

*Dmitri Grischenko*

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## **Arbitration Case**

**LLC AMTO (Latvia)**

**v.**

**Ukraine**

# Arbitrators and Counsel of the Parties

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## Arbitrators:

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

Claimant represented by co-counsel  
Advokat Sverre B. Svahnström,  
Prof. Kaj Hobér  
(Mannheimer Swartling)

Respondent represented by co-counsel  
Dr. Sergei Voitovich, Mr. Dmitri  
Grischenko (Grischenko & Partners),  
Mr. Andriy Alexeev (Proxen &  
Partners)

# General info

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- ❑ The first ECT case won by Respondent State
- ❑ Total amount of claims more than EUR 20 million
- ❑ Claims associated with bankruptcy of National Nuclear Power Generating Company Energoatom

# Issues for discussion

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- Tribunal's interpretation of "associated with"  
(Article 1(6) of the ECT)
  
  - Attribution of Energoatom's actions to the State
  
  - The Parties' refusal from oral hearing
  
  - Other issues
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# Interpretation of the term “associated with an Economic Activity in Energy Sector”

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- Essence of the ECT Article 1(6)
- Respondent’s Argument: AMTO’s Shares are not “Associated With”
  - AMTO’s shares in the Ukrainian subsidiary company do not constitute a qualified “Investment” under the ECT
  - The Arbitral Tribunal concluded that “the interpretation of the words ‘associated with’ involves a question of degree, and refers primarily to the factual rather than legal association between the alleged investment and an Economic Activity in the Energy Sector.”
- Tribunal’s findings (character of association)
  - The alleged investment must be energy related
  - The subject matter of the contract must have functional relationship with the energy sector
- Functional relationship
  - Investment protectable under the ECT should have stable, long-term, intensive and functionally necessary connection with “Economic Activity in the Energy Sector”. Such association should not be loose, unstable, episodic, fragmentary or incidental

## Attribution of Energoatom's actions to the State (1)

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- Claimant's argument in general:
  - “Energoatom's legal independence was purely formal as even its commercial activities were controlled by the State, with prices, retailers, and forms of payment established by law and ultimately fixed and controlled by a state organ called the National Energy Regulatory Commission of Ukraine”
- Real status of Energoatom – Respondent's position
- Tribunal's findings:
  - “Conduct of Energoatom is attributable to Ukraine, in accordance with established principles of international law, where it is shown that Energoatom was exercising *puissance publique* (governmental authority) or acted on the instructions of, or under the direction or control of, the State in carrying out the conduct”

## Attribution of Energoatom's actions to the State (2)

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- Respondent's position:
  - No State organs had been involved in negotiating and executing the contracts between Energoatom and the Claimant's subsidiary, EYUM-10
  - No State bodies had considered the issue of non-payments between Energoatom and the Claimant's subsidiary
  - Therefore, the State could not be responsible for the acts/omissions of Energoatom under the commercial contracts with EYUM-10, to which the State bodies did not have even any remote relation
- Nykomb v. Latvia analogy
  - Unlike Latvenergo, Energoatom may not be named "*a vehicle to implement the Republic's decisions concerning the price setting for electric power*"
  - In negotiating and performance of its contracts with EYUM-10, Energoatom did not implement any governmental decisions.
- Claimant's "lack of funding" argument
  - was not supported by specific evidence(!)
  - And:
    - Energoatom had sufficient financial independence from the State to make payments under the contracts with EYUM-10.
- **Ultimately, the Arbitral Tribunal made a statement of general significance that "[t]he payment or non-payment by a state entity of contractual debts owed to a service provider involves no exercise of sovereign authority or puissance publique, and cannot be attributed to the Ukraine"**

# Refusal from oral hearing

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- Petrobart v. Kyrgyzstan
  - The first cancellation of oral hearing
- Essence of the procedural agreement in AMTO
  - The Parties shall submit written replies to the written questions of the Tribunal, if any, and each party will be given one opportunity to comment upon the other party's replies to the Tribunal's questions
  - Each party shall be given one opportunity to comment in writing on the draft Recital to the Award, including the undisputed facts of the case and the Parties' legal grounds and argumentation
- Procedural agreement in the circumstances of the case
  - We consider that in the particular circumstances of this case, the Parties' agreement to cancel the hearing on such basis was more to the benefit of the Respondent, since the Respondent's last written submission entitled "Pre-hearing brief", which included several expert reports, could not be properly rebutted by the Claimant



# Other issues

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- The AMTO Tribunal also made important findings on a number of other matters, which are beyond the scope of our brief presentation:
  - Article 17 of the ECT (denial of advantages)
  - Alleged denial of justice in Ukrainian courts
  - Ukrainian bankruptcy legislation
  - Application of Article 10(1) (“umbrella clause”)
  - Article 22 of the ECT

# Thank you for your attention!

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