ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

SCC Case No EA 2016/046

BETWEEN:

OSTCHEM HOLDING LIMITED

Claimant

and

PUBLIC STOCK COMPANY ODESSA PORT PLANT

Respondent

EMERGENCY AWARD

31 MARCH 2016

Before the Arbitral Panel:

Noah Rubins
Emergency Arbitrator

IN THE MATTER OF AN ARBITRATION

SCC Case No EA2016/046

BETWEEN:

Ostchem Holding Limited, hereinafter ***Ostchem*** or ***Claimant***, registered address Emiliou Chourmouziou, Lophitis Business Centre, 6th floor, offices 3 & 4, 3035 Limassol, Republic of Cyprus

Claimant

represented by Johan Sidklev and Henrik Fieber of Roschier, Box 7358, SE-103 90 Stockholm, Sweden, and Aapo Saarikivi and Laila Morad of Roschier, 7A Keskuskatu, FI-00100 Helsinki, Finland

AND

Public Stock Company Odessa Port Plant, hereinafter ***OPZ*** or ***Respondent***, registered address 3 Zavodskaya St., Yuzhny, Odessa Region, Ukraine

Respondent

represented by Deputy Director Sergei Nikolaevich Nazarenko

Emergency Award

rendered in Stockholm, Sweden on 31 March 2016 in emergency arbitration proceedings between the parties set out above (collectively the ***Parties***).

I. BACKGROUND

1. This proceeding concerns an application submitted by the Claimant on 23 March 2016 to the Arbitration Institute of the Stockholm Chamber of Commerce (the ***SCC Institute***) for the appointment of an Emergency Arbitrator (the ***Application***). In the Application, Claimant requests the Emergency Arbitrator thus appointed to rule upon a request for interim relief made therein.

2. Specifically, the Claimant seeks an order from the Emergency Arbitrator directing the Respondent to refrain from transferring or encumbering immovable assets owned by OPZ worth at least US$246,440,231.74 (the sum of an alleged debt principal and penalties through 22 March 2016), such asset freeze to remain in place until a final award has been rendered in a forthcoming SCC arbitration. The Claimant also asks the Emergency Arbitrator to order the Respondent to refrain from issuing any corporate resolutions, approvals or decisions through its corporate organs or management authorizing any transaction directed at such an asset transfer or pledge.

3. Pursuant to the preamble of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the ***SCC Rules***), under any arbitration agreement referring to the SCC Rules the parties shall be deemed to have agreed that the rules in force on the date of the commencement of the arbitration shall be applied unless otherwise agreed by the parties. Accordingly, the rules to be applied to the Application are the SCC Rules in force as of 1 January 2010, including Appendix II thereof, which provides for the appointment of an Emergency Arbitrator upon the application of a party.

4. The Claimant is a company incorporated under the laws of Cyprus. It is an international chemical corporation and its main activity is related to the production and export of nitrogen-based fertilizers. Ostchem is part of Group DF, the group of companies owned and

controlled by Ukrainian businessman Dmytro Fyrtash. The Respondent is a Ukrainian company based in the Odessa region of southern Ukraine. It is one of the largest producers of nitrogen-based fertilizers in the country. OPZ is 99.6% owned by the State of Ukraine, through Ukrainian State Property Fund.

5. On 25 January 2013, Ostchem and OPZ concluded the Natural Gas Sales Contract No. 20/CH-36-1 (the ***Contract***). According to the Contract, Ostchem agreed to sell and OPZ to buy 590 million cubic meters of natural gas from 1 February 2013 to 30 June 2013. The Parties also concluded three subsequent amendments to the Contract. The Contract stipulates that payments for natural gas under the Contract shall be made in US dollars against (i) preliminary invoices issued by Ostchem prior to the delivery of the natural gas (50% of the price of the monthly delivery in advance and remaining 50% of the price of the monthly delivery no later than five business days after the end of the month of the delivery); and (ii) final invoices issued by Ostchem after the delivery of the natural gas.

6. According to the Contract, the Parties are to settle any differences between the payment made against the preliminary invoice and the price of the natural gas delivered based on the final invoice. In the event of untimely payments, the Contract sets a penalty of 0.03% per day (corresponding to 10.95% per annum), as compensation for the time value of the unpaid funds.

7. During the period between February and December 2013, it appeaers that Ostchem supplied 1,183,156,889 cubic meters of natural gas to OPZ, which was the subject of invoices totaling US$508,757,462.27 (Exhibit C-3). According to the Claimant, payments against this sum were made only partially and late, with no payments made for deliveries during the period of September to December 2013. The Claimant contends that the outstanding principal debt owed by OPZ to Ostchem for the gas delivered amounts to US$193,257,811.23. In addition, the Claimant alleges that as of 22 March 2016 accrued penalties total US$53,182,420.52 pursuant to the Contract.

8. On 26 January 2016, the Claimant sent a Demand Letter to the Respondent (Exhibit C-7), demanding payment of the outstanding principal debt together with default interest, and purporting to terminate any further obligations under the Contract. In addition, the Claimant

declared its intention to submit the dispute to the Arbitration Institute of the Stockholm Chamber of Commerce if the debt remained unpaid by 4 February 2016. On 1 February 2016, OPZ responded to the Claimant's letter (Exhibit C-8), acknowledging the principal debt to Ostchem (but not mentioning the penalty amount) and expressing a willingness to negotiate "argumentative issues under the Contract." On 3 February 2016, Ostchem wrote to OPZ demanding a proposal for settlement of the debt by 19 February 2016 (Exhibit C-9).

9. This history is complicated by the contemplated privatization of OPZ. It is undisputed that the Government of Ukraine, designated its 99.56% stake in OPZ for sale by auction, within the framework of a general plan to privatize state owned entities in 2016 (Exhibit C-10). According to Ostchem, OPZ and/or its owner, the State Property Fund, intend to restructure the Respondent prior to privatization in order to increase the potential sales price of the State's controlling stake in the company, for example by separating OPZ's hard assets from its debt to Ostchem. The Claimant contends that such a step, regardless of how precisely it is implemented, would render the debt of Ostchem impossible to enforce, even with the support of an eventual arbitration award in the Claimant's favor.

II. PROCEDURE TO DATE

10. The Claimant submitted the Application to the SCC on 23 March 2016, requesting the appointment of an Emergency Arbitrator in accordance with Appendix II of the SCC Rules.

11. On 24 March 2016, Noah Rubins was appointed by the Board of the SCC Institute (the ***SCC Board***) as Emergency Arbitrator in accordance with the SCC Rules. Prior to this appointment, the Emergency Arbitrator signed a statement confirming his independence and impartiality, and provided those statements to the SCC Institute. On the same day, the SCC Board decided that the seat of the emergency proceedings shall be Stockholm and notified the Parties that the deadline for the rendering of the Emergency Arbitrator's decision was 29 March 2016.

12. In the early evening on 24 March 2016, the Emergency Arbitrator invited the Respondent by email to present its arguments in response to the Claimant's Application by midnight on 25 March 2016. The Claimant was invited to provide any comments on this submission by

midnight on 26 March 2016. The Emergency Arbitrator scheduled a telephonic conference for 15:00 CET on 28 March 2016.

13. On 25 March 2016, Respondent wrote to the Emergency Arbitrator, stating that it was prepared to negotiate payment terms with the Claimant. OPZ offered no arguments with respect to the application itself. Later that day, the Emergency Arbitrator wrote to the Respondent with copy to the Claimant, inviting further substantive submission: "I reiterate that you may want to comment on the petition for emergency relief on its merits, as presented in the Claimant's petition. Any such further comments will be welcome until midnight tonight." No further material was then forthcoming. On 26 March 2016, the Claimant submitted comments on the Respondent's letter. By email of 28 March 2016, Respondent submitted its Comments on Claimant's letter on interim measure to the Emergency Arbitrator.

14. On 28 March 2016, the Emergency Arbitrator convened the Parties by telephone for a conference that lasted approximately one hour. The Claimant was represented by counsel from the Roschier law firm in Stockholm and Helsinki, while the Respondent was represented by four managers: Sergiy Nazarenko, Deputy Director for Commercial Issues; Volodymyr Vakeryak, Head of Economics Department; Andrii Roibu, Head of Procurement; and Sergii Dimentiev, Procurement Engineer. The Emergency Arbitrator posed a range of questions to the Parties about the relief requested and their respective positions. In response to a question from the Emergency Arbitrator, the Respondent indicated that it would be prepared to provide a written undertaking not to carry out any alienation of assets or debt prior to privatization without the Claimant's consent, and to procure a similar undertaking from the State Property Fund. At the end of the telephone conference, the Emergency Arbitrator asked whether either Party had further comments to make, and both Parties confirmed that they did not.

15. On 29 March 2016, the Emergency Arbitrator wrote to the SCC requesting an extension of time to render a decision in the present proceeding. He indicated in this communication that the prior day (28 March) had been a bank holiday in France, depriving him of logistical support, and that the Respondent had been accorded the opportunity during the telephone conference to provide undertakings from itself and the State Property Fund. To allow this to occur and the Claimant to comment on any such undertakings, the Emergency Arbitrator asked for an

extension of two days to render his decision, until 31 March 2016. On the same day, the SCC Board communicated to the Parties that the Emergency Arbitrator's request had been granted, and that the deadline had been extended until 31 April.

16. Also on 29 March, the Respondent submitted a letter (in Russian) signed by Mr Nazarenko, confirming that: "in the process of pre-privatization preparations AO OPZ will not take any action to transfer to third parties the debt in favor of Ostchem Holding Limited arising out of gas supply in 2013 without the consent of Ostchem Holding Limited." Later that day, the Respondent wrote to indicate that it was unable to procure a similar undertaking from the State Property Fund, because the SPF could only issue such a letter under direction from the Cabinet of Ministers, whose membership is currently in flux.

17. On 30 March 2016, the Claimant submitted comments on the Respondent's undertaking. Ostchem insisted that the letter from OPZ did not change the situation. First, it expressed the view that the text of the undertaking did not cover all of the possible restructuring schemes that could be implemented to frustrate its rights, and in any event constituted a mere contractual obligation that could be violated at will by OPZ. Second, Ostchem pointed out that the undertaking covers only the period of the "pre-privatization" process, which could be viewed as ending in the next two months. Finally, the Claimant insisted that OPZ did not have the authority to issue such an undertaking (over the signature of Mr Nazarenko), because such corporate action according to the company's foundational documents requires the approval of a shareholders' assembly, which would include the approval of the State Property Fund and the Cabinet of Ministers. The Claimant also noted that the State Property Fund itself has not provided an undertaking of any kind, and could therefore override any promise of OPZ.

18. Also on 30 March 2016, the Respondent provided written comments to the Claimant's submission regarding the undertaking in a letter in Russian signed by Mr Nazarenko, which was followed several hours later by an English translation. In this letter, OPZ reiterated that all actions of the company involving significant transactions, and in particular the alienation of major assets, would require shareholder approval. According to the Respondent, this in turn means that a major restructuring of the sort feared by the Claimant could not be undertaken by OPZ or even the State Property Fund alone; only the Cabinet of Ministers would have the

power to authorize such a step. The Respondent stated once again that its management had no intention of taking action towards "disposal of assets, channeling of assets, dissipating of assets, debt restructuring etc. which could cause the irreparable harm to Ostchem Holding Ltd."

III. CONSIDERATION OF THE PETITION FOR INTERIM MEASURES

19. Pursuant to Article 32(1) and Article I (2) of Appendix II to the SCC Rules, an Emergency Arbitrator has the power to "grant any interim measures it deems appropriate." The purpose of interim measures is to secure a party's claim and/or to safeguard the applicant's rights from harm that cannot readily be compensated with monetary damages as part of a final award. In particular, interim measures are normally designed to preserve the integrity of the arbitration process and to give effect to an award eventually rendered. Given that interim relief issued by an Emergency Arbitrator is not binding on the eventual SCC tribunal constituted in the same matter (per Article 9(5) of Appendix II of the SCC Rules), and moreover will lapse if arbitration is not initiated within 30 days (per Article 9(4)(iii) of Appendix II), it stands to reason that such emergency measures should be particularly aimed at providing protection on a temporary basis that the tribunal cannot offer because it does not yet exist. Once constituted, the tribunal will naturally be in a superior position (through a "normal" procedure to adjudicate interim relief petitions) to assess the facts and legal arguments of the parties and to craft a result that most appropriately addresses the respective rights of the parties. This may be done by nullifying the Emergency Arbitrator's order, extending it, modifying it, or by providing relief where the Emergency Arbitrator declined to do so. But for the months that lie between the present moment and the constitution of a tribunal, the Emergency Arbitrator must carefully (and quickly) consider applications to prevent undue harm to legitimate interests, as he may be the only effective recourse for that relatively short period of time.

20. The SCC Rules and Swedish law accord the Emergency Arbitrator with broad discretion to determine whether interim measures are justified in the circumstances (for example, Christopher Boog, "The Laws Governing Interim Measures in International Arbitration," in *Conflict of Laws in International Arbitration* (2011), p. 438). This is the position of the Claimant, but it has not been contested by the Respondent. There is also broad consensus (for example in the treatises of Gary Born and Redfern & Hunter) as well as common sense supporting the need to consider four separate elements when deciding whether the grant interim measures of protection.

21. First, the petitioner should establish a reasonable prospect of success on the merits of its claim. At times this has been described as a "prima facie" test, but in fact it should be something slightly more. Obviously it is not for the Emergency Arbitrator to determine which of the parties is right and which wrong in their dispute. But if there is no reasonable prospect of success (a "colorable" claim, one might say, which is more than a *prima facie* showing, which requires no evidence at all) then there is no tangible right deserving of protection, and any relief granted will upset rather than preserve the *status quo.*

22. Second, the petitioner must demonstrate that, absent the relief requested, harm will result to its interests that is serious and not adequately compensated by an award of damages. It is generally accepted that this need not rise to the level of "irreparable harm" as the term is used in some domestic legal systems. But it must normally be harm of more than a purely monetary nature – otherwise the tribunal can award compensation with interest that will cure the harm in due course without the need for interim intervention.

23. Third, there must be reasonable confidence that the harm identified by the petitioner will materialize imminently. Normally, this requirement of "urgency" does not suggest that relief will be forthcoming only where the danger is mere days away. Rather, in standard arbitration proceedings the consideration is simply whether the danger is likely to come to fruition before an award will be rendered by the tribunal. If not, then the tribunal's award can mitigate the future harm with an order, and preliminary measures are unnecessary. In proceedings such as these, the situation is slightly different. As noted above, an emergency arbitrator need only concern himself with the period of time until the arbitral tribunal is constituted and can reasonably adjudicate a petition for interim measures. There can be no doubt that the tribunal is better equipped to arrive at the right decision, and therefore to the extent harm is unlikely to come to pass before that body is engaged and ready to hear a petition, it would normally be preferable for the Emergency Arbitrator to defer to the tribunal on the issue.

24. Finally, the proportionality of the measure requested must be taken into account. Most commonly this criterion is assessed as a balance of hardships, considering the burden that will be placed on the party subject to the order, as compared to the burden that the petitioner will bear

if his request is not granted. If the negative impact of the requested relief is disproportionate to its benefit, then either the request must be declined or the relief redesigned to reduce the burden on the subject party. This the Emergency Arbitrator has the authority to do under the SCC Rules.

25. Having described the elements that are to be considered in determining whether interim relief is appropriate, the Emergency Arbitrator now turns to assess them one by one in the case at hand.

a. Likelihood of success on the merits

26. The first element to be established is whether there is a colourable case on the merits of the claim to be presented. It should be noted at the outset that jurisdiction is based on Art 9 of the Contract, and has not been denied by the Respondent. Article 9.1 calls for the negotiation of disputes, and 9.2 refers disputes to SCC arbitration should it "appear impossible to reach agreement" after 30 days. As noted, the Parties exchanged correspondence regarding possible negotiations beginning in January 2016, and arbitration proceedings have not yet begun. The pre-arbitration requirement therefore appears to be satisfied, and the Respondent has not actually argued that jurisdiction would be affected even if this had not been the case.

27. The principal claim of US$193,257,811.23 has been confirmed by the Respondent, both in written correspondence (as recently as 25 March 2016) and during the telephone conference of 28 March 2016. In its submission and during the telephone conference, OPZ insisted that the 2013 gas sales had been carried out "on credit," apparently based upon an oral agreement between the management of the Claimant and the management of the Respondent. There is no evidence to support this contention, which is denied by the Claimant. The Respondent points out that the Claimant did not seek payment of the debt until relatively recently, and that it continued to deliver gas to OPZ despite the mounting debt, and suggests that this confirms the existence of an agreement as alleged. This seems something of a non-sequitur, and does not substantially advance the Respondent's position from an evidentiary standpoint. Moreover, Ostchem promptly issued invoices for gas delivered in 2013 (Exhibit C-3), and there is no suggestion that these invoices were contested on the basis of a parallel credit agreement. But even assuming that there was such an agreement, this does nothing to undermine the preliminary evidence that such credit has come due for repayment (as all credits eventually do). Indeed, as noted, the

Respondent has confirmed in various contexts that the principal amount is indeed past due, and has not explained how the existence of an oral credit agreement would affect this circumstance.

28. The Respondent has not confirmed the additional US$53,182,420.52 claimed in respect of penalties, nor has it expressly denied liability for this amount or provided specific reasons why this liability does not exist. The reasoning of the Claimant with respect to these penalties corresponds to the terms of the contract, and therefore is also established on a reasonable preliminary basis.

29. In light of these considerations, the Claimant has established a reasonable chance of success on a preliminary basis that is sufficient to satisfy the "merits" criterion for interim relief. Naturally, this conclusion is entirely without prejudice to the full assessment of the facts and evidence by the arbitral tribunal that will be constituted in due course.

b. Serious harm

30. The second element is a risk of serious harm. The Claimant has described the harm clearly in the possibility that either OPZ or its owner, the State Property Fund, will restructure the Respondent such as to separate the company's assets from its liability to the Claimant. This would ostensibly occur in advance of privatization. The Claimant contends that if such action were taken in relation to the Respondent, recovery of the debt (if established) would prove exceedingly difficult. Indeed, if steps were taken to reduce the value of OPZ's assets, or to transfer the gas debt to a third party that does not have a corresponding asset value or cash flow, the prospect of voluntary compliance or compulsory enforcement of an eventual US$246.4 million debt is likely to become remote. The very purpose of an arbitral process would then be in doubt. This is indeed harm of the sort that would normally be considered serious and therefore supportive of an order of interim measures to preserve the status quo (See, for example Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (2005), p. 12, 214-218; Gary Born, *International Commercial Arbitration*, Volume II (2009), p. 2002-2007).

31. The question remains as to how likely is the prospect of such a restructuring. Documents submitted indicate that such an approach has been considered by the State Property Fund in the

past. In July 2014, a reliable information agency (UNIAN) published a report on its website regarding the planned privatization of OPZ, in which a Ukrainian official recommended separating the OPZ transhipment terminal into a separate asset for sale as a means of mitigating the impact of the company's debts on the price (Exhibit C-22). Such ideas appear not to have faded with time. In February 2016, the former head of the State Property Fund mentioned debt restructuring proposals in a radio interview specifically in relation to the debt of Ostchem (Exhibit C-19). The current head of the State Property Fund, Mr Bilous, told UNIAN in February 2016 that his institution was "discussing a few options" in relation to OPZ's debt to the Claimant, including "restructure the debt or replace the debt with the state loan" (Exhibit C-17). The separation of productive assets from inconvenient debts has also recently been contemplated in relation to other Ukrainian State-owned companies, such as Naftohaz (Exhibits C-23 and C-25).

32. At the same time, there are indications that the Claimant's alleged debt (at least the principal amount) is recognized to form part of the company to be privatized, and that this would be incorporated into the eventual sale price of the government's shares in OPZ. During the telephone conference with the parties, the Respondent denied that such a restructuring was currently being contemplated, and indeed explained that the pre-privatization valuation exercise currently underway incorporates the alleged debt (again, without clarity as to whether this includes the penalty amount) along with all other assets and liabilities of OPZ. Moreover, the Respondent did provide a letter undertaking not to transfer its assets during the pre-privatization process, or otherwise to separate the debt from OPZ assets. This would tend to suggest that OPZ has no intention of doing so in any event (a relevant consideration to which we will return in considering the proportionality of interim measures). But there is no corresponding undertaking from the State Property Fund, which controls OPZ and from which the reported proposals of debt restructuring have emanated.

33. On the basis of the foregoing considerations, it can be concluded that there is a substantial risk that OPZ will undertake a restructuring of assets or liabilities, including by order of the State Property Fund or other agencies of the State of Ukraine, which will undermine the ability of Ostchem to collect an eventual award on its alleged debt. This satisfies the requirement that the petitioner establish a risk of serious harm in the absence of interim relief.

c. Urgency

34. The Claimant has not indicated specifically when it fears an asset or debt restructuring of OPZ will take place. It asserts that this is likely to occur prior to privatization of OPZ, and refers to press reports indicating that a tender will be issued on 30 June 2016 (Exhibits C-28 and C-29). It is evidenced and accepted by the Respondent that the consulting firms Uvekon and Ernst & Young, as well as lawyers Baker & McKenzie and bankers UBS/SARS, have already been engaged by the State Property Fund to prepare valuations and due diligence for OPZ, and that a price is expected to be set by May 2016.

35. The Respondent indicated during the telephone conference that a restructuring of the sort feared by the Claimant would be practically difficult and would take a long time to implement. No evidence of this position was provided. However, it was also clarified that the privatization of the Respondent was no longer slated for June 2016, but rather for November 2016. An official document from the Cabinet of Ministers submitted by the Respondent confirms that this is the case (Cabinet of Ministers Resolution № 202-p of 10 March 2016), and the Claimant conceded during the telephone conference that it has no basis to assert the contrary other than prior press reports and public statements of officials.

36. On balance, the Emergency Arbitrator can conclude that there is a certain degree of urgency supporting the Claimant's interim measures request. To the extent that the State Property Fund decides to restructure OPZ, this would probably take place after the current valuation process concludes in May, but in advance of privatization in November. The arbitral tribunal should be constituted and ready to hear an interim measures petition by July 2016. This leaves two or three months during which the Claimant's rights remain fully exposed to the risk of serious harm identified above. Should steps towards a restructuring of debts or assets take place during that vulnerable window, it may be irreversible by the time an arbitral tribunal is seized of the matter.

d. Proportionality

37. The fourth element is the proportionality of the relief sought, measured by balancing the inconvenience to the Respondent of an interim order against the potential harm to the Claimant

should the order not be issued. The burden upon the Claimant has already been described above, and must be tempered in the balance by the likelihood of the harm actually coming to pass. This likelihood is serious but by no means certain, in light of the undertaking from OPZ and all the other circumstances outlined above.

38. The burden on OPZ is effectively the limitation of its freedom to transfer or encumber its assets, where there is not yet a judgment in place confirming the debt that is the source of that limitation. In the context of a looming privatization, this loss of flexibility could be disadvantageous indeed. Normally, companies in such a position are free to negotiate their debts and explore with creditors "win-win" options that would result in security for the creditors and maximum share price for the company's owner (the State). There is never certainty that agreement will be reached with all creditors concerned, but the freedom of movement has a value that cannot be discounted. At the same time, it appears that Ukrainian law (like most systems of law) prevents the restructuring of debts and assets without the consent of significant debtors, and so it stands to reason that OPZ is already somewhat limited in this regard.

39. The Claimant has explained at length that its request for interim relief is precisely tailored to minimize the burden on the Respondent. In particular, it has asked only for a freeze of *immovable* assets, leaving OPZ free to conduct its business using bank accounts, receivables, inventories and other movable assets without restraint. The Claimant also contends that the measures requested would have no impact on the privatization process. There is no evidence for that contention, which seems unlikely to be entirely correct. Privatization is a highly complex and high-stakes process, with the results for the State depending on a wide range of objective and subjective factors. The existence of a binding injunctive award from an international arbitration tribunal could have unforeseen consequences for the conduct and outcome of the OPZ privatization process. There is presently insufficient information before the Emergency Arbitrator to reach any secure conclusions in this regard. As a result prudence must be exercised, and an opportunity granted to the Parties in less contracted proceedings to present all of the evidence in relation to the privatization process and the impact of freezing injunctions on it.

40. It is of some reassurance in this regard that OPZ has provided its (albeit limited) undertaking to the Emergency Arbitrator. This undertaking does not correspond precisely to the wording of the Claimant's request, but does overlap substantially. OPZ there indicates (and has since repeated) that it has no intention of separating its assets from its debts, nor any intention of restructuring the company during the pre-privatization process. Contrary to the Claimant's submission, this process is understood to last until privatization takes place, ie until November 2016. Since the Respondent in any event apparently does not currently intend to take such actions, ordering it to refrain from so acting should not present substantial difficulty. This is of course subject to the obvious point that OPZ may not be the master of its own destiny. The State Property Fund or other organs of the Ukrainian State may in due course direct OPZ to take a different path, and it is for this reason that the risk of harm remains significant.

41. Based upon these considerations, the Claimant has established that at least part of the relief requested is proportional. However, in order to reinforce the balance of inconvenience in favor of issuing interim measures of protection, it is necessary to modify the relief requested to narrow its scope to the core of the risk presented, and to narrow its temporal application to allow an eventual arbitral tribunal to re-assess the situation in light of all the circumstances as they develop.

IV. THE ORDER OF INTERIM MEASURES

42. The Emergency Arbitrator is satisfied that he has the authority under the SCC Rules and Swedish law to issue an order directing OPZ to refrain from actions related to the alienation or burdening of assets, or the restructuring of debts. This falls squarely within the traditional scope of interim measures of protection, and is directed at the core of the dangers that provisional measures are designed to mitigate. The emergency arbitrator in Case EA 070/2011 summarized the position aptly:

> *The categorization "interim measures" extends beyond the mere conservation or disposal of goods ... . The provision also allows a tribunal to order or enjoin any particular course of conduct or make any other order that in the arbitral tribunal's opinion will be conducive to the proper conduct of the proceedings, to preserve the integrity of the arbitration, to eliminate or reduce economic loss or other impairment of valuable rights and to provide reasonable safeguards for the preservation of the relief sought against improper or unwarranted conduct.*

43. In view of the various considerations above, and in particular the need to avoid undue interference in the privatization process, it appears that the substantive scope of the interim order must be narrowed and simplified from that presented in the Application. This is both to ensure that the most likely adverse conduct on the part of OPZ is deterred, and also to minimize the opportunity for disagreement about the meaning of the Award and its intended application. In particular, for present purposes it is sufficient that the order prohibit OPZ from taking steps to transfer, assign, or encumber (by pledge or otherwise) its immovable property or to transfer, assign or restructure the debt of OPZ.

44. The Claimant has stated that it is satisfied to limit the order against immovable property to the sum total of its alleged debt, namely US$246,440,231.74. However, given that a valuation of the assets is still underway, such a limitation would be impractical at present and would only lead to unnecessary difficulties in enforcement. In light of the time limitation to be imposed on the order, as explained immediately below, the general nature of the order should not be unreasonably burdensome – and it is noted that OPZ's undertaking was not limited to any particular magnitude of asset value. It will be for the arbitral tribunal to consider, should the need arise, whether a renewal of this order should be subject to such a limitation, since the valuation of assets should be then be available.

45. The Claimant has requested a freezing order that will remain in force until a final award is rendered in the SCC arbitration to be initiated over the course of April. The Emergency Arbitrator has the authority to issue relief that lasts this long, pursuant to Article 9(4) of Appendix II of the SCC Rules. However, in the present circumstances the duration of interim relief need not be so extended. It has already been explained that the true risk of harm to Ostchem will persist only until the arbitral tribunal is constituted and in a position to adjudicate a regular petition for interim measures. It is in any event the tribunal's prerogative to dissolve or extend an order from the Emergency Arbitrator, in accordance with Article 9(4) of Appendix II of the SCC Rules. Given the risk of issuing long-lasting interim relief on the basis of a curtailed procedure and limited submissions and evidence, it is preferable to direct measures only at this period when there is no other reliable source of protection available to the petitioner. While it is impossible to know for sure when the tribunal will be constituted, it is very likely that this will take place no later than the end of June 2016. The tribunal should then be in a position to

adjudicate a new petition for interim relief within one month thereafter. To ensure that there is sufficient time to brief the issue, an additional month of validity is appropriate.

46. The Claimant has requested that the present decision be issued in the form of an award (rather than a decision). This is expressly permitted by Article 32(3) of the SCC Rules, applicable to these proceedings through Article 1(2) of Appendix II. The desire to have an award is understandable, as such an instrument is more likely to be considered by Ukrainian courts to fall within the scope of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). It is the intention of the Emergency Arbitrator that this decision be treated as an award for enforcement purposes, within the framework of the authority granted to emergency arbitrators under the SCC Rules. In accordance with Article 10 of Appendix II of the SCC Rules, no ruling or disposition in respect of costs is made at this stage of the procedure.

ORDER

47. For the reasons stated above, the Claimant's Application for interim relief is granted with modifications:

The Respondent, PUBLIC STOCK COMPANY ODESSA PORT PLANT, is hereby ORDERED to refrain from transferring or encumbering (by pledge, charge, lien or otherwise) any of its immovable assets until 31 August 2016.

Noah Rubins

Emergency Arbitrator

Stockholm, Sweden – 31 March 2016