutet konstateras bland annat att avtalet är giltigt och i kraft (punkten 2), att Naftogaz är skyldigt att leverera naturgas till IUGAS i enlighet med villkoren i avtalet (punkten 3) och att Naftogaz är skyldigt att utge viten enligt avtalet till IUGAS för begärda men icke fullgjorda leveranser av gas från den 1 september 2008 fram tills slutlig skiljedom meddelas (punkten 4).

Av skiljedomen framgår att skiljenämnden i det andra steget av skiljeförfarandet kommer att behandla storleken av de viten som ska tilldömas IUGAS samt kostnaderna för skiljeförfarandet (s. 92 och 99). Den delen av skiljeförfarandet pågår fortfarande.

YRKANDEN I HOVRÄTTEN

Naftogaz har yrkat att hovrätten ska i första hand förklara att skiljedomen är ogiltig såvitt avser punkterna 2, 3 och 4 i domslutet och i andra hand upphäva skiljedomen i samma punkter.

IUGAS har bestritt yrkandena.

Parterna har begärt ersättning för sina rättegångskostnader i hovrätten.

NAFTOGAZ TALAN I HOVRÄTTEN

Ogiltighetstalan

Skiljenämnden har, för det första, förpliktat Naftogaz, eller förklarat att Naftogaz är skyldigt, att faktiskt fullgöra leveranser av gas till IUGAS, trots att Naftogaz är rättsligt förhindrat att göra det och att sådan fullgörelse är straffrättsligt sanktionerad. Ukrainsk rätt uppställer sedan år 2006 förbud mot export av gas av ukrainskt ursprung och vidareexport av gas av centralasiatiskt ursprung. Den som bryter mot förbuden kan dömas till ett långt fängelsestraff.

Undantag från förbuden finns i vissa fall om exportören, i det enskilda fallet, har erhållit ett exportgodkännande – ersatt av ett kvotsystem den 1 januari 2012 – och en licens för export, eller ett särskilt tillstånd för vidareexport. Trots att Naftogaz har framställt förfrågningar om exportgodkännande och exportlicens samt vidareexport-tillstånd och därvid vidtagit de åtgärder som varit möjliga har sådana godkännanden och licenser samt tillstånd inte beviljats av de ukrainska myndigheterna.

Den ukrainska lagstiftningen avseende exportförbud och förbud mot vidareexport av gas är, liksom ukrainsk tullagstiftning, tvingande och straffsanktionerad. Dessa rättsregler är uppställda i samhällets intresse till skydd för grundläggande allmänna intressen om att tillgodose befolkningens och samhällets behov av gas, vilket är nödvändigt för grundläggande samhällsfunktioner och befolkningens grundläggande behov och rättigheter.

Skiljenämnden har, för det andra, förpliktat Naftogaz, eller förklarat att Naftogaz är skyldigt, att utge vite som straff för att Naftogaz inte har levererat gas i strid med legala förbud samt som påtryckning för att förmå Naftogaz att fullgöra gasleveranser i strid med dessa förbud.

Skiljedomen förpliktar Naftogaz att i strid med straffsanktionerade legala förbud leverera gas och, som en konsekvens därav, utge viten. Såväl domslutet som grunderna för domslutet i skiljedomen förutsätter att prestationer vidtas som är förbjudna i lag. Skiljedomen är därmed uppenbart oförenlig med grunderna för den svenska rättsordningen, liksom den ukrainska rättsordningen. Skiljedomen är oförenlig med tvingande rättsregler i ukrainsk rätt beträffande export- och vidareexportförbud uppställda i samhällets intressen. Skiljedomen ska därför, såvitt avser punkterna 2, 3 och 4 i domslutet, förklaras ogiltig enligt 33 § första stycket 2 lagen (1999:116) om skiljeförfarande (LSF).

Klandertalan

Naftogaz har i skiljemålet gjort gällande att Naftogaz har varit rättsligt förhindrat att leverera gas av såväl ukrainskt som centralasiatiskt ursprung till IUGAS. Skiljenämnden har funnit att Naftogaz är klart förhindrat att leverera gas, men har – utan prövning av Naftogaz bestridande (dess rättsliga grund) – funnit att Naftogaz ändå är skyldigt att leverera gas.

Skiljenämnden har inte prövat Naftogaz påstående att Naftogaz till följd av lagstiftningen i Ukraina varit förhindrat att leverera gas av centralasiatiskt ursprung till IUGAS. Därigenom har det, utan Naftogaz förskyllan, förekommit ett sådant fel i handläggningen som har inverkat på utgången i skiljemålet. Alternativt gör Naftogaz gällande att den åberopade klandergrunden i rättsligt hänseende innebär att skiljenämnden har överskridit sitt uppdrag. Skiljedomen ska därför upphävas såvitt avser punkterna 2, 3 och 4 i domslutet i enlighet med 34 § första stycket 6 LSF, alternativt 34 § första stycket 2 LSF.

IUGAS BEMÖTANDE AV TALAN

Ogiltighetstalan

Skiljenämnden har inte förpliktat Naftogaz att fullgöra leveranser av gas till IUGAS.

Skiljenämnden har i stället fastställt Naftogaz avtalsrättsliga skyldigheter att leverera gas till IUGAS i enlighet med villkoren i avtalet.

Naftogaz är inte rättsligt förhindrat att leverera gas till IUGAS. Ukrainsk rätt uppställer inte sedan år 2006 ett förbud mot export av gas av ukrainskt ursprung och vidareexport av gas av centralasiatiskt ursprung. En beviljad exportlicens kan inte beskrivas som ett undantag från ett generellt exportförbud i ukrainsk lagstiftning. Det ukrainska regelverket om gasexport ger uttryck för att den ukrainska befolkningens behov av gas ska tillgodoses på första prioritetsbasis.

Naftogaz förfrågningar om exportlicens och exportgodkännande hos de ukrainska myndigheterna kan inte utgöra stöd för Naftogaz påstående om att man är rättsligt förhindrad att leverera gas. Naftogaz har haft möjlighet att utverka licens eller tillstånd för gasexport till IUGAS under perioden 2007–2010. För perioden 2011 och 2012 kan Naftogaz också utverka licens eller tillstånd till gasexport när årliga gasbalanser fastställts. Det vitsordas att det ukrainska regelverket för gasexport övergått från ett licensieringssystem till ett kvotsystem från den 1 januari 2012.

Det är riktigt att det finns straffrättsliga påföljder i Ukraina för det fall gasexport sker utan erforderliga licenser eller tillstånd. Det förhållandet saknar emellertid relevans i målet, då skiljedomen inte förpliktar Naftogaz att exportera gas i strid med det ukrainska regelverket.

Skiljenämnden har inte förpliktat Naftogaz att utge vite. Skiljenämnden har heller inte förpliktat Naftogaz att utge vite som straff eller påtryckning för att förmå Naftogaz att fullgöra gasleveranser i strid med ukrainska exportregler. Skiljenämnden har i stället fastställt Naftogaz avtalsrättsliga skyldighet att utge vite vid icke-leverans.

Skiljedomen förpliktar inte Naftogaz att i strid med straffsanktionerade legala förbud leverera gas och, som en konsekvens därav, utge vite. Vare sig domslutet eller grunderna för domslutet i skiljedomen förutsätter att prestationer vidtas som är förbjudna i lag. Skiljedomen är inte oförenlig med tvingande rättsregler i ukrainsk rätt beträffande export och vidareexportförbud uppställda i samhällets intressen.

Skiljedomen är inte uppenbart oförenlig med grunderna för den svenska och ukrainska rättsordningen och ska inte ogiltigförklaras.

Klandertalan

Skiljenämnden har inte funnit att Naftogaz är klart förhindrat att leverera gas. Skiljenämnden har heller inte utan prövning av Naftogaz bestridande funnit att Naftogaz är skyldigt att leverera gas.

Det stämmer att Naftogaz i skiljemålet har gjort gällande att Naftogaz har varit rättsligt förhindrat att leverera gas av centralasiatiskt ursprung till IUGAS. Skiljenämnden har prövat Naftogaz påstående även i den delen. Det har inte utan Naftogaz förskyllan förekommit sådant fel i handläggningen som har inverkat på utgången i målet. Skiljenämnden har heller inte överskridit sitt uppdrag. Skiljedomen ska därför inte upphävas.

PARTERNAS UTVECKLING AV TALAN I ÖVRIGT

Utöver sammanfattningarna ovan har parternas utveckling av talan i hovrätten i huvudsak bestått i att de har redogjort för sin respektive syn på regleringen av gasmarknaden i Ukraina samt innebörden av skiljedomen, och utifrån detta argumenterat rättsligt för sin sak. I hovrättens domskäl nedan finns ett särskilt avsnitt om regleringen av gasmarknaden i Ukraina. I domskälen i övrigt går hovrätten närmare in på delar av skiljedomen och parternas argumentation i den mån det är motiverat.

UTREDNINGEN I HOVRÄTTEN

Parterna har åberopat omfattande skriftlig bevisning. På Naftogaz begäran har vittnena Antonina Marchenko, Pavel Afanasyev, Yuri Alekseevich Sukhomlinov och Oleh Bordilovskyi samt partssakkunniga Irina Paliashvili hörts i målet. På IUGAS begäran har partssakkunnige Olexander Martinenko hörts.

HOVRÄTTENS DOMSKÄL

Regleringen av gasmarknaden i Ukraina

Parterna har lagt fram utredning om regleringen av gasmarknaden i Ukraina från tiden vid avtalets tecknande och framöver, bland annat i form av rättsutlåtanden och förhör med partssakkunniga. I det här avsnittet ger hovrätten en översiktlig redogörelse för vad som har framgått av utredningen i den delen. Det kan redan inledningsvis sägas att parterna i de flesta avseenden är överens om vilka regler som har gällt. De har däremot olika uppfattningar om regelverkets innebörd och dess inverkan på Naftogaz möjligheter och skyldigheter att fullgöra avtalet med IUGAS.

Som en bakgrund till regelverket för gasexport bör dock först nämnas något om den allmänna utvecklingen på den ukrainska gasmarknaden under 2000-talet.

Vid tiden för parternas avtal fanns det god tillgång på naturgas i Ukraina. En anledning till detta var ett avtal från 2002 mellan Naftogaz och det ryska statliga gasbolaget Gazprom. Enligt det avtalet betalade Gazprom för transit av rysk gas genom Ukraina i form av gasleveranser till Naftogaz, som därigenom fick tillgång till billig naturgas. Under 2005 förändrades förhållandena och i slutet av det året krävde Gazprom en avsevärd höjning av priset för gas, vilket inte accepterades av Naftogaz. Situationen utvecklades till en gaskris i början på januari 2006, när Gazprom stoppade leveranserna av gas till Ukraina. Naftogaz ingick då det så kallade trepartsavtalet med Gazprom och det schweiziska bolaget RosUkrEnergo. Enligt trepartsavtalet var det RosUkrEnergo som skulle vara leverantören av naturgas till Ukraina. Avtalet anger att Gazprom från den 1 januari 2006 inte ska leverera rysk naturgas till Ukraina och att naturgas som kommer från Ryska Federationen inte ska exporteras från Ukraina av Naftogaz. Naftogaz har framhållit att avtalet var mycket oförmånligt och att skiljenämnden i den särskilda skiljedomen har konstaterat att Naftogaz ingick trepartsavtalet under tvång.

I oktober 2008 träffades en mellanstatlig överenskommelse mellan Ryssland och Ukraina, vilken bland annat angav att parternas avsikt var att Naftogaz skulle vara

ensam importör av all naturgas till Ukraina. RosUkrEnergos roll som leverantör upphörde efter detta. Efter ytterligare en gaskris ersattes trepartsavtalet av ett nytt avtal om handel av naturgas mellan Naftogaz och Gazprom från januari 2009. Avtalet innehåller en bestämmelse om att den naturgas som levereras enligt avtalet är avsedd för ukrainska användare och att Naftogaz inte har rätt att sälja den utanför Ukrainas gränser.

När det så gäller det ukrainska regelverket för gasmarknaden har sammanfattningsvis följande framkommit i målet.

När Naftogaz och IUGAS ingick sitt avtal i december 2003 fanns det inga lagliga restriktioner i Ukraina för export av någon slags naturgas.

Efter gaskrisen i början av 2006 beslutades om restriktioner i ukrainsk rätt för export av inhemskt producerad ukrainsk gas och för vidareexport av importerad gas. Då infördes bestämmelser om att gas som utvinns av statligt ägda bolag i Ukraina i första hand ska användas för att tillgodose den ukrainska befolkningens behov och att ukrainsk gas inte får exporteras utan exportlicens. Ansökan om sådan licens görs hos det ukrainska Ekonomidepartementet, som endast får bevilja exportlicens om Departementet för Energi- och Kolindustrin har lämnat ett godkännande för export. På motsvarande sätt infördes vid samma tid även krav på tillstånd för vidareexport av importerad gas. Sådant tillstånd kan efter ansökan beviljas av Ekonomidepartementet.

Ytterligare en förutsättning för att export av inhemsk eller importerad gas ska kunna beviljas är att det finns avsatt ett utrymme för detta i den ukrainska gasprognosen. I de årliga gasprognoserna, som slutligt fastställs av den ukrainska regeringen, anges bland annat vilka kvantiteter gas som kommer att produceras, importeras, förbrukas och exporteras under nästkommande år. Naftogaz medverkar vid framtagandet av gasprognoserna. Parterna är oense om i vilken utsträckning Naftogaz kan påverka innehållet i dem. I de gasprognoser som fastställts under åren 2007–2010 har den årliga kvantiteten gas för export bara varit mellan fem och nio miljoner kubikmeter gas. Den exporten har såvitt framgått avsett ett ukrainskt åtagande om gasleverans till

ett litet polskt samhälle nära gränsen till Ukraina. För åren 2011 och 2012 har gasprognoserna ännu inte fastställts.

Naftogaz har redogjort för ett antal straffrättsliga sanktioner som kan aktualiseras om gas exporteras utan nödvändiga licenser och tillstånd. Parterna är överens om att sådan export kan leda till straffansvar för smuggling, eftersom tullklarering inte kan erhållas när licenser och tillstånd saknas.

Det nu beskrivna licens- och tillståndssystemet för export av gas har gällt i huvudsak oförändrat sedan 2006, förutom att kravet på exportgodkännande av Departementet för Energi- och Kolindustrin för export av ukrainsk gas har ersatts av ett kvotsystem från januari 2012. Utöver den regleringen har Naftogaz anfört att ukrainsk rätt uppställt ytterligare hinder mot export av inhemsk och importerad gas.

I juli 2010 antogs lag nr 2467 *On the Fundamentals of Natural Gas Market Operation* som bland annat föreskriver att statliga bolag ska sälja all naturgas de har producerat i Ukraina till ett organ som utses av regeringen och att folkets behov av naturgas i första hand ska tillgodoses genom den gasen (se bilaga 11 till Irina Paliashvilis rättsutlåtande den 16 april 2012). Parterna har olika uppfattningar om den lagen. Naftogaz ståndpunkt är att lagen innebar ett absolut exportförbud för gas av ukrainskt ursprung, utan laglig möjlighet att bevilja exportlicens. Enligt Naftogaz blev det först i juli 2011, genom en ändring i lagen som gjordes för att Ukraina skulle kunna fullgöra sitt åtagande om gasleverans till Polen, åter möjligt att bevilja exportlicens. IUGAS hävdar att lagen aldrig har inneburit något absolut exportförbud och har inte vitsordat att den uttryckliga möjlighet till export, som Naftogaz menar infördes i juli 2011, inte gällde redan tidigare.

De partssakkunniga som yttrat sig i målet har haft delade uppfattningar i frågan och några säkra slutsatser kan enligt hovrättens mening inte dras utifrån deras uppgifter eller av de skrivelser från olika myndigheter som åberopats av Naftogaz. Även med beaktande av att den åberopade *Explanatory note* som behandlar bakgrunden till den berörda ändringen i lagen i någon mån talar för Naftogaz tolkning av lagreglerna, kan hovrätten för egen del inte utläsa något exportförbud i den aktuella lagen (se

Explanatory note i bilaga 15 till Irina Paliashvilis rättsutlåtande den 16 april 2012). Hovrättens slutsats blir därmed att det inte framkommit att lag nr 2467 inneburit ett absolut exportförbud för gas av ukrainskt ursprung under tiden juli 2010–juli 2011, på det sätt som Naftogaz hävdat.

Beträffande importerad gas har Naftogaz anfört att det parallellt med kravet på tillstånd för vidareexport, och i linje med trepartsavtalet, infördes ett förbud mot vidareexport av centralasiatisk gas från Ukraina genom resolution nr 163 *On Sale of Imported Natural Gas on the Territory of Ukraine*. I denna anges bland annat att centralasiatisk naturgas som kommer till Ukraina från RosUkrEnergo endast ska användas för att tillgodose behovet hos ukrainska användare inom de volymer som fastställts i gasprognosen samt att importerad gas ska säljas av Naftogaz och dess dotterbolag (se bilaga 22 till Irina Paliashvilis rättsutlåtande den 16 april 2012). Parterna och deras respektive sakkunniga har olika uppfattningar i frågan om den här resolutionen innebär ett absolut förbud mot vidareexport av centralasiatisk gas från Ukraina. Inte heller i fråga om de här bestämmelserna anser hovrätten att ordalydelsen i resolutionen tillsammans med utredningen i övrigt leder till slutsatsen att ett absolut exportförbud, i detta fall för centralasiatisk gas, har gällt.

Som framgår vid redovisningen av parternas talan är Naftogaz uppfattning att det ukrainska regelverket sammantaget innebär att ukrainsk rätt sedan år 2006 uppställer förbud mot export av gas av ukrainskt ursprung och vidareexport av gas av central-asiatiskt ursprung och att Naftogaz är rättsligt förhindrat att fullgöra leveranser av gas till IUGAS. Enligt Naftogaz har det inte varit möjligt för Naftogaz att få nödvändiga licenser och tillstånd för export.

IUGAS menar däremot, i linje med vad skiljenämnden kommit fram till, att Naftogaz inte är rättsligt förhindrat att leverera gas till IUGAS eftersom ukrainsk rätt inte uppställer något förbud mot export av gas. Enligt IUGAS ger det ukrainska regelverket endast uttryck för att den ukrainska befolkningens behov av gas ska tillgodoses i första hand. IUGAS hävdar också att Naftogaz har haft och har möjlighet att utverka licens eller tillstånd för export av gas till IUGAS.

Hovrätten drar sammanfattningsvis följande slutsatser beträffande det ukrainska regelverket för export av gas. Av utredningen i målet har inte framgått annat än att export av både inhemsk och importerad gas i tiden från 2006 och framåt har varit tillåten under förutsättning att nödvändiga licenser och tillstånd har beviljats, vilket i sin tur förutsätter att utrymme för sådan export har fastställts i gasprognosen. Hovrättens ståndpunkt är alltså att ukrainsk rätt inte innehållit eller innehåller något totalförbud mot export av naturgas, oavsett gasens ursprung. Som redan framgått är parterna oense i frågan om Naftogaz faktiskt har haft och har möjlighet att utverka licens eller tillstånd för export av gas till IUGAS. För den bedömning som hovrätten ska göra i detta mål är det inte nödvändigt att ta ställning till den frågan. Hovrätten konstaterar dock att i den mån ett sådant tillstånd inte har kunnat erhållas så har detta, som skiljenämnden också uttalat (s. 75 i skiljedomen), inte berott på något permanent förbud i ukrainsk rätt utan snarare på bristande tillgång på gas. Hovrätten behandlar i nästa avsnitt hur den nu beskrivna rättsliga situationen ska bedömas ur ett ordre public-perspektiv.

Strider skiljedomen mot ordre public?

Enligt Naftogaz är skiljedomen ogiltig eftersom den är uppenbart oförenlig med grunderna för den svenska rättsordningen (ordre public).

I förarbetena till bestämmelsen i 33 § första stycket 2 LSF om att en skiljedom är ogiltig om den är uppenbart oförenlig med grunderna för rättsordningen i Sverige (prop. 1998/99:35 s. 141 f. och 234) anges bland annat följande. Begreppet ordre public omfattar endast höggradigt stötande fall. Regeln riktar sig mot skiljedomar där elementära rättsprinciper av materiell eller procedurmässig art har blivit åsidosatta. I Sverige ges ordre public-regler av hävd en snäv tillämpning och denna ogiltighets-grund torde därför ytterst sällan bli aktuell. Exempel på skiljedomar som kan tänkas strida mot svensk ordre public är skiljedomar som avser anspråk som grundas på spel eller kriminella handlingar eller där någon förpliktas till en prestation som är förbjuden i lag. En skiljedom kan ha vidare ha en sådan karaktär av straff att den inte kan anses godtagbar. Man kan också tänka sig fall då en skiljedom anses strida mot ordre public

därför att skiljemännen avgjort en tvist utan att iaktta en rättsregel som är tvingande med tanke på tredje man eller ett allmänt intresse.

Som framgår av ordalydelsen i 33 § första stycket 2 LSF tar den ogiltighetsgrunden sikte på den svenska rättsordningen. Då detta mål avser en internationell skiljetvist finns det anledning att också beröra ordre public ur ett internationellt perspektiv (för denna redogörelse se Redfern and Hunter on International Arbitration, Student version, femte upplagan s. 614 ff. och 656 ff.). Eftersom synen på ordre public varierar mellan olika länder finns det en risk att ett land med hänvisning till ordre public underkänner skiljedomar som andra länder anser vara giltiga. Det kan också förekomma att enskilda länders domstolar använder sig av ordre public-argument för att i realiteten underkänna skiljedomar på materiell grund. För att motverka att internationella skiljedomar underkänns enbart för att de strider mot ett inhemskt synsätt har det utvecklats en lära om internationell ordre public, som kan sägas vara ett snävare begrepp än dess nationella motsvarighet.

I ett försök att harmonisera tillämpningen av ordre public vid internationella skiljetvister har the International Law Association antagit rekommendationer om detta (ILA resolution 2/2002). I artikel 1(d) anges:

> The international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as ”*lois de police”* or “public policy rules” and (iii) the duty of the State to respect its obligations towards other States or international organisations.

Några exempel på oacceptabla aktiviteter som nämnts i detta sammanhang är korruption, droghandel, smuggling och terrorism (se ILA Interim Report on Public Policy 2000, s. 7, och ILA Final Report on Public Policy 2002, s. 7).

Vid bedömningen av om skiljedomen strider mot ordre public behöver skiljedomens rättsverkan analyseras. Naftogaz har sammanfattningsvis hävdat att skiljedomen förpliktar Naftogaz att i strid med straffsanktionerade legala förbud leverera gas och, som en konsekvens därav, utge viten. Enligt Naftogaz förutsätter såväl domslutet som grunderna för domslutet i skiljedomen att prestationer vidtas som är förbjudna i lag. IUGAS ståndpunkt är att skiljenämnden inte har förpliktat Naftogaz att fullgöra

leveranser av gas eller att utge vite till IUGAS. Skiljenämnden har enligt IUGAS i stället fastställt Naftogaz avtalsrättsliga skyldigheter att leverera gas och att utge vite vid utebliven leverans.

För att förstå vad skiljedomen innebär är den gjorda uppdelningen av skiljeförfarandet i två faser av intresse. Som hovrätten redovisat under rubriken *Skiljetvisten* yrkade IUGAS i käromålet bland annat att Naftogaz skulle förpliktas att leverera en viss mängd naturgas och betala vite med visst belopp till IUGAS. Till följd av den uppdelning som sedan beslutades prövade skiljenämnden i en första fas huruvida avtalet är giltigt, om Naftogaz är skyldigt att leverera naturgas till IUGAS i enlighet med villkoren i avtalet och om Naftogaz är skyldigt att betala avtalsvite och skadestånd till IUGAS. Med de bedömningar som gjordes återstår för skiljenämnden att i det andra steget av skiljeförfarandet behandla storleken av de viten som ska tilldömas IUGAS samt kostnaderna för skiljeförfarandet (skiljedomen s. 99).

Enligt hovrätten har skiljenämnden genom den särskilda skiljedomen prövat om Naftogaz ska befrias från sin kontraktuella skyldighet att leverera gas på grund de invändningar Naftogaz framfört. Skiljenämnden har därvid slagit fast att Naftogaz skyldighet att leverera gas till IUGAS enligt avtalet gäller (se punkten 3 i domslutet). Detta innebär inte att skiljedomen ålägger Naftogaz att faktiskt fullgöra leveranser av gas till IUGAS. Beträffande vitet har skiljenämnden, som hovrätten uppfattar domen, bedömt att Naftogaz är skyldigt att utge viten till IUGAS för vissa perioder och också fastställt några principer för hur vitet ska beräknas, men däremot inte bestämt vilka belopp som ska betalas. Av skiljedomens uppgifter om det andra steget av skiljeförfarandet framgår att det inte heller i den slutliga skiljedomen kommer att bli aktuellt att ålägga Naftogaz att fullgöra gasleveranser. Det handlar i stället om att bestämma storleken på de viten IUGAS ska tilldömas.

Detta innebär att Naftogaz aldrig kan tvingas till leverans av gas på grund av skiljedomen. För det fall Naftogaz inte kan fullgöra sin förpliktelse att leverera gas enligt avtalet får Naftogaz ansvara för detta genom att betala vite. Skiljedomen förpliktar därför inte Naftogaz att vidta någon olaglig handling, som exempelvis smuggling, och kan därför inte anses strida mot ordre public av det skälet.

Frågan är då om det ändå strider mot ordre public att slå fast att Naftogaz är skyldigt att leverera gas och betala viten, med beaktande av den rättsliga situation som har rått och råder på gasmarknaden i Ukraina och som enligt Naftogaz innebär ett förbud att exportera gas. Enligt Naftogaz blir därmed skyldigheten att betala vite ett slags straff för att Naftogaz inte har levererat gas i strid med legala förbud och utgör en påtryckning för att förmå Naftogaz att fullgöra gasleveranser i strid med legala förbud.

Som framgår ovan i avsnittet om regleringen av gasmarknaden i Ukraina är emellertid hovrättens ståndpunkt att ukrainsk rätt i tiden från 2006 och framåt inte innehållit något totalförbud mot export av naturgas, utan att export av både inhemsk och importerad gas har varit tillåten under förutsättning att nödvändiga licenser och tillstånd har beviljats. I den mån Naftogaz inte har kunnat fullfölja avtalet har detta närmast berott på bristande tillgång på gas. Skiljetvisten kan därför beskrivas som att huvudfrågan handlat om att avgöra vem av parterna som ska stå risken för att situationen på gasmarknaden utvecklades på det sätt som skedde efter att parterna ingick avtalet och om den gasbrist som uppstod ger anledning att befria Naftogaz från dess kontraktuella förpliktelser. Den materiella frågan har bedömts av skiljenämnden och ska inte överprövas av hovrätten i detta mål.

Vid dessa förhållanden anser hovrätten att det inte kan anses strida mot ordre public i den traditionellt nationella meningen, eller enligt den lära om internationell ordre public som utvecklats, att slå fast att Naftogaz är skyldigt att leverera gas till IUGAS i enlighet med avtalet. Med detta synsätt strider det inte heller mot ordre public att Naftogaz ska betala viten för uteblivna leveranser. Det kan tilläggas detta avtalsvite inte kan jämställas med sådana så kallade straffskadestånd (*punitive damages*) av amerikansk typ, som några domstolar i andra länder har ansett i vissa fall strida mot ordre public. Någon särskild anledning till att skiljedomen skulle strida mot ordre public med avseende på punkten 2 i domslutet, om att avtalet är giltigt och i kraft, har varken framförts eller framkommit på annat sätt i målet.

Hovrättens slutsats blir därmed att skiljedomen inte är uppenbart oförenlig med grunderna för den svenska rättsordningen.

Klandertalan

Naftogaz har anfört att skiljenämnden inte har prövat påståendet att Naftogaz till följd av lagstiftningen i Ukraina varit förhindrat att leverera gas av centralasiatiskt ursprung till IUGAS. Enligt IUGAS har skiljenämnden prövat Naftogaz påstående även i den delen. IUGAS har också anfört att det påstådda felet inte kan ha inverkat på utgången.

Den aktuella grunden är hänförlig till punkten 10 i skiljedomen som har rubriken *Är fullgörelse av Avtalet omöjlig?* Efter ett inledande allmänt avsnitt behandlas Naftogaz påståenden om omöjlighet att fullgöra avtalet i två olika avsnitt. Det centrala avsnittet för hovrättens prövning är punkten 10.2 med rubriken *Är fullgörelse av Avtalet omöjlig på grund av den ukrainska lagstiftningen?*

Vid redovisningen av Naftogaz utveckling av talan i punkten 10.2.1 i skiljedomen finns angivet att det i ukrainsk rätt uppställs ett förbud mot export av gas av ukrainskt ursprung. Däremot nämns här inget om ett förbud mot export av centralasiatisk gas. Mot bakgrund av att parterna i hovrätten är överens om att Naftogaz i skiljeförfarandet gjorde gällande att ukrainsk rätt uppställer ett förbud mot export även av central-asiatisk gas, måste Naftogaz talan i det avseendet anses ofullständigt redovisad av skiljenämnden. Samtidigt kan konstateras att skiljenämnden har en redogörelse för Naftogaz utveckling av talan även i sitt inledande allmänna avsnitt i punkten 10. Där redovisas bland annat Naftogaz ståndpunkt att det till följd av trepartsavtalet och den ukrainska lagstiftningen som förbjuder export och vidareexport av gas alltjämt är omöjligt att fullgöra avtalet (skiljedomen s. 58). Där är alltså det aktuella påståendet från Naftogaz mera fullständigt återgivet.

Den avgörande frågan är dock inte hur Naftogaz grund har återgetts i skiljedomen, utan om omständigheten har beaktats och bedömts av skiljenämnden eller om skiljenämnden har förbisett grunden vid sin bedömning. För att avgöra den frågan måste beaktas vad som i övrigt har avhandlats i avsnitt 10.2 i skiljedomen.

Till en början kan noteras att skiljenämnden återgett att IUGAS vid utvecklingen av sin talan har argumenterat kring exportregleringen av gas av både ukrainskt och icke-ukrainskt ursprung (skiljedomen s. 69 f.).

Vidare har skiljenämnden vid sin redovisning av bevisningen i det här avsnittet behandlat export av både ukrainsk och importerad gas. Exempelvis anges att Tatyana Slipachuk har anfört att Naftogaz med början år 2006 har varit kontinuerligt förbjudet att vidareexportera importerad gas av bland annat turkmeniskt, kazakiskt eller uzbekiskt ursprung. Vidare redovisas att Olexander Martinenko har anfört att ukrainsk lagstiftning inte uppställer ett förbud mot vidareexport av gas utan snarare etablerar en särskild rättslig reglering för sådan vidareexport. Skiljenämnden redogör också för en skrivelse från den ukrainska handelskammaren som bland annat anger att Naftogaz med början i januari 2006 fram till nu har varit förhindrat att vidareexportera gas av turkmenisk och/eller kazakiskt och/eller uzbekiskt ursprung. Slutligen nämns en skrivelse från det ukrainska Ekonomidepartementet enligt vilken gas från Ryssland, Kazakstan, Uzbekistan och Turkmenistan inte får exporteras utanför Ukrainas gränser. Det framgår därmed att skiljenämnden ansåg det relevant att i detta avsnitt redogöra för bevisning kring exportförbud av centralasiatisk gas, vilket knappast hade varit fallet om nämnden inte hade uppfattat att Naftogaz gjorde gällande att ukrainsk rätt förbjöd export av sådan gas.

När det så gäller skiljenämndens egna slutsatser i den här frågan kommer skiljenämnden vid sin bedömning in på vidareexportförbudet i trepartsavtalet på s. 74, fjärde stycket, i domen. I det efterföljande femte stycket diskuteras hur de bestämmelserna har införlivats med ukrainsk lagstiftning, varvid betydelsen av resolution nr 163 behandlas. Skiljenämnden anger bland annat att den resolutionen inte var ett självständigt regelverk som hindrade Naftogaz från att vidareexportera gas och drar sedan slutsatsen att resolutionen förlorade sin verkan när trepartsavtalet upphörde att gälla. Enligt hovrättens mening är det därigenom tydligt att skiljenämnden har bedömt påståendet att Naftogaz till följd av lagstiftningen i Ukraina varit förhindrat att leverera gas av centralasiatiskt ursprung till IUGAS. Skiljenämnden konstaterar på s. 75 i domen att även om Naftogaz åtminstone tillfälligt var förhindrat att leverera (i den engelska versionen *prevented from exporting*) den mängd gas som krävdes för att

fullgöra avtalet, så berodde inte detta på något permanent förbud i ukrainsk rätt utan snarare på bristande tillgång på gas. Detta uttalande omfattar enligt hovrättens uppfattning frågan om förbud i ukrainsk rätt mot export av såväl ukrainsk som centralasiatisk gas.

Naftogaz har i detta sammanhang argumenterat kring slutsatsen på s. 76 i skiljedomen, där det i den svenska översättningen anges att nämnden sammanfattningsvis anser att Naftogaz varit klart förhindrat av lagstiftningen i Ukraina, men att Naftogaz icke desto mindre kan ha haft vissa möjligheter att exportera gas för att fullgöra avtalet. Enligt Naftogaz framstår skiljenämndens uttalande som motsägelsefullt och tyder på att skiljenämnden bara prövat exportförbudet avseende gas av ukrainskt ursprung. IUGAS uppfattning är att skiljenämnden inte har funnit att Naftogaz är klart förhindrat att leverera gas, utan att nämndens slutsats är att det trots betydande lagstiftningsbegränsningar funnits vissa möjligheter att exportera gas för att fullgöra avtalet.

Hovrätten vill här framhålla att språket i skiljeförfarandet är engelska och att den svenska versionen av skiljedomen alltså är en översättning. Den engelska originaltexten i den här delen lyder: "*In conclusion, the Tribunal considers that Naftogaz was clearly prejudiced by the legislation of Ukraine but may nevertheless have had some possibilities to export gas for the fulfilment of the Contract"*. Det kan noteras att ordet ”prejudiced” också förekommer i meningen *”The Tribunal finds it obvious that Naftogaz´s situation was dramatically prejudiced by the TPA”* på s. 66 i skiljedomen, som i den svenska versionen har översatts med ”Nämnden finner det uppenbart att Naftogaz situation kraftigt påverkades av TPA” (TPA står för trepartsavtalet).

Hovrätten uppfattar att skiljenämndens uttalande om lagstiftningen på s. 76 går ut på att lagstiftningen i Ukraina tydligt påverkade Naftogaz möjligheter att exportera gas (i negativ riktning), men att vissa sådana möjligheter ändå fanns. Enligt hovrätten ger uttalandet inget stöd för att nämnden bara har prövat exportförbudet avseende gas av ukrainskt ursprung, utan det får uppfattas så att det syftar på den ukrainska lagstiftningen avseende export av all sorts gas som omfattas av avtalet.

Naftogaz har också hävdat att skiljenämnden har underlåtit att beakta påståendet om ett rättsligt förbud mot export av centralasiatisk gas vid sin prövning av om fullgörelse av gasleveransavtalet strider mot ordre public i Ukraina, vilket enligt Naftogaz påverkat utgången även i den delen. Frågan om fullgörelse av gasleveransavtalet strider mot ordre public i Ukraina behandlas i avsnitt 13 i skiljedomen. Vid bedömningen där hänvisar skiljenämnden tillbaka till sin tidigare slutsats i avsnitt 10.2 att Naftogaz inte är förhindrat att fullgöra avtalet på grund av den ukrainska lagstiftningen. Som framgår ovan har hovrätten funnit att prövningen i avsnitt 10 innefattar Naftogaz påstående om ett rättsligt förbud mot export av centralasiatisk gas. Det innebär att den omständigheten måste anses beaktad även vid skiljenämndens bedömning av ordre public-frågan. Skiljenämnden har dessutom anfört att under alla förhållanden skulle en dom som ålägger Naftogaz att fullgöra avtalet inte strida mot ukrainsk ordre public.

Hovrättens slutsats är att skiljenämnden har prövat påståendet att Naftogaz till följd av lagstiftningen i Ukraina varit förhindrat att leverera gas av centralasiatiskt ursprung till IUGAS. Något handläggningsfel har alltså inte begåtts i detta hänseende. Det kan därmed inte heller vara fråga om något uppdragsöverskridande.

Sammanfattning av utgången i målet i sak

Skiljedomen är inte uppenbart oförenlig med grunderna för den svenska rättsordningen. Det finns därför inte skäl att förklara skiljedomen ogiltig. Skiljenämnden har inte underlåtit att pröva påståendet att Naftogaz till följd av lagstiftningen i Ukraina varit förhindrat att leverera gas av centralasiatiskt ursprung till IUGAS. Det har därmed inte förekommit något handläggningsfel eller uppdragsöverskridande som ger anledning att upphäva skiljedomen. Naftogaz talan ska därför avslås i sin helhet.

Rättegångskostnader

Med den här utgången i målet ska Naftogaz ersätta IUGAS för dess rättegångskostnad i hovrätten. Naftogaz har godtagit det begärda beloppet.

ÖVERKLAGANDE

Enligt 43 § andra stycket LSF får hovrättens dom överklagas endast om hovrätten anser att det är av vikt för ledning av rättstillämpningen att ett överklagande prövas av Högsta domstolen. Hovrätten anser inte att det finns sådant skäl i detta fall och tillåter inte att domen överklagas.

I avgörandet har deltagit hovrättslagmannen Cecilia Renfors samt hovrättsråden Måns Edling och Ulrika Stenbeck Gustavson, referent. Enhälligt.

Bilaga 2

THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE
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SEPARATE AWARD

Rendered in Stockholm on 19 October 2010
in the arbitration V 007/2008

pursuant to the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce

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FACTUAL BACKGROUND

1. Introduction

IUGAS was established on 16 December 2003 as a part of the Italian F.I.S.I. Group, an integrated group of companies engaged in the Italian and foreign energy markets. By way of example, companies of the F.I.S.I. group explore energy resources worldwide, own and control grid systems, manage gas pipelines and supply industrial and regional end consumers with energy.

Two companies of the F.I.S.I. Group hold respectively 50% of the shares in IUGAS, the Panamanian company PGE Energy S.A. and the Italian company SPEIA.

The first company, PGE Energy S.A. is a wholly owned subsidiary of P.G. Energy Italia S.r.l. PG Energy Italia is also engaged in various activities on the oil and gas market. One of these activities is the organization of Eastern European gas supplies to Italy. SPEIA has its main activity in shipping gas through the Austrian and Italian pipeline system and subsequent sale to Italian end consumers.

National Joint-Stock Company Naftogaz of Ukraine (Naftogaz) was established in 1998 and is a joint-stock company incorporated under the laws of Ukraine. 100 % of its shares are owned by the Ukrainian state. Naftogaz is the leading company in the oil and gas industry in Ukraine. Naftogaz and its subsidiaries and affiliates produce, import, transfer and trade oil and natural gas, process gas and condensate and distribute oil products.

Naftogaz is one of the biggest companies in Ukraine. Naftogaz produces 1/8th of the gross domestic product of Ukraine. Naftogaz has a total of 170,000 employees, which constitutes approximately 1 % of the workforce of Ukraine.

2. The Contract

On 24 December 2003, Naftogaz and IUGAS entered into a contract with the heading "Natural Gas Supply Agreement from 2004 to 2013" (in the following referred to as "the Contract"). In the Contract, Naftogaz is referred to as "the Seller" and IUGAS is referred to as "the Buyer".

The Contract reads, inter alia, as follows:

Article 1 Agreed Terms[1]

The terms used in this Agreement shall have the following meanings:

1.1. "Natural Gas" or "Gas" means any hydrocarbon or a mixture of hydrocarbons containing mostly methane and incombustible gases in a gaseous state, extracted from the Earth's crust in their natural condition, together with liquid hydrocarbons or separately, and processed for pipeline transportation.

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1.11. "Transfer and Acceptance Site" means a reception point at the Ukraine – the Slovak Republic border in the area of Velke Kapusany gas measurement station (GMS), Slovak Republic, where the pipeline supplying natural gas under this Agreement crosses the border. Natural gas quantity and quality measurements taken at Velke Kapusany GMS are effective at the Transfer and Acceptance Site.

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Article 2. Scope of the Agreement. Delivery Volumes

2.1. Pursuant to this Agreement, from January 1, 2004, to December 31, 2013, inclusive, the Seller shall transfer, and the Buyer shall accept under the DAF terms, the Ukraine – the Slovak Republic border, Transfer and Acceptance Point in the area of Velke Kapusany Gas Measurement Station (GMS), Slovak Republic, the natural gas of Turkmen origin and/or Kazakhstan origin and/or Uzbek origin and/or Ukrainian origin in the amount of up to 13,000,000,000 (Thirteen Billion) cubic meters and pays for it under the terms set forth herein.

2.2. Annual volume of natural gas delivered each year under the terms of this Agreement shall be up to 1,300,000,000 (One Billion Three Hundred Million) cubic meters.

2.3. The Parties have agreed upon the following quarterly schedule of yearly delivery volumes (in million cubic meters):

Quarter 1 Up to 325
Quarter 2 Up to 325
Quarter 3 Up to 325

[1] The original contract is in Russian. There is no agreement between the parties on the translation of the contract in its entirety. This translation has been submitted by IUGAS as exhibit C1.

Quarter 4 Up to 325

2.4. Monthly delivery volume shall be determined on the basis of a written request by the Buyer, which the Buyer shall send to the Seller no later than five days prior to the delivery month.

Article 3. Quality

3.1. The quality of natural gas transferred by the Seller at the Transfer and Acceptance Point shall meet the following standards of quality:

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3.2. The Seller shall provide the Buyer with a certificate confirming the quality of gas and specifying physical and chemical parameters at Velke Kapusany GMS no later than 5 (five) calendar days within the end of a gas delivery month.

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Article 4. Transfer and Acceptance of Gas

4.1. Natural gas is transferred and accepted at the border of Ukraine and the Slovak Republic, in the area of Velke Kapusany GMS Transfer and Acceptance Point. The document proof of gas delivery shall be the Deed of Gas Transfer and Acceptance signed by a representative of the Seller's gas transportation company and a representative of the Buyer's gas transportation company within five days of the end of the delivery month.

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4.5. Title to gas shall be passed to the Buyer on the DAF terms, Ukraine and the Slovak Republic border. After the title is passed, the Buyer shall bear all risks and assume all responsibility related to gas title.

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4.9. The Seller shall provide customs clearance for natural gas in accordance with the Ukrainian customs laws.

4.10. The total gas delivery volume may be modified by mutual consent of the Parties. Specific monthly delivery volumes may be modified during the term of this Agreement. Three days before the beginning of the month, as specified in Clause 1.12, the Parties shall agree upon the delivery volumes for the following month and sign corresponding additional agreements hereto.

4.11. The Parties agree to promptly resolve any issues regarding changes in delivery volumes due to unforeseen circumstances, such as pipeline accidents, acts of God, and disasters.

Article 5. Gas Price and Payment Terms

5.1. The price of natural gas delivered by the Seller and accepted by the Buyer under the terms set forth herein shall be specified in Appendix No. 1 hereto, which constitutes an integral part hereof.

5.2. [This translation has been agreed upon between the parties]
In the event of a significant change in the price for gas on the European market, the Parties shall agree on a mechanism for changing and on the amount of the price for gas by signing the corresponding additional agreement.

5.3. Payments for natural gas delivered by the Seller to the Buyer shall be made in US dollars by wire transfer to the Seller's bank account specified in Article 11 hereof no later than within 30 days of the end of the delivery month based on the commercial Deed of Gas Transfer and Acceptance executed in accordance with Clause 4.6 hereof and the invoices issued by the Seller to the Buyer. Any bank fees for the transfer of funds to the Seller's bank account shall be borne by the Buyer.

Article 6. Liability of the Parties

6.1. The Parties shall be liable for fulfilment of their obligations hereunder. In the event of non-fulfilment of its obligations hereunder, each Party shall indemnify the other Party for direct damages caused by such non-fulfilment.

6.2. In the event that the amount of natural gas delivered is less than the amount specified in the Buyer's request (Clause 2.4 hereof), the Seller shall first make an additional delivery of under-delivered amount in addition to the amount scheduled for delivery in the following month. If the Seller fails to make the additional delivery and the amount of under-delivery exceeds 5% of the amount specified in the Buyer's request, the Seller shall pay to the Buyer a penalty of 20% of the cost of amount exceeding 5% of the under-delivered gas amount.

6.3. In the event that the Buyer fails to accept the agreed amount of gas and such failure is not caused by the poor quality of gas, the Buyer shall first accept the remaining amount in addition to the amount of gas scheduled for acceptance in the following month. If the Buyer fails to accept the remaining

amount and such remaining amount exceeds 5% of the agreed amount of gas, the Buyer shall pay to the Seller a penalty of 20% of the cost of amount exceeding 5% of the non-accepted gas.

6.4. In the event that the quality of gas does not meet the requirements specified in Article 3 hereof, the Seller shall reimburse the Buyer for documented expenses related to improvement of the quality of gas.

6.5. In the event that the Buyer fails to sign a commercial Deed of Gas Transfer and Acceptance in a timely manner, the Buyer shall pay to the Seller for every day of delay a penalty in the amount of 0.05% of the cost of supplied gas. If the Buyer fails to make timely payments under this Agreement, the Buyer shall pay to the Seller for every day of delay a penalty in the amount of 0.03% of the late payment for the 90 first days and 0.3% thereafter.

6.6. If any Party illegally discloses any information about the content of this Agreement, such Party shall indemnify the other Party for documented losses caused by such disclosure.

Article 7. Force Majeure

7.1. The Parties shall not be liable for any delay or non-performance of their obligations under this Agreement arising from a force majeure event, such as fire, flood, earthquake, other acts of God, war and hostilities, blockade, and gas main accidents, which is beyond the Parties' control and directly affects the execution of this Agreement and which could not have been prevented by reasonable efforts of the Parties. The effects of a force majeure event must be confirmed within two weeks of its occurrence by a Chamber of Commerce in the country where such force majeure event has occurred.

7.2. Upon the occurrence of a force majeure event, the Party affected by such event shall notify the other Party in writing and within three calendar days of the occurrence of a force majeure event and specify the details and potential duration of such event.

7.3. If the affected Party fails to notify the other Party of the force majeure event, the affected Party shall not have the right to invoke force majeure thereafter to waive its obligations under this Agreement.

7.4. The term of the Parties' obligations hereunder shall be extended for the duration of force majeure event.

7.5. Any force majeure event shall not be considered as grounds for the Buyer's non-payment for natural gas delivered by the Seller prior to the occurrence of such event.

Article 8. Dispute Settlement

8.1. Any and all disputes or controversies arising out of this Agreement or in connection with its interpretation and applicability shall be settled through negotiations and consultations.

8.2. If a dispute or controversy is not settled through negotiations and consultations within 30 (thirty) days of its occurrence, such dispute or controversy shall be settled by the Arbitration Institute of the Stockholm Chamber of Commerce. The arbitration proceedings are held in English or any other language of the Agreement under the material laws of Sweden. The proceedings are held in Stockholm, Sweden.

8.3. Arbitration shall consist of three arbitrators, and each Party shall appoint one arbitrator. The arbitrators appointed by the Parties shall appoint a third arbitrator acting as the presiding arbitrator.

8.4. If within 30 (thirty) calendar days of receipt of notification on arbitrator appointment by any Party, the other Party fails to notify the first Party of arbitrator appointment, the first Party has the right to request a competent authority, separately determined by the Parties, to appoint another arbitrator.

8.5. If within 30 (thirty) days of appointment of the other arbitrator the two arbitrators fail to appoint the presiding arbitrator, the latter shall be appointed by a competent authority in the manner specified for appointment of an arbitrator.

8.6. In the event of death or resignation of an arbitrator, or their inability to perform their duties for any other reason, the arbitrator shall be challenged or replaced under the procedure established by the Arbitration Institute of the Stockholm Chamber of Commerce.

8.7. The decision made by the Arbitration Institute of the Stockholm Chamber of Commerce shall be considered final and binding upon the Parties.

8.8. Clauses 8.2 to 8.7 hereof shall be binding upon the Parties and their respective representatives and assignees and shall remain valid,

notwithstanding the expiration of the term of this Agreement or termination hereof.

Article 9. Miscellaneous

9.1. The Seller shall, upon written request of the Buyer, provide the Buyer with a certificate of origin for gas (CT-1) certified by the Ukrainian Chamber of Commerce and Industry for the agreed amount of gas under this Agreement within the first month of each delivery year.

9.2. Taking into consideration the confidentiality of this Agreement, the Parties shall take measures to ensure that the content of this Agreement is not disclosed to third parties.

9.3. The Parties shall notify each other of any change of legal address, telephone, or fax, within five days.

9.4. Neither Party may transfer its rights and obligations under this Agreement to any third party without written consent of the other Party.

9.5. Any relations between the Parties that are not governed by this Agreement may be established by any additional agreements made by and between the Parties. Any amendments or additions hereto shall be executed in writing and signed by authorized representatives of the Seller and the Buyer.

9.6. Any additions, additional agreements or appendices hereto that are duly signed by the Parties and transmitted via fax shall be considered valid if confirmed thereafter by respective originals within the term agreed by the Parties.

9.7. This Agreement is governed by the material laws of Sweden.

9.8. The invalidity or unenforceability of any provision of this Agreement shall not affect the validity of remaining provisions hereof. In the event that any provision hereof becomes invalid or unenforceable, the Parties shall agree to replace the invalid or unenforceable provision with a new provision that most closely approximates the economic effect and intent of the invalid or unenforceable provision.

9.9. In the event of any reorganization and/or merger and/or any other changes in the legal or organizational status of any Party, which results in the

transfer of rights and obligations hereunder to another entity, such Party shall duly execute the succession process.

9.10. This Agreement may be terminated upon agreement of the Parties by signing a respective additional agreement hereto.

Article 10. Term of the Agreement

10.1. This Agreement becomes valid upon its signing, as well as the signing of Appendix No. 1 hereto, by authorized representatives and shall remain valid, with respect to gas supply, until December 31, 2013, and with respect to payments – until fulfilment in their entirety.

10.2. Expiration of the term of this Agreement shall not result in cancellation of any obligations of the Parties hereunder. Any Party that has duly performed its obligations has the right to request that the other Party performs its obligations hereunder in their entirety.

10.3. This Agreement expires after the Party have performed all their obligations hereunder. This Agreement may be renewed by the Parties signing a respective additional agreement hereto.

Article 11. Bank details of the Parties

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Appendix 1, dated December 24, 2003

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The price of 1,000 (one thousand) cubic meters of natural gas supplied by the Seller and accepted by the Buyer under Agreement NoIUG01 dated December 24, 2003 is US$110 (one hundred and ten).

The price includes all taxes, customs duties and fees, and alike expenses paid before sail at the Ukraine/Slovak Republic border in the territory of Ukraine.

This Appendix to Agreement NoIUG01 dated December 24, 2003, becomes valid upon its signing by authorized representatives and shall remain valid within the term of Agreement NoIUG01 dated December 24, 2003.

3. The Arbitration proceedings

3.1 The Arbitration Institute

IUGAS submitted a Request for Arbitration to the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Institute), dated 17 January 2008. On 28 January 2008, IUGAS appointed as its arbitrator Mr. Lars Edlund, G Grönberg Advokatbyrå AB, Stockholm.

In its Request for Arbitration, IUGAS requested the Arbitral Tribunal to declare that the Contract is valid and order Naftogaz to perform its obligations according to the Contract or, alternatively, to compensate IUGAS for losses due to non-performance of the Contract.

Naftogaz submitted an Answer to the Request for Arbitration on 5 March 2008, appointing as its arbitrator Professor emeritus Jan Ramberg. In its answer, Naftogaz denied IUGAS' requests, stating that it had no obligation to deliver gas or compensate IUGAS for the alleged losses.

On 17 March 2008, the party-appointed arbitrators appointed as Chairman of the Arbitral Tribunal Former Justice of the Supreme Court of Sweden Staffan Magnusson.

In a letter of 19 March 2008, the SCC Institute determined the advance on costs at EUR 1 018 000 and requested the Parties to pay that amount in equal shares. On 21 May 2008, the SCC Institute referred the case to the Arbitral Tribunal, stating that each party had paid half of the total advance on costs and that the final award should be made by 21 November 2008. This time has later been extended to 15 December 2010.

3.2 The Arbitral Tribunal

In a Procedural order of 28 May 2008, the Tribunal stated that, in accordance with Article 8.2 of the Contract, the language of the arbitration should be English and the venue of the proceedings should be Stockholm, Sweden. The Tribunal also stated that, according to Article 9.7, the Contract should be governed by the substantive law of Sweden.

A provisional timetable for the arbitral proceedings was established on 15 June 2008. The dates for the main hearing were originally set at 20–24 October 2008.

In the Statement of Claim dated 15 July 2008, IUGAS stated as follows:

"On behalf of IUGAS we request that the Arbitral Tribunal

1. declare that the Contract is valid and that NAFTOGAZ is obliged to deliver natural gas to IUGAS according to the terms of the Contract,

2. order NAFTOGAZ to deliver to IUGAS natural gas of Turkmen origin and/or Kazakh origin and/or Uzbek origin and/or Ukrainian origin meeting the agreed quality terms in the quantity of 1,312,780,000 m3 at the border of Ukraine/Slovak Republic (Velke Kapusany), in the vicinity of the gas measuring station (GMS) Velke Kapusany (Slovak Republic) on agreed delivery terms and against payment of US$ 110 per 1,000 cubic meters and

3. order NAFTOGAZ to pay to IUGAS a penalty in the amount of US$ 80,733,087.61 plus interests at a rate corresponding to the Swedish official reference rate plus eight percent per annum, from the date on which the respective fines became due, until full payment has been made."

Naftogaz denied this request and stated in its Statement of Defence on 15 September 2008, as follows:

"Naftogaz requests the Arbitral Tribunal to:

1. reject IUGAS' claims in their entirety;

2. declare that the Contract is not valid and that no rights or obligations exist under the Contract;

3. order IUGAS to pay Naftogaz's costs of defending this arbitration, including reasonable attorney's fees;

4. order that, as between the parties, IUGAS shall assume final responsibility for the remuneration and costs of the Tribunal and the SCC Institute; and

5. order IUGAS to pay Naftogaz accrued interest on any amount awarded as of the date of the award."

In early June 2009, the Tribunal, with the agreement of the Parties and the SCC Institute, appointed Ms. Charlotta Sundman as secretary in the arbitration case.

The Parties have, in addition to a Statement of Claim and a Statement of Defence, submitted statements referred to as C2–C6 and R2–R7. The Parties

have also submitted written evidence, including witness statements and expert opinions.

In a submission dated 29 May 2009, Naftogaz requested the Tribunal to declare that the arbitration agreement contained in the Contract is invalid and that the Tribunal has no jurisdiction to determine the dispute. Naftogaz stated, inter alia, that it had previously, starting on 8 February 2008, reserved its rights to contest that the arbitrators had jurisdiction.

In a Response to Naftogaz' request, IUGAS on 2 June 2009 requested the Tribunal to immediately dismiss the jurisdictional objection as time barred according to Section 5 (1) (i) of the Rules of the SCC Institute (the SCC Rules), which provides that any objection concerning the existence, validity or applicability of the arbitration agreement must be raised not later than in the submission of the Statement of Defence.

In a submission dated 12 June 2009, Naftogaz repeated that it had previously reserved its rights to contest that the arbitrators had jurisdiction and that, as a consequence, Naftogaz was not precluded from raising the jurisdictional objection.

In a decision on 18 June 2009, the Tribunal stated as follows:

> "When considering the circumstances in the present arbitration, the Tribunal finds that Naftogaz has made reservations in such a manner that the jurisdictional objection is not time barred. IUGAS' request shall, thus, be rejected. The issue concerning the Tribunal's jurisdiction will be further dealt with in the final arbitral award."

In a letter of 18 September 2009, the Parties stated:

> "The development of this dispute has caused the parties to discuss and agree on bifurcation such that all questions relating to whether the contract dated 24 December 2003 between Naftogaz and IUGAS ("the Contract") is valid and effective and whether the Arbitral Tribunal has jurisdiction to adjudicate the dispute, whether Naftogaz is obliged to deliver gas and whether Naftogaz is liable to pay penalties and/or damages under the Contract should be dealt with at the first stage. All questions related to calculations of possible penalties and/or damages (quantum issues) should be dealt with at the second and final stage.
>
> As a result, IUGAS and Naftogaz jointly request that the Arbitral Tribunal issue a procedural order for bifurcation of these proceedings into two separate

stages, where the first stage will result in a separate award (an interlocutory award) followed by a final award.

Thus, in a separate award, the Arbitral Tribunal shall determine

1. whether the Contract is valid and effective and whether the Arbitral Tribunal has jurisdiction to adjudicate the dispute submitted to the Arbitral Tribunal;

2. if the Arbitral Tribunal finds that the Contract is valid and effective and that the Arbitral Tribunal has jurisdiction, whether Naftogaz is obliged to deliver natural gas to IUGAS according to the terms of the Contract or otherwise;

3. if the Arbitral Tribunal finds that the Contract is valid and effective and that Naftogaz is obliged to deliver natural gas to IUGAS, whether Naftogaz is obliged to pay to IUGAS a contractual penalty pursuant to Clause 6.2 of the Contract, in its entirety or adjusted, for non-deliveries in the period 1 June 2007 and until the date of which a final award is rendered;

4. if the Arbitral Tribunal finds that the Contract is valid and effective,

    a) whether Naftogaz is liable for damages, costs and/or losses arising from any breach of the Contract on the part of Naftogaz, including but not limited to alleged failure to deliver gas and/or failure to cooperate in good faith and loyal manner to secure inter alia transportation through Slovakia, and

    b) whether Naftogaz, as a result of alleged wilful misconduct or gross negligence, is obliged to compensate IUGAS for all costs and losses during the entire contract period, including loss of profit, arising out of Naftogaz' breach of contract, if any, (less any penalties awarded) or whether Naftogaz' liability would be limited to direct damages and whether such limitation to direct damages would exclude compensation for loss of profit or not.

If the Arbitral Tribunal, after having finalized the first stage of the proceedings, holds that the Contract is invalid or has ceased to exist and/or that Naftogaz is not obliged to deliver natural gas under the Contract or to pay penalties or damages to IUGAS, the proceedings shall terminate after the first stage and the Arbitral Tribunal shall render a final award.

> In the event that the Arbitral Tribunal should render a separate award wherein the Arbitral Tribunal holds that the Contract is valid and effective and that Naftogaz is obliged to deliver gas and/or pay penalties and/or damages to IUGAS, the proceedings shall continue into a second stage, whereby the Arbitral Tribunal shall determine the quantum of such penalties and/or damages, whereafter the Arbitral Tribunal shall render a final award.
>
> This joint request is submitted for the purpose of bifurcating the proceedings into two principal stages and is made without prejudice to the parties' legal positions in this arbitration including Naftogaz's objection to the Arbitral Tribunal's jurisdiction. What is stated in this request shall not be treated as terms of reference or a frame for the continued proceedings. Each Party may amend, modify or amplify its positions as if this letter had never been written."

On 1 October 2009, the Parties submitted a letter with an agreed time schedule for the continued arbitral proceedings.

The Tribunal issued a Procedural Order on 9 October 2009, stating that the arbitral proceedings should be bifurcated and awards be rendered in accordance with the Parties' agreement. The Procedural Order also included a timetable for the following proceedings, setting the dates for the final hearing to 17–21 and 24–28 May 2010. Each of the Parties was also ordered to file a Pre-Trial Statement, containing (i) the relief sought, (ii) the grounds for the relief, and (iii) a summary of the facts which, in the Party's opinion, had a particular relevance. The Pre-Trial Statements should be drafted such that they might be attached as annexes to the award.

On 10 May 2010, both Parties filed Pre-Trial Statements, pursuant to the Tribunal's order.

An oral hearing took place in Stockholm on 17–21, 24–25 and 27 May 2010. At the hearing, the following witnesses were heard:

Called by IUGAS:	Called by Naftogaz:
Dr. Andrea Miele	Mr. Oleg Zagnitko
Mr. Marco Marenco	Mr. Oleh Bordilovsky
Mr. Giuseppe Merli	Mr. Valentin Ulianov
Mr. Luigi Mannochi	Ms. Antonina Marchenko
Mr. Vladimir Mykonov	Mr. James Ball
Mr. Milos Pavlik	Mr Vadim Frolov
Professor Peter Cameron	Ms. Tatyana Slipachuk

Mr. Olexander Martinenko

Mr. Andrea Valli
Mr. Antonio Nodari
Mr. Jacques Deyirmendjian

During the hearing, Naftogaz submitted a revised version of its Pre-Trial Statement of 10 May 2010. After IUGAS had objected to the submission, the document was withdrawn. On 4 June 2010, Naftogaz submitted another revised version of the Statement dated 10 May 2010.

In a submission dated 17 June 2010, IUGAS stated, inter alia, that Naftogaz's latest version of its Pre-Trial Statement contained verbatim all the new facts that IUGAS had objected to during the hearing, as well as a new condition precedent regarding the fulfilment of Naftogaz's internal procedures. IUGAS asked the Tribunal to disregard Naftogaz's revised Pre-Trial Statement and to attach to the award to be rendered IUGAS' and Naftogaz's Pre-Trial Statements dated 10 May 2010.

On 24 June 2010 the Tribunal decided that the Pre-Trial Statements dated 10 May 2010 should be attached to the award which, in accordance with the Parties' agreement, would first be rendered. The Tribunal added that the Tribunal might take into consideration even such facts which were referred to in the Parties' previous submissions, but were not mentioned in the Pre-Trial Statements of 10 May 2010.

THE CLAIMS

In the Pre-Trial Statements of 10 May 2010, the Parties have stated as follows.

1. IUGAS

IUGAS requests that the Arbitral Tribunal

1. reject Naftogaz's relief on jurisdiction and declare that the arbitration agreement contained in the Contract is valid and that the Arbitral Tribunal has jurisdiction to determine the dispute,

2. declare that the Contract is valid and that Naftogaz is obliged to deliver natural gas to IUGAS according to the terms of the Contract,

3. declare that Naftogaz is obliged to pay IUGAS a contractual penalty according to Clause 6.2 of the Contract for non-deliveries in the period between 1 June 2007 and the day on which the final award is rendered,

4. declare that Naftogaz is liable for damages and shall compensate IUGAS for all costs and losses suffered during the entire contract period, including loss of profit, arising out of Naftogaz's breach of contract, less any penalties awarded under the penalty clause,

5. order Naftogaz to pay such damages and/or penalties at an amount to be specified later, and

6. order Naftogaz to pay all the costs of the arbitration and attorneys' and other fees and costs incurred by IUGAS in this arbitration, in accordance with Article 43 and 44 of the SCC Rules, including payment of accrued interest on any amount awarded as of the date of the award.

In a clarification of 26 May 2010, IUGAS has stated that the relief sought in the first stage of the arbitral proceedings is as follows:

The Arbitral Tribunal shall rule that:

1. the Contract is valid and effective and that the Arbitral Tribunal has jurisdiction to adjudicate the dispute submitted to the Arbitral Tribunal;

2. Naftogaz is obliged to deliver natural gas to IUGAS according to the terms of the Contract:

3. Naftogaz is obliged to pay to IUGAS a contractual penalty pursuant to Clause 6.2 of the Contract for non-deliveries in the period 1 June 2007 and until the date at which a final award is rendered;

4. Naftogaz is liable for damages, costs and/or losses arising from any breach of the Contract on the part of Naftogaz including but not limited to failure to deliver gas and/or failure to cooperate in good faith and a loyal manner to secure inter alia transportation through Slovakia.

2. Naftogaz

Naftogaz requests the Arbitral Tribunal to:

1. declare that it lacks jurisdiction to try this dispute;

2. declare that the Contract is not valid and that no rights and obligations exist under the Contract;

3. declare that Naftogaz is not in breach of any contractual obligation under the Contract;

4. reject IUGAS' claims in their entirety;

5. order IUGAS to pay Naftogaz's costs of defence in this arbitration, including reasonable attorney fees;

6. order that, between the Parties, IUGAS shall assume final responsibility for the remuneration and costs of the Arbitral Tribunal and the SCC Institute; and

7. order IUGAS to pay Naftogaz accrued interest on any amount awarded as of the date of the award.

GROUNDS FOR THE RELIEF SOUGHT BY THE PARTIES

The main grounds invoked for the claims and defences of the Parties are contained in their respective Pre-Trial Statements, which are attached as Annexes 1 and 2 to this Award. During the oral hearing, the grounds relied on were further elaborated in the Parties' Closing Statements.

1. Grounds relied on by IUGAS

The Contract, including the arbitration agreement contained therein, was executed on 24 December 2003 by authorized representatives of both parties and constitutes a valid and binding agreement under Swedish law.

IUGAS has requested Naftogaz to deliver gas starting 1 June 2007. Naftogaz has not delivered any gas despite IUGAS' delivery requests.

Naftogaz is therefore obliged to deliver gas according to the terms of the Contract. Naftogaz is also obliged to pay contractual penalties for non-deliveries in the period between 1 June 2007 and the date on which the final Award is rendered.

Naftogaz is, further, liable for all damages, including but not limited to lost profits, suffered during the entire contract period up until 31 December 2013 as a consequence of Naftogaz's breaches of contract beginning in early 2004, less any penalties awarded by the Tribunal.

Naftogaz's breaches of contract consist of

(1) failure to deliver gas upon request,

(2) failure to cooperate and ensure transmission capacity in the Ukranian pipeline system, which includes preventing IUGAS from both concluding a gas transmission contract for maximum volumes under the Contract and issuing delivery requests to Naftogaz for maximum volumes under the Contract,

(3) failure to protect the Contract under the Tripartite Agreement and subsequent agreements,

(4) failure to protect the Contract under Ukranian export licensing regime under which Naftogaz has dominant influence,

(5) failure to ensure performance of the Contract through acquisition of gas on the international gas market,

(6) failure to renegotiate in a loyal manner the original price agreed in the Contract despite good faith offers from IUGAS' side, and

(7) failure to react in good faith and provide proper responses to IUGAS' many offers to realize the Contract.

All Naftogaz's objections are without merit.

2. Grounds relied on by Naftogaz

III.A. The Arbitral Tribunal lacks jurisdiction to adjudicate the present dispute.

B. The Contract is not a binding contract for the sale of goods but an "agreement to agree", which excludes application of United Nations Convention on Contracts for the International Sale of Goods (CISG).

C. The Contract did not become effective and is not valid.

1. Conditions precedent were never fulfilled.

2. Presupposed conditions were never fulfilled.

D. The Contract ceased to exist.

E. IUGAS did not give timely notice of alleged breach of contract.

F. IUGAS failed to purchase substitute gas and is therefore prevented from claiming penalties and damages under the Contract, had the Contract been valid.

G. Performance under the Contract was impossible, and the impossibility to perform remains.

H. Naftogaz is not obliged to perform the Contract and is not liable for any failure to perform the Contract.

I. The long-term impediments relieve Naftogaz of its obligations and prevent IUGAS from requesting performance of the Contract.

J. Hardship and the provisions of Section 36 of the Swedish Contracts Act should lead to the setting aside of the Contract in its entirety or, in the alternative, relieve Naftogaz of its obligations under the Contract.

K. Significantly changed circumstances relieve the Parties from their obligations under the Contract.

L. Performance of the Contract would violate public policy.

M. Performance of the Contract requires the Parties to agree on the price for gas and quantities to be delivered.

N. Naftogaz is only obliged to deliver such quantities of gas which IUGAS has capacity to accept and which IUGAS requested.

Naftogaz has also, as regards IUGAS' claims for penalties and damages, stated as follows.

IV.A. Naftogaz should not pay penalties under Article 6.2 of the Contract.

B. IUGAS failed to give timely notice regarding Naftogaz's alleged failure to deliver gas.

C. The penalty clause is unreasonable and should be set aside.

D. IUGAS' delivery requests do not trigger a penalty clause.

1. Article 6.2 of the Contract is not applicable.

2. Agreement on price is necessary.

3. Agreement on delivery volumes is necessary.

4. Penalties are not due to IUGAS for maximum volumes under the Contract or from June 2007.

E. Naftogaz is not liable to pay damages, costs or losses.

F. Penalties and damages should in any case be reduced by 60 %.

REASONS FOR THE AWARD

1. Introduction

The Tribunal will first deal with Naftogaz's objection that the Tribunal lacks jurisdiction to adjudicate this dispute. The Tribunal will then discuss the character of the Contract.

Thereafter, the Tribunal will consider the different grounds which, as alleged by Naftogaz, lead to the invalidity of the Contract, inter alia non-fulfilment of conditions precedent and presupposed conditions. In case the Contract is to be

regarded as valid, the Tribunal will turn to the other objections raised by Naftogaz.

In subsequent sections, the Tribunal will discuss whether Naftogaz is liable to deliver gas under the Contract and to pay contractual penalties and damages, as claimed by IUGAS.

The accounts of the Parties' statements are mainly based on what has been said in their Pre-Trial Statements (as far as Naftogaz is concerned, the Pre-Trial Statement dated 10 May 2010).

The parties have raised a great number of arguments and adduced a large mass of evidence, both written and oral. If a particular submission, argument, document or fact is not expressly mentioned or dealt with in this Award, it does not mean that it has not been carefully considered by the Tribunal.

2. The Tribunal's Jurisdiction
(Naftogaz's item III:A)

2.1 Statements by the Parties

Naftogaz

The presupposed conditions to the Contract were never fulfilled due to circumstances beyond Naftogaz's control. For this reason, the Contract never became effective and was invalid *ab initio*. As a consequence, the arbitration agreement contained in the Contract is also invalid.

In the above circumstances, the Tribunal lacks jurisdiction to determine the dispute referred to the Tribunal. Therefore, the claims submitted by IUGAS shall be dismissed for lack of jurisdiction.

IUGAS

The Tribunal has jurisdiction following the arbitration clause.

2.2 The Tribunal's Conclusions

Where an arbitration clause is incorporated in a contract, it is a generally accepted principle that the arbitration clause shall be considered as a separate

agreement (the doctrine of separability). Therefore, an allegation that the contract is invalid does not affect the validity of the arbitration clause as such. In other words, the validity of the arbitration clause does not depend on whether other parts of the contract are binding.

The principle of separability is explicitly reflected in a provision in the Swedish Arbitration Act (Section 3).

In the Tribunal's opinion, there are no circumstances giving cause for a deviation from the said principle in the present case.

Thus, the Tribunal is authorized to decide whether the Contract is valid and, if so, adjudicate disputes and controversies arising out of the Contract or in connection with its interpretation and applicability (Article 8.2 of the Contract).

3. The Character of the Contract
(Naftogaz's item III:B)

3.1 Statements by the Parties

Naftogaz

It follows from, inter alia, Article 4.10 of the Contract that it is not a binding contract for the sale of goods but an "agreement to agree", which excludes application of CISG. Even if the Contract was not initially an "agreement to agree", it subsequently became such an agreement due to the substantial change in gas prices obliging the Parties to sign a "corresponding additional agreement". If the Contract is not an "agreement to agree", the Tribunal should conclude that it is a call/option agreement, providing for no obligation for IUGAS to purchase gas. Even then, CISG does not apply.

IUGAS

The provisions of the Contract provide a clearly defined set of rules and create obligations between both parties to perform the Contract. Consequently, CISG is applicable.

3.2 The Tribunal's Conclusions

Pursuant to Article 9.7 of the Contract, the Contract shall be governed by the material laws of Sweden. Since CISG is part of Swedish law, the provisions of CISG shall be applicable, provided that the basic prerequisites in CISG are fulfilled.

It is undisputed that the Parties have their principal places of business in different states and that the states are Contracting States. The question is whether the present Contract shall be considered as a contract on sale of goods.

Article 2.1 of the Contract stipulates that, during the period 1 January 2004–31 December 2013, "the Seller shall transfer and the Buyer shall accept" certain kinds of natural gas in the amount of up to 13,000.000,000 (thirteen billion) cubic meters and pay for it under the terms set forth in the Contract. Annual volume of natural gas delivered each year should be up to 1,300,000,000 cubic meters (Article 2.2). Further, as stated in Article 2.3, the parties have agreed upon a quarterly schedule of yearly delivery volumes, meaning that a volume up to 325 million cubic meters should be delivered each quarter. Monthly delivery volume shall be determined on the basis of a written request by the Buyer, which he Buyer shall send to the Seller no later than five days prior to the delivery month (Article 2.4)

There is also reason to mention Article 4.10, which states that the total gas delivery volume may be modified by mutual consent by the parties and that specific monthly delivery volumes might be modified during the term of the Contract. As further stated in this Article, the parties shall, three days before the beginning of the month, agree upon the delivery volumes for the following months and sign corresponding additional agreements hereto.

The price of the gas was fixed at USD 110 per 1,000 cubic meter (Article 5.1 and Annex 1 to the Contract). However, in the event of a significant change in the price for gas on the European market, the parties shall "agree on a mechanism for changing and on the amount of the price for gas by signing the corresponding additional agreement" (Article 5.2).

It follows from Articles 2.1–2.4 that deliveries of gas shall be performed on the initiative of IUGAS. Deliveries shall, thus, take place only after IUGAS has sent a written request to Naftogaz. After having requested delivery, IUGAS is obliged to accept what has been requested. The Contract does not, however, impose a duty on IUGAS to request certain amounts of gas. It should be noted that, according to Article 2.1, the Contract concerns a total amount of "up to"

thirteen billion cubic meters. The same phrase, "up to", is used in the provision on quarterly deliveries in Article 2.3.

IUGAS has, thus, been accorded a far-reaching liberty to determine what volumes of gas shall be delivered. It can, however, be argued that the provision on quarterly volumes rests on the assumption that the quantities mentioned there would be appropriate. Further, IUGAS' right to determine the size of deliveries is, at least in some respects, modified by the provisions in Article 4.10.

The fact that the total volume of gas to be delivered is not clearly stated in the Contract has to be taken into consideration when assessing the character of the Contract. There is also reason to focus on the provision in Article 5.2, which obliges the Parties, in the event of a significant change in gas prices, to reach certain agreements. However, the Article does not regulate the consequences if the parties fail to reach an agreement.

The expert witness James Ball has characterized the Contract as no more than the bare bones of what might be expected from a gas sales agreement. In such agreements, the buyer, as stated by Mr. Ball, is normally required to pay for a minimum quantity of gas each year even if it does not take it ("take or pay"). In the present Contract there is no minimum quantity, and Naftogaz has, consequently, no obligation to supply unless IUGAS has nominated a monthly quantity. According to Mr. Ball, such a form of contract might be acceptable inside a joint venture system, but even then more balance would be expected.

Mr. Ball has further pointed out that the price clause in Article 5.2 has no reference to market structure and contains no mechanism to adapt the price to significant market changes.

When considering the lack of balance of the Contract, the Tribunal finds it appropriate to recall that, as testified by Mr. Andrea Miele, the Contract was drafted by Naftogaz. It was based on a model contract that Naftogaz used at that time and contains only minor modifications. Instead of the one year contract originally envisaged by the parties, the draft prepared by Naftogaz provided for a ten-year life-time.

It is further a fact that, when the Contract was signed, it was the parties' intention that the gas transactions should be handled by a joint venture created by the parties. There is reason to assume that, with such a solution, the deficiencies concerning some of the Contract clauses would, in practice, be less important.

Although the Contract is in some respects rudimentary and contains some questionable provisions, it contains nevertheless a number of other provisions which are characteristic of a sales contract. The Tribunal finds that the reasons in favour of such classification overweigh. The Contract shall therefore be regarded as a sales contract, and CISG is applicable.

4. Is the Contract invalid due to unfulfilled conditions precedent? (Naftogaz's item III:C 1)

4.1 Statements by the Parties

Naftogaz

The Contract is not valid due to unfulfilled conditions precedent. These conditions are:

(i) A positive outcome of the due diligence exercise performed by Naftogaz's counsel, the law firm Magister & Partners, to confirm that the Italian parties were capable of performing their obligations under the envisaged business model;

(ii) Formation of a company under Italian jurisdiction by the Italian parties, namely P.G.Energy Italia and SPEIA;

(iii) Acquisition of more than 50 % of the shares of the joint venture by Naftogaz;

(iv) Arrangement by the Italian parties for transit capacities through Slovakia and Austria to Italy;

(v) Obtaining by the Italian parties of Gazexport's consent for transit of gas through the measuring station Velke Kapusany;

(vi) Obtaining by the Italian parties of all the necessary permits and licenses from the regular bodies of Italy to import and sell gas on the Italian market;

(vii) Securing by the Italian parties of end customer contracts to sell gas in Italy; and

(viii) Availability of Turkmen gas.

IUGAS

The parties did not agree that the validity or effectiveness of the Contract should be subject to any conditions precedent. Also, the Contract does not contain any conditions precedent. The validity of the Contract is set forth in Article 10.1, which merely requires the signature of the parties.

All issues alleged to conditions precedent were in fact fulfilled.

4.2 The Tribunal's Conclusions

Article 10.1 of the Contract states that the Contract became valid upon signing, as well as upon signing of Appendix No. 1, concerning the price of the gas. Apart from these provisions, the Contract does not contain any conditions precedent.

It has not been proven that the parties in any other way agreed on such conditions. The Protocol on Intentions, dated 2 December 2003, describes certain undertakings by the parties. For instance, the Italian parties expressed their readiness to register a Joint-Stock Company under the jurisdiction of Italy. The Italian parties further undertook to obtain certain permits and licenses and to assign in favour of the Company their right under contracts for delivery of gas to ultimate consumers. The Ukrainian party, on its side, expressed its readiness to conclude a contract after certain conditions had been fulfilled. However, the Protocol does not stipulate that these conditions were conditions precedent.

Mr. I.P. Voronin, who signed the Contract on behalf of Naftogaz and also took part in the negotiations preceding the conclusion of the Contract, has not appeared as witness in the arbitration. However, Mr. Andrea Miele, who signed the Contract for IUGAS, has testified and also submitted a written statement. This holds also for Mr. Marco Marenco, the owner of SPEIA, who just like Mr. Miele participated in the negotiations. Both of them have stated that no conditions precedent were agreed upon.

It is also worth noting that, on 31 December 2003, Mr. Voronin sent a letter to IUGAS, in which he confirmed that Naftogaz was available to begin the supply of gas under the Contract, starting on 15 January 2004. Apparently, Mr. Voronin regarded the Contract as valid.

In view of what has now been said, the Tribunal finds that the Contract is not invalid due to non-fulfilment of any conditions precedent..

Due Diligence

The Tribunal finds it appropriate, in this context, to make some comments on item (i) in the list of alleged conditions precedent (a positive outcome of the due diligence exercise performed by the law firm Magister & Partners).

Naftogaz has stated that, in the fall of 2003, Magister initiated a due diligence exercise concerning the capabilities of the Italian parties to the envisaged business project. According to Naftogaz, Magister was not satisfied with the due diligence performed and never produced a final due diligence report.

IUGAS, on its side, has contended that the results of the due diligence proved the capability of the Italian parties to implement the project.

Mr. Zagnitko has submitted a written report and has also testified at the final oral hearing. In his opinion, the due diligence was never finalized due to the lack of information from the Italian side, and also due to inconsistencies in the minimal information provided by them. Going forward with the transaction and the joint venture would be very risky for Naftogaz and, from a legal point of view, subject to government permits and approvals preceding any final arrangements.

In the Tribunal's opinion, Mr. Zagnitko's testimony indicates that the due diligence was never finalized. However, the Tribunal needs not dwell on this issue. It is a fact that Naftogaz, without waiting for a more comprehensive report from Magister, decided to sign the Contract. As mentioned above, Naftogaz also, on 31 December 2003, confirmed the validity of the Contract.

Naftogaz's internal procedures

The Pre-Trial Statement which was submitted by Naftogaz on 4 June 2010 and which, according to the Tribunal's decision of 24 June 2010, should not be attached to the present Award, contains a list of conditions precedent, corresponding to the list now discussed in the Pre-Trial Statement of 10 May 2010. The 4 June list, however, contains an item which is not to be found in the list of 10 May. According to this item, it was a condition precedent that Naftogaz's internal procedures were completed before signing of the Contract.

Since this question was presented already in Naftogaz's Statement of Reply, dated 1 October 2009, the Tribunal will deal with it in the present context.

Naftogaz has contended that, as regards the Contract, Naftogaz did not take the usual steps in its internal organization to prepare for a long-term contract to be performed. Thus, Naftogaz did not treat the Contract as valid and enforceable.

Mr. Valentyn Ulianov, Deputy Chairman of the Management Board of Naftogaz, who has submitted a written witness statement and also been heard orally, has stated, inter alia: According to Naftogaz's internal provisions regulating the procedure of concluding contracts, a draft contract should be endorsed by various concerned departments. Without these endorsements, the contract would not be regarded as valid within Naftogaz. He attended a meeting with representatives of IUGAS in November 2006, and he had not, before this meeting, been aware of the existence of any contract with IUGAS. He did not see any "endorsement table" in the copy of the contract shown to him. He later found out that the contract was not recorded in Naftogaz's record of contracts as it should have been, had it been a true operable contract.

Mr. Oleh Bordilovskyi, Head of the Division of Customs Clearance at Naftogaz, has, like Mr. Ulianov, stated that the Contract does not contain an endorsement list and is not recorded in Naftogaz's contract register. Further, according to Mr. Bordilovskyi, the original of the Contract is missing from the Naftogaz files.

The Tribunal finds that, even if Naftogaz's internal provisions concerning endorsement and recording of contracts have been set aside, the validity of the Contract is not affected in the relation between Naftogaz and IUGAS. It is a fact that the Contract was signed by Mr. Voronin who, as far as has been shown, was authorized to do so. Further, during the numerous contacts between the parties which have taken place before the arbitration was commenced, Naftogaz never seems to have objected that the Contract was invalid, due to non-fulfilment of said internal provisions.

Consequently, the Contract shall not be regarded as invalid on the ground now discussed.

5. Is the Contract invalid because presupposed conditions were never fulfilled?
(Naftogaz's item III:C 2)

Statements by the Parties

Naftogaz

The Contract did not become effective and valid due to faulty or unfulfilled presupposed conditions. The presupposed conditions were all visible for the Parties, important for the envisaged cooperation and jointly presupposed by the Parties. The following conditions were presupposed:

(i) IUGAS should arrange transit of gas across Slovak Republic;

(ii) IUGAS should obtain the consent of Gazprom;

(iii) A valid option to purchase shares should be presented to Naftogaz;

(iv) The Joint Venture Company should be established between Naftogaz and P.G.Energy Italia or SPEIA;

(v) The Joint Venture Company should generate profits for both P.G.Energy Italia/SPEIA and Naftogaz:

(vi) Naftogaz should own IUGAS jointly with P.G.Energy Italia and SPEIA but not with a Swiss or Panamanian company;

(vii) The Italian Parties should procure authorizations for import and distribution of gas in Italy;

(viii) IUGAS should provide distribution contracts with end consumers to Naftogaz or Magister;

(ix) Naftogaz should be able to acquire/purchase gas of Turkmen origin;

(x) Gazprom should not impose on Naftogaz a ban on re-exportation of gas coming from the territory of the Russia Federation; and

(xi) Naftogaz should not be prohibited from exporting gas of Ukranian origin.

IUGAS

The alleged underlying assumptions in connection with the Contract signing were not visible and were not communicated as decisive.

The items listed by Naftogaz shall be dealt with in separate Sections below.

5.1 Alleged failure on the part of IUGAS to arrange transit capacities through Slovakia and Austria to Italy (Naftogaz's item III:C 2(i))

5.1.1 Statements by the Parties

Naftogaz

The Italian parties undertook to secure transit of gas through Slovakia and Austria. During the pre-contractual negotiations, the Italian parties assured Naftogaz that they would be able to secure transit contracts with the Slovakian transmission system operator SPP. In 2004, IUGAS produced an unsigned draft contract with SPP, in which SPP had included a condition precedent requiring Gazprom's consent for the transit contract to be valid. IUGAS failed to obtain Gazprom's consent, and SPP refused to sign the transit contract with IUGAS.

In this arbitration, IUGAS has submitted four other contracts which were actually concluded with SPP, starting from the end of 2006. None of these contracts was prepared for the purposes of the present Contract. So, for instance, the volumes to be transited under the contracts are much lower than the volumes contractually agreed with Naftogaz.

As of 2010, IUGAS does not have any transit capacity whatsoever at SPP.

IUGAS

Negotiations between IUGAS and SPP resulted in February 2004 in a draft transport contract that would have provided IUGAS with the transmission capacity necessary to completely fulfil the Contract. In light of the huge financial risk that a "ship-or-pay" contract of the envisaged size involved, SPP recommended that IUGAS request a confirmation from Gazexport that the gas could indeed be shipped through the Ukrainian pipeline system to the entry point

into SPP's pipeline system in Velke Kapusany. After Naftogaz had refused to cooperate, IUGAS had no other choice than to directly contact both Gazprom and its subsidiary Gazexport. Gazexport in turn asked for a confirmation of the Contract to be given by Naftogaz. Naftogaz, however, failed to give such confirmation. Against the background of Naftogaz's uncooperative attitude and Gazexport's still outstanding confirmation, IUGAS decided not to enter into a transmission contract for the time being.

Starting in late 2006, IUGAS and SPP concluded four transport contracts. IUGAS did not buy the whole capacity necessary for the performance of the Contract. However, once Naftogaz would have commenced delivering the gas, IUGAS would have increased the transport capacity on short notice.

5.1.2 Evidence submitted and the chain of events

The Protocol on Intentions dated 2 December 2003 is silent on the transmission issue. However, the Contract contains certain provisions on this matter. Article 2.1 states, inter alia, that the Seller should transfer the gas to the Transfer and Acceptance Point on the Ukranian/Slovak border, in the area of Velke Kapusany Gas Measurement Station (GMS), Slovak Republic. Article 4.1 contains a similar provision.

Accordingly, Naftogaz was responsible for the transmission of gas through Ukraina and to the measurement station, whereas the measurement and the transport through the Slovak pipeline system and further to Italy fell within IUGAS' sphere of responsibility.

It is uncontested that IUGAS and the transmission operator SPP initiated negotiations in the beginning of 2004. SPP was represented by Mr. Milos Pavlik and Mr. Milan Sedlacek, who have, both of them, signed written witness statements. Mr. Pavlik has also been heard orally.

According to the said witnesses, the parties in the first months of 2004 agreed on a draft contract concerning transport of gas between the Ukranian/Slovak and the Slovak/Austrian borders. The draft, which has been submitted to the Tribunal, stipulated that the contract should become effective on 1 April 2004 and be valid until 31 December 2013. IUGAS was provided an annual transport capacity of 1.32 billion cubic meters. Thus, the transport capacity needed by IUGAS under the Contract would have been satisfied.

Mr. Pavlik and Mr. Sedlacek have, in their written witness statements, confirmed that both IUGAS and SPP were ready to enter into a valid transport

contract on the basis of the draft. However, SPP recommended IUGAS to ask for an official confirmation of Gazexport that gas for IUGAS would indeed be delivered through the Ukrainian pipeline system to Velke Kapusany. The recommendation was made, since Gazexport always told SPP that it had booked the maximum available capacity in the Ukrainian pipeline system. However, according to Mr. Pavlik and Mr. Sedlacek, it would not have been a technical problem in terms of capacity, to arrange the transport of the volume agreed on with IUGAS at the measuring station or in the remaining part of the Slovak pipeline system.

In a message to IUGAS dated 12 March 2004, Mr. Pavlik informed IUGAS that the procedures of allotment of the common total gas flow through Velke Kapusany were organised by the sole gas supplier in this terminal, Gazexport Moscow, and that it was inevitable that the quantities which should be identified and allocated as a separate portion of the gas flow, were agreed upon with Gazexport. IUGAS was asked to inform SPP whether, and if so, in what way the agreement with Gazexport had been reached.

On 29 March 2004, IUGAS sent a message to Gazprom informing it about the Contract with Naftogaz. IUGAS also asked Gazprom to instruct SPP in order to enable SPP to carry out the measuring needed to separate off the amount of gas which belonged to IUGAS from the overall amount of gas arriving at the measuring station.

A similar request was sent by IUGAS directly to Gazexport on 6 April 2004. In an answer dated 9 April 2004, Gazexport asked IUGAS to provide a confirmation from Naftogaz regarding the effectiveness of the Contract.

In a letter dated 9 April 2004, IUGAS requested Naftogaz to confirm to Gazexport the effectiveness of the Contract. This letter was followed by similar letters on 14, 21, 26 and 29 April and 17 May 2004.

It is undisputed that Naftogaz never sent the requested information to Gazexport. As stated by Mr. Miele in his written testimony, Mr. Voronin, at a meeting in Kiev on 22 April 2004, declared that he would not confirm the Contract to Gazprom. He was, however, not able or willing to give any reasons for his refusal.

On 17 May 2004, Gazexport sent a letter to IUGAS, stating that currently the entire gas transmission capacity in the territory of Slovakia was used for long-term contracts of Gazprom, that the Velke Kapusany station was operated at the designed capacity and that no measuring capacity was available. The letter further stated that, under the present operating conditions, Gazprom was unable

to accept additional volumes of gas through the measuring station for subsequent transportation to Italy.

On the same day Gazprom informed Naftogaz that all capacities of the Velke Kapusany measuring station were loaded for the purpose of fulfilment of contractual obligations of Gazprom.

In a telefax of 18 May 2004, SPP informed IUGAS that the required transport capacity between Velke Kapusany and Baumgarten was available.

Mr. Marenco has stated in his written testimony that IUGAS at the end of May 2004 decided not to conclude a transmission contract for the time being. According to Mr. Marenco, this was due to the negative experience that IUGAS had just made with Naftogaz and the risk of having to pay transmission fees to SPP without being able to receive any gas from Naftogaz through the Ukrainian pipeline system.

Mr. Marenco has further stated that, in late 2006, IUGAS decided to put its money at risk and enter into a transmission contract with SPP. IUGAS decided, however, not to book the full capacity needed but only a part of it and only for a limited time in order to minimize financial losses. The first transmission contract was followed by three other contracts.

All of the contracts have been submitted to the Tribunal. They provided for the following transport capacities:

The first contract: 100,000 cubic meters per day for the period 1 December 2006–31 December 2007 and another 326,000 cubic meters per day for the period 1 January 2007–31 December 2007.

The second contract: 300,000 cubic meters per day for the period 1 October 2007–31 December 2008.

The third contract: 720,000 cubic meters per day for the period 1 January 2008–31 December 2008 and another 300,000 cubic meters per day for the period 1 October 2007–31 October 2007.

The fourth contract: 240,000 cubic meters per day for the period 1 January 2009–31 December 2009.

Mr. Pavlik and Mr. Sedlacek have testified as follows: All the contracts concluded were valid and operable. However, they covered far lesser volumes than the volumes agreed upon in 2004. If IUGAS today would ask for the

originally agreed capacities, SPP would currently only be able to offer them as interruptible capacities. However, SPP is interested in converting interruptible capacities to firm capacities as soon as possible.

The expert witness Mr. Jacques Deyirmendjian has stated, inter alia: During 2006, a drastic change occurred in the organization of the local gas industry after Slovakia and the Czech Republic had joined EU. The access rule in relation to the infrastructure changed from a "negotiated access" system to an "open access at transparent and non-discriminatory conditions". Gazprom was obliged to be pragmatic and to adapt its attitude to the new context. However, the entry point into Slovakia remained under the strict control of Gazexport, as is still the case today. IUGAS never obtained the green light of Gazexport to get gas out of the delivery point at Velke Kapusany under the Contract with Naftogaz. IUGAS did perform some smaller short term supplies through Velke Kapusany under its transit contracts with SPP, but these necessarily came from within Gazexport's sphere of influence. The Contract with Naftogaz never entered into force from an operational point of view, and there is no sign that this may change in the coming years.

5.1.3 The Tribunal's Conclusions

When considering what has been shown concerning the transmission issue, the Tribunal finds that IUGAS has made substantial efforts to fulfil its duties under the Contract. IUGAS contacted SPP shortly after the Contract had been signed, and the parties' negotiations resulted in a draft agreement. There is reason to assume that the transmission capacity needed by IUGAS, as regards the transport through Slovakia, would have been provided, had a binding contract based on the draft been concluded.

The question, then, is whether IUGAS chose the best way of action when deciding not to sign the envisaged agreement with SPP. It is true that IUGAS, in spite of repeated attempts, had not managed to obtain an official confirmation by Gazexport that gas for IUGAS would be delivered through the Ukrainian pipeline system to the measuring station at Velke Kapusany. IUGAS had also been informed that Gazprom was unable to accept additional volumes of gas through the measuring station for subsequent transport to Italy.

On the other hand, IUGAS had, more or less at the same time, got a message from SPP stating that the requested transport capacity between Velke Kapusany and Baumgarten was available. Accordingly, it can be argued that IUGAS ought to have signed the transport contract which was envisaged and at least attempted to achieve a gas transmission.

However, it should be kept in mind that, even if it had been possible to arrange a transmission of gas from the measuring station and through Slovakia, it was not clear whether and to what extent gas would have been delivered through the Ukranian pipeline system to the measuring station. Pursuant to the Contract, Naftogaz was responsible for that part of the gas transport. However, by refusing to confirm to Gazexport the effectiveness of the Contract, in spite of numerous requests by IUGAS, Naftogaz did not show a cooperative attitude.

Mr. Vadim Frolov, who has testified in his capacity as chief engineer of Ukrtransgaz in charge of transit, has confirmed that it would have been possible from a technical point of view to transit an additional 1.3 billion cubic meters of gas in the direction of Velke Kapusany in 2004 and onwards. The Tribunal finds, nevertheless, that by entering into the transport agreement with SPP, IUGAS would have run a risk of having to pay substantial transmission fees to SPP without being able to provide a sufficient amount of gas from the Ukranian pipeline system.

The Tribunal does not have to take a clear stand on the issue now discussed. There is, in any case, no reason to state that the Contract became invalid by way of IUGAS' action.

It should also be noted that IUGAS' decision to abstain from contracting with SPP was only for the time being. In 2006, IUGAS resumed the contacts with SPP and signed four transmission contracts.

Whether the purpose of the contracts concluded was to bring about transmissions under the Contract is not clear. It should, inter alia, be noted that the capacity agreed upon in the transmission contracts was lesser than the capacity needed to transport the volumes mentioned in the Contract.

However, it seems to have been possible for IUGAS, at short notice, to enter into more contracts with SPP. It should also be kept in mind that it was for IUGAS to take the initiative to request delivery under the Contract. Accordingly, IUGAS was, not obliged to constantly request the maximum quantities of gas stipulated. As regards the requests which took place in 2007 and 2008, all of them concerned far less quantities than the maximum volumes.

Very little has been said in this arbitration about the transmission of gas from Slovakia to the final destination in Italy. It is, thus, not clear whether IUGAS concluded any transit contract concerning that part of the entire transport from Ukraine. However, the Tribunal has not found any reason to assume that it would have caused any major problems to make arrangements for the said transit.

In view of what has been said above in this Section of the Award and what has else been shown, Naftogaz's allegation that the Contract became invalid because IUGAS failed to arrange transport capacities shall not be accepted.

5.2 The Consent of Gazprom
(Naftogaz's item III:C 2 (ii))

5.2.1 Statements by the Parties

Naftogaz

In the pre-contractual negotiations, Naftogaz and the Italian parties shared a clear understanding that, in order for the contemplated business model to come into being, Gazprom's consent would have been required. In 2003 and 2004, Gazexport effectively dominated the exit points from the Ukrainian gas transportation system to Slovakia. No allocation of gas among the companies transiting gas through Velke Kapusany was possible without Gazexport's consent. IUGAS assured Naftogaz that it had good contacts with Gazprom and would be able to secure Gazprom's consent. Naftogaz relied on this assurance. However, Gazprom explicitly refused the transit of gas to IUGAS.

IUGAS

IUGAS would have secured transmission capacity through Slovakia in 2004, had Naftogaz cooperated. However, Naftogaz failed to clarify whether it would be able to deliver gas through its pipeline system and transfer it to IUGAS in Velke Kapusany. Further, Gazexport did not confirm the Contract towards Gazexport when IUGAS tried to clarify the issue with Gazexport.

5.2.2 The Tribunal's Conclusions

As previously stated by the Tribunal, the Contract stipulates that Naftogaz was liable for the transmission of gas through Ukraina to the measurement station at Velke Kapusany, while the measurement and the transport through the Slovak pipeline system fell within IUGAS' sphere of responsibility.

Neither Gazprom nor Gazexport are referred to in the Contract. However, it might be argued that Naftogaz and IUGAS, in order to fulfil their duties under the Contract, were obliged to ensure that all permits and other kinds of authorization needed for the gas transmission were granted.

The question then arises what would be the consequences if any of the parties failed to obtain such authorization. It cannot be concluded from the Contract provisions that the Contract would become invalid, and the Protocol on Intentions is also silent on this issue.

Mr. Oleg Zagnitko, who has been an associate with the law firm Magister & Partners, has testified, inter alia: At one of the first pre-contract meetings, Mr. Voronin noted that the envisaged joint venture would require a consent of Gazexport. This remark was accepted by the Italian delegation, and they raised no objections or questions as to who was supposed to obtain such consent. They also remarked that they had good contacts with Gazprom. The negotiations proceeded on the assumption that Naftogaz was not bound to procure the consent of Gazprom or Gazexport.

Mr. Miele, in his witness statement, has denied that some kind of consent of Gazprom should have been a precondition for any constructive negotiations. Mr. Miele has further declared that at no time during the negotiations something like a veto right of Gazprom was discussed. The fact that IUGAS agreed to organize transport capacities through Slovakia did not involve any veto rights from Gazprom nor any declaration from IUGAS that IUGAS would be responsible for any confirmation of Gazprom.

In view of the foregoing, it has not, in the Tribunal's opinion, been shown that it was presupposed that IUGAS would obtain the consent of Gazprom or Gazexport for transit of gas through Velke Kapusany. Thus, Naftogaz's claim that, failing such consent, the Contract became invalid shall be rejected.

5.3 The formation of a Joint Venture and Naftogaz's acquisition of shares (Naftogaz's items III:C 2 (iii–vi))

5.3.1 Statements by the Parties

Naftogaz

It was agreed by the parties that Naftogaz should become partner in a joint venture, where Naftogaz would acquire a controlling share. Naftogaz would then be on both sides of the Contract, and would share the profits of the sales. It was never intended that the Contract would become valid without the establishment of the envisaged business model.

At some unidentified period of time, the Italian parties substituted P.G. Energy Italia, a company Naftogaz was considering as its potential business partner, with an unknown Panamanian company, PGE Energy S.A. Naftogaz never discussed with the Italian parties the possibility of becoming a partner of or obtaining shares from a Panamanian company.

The joint venture is non-existent due to misinterpretations and omissions of the Italian parties. Further, Naftogaz was never validly offered and never acquired shares in IUGAS. In this arbitration, IUGAS has submitted an alleged option for Naftogaz to buy its shares. This document is not a valid option to purchase shares, and it has never been validly delivered to Naftogaz.

IUGAS

The Italian parties provided Naftogaz with an irrevocable offer to acquire 60 % of their shares in IUGAS through a duly signed original in Italian. IUGAS has shown that P.G. Energy Italia, SPEIA and IUGAS are genuine Italian enterprises. Accordingly, Naftogaz would have become shareholder of an Italian company. It is therefore of no consequence for this arbitration whether one of the original shareholders of IUGAS was a Panamanian company. It was envisaged that Naftogaz would acquire all of the shares that were held by PGE Energy Italia, so after this acquisition only Naftogaz and the Italian company SPEIA would have been IUGAS' shareholders.

5.3.2 The Tribunal's Conclusions

Neither the establishing of a joint venture nor Naftogaz's acquisition of shares are mentioned in the Contract. However, the Protocol on Intentions deals with these issues.

Article 1 of the Protocol states that the parties recognized as appropriate their joint participation in the capital and management of a Joint-Stock Company established under Italian jurisdiction. In Article 3 the Italian parties expressed their readiness to register by 1 January 2004 the Company with the statute capital of no less than 1 000 000 EUR, pay for its shares in full and deposit part of the shares as agreed by the parties in favour of the Ukranian party until the license necessary for the Ukranian party to purchase the shares was received.

According to Article 4 of the Protocol, the parties had a preliminary discussion on distribution of the Company's shares. Said Article stipulates that the parties' final shareholding would be established before the Company was registered and

that each party determined at its discretion the forms of participation in the Company's share capital.

Mr. Miele has stated as follows in his written witness statement: It was always in the Italian parties' interest to ensure stable gas supplies – be it through a stand-alone supply contract or through a more complex joint venture operation as suggested by Naftogaz. The representatives on the Ukranian side never declared that the joint venture should be an "all-or-nothing" deal, i.e. that no deliveries should take place without the creation of a joint venture. Quite to the contrary, it was Mr. Voronin's suggestion to first enter into the transport contract and establish steady deliveries before Naftogaz would acquire its part of the shares. The joint venture was seen as something in addition to the gas supply contract that was the cornerstone of the cooperation.

As stated previously, Mr. Voronin has not testified at the final oral hearing. Nor has he submitted a written witness statement. Thus, the Tribunal accepts Mr. Miele's statements as regards what was said during the pre-contractual discussions concerning the creation of a joint venture and Naftogaz's acquisition of shares.

The Tribunal has no reason to doubt that it was of importance from Naftogaz's point of view that a joint venture was created and that Naftogaz was provided the opportunity to acquire a majority of the company's shares. However, taking into account Mr. Miele's statement, it seems not to have been the parties' understanding that the validity of the Contract should depend on the said arrangements.

It is also a fact that Mr. Voronin signed the Contract, in spite of its lack of provisions on the issues now discussed. Further, in a letter to IUGAS on 31 December 2003, Mr. Voronin declared that Naftogaz was available to begin the supply of gas starting on 15 January 2004.

Consequently, the Tribunal finds that it was not a presupposed condition, affecting the validity of the Contract, that a joint venture would be established and that a valid option to purchase shares would be presented to Naftogaz.

Nevertheless, there is reason to consider whether the undertakings concerning the establishing of a joint venture and the Ukranian party's purchase of shares (Articles 1, 3 and 4 of the Protocol on Intentions) were fulfilled.

It is uncontested that the Italian parties established the envisaged company (IUGAS) before 1 January 2004. As to the distribution of the company's shares, the Protocol on Intentions left to the parties' discretion to decide how they

should hold their shares (Article 4). In a Memorandum, dated 19 November 2003, which was sent from the law firm Magister & Partners to Mr. Voronin, it was said that the partners of Naftogaz would be P.G. Energy Italy and SPEIA and that the equity interest of P.G. Energy Italy must be decided through negotiations with a representative of Naftogaz.

It is a matter of fact that the Panamanian company PGE Energy S.A. became one of the shareholders of IUGAS instead of P.G. Energy Italia. In the Tribunal's opinion, it has not been clarified whether Naftogaz was informed of the Panamanian ownership during the pre-contractual negotiations.

However, the issue concerning the Panamanian company's ownership and whether Naftogaz got to know of this arrangement seems to be of a limited interest in the present arbitration. It was envisaged by the Italian parties that the shares which were held by the said company should in their entirety be acquired by Naftogaz. So, if this acquisition had been made, only Naftogaz and the Italian company SPEIA would have been IUGAS' shareholders, and Naftogaz would not have had anything to do with the Panamanian company.

Thus, the fact that the Panamanian company was holding part of the shares of IUGAS, can not be considered as a valid obstacle for the creation of the Joint Venture.

In order to show that a valid option to purchase shares was presented to Naftogaz, IUGAS has submitted a document titled "Grant of Call Option", which was signed by PGE Energy S.A. and SPEIA srl. The genuineness of the signatures has been certified by a Notary Public in Milan.

The document states that the said companies granted an irrevocable option to assign a 60 % shareholding in IUGAS, with a Share Capital of 1,000,000 EUR, corresponding to 60,000 shares, with a nominal value of 10 EUR each. It is further stated that the option would have a 7-month validity as from the date of the document and that it was in favour of Naftogaz, "which has caused this irrevocable option to be executed for acknowledgement and in acceptance by its Deputy Chairman, Igor Voronin".

One of Naftogaz's expert witnesses, Mr. Andrea Valli, has stated, inter alia, that the document at stake is not valid and enforceable under Italian law as a call option agreement in favour of Naftogaz, since it was not accepted in writing by Naftogaz.

Mr. Miele has confirmed that Naftogaz was informed of the purchase offer. He has testified as follows: At a meeting in Milan on 30 December 2003, he handed

personally over the offer to Mr. Voronin. In the following time he reminded Mr. Voronin several times of the offer but Mr. Voronin showed no further interest in it and never pursued the issue further. Had he done so, he could have acquired the shares of P.G. Energy.

In view of the foregoing, the Tribunal finds that the Italian parties fulfilled their obligations under the Protocol on Intentions, as regards the establishing of a company apt to become a joint venture and providing Naftogaz with an option to acquire a majority of the shares of the company. Naftogaz must bear the responsibility for not accepting the option and completing the envisaged transfer of shares in IUGAS.

5.4 Procuring of authorizations for import and distribution of gas in Italy and contracts with end consumers (Naftogaz's items III:C 2 vii–viii))

5.4.1 Statements by the Parties

Naftogaz

The Italian parties undertook to secure legal means to import and sell the gas in Italy. Naftogaz participated in the joint venture negotiations on the assumption that the Italian parties would make these authorizations available to the joint venture. In fact, the Italian parties did not have these authorizations when they were negotiating the joint venture with Naftogaz. They also failed to obtain the authorizations after the Contract was signed.

IUGAS has claimed that SPEIA possessed such authorizations. However, no authorization to import and sell non-EU gas in Italy can be assigned from one company to another without transferring the business.

During the pre-contractual negotiations, the Italian parties assured Naftogaz that they had supply contacts with major Italian industrial groups and were willing to contribute these contracts to the joint venture. However, IUGAS has failed to comply with its obligation to secure end consumer contracts.

IUGAS

The Protocol on Intentions provided for various options as to how IUGAS could have obtained the licenses necessary for the sale of gas on the Italian market. One option was the conclusion of contracts with its sister companies, under

which the companies would have imported the gas into Italy and marketed it there until IUGAS received its own licenses.

It was the parties' common understanding that deliveries to end customers would be effected in two stages. Firstly, the deliveries would have been integrated into the already established stream of gas deliveries to IUGAS' sister companies from other suppliers. Then, as a second stage, IUGAS would have concluded its own customer contracts, once steady deliveries had been established.

In order to underline the capability of the F.I.S.I. Group to receive the relevant license without any problems, SPEIA concluded the necessary contract for the supply of gas of non-EU origin from 1 March 2010 to 30 September 2010 and has applied for the license to import this gas into Italy on 11 February 2010.

SPEIA received its license on 25 February 2010, i.e. just two weeks after SPEIA had applied for it. The license allows SPEIA to import gas of non-EU origin under the supply contract as of 1 March 2010. Hence, gas deliveries to Italy could have begun merely three weeks after filing the license application. The fast and unproblematic issuance of this license by the Italian authorities demonstrates that this license was not a real hurdle for the performance of the Contract, not even in early 2004.

5.4.2 The Tribunal's Conclusions

According to Clause 5 of the Protocol on Intentions, the Italian parties undertook to "obtain from the regulatory bodies of Italy all necessary permits and licenses to enable the Company to carry out the activities stipulated in its Statute or to place at the Company's disposal the corresponding permits, licenses and registrations available to it by means of their re-issuance, assignment (cession) or by other legal means that would make it possible for the Company to use them as well as to assign in favour of the Company its rights under contracts for delivery of gas to ultimate consumers".

Thus, Clause 5 left it at the discretion of the Italian parties to decide whether they would apply for new permits and licenses or ensure the availability of their existing permits by different legal means.

Mr. Miele has stated, inter alia: It was never envisaged by the Italian companies or even requested by Naftogaz that IUGAS should have its own licenses and end consumer contracts, be they assigned or newly concluded. This would not have made sense from a business perspective. Rather, the realization was to take place

in two phases. In the first phase, IUGAS would have sold the gas to SPEIA, and SPEIA would have integrated it into its own gas deliveries and sold it as part of of these deliveries to its end customers in Italy under the existing contracts with these customers. Therefore, SPEIA would have continued to use its own licenses for the sale of gas in Italy and would have applied for the license to import gas into Italy. However, SPEIA later decided not to apply for this license. This was due to the costs of such license and the upcoming doubts as to Naftogaz's loyalty. – In the second phase, after the reliable technical functioning of the delivery process from Naftogaz in Ukraina to the end customers in Italy had been secured, SPEIA would have directed its existing customers and the new customers to IUGAS, which by then would have been an established company. IUGAS would then have entered into its own contracts with these customers and would also have applied for its own licenses. – From an economic point of view, all profits from the sale of gas in Italy would have been with IUGAS from the very beginning, as a result of its previous sale to SPEIA. This could have been easily ensured by Naftogaz through its participation in IUGAS' management.

Mr. Marenco, in his testimony, has made similar statements. He has added that the license issue was never a crucial part in the negotiations with Naftogaz and that Naftogaz was convinced of the Italian companies' capabilities to obtain a license. Further, according to Mr. Marenco, Naftogaz never required the Italian companies to present a license in the negotiations from 2004 to 2008.

In the Tribunal's opinion, it may be argued that the approach envisaged by the Italian parties as a first stage was not totally in line with any of the options mentioned in Clause 5 of the Protocol on Intentions. However, the approach seems to have had certain advantages from an economic point of view, and it seems likely that the joint venture in the end would have been able to get the same profits as with other solutions more in conformity with the Protocol. It has also not been shown that Naftogaz objected to the intended arrangements.

There is, in any case, no reason to consider the Contract as invalid because Clause 5 of the Protocol on Intentions was not fulfilled.

With respect to the Italian parties' possibility to receive the relevant licenses, the Tribunal has not found any reasons to assume that this would have entailed any major problems.

It should be mentioned that the license referred to by IUGAS, which has been submitted as evidence, concerned a volume of 13,353,600 cubic meters of gas produced in Russia. The license was valid during the period between 1 March 2010 until 30 September 2010.

5.5 Purchase of gas of Turkmen origin
(Naftogaz's item III:C 2 (ix))

5.5.1 Statements by the Parties

Naftogaz

It was understood between the parties that the joint venture would be supplied with gas of Turkmen origin. This was due to the fact that Ukranian gas was not enough to satisfy the domestic needs of Naftogaz. Gas of Kazakh and Uzbek origin was only sporadically available and could not be relied on for stable deliveries. Further, Naftogaz had a valid long-time gas supply contract with the Turkmen gas monopoly, Turkmengaz.

At the end of 2005, Gazprom bought the entire production of Turkmen gas from Turkmengaz on a long-term basis, thus effectively frustrating Naftogaz's contract with Turkmengaz. The contemplated joint venture, thus, lost its only source of gas.

IUGAS

If availability of Turkmen gas was a significant factor for Naftogaz to enter into the Contract, then Naftogaz could have made its long-term commitment under the Contract subject to continued availability of Turkmen gas. Availability of gas of Central Asian origin was furthermore within Naftogaz's sphere of control. In addition, Naftogaz had the means to safeguard itself against the risk of any subsequent unavailability of such gas, but chose not to.

5.5.2 The Tribunal's Conclusions

According to Article 2 of the Contract, the Seller should transfer and the Buyer should accept "natural gas of Turkmen origin and/or Kazakhstan origin and/or Uzbek origin and/or Ukranian origin". Thus, Naftogaz's obligation to deliver gas was not limited to Turkmen gas. In the event that such gas was not available, Naftogaz would have been obliged to deliver, and IUGAS to accept, gas of such other origin that was mentioned in Article 2.

In other words, it was not a condition for the validity or effectiveness of the Contract that Naftogaz was able to acquire gas of Turkmen origin.

The evidence submitted by Naftogaz includes a contract, dated 24 June 2005, between Turkmengaz and Naftogaz concerning delivery of Turkmen gas in the

second half of 2005 and in 2006. The volumes of gas which should be delivered in 2006 were increased pursuant to a supplementary agreement between Turkmengaz and Naftogaz, dated 22 December 2005.

Naftogaz has also submitted a message from Gazprom to Naftogaz, dated 2 January 2006. In this message it is stated, inter alia, that due to the conclusion of a contract on purchase of Turkmen gas between Gazexport and Turkmenneftegaz on December 29, 2005, Turkmen gas would not, starting from January 1, 2006, be delivered to Ukrainian consumers.

The Tribunal will, in another Section of this Award, further discuss the contract between Gazprom and Turkmenneftegaz and its impact on Naftogaz's possibilities to deliver gas under the Supply Contract. In this context, it suffices to state that the fact that Turkmen gas was no longer available did not affect the validity of the Contract.

5.6 Other presupposed conditions alleged by Naftogaz (III:C 2 (x–xi))

In addition to the alleged presupposed conditions previously dealt with by the Tribunal, Naftogaz has contended that it was presupposed (a) that Gazprom would not impose on Naftogaz a ban on re-exportation of gas coming from the Russian Federation, and (b) that Naftogaz would not be prohibited from exporting gas of Ukrainian origin.

The questions whether Naftogaz was prevented from re-exporting gas coming from Russia and from exporting gas of Ukrainian origin will be discussed subsequently by the Tribunal. Here, it should be stated that, as far as the Tribunal can find, the absence of such obstacles was not discussed as a decisive factor in connection with the conclusion of the Contract. Thus, even if it will be proven that export restrictions occurred, the Contract shall not, for that reason, be regarded as invalid.

6. Summing up concerning Naftogaz's contention that the Contract is not valid

In the previous Sections the Tribunal has come to the conclusion that the Contract shall not be considered as invalid due to non-fulfilment of conditions

precedent or presupposed conditions. Consequently, Naftogaz's claim for invalidity on such grounds shall be rejected.

The Tribunal will then turn to Naftogaz's allegation that the Contract ceased to exist because of passivity.

7. Did the Contract cease to exist because of passivity? (Naftogaz's item III:D)

7.1 Statements by the Parties

Naftogaz

In the spring of 2004, it became evident to the parties that there were impediments hindering performance of the Contract. None of the parties complained to the other that it was in breach of the Contract. IUGAS did not exercise any rights under the Contract, and Naftogaz relied on the conduct of IUGAS. The Contract ceased to exist and no rights or obligations exist under it because of the parties' passivity and subsequent conduct.

The Contract ceased to exist in any event at the latest on 4 January 2006, when Gazprom imposed a re-export ban on Naftogaz, and the export of Ukrainian gas was rendered illegal by Ukrainian legislation.

IUGAS

Contrary to Naftogaz' allegations, IUGAS did not consider the Contract impossible to perform. IUGAS pressured Naftogaz to clarify the issue of deliveries to Slovakia and to confirm the Contract to Gazprom in 2004 in order to allow performance of the Contract as of 1 April 2004.

In the years following, IUGAS consistently insisted on performance of the Contract. In particular, IUGAS repeatedly requested Naftogaz's confirmation of its readiness to deliver the gas, concluded the transport contracts with SPP, conducted price re-negotiations in good faith and finally sent delivery requests. All of this was known to Naftogaz.

7.2 Evidence submitted

As stated before, Mr. Voronin on 31 December 2003 sent a letter to Mr. Miele, in which he confirmed that Naftogaz was available to begin the supply of gas under the Contract, starting on 15 January 2004 with the daily volume of 720,000 cubic meters. Starting on 15 February 2004, the daily gas supply would be 3,600,000 cubic meters.

On 10 January 2004, Mr. Miele sent a letter to Mr. Voronin, telling him that the negotiations with SPP were progressing. This letter was followed by several other messages between IUGAS and Naftogaz during February and March 2004.

On 9 April 2004, IUGAS for the first time asked Naftogaz to provide Gazexport with a confirmation of the validity of the Contract. This request was repeated in letters dated 14, 21, 26 and 29 April. On 4 May, after a meeting with the parties had been held, IUGAS in a letter to Naftogaz expressed its belief that the cooperation between the companies would produce a very positive outcome. A similar letter was sent from IUGAS to Naftogaz on 17 May.

On 17 May 2004, Gazexport informed IUGAS that Gazprom was unable to accept additional volumes of gas through Velke Kapusany. As evidenced by a letter from Mr. Milos Pavlik to IUGAS, SPP and IUGAS on 2 June 2004 held a meeting regarding the possibility of gas transmission through Slovakia. IUGAS informed Naftogaz of this meeting in a letter dated 7 June 2004.

On 3 December 2004, IUGAS sent a letter to Naftogaz, in which Naftogaz was asked to confirm by 6 December that Naftogaz was willing and ready to supply gas under the Contract in the amount of 720,000 cubic meters per day beginning 17 January 2005, and in the amount of 3,600,000 cubic meters per day beginning 17 February 2005. This letter was followed by a letter from IUGAS to Naftogaz dated 4 December 2004, in which Naftogaz was asked to receive Mr Miele on 6 December, to discuss the execution in 2005 of the ongoing Contract.

It is uncontested that Naftogaz was silent after receiving the letters now mentioned.

After Mr. A.G. Ivchenko had replaced Mr. Boiko as chairman of Naftogaz, Mr. Marenco contacted him by a letter dated 28 November 2005. Mr. Marenco informed him about the conclusion of the Contract, and told him that the Contract had not been executed for the past two years due to circumstances beyond IUGAS' control. Mr. Marenco further stated that IUGAS had the required technical and economic capacities to perform the Contract, and

requested Mr. Ivchenko's willingness to begin gas deliveries as of 1 January 2006 under the terms of the Contract.

On 10 January 2006, Mr. Marenco sent another letter to Mr. Ivchenko, informing him that IUGAS had obtained the required consent of SPP regarding the transportation of gas from the Ukraine-Slovakia border at Velke Kapusany to the Slovakia-Austria border. Referring to SPP's consent, Mr. Marenco asked Mr. Ivchenko to confirm that Naftogaz was ready to begin the supply of gas under the existing Contract.

In letters dated 30 March and 21 April 2006, IUGAS requested a meeting between the parties. After a meeting had taken place on 15 May 2006, IUGAS in a letter dated 15 June 2006 presented a new formula regarding the calculation of the price of the Contract. In a letter of 10 September 2006, sent to the new chairman of Naftogaz, Mr. Sheludchenko, Mr. Marenco expressed IUGAS' hope to continue to work with Naftogaz. Mr. Marenco also asked for a new meeting.

On 5 October 2006, Naftogaz sent a letter to Mr. Marenco, stating that Naftogaz was grateful for "the great work you are doing for the benefit of both Ukraine and Italy" in implementing the provisions of the Contract. In order to continue negotiations, Mr. Marenco was invited to a meeting in Kiev.

In a following letter dated 20 October 2006, IUGAS informed Naftogaz that an agreement had been reached with SPP. Naftogaz was requested to meet with IUGAS to negotiate the beginning of the performance of the Contract and determine the price formula.

According to a letter dated 29 December 2006, negotiations had been held on 29 November 2006. On this occasion, IUGAS was informed that Naftogaz would conduct an additional reliability examination of IUGAS. As stated in the letter, IUGAS found it surprising that that the need for additional examination had arisen when the two companies were already bound by the existing Contract.

Further meetings between the parties were held on 16 and 17 January 2007. At the meeting on 16 January Naftogaz came up with a proposal, suggesting a new price of USD 285 per 1000 cubic meters. The proposal was not accepted by IUGAS. Instead, IUGAS on 17 January presented a second price formula.

On 21 March 2007, IUGAS asked for a new meeting.

On 17 May 2007, Naftogaz, represented by Mr. Voronin, answered the two most recent letters from IUGAS. Mr. Voronin pointed out that, compared to the year

2003, the international situation on the natural gas market had changed significantly. Furthermore, the Ukrainian legislation had introduced a new export tax levied on natural gas. Therefore, the price proposed by IUGAS was unprofitable to Naftogaz. Naftogaz did not come up with a proposal of is own. However, Naftogaz requested IUGAS to provide Naftogaz with a confirmation from SPP regarding the transportation of gas from the Ukranian-Slovak border to the border between Slovakia and Austria.

Referring to the Contract, IUGAS on 16 May 2007 requested Naftogaz to ship to IUGAS during the period 1– 30 June 2007 a volume of gas of 12,780,000 cubic meters per day as per terms indicated in the Contract. IUGAS further declared its willingness to pay a price that should be agreed in good faith according to Article 5.2 of the Contract, if Naftogaz found it necessary, or the price that would be set through arbitration, or the price agreed.

Additional requests for gas deliveries were sent by IUGAS on 10 July 2007 (1– 31 August 2007), on 25 August 2008 (1–30 September 2008), on 24 September 2008 (1– 31 October 2008), on 27 October 2008 (1– 30 November 2008), on 24 November 2008 (1– 3 December 2008), 22 December 2008 (1– 31 January 2009), on 22 January 2009 (1– 28 February 2009), 20 February 2009 (1– 31 March 2009), 27 March 2009 (1–30 April 2009), 22 April 2009 (1– 31 May 2009), 25 May 2009 (1–30 June 2009) and 25 June 2009 (1– 31 July 2009).

On 7 August 2007, the law firm Clifford Chance, representing IUGAS, sent a letter to Naftogaz, in which Clifford Chance declared, inter alia, that IUGAS would terminate the negotiations with Naftogaz as regards a new price, if Naftogaz did not send a counterproposal showing a genuine effort to resolve the situation.

In a letter to IUGAS dated 14 August 2007, Naftogaz pointed out that IUGAS, by disclosing information about the Contract, had committed a gross violation of Clause 9.2 of the Contract regarding non-disclosure of the content of the Contract to any third party.

On 28 November 2008, Naftogaz sent a letter to IUGAS, stating that Naftogaz at repeated occasions had made it perfectly clear that there was no contract in force under which IUGAS might request deliveries.

The evidence submitted also includes a letter, dated 24 November 2009, sent to Naftogaz from the Ministry of Fuel and Energy of Ukraine. The Ministry's letter refers to a letter from Naftogaz, dated 11 November 2009 relating to "the possibility to obtain an approval for issuing a license on performing natural gas of Ukrainian origin" under the Contract.

7.3 The Tribunal's Conclusions

The evidence referred to shows that there were intense contacts between IUGAS and Naftogaz during the time period January–March 2004. During April and May, IUGAS went on sending letters to Naftogaz, asking Naftogaz to provide Gazexport with a confirmation of the validity of the Contract. As stated previously, Naftogaz did not answer these letters, and Naftogaz finally declared explicitly that they were not going to send the requested confirmation to Gazexport. However, as far as has been shown, Naftogaz did not give notice to IUGAS that, in their opinion, the Contract had ceased to exist.

In December 2004, IUGAS resumed its attempts to bring about deliveries under the Contract, without, however, getting any response from Naftogaz.

Between December 2004 and November 2005, IUGAS did not send any letters insisting on performance of the Contract. This change in IUGAS' position was, as stated by Mr. Miele and Mr. Marenco, due to the political turmoil in Ukraine and the review of Naftogaz's top administrative level that followed. However, in late November 2005 and the beginning of January 2006, Mr. Marenco contacted the new chairman, expressing IUGAS' wish to fulfil the Contract.

It may be argued that, in order not to create an impression that the performance of the Contract was not an issue any more, IUGAS should have continued requesting performance of the Contract, without making the said break. However, the letters just mentioned, which clearly showed that in IUGAS' opinion the Contract was still valid, did not cause Naftogaz to object.

During 2006, IUGAS kept on sending letters to Naftogaz, requiring Naftogaz to confirm its intention to comply with the Contract. Several meetings between the parties also took place. In May 2006, IUGAS initiated discussions concerning the price for deliveries of gas under the Contract and proposed a new formula for the determination of the price. The price for deliveries was also discussed in 2007.

The price discussions obviously started from both parties' assumption that the Contract still was valid. The letter sent by Naftogaz, represented by Mr. Voronin, on 17 May 2007 is of a special interest in this context. In this letter Mr. Voronin stated that the price which had been proposed by IUGAS was unprofitable to Naftogaz. Mr.Voronin, however, did not allege that the Contract was invalid. Instead, he requested IUGAS to provide Naftogaz with a confirmation from SPP reading the transportation of gas through Slovakia.

There is also reason to point at the letter from Naftogaz dated 14 August 2007, in which Naftogaz stated that IUGAS had violated the Contract by disclosing information to the law firm Clifford Chance. The letter indicates that, at this time, Naftogaz considered the Contract still valid.

Further, as shown by the letter from the Ministry of Fuel and Energy of Ukraine, dated 24 November 2009, Naftogaz as late as 11 November 2009 asked for information concerning the possibility to obtain an approval for issuing a license on performing export of gas under the Contract. Naftogaz obviously at that time regarded the Contract as still valid.

To sum up, the circumstances now referred to, as well as the evidence which has else been submitted, lead, in the Tribunal's opinion, to the conclusion that the Contract has not ceased to exist because of passivity.

8. Has IUGAS forfeited its right to claims, because IUGAS did not give timely notice of alleged breach of contract?

(Naftogaz's item III:E)

8.1 Statements by Naftogaz

According to Swedish law, a party shall give timely notice to the other party in case of any alleged breach of contract. Under the Swedish Sale of Goods Act, Sections 23 and 29, a buyer has a duty to put the seller on notice within a reasonable time after he detects that there is a delay in the delivery of the goods.

Under Swedish law, the obligation of a party to put is counterpart on notice in certain cases goes further than the mere issuing of the notice (see Section 34 of the Swedish Commercial Agents Act).

IUGAS has not given Naftogaz timely notice of any alleged breach of contract. IUGAS forfeited its rights to claims, including claims for deliveries of gas or payment of penalties and/or damages, against Naftogaz for Naftogaz's alleged breach of the Contract.

8.2 The Tribunal's Conclusions

Section 23, first paragraph, of the Swedish Sale of Goods Act stipulates as a main rule that the buyer may stick to the purchase and require performance. However, according to the third paragraph of the said Section, the buyer loses

his right to require performance, if he waits unreasonably long before making the requirement.

CISG, which applies to the Contract, stipulates that the buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement (Article 46:1). CISG does not contain any provision similar to Section 23, 3rd paragraph, of the Swedish Sale of Goods Act. However, there is reason to look at Article 28 of CISG, which states that if, in accordance with the provisions of the Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by the Convention.

IUGAS, in accordance with Article 46:1 of CISG, is entitled to require performance of the Contract. The question is whether the Tribunal would render an award for performance under Swedish law in respect of similar contracts of sale not governed by CISG.

In the Tribunal's opinion, there is reason to assume that the Tribunal, referring to Section 23, first paragraph, of the Swedish Sale of Goods Act, would render such an award. However, with respect to contracts of sale not governed by CISG, the third paragraph of Section 23 would also be applicable. The question then is whether the said paragraph should apply even in the present arbitration.

The Tribunal does not have to take a clear stand on this issue. There is, in any case, no reason to state that IUGAS has waited unreasonably long before requiring performance of the Contract. It has been shown that, during the years 2004–2009, IUGAS made numerous efforts to bring about performance (see Section 7 of this Award). Starting in May 2007, IUGAS has also, on several occasions, sent formal requests for delivery to Naftogaz.

It is true that, during the period December 2004–November 2005, there was a break in the contacts between IUGAS and Naftogaz. However, when the contacts were resumed, Naftogaz did not object that the Contract was not effective.

In view of the foregoing, the Tribunal finds that IUGAS has not forfeited its right to claim performance of the Contract by failing to give timely notice concerning its claim.

In other Sections below, the Tribunal will discuss the question whether IUGAS has lost its right to claim payment of penalties and damages by not giving timely notice.

9. Has IUGAS forfeited the right to request deliveries of gas and to claim penalties and damages, because IUGAS failed to purchase substitute gas? (Naftogaz's item III:F)

9.1 Statements by Naftogaz

According to Swedish law, a party that fails to make substitute purchases forfeits the right to demand performance.

IUGAS should have purchased substitute volumes of gas to compensate for any alleged non-deliveries. IUGAS had the possibility to make such substitute purchases of gas. IUGAS remained passive, and therefore forfeited the right to request deliveries of gas and to claim penalties and damages from Naftogaz.

9.2 The Tribunal's Conclusions

As pointed out by the Tribunal in the previous Section of the Award, a buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement (Article 46:1 of CISG). The Tribunal has also looked at Article 28 of CISG, which states that if, in accordance with the provisions of the Convention, one party is entitled to require performance of any obligation of the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by the Convention.

The insertion of Article 28 in the Convention was motivated by the difference between common law and civil law, as far as specific performance is concerned (see the commentary by John Honnold, p. 195 ff). As stated by Honnold, common law works from the premise that performance will be compelled only when damages do not provide an adequate remedy, while it is the principle under civil law, including Swedish law, that each of the parties has a right to performance.

In a commentary to the Swedish Sale of Goods Act (Jan Ramberg, Köplagen, p. 306 f) it is stated that, even if, under Swedish law, the parties are entitled to

performance, it is common practice for a buyer to purchase substitute goods and for a seller to resell rejected goods. However, as also pointed out in the commentary, a principal right to performance is important not only in cases where substitute transactions are difficult or impossible but also in other situations, for instance when the right to damages is limited.

What has now been said leads to the conclusion that, even it would have been possible for IUGAS to make substitute purchases of gas on the European market or elsewhere, IUGAS was entitled to adhere to the Contract and require performance from Naftogaz.

Thus, IUGAS did not forfeit its right to performance under the Contract by failing to make substitute purchases of gas.

10. Is performance of the Contract impossible?
(Naftogaz's item III:G)

Statement by Naftogaz

Under Swedish law, impossibility of performance discharges a party from its contractual obligations. The impossibility defence is not limited only to events where unique and irreplaceable goods are destroyed.

It is impossible for IUGAS as well as Naftogaz to perform the Contract. The impossibility has lasted for a long time. Because of the Tripartite Agreement and the legislation of Ukraine prohibiting export and re-export of gas, it is still impossible to perform the Contract.

Under Swedish law, the impossibility of performance discharges Naftogaz from its contractual obligations. Consequently, Naftogaz may not be ordered to perform the Contract, and is not liable for penalties or damages for any failure to perform.

The Tribunal's Conclusions

Section 23 of the Swedish Sale of Goods Act contains certain provisions concerning the buyer's right to require performance by the seller. According to paragraph 1 of Section 23, the seller is not obliged to perform the sales contract, if there is an impediment which he can not overcome or if performance would require sacrifices which are not reasonable in comparison with the buyer's

interest that the seller performs the contract. Paragraph 3 stipulates that the buyer loses his right to request performance, if he waits unreasonably long before putting forth any request.
However, as concluded above by the Tribunal, CISG and not the Swedish Sale of Goods Act is applicable to the Contract. Article 79 of CISG contains provisions similar to those inserted in Section 23 of the Swedish Act. Thus, it is stipulated inter alia that a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of conclusion of the contract or to have avoided or overcome it or its consequences.

However, it follows from the fifth paragraph of Article 79 of CISG that the preceding paragraphs are applicable only to a party's right to claim damages under the Convention. The said paragraph stipulates that nothing in Article 79 prevents either party from exercising any right other than to claim damages.

With respect to such other rights, CISG does not stipulate any exemptions similar to those included in Article 79. So, for instance, as stated in one of the commentaries to CISG (commentary by John Honnold 1982, p. 427) the grounds for avoiding a contract remain applicable although the disappointed party may not recover damages. It has also been pointed out (see the CISG commentary by Jan Ramberg and Johnny Herre, 3 edition p. 567 ff.) that Article 79 does not affect the buyer's right to request performance of the sale contract.

The commentary just mentioned discusses whether the seller's liability to perform shall remain unchanged after a long-lasting impediment. The commentary recalls that, in such a case, the conditions for fulfilment of the contract may have changed substantially compared to the situation when the contract was concluded. According to the commentary, it might perhaps be possible to take Swedish law into consideration and let the seller's liability cease to exist, if the liability would entail unreasonable sacrifices or if the buyer has waited unreasonably long before requesting performance. However, as pointed out by the authors, such an approach might not be consistent with Article 79.

In several commentaries, reference has been made to the theories on hardship or frustration. Honnold has, however, stated that the fact that a domestic legal system provides for exemption by a terminology not used in CISG (e.g. frustration or the like) does not justify recourse to the domestic law – an approach that would undermine the convention's central objective to provide uniformity. However, Honnold has pointed out that Article 8 of CISG permits flexible interpretation of the contract in the light of surrounding circumstances;

in extreme situations it may be appropriate to conclude that the contract did not contemplate performance under radically changed circumstances.

The matter has also been addressed by the CISG Advisory Council in its interpretation of Article 79 of CISG (Opinion 7), concluding that in order to reach a uniform interpretation the issue should be solved on the basis of general principles underlying that Article. Therefore, it is reasonable to conclude that Article 79 does apply to hardship situations which under the circumstances could relieve a party from its obligations.

Article 80 of CISG states that a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

The placement of this provision in the same Section as Article 79 indicates that it has the same scope of application as Article 79. That would mean that claims concerning performance of a contract would fall outside Article 80.

On the other hand, the provision in Article 80 is based on the general principle that a party should not have rights based on his own wrongful action. Thus, there is reason to apply what is said in Article 80 with respect to a party's right to request performance, even though the Article is not formally applicable (see the said commentaries by Honnold, p. 444, and Ramberg-Herre, p. 556 and 571 f).

In the following Sections of the Award, the Tribunal will discuss Naftogaz's assertions that performance of the Contract was made impossible (1) by the Tripartite Agreement and subsequent agreements between Naftogaz and Gazprom and (2) by the legislation of Ukraine.

10.1 Is performance of the Contract impossible because of the Tripartite Agreement and subsequent agreements between Naftogaz and Gazprom?

10.1.1 Statements by the Parties

Naftogaz

Because of the Tripartite Agreement (TPA), entered into by Gazprom, Naftogaz and RosUkrEnergo (RUE) on 4 January 2006, and subsequent agreements in 2008 and 2009, Naftogaz was prohibited from performing the Contract.

By the end of 2005 and despite the existence of a long-term contract between Naftogaz and Gazprom, and despite the existence of the Supplement no. 4 thereto fixing the price for gas in the amount of USD 50 per 1000 cubic meters until the end of 2006, Gazprom demanded that Naftogaz accept price increases. Naftogaz attempted to argue the validity of the then-existing arrangements with Gazprom, but in vain.

On 1 January 2006, Gazprom started reducing pressure in the pipelines, and on 2 January, Gazprom informed Naftogaz that the Turkmen gas would no longer be available to it. On the night of 4 January 2006, Naftogaz was presented with the TPA. Naftogaz had no other choice but to sign it. Thus, the TPA was signed under duress.

The TPA prohibited Naftogaz from re-exporting gas coming from the territory of Russia, and it thus frustrated the Contract even it had been valid.

The re-export ban has been upheld in subsequent agreements between Gazprom and Naftogaz. Naftogaz has not been able to avoid or circumvent this ban. It is not possible for Naftogaz to procure gas otherwise than from Gazprom, or from Gazprom's transit system which also requires Gazprom's consent.

IUGAS

Naftogaz's duress argument fails already because Gazprom is not in a position to exercise undue pressure on Naftogaz, since both companies are on a par. This is due to the simple fact that Gazprom needs Naftogaz for the fulfilments of its supply contracts to Western Europe as much as Naftogaz needs Gazprom to fulfil the needs of Ukrainian society.

Secondly, the Russian-Ukrainian dispute in 2006 shall be seen against Gazprom's adopted strategy to turn from an old Soviet state enterprise into a

modern company. At the time, Gazprom was trying to change from a system of opaque barter deals and subsidized delivery to market-based relationships.

Thirdly, Naftogaz had various options to withstand Gazprom's pressure. For example, it could have withdrawn the gas that was needed to satisfy the needs of the Ukrainian population from the Russian gas transits into Western Europe.

Further, if Naftogaz was unable to afford market prices, it could have offered Gazprom a participation in its pipeline system.

Finally, the outcome of the crisis does not support Naftogaz's duress argument. For example, under the TPA Naftogaz paid USD 95 per 1000 cubic meters, a price well below the USD 230 per 1000 cubic meters requested by Gazprom.

The international agreement from 2008 between the Russian and Ukrainian governments (IA 08) and the bilateral agreement between Naftogaz and Gazprom of the same year (BA 08) were the result of normal negotiations. In these negotiations, Ukraine managed to exclude RUE from the dealings between Gazprom and Naftogaz. The decisive provisions on gas re-exports were entered into voluntarily and were considered as a fair compromise between the interests of the parties. Ukraine had at this time sufficient reserves to meet the needs of the Ukrainian society for several months.

Notwithstanding the circumstances surrounding the signing of the TPA, it did not prevent Naftogaz from performing the Contract. The TPA concerned only gas deliveries from Russia to Ukraine below market price in order to satisfy the need of the Ukrainian domestic market. It left Naftogaz with sufficient options to perform the Contract either within the TPA or outside of it.

Most of these options existed also under the agreements between Naftogaz and Gazprom in 2008 and 2009. These agreements did not materially change the contractual situation in existence following the signing of the TPA. Naftogaz could have been able to acquire further volumes of gas on the international market or to reach a deal with Gazprom. Both the IA 08 and the BA 08 expressly provided for joint exports with Gazprom of agreed volumes of gas to the European market.

10.1.2 The TPA and other agreements

The TPA (Agreement on Settling Relations in the Gas Sector, dated Moscow, 4 January 2006) contains, inter alia, the following provisions.

Clause 1 states that, to ensure transit of natural gas which belongs to Gazprom and RUE through Ukraine and Russia, the Sides had agreed on the rate of payment for transit to the amount of USD 1.60 per 1,000 cubic meters per 100 km until 01.01.2011.

Clause 2 states that the Sides had agreed on RUE as the supplier of gas to Ukraine. Further, from 1 January 2006 Gazprom should not deliver gas to Ukraine, while Naftogaz should not export from Ukraine the gas that came from Russia.

Clause 3 states that, to sell gas that came from Russia on the Ukrainian market, Naftogaz and RUE should set up a joint venture, within the shortest possible time but no later than 1 February 2006, whose authorized capital should be formed by paying money and bringing in other assets.

Clause 4 contains provisions on what amounts of gas should be purchased annually by RUE and what amounts should be sold to Naftogaz until the creation of the joint venture and, after that, to the joint venture, for subsequent sale on the Ukrainian domestic market without the right to re-export. In 2006, the gas should be sold at the price of USD 95 per 1,000 cubic meters.

In a Memorandum, dated 2 October 2008, between the Government of Russia and the Ukrainian Cabinet of Ministers, it is said, inter alia:

Clause 1 states that the Parties welcome long-term relations between Gazprom and Naftogaz "in the supply of gas to Ukraine in the amounts ensuring gas balance for the Ukrainian consumers".

According to Clause 3, the Parties support the intention of Naftogaz to act as the sole importer of the entire volume of gas supplied to Ukrainian consumers.

Clause 4 states that the Parties support the intention of Gazprom and Naftogaz "for mutual export deliveries of natural gas, including deliveries from underground gas storage to the European market subject to the availability of agreed uncommitted gas resources".

In Clause 5, the Parties confirm the need for uninterrupted gas transit through the territory of Ukraine on a long-term basis.

According to Clause 7, the aforementioned provisions should be reflected in commercial contracts between respective economic agents.

In October 2008, Gazprom and Naftogaz, referring to the Memorandum just mentioned, entered into an "Agreement on the Principles of Long-term Cooperation in the Gas Sector". This agreement contains, inter alia, the following provisions.

> In Clause 2 it is said that, starting on 01/01/2009, Naftogaz would be the sole importer of the entire volume of gas to the territory of Ukraine.
>
> Clause 3.2 states, inter alia, that the gas supplied by Gazprom to Ukraine is intended solely for the Ukrainian consumers and may not be sold outside the territory of Ukraine.
>
> According to Clause 3.3, the Parties should, by 1 November 2008, sign a long-term agreement for gas transit through Ukraine. Further, Naftogaz guaranteed reliable and uninterrupted transit of the Russian gas through Ukraine annually at the level of the year 2008 but no less than 120 billion cubic meters per year. Together with Gazprom, Naftogaz should provide for mutual export supply of the agreed volumes of gas to the European market.
>
> Clause 6 states that the Parties had agreed to withdraw from the TPA, when the terms of the Agreement in question had been executed.

On 19 January 2009, Gazprom and Naftogaz concluded a contract concerning sales and purchase of gas originating from Russia, Kazakhstan, Uzbekistan and Turkmenistan for the years 2009–2019. It is stated in the said contract that the gas delivered in accordance with the contract was intended for Ukrainian consumers, and that Naftogaz had no right to sell it outside the borders of Ukraine.

As stated above, Turkmengaz and Naftogaz on 24 June 2005 entered into a contract concerning delivery of Turkmen gas in the second half of 2005 and in 2006. The volumes of gas which should be delivered under the contract in 2006 were increased pursuant to a supplemental agreement between Turkmengaz and Naftogaz, dated 22 December 2005.

On 2 January 2006, Gazprom sent a message to Naftogaz, stating inter alia that, due to the conclusion of a contract dated 29 December 2005 between Gazexport and Turkmenneftegaz, Turkmen gas would not, starting from January 1 2006, be delivered to Ukrainian customers.

10.1.3 Other evidence submitted

Ms. Antonina Marchenko, Director of the Department for Cooperation on Transit and Supply of Natural Gas at Naftogaz, has testified, inter alia, as follows:

> On 21 June 2002, Naftogaz and Gazprom entered into a Long-Term Contract for the transit of Russian gas through Ukraine for the period from 2003 to 2013. The exact quantity of gas to be transited would be agreed between the Russian and Ukrainian governments in annual protocols. In Supplement No. 4 to the Long-Term Contract, dated 9 August 2004, the price for Russian gas was fixed at USD 50 per 1,000 cubic meters.
>
> In the summer of 2005 it became clear to Naftogaz that Russia was not going to sign the protocol for 2006. In the beginning of December 2005, Gazprom informed Naftogaz that it was willing to supply Russian gas at the price of USD 160 per 1,000 cubic meters, which was more than three times as high as the USD 50 that was supposed to be fixed until 2010 pursuant to Supplement No. 4. By mid-December, the price demanded by Gazprom had increased to USD 230 per 1,000 cubic meters. In order to solve the precarious situation, Naftogaz signed a supplementary agreement with Turkmengaz. The agreed price was USD 50 per 1,000 cubic meters for the first half of 2006.
>
> On 1 January 2006, Gazprom began reducing the pressure in the pipeline system, and on 2 January Gazprom informed Naftogaz that, due to a contract on purchase of Turkmen gas between Gazexport and the state company Turkmenneftegaz, Turkmen gas would not be delivered to Ukainian customers.
>
> Following an invitation from Gazprom, an Ukrainian delegation, which included Ms. Marchenko, on 3 January 2006 went to a meeting with Gazprom in Moscow. In the night of 3 January, the TPA between Gazprom, Naftogaz and RUE was signed. Naftogaz had not seen any drafts of the agreement before the signing. However, in order to avoid the collapse of Ukraine's gas-dependant industry as well as to avert a humanitarian and social crisis, Naftogaz had no other choice than to sign.

The TPA and its consequences have been further analyzed and commented by the expert witness Mr. Peter Cameron and Mr. James Ball, relied on by IUGAS and Naftogaz, respectively.

Mr. Cameron has stated inter alia that, in his opinion, the TPA cannot be considered as having been signed under duress, mainly since Naftogaz had its

extensive pipeline and storage system as a strong bargaining chip. Moreover, the negotiation and conclusion of the TPA was not beyond Naftogaz's control, since Naftogaz actively participated in the earlier negotiations with Gazprom and had unusually strong links to the Ukrainian Government.

As regards the question whether Naftogaz could have complied with its obligations under the Contract (i.e. exported gas) notwithstanding the terms of the TPA, Mr. Cameron has stated that a review of the facts relating to this issue suggests that Naftogaz could indeed have identified ways of exporting gas, if it had wanted to do so.

Mr. Ball, as opposed to Mr. Cameron, has come to the conclusion that Naftogaz signed the TPA under duress. Mr. Ball has stated that, by cutting off gas supply to Ukraine in 2006, Gazprom created a potentially dangerous situation for Ukraine and left Naftogaz with little choice but to sign the TPA. Further, according to Mr. Ball, the commercial terms contained in the TPA were unbalanced, and it would have been against Naftogaz's best commercial interests to voluntarily enter into the agreement.

Mr. Ball has added that the TPA made it impossible for Naftogaz to re-export Central Asian gas. The TPA also greatly diluted Naftogaz's most valuable source of revenue by inserting RUE into a joint venture which took the best industrial customers.

10.1.4 The Tribunal's Conclusions

The Tribunal finds it obvious that Naftogaz's situation was dramatically prejudiced by the TPA. With respect to the price for gas delivered, Naftogaz had to give up the bartering system which had been applied before and instead make payments in cash. It is true that the price fixed in the TPA was lower than the prices proposed by Gazprom during the autumn of 2005. However, the TPA price for 2006 was nearly twice as high as the price which had been applied pursuant to the Long-Term Contract and Supplement No. 4, which were still valid when the TPA was signed.

Another important fact resulting from the TPA, was that RUE was inserted as the sole supplier of gas to Ukraine and that gas coming to the Ukrainian domestic market from Russia was to be sold by a joint venture set up by Naftogaz and RUE. These arrangements clearly weakened Naftogaz's possibilities to control its gas sales network within Ukraine and deprived Naftogaz of a valuable source of income.

In addition, Naftogaz was prohibited from re-exporting gas coming from Russia, which meant that Naftogaz, at least to a large extent, was denied possible export revenues on its own.

The circumstances now described contradict IUGAS' allegation that the TPA was the result of normal negotiations. Instead, the contents of the TPA and its consequences support Naftogaz's contention that the agreement was forced upon it.

Ms. Marchenko's testimony also strongly supports the notion that the TPA was concluded under duress. In her testimony, she has given a convincing picture of the situation before the TPA was signed and the pressure put on Naftogaz. The drastic step taken by Gazprom to reduce the pressure in the pipeline system, and the consequences of such a measure in the middle of the winter, made it necessary for Naftogaz to rapidly find a solution.

The pressure upon Naftogaz was obviously further reinforced by the sudden message from Gazprom on 2 January 2006 informing Naftogaz that the Gazprom group had blocked the performance of Naftogaz's contract with Turkmengaz through Gazexport's entering into a contract with Turkmenneftegaz. It is clear that fulfilment by the Turkmen company of its obligations to Gazprom under the new contract would effectively prevent Turkmengas from delivering the agreed quantities of gas to Naftogaz.

IUGAS has alleged that Naftogaz had various options to withstand Gazprom's pressure. For instance, it could have withdrawn the gas that was needed to satisfy the needs of the Ukrainian population from the Russian gas transits to Western Europe. Further, according to IUGAS, Naftogaz could have offered Gazprom a participation in its pipeline system.

As far as the Tribunal can find, some of the options mentioned by IUGAS might have been of long term interest to Naftogaz. However, there does not seem to have been any options available in the acute situation preceding the signing of the TPA.

Consequently, the Tribunal finds that there are reasons to conclude that Naftogaz signed the TPA under duress.

With respect to the subsequent agreements between Naftogaz and Gazprom, concluded in October 2008 and on 19 January 2009, Naftogaz has not contended that the agreements were signed under duress. There is, thus, reason to argue that Naftogaz might have been able the take into account its obligations under the Contract with IUGAS when the said agreements were negotiated.

It is true that both agreements stipulate that the gas supplied by Gazprom to Ukraine was intended solely for the Ukrainian consumers and could not be sold outside the territory of Ukraine. However, there is no evidence that Naftogaz did not do its best to get a contract with Gazprom on as favourable conditions as possible, which would then also benefit the IUGAS Contract.

The question then is which were, in practice, the consequences of the TPA and the subsequent agreements as regards Naftogaz's possibilities to fulfil the Contract. As stated above, all three agreements categorically prohibited Naftogaz to re-export gas supplied by Gazprom. However, the expert witness Mr. Cameron has, when commenting on the TPA, stated that there was apparently no reason why Gazprom and/or RUE would not have been interested in realizing the Contract, be it as Naftogaz's suppliers or on a joint venture with Naftogaz. Mr. Cameron has added that it is noteworthy that the 2008 Agreement expressly provided for joint exports of Gazprom and Naftogaz.

It follows from Mr. Ball's expert statement that he does not share Mr. Cameron's views concerning Naftogaz's possibilities to re-export gas in spite of the conditions in the TPA and subsequent agreements.

As far as the Tribunal can find, Naftogaz does not seem to have been without means to bring about an export of gas to IUGAS, perhaps jointly with Gazprom. A joint export was not only envisaged in the 2008 Agreement but is also in line with the Agreement of 19 January 2009. However, such a change compared with the situation at the time of the conclusion of the Contract would, as foreseen in the Contract, require an agreement between the parties on an increased price for the gas.

It may also be taken into account that Naftogaz is fully owned by the Ukrainian state and that senior state officers are members of Naftogaz's supervisory board. Further, Naftogaz is responsible for the preparation of the annual draft prognostic balances, which are subject to their approval by the Cabinet of Ministers of Ukraine. IUGAS has alleged that Naftogaz could have used its influence in order to make it possible to perform the obligations under the Contract.

In the Tribunal's opinion, it can not be excluded that Naftogaz would have been able to exert some influence of the kind alleged by IUGAS. The Tribunal will revert to this issue in the following Section of this Award.

When discussing the consequences of the TPA and the subsequent agreements, there is also, as far as the TPA is concerned, reason to take into account the extreme circumstances under which it was signed. In the Tribunal's opinion, it

must be assumed that the Contract did not contemplate performance under such circumstances. The Tribunal therefore holds that, because of the pressure exerted by Gazprom, Naftogaz was not liable to deliver gas under the Contract, at least for such time which would have been required for Naftogaz and its owner to adapt themselves to the changed situation. Accordingly, the Tribunal finds that Naftogaz was not obliged to perform until after the end of 2006.

As regards the agreements concluded by Naftogaz and Gazprom in October 2008 and on 19 January 2009, Naftogaz has not contended that they were signed under duress. Consequently, there is no reason to suspend Naftogaz's obligation to deliver gas under the Contract because of these agreements, although, an agreement on an increased price would have been necessary.

10.2 Is performance of the Contract impossible because of the legislation of Ukraine?

10.2.1 Statements by the Parties

Naftogaz

The Ukrainian legislation restricts the export of gas of Ukrainian origin. Such gas is only available for the population, and cannot be supplied by Naftogaz for industrial purposes.

Under the laws of Ukraine, Naftogaz is a separate legal entity clearly distinct from the state of Ukraine. Naftogaz has no decisive role in setting the prognostic gas balances of Ukraine, which would be the basis for volumes of gas that would be allowed for consumption and export.

The performance of the Contract, if ordered now, would be contrary to the laws of Ukraine. An award ordering Naftogaz to perform the Contract would violate Ukrainian public policy and would not be enforceable in Ukraine.

IUGAS

The Ukrainian Budget Laws provides for a two-step procedure. The first step stipulates the formation of the national gas reserve in order to ensure that the needs of the population will be met. The second step stipulates that the use of the gas reserve thus created and of the imported volumes are determined by the procedure established by the Cabinet of Ministers.

To this end, a prognostic balance is set up annually determining both the volumes necessary for the supply of various sectors of the Ukrainian society (one of which is the population) and the resources from which the respective volumes should be taken. The prognostic gas balance determines also the volumes that can be exported.

Exports of gas of both Ukrainian and non-Ukrainian origin are then subject to approvals issued by the relevant state bodies – the Ministry of Economy and the Ministry of Fuel and Energy.

Since many of Naftogaz's decision-makers and supervisors are leaders of the Ministry of Fuel and Energy, Naftogaz has influence on the approval of export volumes. Moreover, it is Naftogaz which is responsible for the preparation of the annual draft prognostic balances.

10.2.2 Evidence submitted

The Parties have submitted a large number of documents which concern Ukrainian legislation. Among these documents are excerpts from the Law of Ukraine on the State Budget, the Resolution of the Cabinet of Ministers of Ukraine No. 1729, "On Providing Consumers with Natural Gas" (including amendments), the Civil Code of Ukraine and the Commercial Code of Ukraine.

Both Parties have also relied on written and oral statements by experts, Naftogaz on statements by Ms. Tatyana Slipachuk and IUGAS on statements by Mr. Olexander Martinenko.

Ms. Slipachuk has stated, inter alia:

> Starting from 2006 and until the present, the export of natural gas of Ukrainian origin has been subject to mandatory licensing. The approval of the Ministry of Fuel and Energy must be obtained before an application may be submitted to the Ministry of Economy for a license. While considering the application for such an approval, the Ministry of Fuel and Energy takes into account the prognostic and actual balances of gas and the availability of sufficient resources of gas for the internal market.
>
> According to a special legislative regime, gas of Ukrainian origin may only be used for the needs of the population and the needs of non-commercial entities and organizations connected with the needs of the population, but in no case for industrial purposes.

Starting from 2006, Naftogaz has been continuously prohibited from re-exporting imported gas, inter alia, of Turkmen, Kazakh or Uzbek origin.

Naftogaz is an independent legal entity which possesses separate assets. Naftogaz cannot be regarded as an organ of the state of Ukraina. Naftogaz has never had any decisive role in the process of establishing the prognostic annual balances of receipt and distribution of gas.

The performance of the Contract by Naftogaz, if ordered now, would violate public policy of Ukraine.

Mr. Martinenko has stated, inter alia:

The provisions of the State Budget Laws and Resolution No. 1729, which complements the Laws, set out a regulatory framework for the provision of the population of Ukraine with gas on the first-priority basis from the volumes received by Naftogaz both from the Ukrainian state controlled gas producers and other sources, including foreign gas suppliers. Neither the Budget Laws nor the Resolution No. 1729 may be construed to impose a direct or indirect ban on Naftogaz on using gas for any purposes, other than the supply to the population.

From 7 March 2006 export of gas of Ukrainian origin became subject to mandatory licensing. The licenses are issued by the Ministry of Economy, subject to approval by the Ministry of Fuel and Energy. The approvals are made on the basis of the gas prognostic balance and actual balances, provided that there is enough gas on the domestic market to fully satisfy its demand in gas.

Ukranian legislation does not impose a ban on re-export of gas, but rather establishes a special legal regime for such re-export. Any re-export operations with gas are subject to approval of the state bodies of Ukraine. The volumes to be re-exported must comply with the prognostic balance.

Ukrainian law does not provide for a detailed procedure on drafting and adoption of the prognostic balance, Taking into account that it is only Naftogaz which collects and analyzes the statistical data relating to the gas supplies in Ukraine, Naftogaz may be the only entity in a position to draw up the draft prognostic balance. Consequently, the balances for every given year are, in essence, state endorsements of the annual gas supply plans developed and suggested by Naftogaz. Senior state officers are members of the Naftogaz supervisory board.

Analysis of the Prognostic Balances 2007–2010 unequivocally demonstrates that Naftogaz has been exporting certain volumes of gas annually to Poland. There are no provisions of Ukrainian legislation or treaties to which Ukraine is a party that would allow discrimination between Polish and Italian consumers by allowing Naftogaz to supply gas to the population of Poland, but not to the industrial consumers in Italy. Taking into account the figures contained in the Prognostic Balances for 2007–2010, and the volume of gas to be supplied by Naftogaz to IUGAS under the Contract, Naftogaz appears to have had sufficient resources for the due and full performance of its obligations under the Contract for the time in question.

The Commercial Code of Ukraine expressly allows a commercial entity to enter into any foreign economic contracts which do not violate the applicable Ukrainian legislation. Ukrainian law also envisages that parties to commercial agreements are obliged to perform such agreements in good faith. Taking into account the above and the fact that the Ukrainian legislation does not impose any bans relating to the re-export of natural gas, Naftogaz was entitled to negotiate and to purchase further volumes of natural gas from Gazprom and/or RUE, or any other third party at market prices for the further re-selling of the mentioned volumes of the gas to IUGAS in a manner provided for by the Ukrainian legislation and the Contract.

In light of the above, it becomes obvious that neither performance of the Contract, nor an award ordering Naftogaz to perform the Contract, would violate Ukrainian public policy.

Naftogaz has also submitted a letter to Naftogaz dated 6 August 2009, from the Ukrainian Chamber of Commerce and Industry. This letter states that (1) starting from January 2006 and until now, Naftogaz has been prohibited to re-export gas of Turkmen and/or Kazakh and/or Uzbek origin, and (2) starting from 2006 and until now, Naftogaz has been prohibited to export gas of Ukrainian origin for commercial/industrial purposes. As further stated in the letter, the reason for the prohibition was the TPA beween Naftogaz, Gazprom and RUE, which was implemented into the Ukrainian legislation by resolution no. 163, and also the Memorandum of 2 October 2008 between the Ukrainian and Russian governments and the agreement signed in October 2008 by Naftogaz and Gazprom. Before the conclusion of the TPA, the export quota was rather high, because Naftogaz could re-export gas supplied from Russia. After the entry into force of the TPA, the quota of Ukrainian gas to be exported decreased significantly, but did not disappear completely. Small amounts of gas could be supplied to Poland, because they were intended for the population, and not for industrial purposes.

The evidence submitted by Naftogaz further includes a letter to Naftogaz, dated 24 November 2009, from the Ukrainian Ministry of Fuel and Energy. The letter was sent in response to a letter from Naftogaz concerning the possibility to obtain an approval for issuing a license on performing export of gas of Ukrainian origin under the Contract. The Ministry stated, inter alia, that currently, as well as during the previous years, the resources of natural gas of Ukrainian origin were not sufficient to satisfy the Ukrainian market. On 3 June 2009, the Cabinet of Ministers of Ukraine had approved the prognostic balance of receipt and distribution of gas for 2009, which in particular included a volume of gas in the amount of 9 million cubic meters, intended for export under a contract between Naftogaz and a Polish company, in order to satisfy the needs of population of the south-eastern districts of Poland. Thus, as further stated in the Ministry's letter, the volumes of natural gas of Ukrainian origin, allowed to be exported in 2009 pursuant to the Prognostic balance, would not enable Naftogaz to perform the Contract. The Ministry concluded that there were no grounds for granting an approval for issuing a license for export of gas of Ukrainian origin under the Contract.

Naftogaz has also submitted a letter, sent to Naftogaz on 31 December 2009 from the Ministry of Economy of Ukraine. It is stated in the letter that, in accordance with a Contract dated 19 January 2009 between Naftogaz and Gazprom, gas of Russian, Kazakh, Uzbek and Turkmen origin was intended for Ukrainian consumers and should not be sold outside the borders of Ukraine. Consequently, as stated in the letter, Naftogaz had no legal grounds for applying to the Ministry of Economy for a permit on re-exporting gas of Russian, Kazakh, Uzbek and Turkmen origin as well as for a license on exporting gas of Ukrainian origin.

10.2.3 The Tribunal's Conclusions

In the Tribunal's opinion, it should first be pointed out that Naftogaz, as seller of gas under the Contract, was obliged to ensure that the intended transaction was in compliance with Ukrainian legislation. In case it was doubtful whether the sale of gas would be approved by the Ukrainian authorities, Naftogaz should have informed IUGAS or made a reservation, stating that the performance of the Contract was dependant on the Ukrainian authorities' approval.

As far as has been shown, Naftogaz did not express any doubt as to the lawfulness of the Contract when it was signed. As stated above, Naftogaz in a letter to IUGAS, dated as early as 31 December 2003, confirmed that Naftogaz was available to begin the supply of gas under the Contract, starting on 15 January 2004.

The evidence submitted by the Parties indicates that, when it comes to the relevant Ukrainian legislation, the State Budget Laws and Resolution No. 1729 of the Cabinet of Ministers of Ukraine are of a particular interest. Under these legislative acts, the population of Ukraine was provided with natural gas on the first-priority basis from the volumes received from the Ukrainian State controlled gas producers and other sources, including foreign gas suppliers.

With respect to export of gas of Ukrainian origin, it follows from the expert witnesses' statements that a mandatory licensing system was introduced in 2006. The licenses needed are issued by the Ministry of Economy of Ukraine, subject to approval by the Ministry of Fuel and Energy. The decisions by the ministries are based on natural gas prognostic balances, which are issued each year. A license will not be granted, unless there is enough gas on the domestic gas market to fully satisfy its demand for gas.

The system now described seems not to have prevented Naftogaz from exporting gas, as long as there were sufficient volumes of gas available. However, as stated by the Ukrainian Chamber of Commerce and Industry, the export quota decreased significantly after the entry into force of the TPA, which was signed on 4 January 2006. Due to the re-export ban of the TPA, large volumes of quantities of gas were removed from the quota of gas to be exported.

As stated by the Chamber of Commerce and Industry the provisions of the TPA were implemented into the Ukrainian legislation by Resolution No. 163, issued by the Cabinet of Ministers of Ukraine. This Resolution was not an independent legal act, preventing Naftogaz from re-exporting gas, but only repeated the limitations contained in the TPA. As stated above in a previous Section of the Award, TPA ceased to exist after the coming into force of the agreement between Naftogaz and Gazprom, concluded in October 2008. Consequently, the Resolution No. 163 lost its relevance.

The re-exporting ban introduced by the TPA was maintained in the agreement of October 2008. It was stated in this agreement that the natural gas supplied by Gazprom to Ukraine was intended solely for consumers and might not be sold outside the territory of Ukraine.

According to the letter sent to Naftogaz on 31 December 2009 from the Ministry of Economy of Ukraine, a contract with a similar content was concluded between Naftogaz and Gazprom on 19 January 2009.

As pointed out by the expert Olexander Martinenko, as well as by the Chamber of Commerce and Industry, the quota of gas to be exported did not disappear completely when the TPA had entered into force. According to Mr. Martinenko,

the prognostic balances for the years 2007–2010 demonstrated that Naftogaz had been exporting certain volumes of gas annually to Poland.

It is true that, as far as has been shown, the volumes of gas delivered to Poland were limited and that the deliveries were meant to satisfy the needs of Polish consumers. However, there is reason to argue that Naftogaz discriminated IUGAS when choosing to supply the Polish company with gas at the same time as it was bound by the Contract.

The expert witness Mr. Martinenko, having analyzed the prognostic balances for the years 2007–2010, has come to the conclusion that, during this period of time, Naftogaz apparently had sufficient resources for the due and full performance of its obligations under the Contract. This conclusion is hardly in line with what has been stated by the Ministry of Fuel and Energy in its letter to Naftogaz, dated 24 November 2009. According to the Ministry, the resources of gas of Ukrainian origin were currently, as well as during the previous years, not sufficient to satisfy the Ukrainian market. The volumes of Ukrainian origin, allowed to be exported in 2009 pursuant to the Prognostic balance, would not, as stated by the Ministry, enable Naftogaz to perform the Contract.

There is reason to state that, although Naftogaz was, at least temporarily, prevented from exporting the gas needed in order to fulfil the Contract, this fact was not due to some kind of permanent ban stipulated in the Ukrainian legislation, but rather to a lack of resources of gas. In the letter of 24 November 2009, the Ministry of Fuel and Energy did not refer to any legal ban but only to a deficit of gas.

As for IUGAS' assertion that Naftogaz has influence on the approval of export volumes, it is a fact that Naftogaz is fully owned by the Ukrainian state and that senior state officers are members of Naftogaz's supervisory board. Further, the preparations of the annual draft prognostic balances, which are subject to their approval of the Cabinet of Minsters of Ukraine, are the responsibility of Naftogaz.

The said circumstances support IUGAS' assertion. The assertion is also in line with Mr. Martinenko's testimony. According to Mr. Martinenko, the balances for every given year are, in essence, state endorsements of the annual gas supply plans developed and suggested by Naftogaz.

The expert witness Ms. Slipachuk has, on the other hand, stated that Naftogaz has never had any decisive role in the process of establishing the prognostic balances.

In the Tribunal's opinion, it seems likely that, even if Naftogaz does not control the application of the Ukrainian legislation, Naftogaz is able to exert a certain influence of the kind alleged by IUGAS. However, the letter from the Ministry of Fuel and Energy, dated 24 November 2009, and the letter from the Ministry of Economy, dated 31 December 2009, indicate that Naftogaz's influence is not without limits.

In conclusion, the Tribunal considers that Naftogaz was clearly prejudiced by the legislation of Ukraine but may nevertheless have had some possibilities to export gas for the fulfilment of the Contract.

11. Alleged impediments hindering performance of the Contract (Naftogaz's items III:H and I)

11.1 Statements by Naftogaz

Naftogaz is hindered by various impediments to perform the Contract. Since CISG does not apply to the Contract, the Swedish Sale of Goods Act is applicable, as far as impediments are concerned. Pursuant to paragraph 1 of Section 23 of the said Act, Naftogaz does not have an obligation to perform the Contract because there are impediments which Naftogaz cannot overcome or, if such impediments can be overcome, performance would require unreasonable sacrifices by Naftogaz.

Naftogaz could not have prevented Turkmengaz from selling its entire production of gas to Gazprom. Ukrainian law prohibits the export of gas of Ukrainian origin for industrial purposes. It is not possible to export gas in violation of Ukrainian law. Even if it was possible, such a violation would likely result in severe consequences for Naftogaz.

IUGAS has access to the European market with its plethora of gas suppliers and spot markets. It was possible for IUGAS to make substitute purchases of gas on the European and Italian markets, but IUGAS failed to do so.

Even if CISG applied and if the Contract was valid and possible to perform, Naftogaz is, pursuant to CISG Article 79, not liable for not performing the Contract. The impediments which hinder performance are beyond the control of Naftogaz, and Naftogaz could not be expected to have taken them into account when signing the Contract.

Even if CISG applies, Article 80 prevents IUGAS from asserting that Naftogaz neglected to perform any of its alleged obligations. This is due to the fact that IUGAS failed to perform its own obligations as undertaken in the context of the envisaged business model.

The impediments remain to prevent the performance of the Contract. If the Tribunal concludes that the long-term impediments have ceased to prevent the performance, the question whether the parties shall be relieved of their contractual obligations shall be decided under Swedish domestic law, i.e. the Swedish Sale of Goods Act, Section 23, 2nd paragraph, irrespective of the application of CISG. Under Swedish law, an impediment lasting for a period of six months is enough to release the seller from performance of a contract.

IUGAS' interest that Naftogaz performs the Contract is insignificant in comparison with the possibilities that IUGAS has and has had to make substitute purchases.

When IUGAS allegedly signed a transport contract with SPP (in November 2006), the circumstances had changed fundamentally such that any performance by Naftogaz would require drastically different sacrifices than what was envisaged at the signing of the Contract

In any event, IUGAS has, pursuant to the Swedish Sale of Goods Act Section 23, 3rd paragraph, lost the right to request performance because IUGAS did not within a reasonable time put forth any request to Naftogaz or made a timely notice.

11.2 The Tribunal's Conclusions

Besides the TPA and the subsequent agreements and the legislation of Ukraine, Naftogaz has referred to a number of circumstances which, according to Naftogaz, constituted impediments hindering performance of the Contract. In support of its allegations, Naftogaz has, inter alia, referred to Section 23 of the Swedish Sale of Goods Act. However, in a foregoing Section of this Award, the Tribunal has pointed out that the said Act is not applicable to the Contract.

Naftogaz has also referred to Article 79 of CISG. This Article applies to the Contract, but only as far as damages are concerned. That implies that some of the alleged impediments do not have to be further addressed by the Tribunal.

However, there is reason to discuss Naftogaz's allegation that IUGAS had failed to perform its own obligations and that IUGAS therefore, following Article 80 of CISG, is prevented from relying on Naftogaz's alleged failure to perform.

Above, the Tribunal has stated that, even though Article 80 is not formally applicable to a party's right to request performance of a contract, there is reason to apply what is said in this Article also as regards such request.

Naftogaz's claim that IUGAS had failed to perform its obligations concerns inter alia, IUGAS's alleged obligations to arrange transit capacities, to establish a joint venture, to provide Naftogaz with shares, and to procure authorizations and contracts with end consumers.

IUGAS' obligation to arrange capacities for the transit of gas has been discussed at length in Section 5.1 of this Award. As stated by the Tribunal, IUGAS and the transit operator SPP initiated negotiations in the beginning of 2004, and the negotiations resulted in a draft contract. However, IUGAS decided not to sign the contract.

It should be added that IUGAS did not start requesting deliveries of gas until May 2007. By that time, IUGAS had begun concluding transmission contracts with SPP.

In view of the above, the Tribunal holds that IUGAS has not failed to perform its obligations concerning transmission of gas, thereby hindering Naftogaz to fulfil its duties to deliver.

In Section 5.3 of this Award, the Tribunal has concluded that the Italian parties negotiating the Contract fulfilled their obligations, as regards the establishing of a company to become a joint venture and providing Naftogaz with an option to acquire a majority of the shares of this company. It is a fact that Naftogaz never acquired any shares and that, consequently, there was never any joint venture as envisaged. As far as has been shown, this failure can not be attributed to the Italian side.

Accordingly, Naftogaz was not prevented from performing its duties because the Italian side did not fulfil their obligations concerning the formation of a joint venture.

As stated in Section 5.4 of this Award, the Italian parties negotiating the Contract undertook to secure licenses enabling the gas delivered under the Contract to be sold on the Italian market. The Italian parties also undertook to secure contracts for delivery of gas to ultimate customers.

As also stated in Section 5.4, the Italian parties found means to secure licenses and contracts which were, to some extent, not totally in line with what had been agreed upon during the negotiations. However, according to the Tribunal's findings, the approach envisaged by the Italian parties had certain advantages from an economic point of view. Further, it has not been shown that Naftogaz objected to the intended arrangements.

Thus, there is no reason to conclude that Naftogaz was hindered from delivering gas under the Contract because IUGAS had failed to secure licenses and contracts with end users.

In the Tribunal' opinion, it has not been shown that IUGAS in any other way prevented Naftogaz from fulfilling its duties under the Contract.

As for the Turkmen gas issue, it is a fact that Gazexport and Turkmenneftegaz on 29 December 2005 entered into a contract whereby Naftogaz's possibilities to buy Turkmen gas were blocked. It seems likely that, as contended by Naftogaz, it could not have prevented the conclusion of the 29 December contract. Howewer, IUGAS has argued that Naftogaz might have commenced arbitral proceedings against Gazprom and/or Turkmengaz.

The Tribunal finds it doubtful if commencing arbitral proceedings would have been of much help in the critical situation occurred. However, as stated above by the Tribunal, Naftogaz might have been able, in the long term, to find other solutions. The expert witness Mr. Cameron has pointed at the possibility of entering into a joint venture with Gazprom.

It should also be taken into account that purchase of gas from other Central Asian countries was not blocked in the same way as purchase of Turkmen gas, albeit production of gas in the other countries was not as important as the production in Turkmenistan.

Taking into account Naftogaz's entire argumentation, the Tribunal concludes that Naftogaz shall not, due to any of the alleged impediments, be relieved from its obligations to perform under the Contract.

12. Shall the Contract be set aside because of hardship and changed circumstances?
(Naftogaz's items III:J and K)

12.1 Statement by Naftogaz

Following the TPA, an alteration of the gas price was imposed upon Naftogaz. Naftogaz had no alternative but to sign the TPA. If the Contract had been valid and enforceable, Section 36 of the Swedish Contract Act would apply and the Contract would have to be set aside.

Naftogaz is also relieved of its obligations, if any, under the Contract, due to the drastically changed circumstances, i.e. refusal by Gazprom to consent to deliveries, the introduction of export and re-export prohibitions, the failure of IUGAS to obtain licenses and permits, the increased market prices and frustration of Naftogaz's contract with Turkmengaz. It would not be reasonable for Naftogaz to be obliged to perform the Contract.

Naftogaz could not have foreseen these changes, and cannot be considered to have taken the risk of such events when the Contract was signed.

12.2 The Tribunal's Conclusions

Section 36, first paragraph, of the Swedish Contracts Act stipulates that a contract term or condition may be modified or set aside if such term or condition is unreasonable having regard to the contents of the agreement, the circumstances prevailing at the time the agreement was entered into, subsequent circumstances, and circumstances in general.

The Tribunal finds, to start with, that the price imposed on Naftogaz by the TPA can not be deemed to be unreasonable *per se*. It is true that the TPA price for 2006 was nearly twice as high as the price which had been applied pursuant to the Long-Term Contract between Naftogaz and Gazprom and Supplement No, 4, which were still valid when the TPA was signed. Yet the TPA price was lower than the prices applied in connection with export from Russia to other European countries.

Nevertheless, the circumstances under which the TPA was signed were extreme. As stated by the Tribunal in a previous Section of this Award, it must be assumed that the Contract did not contemplate performance under such circumstances. The Tribunal has found that, due to the pressure exerted by

Gazprom, Naftogaz was not liable to deliver gas under the Contract during a transition period running to the end of 2006.

As regards Naftogaz's claim that it should be relieved of its obligations under the Contract due to the drastically changed circumstances which occurred after the Contract was signed, it is true that such a situation might be a reason for the setting aside of a contract, wholly or partly, under Section 36 of the Swedish Contracts Act. However, according to the preparatory works of the Contracts Act (prop. 1975/76:81), Section 36 should mainly be applied in the relationship between companies and consumers. With respect to agreements between companies, a more restrictive application is intended. In Swedish case law, application of Section 36 is not excluded, although in such relations much stronger reasons are required than in a contractual relationship between a company and a consumer.

There is reason to assume that Naftogaz had a strong position when the present Contract was negotiated, considering its size and resources and its vast experience in gas trading. Further, the Contract was drafted by Naftogaz. The Tribunal finds, therefore, that even though circumstances changed after the signing of the Contract, there is no reason to apply Section 36 of the Swedish Contracts Act. Consequently, the Contract shall not be set aside because of these changes.

13. Would performance of the Contract violate public policy of Ukraine? (Naftogaz's item III:L)

13.1 Statement by Naftogaz

In 2006, the export of gas of Ukrainian origin was prohibited. Such gas may only be used for the needs of the population and the needs of non-commercial entities and organizations connected with the needs of the population, but in no case for industrial purposes.

Performance of the Contract, if ordered now, would violate public policy of Ukraine. It would have political implications of unpredictable magnitude.

13.2 The Tribunal's Conclusions

As mentioned above (Section 10.2.2), the expert witness Ms. Tatyana Slipachuk

has stated that the performance of the Contract by Naftogaz, if ordered now, would violate public policy of Ukraine. The expert witness Mr. Olexander Martinenko has, on the other hand, declared that it is obvious that neither performance of the Contract, nor an award ordering Naftogaz to perform the Contract, would violate Ukrainian public policy.

As stated in Section 10.2.3, Naftogaz is not, as far as the Tribunal can find, prohibited from performing the Contract because of the legislation of Ukraine. The export of gas of Ukrainian origin is, however, subject to mandatory licensing. The question whether a license shall be granted or not is dependant on prognostic and actual balances of gas and the availability of sufficient resources of gas.

As shown by a letter to Naftogaz, dated 24 November 2009, from the Ministry of Fuel and Energy of Ukraine, the volumes of natural gas of Ukrainian origin, allowed to be exported in 2009 pursuant to the Prognostic balance, would not enable Naftogaz to perform the Contract. However, it can not be taken for granted that this situation remains also in the future.

The Tribunal holds that, in any case, an award ordering Naftogaz to perform the Contract would not violate Ukrainian public policy.

14. Can the Contract be performed, even though the Parties have not agreed on the price for gas and quantities to be delivered?

(Naftogaz's item III:M)

14.1 Statement by Naftogaz

No deliveries may be made unless IUGAS and Naftogaz have agreed on the quantities to be purchased by IUGAS and Naftogaz has accepted IUGAS' delivery requests.

The circumstances, including the market price for gas, have changed drastically since the signing or the Contract. No deliveries can take places before IUGAS and Naftogaz have agreed on a price modification mechanism and thereafter the price of gas.

The price negotiations would have to be conducted taking into consideration the profit Naftogaz would have made in January 2004 due to the sale of gas and its 60 % shareholding in the joint venture, should it have materialized. This should

include the profit and cost calculations related to IUGAS' sales of gas on the Italian market.

In the spring of 2007, Naftogaz offered a price which was below market price but apparently higher than IUGAS wanted and therefore rejected

14.2 The Tribunal's Conclusions

It follows from Articles 2.1– 2.4 of the Contract that deliveries of gas should be performed on the initiative of IUGAS. Thus, deliveries should take place only after IUGAS had sent a written request to Naftogaz. The Contract does not, however, impose a duty on IUGAS to request certain amounts of gas. It should be noted that, according to Article 2.1, the Contract concerns a total amount of "up to" thirteen billion cubic meters. The same phrase, "up to", is used in the provision on quarterly deliveries in Article 2.3.

However, it is stated in Article 4.10 that the total gas delivery volume may be modified by mutual consent by the Parties and that specific monthly delivery volumes might be modified during the term of the Contract.

Article 5.2 stipulates that, in the event of a significant change in the price for gas on the European market, the Parties shall agree on a mechanism for changing and on the amount of the price for gas by signing the corresponding additional agreement. The Contract is silent on what should be done if the Parties are unable to reach an agreement.

As stated above by the Tribunal (Section 3), the said Articles are questionable from several points of view. However, it should be recalled that, as testified by Mr. Andrea Miele, the Contract was drafted by Naftogaz and based on a model contract that Naftogaz used at that time.

When the Contract was signed, it was the parties' intention that the gas transactions should be handled by a joint venture created by the parties. There is reason to assume that, with such a solution, deficiencies concerning the Articles now discussed would, in practice, be less important. However, as concluded by the Tribunal, it was not a presupposed condition, affecting the validity of the Contract, that a joint venture would be established.

Accordingly, the parties are not relieved of their duty to apply the Articles now discussed because no joint venture existed.

As far as Articles 2.1– 2.4 are concerned, the Tribunal holds that, even though they might be criticized, the application of the Articles should not cause any insurmountable problems.

As regards Article 5.2, it is undisputed that, after the Contract was signed, there has been a significant change in the price for gas on the European market. Therefore, the gas price determined in the Contract needs to be renegotiated. Accordingly, price discussions have taken place between the parties.

In a letter dated 15 June 2006, IUGAS presented a formula regarding the calculation of the price of the Contract. IUGAS did not receive an answer to its proposal. However, at a meeting between the parties on 16 January 2007, Naftogaz, represented by Mr. Voronin, came up with a proposal, suggesting a new price of USD 285 per 1000 cubic meters. This proposal was not accepted by IUGAS. Instead, IUGAS on the 17 January 2007 presented a second price formula. This formula would have led to a new price of USD 236.99 per 1000 cubic meters. By a letter dated 17 May 2007, Naftogaz rejected IUGAS' offer, stating that the price suggested by IUGAS was unprofitable to Naftogaz. Naftogaz did not come up with a proposal of its own.

Thus, the negotiations in 2006 and 2007 concerning a new Contract price ended without a result. However, this does not imply that the parties would be unable to reach an agreement, if price discussions are resumed. An agreement on price is not a necessary prerequisite for a binding obligation to deliver (cf. Article 55 of CISG).

In conclusion, the Tribunal finds that even if the Parties neither have agreed on the quantities of gas to be delivered, nor agreed on the price to be applied, the Tribunal is not prevented from ordering that the Contract shall be performed.

15. Is performance of the Contract hindered because Naftogaz is only obliged to deliver such quantities of gas which IUGAS has capacity to accept?
(Naftogaz's item III:N)

15.1 Statement by Naftogaz

Naftogaz is only obliged to deliver such quantities of gas which IUGAS has the capacity to accept, transit, import and distribute, and which were requested by IUGAS and agreed on by the Parties.

IUGAS failed to obtain transit contracts, failed to obtain Italian licenses for import to and distribution of gas in Italy and furthermore did not submit any contracts for storage of gas in Italy. Nor has IUGAS provided any contracts with customers demonstrating that IUGAS has the means to distribute the gas. Currently IUGAS has no means to accept the gas under the Contract and transit it to and sell it on the Italian market.

In the above circumstances, there would not be any obligation upon Naftogaz to deliver gas to IUGAS.

15.2 The Tribunal's Conclusions

In previous Sections of the Award (Sections 5.1 and 5.4), the Tribunal has discussed IUGAS' obligations to arrange transit capacities through Slovakia and Austria to Italy, as well as the Italian companies' obligations to procure authorizations for import and distribution of gas in Italy and contracts with end consumers.

As to the issue concerning transit of gas, it has been shown that, after the signing of the Contract, IUGAS had frequent contacts with the transmission operator SPP and that, starting in 2006, Naftogaz entered into four transmission contracts with SPP. It is true that the capacity agreed upon in these contracts was much less than the capacity needed to fulfil the Contract. However, it seems likely that IUGAS could have obtained transmission contracts for larger capacities. The witnesses Milos Pavlik and Milan Sedlacek have stated that, if IUGAS today would ask for the capacities needed under the Contract, SPP would currently only be able to offer them as interruptible capacities. Yet, according to the said witnesses, SPP is interested in converting interruptible capacities to firm capacities as soon as possible.

When the Contract was negotiated, the Italian parties undertook to provide certain permits and licenses, as well as contracts with end consumers. However, it was left to the Italian parties to decide whether they would apply for new licenses and provide new contracts or ensure the availability of existing licenses and rights under existing contracts.

As stated above by the Tribunal, it may be argued that the approach envisaged by the Italian parties at a first stage was not totally in line with the options agreed upon. However, it has not, in the Tribunal's opinion, been shown that Naftogaz objected to the intended arrangements.

In conclusion, there is reason to state that the obligations now discussed have been fulfilled.

It should also be recalled that, according to Articles 2.1–2.4 of the Contract, deliveries of gas should be performed on the initiative of IUGAS. In case, for instance, the transmission capacities available during a certain period of time were insufficient, IUGAS could decide to request a lesser volume of gas than the maximum volume stipulated in the Contract. This also applies if, for some reason, a license or contracts with end consumers were temporarily missing.

In view of what has now been said, the Tribunal finds that the fact that Naftogaz is only obliged to deliver such quantities of gas which IUGAS has capacity to accept does not prevent the Tribunal to order that the Contract shall be performed.

16. Summing up regarding validity of the Contract and Naftogaz's obligation to perform it

Taking into account what has been said in the previous Sections of this Award, as well as what has else been submitted, the Tribunal concludes that the Contract is valid and that performance of the Contract is not prevented by any of the circumstances alleged by Naftogaz. Thus, Naftogaz is obliged to deliver gas to IUGAS according to the terms of the Contract.

Following Article 2.4 of the Contract, it is for IUGAS to request monthly deliveries of gas. Written requests shall be sent to Naftogaz five days prior to the delivery month.

Since, after the Contract was signed, there has been a significant change in the price for gas on the European market, the Parties shall, according to Article 5.2, agree on a mechanism for changing and on the amount of the price for gas by signing the corresponding additional agreement. In doing so, the parties have a duty to act in a loyal manner and do their best to reach an agreement.

17. Is Naftogaz obliged to pay a contractual penalty? (Naftogaz's items IV:A–D)

17.1 Statements by the Parties

IUGAS

Naftogaz is obliged to pay to IUGAS a contractual penalty pursuant to Article 6.2 of the Contract for non-deliveries of gas in the period between 1 June 2007 and the date at which a final Award is rendered.

The penalty owed to IUGAS has to be determined on the basis of the value that the non-delivered volumes had in the month in which no delivery took place. The penalty became due on the first day of the month following the month in which no supplemental delivery as foreseen in Article 6.2 was forthcoming.

The value of the gas can be derived from the price that IUGAS' main competitor ENI paid to Gazprom at the delivery point Baumgarten in the respective months. The ENI-Gazprom price is reprinted in the magazine "European Gas markets".

Swedish law does not provide for an automatic adjustment of the penalty clauses, even if the penalty is considered to be high. All other relevant factors must be taken into account. The penalty clause was introduced and drafted by Naftogaz, and Naftogaz willingly assumed the risk of failure to deliver gas.

Contrary to Naftogaz's arguments, IUGAS' delivery requests suffice to trigger the penalties. Naftogaz's argument that the parties would have needed to agree on a price before demands could have been made is incorrect. The same holds true for Naftogaz's argument that the parties would have had to agree on the delivery volume.

The fact that IUGAS has refrained from sending delivery requests for some time does not relieve Naftogaz from its obligation to pay the penalties. Naftogaz has completely denied any obligation to deliver any gas to IUGAS and has made it clear that it will never perform the Contract. It is a generally accepted principle of commercial law that no party is required to adhere to a mere formality when the other party has made it clear that it will not perform.

Finally, the penalties have to be calculated on the basis of the maximum volumes that IUGAS could have and, indeed, would have requested in the relevant period, had Naftogaz not decided to ignore its obligations towards IUGAS. Naftogaz's reference to the formal terms of the transport contracts and the delivery requests that were provoked by its behaviour has no merit.

Naftogaz

(IV:A) Article 6.2 of the Contract is only applicable in situations where the parties have agreed on the price and volumes of monthly deliveries, and such deliveries have taken place but were insufficient to satisfy the agreed volumes. Article 6.2 does not apply when no deliveries have ever been performed.

(IV:B) IUGAS failed to give proper and timely notice that IUGAS considered the non-delivery of gas a breach of contract for which IUGAS would claim penalties and damages. IUGAS therefore forfeited its right to penalties and damages for any quantities of gas requested before such time when IUGAS for the first time in this arbitration submitted a claim for penalties and damages.

(IV:C) The penalty clause in the Contract is unreasonable and should be set aside pursuant to the Swedish Contracts Act Section 36 or, in the alternative, be modified so that the amount that Naftogaz has to pay to IUGAS becomes reasonable in the light of all relevant circumstances.

(IV:D 1) There may be no penalties for non-performance of an invalid contract. IUGAS' delivery requests do not serve to trigger a penalty – they merely evidence the fact that they were sent in bad faith.

(IV:D 2) Article 6.2 does not apply when there has been a substantial change in gas prices on the European market. Under Article 5.2 of the Contract, the parties are in such event obliged to sign an additional agreement. The price discussions held between the parties were without result. The Arbitral Tribunal does not have the authority to determine a relevant price for gas.

(IV:D 3) It follows from Article 4.10 of the Contract that a written request for delivery of gas is only a basis for <u>further</u> final determination of specific volumes of gas to be delivered by way of signing supplementary agreements. This contractually established procedure has never been complied with by IUGAS.

(IV:D 4) Penalties could not be due for the maximum volumes stated in the Contract. IUGAS has neither valid transit contracts concluded for the purposes of the Contract, nor a valid authorization to import gas to Italy or customer contracts.

Neither any alleged anticipated breach of contract on the part of Naftogaz, nor any general principles of commercial law entail that penalties are due to IUGAS starting from June 2007.

17.2 The Tribunal's Conclusions

Article 6.2 of the Contract states as follows.

> In the event that the amount of natural gas delivered is less than the amount specified in the Buyer's request, the Seller shall first make an additional delivery of under-delivered amount in addition to the amount scheduled for delivery in the following month. If the Seller fails to make the additional delivery and the amount of under-delivery exceeds 5% of the amount specified in the Buyer's request, the Seller shall pay to the Buyer a penalty of 20% of the cost of amount exceeding 5% of the under-delivered gas amount.

As stated by Mr. Miele, who signed the Contract, it was drafted by Naftogaz and was based on the model contract used by Naftogaz at that time. Mr. Marenco has confirmed that the Contract had been drafted by Naftogaz. He has added that he was fine with the draft which was pretty much a standard contract.

The statements by Mr. Miele and Mr. Marenco do not indicate that the penalty clause now at issue was discussed specifically before the Contract was concluded. There is reason to assume that it was a standard clause, drafted in accordance with Naftogaz's wishes.

It seems likely that the penalty clause, at least in the first place, had in view situations where deliveries have actually taken place, but are less than contractually required. However, it does not follow from the wording and purpose of the clause that total non-deliveries are excluded from the scope of application of the clause.

According to Article 6.2, penalties are triggered when the amount of gas delivered is less than the amount specified in the Buyer's request. The use of the word "request" is consistent with Article 2.4, which states that monthly delivery volumes shall be determined on the basis of a written request by the Buyer.

Naftogaz has contended that a mere request by the Buyer is not sufficient, but that the parties must also agree on the specific volumes to be delivered. In support of that statement, Naftogaz has referred to Article 4.10 of the Contract.

In the Tribunal's opinion, Naftogaz's interpretation of Article 4.10 is doubtful. The Article stipulates that the total gas delivery volume may be modified by mutual consent of the parties and that specific monthly delivery volumes may be modified during the term of the Contract. In such cases, the parties shall agree upon the delivery volumes for the following month and sign corresponding additional agreements hereto. This formulation can hardly be interpreted as

requiring a written agreement each time the Buyer has requested or intends to request delivery. However, if any of the parties wants a modification, in relation to what is stated in the Contract or otherwise, an agreement between the parties is needed.

Even in cases where an agreement is not necessary, the parties may of course sometimes have a need to discuss practical issues before a formal request for delivery is sent. As stated above in Section 14.2, this does not entail that an agreement on price under Article 5.2 is necessary in order for IUGAS to make a delivery request.

With respect to the question whether IUGAS failed to give timely notice, there is reason to look at Article 49:2 of CISG. It stipulates, inter alia, that in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided because of late delivery, unless he does so within a reasonable time after he has become aware that delivery has been made. Article 49:2 is silent on cases of non-delivery. The same applies for claims for damages or penalties.

In this situation there is reason to pay attention to Article 7:2 of CISG, which states that questions concerning matters governed by the Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

It is a general principle in Swedish and international contract law that even without support of statutory law a party has to inform the other party within a reasonable time when it is important for him to know whether an action will be pursued.

IUGAS sent its first request for delivery on 16 May 2007, demanding delivery of 12,780,000 cubic meters of gas during the period 1–30 June 2007. IUGAS offered to pay a price to be agreed between the parties in good faith according to Article 5.2 of the Contract, if Naftogaz found it necessary, a price to be determined by an Arbitral Tribunal or the original price of USD 110 per 1000 cubic meters.

Requests were further sent on 10 July 2007 (12,462,000 cubic meters during 1–31 August 2007), on 25 August 2008 (30,600,000 cubic meters during 1–30 September 2008), on 24 September 2008 (22,320,000 cubic meters during 1–31 October 2008), on 27 October 2008 (21,600,000 cubic meters during 1–30 November 2008), on 24 November 2008 (22,320,000 cubic meters during 1–31

December 2008), on 22 December 2008 (7,440,000 cubic meters during 1–31 January 2009), on 22 January 2009 (20,160,000 cubic meters during 1–28 February 2009), on 20 February 2009 (22,320,000 cubic meters during 1–31 March 2009, on 27 March 2009 (21,600,000 cubic meters during 1–30 April 2009), on 22 April 2009 (22,320,000 cubic meters during 1–31 May 2009), on 25 May 2009 (21,600,000 cubic meters during 1–30 June 2009 and on 25 June 2009 (22,300,000 cubic meters during 1–31 July 2009).

Naftogaz did not answer to the first two requests. The other requests were expressly or impliedly rejected.

As far as the Tribunal can find, the penalty issue was not raised by IUGAS prior to the Statement of Claim, dated 15 July 2008. That implies that Naftogaz did not receive any notice, as far as the first delivery request is concerned, until more than a year after the month in which delivery should have been performed. In the Tribunal's opinion, such a delay is not reasonable. IUGAS also waited too long before giving notice with respect to the second delivery request.

Accordingly, IUGAS has lost its right to penalties under the Contract, as regards the requests dated 16 May 2007 and 10 July 2007. With respect to the remaining requests, IUGAS has not forfeited its right to penalties because of late notice.

As for Naftogaz's objection that the penalty clause is unreasonable and that the clause, for such reason, should be set aside or modified pursuant to Section 36 of the Swedish Contracts Act, it should be recalled that this law provision mainly refers to the relationship between companies and consumers. In the present case, which concerns two commercial entities, it should be taken into account that Naftogaz is a large company with a vast experience in gas trading. Further, as noted above, the Contract, including the penalty clause, was drafted by Naftogaz. The Tribunal finds, therefore, that Section 36 of the said Act is not applicable.

When calculating the penalties claimed, IUGAS has, as regards the months for which delivery has been requested, in most of the cases used the volumes of gas requested as a basis for the calculations. For the remaining months, the calculations are based on the maximum volumes of gas stipulated in the Contract. The value of the gas has been derived from the price ENI paid to Gazprom at the delivery point Baumgarten in the respective months.

It should be noted that a right to penalties under Article 6.2 of the Contract presupposes that the amount of gas delivered is less than the amount specified "in the Buyer's request". Claiming penalties not only for months for which delivery of gas has been requested but also for months without such request is

not in line with the said prerequisite. Accordingly, IUGAS is not entitled to penalties regarding these months.

Further, it follows from Article 6.2 that the calculation of penalties should be based on the amounts of gas which were in fact requested and not on the maximum volumes of gas stipulated in the Contract.

The Tribunal will revert to the calculation of penalties in the next stage of the arbitration. In that context, it shall also be discussed what price of gas shall be the basis for the calculations.

18. *Is Naftogaz obliged to pay damages?*
(Naftogaz's item IV:E)

18.1 Statements by the Parties

IUGAS

Naftogaz is liable for damages and shall compensate IUGAS for all costs and losses, including loss of profit, arising from any breach of the Contract on the part of Naftogaz during the entire contract period.
Naftogaz's breaches of contract consist of

(1) failure to deliver gas upon request,

(2) failure to cooperate and ensure transmission capacities in the Ukrainian pipeline system, which includes preventing IUGAS from both concluding a gas transmission contract with SPP for maximum volumes under the Contract and issuing delivery requests to Naftogaz for maximum volumes under the Contract,

(3) failure to protect the Contract under the TPA and subsequent agreements,

(4) failure to protect the Contract under Ukrainian export licensing regime under which Naftogaz has a dominant influence,

(5) failure to ensure performance of the Contract through acquisition of gas on the international market,

(6) failure to negotiate in a loyal manner the original price agreed in the Contract despite good efforts from IUGAS' side, and

(7) failure to react in good faith and provide proper responses to IUGAS' many offers to realize the Contract.

Even though Article 6.1 of the Contract provides for a limitation of liability to direct damages, such limitation is not upheld under Swedish law in case of intentional wrongdoing or gross negligence. Naftogaz's repeated contractual breaches amount to a fundamental breach of contract and are the result of intentional wrongdoing.

If the Tribunal finds, in the next phase of the arbitration, that penalties shall be calculated based on maximum volumes of gas which IUGAS could and would have requested in its delivery requests, then IUGAS will not, in addition to such awarded penalties, claim damages for the same period of time, meaning the period June 2007 until the day on which the final Award is rendered.

However, as regards the time period prior to June 2007, IUGAS maintains its claim for damages based on a number of breaches of contract on the part of Naftogaz already in 2004 and onwards which prevented the timely realization of the Contract.

Naftogaz

(IV:E) Swedish law does not recognize that a party has a right to choose to claim damages if such damages are in excess of the contractually stipulated penalty. It, further, does not recognize the choice for the penalty in the event that the actual damages are less than the penalty.

IUGAS failed to give proper and timely notice that IUGAS considered the non-delivery of gas a breach of contract for which IUGAS could claim damages, costs and losses from Naftogaz. IUGAS has therefore forfeited its rights, if any.

Pursuant to Section 27 of the Swedish Sale of Goods Act, a party is not entitled to damages if the other party proves that the failure to deliver is due to an impediment beyond its control which could not reasonably have been expected at the purchase and for which the implications could not have been avoided or overcome.

Under the Swedish Sale of Goods Act, damages (or losses) may be claimed only in case of a negligent breach of contract. Article 6.1 of the Contract limits contractual liability to direct damages.

Under CISG, damages must not exceed such loss which Naftogaz could have foreseen would result from an alleged breach of contract.

IUGAS would only be entitled to damages to the extent IUGAS would be able to accept gas, transport and import gas to Italy and distribute it there. IUGAS lacks such ability.

In any event, IUGAS had an obligation to mitigate its damages, which includes, inter alia, purchasing substitute volumes of gas, which IUGAS failed to do.

18.2 The Tribunal's Conclusions

Article 74 of CISG contains the following central provision on damages:

> Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

According to Article 79:1 of CISG, a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

In commercial contracts, deviations from the general rules on damages are common. Thus, it is frequently stated that the liability to pay damages does not cover loss of profit or "indirect losses". However, it is a commonly recognized, albeit criticized, principle that such limitation does not apply in cases of intentional wrongdoing or gross negligence by the party in breach of the contract.

In the present Contract, damages are dealt with in Article 6.1. According to this Article, the parties shall be liable for fulfilment of their obligations hereunder. In the event of non-fulfilment of its obligations, each party shall indemnify the other party for direct damages caused by such non-fulfilment.

The question then is whether Naftogaz has breached the Contract.

Item 1 in IUGAS' list of alleged breaches of contract

As stated in previous Sections of the Award, IUGAS started sending requests for deliveries on 16 May 2007. A second request was sent on 10 July 2007. In both cases, the volume of gas requested was far below the maximum monthly volume stipulated in the Contract. In both requests, IUGAS presented three alternatives concerning the price to be paid.

In 2008 and 2009, IUGAS sent additional requests for delivery, with content similar to the content of the requests sent in 2007.

Naftogaz did not answer the requests sent in 2007. The remaining requests were expressly or impliedly rejected by Naftogaz.

The Tribunal finds that, by its behaviour, Naftogaz breached the Contract. However, it should be recalled that a failure on the part of the Seller to make delivery in accordance with the Buyer's request is sanctioned by way of penalties (Article 6.2). This clause must be interpreted as providing the exclusive remedy in cases of delay or non-delivery. Accordingly, IUGAS is not entitled to damages in such a situation, even if damages might have amounted to a larger sum than the penalty. Conversely, Naftogaz is not entitled to a discount if the penalty exceeds what would have been payable as damages.

In the previous Section of the Award, the Tribunal has concluded that Naftogaz has to pay penalties because some of the requests for delivery were not fulfilled. However, with respect to the first two requests, IUGAS has lost its right to penalty due to untimely notice. The Tribunal finds that, in this situation, the right to damages is also excluded.

To sum up, IUGAS shall not be awarded damages because Naftogaz has failed to deliver gas upon request.

Item 2 in IUGAS' list

It is shown that IUGAS and the transmission operator SPP initiated negotiations in the beginning of 2004 and that the parties agreed on a draft contract providing such transport capacity as was needed under the Contract. However, SPP recommended IUGAS to ask for an official confirmation of Gazexport that gas for IUGAS would be delivered through the Ukrainian pipeline system. Gazexport, in its turn, asked IUGAS to provide a confirmation from Naftogaz regarding the effectiveness of the Contract. In the spring of 2004, IUGAS sent a number of letters to Naftogaz, asking Naftogaz to send the requested information to Gazexport. It is undisputed that Naftogaz never did so. Instead, at

a meeting, the representative of Naftogaz, Mr. Voronin, declared that he would not confirm the Contract.

On 17 May 2004, IUGAS was informed by both Gazexport and Gazprom that there was no measuring capacity available at the measuring station Velke Kapusany. Shortly thereafter, IUGAS decided not to conclude a transmission contract for the time being.

The Tribunal holds that Naftogaz, by its unwillingness to cooperate, breached the Contract and that this breach, *per se,* triggered a liability to pay damages. However, it remains to consider whether IUGAS has forfeited its right to damages because of failure to give timely notice,

In the previous Section of the Award, the Tribunal has stated that it is a general principle in Swedish and international contract law that, even without support of statutory law, a party has to inform the other party within a reasonable time when it is important for him to know whether an action will be pursued.

The breach of contract now discussed occurred as early as in the spring of 2004. As far as the Tribunal has found, IUGAS did not indicate any intention to raise a claim for damages until in the Request for Arbitration, dated 17 January 2008. In the Tribunal's opinion, IUGAS has therefore lost its right to damages for the aforementioned breach.

Item 3 in IUGAS' list

It should be recalled that, as stated by the Tribunal in Section 10.1.4, Naftogaz signed the TPA under duress and that, due to the pressure exerted by Gazprom, Naftogaz was not liable to deliver gas under the Contract until after the end of 2006.

As regards the subsequent agreements between Naftogaz and Gazprom, concluded in October 2008 and on 19 January 2009, Naftogaz has not contended that they were signed under duress. However, as stated by the Tribunal, there is no evidence that Naftogaz did not do its best to get a contract with Gazprom on as favourable conditions as possible which would then also benefit the IUGAS Contract.

What has now been said leads to the conclusion that Naftogaz shall not be held liable for breach of contract due to the alleged failure to protect the Contract under the TPA and subsequent agreements.

Item 4 in IUGAS' list

In Section 10.2.3, the Tribunal has discussed Naftogaz's role under the Ukrainian export licensing regime. The Tribunal has found it likely that, even if Naftogaz does not have any control of the application of that regime, Naftogaz is able to exert a certain influence. However, letters from Ukrainian ministries indicate that Naftogaz's influence is not without limits.

Consequently, there is not, in the Tribunal's opinion, reason to conclude that Naftogaz has breached the Contract because of failure to protect the Contract under the Ukrainian export licensing regime.

Item 5 in IUGAS' list

IUGAS has alleged that Naftogaz has failed to ensure performance of the Contract through acquisition of gas on the international market. The Tribunal concludes that there was no reason for Naftogaz to acquire such gas except for the fulfilment of IUGAS' delivery requests. As stated above by the Tribunal in 17.2 and item 1 above, the contractual remedy for failure to deliver gas is a penalty in accordance with Article 6.2. Thus, IUGAS is not entitled to damages in addition to penalties.

Item 6 in IUGAS' list

As far as the price of the gas is concerned, negotiations between the parties have taken place during 2006 and 2007 (see Section 7.2 above). IUGAS presented a formula regarding the calculation of the price on 15 June 2006, and Naftogaz came up with a different proposal on 16 January 2007. This proposal was not accepted by IUGAS. Instead, IUGAS on the following day presented a second price formula. On 17 May 2007, Naftogaz rejected IUGAS' offer, without coming up with a proposal of its own. Thus, the negotiations ended without a result.

It may be argued that Naftogaz should have reacted more promptly after having received IUGAS' proposals and that Naftogaz, on the whole, might have acted in a more loyal manner. However, in the Tribunal's opinion, Naftogaz's behaviour did not amount to a breach of the Contract.

Item 7 in IUGAS' list

It is a fact that, after the Contract had been signed, IUGAS made substantial efforts to fulfil the Contract (see the account in Section 7.2). IUGAS sent a large number of letters to Naftogaz, of which many were left unanswered. In the

Tribunal's opinion, there is reason to criticize Naftogaz's behaviour. However, it did not amount to a breach of the Contract.

Summing up regarding items 1–7

To sum up, the Tribunal has come to the conclusion that Naftogaz is not liable to pay damages on any of the grounds alleged by IUGAS.

As a consequence, the Tribunal does not have to address the question whether a liability for IUGAS to pay damages would have included compensation not only for direct losses but also for indirect losses, such as lost profit. Nor does the Tribunal have to consider whether, as alleged by Naftogaz, IUGAS has failed to mitigate its losses.

19. Shall penalties or damages payable by Naftogaz be reduced by 60 %? (Naftogaz's item IV:F)

19.1 Statement by Naftogaz

If any penalties or damages are payable by Naftogaz to IUGAS, such penalties and damages should be reduced by 60 % considering the fact that Naftogaz was to own 60 % of IUGAS.

19.2 The Tribunal's Conclusions

Above, the Tribunal has come to the conclusion that Naftogaz is not liable to pay damages to IUGAS.

As regards the question whether penalties awarded to IUGAS shall be reduced in accordance with Naftogaz 's request, the Tribunal concludes as follows.

When the Contract was negotiated, it was the intention of the negotiating parties that a joint venture should be established and that Naftogaz should own 60 % of the shares of the joint venture (IUGAS). As stated by the Tribunal in Section 5.3 above, the Italian parties fulfilled their obligations. It is, however, a fact that Naftogaz never acquired any shares and that, consequently, there was never any joint venture as envisaged. As far as has been shown, this failure can not be attributed to the Italian side.

In view of the above, there is, in the Tribunal's opinion, no reason to reduce the amount of penalties as requested by Naftogaz.

20. Final summing-up

In accordance with what has been stated in the previous Sections of the Award, the Tribunal will rule as follows.

The Tribunal has jurisdiction to adjudicate the dispute submitted to the Tribunal, the Contract is valid and effective and Naftogaz is obliged to deliver gas to IUGAS according to the terms of the Contract.

Further, Naftogaz is obliged to pay penalties to IUGAS for partial or total non-deliveries of requested gas pursuant to Article 6.2 of the Contract in the period from 1 September 2008 until the date at which a final Award is rendered.

Naftogaz's obligation to pay penalties concerns only non-fulfilment of requests of gas which have actually been submitted by IUGAS. The calculation of the penalties shall be based on the volumes of gas requested.

Naftogaz is not liable to compensate IUGAS for damages arising from any breach of the Contract.

In the second stage of the arbitration, the Tribunal will deal with the quantum of the penalties which shall be awarded to IUGAS. The Tribunal will also address issues concerning costs of the arbitration.

THE SEPARATE AWARD

The Tribunal decides as follows.

1. The Tribunal has jurisdiction to adjudicate the dispute submitted to the Tribunal.

2. The Natural Gas Supply Contract from 2004 to 2013, concluded on 24 December 2003 by Naftogaz and IUGAS, is valid and effective.

3. Naftogaz is obliged to deliver natural gas to IUGAS according to the terms of the said Contract.

4. Naftogaz is obliged to pay penalties to IUGAS for partial or total non-deliveries of requested gas pursuant to Article 6.2 of the Contract in the period from 1 September 2008 until the date at which a Final Award is rendered.

Naftogaz's obligation to pay penalties concerns only non-fulfilment of delivery requests for natural gas which have actually been submitted by IUGAS. The calculation of the penalties shall be based on the volumes of natural gas requested.

5. IUGAS' claim for compensation for damages arising from breaches of the Contract is rejected.