

**AD HOC ARBITRATION
UNDER THE UNCITRAL ARBITRATION RULES**

between

ENERGOALLIANCE LTD. (Claimant)

and

THE REPUBLIC OF MOLDOVA (Respondent)

ARBITRAL AWARD

23 October 2013

Arbitral Tribunal:

**Mikhail Yuryevich Savransky
Viktor Kornelyevich Volchinsky
Dominic Pellew (Chairman)**

Secretary of the Tribunal:

Izabella Levonovna Sarkisyan

Representing Claimant:	Representing Respondent:
Mr. Viacheslav Lych Ms. Galina Sineokaya Vyacheslav Lych & Partners, Attorneys-at-law	Mr. Mikhail Buruiana Buruiana & Partners, Attorneys-at-law

Seat of Arbitration:

Paris

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I. INTRODUCTION

1. In the framework of this arbitration proceedings, Claimant, Energoalliance Ltd., a legal entity established and registered under the laws of Ukraine ("**Claimant**"), claims for a compensation for damages allegedly incurred by Claimant as a result of violations by Respondent, the Republic of Moldova ("**Respondent**"), of its obligations to Claimant under the Agreement between the Government of Ukraine and the Government of the Republic of Moldova Concerning the Encouragement and Reciprocal Protection of Investments, signed on 29 August 1995 ("the **BIT**") and under the Energy Charter Treaty ("the **ECT**").
2. In particular, Claimant argues that its rights to debt to the Moldova's State-owned enterprise "Moldtranselectro" ("**Moldtranselectro**"), have been depreciated due to certain actions or omissions of the Government, the Audit Chamber and state courts of Respondent in the period between 2001 and 2013. The rights to debt arose in connection with the supply of electricity to Moldtranselectro.

II. PROCEDURAL HISTORY

3. On 12 May 2010, Claimant sent to Respondent a Request for amicable settlement of the dispute, which, as stated by Claimant, was pursuant to Articles 9(1) and 9(2) of the BIT and Articles 26(1) and 26(2) of the ECT. Claimant received no reply for the Request.
4. On 8 July 2010, Claimant sent a Notice of Arbitration to Respondent, in which Claimant again directly stated that the Notice was sent within the framework of dispute settlement mechanisms provided either by the BIT or the ECT. Claimant also pointed out that it selected, by virtue of its right under either the BIT or the ECT, *ad hoc* arbitration under the UNCITRAL Arbitration Rules. In its Notice, Claimant also provided some options with regard to the legal seat of arbitration, language and number of arbitrators.
5. On 19 August 2010, Claimant repeatedly sent the Notice of Arbitration to Respondent. The reason for the repeated Notice was the expiry of a three-month period (from 12 May 2010) for amicable settlement prescribed under Article 26(2) of the ECT. In this second Notice Claimant also advised of appointing Mikhail Yuryevich Savransky (a citizen of the Russian Federation) as an arbitrator.
6. In its letter of 23 September 2010, Respondent indicated Viktor Kornelyevich Volchinsky (a citizen of the Republic of Moldova) as an arbitrator. Respondent also provided some counter proposals in respect of procedural aspects of the arbitration proceedings.
7. On 27 September 2010, Claimant advised Respondent of appointing Mr. Lych as a representative of Claimant. A copy of the Respective power of attorney was sent to Respondent.
8. On 7 December 2010, arbitrators appointed by the parties elected Mr. Dominic Pellew (a citizen of the United Kingdom) the Chairman of the Tribunal ("the Tribunal").
9. On 9 December 2010, Respondent communicated its consent with Claimant's proposal to recognize the International Court of Arbitration of the International Chamber of Commerce in Paris as an appointing authority within the meaning of the UNCITRAL Arbitration Rules, as well as its consent to Claimant's proposal that Paris be selected as the legal seat of the arbitrations. However, at that moment the parties had not yet come to an agreement on the language of the arbitrations and the applicable version of the UNCITRAL Arbitration Rules (1976 version or 2010 version).
10. On 12 January 2011, the Tribunal requested that the parties pay a provisional advance on costs of the arbitrations in the amount of USD 200,000 in equal shares (i.e. USD 100,000 from each

party) to cover the arbitrators' fees. The Tribunal also put forward a proposal to appoint Ms. Izabella Levonovna Sarkisyan as Secretary of the Tribunal and declared its intention to establish the arbitrators' fees based on the ICC's Schedule of Fees. Finally, the Tribunal suggested that the parties submit requests concerning the outstanding procedural matters mentioned in para. 9 above.

11. On 24 January 2011, the Tribunal advised the parties of its decision to determine the Russian language as the language of the arbitration proceedings.
12. On 3 February 2011, Respondent filed a motion to adjourn the arbitral proceedings for three months owing to its need to select and appoint a legal representative. Claimant did not support Respondent's motion.
13. By 11 February 2011, Claimant paid its share of the provisional advance on costs of the arbitrations requested by the Tribunal (i.e. USD 100,000). However, Respondent did not pay its portion of the advance on costs and informed that would not pay it.
14. On 17 February 2011, the Tribunal advised the parties of its decision that the 1976 UNCITRAL Arbitration Rules should be applied. The Tribunal rejected Respondent's motion to adjourn the arbitration proceedings. However, when establishing the timeframes for filing a Statement of Defense by Respondent, the Tribunal took into consideration the delays encountered by Respondent when appointing a legal representative. Finally, the Tribunal confirmed the appointment of Ms. Izabella Levonovna Sarkisyan as the Secretary of the Tribunal.
15. On 18 March 2011, within time limits established by the Tribunal, Claimant submitted a Statement of Claim ("the **Statement of Claim**").
16. On 27 May 2011, four days prior to the date established by the Tribunal for filing a Statement of Defense by Respondent, the latter requested the Tribunal to grant a one-month delay to prepare its Statement of Defense. On 31 May, Respondent also notified the Tribunal and Claimant on the appointment of Mr. Mikhail Buruiana as its representative in this arbitration and provided a respective power of attorney. The Tribunal sustained the motion of Respondent to extend the due date of submitting the Statement of Defense until 30 June 2011.
17. On 30 June 2011, Respondent duly submitted its Statement of Defense ("the **Statement of Defense**"). In the Statement of Defense Respondent indicated the need for a interim award on the lack of jurisdiction on the part of the Tribunal. Claimant did not support Respondent's position. On 22 July 2011, the Tribunal ruled that it was inadvisable to divide this arbitration into two stages (hearing on the jurisdiction and hearing on the merits), since Respondent's objections to jurisdiction were closely connected with arguments related to the merits.
18. The first hearing on the procedural issues was held on 11 August 2011. Upon proposal of the Tribunal and the consent by the parties, the hearing was held in Moscow (this in no way affects the seat of arbitration, Paris being the legal seat of arbitration), in the Office of Baker Botts L.L.P. The participants of the hearing included: Claimant's representatives, Viacheslav Alekseyevich Lych and Galina Ivanovna Sineokaya, and Respondent's Representative, Mikhail Buruiana. Following the hearing, on 17 August 2011, the Tribunal, *inter alia*, ordered Claimant to pay Respondent's share of the advance on costs in accordance with Article 41 of the UNCITRAL Arbitration Rules (Claimant later paid this sum). The Tribunal also established the schedule of the arbitration proceedings, according to which the main hearings were to be held in Paris on 19 - 21 January 2012.
19. On 9 September 2011, Claimant submitted a Reply to Statement of Defense ("the **Reply**").
20. On 19 November 2011, Respondent submitted a Rejoinder to Claimant's Reply ("the **Rejoinder**") and the "expert opinion" of Dr. Hans-Joachim Schramm.

21. On 15 December 2011, in reply to Claimant's request to permit the submission of a legal opinion as a reply to the "expert opinion" of Dr. Schramm, the Tribunal informed the parties that (i) the so-called "expert opinion" of Dr. Schramm in form and in substance was an ordinary statement by a party and would be considered as a part of Claimant's Reply; (ii) Claimant would be provided with an opportunity to submit replies to new arguments put forward by Respondent in the first Rejoinder (which Respondent could have included in the Statement of Defense, but failed to do so). In its letter of 21 December 2011, the Tribunal defined a range of new arguments, in respect of which Claimant might submit an additional statement by 31 December 2011. The Tribunal also confirmed the right of Respondent to reply to the Claimant's additional statement during the oral hearings or in the final pleading document to be submitted after the hearing.
22. On 23 December 2011, the Tribunal, *inter alia*, (i) sustained the motion of Claimant to extend the date of submitting an additional statement until 12 January 2012, and (ii) confirmed that since at least one party (Claimant) insisted on holding an oral hearing, that hearing would take place. Finally, the Tribunal also requested each party to pay a supplementary advance on costs in the amount of USD 50,000 (i.e., to total USD 100,000).
23. By 28 December 2011, the parties agreed upon proposal of the Tribunal to adjourn the main hearings for one month until 16-17 February 2012.
24. On 12 January 2012, Claimant submitted the additional statement ("the **Additional Statement**").
25. On 13 January 2012, a meeting was held via conference calls, with participation of the parties, during which the questions of procedure of the forthcoming hearing were discussed as well as the parties' statements. After the meeting, on 18 January 2012, the Tribunal sent a communication to the parties, which included the questions of procedure agreed upon by the parties, as well as the issues in respect of which the Tribunal made a decision. In particular, the Tribunal permitted both parties to submit additional annexes, to which they wished to refer, by 31 January 2012. The Tribunal also ruled that the hearing would be held without a stenographic record.
26. By the letter of 20 January 2012, Respondent drew attention of the Tribunal to the noncompliance of the Claimant's additional statement with the Tribunal's instructions in respect of the scope and content, as well as to the fact that Claimant had submitted to the Tribunal one more pleading document as compared to Respondent. Respondent also stated its position on the need for a stenographic record of the oral hearing. Finally, Respondent stated that it would not pay the supplementary advance on costs, requested by the Tribunal.
27. On 20 January 2012, Claimant expressed its objection to stenographic record of the oral hearing taking into account the already established position of the Tribunal, and unavoidable additional costs, which should have to be covered by Claimant (given Respondent's refusal to pay its share of the advance on costs).
28. On 25 January 2012, the Tribunal confirmed its decision to conduct the hearing without a stenographic record and notified the parties that the Hearing Centre of the International Chamber of Commerce in Paris ("**ICC**"), where the oral hearing was to be held, would arrange for recording of the hearings to electronic media and would provide the parties with copies thereof.
29. On 30 January 2012, Claimant filed a motion to adjourn the arbitral proceedings for one month in accordance with Article 41(4) of the UNCITRAL Arbitration Rules due to Claimant's inability to pay the deposit for the arbitration costs (to include its own share and Respondent's share). On 31 January, Claimant submitted the additional annexes to the Tribunal.

30. On 2 February 2012, Respondent expressed its objection to the suspension of the arbitral proceedings and filed a motion to the Tribunal to issue an order on interim relief in case of Claimant's duty to perform an award ordering to cover the costs and expenses
31. On 3 February 2012, the Tribunal sustained the motion of Claimant and adjourned the proceedings to the period from 6 February to 5 March 2012.
32. On 4 February 2012, Respondent submitted additional annexes to the Tribunal.
33. On 7 March 2012, the Tribunal informed the parties that the arbitration proceedings had been resumed. Having reviewed the additional statements of the parties, it granted an additional extension to Claimant for paying the deposit until 9 April 2012. The supplementary advance on costs to total USD 100,000 was duly paid by Claimant by the established deadline.
34. On 11 April 2012, Respondent filed a motion to terminate the arbitration proceedings. Respondent explained that on 13 December 2011 the Kyiv Commercial Court (Ukraine) dismissed the acting director of Energoalliance Ltd. However, Claimant's representatives did not provide new powers of attorney to the Tribunal; therefore they were not authorized to act on behalf of Claimant.
35. On 19 and 20 April 2012, Claimant provided explanations on powers of attorney of Claimant's representatives and provided evidence of validity of the earlier submitted powers of attorney.
36. On 25 April 2012, the Tribunal ruled to hold a hearing on 4-6 July 2012 in Paris and dismissed Respondent's motion on the interim measures in respect of Claimant and termination of the proceedings.
37. On 6 June 2012, Claimant submitted a statement containing an alternative calculation of compensation in respect of its claims in the national currency of the Republic of Moldova ("**Alternative Calculation Statement**"). On 11 June, Respondent filed an objection on the acceptance by the Tribunal of Claimant's statement.
38. On 12 June 2012, the Tribunal accepted the Alternative Calculation Statement and suggested that Respondent within 10 days submits a written reply to Claimant's statement. Therefore, on 13 June 2012 Respondent filed a motion to adjourn the hearing to a later date. The Tribunal dismissed the motion and explained that the preparation of a written reply to Claimant's statement would not interfere with the preparation for the hearing.
39. On 25 June 2012, Respondent submitted a Reply to Alternative Calculation Statement ("**Reply to Alternative Calculation Statement**").
40. On 26 June 2012, a meeting was held via conference calls, with participation of the parties, during which the Tribunal decided on a number of the procedural issues of the hearing. The Tribunal also enumerated some questions, which it wished to be answered in the course of the oral statements of the parties during the hearing. Instructions of the Tribunal and the list of questions were additionally communicated to the parties in the Tribunal's letter of 2 July 2012.
41. The oral hearing was held with the participation of Claimant's representatives, Viacheslav Lych, Galina Sineokaya and Denis Korotkevich, and Respondent's representative, Mikhail Buruiana in Paris in the ICC Hearing Center on 4-6 July 2012. Respondent was also represented by Konstantin Bragoy and Anatoly Chebuk.
42. The parties did not bring any witnesses or experts to appear at the hearing. The first day (4 July) and a part of the second day (5 July) were devoted to matters of jurisdiction of the Tribunal. The major part of the second day was devoted to address the merits of dispute. During the closing session of the second day and the first part of the third day (6 July) Claimant's alleged damages were evaluated. In the course of the three-day hearings the parties submitted statements, including counter statements, and the Tribunal put many questions to the parties.

43. Pursuant to the directions of the Tribunal, the ICC Hearing Center arranged for recording of the hearings to electronic media. The copies of the records were provided to the parties at the end of each day. While listening to the records it was established that on 5 July the recording was interrupted. On July 2012, the ICC Hearing Center sent a letter to the parties and to the Tribunal, in which it explained that the recording had been interrupted due to technical reasons, of which the Center became aware only after the closing of the hearings. Therefore, a part of the hearing procedures on 5 July was not recorded.
44. On 25 July 2012, the Tribunal requested each party to pay a supplementary advance on costs in the amount of USD 20,000 (i.e. to total USD 40,000).
45. On 17 August 2012, the parties filed a motion to extend the term for closing submissions until 20 August. The same day, the Tribunal sustained the motions of the parties. On 21 August 2012, the Tribunal sent to the parties the closing written submissions provided to the Tribunal by each party ("**Closing Submission**" of Claimant /Respondent).
46. On 24 August 2012, Respondent stated and provided documentary evidence to the Tribunal that in connection with the institution of insolvency proceedings in respect of Claimant the powers of attorney of Claimant's representatives, Mr. Lych and Ms. Sineokaya, were revoked on 5 July 2012 by the administrator from Energoalliance Ltd. On 5 September 2012, the Tribunal instructed Claimant (as represented by Mr. Lych and Ms. Sineokaya) to provide explanations in respect of their powers of attorney.
47. By 5 September 2012, neither Party has paid its share of the supplementary deposit in the amount of USD 40,000 (with Respondent indicating that it would not pay its share). Accordingly, the Tribunal stated that it would request Claimant to pay the sums due by both Parties as soon as the Tribunal decided on the persons authorized to represent Claimant's interests.
48. In its letter of 21 September 2012, addressed to the parties, the Tribunal indicated that it considered Claimant's representatives, Mr. Lych and Ms. Sineokaya, authorized to represent Claimant's interests. A copy of the letter was also sent to Mr. Andrey Gorokhovsky, external administrator of Claimant. The Tribunal also requested Claimant to pay the supplementary deposit of USD 40,000 in full by 12 October 2012.
49. On 4 October 2012, the external administrator of Claimant addressed to the Tribunal with a request to provide a copy of the Statement of Claim with all additional submissions. He also notified the Tribunal of the suspension of powers of the attorneys of Lych & Partners.
50. On 9 October 2012, Mr. Lych objected to the arguments of the external administrator concerning a defect of authority.
51. On 26 October 2012, the Tribunal recognized Mr. Andrey Gorokhovsky, external administrator, as the only authorized representative of Claimant in these arbitral proceedings. The Tribunal adjourned the proceedings under Article 41(4) UNCITRAL Arbitration Rules (non-payment of the deposit in the amount of USD 40,000) until 30 November 2012 in order to give time to Mr. Gorokhovsky to study the materials (sent by the secretary of the Tribunal separately) and make a decision on Claimant's subsequent participation in the arbitral proceedings.
52. On 20 November 2012, the external administrator of Claimant filed a motion to adjourn the hearings until 1 March 2013. On 12 December 2012, Respondent expressed an objection to Claimant's motion to adjourn the hearings until 1 March 2013.
53. On 30 November 2012, the Tribunal also received a letter from the Law Firm Actio, representing Claimant's Creditors' Committee, in which the Creditors' Committee requested to extend the date of hearing adjournment pending "the review by the Commercial Court of Kyiv of

the Creditors' Committee's petition to appoint a new external administrator of Energoalliance Ltd.”

54. On 13 December 2012, the Tribunal dismissed Claimant's motion (as represented by Mr. Andrey Gorokhovskiy, external administrator) to extend the date of hearing adjournment. The Tribunal suggested that Claimant (as represented by the external administrator) communicated its opinion on the question whether the powers of Claimant's representatives had been valid during the hearings on 4-6 July 2012 and while providing the Closing Submission on behalf of Claimant.
55. On 20 December 2012, Claimant declared the appointment of new representatives, Vasil Kisil & Partners, and requested the Tribunal to provide them with the records or minutes of the oral hearings and Claimant's Closing Submission. Claimant also requested to adjourn the proceedings until 1 February 2013.
56. On 28 December 2012, Respondent objected to Claimant's motion to adjourn the proceedings.
57. On 10 January 2013, the Tribunal (i) accepted Vasil Kisil & Partners as Claimant's authorized representatives; (ii) adjourned the proceedings until 1 February 2013 to allow Claimant's representatives to get acknowledged with the proceedings records, including the oral hearing; (iii) instructed Claimant to express its position on the statements made on its behalf by the former Claimant's representatives by 1 February 2013. The Tribunal noted that the supplementary deposit in the amount of USD 40,000 remained unpaid and declared that it would not make any decision on the interim measures related to that non-payment pending Claimant's reply in respect of p. (iii).
58. On 30 January 2012, Respondent requested the Tribunal to compel Claimant to provide further explanations in respect of powers of its representatives, objected to the adjournment of the proceedings and pointed at the violation of Respondent's procedural rights.
59. On 1 February 2013, Claimant confirmed that its previous representatives had acted in good faith on behalf of Claimant during the oral hearings on 4-6 July 2012 in Paris, and affirmed the statements made at the hearings. Claimant requested the Tribunal to provide an opportunity to supplement and adjust Claimant's position in respect of the statements made by its previous representatives in Claimant's Closing Submission.
60. On 8 February 2013, Respondent provided various submissions to the Tribunal, including a request to dismiss Claimant's motion to supplement and adjust Claimant's Closing Submission and a request to terminate the arbitral proceedings.
61. On 19 February 2013, the Tribunal affirmed that Claimant could provide a new closing submission, in which case Respondent would have the right to provide an additional closing submission in reply to Claimant's submission. However, the Tribunal directly noted that Claimant had in any case to pay the supplementary deposit in full (USD 40,000) by 11 March 2013, otherwise the Tribunal would terminate the arbitral proceedings as per Article 41(4) of the UNCITRAL Arbitration Rules. The Tribunal also noted that if Claimant made a decision to provide a new closing submission, the Tribunal would require a supplementary deposit in the amount of USD 20,000 (USD 10,000 to be paid by each party).
62. On 21 February 2013, the Tribunal received an electronic message from lawyers of Vasil Kisil & Partners advising that their powers to represent Claimant in the arbitral proceedings had been terminated.
63. On 25 February 2013, Claimant's external administrator confirmed that Claimant would not make a new closing submission and requested the Tribunal to issue a final award based on the Closing Submission made on 20 August 2012 on behalf of Claimant.

64. On 25 February 2013, Respondent alleged that the Tribunal treated with prejudice the motions and statements of Respondent in respect of Claimant's representatives powers and repeatedly objected to the non-compliance on the part of the Tribunal with the principle of equality with regard to the parties (in Respondent's view).
65. On 22 March 2013, Claimant, as represented by the new director (Mr. Gennady Martynenko) advised the Tribunal that the court of Kyiv had affirmed the amicable Contract related to the Energoalliance Ltd. insolvency and that the economic activities of Claimant had been resumed. Claimant confirmed the powers of Lych & Partners to represent Claimant's interests in arbitral proceedings against the Republic of Moldova.

III. FACTUAL BACKGROUND

66. The Tribunal presents below a brief description of relevant facts substantiating the claims of Claimant. The Tribunal emphasizes the instances when these facts are challenged by Respondent. In addition, the Tribunal notes that certain facts relating to the supply of electricity to Moldtranselectro, which initially had not been challenged by Moldtranselectro or by any other party, subsequently were challenged (some years later) in the courts of Moldova and are challenged by Respondent in this arbitration. Instead of referring to these facts as "alleged", when they are presented in chronological sequence in the text below, the Tribunal will present the facts as if they were true, it being understood that Tribunal has not forgotten that the facts were subsequently challenged and that Respondent challenges them now.

A. The Parties

67. Claimant is a private company producing and distributing electricity in Ukraine under a license.
68. Moldtranselectro was a State-owned enterprise of Moldova up to October 2000 and was responsible for operation of Respondent's power grids. In addition to other functions, it exercised dispatching control of the power grids, distribution of electricity through high-voltage power networks and provided for compliance with the requirements of operating the national power grids in parallel with the neighbour countries grids. Moldtranselectro was a participant (together with other companies) of the electricity wholesale market in the Republic of Moldova and possessed a license for electricity import and trade. The Ministry of Industry and Energy of the Republic of Moldova was the founder of Moldtranselectro.

B. Contract No. 24/02

69. On 1 February 1999, Claimant signed Contract No. 1/01 with the Ukrainian State-owned enterprise Ukrenergo ("**Ukrenergo**") and with Moldtranselectro (**C16**)¹. Ukrenergo was a system operator of the Ukrainian power grids. The subject of Contract No. 1/01 was the purchase of electricity by Claimant from Ukrenergo on the Ukrainian wholesale market of electricity for subsequent export of electricity to the Republic of Moldova during 1999. The monthly volumes of electricity to be supplied were to be agreed between Ukrenergo and Moldtranselectro, while Ukrenergo was to exercise control and metering of flows of electricity supplied into the grid of the Republic of Moldova.

¹ The Tribunal will include references to underlying documents through indication of the respective annex number, based on the final lists of annexes provided by the parties. Annexes with letter "C" are annexes provided by Claimant, annexes with letter "D" are annexes provided by Respondent.

70. Within the framework of Contract No. 1/01, on 24 February 1999, Claimant signed Contract No. 24/02-99EA ("**Contract No. 24/02**") with Moldtranselectro and Derimen Properties Ltd ("**Derimen**") (C10). Derimen is referred to in Contract No. 24/02 as a Swiss company; however, currently both Parties have agreed that in reality it was incorporated in the British Virgin Islands (BVI) under the BVI law. Contract No. 24/02 provided for an obligation of Claimant (supplier) to supply electricity to Derimen (buyer) for the use by Moldtranselectro (recipient):

Subject of this Contract, as agreed with NPC Ukrenergo, shall be the supply to the Buyer of electricity and capacity owned by the Supplier, as per the Annex (for 2000, with the breakdown by months and the indication of maximum capacity), for further use by the Recipient purchasing it on the Wholesale Market of Electricity (WME), as well as settlement payments by the parties for the above-mentioned supplies in cash or through barter.²

71. Contract No. 24/02 covers the year 1999 although in December 1999 it was extended until 31 December 2000 (as Contract No. 1/01 of 1 February 1999). Contract No. 24/02 provided for supply of electricity according to "Delivered at frontier" (D.A.F.) terms, Incoterms 1990. Claimant was to receive payments from Derimen for each month of supply within 80 calendar days from the moment of delivery, and Derimen was to receive payments from Moldtranselectro. The prices for the purposes of payments by Derimen in Claimant's favor, and by Moldtranselectro in Derimen's favor were established in various annexes to Contract No. 24/02. General provisions contained in these annexes (depending on the month) provided that the price to be paid by Moldtranselectro was about twice the price to be paid by Derimen (C130).

72. The electricity was supplied under Contract No. 24/02 during 1999 and 2000, for the exception of May, June and July of 1999. Moldtranselectro paid to Derimen for all the electricity supplied in 2000, for the electricity supplied in January 1999 and for a part of the electricity supplied in February 1999. These payments were made mostly through barter (e.g., through transfer of power generation equipment) or through assignment of creditor's claims. The rest of 1999 supplies remained unpaid by Moldtranselectro. Therefore, by 1 January 2000, the debt of Moldtranselectro to Derimen totalled USD 18,132,898.94. However, Derimen had no debt to Claimant as it paid to Claimant in cash for all the electricity supplied.

73. On 19 May 2000, Derimen and Moldtranselectro signed a document titled "The reconciliation statement of settlements as of 1 May 2000, to Contract No. 24/02-99EA of 26 February 1999", in which it was confirmed that as of 1 January 2000 the debt of Moldtranselectro under Contract No. 24/02 equaled USD 18,132,898.94 and as of 1 May 2000 the debt increased up to USD 18,932,191.26 (C28). (It is unclear why the debt increased).

74. On 30 May 2000, Derimen, Claimant and Moldtranselectro entered into Contract No. 06-20 ("**Contract No. 06-20**"), according to which Derimen assigned its claims against Moldtranselectro to Claimant in the amount of USD 18,132,898.94, which had arisen under Contract No. 24/02 (C14).

B. Contract No. 53/21

75. In addition to purchasing the rights to debt in the amount of USD 18,132,898.94 on 30 May 2000, on the same date Claimant purchased from Derimen one more claim against Moldtranselectro. It is necessary to explain the origin of this claim.

76. On 1 December 1998, Ukrenergo, Moldtranselectro and ZAO Stal (a Ukrainian company having a license to supply electricity) entered into Contract No. 460/01-ER (C32) on compensation of

² Agreement No. 24/02 as revised by the Addendum No. 1 of 3 January 2000.

electricity, which was received by Moldtranselectro from Ukrenergo off-schedule under Contract "On cooperation and joint operational activities aimed at compensating the electricity received by state-owned Moldenergo off-schedule in the context of parallel operation of power grids of Ukraine and Moldova," dated 11.11.97, signed by Minenergo of Ukraine and state-owned enterprise Moldenergo. The parties agreed that ZAO Stal would supply electricity to Ukrenergo as compensation and Moldtranselectro would make payments to ZAO Stal under a separate contract. Volumes and cost of the respective electricity were not indicated in Contract No. 460/01-ER.

77. On 30 December 1998, Moldtranselectro, ZAO Stal and Derimen signed Contract No. 180/12-98, according to which the parties agreed that (i) ZAO Stal had supplied 132.4 million kWh to Ukrenergo to compensate the electricity received by Moldenergo off-schedule; (ii) Moldtranselectro would pay to Derimen (not to ZAO Stal) for this delivery under a separate Contract; and (iii) Derimen would pay to ZAO Stal for the same delivery (**C30**).
78. On 27 January 1998, Moldtranselectro and Derimen signed Contract No. 53/21 ("**Contract No. 53/21**"), according to which the parties agreed again that ZAO Stal had supplied 132.4 million kWh of electricity to Ukrenergo under Contract No. 460/01-ER of 1 December 1998 and Contract No. 180/12-98 of 30 December 1998 and that the cost of that electricity equaled USD 4,888,900.97 (**C11**). In addition, the parties agreed that as soon as Derimen provided a documentary confirmation of the aforesaid actions, Moldtranselectro would assign financial liabilities in the amount of USD 4,888,900.97 in favor of Derimen. At the same time, Derimen would acquire the obligation of Moldtranselectro to pay USD 4,888,900.97 in favor of ZAO Stal.
79. This particular debt was assigned by Derimen to Claimant on 30 May 2000. According to Contract No. 07-20 of 30 May 2000 ("**Contract No. 07- 20**") Derimen assigned to Claimant the claim against Moldtranselectro, which arose under Contract No. 53/21 in the amount of USD 4,000,496.35 (**C15**). (Apparently, the debt reduced during the period January 1998 - May 2000 from USD 4,888,900.97 to USD 4,000,496.35).
80. Therefore, on 30 May 2000, Claimant acquired two claims against Moldtranselectro: the first claim, under Contract No. 06-20, refers to the debt in the amount of USD 18,132,898.94, which initially arose in connection with electricity supplied under Contract No. 24/02, and the second claim, under Contract No. 07-20, refers to the debt in the amount of USD 4,000,496.35, which arose in connection with electricity supply by Ukrenergo in accordance with Contract on Cooperation of 11.11.97, and in connection with the subsequent related Contracts, which led to Contract No. 53/21. It may be noted that although Claimant participated in the electricity supply, which resulted in the first debt, Claimant did not participate in the supply of electricity, which resulted in the second debt.

D. Events after 30 May 2000

81. On 30 June 2000, Claimant signed Contracts with Moldtranselectro on the assignment to Claimant of debts owed by RED SUD and RED Centru to Moldtranselectro in the amount of MDL 23,000,000 (**C34, C35**). As the result, the debt of Moldtranselectro to Claimant under Contract No. 06-20 (related to the debt in the amount of USD 18.1 million) was reduced by MDL 23,000,000 (equivalent of USD 1,845,713.00). There is no evidence that the validity of the Assignment Contracts in respect of RED SUD and RED Centru was ever challenged in the Moldavian courts.
82. On 17 July 2000, Claimant, Derimen and Moldtranselectro signed a reconciliation statement to Contracts No. 06-20 and No. 07-20, which demonstrated that while the aggregate debt of Moldtranselectro under Contracts No. 06-20 and No. 07-20 equalled USD 22,133,395.29 as of 30 May 2000, the current debt amount after assignments under Contracts No. 53/205/1 and No.

53/205/2 (C34 and C35), stated above, totalled USD 20,287,682.29 (C36). Hence, the debt under Contract No. 06-20 was reduced from USD 18,132,898.94 to USD 16,287,185.94.

83. On 31 July 2000, Claimant sent a letter to Moldtranselectro, in which it requested to pay the above sum of USD 20,287,682.29 within seven days (C37). On 9 August 2000, Claimant sent another letter to Moldtranselectro under the titled "Claim", in which it threatened to apply to court (C38).
84. On 22 August 2000, Moldtranselectro again recognized its debt to Claimant in the amount of USD 20,287,682.29 and advised Claimant that it "currently cannot pay in full in cash." However, Moldtranselectro suggested that the settlement be effected through assignment of debts of its counterparts, including enterprises RED Nord and RED Nord Vest (C39).
85. Obviously, on 1 September 2000, following this proposal from Moldtranselectro, Claimant and Moldtranselectro signed Assignment Contracts in respect of creditors' claims (No. 71-1/09-EA and No. 71-2/09-EA, respectively) with JSC "RED Nord" ("RN") and JSC "RED Nord-Vest" ("RNV") (C40 and C42). According to these Contracts Claimant acquired the claim against RN in the amount of USD 5,339,719.42 and the claim against RNV in the amount of USD 5,501,529.10. The debt of Moldtranselectro to Claimant was reduced by the same amounts (i.e. in total by USD 10,841,248.52). It is unclear whether the reduction was applied to the Moldtranselectro's debt under Contract No. 06-20 or its debt under both Contracts No. 06-20 and No. 07-20.
86. Therefore, by September 2000 the original claims of Claimant against Moldtranselectro, namely its claim in the amount of USD 18,132,898.94 under Contract No. 06-20 and its claim in the amount USD 4,000,496.35 under Contract No. 07-20, were partially satisfied through the assignment of debts of RED SUD and RED Centru owed to Moldtranselectro and partially converted, upon proposal of Moldtranselectro and with its full support, in (i) the claim against RN in the amount of USD 5,339,719.42 and (ii) the claim against RNV in the amount of USD 5,501,529.10. The balance of debt of Moldtranselectro equalled USD 9,446,433.77.

(i) Decree No. 1000

87. On 2 October 2000, the Government of the Republic of Moldova adopted Decree No.1000 "*On the Establishment of Certain State-Owned Enterprises in the Electricity Sector*" ("**Decree No. 1000**") (C81). Decree No. 1000 provided for the establishment of three new state-owned enterprises "through a spin-off of the respective functional assets of the state-owned enterprise Moldtranselectro without accounts payable and accounts receivable." These new state-owned enterprises were state-owned enterprise Moldelectrica ("**Moldelectrica**"), state-owned enterprise Nodul Hidroenergetic Costesi and state-owned enterprise Autoelectrotrans. In reality, Moldelectrica received the major part of the Moldtranselectro's assets and functions, including its high-voltage power networks and the license for transmission of electricity.
88. Decree No. 1000 imposed an obligation on state-owned enterprise Moldtranselectro "to continue the implementation of the effective Contracts and administration of its accounts payable and accounts receivable" (para. 9 of Decree No.1000). Finally, Decree also imposed an obligation on the Ministry of Industry and Energy and the Ministry of Finance to submit proposals for review by the Government in respect of (i) the transfer of proceeds from privatization of certain state assets to Moldtranselectro "in the amounts required to repay the payables and receivables and the external debts" and (ii) "the settlement of the balance between payables and receivables of the state-owned enterprise Moldtranselectro and its external debts" (para .11 of Decree No.1000).

(ii) Claims against RN and RNV

89. The next event, in chronological order, refers to the beginning of the court proceedings in Moldova in respect of RN and RNV's debts to Claimant.
90. On 13 October 2000 and 20 October 2000, respectively, RN and RNV recognized their debts to Claimant and requested a delay in payment (C42 and C43). On 15 November 2000, Claimant received the judgment issued by the Kishinev Economic Court in respect of RN's debt in the amount of USD 5.3 million (C44), and on 21 December 2000, Claimant received the judgment issued by the same court in respect of RNV's debt in the amount of USD 5.5 million (C45).
91. However, on 31 January 2001, the General Prosecutor of Moldova filed a cassation appeal against the above judgment in respect of RNV, arguing that in accordance with para. 3 of Article 2 of Law of Moldova "On Restructuring Debts of the Electricity Sector Enterprises (the "Law on Restructuring") (C108), the debts of RNV to Moldtranselectro, which had arisen before 1 January 1999, were cancelled (C53).³
92. It was difficult for the Tribunal to establish the true sequence of court proceedings in respect of debts owed by RN and RNV after this date, partly because in addition to seeking a reversal of judgement in Claimant's favour the General Prosecutor also initiated new proceedings (in February 2001), where he requested the Moldavian courts to invalidate Contracts on assigning creditors' claims (No. 71-1/09-EA and No. 71-2/09-EA). Court proceedings on debts of RN and RNV (separately) continued until November 2003 and not all court judgements were included in this case materials.
93. As for RNV (the debt in the amount of USD 5.5 million), in addition to the cassation appeal against the judgement on the debt of RNV, filed on 31 January 2001, the General Prosecutor, apparently, filed a new appeal in February 2001 to invalidate the Assignment Contracts in respect of RNV. On 21 February 2001, the Civil Chamber of the Supreme Court of Moldova rejected the appeal of the General Prosecutor against the court judgment on the debt, having established that the Law on Restructuring provided for the cancellation only of the RNV's debts, which had arisen prior to 1 January 1999 (C55). After this judgment, on 21 August 2001, the court of Donduseni town in Moldova issued a writ of execution in respect of RNV in Claimant's favour (C57). Similarly, on 20 March 2001, the Economic Court of the Republic of Moldova rejected the claim of the General Prosecutor on invalidating the Assignment Contract in respect of RNV on the grounds that the decision of the Supreme Court of Justice of 2 February 2001 was mandatory.
94. Meanwhile, almost at the same time (on 3 May 2001) the Ministry of Internal Affairs of the Republic of Moldova applied to the Ministry of Finance of the Republic of Moldova with a request to verify the validity of the economic relations between Moldtranselectro, Claimant, ZAO Stal and Derimen during 1999-2000 (C111). Apparently, this was the first step in the sequence of events which ultimately led to Decree No. 66 of the Audit Chamber (see below).
95. Although the General Prosecutor lost its cassation appeal against the court judgment in respect of RNV, nevertheless, he was allowed to file an additional appeal this time to the Plenum of the Supreme Court of Justice. On 17 September 2001, the Plenum of the Supreme Court of Justice sustained the appeal of the General Prosecutor and sent back the claim of Claimant against RNV in respect of the debt in the amount of USD 5.5 million to the first-instance court for review.

³ Article 2 of the Law on Restructuring provides: "Write off as of 1 January 1999: (...) (3) the debts of the joint-stock companies Retelele Electrice de Distribuție, Kishinev municipality, Retelele Electrice de Distribuție Electrice de Distribuție Sud owed to the State-owned enterprise Moldtranselectro Centru, Retelele Electrice de Distribuție Nord, Retelele Electrice de Distribuție Nord-Vest, Retelele for the electricity sold in the amount of USD 140 million equivalent in Moldovan Leus (...)".

This decision of the Plenum was made on the grounds that RNV and the Ministry of Energy of Moldova provided evidence that the debts of RNV to Moldtranselectro to total USD 5.5 million had been "overestimated and had not reflected the real cost of the electricity supplied" (C59). It is clear that this reasoning differed from the reasoning initially relied upon by the General Prosecutor, namely, that in accordance with the Law on Restructuring the debts of RNV to Moldtranselectro had been cancelled.

96. As for the debts of RN, on 18 September 2001, the Supreme Court suspended the execution of the first-instance court's judgement in respect of RN pending the decision on the cassation appeal of the General Prosecutor (C48). (Therefore, apparently, the General Prosecutor filed a cassation appeal against the judgement in respect of RN at some time prior to 18 September 2001). On 31 October 2001, the Civil Chamber of the Supreme Court of Moldova sustained the appeal of the General Prosecutor and sent Claimant's claim against RN for debt recovery back to the first-instance court. The grounds were that the original Contract between RN and Moldtranselectro, which resulted in the debt subsequently assigned (namely, Contract No. 3 of 10 December 1999), obviously indicated that a part of the debt had arisen prior to 1 January 1999, thus meaning that a part of the debt possibly had been cancelled by the Law on Restructuring (C49).
97. After 31 October 2001, the claims of the General Prosecutor, which were transferred to the respective first-instance courts, were sustained in part as described in the paragraphs below.
98. First, as for RNV, on 22 November 2001, the claim of the General Prosecutor to invalidate the Assignment Contract in respect of RNV was again rejected by the first-instance court (the Economic Court of Moldova) on the grounds that the debt of RNV to Moldtranselectro had arisen after 1 January 1999 (C61). On 26 March 2002, this judgment was upheld by the appellate chamber of the Economic Court (C63). However, the Civil Chamber of the Supreme Court of Moldova held a different position. On 22 May 2002, it set aside two previous judgments and sent the case back to the first-instance court. The reasoning used by the said Chamber was similar to the reasoning stated in its judgment of 31 October 2001 in respect of RN, namely, that the original contractual documents signed between RNV and Moldtranselectro, obviously, indicated that the debts had arisen before 1 January 1999⁴ (C64).
99. As for RN, after 31 October 2001 the General Prosecutor subsequently won its claims. Thus, on 12 February 2002, the first-instance court (the Economic Court of Moldova) invalidated Assignment Contract No. 71-2/09-EA (C51). The court established that (i) in accordance with Article 2(3) of the Law on Restructuring, Moldtranselectro "was not entitled to assign its debts to other economic agents in the electricity sector without consent of S.A. RED Nord"; and (ii) when implementing Contract and assignment deed, Moldtranselectro "did not transfer the documents supporting the debt liability" (it should be noted, that this reflects the future findings of the Audit Chamber, below). On 22 May 2002, the judgment of the first-instance court was upheld by the appellate chamber of the Economic Court, this time on somewhat different grounds: first, "S.A. Red Nord never signed a contract for supply of electricity with Energoalliance Company and owed no debt to it", and, second, since in accordance with para. 3 of Article 2 of the Law on Restructuring "the debts were cancelled" (C52). Claimant challenged this judgment in the Supreme Court, however, the Supreme Court held that this was a pecuniary claim and, therefore, Claimant, together with RN and Moldtranselectro, was to pay a sum of 3% of the RN's alleged debt as court fees (C148). Apparently, Claimant refused to pay these fees.

⁴ However, apparently, there are errors in the judgement. The judgement states that according to "Art. 3 para. 3" of the Law "*On Restructuring*" the debts of the energy distribution companies to Moldtranselectro were cancelled as of 01.01.2001" (emphasis added). However, Article 3 of the Law "*On Restructuring*" does not include a paragraph numbered "3".

100. To summarize the situation as of the end of May 2002, it should be stated that the General Prosecutor succeeded with his claim to invalidate the Assignment Contract in respect of RN (given the outcome of Claimant's appeal review at the Supreme Court) and waited a the first-instance court judgement (to which the case was referred the third time) on its claim to invalidate the Assignment Contract in respect of RNV.

(iii) Decree of the Audit Chamber

101. On 4 July 2002, the Audit Chamber of the Republic of Moldova issued Decree No. 66 ("**Decree of the Audit Chamber**") (C93). Before the Decree of the Audit Chamber, respective governmental bodies in Moldova received communications from the Ministry of Finance of Moldova and from the Audit Chamber of Ukraine supporting the volumes of electricity supplied to Moldtranselectro in 1999-2000 (C90, C91). However, the Audit Chamber of Moldova concluded, *inter alia*, that Moldtranselectro had violated certain national regulations of Moldova concerning the technical control of the imported volumes of electricity (through use of meters), and that the supply of electricity to Moldtranselectro under Contract No. 24/02 and the supply of electricity, which had led to the creation of debt under Contract No. 53/21, "were not supported with primary accounting documents". The Audit Chamber also came to a conclusion that the quantity of electricity allegedly supplied by Claimant under Contract No. 24/02 in January and February 1999, "could not be considered as supplied", as Contract 24/02 came into force only on 1 March 1999. Respectively, the Audit Chamber held that the management of Moldtranselectro was: (i) "to reimburse the payment for electricity made without grounds to Energoalliance Ltd. in December 1998,⁵ January 1999 and February 1999 in the amount of USD 10.8 million,⁶ (ii) "to adjust" the debt to Claimant as assigned by RN, in the amount of USD 5.3 million, and by RNV, in the amount of USD 5.5 million, (iii) "to adjust" the rest of the debt to Claimant in the amount of USD 9.4 million.

102. As for the Decree of the Audit Chamber it should be noted, that the Decree does not contain any explicit conclusion that the respective electricity was not supplied to Moldtranselectro, it only stipulates that certain documents required under the Moldavian laws on accounting were not executed. However, the Audit Chamber ordered Moldtranselectro to cancel its debts related to this supply of electricity.

103. Neither Claimant, nor Derimen was a party to the hearing by the Audit Chamber, and the Decree of the Audit Chamber did not bind them to undertake any actions (the Tribunal understands that the Audit Chamber has a jurisdiction only to conduct reviews and issue respective Decrees concerning financial standing of Moldavian governmental bodies or state-owned enterprises).

104. On 7 November 2002, Director of Moldtranselectro sent a letter to the Audit Chamber in which he declared, *inter alia*, that the supply of electricity that resulted in the debt to Claimant, had been actually carried out and that the acceptance certificates signed by Moldtranselectro complied with the legislation on the electricity interchange between Ukraine and Moldova even though that legislation was in conflict with other Moldavian regulations on accounting. (C95)

105. Claimant challenged the Decree of the Audit Chamber in the Kishinev Court of Appeal. On 16 December 2003, the Kishinev Court of Appeal set aside those parts of the Decree of the Audit

⁵ The electricity supplied in December 1998 was the subject of debt obligations under Contract No. 53/21.

⁶ The Tribunal does not understand the finding made by the Audit Chamber that Moldtranselectro had paid to Claimant in cash under Contract No. 24/02, as, in the view of the Tribunal, all payments made by Moldtranselectro under Contract No. 24/02 (e.g., payments made in 2000) were made in favour of Derimen. In addition, obviously, Moldtranselectro did not make any payments in respect of the debt of USD 4.8 million, which was the subject of Contract No. 53/21.

Chamber, which referred to the cancellation of Moldtranselectro's debts to Claimant (including the debts of RNV and RN) and to the reimbursement of funds allegedly paid to Claimant in December 1998. The Court of Appeal ruled that the supply of the respective quantity of electricity was actually proved by Claimant, and that the Audit Chamber unjustifiably relied on the lack of certain standard documents. (C98)

106. However, on 14 July 2004, the Supreme Court set aside the judgment of the Kishinev Court of Appeal of 16 December 2003. The Supreme Court sent the case back to the Kishinev Court of Appeal, to a new judge panel and ordered that this new panel requested Moldtranselectro to provide respective primary accounting documents (C99). On 27 December 2004, the Kishinev Court of Appeal rejected Claimant's appeal against the Decree of the Audit Chamber on the grounds that "although Energoalliance Ltd. possesses certain documents,... the State Enterprise Moldtranselectro does not have the primary accounting documents" (C100). On 11 May 2005, this judgment was upheld by the Supreme Court without changes (C101).

(iv) Claims against RN and RNV (continued)

107. As stated in para. 100 above, the court proceedings in respect of RNV had not yet been completed by the moment of issuing the Decree by the Audit Chamber. The General Prosecutor was still waiting a judgment by the first-instance court (where the case was referred the third time).

108. On 19 November 2002, the Economic Court of the Republic of Moldova sustained the appeal of the General Prosecutor and invalidated the Assignment Contract in respect of RNV (C66). The Court relied upon three main grounds. First, it established that:

when signing the Assignment Contract, the parties violated para. 1 Art. 209 and Art. 201 of the Civil Code of the RM,⁷ hence the Contract contradicts the provisions of the effective legislation and the documents supporting the claim were not transferred.

109. Second, the Court noted that:

in accordance with Decree of the Government No 890 of 21.08.95, para. 1 (1), the repayment of debts in respect of the imported electricity shall be made by means of a transfer of funds without a transfer of debts.⁸

110. Third:

According to para. 6 of Decree [Decree of the Audit Chamber], during 1998-2000, state-owned enterprise Moldtranselectro unjustifiably repaid its debts to Energoalliance Ltd. in the amount of USD 10.8 million and committed to reverse its debt to Energoalliance Ltd. in the amount of USD 9,4 million.

Hence, according to the above, state-owned enterprise Moldtranselectro owed no debt to Energoalliance Ltd. It may be established that the former management of state-owned enterprise Moldtranselectro, RED Nord-Vest S.A. jointly with Energoalliance Ltd., Ukraine, pegged the debt of the Northern Distribution networks, to privatize them at no

⁷ Para. 1 of Art. 209 of the Civil Code of the RM provides: "The transfer of the creditor's rights to another person shall be allowed if it does not contradict the law or the right is not linked with the creditor's personality". Para. 1 of Art. 209 of the Civil Code of the RM also provides: "A debtor, which is obliged to perform one of two or several actions, shall have the right of choice, unless otherwise stipulated by the law, or contract, or the essence of obligation"

⁸ This, it seems, is the reference to the Resolution of the Government No. 890 of 21.08.98 (not 95), para. 1(1) of which provides that "the repayment of debts in respect of the imported electricity and natural gas shall be made by means of a direct transfer of funds, supply of goods services, works, etc., without the right to transfer debts"

charge for Energoalliance Ltd., i.e. to settle the non-existing debt, which action would cause a significant damage to the State.

111. On 14 December 2002, Claimant challenged the court judgment of 19 November 2002 in the Supreme Court (C67). However, on 5 March 2003, the Supreme Court refused to hear Claimant's appeal pending the payment by Claimant of the state court fees. (It should be noted, that on 5 January 2003 an insolvency proceedings were initiated against Claimant).
112. Essentially, the court proceedings in respect of RN/RNV were closed at that moment. The General Prosecutor won (eventually) its claims to invalidate the Assignment Contracts in respect of RN and RNV. On 22 November 2004, Moldtranselectro sent a letter to Claimant confirming that according to Moldtranselectro's accounting records the debt to Claimant equaled MDL 134 million and USD 9,446,433.77, i.e. the aggregate debt in the amount of about USD 20.3 million (C74). The Tribunal understands this as the acceptance of the fact that since the Assignment Contracts in respect of RN and RNV were finally declared invalid by the Moldavian courts, these debts were transferred back to Moldtranselectro. The letter directly stated that "the final recognition of these sums will be performed only upon the closing of the court proceedings in respect of this matter " .

(v) Claimant's claims against Moldtranselectro in Moldova

113. In March 2001, Claimant filed a claim to the Moldavian courts against Moldtranselectro in respect of the remainder of the debt in the amount of USD 9.4 million (after the assignment of debts of RN and RNV). However, there is no progress in the hearing on this claim, it seems.⁹ On 25 March 2003, the court issued a Decree on dismissing the claim without a hearing on the merits due to Claimant's failure to pay the court fees (C47). After that, the true sequence of Claimant's attempts to get its claims against Moldtranselectro for debt recovery reviewed by courts in Moldova. On 20 March 2006, Claimant filed an Additional Statement of Claim against Moldtranselectro within the framework of proceedings on debt recovery in respect of RN and RNV (i.e. Claimant tried to substitute Moldtranselectro for RN and RNV as Respondent) (D5). The amount of this claim equalled USD 10.8 million. However, on 20 March 2007, the Economic Court of Appeal closed the case due to non-appearance on the part of Claimant's representative (C75). Finally, on 2 June 2008, Moldtranselectro sent a letter to Claimant stating that since Moldavian courts dismissed Claimant's claim without a hearing, the sums indicated in its financial statements "as debt to Claimant", were transferred to the off-balance accounts and "in the second half of the year these sums will be recognized in the entity's profit" (C76).

(vi) Claimant's claims against Moldtranselectro in Ukraine

114. On 4 June 2008, Claimant filed a claim to the Ukrainian court against Moldtranselectro and Moldelectrica (among other Parties) on the grounds that Moldelectrica was the legal successor of Moldtranselectro. Claimant sought the repayment of the aggregate debt in the amount of USD 20.3 million plus losses caused by inflation (D8). As at the date of hearing within the framework of this arbitration, the court proceedings in Ukraine, essentially, seem advantageous for Claimant. On 25 August 2010, the Commercial Court of Kyiv Region issued a decision in Claimant's favour, which ordered Moldtranselectro jointly with Moldelectrica to pay Claimant a sum of USD 20.3 million (although without interest, that was claimed by Claimant) (D9). Claimant also secured the second decision by the Commercial Court of Kyiv Region on 24

⁹ Claimant's Representative declared at the hearing that Respondent had filed a motion to suspend the case, which was sustained. However, no respective court materials were provided to support this.

November 2011, according to which Claimant's was awarded a sum of UAH 227,724,060 (about USD 29 million) as losses caused by inflation, in addition to the principal sum of USD 20,3 million. (At the moment of the substantive hearing in this arbitration, the judgment of 24 November 2011 was still in the process of being challenged by Moldelectrica.)

115. The Tribunal does not know whether Claimant tried to reach the enforcement of the judgments against Moldelectrica or Moldtranselectro in Ukraine. However, Claimant tried to reach a recognition and enforcement in Ukraine of the separate court judgment against Moldtranselectro and Moldelectrica, according to which these companies jointly were ordered to pay USD 6,249,842 in Claimant's favour as interest (the Tribunal was not provided with this court judgment, therefore, it does not know the legal grounds of the claim.) Those proceedings for the purposes of enforcement reached some success, as a lien was put on the high voltage transmission lines of Moldelectrica located in Ukraine. The attempts by the Ministry of Finance of Moldova to get this lien revoked on the ground that these transmission lines had been already transferred to it as a pledge, did not succeed as at the date of hearings under this arbitration (July 2012) (C111). The Tribunal is not aware of further developments after that date.
116. Claimant tried to reach a recognition and enforcement of the judgment against Moldtranselectro and Moldelectrica in the amount USD of 20.3 million in the Moldavian courts according to the Minsk Convention of 22 November 1993 and the 1993 Agreement between the Republic of Moldova and Ukraine on legal assistance in civil and criminal cases. However, on 25 October 2011, the Moldavian Economic Court of Appeal refused to enforce the court judgment on the grounds that Moldavian courts had exclusive jurisdiction to hear the dispute. (C185). On 22 March 2012, the Supreme Court of Moldova dismissed Claimant's appeal against this judgment (C215).

(vii) The claims of Moldtranselectro/the General Prosecutor against Claimant in the Moldavian courts

117. As stated above, the Decree of the Audit Chamber ordered Moldtranselectro "to reimburse the payment for electricity made without grounds to Energoalliance Ltd. in December 1998, January 1999 and February 1999 in the amount of USD 10.8 million". Obviously, in accordance with this requirement on 2 February 2009, the General Prosecutor of Moldova filed a Statement of Claim against Claimant to the Economic Court of Appeal in Kishinev, requiring the payment of USD 42 million to the benefit of Moldtranselectro (including the debt principal in the amount of 10.8 million USD plus "the loss of expected profit" and the losses caused by inflation) (C102). In connection with this claim the Economic Court of Appeal froze certain assets of Claimant located in Moldova.
118. On 8 June 2009, the Economic Court of Appeal sustained the claim of the General Prosecutor (C104). However, the same court, acting in the capacity of an appellate instance, set aside its own judgement of 8 June 2009 and sent the case back for review. On 14 January 2010, the Economic Court of Appeal dismissed the claim of the General Prosecutor on the grounds that the Moldavian court had no jurisdiction to hear the case.

IV. JURISDICTION OF THE ARBITRAL TRIBUNAL

119. The Tribunal will hear, in the first instance, the matters of jurisdiction of the Tribunal under the ECT and under the BIT.

A. Jurisdiction of the Arbitral Tribunal under the ECT

120. According to the ECT, the Tribunal has jurisdiction to hear “disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former” (Article 26(1) of the ECT).

121. The ECT came into force in respect of the Republic of Moldova on 16 April 1998 and in respect of Ukraine – on 27 January 1999. This dispute relates to the alleged actions by Respondent, dated October 2, 2000 at the earliest (the date of Decree No.1000 of the Government of Moldova). Accordingly, the Tribunal has jurisdiction *ratione temporis* under the ECT to hear this dispute.

122. In the Statement of Defense Respondent declared that Claimant’s claims became invalid due to the expiry of limitation period. Argument of Respondent, apparently, is based on the Moldavian law, which, according to Respondent, sets forth the limitation period of three years. However, the Tribunal believes that in respect of the question whether under the ECT the Tribunal has jurisdiction *ratione temporis* to hear this dispute the international law shall be applied and not the law of Moldova. Respondent did not base its argument on the international law and the Tribunal is also not aware of any principle of limitation under the international law that would prevent Claimant from filing its claim taking into account the circumstances of the case. Therefore, the argument of Respondent shall be dismissed.

123. The two main outstanding issues, which require a positive answer in order to establish whether this Tribunal has jurisdiction to hear the dispute under the ECT, are as follows:

- Jurisdiction *ratione personae*: is Claimant an “Investor” for the purposes of the ECT?¹⁰
- Jurisdiction *ratione materiae*: does it relate to “Investment” for the purposes of the ECT?

124. In respect of the applicable law, the Tribunal notes that Article 26(6) of the ECT envisages that the Tribunal, which hears the dispute between an Investor and a Contracting Party, shall decide the issues in dispute “in accordance with this Treaty [ECT] and applicable rules and principles of international law.” This does not mean that the law of Ukraine and the law of Moldova do not cover the issue of applying the ECT by the Tribunal. Certain issues, obviously, shall be addressed under this law.

125. As for the issues of interpretation of the ECT, the Tribunal will be also governed by provisions of the Vienna Convention on the law of treaties (“**Vienna Convention**”), as Respondent and Ukraine are the parties to the Vienna Convention, and, moreover, they acceded to the Vienna Convention in 1993 and 1986, respectively, i.e. prior to acceding to the ECT. Article 31 of the Vienna Convention provides:

General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

¹⁰ The term "investor" (in quotes), as used in this award, has the meaning of the term "investor" in the BIT, while the term "Investor" (in quotes, starting with capital "I") has the meaning of the term "Investor" in the ECT. Similar principle is applied to the terms "investment" and "Investment", when they are used in quotes.

(a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

126. At that Article 32 of the Vienna Convention also establishes:

Supplementary Means of Interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) *Leaves the meaning ambiguous or obscure; or*

(b) *Leads to a result which is manifestly absurd or unreasonable.*

127. In view of the above, the Tribunal considers necessary to keep always in mind the goals of signing the European Energy Charter (signed on 21 November 1990) stated in its preamble, in particular those that should be taken into account when qualifying differently understood events and relations. Those goals of the Member States include, *inter alia*:

- *determination to establish closer, mutually beneficial commercial relations and promote energy investments*
- *conviction of the importance of promoting free movement of energy products and of developing an efficient international energy infrastructure in order to facilitate the development of market-based trade in energy*

128. On the basis of the foregoing, when interpreting the respective provisions of the ECT, the Tribunal proceeded from the need for filling of the gaps mainly through use of provisions and principles of the ECT *per se*, also taking into account the different approaches of authoritative authors within the modern doctrine to interpretation of the legal aspects of investment protection, which are important for settlement of this dispute and which are defined with regard to the ECT. In addition, the Tribunal took into consideration other approaches as well, giving preference to those complying with the letter and a spirit of the ECT.

129. The Tribunal states that both Parties referred to the legal doctrine and arbitral awards rendered by other tribunals under different investment disputes.
130. As for arbitral awards, it is clear that each State is a sovereign and may not be bound by the interpretation of law proposed by the Tribunal, which hears some dispute with the involvement of another State and under different international investment treaty.
131. Therefore, the Tribunal in principle is not bound to be governed by, and even to refer to the findings of other arbitral tribunals. However, the Tribunal took into account a number of arbitral awards to the extent it considered the findings stated in those arbitral awards to be convincing and applicable to this case.
132. At that, the Tribunal presumed that the strongest argument, which could influence the process of rendering similar awards, was the provision of an express and sufficient evidence of an established approach to certain issues of the investment law, as reflected in a number of subsequent cases. This argument was prudently worded in the award rendered in *Burlington Resources Inc. v. Republic of Ecuador*:

*The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. The majority believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law.*¹¹

133. Similar conclusion was made by the Tribunal in *Suez and others v. Argentina*:

*Moreover, considerations of basic justice would lead tribunals to be guided by the basic judicial principle that 'like cases should be decided alike,' unless a strong reason exists to distinguish the current case from previous ones. In addition, a recognized goal of international investment law is to establish a predictable, stable legal framework for investments, a factor that justifies tribunals in giving due regard to previous decisions on similar issues. Thus, absent compelling reasons to the contrary, a tribunal should always consider heavily solutions established in a series of consistent cases.*¹²

134. Without prejudice to the above approaches, the Tribunal also considers worth mentioning the following finding:

Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real

¹¹ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction of 2 June 2010, p. 100. ("The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. The majority believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law.")

¹² *Suez and others v. Argentina*, ICSID Case No. ARB/03/19, Decision on Liability of 30 July 2010, p. 189. ("Moreover, considerations of basic justice would lead tribunals to be guided by the basic judicial principle that 'like cases should be decided alike,' unless a strong reason exists to distinguish the current case from previous ones. In addition, a recognized goal of international investment law is to establish a predictable, stable legal framework for investments, a factor that justifies tribunals in giving due regard to previous decisions on similar issues. Thus, absent compelling reasons to the contrary, a tribunal should always consider heavily solutions established in a series of consistent cases.")

*interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution.*¹³

135. Since the seat of arbitration for this dispute is Paris, the Tribunal, in accordance with the law of France on the international arbitration, also considers necessary to take into account the French practice of enforcement, according to which the precedent is very rarely an isolated decision. It is the result of an evolution.¹⁴
136. Taking into account the aforesaid, when establishing its position on the issues in dispute the Tribunal sought to develop a reasonable approach based on the analysis of the previous awards referred to by the parties in order to use these awards in the process of legal treatment of the established factual circumstances of the case or, to the contrary, to deny their precedent nature.
137. In addition to the aforesaid, the Tribunal also sought to prevent its award from being inadmissibly unexpected for the parties, substantiating its award only with facts submitted by the parties and which the Tribunal considered properly proved while following the accepted approach to the limits of implementing the “adversarial principle”, concerning the obvious lack of the obligation to bring up every finding, which may be made on the basis of evidence produced by the parties.
138. Now the Tribunal will address two questions mentioned above.

(i) Jurisdiction *ratione personae*: is Claimant an “Investor”?

139. Article 1(7) of the ECT provides:

(7) “Investor” means:

(a) with respect to a Contracting Party:

(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;

(ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;

(b) with respect to a “third state”, a natural person, company or other organization which fulfils, *mutatis mutandis*, the conditions specified in subparagraph (a) for a Contracting Party.

(1) Claimant’s Position

140. Claimant argues that it is a legal entity established and registered under the laws of Ukraine. Therefore, it meets the requirements of the definition above.

¹³ *AES Corp. (USA) v. Argentina*, ICSID Case No. ARB/02/17, Award of 26 April 2005, p. 30. (“Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution”).

¹⁴ Troper M. and Grzegorzczuk C. Precedent in France, in *Interpreting Precedents*, D.N. MacCormick & R.S. Summers (eds), (Ashgate/Dartmouth, 1997). p. 137-138.

(2) Respondent's Position

141. Arguments of Respondent were formulated differently at various stages of the arbitration. Below is a brief description of its arguments as they are stated in Respondent's Closing Statement:

- Claimant is not actually a Ukrainian legal entity, as Moldtranselectro owns 30% of shares in Claimant;
- Claimant seeks to exercise the right, which is owned by Derimen;
- Claimant is only a body, which has to assist in recovery of the debt to Derimen;
- Access to the protection mechanisms under the BIT and ECT shall be implemented in good faith;
- Claimant did not "make investments in [the] Area" of the Republic of Moldova;
- Claimant and Derimen coordinated their actions;
- There is no legal entity under the name of Energoalliance Ltd. in the State Register of Ukraine.

(3) Tribunal's Analysis

142. The Tribunal notes, in the first instance, that Claimant is a legal entity, established and registered under the laws of Ukraine. Claimant presented as evidence, *inter alia*, the statements from the Unified State Register of Ukraine (Unified State Register of Enterprises and Organizations of Ukraine (USREOU)). The Tribunal also notes that the existence of Claimant in the capacity of a registered legal entity of Ukraine is established in many judicial documents of the Moldavian court, which were entered in the case file.

143. As for the first argument of Respondent, namely, that Claimant is not actually a Ukrainian legal entity, as Moldtranselectro owns 30% of shares in Claimant, it covers two aspects: first, that Claimant only "formally" is a Ukrainian legal entity and, second, that Moldtranselectro (i.e. a Moldavian entity) owns 30% of shares in Claimant.

144. The Tribunal understands these two arguments taken together as the statement that to be recognized as an "Investor" under the ECT Claimant should be not only formally registered in another "Contracting Party", but also 100% of its shares should be owned by natural persons having the citizenship of that "Contracting Party".

145. However, the ECT does not contain any requirement in respect of the nationality of natural persons or companies, which own an "Investor". The only requirement is that an "Investor" *per se* should be established under the laws of the Contracting Party. The Tribunal is also aware of many awards rendered by other arbitral tribunals in investment disputes, according to which in the absence of any specific requirement in investment treaty in respect of the ultimate owner of an investor (as opposed to its place of registration) the arbitral tribunals should not assume that such requirement exists.¹⁵ Therefore, the argument of Respondent shall be dismissed.

146. As for Respondent's second argument, namely, that Claimant seeks to exercise the right owned by Derimen, the Tribunal does not fully understand the position of Respondent. Apparently, Respondent states that since Derimen Company is not an "Investor" under the ECT (being not registered in a "Contracting Party" to the ECT) Claimant also cannot be an "Investor". The Tribunal does not accept the logic of this statement. The argument of Respondent, apparently, is based on a misperception that on 30 May 2000 Derimen assigned to Claimant those rights, which now are the subject of Claimant's claim against Respondent. However, Derimen assigned to

¹⁵ *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 August 2008; *Saluka Investments BV v Czech Republic*, UNCITRAL, Award of 17 March 2006; *Hulley Enterprises Ltd. v. Russian Federation*, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility of 30 November 2009;

Claimant the rights to debt, which it allegedly owned in respect of Moldtranselectro and not in respect of Respondent. Derimen could not assign to Claimant the right of claim, which it owned in respect of Respondent if only because Respondent at that moment (30 May 2000) had not yet committed any of the alleged actions, which according to Claimant, were the violation of Respondent's obligations under the BIT and the ECT.

147. To the extent Respondent argues that no foreign investor cannot acquire a right under a bilateral investment treaty if this investor acquires an asset from the owner, which does not have such rights, this argument should be dismissed. If this were the case, an investor from country A, which acquires a plant in country B from a company incorporated in that country B, would never be qualified as a foreign investor under a bilateral investment treaty. The Tribunal does not find in the text of the ECT any supporting provision indicating that the previous chain of owners of an asset, which allegedly is an "Investment", is important when answering the question whether the current owner is an "Investor".

148. If this finding should be substantiated, it may be done with reference to *Fedex v. Venezuela*.¹⁶ In this case Respondent State issued promissory notes to a Venezuelan company and then Claimant (a Dutch company) acquired these promissory notes from the original holder by way of endorsement. The Tribunal held that Claimant was entitled to use the mechanisms of protection provided by the bilateral investment treaty between the Netherlands and Venezuela, whereas the original holder (a Venezuelan company) had no such right.

149. To support its argument Respondent refers to *Mihaly v Sri Lanka*.¹⁷ In this case a Canadian investor allegedly assigned an existing claim against Sri Lanka to the US-based affiliated entity with the intent that that affiliated entity used the advantages of the ICSID dispute settlement mechanism under the BIT between the USA and Sri Lanka (the Canadian investor had no right to use the ICSID mechanism, as Canada was not a party to the Washington Convention). However, that case concerned the assignment of claim against a State and not the assignment of the underlying investment, which later would lead to creation of claim against a State (which is the case in the current dispute). Similarly, in *Banro American v. Republic of the Congo*¹⁸ (another case referred to by Respondent) the arbitral tribunal was to decide whether a Canadian company had lawfully assigned to its US-based affiliated entity the benefits of the arbitration clause contained in the Contract between the Canadian company and Respondent-State, which provided for a right of access to ICSID mechanism. That case is not directly related to the present situation as Derimen did not intend to assign any contractual rights to Claimant, which Derimen owned in respect of the Republic of Moldova.

150. The second argument of Respondent, therefore, shall be dismissed.

151. As for Respondent's third argument, namely, that Claimant is only a body which has to assist in recovery of the debt to Derimen, it to a greater extent refers to the question whether or not Claimant made a qualifying "Investment", which will be addressed in the next section.

152. Respondent's fourth argument that the access to the protection mechanisms under the ECT shall be implemented in good faith is based on an assumption that the assignment by Derimen of its investment to Claimant was not made in good faith, i.e. exclusively for the purpose of allowing Claimant to use the advantages of the protection mechanisms under the BIT and the ECT. Respondent argues that there is an imperative of good faith in the international law, which does not allow arbitral tribunals to admit that they have jurisdiction in such circumstances.

¹⁶ *FEDAX N. V v. Venezuela*, ICSID Case No. ARB 19613, Award of 9 March 1998.

¹⁷ *Mihaly International Corporation v Sri Lanka*, ICSID Case No. ARB/00/2, Award of 15 March 2002.

¹⁸ *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo* "ICSID Case No. ARB/98/7", ICSID Case No. ARB/98/7, Award of 1 September 2000.

Respondent refers to *Phoenix Action, Ltd. v. The Czech Republic*,¹⁹ in which a natural person being behind Claimant, a Czech citizen, transferred the title to two Czech companies, the assets of which had been allegedly expropriated, to Claimant (an Israeli company) two month prior to filing a claim. In that case the tribunal came to a conclusion that an abusive manipulation of the system of international investment protection under the ICSID had taken place and refused to accept jurisdiction in that case. Similarly, Respondent refers to the award in *Société Générale v. the Dominican Republic*,²⁰ in which the Tribunal noted that the assignment of investment should be *bona fide*, and not devised after the commencement of an alleged expropriation by the state to allow a national of a State not qualifying for protection under a treaty to obtain an inappropriate jurisdictional advantage.

153. This argument shall be dismissed on a number of grounds, the most obvious of which, as stated above, is that no action or failure to act representing the alleged violation by Respondent of its obligations under the ECT did not occur before the assignment by Derimen of its rights to Claimant. In these circumstances, according to the Tribunal, it may not be accepted that there are evidences of unfair practices, *inter alia*, formulated in the award in respect of *Phoenix Action*. In addition, there is no evidence that Claimant ever threatened filing a claim or even considered an option of filing a claim against Respondent before 2010. Respondent's assumption that Claimant acquired its claims against Moldtranselectro specially for the purposes of having an opportunity to file such a claim cannot be accepted by the Tribunal due to the failure of evidence and the utmost dubiousness of the alleged bad faith on the part of Claimant, which had appeared 10 years before filing a claim against Respondent.
154. The Tribunal notes that Respondent also stated that the assignment by Derimen in the favour of Energoalliance was intended to allow Energoalliance to use the advantages of the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (1997) concluded by CIS countries and/or the Agreement on Legal Assistance and Legal Relations in Civil and Criminal Cases (1995) (between the Republic of Moldova and Ukraine). However, if any rights under these international agreements were received by Claimant not in good faith then this issue would fall under jurisdiction of an appropriate state court of Ukraine or Moldova, should Claimant file a claim to exercise such rights. This argument does not relate to the question whether Claimant acquired its rights under the ECT not in good faith.
155. Accordingly, Respondent's argument related to the alleged bad faith of Claimant shall be dismissed.
156. Respondent's fifth argument that Claimant did not invest in the territory of the Republic of Moldova (for the purposes of defining the term "investor" in the BIT, but not the ECT) relates to the issue whether or not this dispute refers to an "investment" under the BIT. Addressing this issue would be reasonable within a subsequent range of other issues in connection with applicability of the BIT for settling this dispute; this will be discussed below.
157. Respondent's sixth argument that Claimant and Derimen coordinated their actions relates, obviously, to Respondent's argument in respect of the alleged "bad faith" of Claimant, which has already been addressed. However, this argument at the same time is the acceptance of the interrelation between Claimant and Derimen in making the purported "Investments"; this will be reviewed separately below.
158. Finally, as for Respondent's argument that there is no legal entity under the name of Energoalliance Ltd. in the State Register, the Tribunal does not understand both the factual grounds of this argument and its alleged legal significance for the question whether or not

¹⁹ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009.

²⁰ *Société Générale (In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A.) v. the Dominican Republic*, LCIA Case No. UN 7927, award of 19 September 2008.

Claimant is an "Investor". As the Tribunal understands, Respondent's argument is that Claimant merely does not exist, or that Claimant is not registered in Ukraine. None of these assumptions is supported with evidence. Respondent's argument is entirely based on the fact that in all official documents in the Ukrainian language, related to Claimant, including the respective record in the Unified State Register (USR), the first letter in the name of Claimant is the Ukrainian letter "Ye" ("Yenergoalyans" as transliterated from Ukrainian), while in all other cases when Claimant transliterates its name for the purposes of documents in Russian, including its pleadings within the framework of this arbitration, Claimant uses the letter "E" ("Energoalyans" as transliterated from Russian). The Tribunal cannot understand in which way it may somehow affect the existence of Claimant or the fact that it was registered under the laws of Ukraine. Anyhow, the Tribunal notes that the Charter of Claimant absolutely clear indicates that the different spelling is used in two different languages. Therefore, this argument shall be dismissed.

159. In conclusion, the Tribunal established that Claimant was an "Investor" for the purposes of the ECT.

(ii) Jurisdiction *ratione materiae*: does the dispute relate to "Investment" under the ECT?

160. As explained above, this question also covers an additional aspect whether the "Investment" of Claimant was made (if so) "in the area" of Respondent. Two these questions are addressed together.

161. Article 1(6) of the ECT contains the following definition:

"Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;

(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;

(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;

(d) Intellectual Property;

(e) Returns;

(f) any right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

"Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat.

162. For these purposes, the Tribunal does not consider it necessary to review the definition of the term "Area" in the ECT.

(1) Claimant's Position

163. Below the Tribunal states the arguments of Claimant. In order to avoid unnecessary repeating where possible the Tribunal reworded and abridged the said arguments, however, in some cases it considered appropriate to reproduce the wording used by Claimant. Below the Tribunal states Claimant's arguments which relate to the BIT as well as to the ECT (the Tribunal will return to the matters of the Tribunal's jurisdiction *ratione materiae* under the BIT in section B(ii) below).

164. Claimant declares that the claim it acquired from Derimen under Contract No. 06-20 (in respect to the debt in the amount of USD 18.1 million to Derimen under Contract No. 24/02) and the claim it acquired from Derimen under Contract No. 07-20 (in respect to the debt in the amount of USD 4 million to Derimen under Contract No. 53/21) constitute "assets", which fall into the scope of the above definitions of "investment"/ "Investment" in the BIT and ECT, respectively. Claimant also declares that the said claims constitute, more specifically, "claims to money" within the meaning of Article 1(c) of the BIT and Article 1(6)(c) of the ECT, and that they equally constitute the "right conferred ... by contract", for the purposes of Article 1(e) of the BIT, and "right conferred ... by contract to undertake... Economic Activity in the Energy Sector" within the meaning of Article 1(6)(f) of the ECT. As for Article 1(6)(f) of the ECT, Claimant also refers to the fact that Article 1(5) of the ECT defines "Economic Activity in the Energy Sector" as an "economic activity concerning ... trade, marketing, or sale of Energy Materials and Products"; and also notes that the list of "Energy Materials and Products", in Annex EM to the ECT includes "electricity".

165. As for the additional requirement in the last paragraph of Article 1(6) of the ECT that any Investment shall be "associated with Economic Activity in the Energy Sector", Claimant (in paras. 1.39-1.59 of the Reply, and in para. 52 of the Closing Statement) explained that this requirement was met by the fact that both underlying Contracts, which related to the debts of Moldtranselectro (i.e. Contract No. 24/02 and Contract No. 53/21), constituted Contracts associated with the supply of electricity into the territory of the Republic of Moldova for the benefit of Moldtranselectro. These circumstances constitute links between Claimant's Investment and Respondent's Economic Activity in the Energy Sector, which (the licensed activity of constant transmission of electricity through the high-voltage power networks in the Republic of Moldova) was performed exactly by the company Moldtranselectro (the receiver of electricity, the debtor) (p.1, **C85**).

166. Initially Claimant argued that it had acquired its alleged "investment"/"Investment" on the date of two Contracts No. 06-20 and No. 07-20, i.e. on 30 May 2000, and not on some earlier date. However, in this respect Claimant's position was somewhat transformed, including its reference to the fact that Contract No. 24/02 (according to Claimant) was "long-term" (as if indicating that Contract No. 24/02, and not Contract No. 06-20, fell within the scope of the term "investment").

167. Claimant additionally specified this argument in its Closing Statement (para. 30):

Claimant is of the opinion that all transactions, which related to the export supplies of electricity [to the Republic of Moldova], should be considered as a whole, one transaction: from the electricity interchange through legal registration of electricity export Contracts, the replacement of creditors in respect of the original obligation (through assignment contracts) and further to taking measures concerning the payment. Contracts No.53121 and No. 24/02-99EA are directly associated with the Investments in the Energy Sector, as they provide for the mechanisms of electricity export from Ukraine to RM, constitute the long-term cooperation between two states in the energy sector, are

designed to contribute to the economic growth of the host state (electricity consumption in RM) and are exposed to investment risks (delivery on credit, lengthy settlements).

168. In its Closing Statement Claimant also referred to a number of other Contracts, mainly those, which had been cited earlier in claim papers, as well as in the course of oral hearings. In particular, Claimant indicated that during the period of December 1998 - 2000 a very complicated scheme of electricity supply was used under Contracts No. 53/21 and No. 24/02 and not an ordinary purchase-and-sale for money. The claim under Contract No. 53/21, which was assigned to Claimant by the original creditor (Derimen) on the basis of Contract No. 07- 20, represents the claim for payment for electricity interchange from the UES of Ukraine into the grid of the Republic of Moldova in December 1998. ZAO Stal compensated the debt to the UES of Ukraine for these electricity interchanges through supplying into the UES the electricity generated by power units leased by this enterprise. ZAO Stal was the founder of Claimant (in December 1998 it owned 67.16% of the authorized capital). Under Contract No. 24/02 Claimant was the supplier of electricity to the Republic of Moldova. Based on these facts, Claimant argued during the oral hearings that the Investment had already been made starting from the moment of the legal registration of Contracts for supply of electricity exported to the Republic of Moldova.
169. Claimant also indicated that the arbitral tribunals, which had applied the ECT earlier, came to conclusion that an investment, which does not constitute a real ownership or control, also may be qualified as an "Investment" under the ECT, referring to the cases of *Yukos Universal Ltd. v. Russian Federation*, *Hulley Enterprises Ltd. v. Russian Federation* and *Veteran Petroleum Ltd. v. Russian Federation*.²¹
170. Demonstrating that the ECT provides the broadest definition of "Investment" as compared to the modern agreements on investment protection in respect of the assets included in the rights arising from contracts, Claimant notes that the ECT does not include in its definition of "Investment" any restrictive provisions that would exclude certain kinds of assets as, for example, The North American Free Trade Agreement of 7 October 1992 (NAFTA), which intentionally excludes from its definition of "Investment" "claims to money that arise solely from commercial contracts for: (i) the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party; or (ii) the extension of credit in connection with a commercial transaction; or (iii) any other claims to money, that do not involve the kinds of interests".
171. Claimant also refers to the case of *Petrobart Ltd v. Kyrgyzstan*,²² in which the arbitral tribunal established that Claimant and governmental entity had signed a purchase-and-sale contract for supply of gas condensate to be carried out in several shipments over the course of one year. The arbitral tribunal stated, first, that the Petrobart's contractual right to get paid for the gas condensate supplied to Kyrgyz company constituted the assets being an Investment under Art.1(6) of the ECT. Second, the arbitral tribunal ruled that the claims to money might constitute investments even if they were not part of a long-term business engagement in another country, referring to other awards rendered under the ECT to prove that a broad definition (differentiating between the definition and content) of investment was not at all exceptional.
172. Taking into account the above arguments, Claimant comes to a conclusion that the analysis of Article 1(6) of the ECT shows that the ECT accepted a broad concept (i) having specified the kinds of investments, which are the object of protection under the ECT substantive provisions, and (ii) having extended the scope of action to "all kinds of assets".

²¹ *Yukos Universal Ltd. v. Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility of 30 November 2009; *Hulley Enterprises Ltd. v. Russian Federation*, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility of 30 November 2009; *Veteran Petroleum Ltd. v. Russian Federation*, PCA Case No. AA 228, Interim Award on Jurisdiction and Admissibility of 30 November 2009.

²² *Petrobart Ltd v. Kyrgyzstan*, SCC Case No. 126/2003, Award of 29 March 2005.

173. Claimant also indicates that in *Hulley Enterprises Ltd. v. Russian Federation* the Tribunal stated that the Tribunal was not entitled to impose on the parties to arbitral proceedings any supplementary requirements for the definition of an "Investment", which had not been agreed upon by the Contracting Parties at the moment of signing the ECT, and could not apply a definition of investment other than that agreed upon by the parties to the ECT and Respondent.

174. Claimant through its written statements also refers to the decisions of other tribunals in the disputes under the ECT, including the award in the case *No.V (I 16/2008), Remington Worldwide Limited v. Ukraine*, which stated that "in the dispute under the ECT even a simple commercial transaction, if carried out in the energy sector, shall be qualified as an Investment".²³

175. As for the role of Derimen, Claimant additionally explained that Derimen actually acted as an agent under the electricity supply Contracts, which Claimant had to involve because of the anticipated delays in payments and the settlements made by Moldtranselectro predominantly in non-cash form. The involvement of an agent provided Claimant with an opportunity to avoid penalties stipulated by the Law No.185/94-BR.

176. At the same time, according to Claimant:

- Claimant was a creditor of the agent and Derimen acted as a creditor of the Moldavian company. Claimant indirectly (through Derimen company) was a creditor of the Moldavian company - the debtor;
- The receipt of commodity from Moldtranselectro towards the repayment of debt (C131), which Derimen was to sell independently, entailed respective risks as Energoalliance depended on cash proceeds from Derimen and the agent's risks affected Claimant as well;
- Claimant and the agent were linked by common interest as they were committed to full and timely settlement by Moldtranselectro;
- Joint work covered not only the investment project implementation stage but also the subsequent court proceedings, in which Claimant and Derimen were frequently represented by the same authorized persons (e.g., Mr. D. Makarenko);
- The involvement of the agent was forced by objective circumstances and did not change the essence of the investment, and the activities of the agent company under the investment project were inseparably linked to the underlying transaction (supply of electricity);
- The activities of the agent were not formal; together with Claimant it actively participated in the investment project implementation, bore equal risks and actually was a co-investor.

177. Therefore, according to the specified position of Claimant, within the meaning of the ECT the supply of electricity by Claimant was an investment by its nature and initially had a number of elements of an investment. However, the legal allocation of responsibilities between Claimant and the agent, the lack of direct claims to Moldtranselectro on the part of Claimant, did not allow the latter to formally lay a claim to be an investor. Claimant, having received the claim to the debt under Contracts No. 06-20 and No. 07-20 in respect of the electricity supplied under Contracts No. 24/02 and No. 53/21, obtained the final element to be legally qualified as a true investor having all respective features. The date of initiating the investment corresponds to the date of signing Contracts No. 24/02 and No. 53/21. The date of acquiring investments by Claimant corresponds to the date of signing Contracts No. 06-20 and No. 07-20.

178. For the purposes of supporting its position in respect of the participation of a group of persons on the part of an investor, Claimant referred to *Ceskoslovenska obchodni Banka, A.S. v. Slovak Republic*, where the arbitrators while analysing the Tribunal's jurisdiction, referred to the

²³ *Remington Worldwide Limited v. Ukraine*, SCC Case No. V(116/2008), Award of 28 April 2011, p. 200.

opinion of the Tribunal in *Fedex v. Venezuela* mentioned by Claimant, and additionally indicated that:

*An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.*²⁴

(2) Respondent's Position

179. Respondent's arguments concerning the existence or non-existence of an "investment"/"Investment" are not always worded clearly and in full; also, Respondent not always differentiated between this issue and the issue whether Claimant was a proper investor"/"Investor". The Tribunal enumerates below Respondent's arguments as stated in the Closing Statement of Respondent. The Tribunal, to the extent it considered to be reasonable, interpreted and re-worded the said arguments instead of citing the original wording used by Respondent.

(a) Nemo dat quod non habet

180. The main argument of Respondent is the same as stated above in the context of the question whether Claimant is a proper investor"/"Investor"; namely, because Derimen had no rights under the BIT or the ECT, Claimant could not acquire such rights at the moment of acquiring the claims of Derimen. Respondent formulated as follows:

In consequence of the assignment of rights to debt of Derimen Properties Ltd. the Assignee, Energoalliance Ltd., could not acquire any greater right than that, which belonged to the Assignor, Derimen Properties Ltd., by virtue of the principles of nemo dat quod non habet and nemo potiore potest transferre quam ipse habet.

(b) Contract for the supply of goods is not an "investment"/"Investment"

181. Respondent also states that in any case, neither the rights of Derimen, nor the rights of Claimant under Contract No. 24/02 (under which the debt in the amount of USD 18.1 million arose) could constitute an "investment"/"Investment" for the purposes of the BIT or ECT, as contracts for the sale of goods are not "investments"/"Investments" covered by protection under the BIT or the ECT, respectively. The rationale is that such contracts lack the necessary elements of some duration and allocation of the respective risk. There is also a special rationale, according to which Claimant *per se* could not make an "investment"/"Investment" through supply of electricity under Contract No. 24/02, which states that Claimant supplied electricity to Derimen and not to Moldtranselectro. As for the debt in the amount of USD 4 million, the underlying

²⁴ *Ceskoslovenska obchodni Banka, A.S. v. Slovak Republic*, Decision of the Tribunal of 24 May 1999, para. 72. ("An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment. ").

supply Contract was signed by ZAO Stal and Ukrenergo, i.e. between two Ukrainian legal entities; thus, it could not constitute an investment into the territory of Respondent.

(c) Claimant's claims against Moldtranselectro are not the rights "associated with an investment"

182. Respondent declares that Claimant's rights are not the rights within the meaning of Article I(c) of the BIT or Article I(6)(c) of the ECT, respectively, as they are not the rights "associated with an investment". According to Respondent, the claims under the supply Contract would be the rights within the meaning of these Articles, provided the original (different) "investment"/"Investment" was implemented, in respect of which that supply Contract would be signed.

(d) Claimant's claims against Moldtranselectro did not constitute the right to carry out Economic Activity

183. Respondent also declares, that Claimant's rights are not the rights within the meaning of Article 1 (6)(f) of the ECT, as these rights constitute the claims to money and not the rights to undertake "Economic Activity in the Energy Sector". In addition, as for Article I(6)(f) of the ECT and Article 1(1)(e) of the BIT, these Articles may not be interpreted so as to contradict Articles I(6)(c) and 1.1(c), respectively (which require that the claims to money be "associated with an investment").

(e) Claimant did not invest in the Moldavian economy

184. More generally, Respondent notes that the acquisition by Claimant of Derimen's rights did not constitute a contribution to the Moldavian economy, as Claimant did not intend to undertake any economic activity in connection with Contract No. 24/02 or Contract No. 53/21. Claimant acted merely as a collection agent exercising the rights owned by Derimen. In addition, Claimant did not prove that it had made any payment for these rights. Therefore, Claimant's goal was not to "invest".

(f) If an "investment" /"Investment" was made, it was made illegally and, consequently, it should be denied the benefits of protection

185. In the context of this argument Respondent refers to a number of alleged violations of respective legislation. In brief:

- Claimant, Derimen and Moldtranselectro violated certain provisions of the Law of Moldova *On Electricity* in connection with their respective activities and responsibilities under Contract No. 24/02;
- Assignment by Moldtranselectro of the debts of RED Nord and RED Nord Vest 1 on September 2000, as well as the previous assignment by Moldtranselectro of the debts of RED Sud and RED Centru on 30 June 2000 contradicts the Moldavian legislation;
- Assignment by Derimen of its rights to debt against Moldtranselectro under Contract No. 06-20 (related to the Moldtranselectro's debt in the amount of USD 18.1 million) was also illegal according to the Moldavian legislation;
- Derimen did not pay either customs duties or income taxes in the Republic of Moldova; this contradicts the Moldavian legislation;

- The Moldtranelectro representatives acted wilfully to the detriment of Moldtranelectro *per se* and the Moldavian consumers of electricity, when these representatives entered into Contract No. 24/02, hence, the signing of Contract No. 24/02 contradicted the legislation of Moldova and the legislation of Ukraine as well;
- Derimen acted in respect of legal relations in the Republic of Moldova and in Ukraine under an assumed (fictitious) nationality, thus contradicting the Moldavian and Ukrainian legislations;
- Derimen did not possess any licenses for the right to engage in any economic activity in Ukraine.

(3) The Tribunal's Analysis

186. Below the Tribunal will analyse whether the ECT requirements for "Investment" were complied with. However, to begin with, given a significant number of arguments put forward by the parties and containing frequently contrary statements, the Tribunal considers necessary to establish and qualify the real actions by the parties and other persons, important for answering this question and to do this in the context of establishing the general chronological sequence of those events, part of which was represented by the recorded "Business Transaction", including the decisions taken in the Respective states.

187. Cooperation between Ukraine and Moldova in the energy sector at the end of 90s –beginning of 2000s developed "at the background of earlier closely interconnected power systems..."²⁵ The nature and content of relations between two power systems changed after the collapse of the Soviet Union and had to be legalized.

188. Legalization of the economic relations between Ukraine and Moldova in the energy sector developed as follows.

189. At the governmental level the following documents were signed:

- Agreement between the Government of Ukraine and the Government of Moldova on cooperation in electricity sector of 20.03.1993 (**C20**);
- Agreement on the parallel operation of the power systems of Ukraine and Moldova of 01.01.1995 (**C19**);
- Regulation on the procedure for arrangement of commercial metering of interstate cross-flows of power and capacity and relations of the parties in respect of the metering system maintenance, signed on and effective from 23.06.1998 (for Ukraine) and signed on and effective from 08.07.1998 (for the Republic of Moldova) (**C21**).

190. At the level of companies the following documents were signed:

- Contract (Contract) No. 1/01 of 01.02.1999 between Ukrenergo, Energoalliance Ltd. and Moldtranelectro on the purchase of electricity on the wholesale electricity market of Ukraine designated for the export to the Republic of Moldova (**C16**);
- Contract No. 24/02 of 26.02.1999 (**C10**), according to which Energoalliance is the supplier, Derimen – the buyer(payer), Moldtranelectro – the receiver;
- Contract No. 50 of 01.03.1999 on the procedure for interaction in the metering and control system maintenance, as well the procedure for recording electricity interchange and detecting losses of electricity in the interstate transmission lines of all

²⁵ Hans-Joachim Schramm, "Expert Opinion", p. 1 (**D47**). Moreover, prior to the collapse of the Soviet Union, the power systems of Ukraine and Moldova were elements of a single South-Western European part of the power system of the Soviet Union.

voltage levels between Ukraine and Moldova along the borders of the South-Western Power System of Ukrenergo (C22);

- Contract No. 200 of 25.07.2000 on the procedure for interaction in the metering and control system maintenance, as well the procedure for recording electricity interchange and detecting losses of electricity in the interstate transmission lines of all voltage levels between Ukraine and Moldova along the borders of the South Power System of Ukrenergo (C23);
- Addendum No.1 of 03.01.2000 to Contract on supply of electricity No. 24/02 (C135).

191. The subject, objective and content of the legal mechanisms, which regulates relations between parties to cooperation in the electricity sector, allow to conclude that there was a single evolutionary process of the transition from the old modalities of legalizing this cooperation to the new ones determined by market relations and new practices of settlements between independent and sovereign subjects, which moved these relations and their legal regulation into the sphere of international commercial relations. The unity of this process, it appears to the Tribunal, is determined by the following factors:

- Same subject - cooperation of Ukraine and the Republic of Moldova in the electricity sector (C19, C20);
- Same objective - providing for efficient economic development of the Republic of Moldova through uninterrupted supply of electricity, which determines all contractual relations at every three indicated stages;²⁶
- Same techniques for ensuring the uninterrupted parallel operation and maintenance of the power systems of Ukraine and the Republic of Moldova, as well as metering equipment;²⁷
- Same methodology of commercial metering of electricity supplied by specific participants of these commercial relations from Ukraine to specific consumers from the Republic of Moldova;²⁸
- Same authority setting the price of 1 kWh of electricity (Ukrenergo);²⁹
- Same methodology of setting the price of 1 kWh.³⁰

192. It is important to note the following specific features of this evolutionary process:

- Legal mechanism, which regulated the relations between parties to cooperation in the electricity sector, remained in force over the course of this cooperation, complementing each other, strengthening and specifying the relations between parties;

²⁶ Agreement between the Government of Ukraine and the Government of Moldova on cooperation in the power sector, Preamble, par. 3 p. 1 (C20); Agreement on parallel operation parallel operation of the power grids of Ukraine and Moldova, Preamble and p. 7 (C19); Article 2 the Energy Charter Treaty, in: The Energy Charter Treaty and Related Documents, A Legal Framework for International Energy Cooperation, 2004; Agreement No. 1/01 of 01.02.1999, Preamble (C16); Agreement No. 24/02-99 EA of 26.02.1999 On Supply of Electricity, paras. 2.2 and 8 (C10); Addendum No. 1 of 03.01.2000 to Contract No. 24/02-99 EA of 26.02.1999. (C135).

²⁷ Regulation on the procedure for arrangement of commercial metering of interstate cross-flow of power and capacity and relations of the parties in respect of metering and control system maintenance (C21); Agreement No. 50 of 01.03.1999 (C22); Agreement No. 200 of 25.07.2000. (C23).

²⁸ Regulation on the procedure for arrangement of commercial metering of interstate cross-flow of power and capacity and relations of the parties in respect of metering and control system maintenance (C21); Agreement No. 50 of 01.03.1999 (C22); Agreement No. 200 of 25.07.2000 (C23); Preamble and para. 4 of Contract No. 1/01 of 01.02.1999 (C16); the letter from the Director of NPC Ukrenergo of 12.12.2002, to Director of Energoalliance Ltd. (C96).

²⁹ National Commission for State Energy and Public Utilities Regulation of Ukraine (D34); Agreement between the Members of the Wholesale Electricity Market of Ukraine of 13.03.1998 (D33).

³⁰ Rules for the Wholesale Electricity Market of Ukraine, Annex No. 1 to Contract between Members of the Wholesale Electricity Market of Ukraine, of 13.03.1998 (D34).

- Gradual transition was in progress from general organizational and technical principles of ensuring the parallel operation of the power systems of Ukraine and the Republic of Moldova to the establishment of contractual relations between specific entities undertaking economic activity in the electricity sector of these countries;
- The circumstances forced to apply the outdated legal institutes to relations, which were new in nature and in essence, as at that moment the dynamics of their development effectively outstripped the dynamics of modernization of the legal mechanism regulating these relations.

(a) Contracts No. 24/02 and No. 06-20

193. Taking into account the aforesaid, Claimant's argument that Contract No. 24/02 is a trilateral foreign economic Contract³¹ seems valid, although the three parties to this Contract apply to it the rules regulating a supply Contract under the Civil Code of Ukraine of 1964, and include Derimen in the contractual relations scheme,³² thus attributing to this company an ambiguous legal status: either a buyer or a payer.³³
194. At that, according to para. 2.1.1 of Contract No. 24/02, the supplier commits to supply of electricity to the purchaser since no other option shall be admitted by Article 245 of the Civil Code of Ukraine of 1964. At the same time, no provision of Contract mentions the responsibility of the purchaser to accept this product according to the same Article of the Civil Code of Ukraine. Possible inclusion in Contract No. 24/02 of that condition would contradict the real arrangements. The specific nature of the contracted item under the electricity supply Contract provides that the only possible option to actually transfer the contracted item under Contract from a supplier to another entity is its transfer through transmission lines, which connect in this case the power systems of Ukraine and the Republic of Moldova. Moldtranselectro was an authorized representative of the Republic of Moldova, and Derimen was by no means related to Moldtranselectro. That is why the responsibility to accept the contracted item under the supply Contract shall be imposed on the receiver (p.2.2.2) under Contract No. 24/02.
195. The only responsibility of the buyer is to "to settle with the supplier according to the conditions of this Contract" (p.2.3.1), i.e. conditions set forth in pp. 4.2 and 4.3 of the said Contract No. 24/02. It shows that Contract No. 24/02 has been influenced by the transition period "...from the centrally-controlled economy..."³⁴ to the market economy, when it is rather difficult to put new economic relations in respect of international cooperation in the sphere of purchase-and-sale and transportation of such specific goods as electricity, into the old legal frameworks on supplies.
196. In the context of the aforesaid, it should be noted that in accordance with p. 2.1.1 of Contract No. 24/02 the supplier shall "carry out the supply of electricity to the purchaser...", however, in Annex No.1 of 03.01.2000 thereto the same p. 2.1.1 obligates the supplier "carry out the supply of electricity and capacity to the receiver" (C135). Obviously, the parties were aware of the insufficient compliance of the private law arrangement of their relations with their real status and they gradually adjusted the existing legal mechanisms to this status.
197. The said circumstances, in view of the Tribunal, provided grounds to Respondent to advance a significant number of arguments substantiating a conclusion on contradictory nature of some

³¹ Statement of Claim, pp. 6.1 - 6.10; Reply, p. 1.2.4; Claimant's Closing Submission, pp. 8 - 10

³² Factors stipulating the need for inclusion of Derimen into the contractual relations scheme under Contract No.24/02 are mentioned in p. 1 of the Protocol of 24.03.1999 (C121); Reply, p. 1.2.5.

³³ Compare, e.g., paras. 1.1, 2.1.1, 2.3, 4.2 and 4.3 of Contract No. 24/02 (C10).

³⁴ Hans-Joachim Schramm, "Expert Opinion", last paragraph, p. 1 (D47).

provisions of Contract No. 24/02,³⁵ its invalidity and the worthlessness of legal relations resulting from this Contract and, in addition, to indicate that Energoalliance was not a supplier and Moldtranselectro had no debts to it.³⁶

198. In particular, Respondent's Representative argues that:

- Contract No. 24/02 is a document, which contains two purchase-and-sale Contracts, which create two specific types of bilateral legal relations with regard to supply of electricity. One Contract - between the supplier and the purchaser (purchase-and-sale No. 1), the other - between the buyer and the receiver (purchase-and-sale No. 2),³⁷
- Under Contract No. 24/02 Energoalliance (supplier) supplied electricity to Derimen (buyer) and not to Moldtranselectro (receiver).³⁸ The buyer acquiring the title to the supplied electricity³⁹ sold it to the receiver.

199. The above mentioned conclusions of Respondent are based on a formal interpretation of the paragraphs and terms contained in the rules of the Civil Code of Ukraine (1964) relating to supply as well as in Contract No. 24/02; Respondent has not used any systematic interpretation of provisions of other contracts and Contracts between the parties, which created the existing relations *sui generis*.⁴⁰ First, the relations *sui generis* arising under Contract No. 24/02 and other related juridical acts cannot be separated as they are closely interconnected through the unity of the specific subject (electricity) and the same objective (uninterrupted provision of the Moldova's economy with electricity). The interrelation consists, in particular, in that according to p. 3.1 of Contract No. 24/02 electricity is supplied monthly during 1999 by electricity transmission lines of all voltage classes, which connect the power systems of Ukraine and the Republic of Moldova. The technical aspects of electricity supply concerning the power systems are agreed by the receiver and Ukrenergo (p. 8.6 of Contract No. 24/02). At that, the technical aspects were determined and agreed based on the juridical acts of Ukraine and the Republic of Moldova adopted in the 90s and earlier and remaining in force as well as by the letters of the Director of Ukrenergo to the Director of Energoalliance dated December 12, 2002 (C96) and 24 January 2006 (C97). These acts taken together envisaged the following scheme of relations between the parties to the supply of electricity:

- The receiver (Moldtranselectro), on a monthly basis, no later than the 25th day of the month preceding the month of supply submitted to Ukrenergo a request approved by the supplier (Energoalliance) concerning the amount of required electricity to be supplied in the next month;
- The supplier (Energoalliance) within the same period submitted to Ukrenergo a request for the amount of electricity to be bought for the purposes of export to the receiver (Moldtranselectro) within the same month;
- The receiver (Moldtranselectro) no later than the 7th day of the month following the month of supply submitted to the supplier (Energoalliance) information on the amount of electricity received within the month of supply and executed the customs freight declarations (C27) and certificates of acceptance (C26) jointly with the supplier and customs authorities;
- The supplier (Energoalliance), based on the certificates of acceptance (C26) and the customs freight declarations (C27), issued an invoice to the buyer (Derimen) for the

³⁵ Rejoinder, pp. 36 - 39, pp. 44 - 57; Respondent's closing submission, pp. 39 - 40, p. 74.

³⁶ Statement of Defense, p. 49; Respondent's closing submission, p. 52.

³⁷ Statement of Defense, pp. 34 - 35; Respondent's closing submission, p. 44.

³⁸ Rejoinder, p. 37.

³⁹ Rejoinder, p. 39; Closing Submission, p. 74.

⁴⁰ Meaning the acts relating to the first stage and Contract No. 1/01 of 01.02.1999 relating to the third stage.

purposes of payment for exported electricity at the price agreed in annexes to Contract No. 24/02 (**C130**, pages 1-9);

- The buyer (Derimen), while making payments to the supplier (Energoalliance) for the quantity of exported electricity in the respective month, issued an invoice to the receiver (Moldtranselectro) for the purposes of payment for the same quantity of electricity at the price agreed by the buyer and the receiver in annexes to Contract No. 24/02 (**C130**, pages 10-11).

200. The aforesaid leads to a conclusion that the implementation of these arrangements was only possible subject to the consistency of the established links. Based on the systemic interpretation of the regulatory acts, Contracts and technical regulations in the case file, which establish, as taken together, the options and procedure of transportation, metering and transmission of the supplied electricity, this electricity throughout the period under review was transmitted directly from the supplier (Energoalliance) to the receiver (Moldtranselectro) by-passing the buyer (Derimen). Therefore, the buyer could not buy the supplied electricity either on technical grounds, as it did not own any transmission line, or on legal grounds, as there are no documents regulating the relations between the parties in the case file, including Contract No. 24/02 and annexes thereto, which envisage for the buyer any responsibilities other than the responsibility “to make timely payments to the supplier” (p. 3.1 of Contract No. 24/02). Therefore, the main responsibility of Derimen was to ensure the payment discipline established by the Law *On the Procedure for Settling Accounts in Foreign Currency* No.187/98- VC dated September 23, 1994, as revised by the Law of Ukraine dated May 7, 1996 No.184/96-VC (**C121**).

201. According to the established procedure, payments for the supplied electricity between the buyer (payer) and the supplier were made *post factum* (after delivery and consumption of electricity – the specific item of supply) within time limits established in Contracts,⁴¹ but no later than 90 calendar days from the date of executing a respective customs freight declaration (CFD).⁴² Therefore, settlements between the receiver and the buyer (payer) were made after the settlements between the payer and the supplier within the same time limits and according to the same procedure. According to the aforesaid, both the supplier and the payer assumed risks connected with payments for the electricity already delivered and consumed (including the electricity transformed into other material assets).

202. It should be also stressed that Energoalliance, under all arrangements of contractual relations within the period under review (including legal relations arising under Contract No. 06-20) had the legal status of supplier. Only Energoalliance, having leased selected power units of the Tripolskaya TPP and having become a member of the Wholesale Electricity Market of Ukraine according to the Preamble and Article 2.3 of Contract between Member of the Wholesale Electricity Market of Ukraine of 15 November 1996 (**D33**), had the right to purchase electricity on the wholesale market for its subsequent export to the Republic of Moldova to Moldtranselectro on the conditions of D.A.F. during the whole period under review.

203. On the basis of the foregoing, the Tribunal finds that there is a specific case of intergovernmental cooperation between Ukraine and the Republic of Moldova in the electricity sector, where respective private legal arrangements constitute important elements. Before entering into Contract No. 24/02 this cooperation was implemented through the metering of electricity interchange on the basis of readings of the measuring equipment installed at the border, with monthly execution of bilateral certificates signed by representatives of both parties. Therefore, the use of the cooperation model with signing of Contract No. 24/02 possibly was

⁴¹ According to p.4.2 of Contract No.24/02-99 EA of 26.02.1999 the time limits for settlements between the Buyer and the Supplier are 80 calendar days from the date of issuing a respective customs freight declaration (CFD) and respective certificate of acceptance signed by the parties.

⁴² Law of Ukraine No.187/94-VC of 23 May 1994, Art. 1 (**C121**).

agreed upon by the participants thereof under the conditions when Moldavian energy companies' payments for the officially recorded quantity of electricity in accordance with the foreign exchange legislation of Ukraine were not always timely. That situation created for the Ukrainian suppliers the risks of being prosecuted for violation of the said legislation.

204. Therefore, the cooperation in the sphere of power supply was continued with the involvement of an agent, which eliminated the risk of violating the legislation. Under these circumstances, it would hardly be fair to treat Claimant, which implemented measures (with no objections on the part of Respondent) to ensure the compliance of its activities with Ukrainian legislation (all other things being equal), less favourably than in the situation when no such measures are implemented.

205. As it was established, the claim of Derimen against Moldtranselectro arose under the trilateral Contract No. 24/02. Taking into account the above discussed reasons for signing Contract, as well as the status of the supplier and the payer, a conclusion may be made that the requirements of the receiver of electricity (the objective of Contract) were satisfied through activities of the supplier and the payer. Then it follows that:

- The claim of Derimen against Moldtranselectro arose from the activities of Energoalliance in connection with supply of electricity in the territory of the Republic of Moldova;
- The claim arose from Claimant's investment activities and is associated with "Investment"; and having returned to "Investor" as the result of the assignment the rights to debt fell with the scope of the ECT protection clauses;
- Energoalliance, while acquiring from Derimen the claim against Moldtranselectro under Contract No. 24/02, on 30 May 2000, continued to supply electricity into the territory of the Republic of Moldova until October 2000; therefore the acquisition of these assets was associated with Claimant's activities on electricity supply to the Republic of Moldova as before the acquisition thereof, as afterwards.

206. Since earlier the Tribunal reviewed some of the questions concerning the specifics of relations between the entities participating in the alleged investment, further it would be reasonable to qualify the parties' facts and arguments, which refer to the interrelationship of the key participants of the above mentioned complex of transactions ("**Business Transaction**"). Claimant and Respondent accepted some the factual circumstances indicating at similar interrelationship, but differently interpreted their consequences. A part of Respondent's arguments came down to denying the foreign origin of Claimant and to the statements on Claimant's bad faith and activities as a debt collection agent.

207. Thus, during its presentation at the hearings on 4 July 2012 the representative of Respondent, in particular, noted the following:

Total of 70% interest in Energoalliance was owned by ZAO Stal controlled by Mr. Chelombitko, a native of Moldova. Derimen and Claimant coordinated their actions. They had a common representative (Mr. D.V.Makarenko), who acted on behalf of both companies (D5, D29, p. 3-4, C134). The same representative acted on behalf of ZAO Stal (C32 and C33). There is information that Mr. Makarenko also was the head of the committee of creditors of Energoalliance.

208. This argument was reiterated in para. 123 of Respondent's Closing Statement.

209. Claimant in its Closing Statement of 17 August 2012, in particular, noted the following:

31. ... ZAO Stal was the founder of Claimant, having in its ownership as of December 1998 a total of 67.16% of the authorized capital...

67. In the course of oral hearings, Respondent put forward arguments concerning an alleged concealment of information on owners of Derimen, which was not true as Respondent did not make statements, before the oral hearings, concerning the presentation of any such information. Therefore, Claimant notifies that at the moment of implementing the investment transaction the ultimate owner of Derimen was a citizen of Ukraine.

210. In this regard, the Tribunal states that in paragraphs 142-145 above, the issue of Claimant's national identity was reviewed. As it is known, a number of somewhat different criteria are used under the international investment treaties to identify a legal entity nationality. The most widely used among them is the criterion of incorporation, according to which the nationality of a legal entity is determined depending on the territory of, and under the laws of what state it was incorporated. This criterion is also used in Article 1(7)(a)(ii) of the ECT, according to which an investor in respect of a contracting party means "a company or other organization organized in accordance with the law applicable in that Contracting Party".
211. As for Derimen, both Parties accept that this company, at the moment of carrying out the Business Transaction and the assignment of rights to debt, had the status of a legal entity under the laws of the British Virgin Islands, which are not covered by the ECT. However, Respondent's argument that for this reason Claimant is not a proper "Investor", as an assignee cannot acquire any greater right than that which belonged to its assignor on the basis of the principles *nemo dat quod non habet* and *nemo potioem potest transferre quam ipse habet*, need to be further reviewed.
212. In the context of *ratione personae* this issue was addressed by the Tribunal under paragraphs 146-150 above where a conclusion was made that the scope of Claimant's rights in respect to Moldtranselectro had not been enlarged. Obviously, by virtue of Claimant's national identity differing from that of Derimen the international legal protection regime in respect of the alleged "Investment" has changed.
213. As for the private legal aspects of an assignment, since the Assignment Contracts are regulated by the Ukrainian law, which is not challenged by the parties, then according to Article 197 of the Civil Code of Ukraine being in force at the moment of signing the Assignment Contracts, "assignment of the creditor's rights shall be allowed if it does not contradict the law or a contract, or if the claim is not linked with the creditor's personality. The rights securing the obligation performance shall be passed to the transferee."
214. Therefore, the assignment of the creditor's rights to another person is one of the instances of the substitution of persons in an obligation, which results in that the original creditor (assignor) is no longer a participant in an obligation, instead a new person becomes a participant in that obligation – an assignee. Changes in the subject matter of an obligation occur, while the content is preserved, i.e. the change of a creditor takes place "within" an obligation and a new person in such obligation shall be transferred the whole complex of its legal powers in respect of a debtor, as available at the moment of such transfer. Identity of rights and responsibilities of the parties is present.
215. Taking into account the aforementioned arguments, a conclusion should be made that if the Derimen's claim was associated with an "Investment", then its transfer to Claimant did not change the nature of this right. This conclusion also follows from the legal doctrine and is affirmed by a number of precedents mentioned in this award, which concerned various situation of rights transfer, including transfer of shares, promissory notes, etc.
216. At that, it should be noted that the right transferred to Claimant under Contract No. 06-20 with the corresponding debt obligations of Moldtranselectro (as it can be understood from the materials of the case and, essentially, as was analysed above in this award) is a claim to money,

which arises from the complicated Business Transaction implemented by Claimant jointly with Derimen and constitutes the financial result thereof. In this regard, a need to perform a separate check of each element of this transaction (including individual civil law transactions) for compliance with any of criteria of an “Investment” does not follow from the ECT provisions, the application of which, as a mechanism of public law protection, suggests an aggregate qualification of the juridical and factual role of all participants in the occurred Business Transaction, to include at the moment of the alleged violation of Claimant’s rights by Respondent.

217. As was already stated, Claimant substantiated with the need for compliance with the foreign exchange legislation of Ukraine the participation of the payer/creditor (Derimen) in the complex of relations together with the supplier of electricity (Claimant) and the emergence of a trilateral relationship *per se*. Respondent has not proved an illegitimacy or bad faith in respect of such organizational and legal structuring of this activity; this also will be addressed below in this award.

218. Therefore, the functions usually performed by one subject (investor), by virtue of understandable reasons, were “split” between the group members and subsequently consolidated (through signing the Assignment Contracts); this even without the available explanation of reasons for using such scheme hardly should lead to the inapplicability of the ECT investment protection mechanism.

219. A reverse situation would deprive potential investors of an opportunity to structure their “Investments” in the energy sector and would admit a number of entities, including those constituting a group of companies, to participation in those “Investments” on the part of an investor.

220. In this regard, there are no grounds to disagree with the statement of existence of:

*established arbitration practices, according to which an investment is considered as a complex operation composed of various interrelated transactions, and a separate transaction constituting a ground for a dispute may be qualified by tribunal as an investment provided it is an integral part of such operation.*⁴³

221. On the basis of the foregoing, *inter alia*, taking into account the fact accepted by the parties of the initial close interrelationship between Derimen Claimant, the Tribunal does not have enough grounds to draw a conclusion that within the complex of relations originating from Contracts No. 24/02 and No. 06-20 Claimant performed predominately a function of debt collecting agent.

222. In addition, the Tribunal believes that for the purposes of qualifying an “Investor” and “Investment” account must be taken of the “quality” characteristics of an alleged “Investment” at the moment of alleged violations by a host state of that investment owner’s rights, as well.

223. It is obvious, it also should be noted, that frequently an investment process is followed by signing a whole range of various commercial transactions, including cross-border transactions, and the existence of improperly executed transactions, as well as their absence not in the least means that in parallel with claims against the counterparties under such transactions no investment dispute (one way or another connected with those transactions) may arise with a host state as the result of its actions (or inactions).

224. Having reviewed Respondent’s objection that Claimant did not present an evidence of a compensatory nature of claims acquisition from Derimen through assignment, the Tribunal states that, by virtue of its legal nature, an assignment (including under the Ukrainian law applicable to Contract No. 06-20) is an abstract transaction implying a presumption of the availability and

⁴³ This argument was presented by Claimant with reference to the case *Ceskoslovenska obchodni Banka, A.S. v. Slovak Republic*, Award of 24 May 1999.

validity of grounds for it. Accordingly, if one of the parties challenges the grounds for assignment, that party shall bear the burden of proving the absence or invalidity of the grounds. At that it is obvious that the value of the right acquired through assignment shall be determined by its fair value. Respectively, this objection of Respondent shall be dismissed.

225. Having reviewed Respondent's argument that the supply of electricity could not constitute an "Investment" as contracts for the sale of goods are not "Investments" covered by the ECT protection, as well as respective objections of Claimant, the Tribunal arrives at a conclusion that Claimant's "Investment" was "associated with Economic Activity in the Energy Sector." Trade in electricity falls within the definition of the term of "Economic Activity in the Energy Sector" and Claimant's rights were "associated" with such activity as they emerged as a direct result of the sale of electricity. This conclusion follows from Articles 1(5) and 1(6) of the ECT; dispositions, which cover the functional aspects of activities of the participants in the Business Transaction, are cited in this award of the Tribunal. Thereat, the Tribunal notes that the definition of the term "every kind of asset..." in 1(6) of the ECT does not require that assets be invested in connection with economic activity by an investor in the territory of another state.
226. The ECT provides that an "Investment" means "every kind of asset, owned or controlled directly or indirectly by an Investor", while individual categories of investments enumerated in the ECT constitute only concrete examples of some kinds of assets. However, these concrete enumerated examples include exactly "claims to money" (Article 1 (6)(c) of the ECT), i.e. Claimant's claim.
227. The Tribunal states that Claimant possesses an "Investment", in the meaning of the ECT, in Respondent's state-owned enterprise carrying out activities in "the Energy Sector". This conclusion follows from a rather broad definition of the term "Investment" accepted under the ECT and supported by authoritative researchers, and also sustained in the whole range of arbitral awards in investment disputes, where under quite similar circumstances the presence of jurisdiction to resolve such disputes was accepted.
228. Thus, in *Remington Worldwide Limited v. Ukraine* was noted that the broad definition of "Investment" was supported by a majority of academic lawyers, in particular, Thomas W. Walde and Prof. Emmanuel Gaillard.⁴⁴ These publications state that the ECT diverges from the narrow and technical definition of an "Investment" and defines an investment as virtually any asset or legal right. For example, Thomas W. Walde assumes that:

*'extensive' definition of investment seems to express a revival of the concept that property rights - and not only 'foreign direct investment' - is protected...the ECT covers not only contractual claims to performance when the contract is part of a foreign direct investment scheme - the traditional notion, but also simple contract claims, e.g. non-payment on a sales contract or embodied in a judgement based on the sales contract.'*⁴⁵

229. Similar interpretation is connected also with the history of drafting the ECT when:

⁴⁴ *Remington Worldwide Limited v. Ukraine*, SCC Case No. V(I 16/2008), Award of 28 April 2011, p.194. Emmanuel Gaillard, Investments and Investors covered by the Energy Charter Treaty; Investment arbitration and the Energy Charter Treaty, Juris Net, 2006, p. 54-72; Stephen Jagusch & Anthony Sinclair, The Limits of Protection for Investments and Investors under the Energy Charter Treaty in Investment Arbitration and the Energy Charter Treaty; Clarisse Ribeiro ed." 2006, p. 90-91.

⁴⁵ Thomas W. Walde, Investment arbitration under the Energy Charter Treaty: An overview of selected key issues based on recent litigation experience. Arbitrating foreign investment disputes. Studies in Transnational Economic Law. Vol. 19 (2004), p. 232. ("*extensive' definition of investment seems to express a revival of the concept that property rights - and not only 'foreign direct investment' - is protected...the ECT covers not only contractual claims to performance when the contract is part of a foreign direct investment scheme - the traditional notion, but also simple contract claims, e.g. non-payment on a sales contract or embodied in a judgement based on the sales contract.*").

*“during the course of the negotiations, the drafters inserted in the definition of an “investment” the notion of “energy asset”, “every kind of asset in energy field”, or every kind of asset employed in association with the exploration, production, conversion, storage, transport, distribution and [supply] of Energy Materials and Products”*⁴⁶ (Emphasis added).

230. In the commentary to the ECT prepared by the Energy Charter Secretariat it is also stated that “the ECT contains a broad, non-exhaustive, “asset-based” definition of an “investment””.⁴⁷
231. A number of arbitral awards under the ECT reiterate the argument that the vast list of assets in the said Article is not exhaustive.⁴⁸ Thus, the arbitral awards on the cases of *Yukos Universal Ltd. v. Russian Federation*, *Hulley Enterprises Ltd. v. Russian Federation* and *Veteran Petroleum Ltd. v. Russian Federation* contain a conclusion that the definition of an “Investment” under Article 1(6) of the ECT is “comprehensively and neutrally cast” and covers “every kind of asset.”⁴⁹
232. The Tribunal states that, along with the above approach, when addressing the issue of investment tribunal’s jurisdiction in the whole range of cases settled under different international investment treaties and different arbitration rules (other than that applied by the Tribunal in this case, by the virtue of Contract between the parties), arbitral tribunals applied an approach based on the need for an interpretation of the term “investment”, which would be “non-biased” or “independent” from the language of an international investment treaty (“conceptual” or “abstract” approach assuming the distinguishing of “investment” from any other kind of assets, rights, etc. through a check of a suggested “investment” for its compliance with established criteria).
233. Respondent refers to some of these criteria, indicating that Claimant’s Contracts lacked necessary elements of certain duration and allocation of the transaction risks.
234. The Tribunal, while not providing a legal assessment of the said approach justification when applying any investment treaties (if it is considered that arbitrators must or should follow it), accepts the point of view that the ECT in its nature is a document that differs from other investment treaties and its rather extensive wording and a detailed list of what constitutes an investment does not allow to change or narrow down such a broad definition through an abstract and conceptual approach.
235. In *Yukos Universal Ltd. v. Russian Federation*, *Hulley Enterprises Ltd. v. Russian Federation* (proceedings in accordance with the UNCITRAL Arbitration Rules, referred to by Claimant), where the Tribunal referred to *Saluka Investments BV v. Czech Republic* (stating that “the predominant factor which must guide the Tribunal’s exercise of its functions is the terms in which the parties to the Treaty now in question have agreed to establish the Tribunal’s

⁴⁶ See Emmanuel Gaillard, p. 64-65. (*“during the course of the negotiations, the drafters inserted in the definition of an “investment” the notion of “energy asset”, “every kind of asset in energy field”, or every kind of asset employed in association with the exploration, production, conversion, storage, transport, distribution and [supply] of Energy Materials and Products...”*).

⁴⁷ Joachim Karl, *The Energy Charter Treaty. A Reader's Guide*, the Energy Charter Secretariat.

⁴⁸ See inter alia, *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award of 8 February 2005; *Petrobart Ltd v. Kyrgyzstan*, SCC Case No. 126/2003, Award of 29 March 2005, pp. 392-397; *Remington Worldwide Limited v. Ukraine*, SCC Case No. V(116/2008), Award of 28 April 2011, pp. 194-196.

⁴⁹ *Yukos Universal Ltd. v. Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility of 30 November 2009, p. 435; *Hulley Enterprises Ltd. v. Russian Federation*, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility of 30 November 2009, p. 434; *Veteran Petroleum Ltd. v. Russian Federation*, PCA Case No. AA 228, Interim Award on Jurisdiction and Admissibility of 30 November 2009, p. 488.

jurisdiction”⁵⁰) the Tribunal came to a conclusion that they could not “in effect impose upon the parties a definition of “Investment” other than that which the parties to the ECT, including Respondent, have agreed”.⁵¹

236. This approach was accepted in *Remington Worldwide Limited v. Ukraine*, where the Tribunal noted that “the Tribunal may not accept a different or narrower definition of investment, suggested by Respondent, as compared to the definition in the ECT..., [which] as any international treaty shall be interpreted literally and in good faith.”⁵²
237. In this regard, based on the analysis of a number of subsequently rendered arbitral awards under the ECT, the Tribunal states that some arbitral tribunals, which refer to the definition of “Investment” under the ECT when making decisions concerning their jurisdiction, do not accept the criteria (obligatory signs of the presence of an investment) used in many arbitral awards rendered under different international investment treaties. This applies also to the requirements for an “Investment” (suggested by Respondent and not met by Claimant according to Respondent) and, for example, to the criteria of the widely known Salini test applied by many arbitral tribunals predominantly when resolving investment disputes under ICSID. Similar arbitral awards are cited, on the contrary, to support the extensive interpretation of the definition of “Investment” worded in Article 1(6) of the ECT.
238. Any different approach, in the Tribunal’s view, would mean that the application of the ECT in the sphere of investment protection along with limitations set forth in the ECT (which mainly refer to “Economic Activity in the Energy Sector”, i.e. substantive aspect of jurisdiction) also suggests the presence of certain elements of an investment, which should be looked for outside the text of the ECT, for example, in the bilateral investment treaties and/or the ICSID (Washington) Convention and/or in the practice of applying all these international treaties or any of them.
239. At that, taking into account the difference between the BIT texts in respect of setting forth particular criteria for an “investment” it is not enough clear, which specific set of criteria should be applied. Assuming that there is a need for applying the whole body of the most rigorous criteria used, for example, under a number of bilateral investment treaties then the ECT (the substantive criterion of which applies only to the energy sector) would have a rather limited application and could hardly provide for a full-scale international legal protection of business activities in the energy sector, which obviously stems from its goals and principles and was envisaged at the stage of drafting this treaty and its adoption by the participants.
240. Nevertheless, even if in this context we refer to the Washington Convention an attention should be paid to the point, according to which the only objective characteristic of investment under the Washington Convention is the role of investment in economic development of a host state⁵³. This conclusion was drawn mainly from the Preamble of this treaty for the purposes of its interpreting, which states “the need for international cooperation for economic development”.

⁵⁰ *Saluka Investments BV v Czech Republic*, UNCITRAL, Award of 17 March 2006, p. 241. (“the predominant factor which must guide the Tribunal’s exercise of its functions is the terms in which the parties to the Treaty now in question have agreed to establish the Tribunal’s jurisdiction”)

⁵¹ *Yukos Universal Ltd. v. Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility of 30 November 2009, p. 432; *Hulley Enterprises Ltd. v. Russian Federation*, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility of 30 November 2009, p. 431. (“in effect impose upon the parties a definition of “Investment” other than that which the parties to the ECT, including Respondent, have agreed”)

⁵² *Remington Worldwide Limited v. Ukraine*, SCC Case No. V (116/2008), Award of 28 April 2011, p. 202.

⁵³ This conclusion was made by the ad hoc Committee of ICSID in the case of *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, and later supported by some researchers. See, *inter alia*, Anna Turinov “Investment” and “Investor” in *Energy Charter Treaty Arbitration: Uncertain Jurisdiction*, *Journal of International Arbitration*, Kluwer Law International, 2009, Volume 26, Issue 1, p.19.

241. As for other elements of an “investment” suggested by the legal doctrine, the already mentioned *Salini test*, as it is known, is a reduced set of indicators of an investment previously proposed C. Schreuer, who cautioned, though, that “these features should not necessarily be understood as jurisdictional requirements” under the Washington Convention⁵⁴. Accordingly, such criteria, in principle, could hardly serve as universal limitations in respect of admissibility of arbitration mechanism for settlement of investment disputes.
242. On the basis of the foregoing, the interpretation of the term “investment” in the context of each particular international investment treaty using this term is valid also because the elements of an investment under the long-applied international investment treaties are constantly subjected to re-thinking, which is obvious under the condition of constant change of cross-border cooperation models and ever increasing variety thereof due, *inter alia*, to dynamic development of various technologies.
243. Should we admit, in the context of any single accepted standard, a need for an average set of elements of the notion of “investment” for the purposes of its acceptance by the Tribunal when applying the ECT, it will be clear that the understanding of the content of each particular element (including in respect of its nature and sufficient indication of presence of any element) is also characterized by multiple approaches, which would make the conditional “demarcation” line not enough clear. In such a situation a discretionary refusal by arbitral tribunals to accept jurisdiction in many cases (given the significant role of governments in the energy sector) would mean denying protection for foreign investors possessing assets in the energy sector of host states. This would clearly contradict the ECT’s objectives as an international treaty and hopes vested in it by investors, which while increasing their assets in host states obviously continue rely on the ECT as an accessible and efficient mechanism of protection.
244. For all the reasons mentioned above, the definition of an “Investment” in Article 1(6) of the ECT should be recognized as more broad compared to other acts on investment protection, namely: as a treaty covering maximum possible varieties of assets in the energy sector and optional operations therewith.
245. Based on the objectives of signing the European Energy Charter (as cited in para. 127 above, and the statement contained in the ECT Preamble that the Charter “is to catalyse economic growth by means of measures to liberalize investment and trade in energy”, as well as the ECT’s goal set forth in Article 2 to establish “a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter”) it should be assumed that the securing of a more broad jurisdiction of investment arbitration through renouncing a set of rigorous criteria can be explained by the intention of the ECT Member States to promote cross-border energy cooperation related, *inter alia*, to the need of many national economies for obtaining energy resources on a competitive market without interruptions or administrative barriers on the part of some states. It is obvious that the implementation of these intentions in full may be provided through a wider attraction of private foreign capital into this sector implying that foreign investors, in their turn, are seeking extensive international legal protection of their property interests in the host states.
246. At the same time, the Tribunal takes into consideration Respondent’s arguments and the criticism in respect of the approach, which, if applied, would lead to the extension of the notion of “Investment” so as to contradict the language and a spirit of the ECT; this, in particular, will be expressed when qualifying the claims arising under Contracts No. 53/21 and No.07-20.

⁵⁴ Schreuer C. Commentary on the ICSID Convention, ICSID Review - Foreign Investment Law Journal, 1996, Vol. 11, p. 372.

247. Since the Preamble of the ECT implies that the states endeavour to catalyse economic growth, then the facilitation of this process in practice possibly would constitute a general requirement for an “Investment” under the ECT and this would cut off those business operations that clearly cannot be considered as “Investments” thereunder.

248. In this regard, account should be taken of the circumstances below, which are significant for settlement of this dispute and have been established in the process of the settlement, as well as the conclusions made in this respect:⁵⁵

- During the period of supply the electricity was within the high voltage transmission networks in the territory of both States (Ukraine and the Republic of Moldova); hence it is impossible to identify a particular moment when the Republic of Moldova received the power (generation-transmission-distribution-consumption occur instantaneously);
- Transmission of the given volume of electricity was possible only through the high voltage transmission lines interconnected into the national power grids in the territory of Moldova;
- Implementation of the Business Transaction could not take place without support, approval and control by the authorized bodies and organizations of Respondent;
- Cross-border supply of electricity into the territory of states being in need of such energy (as in the case under review) constitutes a necessary and strategic condition for any production or other economic activity (including, for uninterrupted functioning of the industrial, transport and agricultural sectors) in the territory of these states;
- Business Transaction resulted in ensuring the implementation by Respondent’s state-owned enterprise of its main (core) responsibilities, as well as in the energy crediting of this enterprise and Respondent, being the owner thereof and, consequently, a beneficiary.

249. Therefore, the case papers supported that Claimant transferred, under the conditions of actually not guaranteed credit payment, the high liquidity energy resources necessary for Respondent’s economy (accepted and distributed by Respondent’s state-owned enterprise) into the territory of the Republic of Moldova. This energy constituted an importance resource for the purposes of maintaining and developing Respondent’s national economy.

250. Taking into account the arguments mentioned above, the Tribunal finds that Claimant’s investment, which occurred under Contracts No. 24/02 and No. 06-20, is covered by the definition of an “Investment” within the meaning of Article 1(6) of the ECT.

251. As for the qualification of this case in accordance with particular subparagraph of Article 1(6) of the ECT, the Tribunal considers, as stated above, that the interpretation of this rule of the ECT as containing a non-exhaustive list of assets with illustration of their possible (but not all) implementation in practice is true. That is why the reference of the implementation that took place to the listed kinds of assets (based on literal interpretation of the Respective rule) would not be significant in terms of qualification under to such an approach. Nevertheless, taking into account different approaches, the Tribunal finds that out of the listed assets the given case, in particular, is covered by Article 1(6)(c), which contains the phrase: “claims to money”. This subparagraph also includes “claims to performance pursuant to contract having an economic value and associated with an “Investment”, therefore covering along with the claims to money (which refers also to the case under review) also the “claims to performance”, which are subject to evaluation and are associated with an “Investment”.

⁵⁵ Some of the listed circumstances are discussed in more detail in pp. 186-205 above and are not reiterated here.

252. As for the question whether the respective case falls within the scope of Article 1(6)(f) of the ECT referred to by Claimant, the Tribunal (taking into account the aforesaid) does not consider necessary to refer the case occurred to the illustration specified in this subparagraph since, as may be understood on the basis of the abovementioned arguments, this certainly would not influence the resolving of the question which has been resolved, anyway.
253. Below Respondent's arguments are addressed, which state that the "Investment" was made illegally and therefore it shall not be covered by protection (the arguments are summarized in paragraphs 184-185 above). Respective objections of Claimant are summarized, in particular, in paragraphs 59-65, 105 of the Closing Submission.
254. Having reviewed Respondent's arguments concerning the intentional actions on the part of Moldtranselectro's representatives when signing and implementing Contract No. 24/02 to the detriment of this company *per se* and Moldavian consumers of electricity, as well as the non-compliance of this Contract and the respective activities of Moldtranselectro, Derimen and Claimant with the Ukrainian and Moldavian legislation establishing procedure for conducting those activities, the Tribunal finds, in the first instance, that Respondent did not provide a convincing explanation in respect of the rationale for recognizing Contract No. 24/02 as non-complying with the respective Moldavian or Ukrainian legislation. This issue, in particular, could have been studied when resolving the dispute between Claimant and Moldtranselectro under Contracts No. 24/02 and No. 06-20 in the competent national courts. However, as can be seen from the judicial acts of the Ukrainian courts, neither the new management of Moldtranselectro nor Respondent stated the respective arguments. Respondent also did not prove the unprofitable nature of Contract No. 24/02 for Moldtranselectro. Similarly, the Tribunal's respective findings are also applicable to Contract No. 06-20.
255. As for the violations by Claimant or Derimen of the public law regulations concerning the entrepreneurial activity set forth by the laws of the Republic of Moldova, the Tribunal states that the Law of the Republic of Moldova *On Electricity (D31)* includes "generation, transmission, distribution, central dispatching and supply of electricity" in the list of activities to be licensed. Licenses for activities envisaged by Article 13 of the Law are issued to economic entities – legal entities if they: a) are registered in the Republic of Moldova; b) submitted documents supporting the availability of financial and technical means, as well as availability of professionally trained personnel to carry out the activity covered by the license.
256. According to Claimant, neither Claimant nor Derimen is registered in the Republic of Moldova (this is not denied by both Parties to the dispute) and did not carry out "internal" supplies of electricity in Respondent's territory. Hence, Claimant argues that they had no obligation to apply to the National Energy Regulatory Agency of the Republic of Moldova for a license for supply of electricity in the territory of the Republic of Moldova. Respondent did not provide any evidence to the contrary. At the same time the Tribunal notes the lack (in the case file) of any claims in this respect from the competent governmental bodies of the Republic of Moldova or Ukraine. Therefore, this argument of Respondent shall be dismissed.
257. As for the non-payment by Claimant and Derimen of taxes and customs duties, according to Claimant, neither Claimant nor Derimen was a taxpayer under the law of the Republic of Moldova, as follows from Articles 5, 71-91 of the Tax Code the Republic of Moldova (**D30**). Claimant submitted Act No. 74 of the State Tax Administration of Ukraine in order to support the duly paid taxes in Ukraine (**C195**). The Tribunal states that Respondent did not submit any evidence that the competent governmental bodies of the Republic of Moldova filed claims against the said companies. Therefore, this argument of Respondent shall be dismissed.
258. The Tribunal, having reviewed Respondent's argument that Derimen did not meet the requirements for licensing its activities in Ukraine, states that the Tribunal has no evidence of the need for such licensing, as well as any information on any claims against Derimen in this respect

on the part of the competent governmental bodies of Ukraine. Therefore, this argument of Respondent shall be dismissed.

259. With reference to Respondent's argument concerning "fictitious" nationality of Derimen, the Tribunal states that it has already referred to the established fact of Derimen incorporation under the laws of the British Virgin Islands. Claimant submitted a copy of the Mandate Contract of 27 July 1998 between Derimen and Corener SA, Switzerland, according to which Derimen used a mailing address in Geneva and opened an account with a Swiss bank (C123). Taking this into account, the Tribunal does not fully understand this Respondent's argument.

260. As for Respondent's argument concerning the illegal assignment by Moldtranselectro of the debts of RED Nord and RED Nord Vest on 1 September 2000 and the previous assignment by Moldtranselectro of the debts of RED Sud and RED Centru on 30 June 2000, the Tribunal assumes that the review of these Contracts is of no importance for the purposes of addressing the issue of "Investment" illegality.

261. Summarizing the aforesaid, the Tribunal states that the modern international law applies an established approach that only material and deliberate violation by investors of the host state's legislation may constitute a ground for an award on the absence of jurisdiction. This corresponds, in particular, to the goals and principles set forth in the ECT. Such violations include, *inter alia*, corruption, fraud and other actions constituting gross infringement of the law of a host state or the international law. These facts should be duly proved and, *inter alia*, affirmed by the competent court judgments that came into force.⁵⁶ Respondent did not submit any respective evidence; therefore its arguments concerning the illegality of the "Investment" shall be dismissed.

262. Therefore, taking into account the above mentioned circumstances, the Tribunal comes to a conclusion that it has jurisdiction *ratione materiae* to hear Claimant's claim, which arose under Contracts No. 24/02 and No. 06-20.

(b) Contracts No. 53/21 and No. 07-20

263. The Tribunal states that while there is a substantive similarity of relations established in connection with Contracts No. 24/02 and No. 06-20 (on one side) and Contracts No. 53/21 and No. 07-20 (on the other side), certain distinguishing features are obvious, which refer, in the first instance, to the subject matter of relations and the type of business of the participants thereof, to include Claimant. These circumstances addressed below influence the jurisdiction of the Tribunal.

264. When reviewing specific features of relations under Contract No. 53/21, it is necessary to take into account the arrangements reflected in the Minutes of the meeting of representatives of the Minenergo of Ukraine and Moldtranselectro, dated November 25, 1998, (C128) and in the Protocol of negotiations between representatives of the Minenergo of Ukraine and representatives of Moldtranselectro, dated March 24, 1999 (C122). The content of the above Minutes and Protocol allows to see the reasons and circumstances affecting the willingness of the parties later set out in the contractual relationship arrangements in respect of repayment of Moldtranselectro's debts for 1998 (formalized by Contracts No. 460/01(C32), No. 478/01(C31) and No. 180/12-98(C30) with involvement of Derimen), as well as the goal (*causa*) of the interrelated Contracts.

265. Ukrenergo was the supplier under Contract No. 460/01-ER; however, this Contract should be reviewed together with the other two Contracts, since all of them have one common goal – repaying the Moldova's debt for electricity consumed off-schedule in December 1998.

⁵⁶ See, *inter alia*, Andrew Newcombe, The Question of Admissibility of Claims in Investment Treaty Arbitration, 3 February 2006.

Implementation of relations arising in connection with the said three Contracts subsequently led to signing Contract No. 53/21(C11), according to which Derimen became a creditor of Moldtraselectro.

266. Therefore, Derimen participating as a payer in the relationship arrangement aimed at making payments under Contract No. 460/01-ER via Contract No. 180/12-98, arrived at Contract No. 53/21, according to which Derimen (with assistance of ZAO Stal) acquired from Ukrenergo a claim against Moldtraselectro, which then was assigned to Claimant under Contract No. 07-20.
267. Respondent argues that in accordance with Contract No. 53/21 the supply of electricity to Moldtraselectro was not carried out, but electricity was supplied from ZAO Stal to Ukrenergo, i.e. from one Ukrainian company to another. Accordingly, in Respondent's view, Contract No. 53/21 is not associated with Claimant's "Investment" into the Republic of Moldova and none of the participants to these transactions is an "Investor". Therefore, the assignment of debt obligation through Contract No. 07-20 cannot give rise to Claimant's right to settle the dispute through international investment arbitration.⁵⁷ Respondent referred to other arguments to confirm the absence of jurisdiction to hear this claim.
268. The Tribunal states that the Derimen's claim against Moldtraselectro (which was assigned to Claimant under Contract No.07-20) arose not as a result of business transaction of electricity supply to Moldova, carried out by Claimant jointly with Derimen (as, for example, under Contract No. 24/02), but is connected with electricity supply to Moldtraselectro by a third party (Ukrenergo) and subsequent involvement of Derimen for settlement of financial issues related to that supply (formalized by Contracts No. 180/12- 98 of 30 December 1998 and No. 53/21 of 27 January 1999, without participation of Ukrenergo). At that, the role of Derimen consisted in assuming financial obligations of Moldtraselectro towards ZAO Stal arising from the compensatory supply of electricity carried out by ZAO Stal in favor of Ukrenergo with simultaneous acquisition of financial claims against Moldtraselectro connected with payment for that supply.
269. In Article 1(8) of the ECT the term "Making of Investments" means "establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity". Therefore, a question arises whether Claimant may be recognized as an entity having made an "Investment".
270. Papers of the case do not support that Claimant (in addition to acquiring the claim to money from Derimen under Contract No. 07-20 as a financial result of the alleged "Investment") has made any effort in the process of investment or that Claimant is a proper legal successor of the entity, which had made such efforts.
271. Even if it is assumed that having completed the said business transaction, the participants thereof made an "Investment" jointly (e.g., as a group of companies, according to Claimant), through allocation of the whole range of functions (which otherwise could be performed by one potential investor independently), the Tribunal does not find sufficient grounds for such finding.
272. Given the above mentioned circumstances, the Tribunal cannot recognize Claimant as an entity, which made an "Investment: in respect of the right acquired under Contract No. 07-20 (i.e. the right to receive USD 4,000,496.35) and, stating inexpediency of reviewing other circumstances concerning jurisdiction *ratione materiae*, the Tribunal concludes that it has no jurisdiction to hear the said claim.

⁵⁷ See, *inter alia*, Respondent's closing submission, pp. 223, 229.

B. Jurisdiction of the Arbitral Tribunal under the BIT

273. According to the BIT the Tribunal has jurisdiction to hear a “dispute... between an investor of one Contracting Party and the other Contracting Party in connection with an investment on the territory of that Contracting Party” (Article 9.1 of the BIT).

274. The BIT was ratified by the Republic of Moldova on 6 March 1996 and in respect to Ukraine the BIT came into force on 27 May 1996. This dispute relates to the alleged actions of Respondent starting from 2 October 2000 at the earliest (date of Decree No.1000 of the Government of Moldova). Therefore, the Tribunal has jurisdiction *ratione temporis* to hear this dispute under the BIT. As for the limitation of action, the Tribunal reiterates its argument stated in para. 122 above.

275. Respondent put forward a special argument (concerning the admissibility of Claimant’s claim under the BIT) that Claimant did not fulfil responsibilities envisaged by Article 10.2 of the BIT for conducting consultations and negotiations within six months prior to submission of a dispute to arbitration. The Tribunal will return to the question later after addressing the issue of its jurisdiction *ratione personae* and jurisdiction *ratione materiae*.

276. The two main outstanding issues, which require a positive answer in order to establish whether this Tribunal has jurisdiction to hear this dispute under the BIT, are as follows:

- Jurisdiction *ratione personae*: is Claimant an “investor” for the purposes of the BIT?
- Jurisdiction *ratione materiae*: did the dispute arise in connection with an “investment” for the purposes of the BIT?

277. In respect of the applicable law, the Tribunal states that the BIT does not contain any provisions on the choice of law. However, in this case the Tribunal believes that it is possible to apply to the BIT the same approach in respect of the choice of law as to the ECT. It means that the Tribunal will decide the issues in dispute, including the issue of BIT interpretation, in accordance with provisions of the BIT *per se* and in accordance with rules and principles of the international law with reference to Ukrainian legislation and Moldavian legislation in respective cases (within the limits allowed by provisions of applicable international acts).

(i) Jurisdiction *ratione personae*: is Claimant an “investor”?

278. Article 2 of the BIT provides:

2. The term “investor” shall mean any natural or legal person investing in the territory of another Contracting Party:

a) the term “natural person” shall mean any natural person being a national of either Contracting Party in accordance with its law;

b) the term “legal person” shall mean with respect to any Contracting Party:

- any enterprise established in accordance with the effective legislation of the State of each Contracting Party, and having the right to invest in the territory of the other Contracting Party,;

- any organization of persons, which does not have the status of a legal person, however, is considered as a company or an enterprise under its law.

(1) Claimant’s Position

279. Claimant’s Position on this issue under the ECT and the BIT is stated in para. 140 above.

(2) Respondent's Position

280. Respondent's Position on this issue under the ECT and the BIT is stated in para. 141 above.

(3) The Tribunal's Analysis

281. Arguments and rationales of the Tribunal in respect of jurisdiction *ratione personae* under the ECT (as stated in paras. 142-159 above) may be without duplication applied as arguments and rationales to jurisdiction *ratione personae* under the BIT, except for the issues, which the Tribunal considers more connected with the issues *ratione materiae* under the BIT, and therefore will address them below.

(ii) Jurisdiction *ratione materiae*: does the dispute relate to "investment" under the BIT?

282. Article 1 of the BIT provides that for the purposes of the BIT:

The term 'investment' shall comprise every kind of asset invested in connection with economic activities by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter and shall include, in particular, though not exclusively:

a) movable and immovable property as well as any other rights, such as mortgages, liens, pledges, and similar rights;

b) shares, stocks and debentures of companies or interests in the property of such companies;

c) claims to money or claims to any performance having an economic value associated with an investment,'

d) intellectual property rights, such as copyrights, trademarks, patents, industrial designs, technical processes, know-how, trade secrets, trade names and goodwill, associated with an investment;

e) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law, including concessions for exploration, extraction, development, and exploitation of natural resources.

A change in the form in which assets are invested does not affect their character as investments.

(1) Claimant's Position

283. Claimant's Position on this issue under the ECT and the BIT is stated in paras. 163-178 above.

(2) Respondent's Position

284. Claimant's Position on this issue under the ECT and the BIT is stated in paras. 179 - 185 above.

(3) The Tribunal's Analysis

285. The Tribunal notes that the first part of the definition of the term "investment" under the BIT requires that an asset (which allegedly is an investment) be invested "in connection with

economic activities by an investor of one Contracting Party in the territory of the other Contracting Party”. This distinguishes the respective provision of the BIT from the ECT, which does not contain such requirement. Therefore, for a proper investment to take place according to the BIT, an investor, in the view of the Tribunal, must carry out economic activity in the territory of the other Contracting Party at the moment of the respective asset acquisition, or the acquisition of an asset should be necessarily followed by a commencement of new economic activity by that investor in that country.

286. In this case Claimant’s rights to debt to Moldtranselectro (acquired under Contracts No. 06-20 and No. 07-20) were not acquired in connection with any existing economic activity of Claimant in the territory of Respondent. The only economic activity of Claimant associated with the territory of Respondent, to the Tribunal’s knowledge, was Claimant’s activity in the capacity of a supplier under Contract No. 24/02. However, Claimant’s activity under Contract No. 24/02, though it obviously produced a significant economic impact in the territory of Respondent, was not carried out in that territory since Claimant supplied electricity only to the Moldova’s border.
287. The above stated circumstances are confirmed by Claimant itself when qualifying its own activity and the activity of Derimen. Thus, it is indicated in para. 54 of the Closing Submission, in particular, that “supply of electricity was carried out under DAF conditions (border of Ukraine/Moldova) and these companies did not carry out any economic activity in the energy sector directly in the territory of the Republic of Moldova”.
288. The second question is as follows: did the purchase by Claimant of the rights to debt to Moldtranselectro suggest a commencement by Claimant of a new economic activity in the territory of Respondent? The Tribunal believes that such acquisition did not suggest a commencement of any economic activity. Claimant was not obliged to supply electricity to Moldtranselectro after the acquisition of these claims. The only “activity” in the territory of Respondent, which Claimant could carry out, consisted of debt recovery from Moldtranselectro. The Tribunal believes that debt recovery may not be qualified as an “economic activity” within the meaning of Article 1 of the BIT. Making this conclusion, the Tribunal takes into account a common meaning of the phrase “economic activity” suggesting the involvement of certain efforts.
289. Based on the reasons above, the main argument of Claimant concerning the nature of its alleged “investment” shall be dismissed. Claimant’s rights to debt to Moldtranselectro were not purchased in connection with economic activity of Claimant in the Republic of Moldova.
290. It follows from the aforesaid that there is no need to review whether Claimant’s rights in respect of Moldtranselectro correspond to any particular example of “investments” mentioned in Article I(a)-(e) of the BIT.
291. Under the circumstances, the Tribunal finds that this dispute does not relate to an “investment” within the meaning of Article 1 of the BIT, therefore precluding a review of any claims of Claimant arising under the BIT. At that the Tribunal is excused from resolving other questions, *inter alia*, whether Claimant actually “invested in the territory” of the Republic of Moldova in the context of determining whether Claimant is an “investor” under the BIT.
292. Based on the aforesaid, the Tribunal comes to a conclusion that it has no jurisdiction over any claims of Claimant arising under the BIT.
293. Considering this conclusion, the Tribunal states that there is no need to further hear the parties’ arguments concerning admissibility of the claim within the meaning of Article 10.1 of the BIT (in respect of the requirement to conduct negotiations within the period of six months).

V. MERITS OF THE CASE

294. The Tribunal, by the majority of the votes, concluded that it has jurisdiction to hear Claimant's claim in respect of the right to receive payments, which was acquired by Claimant in accordance with Contract No. 06-20 (i.e. the right to receive a sum of USD 18,132,898.94), but the Tribunal has no jurisdiction over Claimant's claim in respect of the right acquired by it in accordance with Contract No. 07-20 (i.e. the right to receive a sum of USD 4,000,496.35). The Tribunal, by the majority of the votes, also concluded that it has jurisdiction to hear the first claim only under the ECT, but not under the BIT.
295. This section discusses the question whether Respondent violated its obligations under the ECT, according to Claimant, in respect of Claimant's right to receive a payment in the amount of USD 18,132,898.94. This question is reviewed separately from the question whether the violations on the part of Respondent (if any) entailed losses for Claimant. The latter question is discussed in Section VI of this Award. The parties did not always clearly delineate their arguments related to the alleged violations on the part of Respondent and the arguments related to the alleged loss, therefore some of the arguments summarized below may relate to both aspects (in this respect Section VI will include a repeated reference to the arguments related to the loss).
296. In the brief statement of the parties' arguments below the Tribunal summarizes its understanding of the said arguments, but not the exact wording used in the pleadings of the parties. In case the Tribunal did not understand the parties' arguments or considered them manifestly unjustified, it did not include them in the summary below. Therefore, should any of the arguments be not included, this will not mean that the Tribunal has not taken it into account.

A. Claimant's Arguments

297. Claimant relies upon three alleged instances of actions/inactions on the part of Respondent, which according to its statement constituted a violation of Respondent's obligations. These are stated in sections (i)-(iii) below.
298. In addition to these arguments, Claimant separately states that the actions/inactions on the part of Moldtranelectro should be attributed to Respondent. This argument is summarized in section (iv) below.

(i) Decree No.1000

299. Events connected with the issue of Decree No. 1000 by the Government of Moldova were described by the Tribunal in paragraphs 87-88 above.
300. Claimant argues that the transfer of the Moldtranelectro's property without divestiture and transfer of payables and receivables was intended only to release Moldtranelectro from repayment of debt to creditors. Claimant emphasizes that Decree No.1000 resulted in a reduction in the Moldtranelectro's authorized capital from MDL 444,414,612 to MDL 47,903,970 (i.e. in USD equivalent - from about USD 39 million to USD 4 million). Therefore, according to Claimant, the capital assets of Moldtranelectro were withdrawn thus precluding the enforcement of any judgements against Moldtranelectro in favour of Claimant.
301. Claimant also argues that the transfer of assets and economic activity envisaged by Decree No.1000 was a "reorganization" of " Moldtranelectro, and that according to Articles 70, 72 and 39 of the Civil Code of Moldova (in the version existing at the moment of adoption of Decree No.1000) the rights and responsibilities of Moldtranelectro were to be transferred as a whole to a new legal entity, whereby Moldelectrica was to become a new debtor in respect of Claimant.

302. Claimant relies on the letter of the Minister of Industry and Energy of Republic the Moldova, dated October, 24 2000 (C88), to president of the State Registration Chamber within the Ministry of Justice as an evidence supporting its statements that the true objective of Decree No.1000 was to release Moldtranselectro from its debts and that Moldtranselectro was “reorganized” according to Decree No.1000: the letter states:

According to Decree No.1000 of the Government dated October 2, 2000 “ On Establishment of New State-Owned Enterprises in Electricity Sector”, it is envisaged to establish state enterprises Moldelectrica, Nodul Hidroenergetic Costești and Autoelectrotrans. In this regard, as well as in connection with the initiation of the public assets forfeiture proceedings⁵⁸ on the part of creditors of Moldtranselectro, we ask you to register on expedite basis the above mentioned enterprises. At the same time, concurrently with registration, we ask you to exempt these enterprises from the stamp duty, since the enterprises are established in consequence of reorganization of the State Enterprise Moldtranselectro on the basis of spin-off of appropriate functional assets from the said enterprise. (Emphasis added by Claimant).

303. Claimant also emphasizes that when Moldtranselectro recognized the debt to Claimant in the letter of 22 August 2000 (C39) it requested a delay in repayment of that debt on the grounds that

upon reaching a favourable financial standing state-owned enterprise Moldtranselectro will immediately settle the accounts with your enterprise.

304. However, since the economic activity of Moldtranselectro was discontinued after coming into force of Decree No.1000, Moldtranselectro was prevented from receiving any profit and, accordingly, to reach a “favourable financial standing”.

305. As for substantive protection standards under the ECT, referred to by Claimant, it relies on the followings.

(1) Article 10(1)

306. Article 10(1) of the ECT provides:

Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

307. Claimant argues that Respondent through its actions/inactions in connection with Decree No.1000 violated a number of provisions of the article above. First, according to Claimant, Respondent did not provide for “stable, equitable, favourable and transparent conditions” (lines 2-3 of Article 10(1) above), since “stable” conditions mean predictable conditions, but the reorganization of Moldtranselectro was not predictable at the moment of making an Investment.

308. Second, Claimant argues that Respondent did not provide for “fair and equitable treatment” (lines 6-7 of Article 10(1) of the ECT). As for this standard, Claimant specifies that Respondent

⁵⁸ The original text in Moldavian uses the word “sechestru”

did not protect legitimate interests and expectations of Claimant; in particular, it was “denied justice” (this in the view of Claimant is equivalent to a violation of the “fair and equitable treatment” standard, as well as the standard mentioned in Article 10(12), to be discussed below). According to Claimant, a “denial of justice in this case means that it is impossible to actually enforce any judicial act against state-owned enterprise Moldtranselectro”.

309. Third, Claimant argues that Decree No. 1000 was a “discriminatory measure” (line 10 of Article 10(1) of the ECT) meaning that Moldtranselectro on a voluntary basis made payments to other suppliers of electricity in 1999.⁵⁹

310. And finally, fourth, Claimant argues that Respondent did not provide “treatment ... required by international law” (line 13 of Article 10(1) of the ECT) (i.e. the international law minimum standard). It argues that for these purposes Article 1 (Protection of Property) of the supplementary Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms provides the respective international minimum standard.

(2) Article 10(12)

311. Claimant also argues that adoption of Decree No.1000 by the Government of Respondent constituted a violation of Article 10(12) of the ECT, which provides as follows:

Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorizations.

312. As explained above, Claimant refers to Article 10(12) in the context of the argument on the “denial of justice” in connection with Decree No.1000.

(3) Article 13(1)

313. Finally, Claimant refers to Article 13(1) of the ECT (Expropriation), which provides as follows:

Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as “Expropriation”) except where such Expropriation is:

(a) for a purpose which is in the public interest;

(b) not discriminatory;

(c) carried out under due process of law; and

(d) accompanied by the payment of prompt, adequate and effective compensation.

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the “Valuation Date”).

Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a

⁵⁹ Claimant filed a petition requesting that the Tribunal order Respondent to provide evidence of Moldtranselectro’s payments to other creditors. This petition was dismissed by the Tribunal.

commercial rate established on a market basis from the date of Expropriation until the date of payment.

314. Claimant argues that adoption of Decree No. 1000 constituted an indirect expropriation, i.e. a measure having effect equivalent to nationalization or expropriation. According to Claimant, reorganization of Moldtranselectro “constituted one element of depriving Energoalliance Ltd. of the right to use and dispose of its property”.

(ii) Decree of the Audit Chamber

315. The Tribunal described the events related to the Decree issued by the Audit Chamber in paragraphs 101-106 above.

316. Claimant argues, first, that the Audit Chamber acted at all significant moments as a governmental body, and that, therefore, its actions should be attributed to Respondent.

317. According to Claimant, the Decree of the Audit Chamber was arbitrary and unfair in respect of findings related to Claimant and was aimed at protection of interests of the State Enterprise Moldtranselectro with use (according to Claimant) of “state coercion”. Claimant emphasizes that findings of the Audit Chamber on non-receipt by Moldtranselectro of electricity from Claimant, contained in the Decree, were rebutted not only by Moldtranselectro (in its letter of 7 November 2002), but also by evidence, which the Audit Chamber received from the Audit Chamber of Ukraine (C92), and by information provided by the Department of Financial Control and Audit of the Ministry of Finance of Moldova on 27 July 2001 (C111), which taken together supported the volumes and cost of electricity supplied to Moldtranselectro in 1999 and 2000. Claimant argues that if Moldtranselectro violated respective provisions of the Moldova legislation on accounting, Claimant could not be liable for such violations. Further, the requirement that Moldtranselectro demanded Claimant to reimburse the funds that were not paid to the latter (i.e. USD 10.8 million) was “absurd” and constituted an excess of jurisdiction on the part of the Audit Chamber.

318. Claimant argues that Decree of The Audit Chamber resulted in a situation when Claimant could not obtain a positive judgement in respect of any of its claims in the courts of Moldova (whether in respect of RN/RNV or Moldtranselectro). In particular, Claimant argues that the Decree of the Audit Chamber constituted a ground for issuing by the Economic Court of Moldova on 19 November 2002 of a judgement, according to which Assignment Contract No. 71-2/09-EA (in respect of RNV) was declared invalid at the second trial. Claimant states that for this reason and because of the Decree of the Audit Chamber was not cancelled by the courts of Moldova, in March 2007 Claimant stopped all further attempts to recover debts in the courts of Moldova. (However, Claimant also recognizes that this decision was connected with its inability to pay certain court fees). Claimant also emphasizes that the Decree of the Audit Chamber entailed court proceedings against the Claimant in the courts of Moldova concerning the recovery of USD 42 million (even if these proceedings eventually did not result in payment of any sums by Claimant).

319. As for substantive protection standards under the ECT, which were violated by the adoption of the Decree of the Audit Chamber, Claimant relies on all provisions of Articles 10(1), 10(12) and 13(1) of the ECT above. In general, as understood by the Tribunal, Claimant’s Position is that each of three actions/inactions listed above and below, as well as the non-payment by Moldtranselectro of its debt (which, as states Claimant, should be attributed to Respondent) constitute violations, whether severally or in combination, of one or several Articles 10(1), 10(12) and 13(1).

(iii) Court Proceedings in Moldova

320. Claimant argues that actions/inactions on the part of the courts of Moldova in connection with various claims relating to Claimant's Investment constituted a violation of the ECT in respect of the following.

321. First, Claimant argues that intervention by the General Prosecutor of Moldova in the court proceedings in respect of RN/RNV constituted a violation *per se (inter alia)* of Respondent's responsibility to provide "fair and equitable treatment" and entailed a denial of justice.

322. Second, Claimant argues that it took the court unreasonably long to hear Claimant's claims against RN and RNV (according to Claimant – "more than seven years").

323. Third, Claimant argues that judgements of the Moldova's courts were manifestly unfair and that the courts intentionally abused the law. Claimant refers, in particular, to the following:

- Decisions relating to invalidation of the Assignment Contracts in respect of RN and RNV. Claimant notes that if at the first trial the grounds for invalidating Contracts (according to claim of the General Prosecutor of Moldova) were connected with writing off the debt in accordance with the Law on Restructuring, then at the second trial the assignment Contracts were invalidated in connection with the absence of the debt, as established by the Decree of the Audit Chamber.
- Decision not to cancel the part of the Audit Chamber' Decree, according to which Claimant was to reimburse the funds it had never received.
- Decisions on the assessment of court fees in the amount of 3% to Energoalliance in respect of the General Prosecutor's claim to invalidate the Assignment Contract in respect of RN.
- Ruling of the Moldavian court on consolidation of cases connected with Claimant's claims against RN and RNV.
- Denial to recognize and enforce in Moldova the judgement of the Ukrainian court (dated August 25, 2010) in Claimant's favour against Moldtranselectro and Moldelectrica.

(iv) Attribution

324. In addition to the aforesaid, Claimant argues that actions/inactions on the part of Moldtranselectro should be attributed to Respondent. Stating this argument Claimant presumes that Respondent exercised control over Moldtranselectro under the law of Moldova and in accordance with the Charter of Moldtranselectro, and that the supply of electricity under Contract No. 24/02 was carried out based on the regulatory framework comprising many intergovernmental treaties and Contracts between Ukraine and the Republic of Moldova. Claimant also refers to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the UN International Law Commission ("ILC Draft Articles"), which, according to Claimant, support its argument that the nature of tasks imposed on Moldtranselectro by the Government of the Republic of Moldova is the confirmation of the fact that Moldtranselectro performed governmental functions.

325. For this reason, as Claimant states, "responsibility for the damage caused to Energoalliance Ltd. by actions of state-owned enterprise Moldtranselectro should be attributed to Respondent". The Tribunal proceeds from the premise that the respective "action" on the part of Moldtranselectro, referred to by Claimant, is the denial of Moldtranselectro to repay its debt to Claimant.

B. Respondent's Arguments

326. Respondent denies that it violated any of the provisions of Articles 10(1), 10(12) and 13(1) of the ECT, relied upon by Claimant, and argues that Claimant did not present required evidence to substantiate its accusations.
327. In addition, Respondent puts forward some concrete arguments which should be stated through a reference (which is more practical) to the above mentioned three main actions/inactions, which constitute the subject matter of Claimant's claim. Respondent also rejects Claimant's argument that the non-payment by Moldtranselectro of its debt (assuming that the debt actually arose) should be attributed to Respondent.

(j) Decree No. 1000

328. Respondent argues that Claimant did not prove that it had an indubitable claim against Moldtranselectro. Claimant neither had nor has a writ of execution, which constitutes an unconditional, marketable and enforceable claim. Respondent argues, first, that the amount of electricity supplied by Claimant was not confirmed by it, taking to account the findings of the Audit Chamber. Second, Contract No. 24/02 was void, since the price set for Moldtranselectro in respect of payments to Derimen was more than twice the price on the Ukrainian market.⁶⁰ Either Claimant imposed such price taking advantage of the difficult situation for Moldtranselectro or there were concerted actions on the part of Moldtranselectro, Derimen and Claimant aimed at causing damage to Respondent.
329. Respondent further argues that, even if Claimant's claim against Moldtranselectro was substantiated, Claimant could not prove that precisely in consequence of Decree No.1000 and other actions of governmental bodies under Decree No.1000 Claimant had lost an opportunity to recover debt from Moldtranselectro. This argument has two aspects. First, Decree No.1000 envisages a mechanism and means for settlement of accounts payable and accounts receivable of Moldtranselectro. Second, Respondent argues that creditors of any state-owned enterprise in Moldova in any case may not set up a claim against assets, which are on the books of a State-owned enterprise only formally and in respect of which state-owned enterprise possesses only the right of use (right of economic management / operational management). State-owned enterprises may repay debts only from profits.⁶¹
330. Respondent argues that there was nothing illegitimate in the transfer of assets envisaged by Decree No.1000. This contradicts Claimant's assertions, which according to Claimant are based on the 2003 version of the Civil Code of Moldova (not in force in 2000). Decree envisages not the "reorganization" of Moldtranselectro, but a simple transfer of certain assets to selected new entities.
331. According to Respondent, Claimant intended to withdraw certain assets of Moldtranselectro (or to negotiate an Contract on their transfer to Claimant) and the compliant of Claimant in reality is that these assets were transferred in favour of Moldelectrica. However, Claimant had not rights to these assets, even assuming that it was a creditor of Moldtranselectro.

⁶⁰ Claimant countered this argument in its Additional Statement, where it indicated that the price used by Moldtranselectro for making payment, actually was about 50% of the price on the Ukrainian market.

⁶¹ Claimant countered this argument in its Additional Statement, where it indicated that State-owned enterprises may be liquidated upon decision of a competent court instance pursuant to the Law *On State-Owned Enterprise*, and that the Moldova legislation on bankruptcy provides that all assets of a bankrupt legal entity irrespective of its legal organizational form shall be liquidated with distribution of respective proceeds among creditors.

332. As for Claimant's accusation of discrimination on the part of Respondent, Respondent argues that Claimant did not prove that Moldtranselectro made payments to other creditors for electricity imported in 1999. In any case, if such payments were made that decision was within the competence of Moldtranselectro, not Respondent.

(ii) Decree of the Audit Chamber

333. Respondent argues that the Audit Chamber complied with the effective law of Moldova when gathering and evaluating evidence, which constituted grounds for its conclusions. Respondent also argues that Claimant did not prove that Derimen supplied electricity for Moldtranselectro under Contract No. 24/02.

334. According to Respondent, the Decree of the Audit Chamber did not violate Claimant's rights to debt to Moldtranselectro since Moldtranselectro was a subject of the control. The Decree did not release Moldtranselectro from paying debt to Claimant because, first, the Decree does not comprise such a paragraph and, second, the Audit Chamber does not have such powers.

335. Further, Respondent argues that the Audit Chamber does not have a direct influence over proceedings and its Decrees constitute sources of evidence along with other sources of evidence. In any case, the Audit Chamber' functions do not include the task to establish precise quantity of imported electricity. It merely verifies the availability of prescribed mechanisms and the performance by officials of their duties.

336. Finally, Respondent argues that order contained in the Decree of the Audit Chamber that Moldtranselectro required Claimant to reimburse funds, which were paid to it (USD 10.8 million), did not go beyond authority of the Audit Chamber as it complied with Article 28(g) (Imposing disciplinary sanctions) of the Law on *the Audit Chamber*.

(iii) Court Proceedings in Moldova

337. The main argument of Respondent is that Claimant may not lodge claims, which are based on allegedly erroneous judgements of Respondent's courts, if Claimant did not use all available means either to lodge its claims or to challenge judgements against it. Respondent refers as an example to the following instances, when (Respondent)⁶² did not do it:

- Claimant's claims against RN and RNV in respect of debt (on 24 November 2003, these claims were consolidated within one claim); the court dismissed the case because of non-appearance of Claimant on 20 March 2007.
- Claimant's claim against Moldtranselectro in respect of the debt in the amount of USD 9.4 million (i.e. the sum, which remained after the assignment of creditors' claims against RN and RNV); the court dismissed the case because of non-payment by Claimant of the stamp duty. There was no sign of discrimination in it. Further, on 20 March 2007, the court dismissed the claim of Claimant in respect of USD 10.8 million (i.e. the debt, which was repeatedly purchased by Moldtranselectro after the Assignment Contracts in respect of RN and RNV were invalidated) because of repeated non-appearance of Claimant.
- Claimant did not pay the stamp duty required for filing an appeal in respect of the decision of the Supreme Court Moldova, dated November 19, 2002, on invalidating the Assignment Contract in respect of RN. Thus, on 5 March 2003, the Supreme Court left the cassation appeal of Claimant without action.

⁶² Translator's note: possibly an error. It should read Claimant (?)

338. As for the alleged delay, Claimant may not complain about delays in a situation when Claimant itself provoked a delay. As for Respondent's claims against RN and RNV to recover debt (which were consolidated within one claim on 24 November 2003), Claimant applied (repeatedly) for suspension for the purposes of submitting new evidence, and the court allowed these applications.

339. As for the subject matter of decision on invalidity of the Assignment Contracts in respect of RN and RNV, Respondent argues as follows:

- As for RNV, the General Prosecutor filed its claim for invalidation of the assignment Contract in respect of RN on two grounds: first, the previous cancellation of RNV's debts to Moldtranselectro in accordance with the Law on Restructuring and, second, the invalidity of the assignment Contract in respect of RNV's debt in accordance with Decree No. 890 of 21.08.90 of the Government of the Republic of Moldova.⁶³ The Economic Court of Appeal invalidated the Assignment Contract in respect of RNV on both grounds in its decision of 19 November 2002 and was right in doing so. (Respondent further notes that exactly this decision was not challenged subsequently by Claimant, when it refused to pay the stamp duty).
- As for RN, Respondent argues that the ground for the claim of the General Prosecutor was identical⁶⁴ and that the decision of the Economic Court of Appeal of 12 February 2002 was made rightfully in favour of the General Prosecutor on both grounds.⁶⁵

(iv) Attribution

340. As for Claimant's argument that actions/inactions on the part of Moldtranselectro (in particular, non-repayment of debt) should be attributed to Respondent, Respondent denies that Moldtranselectro acted as a governmental entity in respect to Contract No. 24/02. Respondent denies that Moldtranselectro enjoyed a monopoly in the Republic of Moldova as a producer, seller or supplier of electricity. Being a buyer under Contract No. 24/02, Moldtranselectro acted as a merchant and, accordingly, not as a governmental entity. Respondent accepts that Moldtranselectro enjoyed a monopoly and performed governmental functions as an entity transmitting power through high-voltage power networks in Moldova and as an operator of the central dispatching service in Moldova. Further, it accepts that Moldtranselectro acted in the latter capacity when signed various intergovernmental agreements and protocols with Ukrainian governmental organizations, referred to by Claimant. However, the electricity purchase contract (Contract No. 24/02) was of different nature, according to Respondent. Moldtranselectro was in the same position as any other buyer of imported electricity in the Republic of Moldova.

C. The Tribunal's Analysis

341. The Tribunal now proceeds to review of each of the four main arguments stated by the parties.

⁶³ The Tribunal notes the Statement of Claim of the General Prosecutor of 31 January 2001 is based on the first and not on the second ground. Possibly, the General Prosecutor presented new arguments at the later stage of the proceedings.

⁶⁴ Neither of the parties presented a copy of the General Prosecutor's Statement of Claim.

⁶⁵ The Tribunal notes that the grounds mentioned in the decision, apparently, are somewhat different; their description is in paragraph 99 above.

(i) Decree No.1000

342. The parties do not challenge that before the implementation of the Decree No.1000 Moldtranselectro owned certain assets of Respondent based on the right of use, to include high voltage transmission lines in the territory of Moldova. Moldtranselectro also performed the management of the power grids of Respondent, acting as the body of Respondent. Therefore, Moldtranselectro occupied a strategic position in the economy of Respondent. At the same time, Moldtranselectro encountered financial difficulties several months before adoption of Decree No.1000. This clearly follows from the fact that under Contract No. 24/02 a debt arose in the amount of USD 18.1 million (which was not challenged by Moldtranselectro at that moment), as well as from the letter of Moldtranselectro dated August 22, 2000, in which the entity stated that it "currently cannot pay in full in cash". Again, this is not challenged by the parties.
343. Taking into account the aforesaid, it is clear that Decree No.1000, to put in plainly, resulted in that the major part of Moldtranselectro's assets, including its high voltage transmission lines, its economic activity (operation of power transmission system) and the respective license were transferred to a new state-owned enterprise Moldelectrica.
344. Proceeding from these indisputable facts, the Tribunal comes to an apparent conclusion that one of the goals of Decree No.1000 (if not the main goal) was to protect assets of Moldtranselectro (i.e. to keep them under the control and in ownership of the state of Moldova) and to ensure that Moldtranselectro continued performing its functions. This follows from the introductory clause of Decree ("with the aim of ensuring efficient functioning of the electricity sector..."). Claimant did not provide any additional explanation in respect of Decree No.1000. This also corresponds to the letter from the Minister of Industry and Energy of the Republic of Moldova dated October 24, 2000, relied upon by Claimant. This letter, as known, comprises a reference to "procedures of confiscation of public assets by Moldtranselectro's creditors".
345. Respondent argues that the Decree created mechanisms that protected Moldtranselectro's creditors and, therefore, could not be aimed at infringement of interests of those creditors. The Tribunal notes that these mechanisms were not clearly determined in the Decree and their implementation depended on further actions by the Ministry of Industry and Energy of the Republic of Moldova and the Ministry of Finance of the Republic of Moldova. It was not clear whether Claimant (and other creditors of Moldtranselectro) would have remedies in respect of Respondent (if yes, what remedies), should these actions be taken. Further, more importantly, the Decree discontinued the economic activity of Moldtranselectro; therefore it was prevented from generating income in future, which could provide a source for debt repayment.
346. Based on these reasons, the Tribunal concludes that Respondent did not take into consideration the legitimate interests and other expectations of the Moldtranselectro's creditors, to include Claimant, when issuing Decree No.1000. The Decree was beyond doubt intended to protect national interests of Respondent, however in doing so Respondent undoubtedly restricted the interests of the Moldtranselectro's creditors, to include Claimant. The Tribunal was not provided with any convincing evidence that actions of Respondent were directed exactly against Claimant or exactly against foreign and not domestic creditors of Moldtranselectro. Therefore, Respondent's action, it seems, was not "discriminatory". Nevertheless, the Tribunal believes that the adoption of Decree No.1000 constituted a violation of Respondent's obligation envisaged by Article 10(1) of the ECT "stable, equitable, favourable and transparent conditions" for Claimant's Investment and accord to Claimant's Investment "fair and equitable treatment".
347. The Tribunal does not consider Claimant's argument that Decree No. 1000 was not adopted in accordance with the law of Moldova (i.e. it was an illegal form of reorganization) to be convincing. However, this by no means affects the Tribunal's conclusion that the adoption of the

said Decree constituted a violation of the international law obligations of Respondent under the ECT.

348. Taking into account the above conclusion, there is no need to consider whether Decree No.1000 could have also violated other provisions of the ECT.

(ii) Decree of the Audit Chamber

349. The Tribunal notes that Respondent does not deny that the Audit Chamber was a body of Respondent and therefore its actions should be attributed to Respondent. In any case the Tribunal is convinced that it should be just like this. Although, the Audit Chamber is to a certain degree independent of the Moldova's Government, it seems (according to the provisions of the Law *On the Audit Chamber*, which was provided by Claimant), it is under the full control of the Moldova's parliament. Moreover, the Audit Chamber has the right to impose sanctions on individuals and as such performs judicial duty. Therefore, the Tribunal comes to a conclusion (given the absence of any argument to the contrary on the part of Respondent) that the Audit Chamber always acted as a body of Respondent.

350. The most noticeable feature of the Audit Chamber' Decree (as noted by the Tribunal in paragraph 101 above) is the obvious conclusion comprised in it that the supply of electricity to Moldtranselectro under Contract No. 24/02, as well as the supply of electricity, which led to creation of debt under Contract No. 53/21, did not take place at all. Although this fact is not directly mentioned in the Decree, it clearly follows from the Audit Chamber' requirement in respect of the Moldtranselectro's management "to adjust" the debt to Claimant.

351. If the Audit Chamber simply established that Moldtranselectro had not complied with certain accounting rules and imposed respective sanctions on Moldtranselectro's management, the Decree would by no means affect Claimant's rights. However, the conclusion that no supply ever took place (as per the Decree) manifestly exceeds the limits. That conclusion actually determined the mutual rights of Claimant and Moldtranselectro under the Contracts signed by them. Further, the Moldavian courts subsequently considered that conclusion of the Audit Chamber to be convincing. Thus, the Economic Court of the Republic of Moldova relied in its decision of 19 November 2002, in which the assignment of RNV's debt is invalidated, partially on this conclusion of the Audit Chamber:

According to para. 6 of this Decree [the Decree of the Audit Chamber], during 1998-2000 ES Moldtranselectro unjustifiably repaid its debts to Energoalliance Ltd. in the amount of USD 10.8 th..⁶⁶.

352. The Audit Chamber made a decision not only on this matter of fact but also on the matter of right relating to Contract No. 24/02, having concluded that the quantity of power supplied by Claimant in January and February 1999 could not be regarded as supplied since Contract No.24/02 "came into force only on 01.03.99".

353. These conclusions on the matters of fact and of right were made by the Audit Chamber in the course of proceedings, in which Claimant was not entitled to participate.

354. In addition to this procedural aspect, the main point of the Audit Chamber' judgement (namely its judgement that no power had been supplied to Moldtranselectro) did not follow, from a strictly logical point of view, from its conclusion that no proper accounting records were presented. Clearly, no legal grounds for that conclusion, based on the respective laws on accounting, were provided by the Audit Chamber. In addition, the Audit Chamber' judgement was in conflict with the evidence received by it, *inter alia*, from the respective governmental

⁶⁶ Translator's note: possibly an error. It should read USD 10.8 Million (?).

bodies of Ukraine (see paragraph 101 above). This decision was contradicted by the fact that Moldtranselectro itself repeatedly recognized that the power had been supplied, as before the adoption of the Decree of the Audit Chamber (C28, C36, C39), as afterwards (C95). In this respect the Tribunal takes into consideration that one of the Moldtranselectro's responsibilities, which was performed (as accepted by Respondent) by Moldtranselectro in capacity of a body of Respondent, was to coordinate with the respective Ukrainian authorities a procedure of metering the power interchange between two countries. Consequently, as the Tribunal understands, Moldtranselectro was the only Moldavian entity officially authorized by Respondent to keep record of power fed into the Moldavian high-voltage power network from Ukraine.

355. Finally, as stated above in paragraph 101 and note 6 thereto, the Tribunal cannot understand factual grounds, according to which the Audit Chamber made a conclusion that Moldtranselectro had paid USD 10.8 million to Claimant for the electricity supplied in December 1998, January 1999 and February 1999. There is no evidence (as well as the Audit Chamber did not make any references to any evidence) that Moldtranselectro had paid any funds in favour of Energoalliance, and not of Derimen. Moreover, other sections of the Audit Chamber's Decree reasonably state that the payments under Contract No. 24/02 were made by Moldtranselectro in favour of Derimen. In addition, no evidence was presented that Moldtranselectro had paid to anybody for the electricity supplied in December 1998 (which constituted the contracted item under Contract No. 53/21). This aspect of the Decree of the Audit Chamber seems to be particularly arbitrary.

356. According to the reasons above, the Tribunal comes to a conclusion that the adoption of the Decree by the Audit Chamber constituted a violation of Respondent's obligations under Article 10(1) of the ECT to create "stable, equitable, favourable and transparent conditions" for Claimant's Investment and accord to Claimant's Investment "fair and equitable treatment". In particular, the Tribunal believes that taking into account the quasi-judicial role of the Audit Chamber, the Decree constituted a denial of justice from the point of view of both procedural aspects and content thereof. In this regard, the Tribunal notes that Claimant tried to challenge the Decree of the Audit Chamber in the Moldavian courts, including in the Supreme Court, but without success.

(iii) Court Proceedings in Moldova

357. The Tribunal cannot agree with Claimant's argument that the petition of the General Prosecutor of Moldova to initiate proceedings in respect of the claim for invalidation of the Assignment Contracts in respect of RN and RNV constituted a violation of Respondent's obligations under the ECT. The Tribunal believes that foreign investors in Moldova, which enter into Contracts with Moldavian enterprises, should be prepared that the State as represented by its body, the General Prosecutor, will resort to all sorts of available legitimate arguments and procedures with the aim of protecting the interests of such state enterprises. Claimant did not put forward an argument that in connection with the General Prosecutor's claim any abuse of the Moldova's law occurred.

358. As for the time it took the Moldavian courts to make decisions on the claims against RN and RNV, it was not simple for the Tribunal to ascertain the exact procedural history of these claims. However, proceedings in respect of the General Prosecutor's claim to invalidate the Assignment Contract in respect of RNV, it seems, was initiated on 31 January 2001 and closed on 5 March 2003 or about this date (when Claimant did not pay the established court fees for the purposes of appealing the decision of the Economic Court of 19 November 2002). The Tribunal accepts that during this period the General Prosecutor's claim was dismissed twice, by the first-instance court

and court of appellate jurisdiction. However, the Supreme Court every time sent the claim back to the first-instance court. Although, as a consequence, the court proceedings lasted almost three years cumulatively, the Tribunal does not consider this term extraordinary so as to constitute a violation of Respondent's obligations under the ECT.

359. As for the General Prosecutor's claim concerning the Assignment Contract in respect of RN, the respective proceedings were initiated, it seems, on 31 January 2001 and were closed on 29 January 2003 or about this date (when Claimant did not pay the established court fees for the purposes of appealing the decision of the Economic Court as an appellate jurisdiction, dated May 2, 2002). Again, the Tribunal does not consider this term (i.e. two years) to be extraordinary.
360. It must be admitted that the court proceedings on Claimant's claims against RN and RNV to recover debts (as opposed to proceedings on claims to invalidate the Assignment Contract in respect of RN/RNV), it seems, continued after March 2003. However, Claimant did not specify what aspect of these continued court proceedings had allegedly lasted unjustifiably long. In any case, it is not clear to the Tribunal, what is the basis for Claimant's argument that the court proceedings in respect of RN/RNV lasted "more than seven years".
361. For these reasons the Tribunal dismisses the second argument of Claimant that the court proceedings in respect of debts of RN/RNV lasted unjustifiably long.
362. The third argument of Claimant is that the judgements of the Moldavian courts were essentially unfair. In respect of this argument the Tribunal, in the first place, notes that it is not an appellate instance. According to the Tribunal, if the Moldavian court's judgement was erroneous this does not mean that Respondent violated its obligations under the ECT. The Tribunal has to conclude that the court decision, according to the Tribunal in *Mondev International Ltd. v. United States of America*, was "clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment".⁶⁷
363. In general, Claimant did not put forward concrete accusations in respect of errors in various judgements of the Moldavian courts, which it refers to. Further, the Tribunal has no copies of pleadings submitted by the parties in each of the cases, as well as does not know what evidence was provided to the courts. Also, the Tribunal was not provided with any expert opinions (or at least a detailed analysis) on the respective norms of the Moldova's law. Taking into consideration these limitations, the Tribunal presents the following analysis.
364. As for decisions on the Assignment Contracts in respect of RN and RNV, the Tribunal notes the existence of inconsistency of the grounds used by Moldavian courts to issue their judgements. As for the court proceedings in respect of RNV, for the first time when the Supreme Court sent the case back to the first-instance court (through its decision of 17 September 2001) it made this on the grounds that the RNV's debts to Moldtranselectro "were overestimated and did not reflect the true cost of the supplied electricity". (This conclusion was surprising *per se* as the argument that the debt was "overestimated", it seems, had not been addressed by the lower courts). However, for the second time when the Supreme Court sent the case back (through its decision of 22 May 2002) it made this on the grounds, in the first place, that the RNV's debt had been in part or in full cancelled by the Law on Restructuring. Another additional ground for satisfying the claim of the General Prosecutor was put forward by the court of appellate jurisdiction during the proceedings in respect of RN. The court declared in its judgement of 22 May 2002, that "S.A. Red Nord did not enter into a Contract on supply of electricity with Energoalliance Ltd. and had no debts thereto". Finally, the judgement of Moldavian court of 19 November 2002, which ultimately satisfied the claim of the General Prosecutor in respect of

⁶⁷ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF), Award of 11 October 2002, p. 127. ("clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment")

RNV, mentioned as one of the grounds that “in accordance with para. 1(1) of Decree No. 890, dated 21.08.95, of the Government, repayment of debts for imported electricity shall be made through transfer of funds without the right to assign debts”. Decree No. 890, it seems, was not mentioned in any of the previous court judgements.

365. However, notwithstanding these inconsistencies, taking into account the limited scope of information available for the Tribunal, the Tribunal cannot make a conclusion that the Moldavian courts’ actions were “clearly improper” as applied to claims against RN and RNV. Actually, the Tribunal even cannot conclude that the final judgement of the Moldavian courts on invalidation of the Contracts on assignment in respect of RN and RNV was erroneous (even if the Tribunal considers the ground stated in the text of some court judgements to be unclear or unconvincing). In particular, the Tribunal notes that the assignment of debts of RN and RNV, it seems, indeed constituted a violation of Decree No. 890. It should be noted that the General Prosecutor never referred to such argument to substantiate the claim for invalidation of Contracts on assignment of debt to Moldtranselectro on the part of RED SUD and RED Centru companies (see paragraph 81 above); it should be also noted that this argument, it seems, was put forward at the later stage of the court proceedings in respect of RN/RNV. However, Claimant did not provide explanations as to why it considered that the Moldavian courts actually made an error issuing their judgement on the basis of Decree No.890.
366. As for judgements of the Moldavian courts not to cancel respective sections of the Decree of the Audit Chamber, the Tribunal has already resolved that the Decree *per se* constituted a violation of Respondent’ obligations under Article 10(1) of the ECT. Taking into account the method Claimant applied to calculate the amount of its claim (discussed in Section VI of this Award), any violation of the ECT connected with subsequent judgement of the Moldavian courts not to cancel respective sections of the Decree will not cause any losses in excess of the loss inflicted by the Decree. Therefore, there is no need for the Tribunal to determine whether the judgements of the Moldavian courts constituted a different and additional violation of the ECT.
367. Another complaint of Claimant relates to the judgement of the Moldavian courts (in particular, decision of the Supreme Court of 29 January 2003) to order Claimant to pay the court fees, in connection with its appeal, in favour of the General Prosecutor to invalidate the Assignment Contract in respect of RN, which are calculated as a percentage of the amount of that Assignment Contract (3%). Claimant’s argument, it seems, is that the claim for invalidation of any contract is not the same as the claim for debt recovery under the contract (i.e. it is not a claim “*in rem*”), that is why the Moldavian courts erroneously required these court fees to be paid. Although the Tribunal understands the logic of this argument, the Tribunal received no reference to respective norms of the procedural law of Moldova or any expert opinions (or court judgements), which could help in the analysis. Therefore, the Tribunal cannot make a conclusion that the Moldavian courts made a mistake. This implies that the Tribunal is far less convinced that in this respect the judgement of the Moldavian courts was “clearly improper”. Therefore, this argument shall be dismissed.
368. Claimant did not support its statement that the decision of the Moldavian courts to consolidate claims of Claimant against RN and RNV within one case clearly was a mistake. Claimant did not submit respective evidence, while relying on the norms of the procedural law of Moldova. Also, based on the decisions provided to the Tribunal, the circumstances of that consolidation are not enough clear to the Tribunal. Therefore, this argument shall also be dismissed.
369. Finally, Claimant argues that judgements of the Moldavian courts that order to deny enforcement of Ukrainian court judgements in Claimant’s favour in the amount of USD 20.3 million constituted denial of justice. Ground for the denial of enforcement by Moldavian court, as known, was that the Moldavian courts (and not Ukrainian) had exclusive jurisdiction to hear claims if Claimant against Moldtranselectro and Moldelectrica. Claimant did not submit to the

Tribunal any detailed explanation concerning the statement that these judgements of Moldavian court were allegedly erroneous. To the knowledge of the Tribunal, Claimant's claim filed to Ukrainian court was against the guarantor of the Moldtranselectro's debt, OOO Katko (Ukrainian company), and that Moldtranselectro and Moldelectrica were involved as co-defendants. The Tribunal is not aware of circumstances under which OOO Katko became a guarantor of the Moldtranselectro's debt. On the basis of these facts only, it appears to the Tribunal that there really could be doubts as to whether Ukrainian courts had the right to accept jurisdiction to hear Claimant's claim for recovery of debt from Moldtranselectro/Moldelectrica. However, the Tribunal cannot make a decision on this issue. For the current purposes the Tribunal simply will make a conclusion that Claimant did not submit required evidence that the judgements of the Moldavian courts were clearly erroneous.

370. Finally, the Tribunal does not consider that any of the Moldavian courts' judgements gave rise to violation of Respondent's obligations under the ECT.

(iv) Attribution

371. Arguments of Claimant that Moldtranselectro acted as a body of Respondent in connection with Contract No. 24/02 are clear; less clear is the question what action/inaction of Moldtranselectro is stated by Claimant as having constituted a violation of the ECT. The Tribunal notes that until June 2008 Moldtranselectro did not deny its debt to Claimant, which had arisen in connection with Contract No. 24/02 (i.e. initially in the amount of USD 18.1 million). Precisely the actions listed above (i.e. actions of other bodies of Respondent), according to Claimant, prevented it from recovery of that debt.

372. Indeed, after the rejection by the Moldavian courts in March 2007 of Claimant's claim against Moldtranselectro for recovery of debt (on the grounds of Claimant's non-appearance), Moldtranselectro in its letter of 2 June 2008 advised Claimant that it had transferred the debt to the off-balance accounts. However, precisely this requirement, it seems, was stated in the Decree of the Audit Chamber, which had become final and binding by that moment.

373. Therefore, the Tribunal is not persuaded that any action/inaction on the part of Moldtranselectro (as opposed to other bodies of Respondent) resulted in the impairment of Claimant's Investment. On the contrary, Moldtranselectro, it seems, acted under pressure from other bodies of Respondent not to pay its debt.

374. Even if it is not true, the Tribunal does not find Claimant's argument that Moldtranselectro acted in capacity of a body of Respondent when signing Contract No. 24/02 (and later when it did not repay its debt under Contract No. 24/02) to be convincing. The main criterion for these purposes is not the degree of legal control, which Respondent exercised over Moldtranselectro, but the nature of transaction. The Tribunal notes that Claimant relies on Article 5 of the ILC Draft Articles. Article 5 ILC Draft Articles states as follows:

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

375. Should this Article be applied to the facts of the case, then Moldtranselectro, according to the Tribunal, did not exercise an element of the governmental power when signing Contract No. 24/02. Other private Moldavian entities also could buy (and they bought) electricity from Ukrainian suppliers. Although it is clear that Moldtranselectro was authorized to perform governmental functions in certain relationships, including in respect of providing for parallel

operation with the power grids of neighbour countries, it acted not in that capacity when signing Contract No. 24/02, according to the Tribunal.

376. Contract No. 24/02 was really concluded within the framework of Contract No. 1/01 of 1 February 1999 between Moldtranelectro, Ukrenergo and Claimant (see paragraph 69 above). The very Contract No. 1/01 (as stated in its whereas) was indeed concluded within the framework of certain earlier interstate agreements, including the Agreement on the parallel operation of the power systems of Ukraine and Moldova dated January 1, 1995. However, not necessarily it implies that within the framework of Contract No. 24/02 Moldtranelectro acted as a body of Respondent. According to the Tribunal, commercial nature of Contract No. 24/02 and the private entity status of the two parties thereto (Claimant and Derimen) are more indicative for the purposes of determining in what capacity Moldtranelectro acted.

377. The Tribunal does not believe that *Nykomb Synergics Technology Holding AB v. Latvia*,⁶⁸ relied upon by Claimant, supports Claimant's position. Although it is true that in the said case the State Joint-Stock Company Latvenergo in Latvia performed functions similar to the functions of Moldtranelectro in Moldova and the tribunal in that case attributed actions of Latvenergo to Latvia, these actions were of different nature and were taken in a different context as compared to Moldtranelectro in this case. According to the facts of that case, Latvenergo entered into a number of contracts with local company, SIA Windau, for construction of a power plant in Latvia. The tribunal in that case attributed to Latvia the denial of Latvenergo to pay for electricity generated by these power plants on the basis of the agreed contractual tariff. However, as the tribunal explained, Latvenergo according to the law of Latvia was the only buyer of all electricity generated by private entrepreneurs in Latvia. Further, Latvenergo's contracts with SIA Windau included an obligation of investor to construct a power plant and, therefore, were concluded for the purposes of implementing the policy of the Latvian Government in the sphere of energy supply. Therefore, the circumstances important for qualification of the issue in the current case and in the said case significantly differ.

378. Claimant also refers to Article 8 of the ILC Draft Articles. Article 8 of the ILC Draft Articles states as follows:

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.

379. However, Claimant did not present any evidence that Moldtranelectro acted under a special and direct control of Respondent neither when signing Contract No. 24/02 nor afterwards. Claimant simply indicates the degree of control which Respondent exercised over Moldtranelectro by virtue of possessing Moldtranelectro and under the Moldavian law. In any case, according to the Tribunal, the fact that Moldtranelectro systematically recognized the right of Claimant to payment under Contract No. 24/02 and objected to the findings of the Audit Chamber in the letter of 7 November 2002, shows that Moldtranelectro acted exactly in spite of wishes of Respondent (as represented by the Audit Chamber), at least, after having signed Contract No. 24/02. Therefore, the Tribunal does not believe that Article 8 of the ILC Draft Articles may be somehow related to the conduct of Moldtranelectro.

380. For these reasons, Claimant's argument that actions/inactions of Moldtranelectro should be attributed to Respondent shall be dismissed.

⁶⁸ *Nykomb Synergics Technology Holding AB v. Latvia*, SCC Case No. 118/2001, Award of 16 December 2003.

VI. CLAIMANT'S DAMAGES

381. The Tribunal came to a conclusion that Respondent has violated its obligations to Claimant under the ECT in connection with the adoption of Decree No.1000 by the Government of Respondent and the Decree of the Audit Chamber. In this section the Tribunal will evaluate what losses were incurred by Claimant in consequence of those violations.

382. Claimant claims for compensation of the following alleged damages:

(1) Loss in the amount of debt principal - **MDL 243,577,971.11**. (This sum in Moldovan Leus is an equivalent of USD 20,287,682.29 using the USD rate to Leus as at 1 June 2012. The sum of USD 20,287,682.29 comprises the sum of USD 16,287,185.94 relating to Contract No. 24/02 and the sum of USD 4,000,496.35 relating to Contract No. 53/21).

Plus

(2)

(a) Interest for overdue money liabilities in accordance with Article 619 of Civil Code of the Republic of Moldova in the amount of **MDL 704,664,857.97**.

Or

(b) Interest on the debt principal in accordance with the UNIDROIT Principles in the amount of **MDL 600,103,060.42**

(3) Costs and fees of Claimant's lawyers in the amount of **USD 200,000.00**.

(4) Interest on the costs and fees of Claimant's lawyers in accordance with the UNIDROIT Principles.

(5) Interest at the rate of 20.48% per annum (average bank rate used by Claimant to calculate interest due in accordance with para. 2(b) above) on the sums indicated in pp. (1) and (2) above, for the period starting from 1 June 2012 to the date of the final award.

383. For convenience, we will address each of these alleged losses separately.

A. The debt principal amount

384. The Tribunal established that it does not have jurisdiction to hear Claimant's claim relating to the debt in the amount of USD4,000,496.35 (i.e. claims under Contract No. 53/21). Therefore, the amount of Claimant's possible loss related to the debt principal is limited by USD 16,287,185.94, i.e. Moldtranselectro's debt to Claimant in accordance with Contract No. 06-20 (i.e. which arose under Contract No. 24/02), which remained unrepaid after the repayment by Moldtranselectro of a part of this debt through assignment of the rights to debt to receive payments from RED SUD and RED Centru in Claimant's favor on 30 June 2000 (see paragraphs 81-82 above). Simply stating, this is the cost of Claimant's Investment before the violation by Respondent of its obligations under the ECT.

385. As for the currency of Claimant's claim, the debt principal amount is denominated in Moldovan Leus, although the right to receive payment under Contract No. 06-20 related to the sums denominated in US Dollars. Claimant initially denominated its claim (in respect of the debt principal and interest) in US Dollars. However, later Claimant changed the claims in its Alternative Calculation Statement and denominated the respective sums in Leus. The rationale, as applied to the debt principal, was that in accordance with Article 583(1)(2) of the Civil Code of the Republic of Moldova any payments in the territory of Respondent were to be made in Moldovan Leus at the official exchange rate effective on the date of payment. As the Tribunal

understands, Claimant's argument is that any payments of Moldtranselectro in Claimant's favor would have to be made in Moldovan Leus (in the case of cash payments), therefore Claimant's damages can be more precisely measured in Moldovan Leus.

386. Respondent denies that the Moldavian law may be applied to Claimant's claim. However, the grounds presented by it can be summarized by saying that Respondent was not a party to any contract with Claimant. Respondent does not put any substantiated argument that such claim should be denominated in a different currency.
387. No procedural norm or national legislation may be applied in respect of the Tribunal to the effect that it would oblige the Tribunal to award payments in any particular currency. The Tribunal believes that currency of the award within the framework of this arbitration should reflect to the extent possible the real loss incurred by Claimant. With regard to the debt principal owed to Claimant, it is not possible to establish any particular date, or dates, when Claimant would receive payment from Moldtranselectro, should the violations by Respondent not occur (this issue will be further discussed below). Also, it is not possible to establish with any degree of certainty whether those payments were made in cash or through barter. However, under any circumstances and taking into account the arguments of the parties, the Tribunal believes that it would be reasonable, in principle, to issue an award in respect of the debt principal in Moldovan Leus and not in US Dollars (taking into account additional considerations stated below). As for the date in respect of the exchange rate to be applied when converting the sum of USD 16,287,185.94 in Moldovan Leus, this issue will be discussed below.
388. A more fundamental issue should also be resolved concerning a sum (or sums), which Claimant would receive if the violation of the ECT by Respondent not occur (i.e. as if Decree No.1000 and the Decree of the Audit Chamber were not issued). Under such scenario, Moldtranselectro would be the only debtor of Claimant in respect of the total debt in the amount of USD 16,287,185.94. Since the Tribunal has determined that Respondent did not violate its obligations under the ECT in connection with court proceedings under the Assignment Contracts in respect of RN and RNV, the Tribunal shall not address the issue whether Claimant would recover any part of the said funds from RN or RNV.
389. The first objection put forward by Respondent in respect of the alleged loss incurred by Claimant in the amount of USD 16,287,185.94 is that Claimant never brought to the end the proceedings in connection with its claims against Moldtranselectro in Moldavian State courts (as Claimant either did not appear or did not pay the court fees - see paragraphs 111, 113 above). Therefore, according to Respondent, Claimant did not have a writ of execution, which is an unconditional, marketable and enforceable claim. Basically, as Respondent states, Claimant had no legal grounds at all to submit a claim against Moldtranselectro. Respondent put forward a number of arguments to substantiate that statement. (As the Tribunal understands, the logic of Respondent's position is that, should Claimant seek relief in the Moldavian courts, Moldtranselectro would put forward those arguments in its own defense and the Moldavian courts would sustain them and dismiss the claim of Claimant).
390. Arguments of Respondent fall into two categories. First, Respondent declares that Contract No. 24/02 and various pieces of evidence of electricity supply under that the Contract (certificates of acceptance, customs entries, reconciliation statements concerning debt acknowledgment signed by Respondent) either were not executed properly, formally, and therefore were invalid, or were not sufficient to support the fact of electricity supply. Second, Respondent states that Contract No. 24/02 contradicted the interests of Moldtranselectro and the population of Moldova insomuch that the General Director of Moldtranselectro must have acted under compulsion when signing the Contract, or committed a fraud (i.e. in collusion with Claimant).

391. The Tribunal notes, first, that Moldtranselectro never denied the fact of debt to Claimant in the amount of USD 16,287,185.94 or advanced any of the arguments (in its communications addressed to Claimant), which Respondent advances now. On the contrary, Moldtranselectro repeatedly recognized the debt, *inter alia*, in the Reconciliation Statement signed by it on 17 July 2000 (C36), in its letter to Claimant dated August 22, 2000 (C39) and in the letter to the Audit Chamber dated November 7, 2002 (C95). The Tribunal has already noted that the Moldtranselectro's decision of 2 July 2008 to transfer the debt to off-balance accounts, it seems, was made for the purposes of implementing the instructions issued by the Audit Chamber to the Moldtranselectro's management to "adjust" its debt to Claimant. In other words, one has the impression that if not for the Audit Chamber' instructions Moldtranselectro would continue to recognize the debt.

392. It should be admitted that in its letter of 2 June 2008 Moldtranselectro indicated as a rationale for debt transfer to off-balance accounts not the Audit Chamber' instructions, but the decision of the Moldavian courts to dismiss Claimant's claim against Moldtranselectro (due to non-appearance of Claimant). However, the Tribunal accepts Claimant's arguments that Decree of the Audit Chamber prevented Claimant from achieving success in the Moldavian courts. This follows from the decision of the Economic Court of the Republic of Moldova of 19 November 2002 (mentioned in paragraph 108 above), where the findings of the Audit Chamber were accepted to be final and binding for Claimant. This also follows from the decision of the Economic Court of Appeal of 8 June 2009 according to claim of the General Prosecutor against Claimant in the amount of USD 42 million (see paragraph 118 above), where the court indicated that by virtue of the Audit Chamber' decision:

The fact was confirmed that in 1998 - 2001 JSC Moldtranselectro of the RM unjustifiably made payments to Energoalliance Ltd. (Kyiv, Ukraine) for the following supplies of power: 132.4 million kW (in December 1998), 105.8 million kW (in January 1999) and 106.5 million kW (in February 1999), to total USD 10.8 million for 344.7 million kW cumulatively) (...)

393. The Economic Court of the Republic of Moldova further noted that:

According to the terms of Art. 123 p. 2 of the Code of Civil Procedure of RM, the findings established by the court judgement, which entered into legal force for a previous civil trial in a court of general jurisdiction or a specialized court, are binding for a court reviewing a case, do not require any evidence of their validity and may not be challenged in any other civil trial, in which the same persons participate.

394. Therefore, Claimant is right that it would be senseless to continue defending the claim against Moldtranselectro in the Moldavian courts. Further, the Tribunal agrees with Claimant's argument that if the Decree of the Audit Chamber (and Decree No.1000) was not adopted, Claimant would defend its claim. Therefore, the true reason for the Moldtranselectro's decision of 2 June 2008 to transfer debt to off-balance accounts was the Decree of the Audit Chamber and not Claimant's decision not to defend its claim.

395. There is another reason, according to the Tribunal, for Moldtranselectro not to advance any objections in respect of Claimant's claims in the Moldavian courts, which are currently advanced by Respondent. The reason is that to making such objections Respondent would have to accept that its own management acted fraudulently or, at least, imprudently.

396. For these reasons, the Tribunal comes to a conclusion that Moldtranselectro would not succeed in defending itself from Claimant's claim, if not for the Decree of the Audit Chamber.

397. Even if this conclusion is not correct, i.e. Moldtranselectro would advance objections to Claimant's claim, none of Respondent's arguments is convincing *per se* for the Tribunal. In particular, Respondent's argument that the director of Moldtranselectro acted fraudulently is

absolutely unsubstantiated (the Tribunal does not agree that the objective financial characteristics of Contract No. 24/02 provide evidence of fraud). There is no evidence that the said director was ever found guilty or even prosecuted by the criminal justice authorities in Moldova in connection with Contract No. 24/02.

398. Therefore, Respondent's argument that Claimant never possessed a claim against Moldtranselectro shall be dismissed.

399. The second objection put forward by Respondent in respect of the causal connection between violations of the ECT and the alleged loss in the amount of USD 16,287,185.94 is that Moldtranselectro was insolvent and would not be able to repay the debt to Claimant, supposing it wished to do so. Further, in case Claimant tried to submit an application to enforce the judgment against assets of Moldtranselectro, it would fail since those assets were state-owned and Moldtranselectro possessed only the right of operational management (see paragraph 329 above).

400. Obviously, in the middle of 2000 Moldtranselectro had financial difficulties and for that very reason the debt to Claimant arose. However, besides that the Tribunal has very limited information on financial standing of Moldtranselectro in 2000. The Tribunal notes that notwithstanding the debt under Contract No. 24/02, Moldtranselectro continued to make payments to Derimen for electricity supply under Contract No. 24/02 during 2000. Therefore, Moldtranselectro was able to make payments to some creditors through barter. Further, in case Decree No.1000 was not adopted, Moldtranselectro certainly would continue its economic activity after 2000 and possibly would accrue profit and make payments to Claimant from that profit.

401. As for possible enforcement against assets of Moldtranselectro, surely, it is theoretically probable that Moldtranselectro would not have sufficient assets to settle the debt to Claimant or that Claimant's claims would entail bankruptcy proceedings against Moldtranselectro in consequence of such proceedings the claims would be satisfied only in part. However, in this case it is obvious that taking into account the strategic role of Moldtranselectro's activities for the Moldova's economy and the status of Moldtranselectro as a State-owned enterprise, in reality Respondent would have to provide financial support to Moldtranselectro. Dr. Schramm notes as follows:

Usually the state does not bear responsibility for debts of such enterprises in respect of third parties, but per se ought to cover losses.

402. Indeed, this is supported by Respondent's order in Decree No.1000 in respect of the Ministry of Industry and Energy and the Ministry of Finance to submit proposals to the Government on repayment of Moldtranselectro's debt. Apparently, at the moment of adoption of Decree No.1000 Respondent was not ready to allow a direct liquidation of Moldtranselectro in connection with insolvency (i.e. to reject claims of a part of Moldtranselectro's creditors).

403. The Tribunal is not persuaded in accuracy of Respondent's argument that enforcement against assets of Moldtranselectro would be impossible in accordance with Moldavian law. The argument of Respondent is not supported with any detailed analysis of the respective provisions of Moldavian law and Dr. Schramm (who puts this argument on behalf of Respondent) does not claim to be an expert in Moldavian law on bankruptcy or enforcement procedures in Moldova. The Tribunal notes that this argument, it seems, may be applied to Moldelectrica as well (which is also a State-owned enterprise); however, that argument was not put forward by Moldelectrica or the Ministry of Finance of Moldova during proceedings in Ukrainian courts in 2012 in connection with the seizure of the high voltage transmission lines of Moldelectrica in Ukraine.

404. In conclusion, although the Tribunal agrees that there are certain doubts as to when and in what possible form Claimant would eventually receive payments from Moldtranselectro, the

Tribunal assumes that one way or another Claimant would receive the debt in full, in the amount USD 16,287,185.94.

405. Therefore, Respondent's arguments, which based on the alleged insolvency of Moldtraselectro, shall be dismissed.
406. The third and the last principal objection of Respondent in respect of this element of the loss incurred by Claimant is that the latter succeeded in filing claims against Moldelectrica (and against Moldtraselectro) to Ukrainian courts for recovery of the same debt principal, which it claims to be recovered in this arbitration (USD 20,287,682.29), as well as inflationary costs in the amount of USD 29,989,248.86 in accordance with the procedural law of Ukraine. Consequently, there is a risk of double compensation.
407. Respondent puts this argument forward also in other context, namely, that Claimant seeks a repeated hearing before the court in respect of a dispute, which has already been (or currently is) the subject of court proceedings in other place and, hence, Claimant should not be allowed to bring its claim in the current arbitration proceedings, based on the principle of *lis pendens*. However, the Tribunal assumes that this argument is without grounds as these arbitration proceedings differ from court proceedings on the claims filed to Ukrainian courts in terms of the subject matter and the parties involved.
408. As for Respondent's argument concerning double compensation, the Tribunal in principle agrees that if Claimant has collected the Moldtraselectro's debt in the amount of USD 16,287,185.94, then Claimant's loss has reduced accordingly. However, it seems, Claimant has not performed any such collection. Claimant's claims in respect of the sums indicated by Respondent were satisfied in Ukraine, however, no voluntary payments were made upon these judgements and Claimant could not succeed in getting Moldavian State courts to enforce judgements against Moldelectrica in respect of USD 20,287,682.29 (see paragraph 116 above). According to the Tribunal, this implies that Claimant also will not be able to provide for enforcement of the judgement in respect of inflationary costs in the amount of USD 29,989,248.86 in Moldova. The Tribunal also came to a conclusion that it is highly improbable that Moldelectrica or Moldtraselectro will ever pay any part of the compensation awarded by these two judgements, or that Claimant will be able to collect any part of the compensation awarded by these two judgements against assets owned by Moldelectrica or Moldtraselectro, whether in Moldova or elsewhere. Therefore, Respondent's argument concerning double compensation shall be dismissed.
409. The Tribunal notes that Respondent's argument concerning possible double compensation was advanced only in respect of two judgements of Ukrainian courts above. Respondent did not state that the enforcement of the Ukrainian court's judgement against Moldelectrica's assets in Ukraine in the amount of USD 6,249,842 (mentioned in paragraph 115 above) had entailed or would entail double compensation. However, the Tribunal addressed this issue. The Tribunal notes that Claimant has accepted that the current court proceedings in Ukraine concerning enforcement "will allow to recover only a part of the debt in the amount of about USD 5 million" (see paragraph 5.7 of the Reply). However, the legal grounds for the judgement in respect of the sum of USD 6,249,842 are not clear to the Tribunal. The Tribunal is only aware that this sum makes "three percent per annum". The Tribunal concludes that Respondent has not submitted evidence that any funds received by Claimant upon such judgement and the funds claimed in the current arbitration proceedings would constitute double compensation.
410. Finally, the Tribunal accepts that it is no longer open to Claimant to enforce the initial debt in the amount of USD 16,287,185.94 as the result of the violation of the ECT by Respondent. Therefore, Claimant is entitled to an award of reimbursement of this sum with its conversion into Moldovan Leus.

411. As for the date for the purposes of calculation of the sum to be converted in Moldovan Leus, the proper date should be, in principle, the date when Claimant would have received this sum. However, for the reasons mentioned above it is impossible to establish any such date. This also refers to the interest, which Claimant would be entitled to receive (discussed in the following section). The Tribunal notes that even without violation of the ECT by Respondent, Claimant had to defend against claims of the General Prosecutor for invalidation of the Assignment Contracts in respect of RN/RNV, where the final judgement against Claimant was issued not earlier than the mid-2003. In addition, as Respondent stated, Claimant had never actively struggled for collecting from Moldtranselectro the balance of the debt in the amount of USD 16,287,185.94, though it had such an opportunity already in the mid-2000. Although the adoption of Decree No.1000 on 2 October 2000 could be one of the reasons for Claimant's reluctance to undertake any steps to collect the debt, the Tribunal notes that all the same Claimant initiated proceedings against Moldtranselectro on 20 March 2001 (this particular proceeding was suspended for some reason). The Tribunal comes to a conclusion that Claimant made a decision to grant additional time to Moldtranselectro. There are no reasons to assume that in the absence of Decree No.1000, Claimant would not also grant additional time to Moldtranselectro.
412. For these reasons, the Tribunal considers it expedient to assume (as for the purposes of establishing the date of converting the debt principal in the amount of USD 16,287,185.94 into Moldovan Leus, as for the purposes of calculating the respective interest, to which Claimant is entitled (to be discussed in the following section)) that Claimant would receive a sum of USD 16,287,185.94 on 1 August 2002, i.e. soon after the date of the adoption of the Audit Chamber' Decree. While establishing this date, the Tribunal understands that Claimant could have recovered a part of the debt in the amount of USD 16,287,185.94 (that particular part which was the subject matter of the assignment on the part of RN/RNV) after 1 August 2002, but equally it could have recovered the other part of the debt (due from Moldtranselectro) before 1 August 2002. Unfortunately, the Tribunal cannot establish precise amounts in respect of these parts (for the reason mentioned in the end of para. 85 above) and in any case the precise dates, on which Claimant would receive these sums, may be estimated by the Tribunal with high degree of approximation. Therefore, the Tribunal prefers to establish 1 August 2002 as a "middle" date, on which the whole sum would have been received.
413. According to the information published by the National Bank of Moldova, as at 1 August 2002, one US Dollar equaled 13.6233 Moldovan Leus. The sum of USD 16,287,185.94 using this rate would equal MDL 221,885,220. However, the Tribunal notes that Claimant required that the payment of the debt principal be made in Moldovan Leus using the rate as at 1 June 2012 (i.e. MDL 12.0062 = USD 1). Should this rate be applied, the sum of USD 16,287,185.94 in Moldovan Leus (MDL) will be MDL 195,547,212. Taking into account that Claimant required that the payment be made only based on this rate, the Tribunal limits the debt principal awarded to Claimant by the sum of **MDL 195,547,212**.

B. Interest

414. As summarized in paragraph 382 above, Claimant sets up a claim for repayment of interest on the basis of Article 619(2) of the Civil Code of the Republic of Moldova or, alternatively, Article 7.4.9(2) of the Principles of International Commercial Contracts ("UNIDROIT Principles"). Aggregate amounts claimed by Claimant (including the interest on the debt under Contract No. 53/21), equal MDL 704,664,857.97 (about USD 59 million according to the exchange rate as at 1 June 2012) and MDL 600,103,060.42 (about USD 50 million), respectively.

415. Calculation of the amount of Claimant's claim on the basis of the Civil Code of the Republic of Moldova was made according to the exchange rate established in Article 619(2) of the Civil Code of the Republic of Moldova, i.e. 9 percentage points over the base rate of the National Bank of Moldova. Claimant calculated the rate for each month starting from July 1999 to the end of May 2012 and applied the rate to the debt principal for each month calculated in Moldovan Leus according to the exchange rate effective at that time. For the purposes of its alternative calculation on the basis of the UNIDROIT Principles Claimant used, according to its statement, an average bank short-term lending rate to prime borrowers prevailing for Moldovan Leus in Moldova (taken from the tables published by the National Bank of Moldova). Claimant applied this rate (which varied each month) to the debt principal amount for the period from 8 August 2000 to 1 June 2012.
416. Respondent declares that neither the Civil Code of the Republic of Moldova nor the UNIDROIT Principles can be applied to Claimant's claim in the current arbitration. However, Respondent does not suggest either any alternative procedure for calculation of interest or any comments in respect of the periods, for which Claimant demands the interest to be paid.
417. The Tribunal assumes that, first, in principle, it is reasonable to award Claimant the interest on the debt principal in the amount of MDL 195,547,212. Claimant did not use these funds over a long period of time and the interest on this sum, or income, which Claimant would have earned if the funds had been used in its commercial activity, constitutes a part of the loss incurred by Claimant and shall be reimbursed by Respondent.
418. However, the Tribunal is not persuaded by Claimant's argument that the Tribunal should apply Article 619(2) of the Civil Code of the Republic of Moldova. The concrete ground relied upon by Claimant when putting this argument forward remains unclear to the Tribunal, except for the fact that the debt principal is denominated in Moldovan Leus. The Tribunal is not of the opinion that the norms of procedural or substantive law contained in the Civil Code of the Republic of Moldova are binding for the Tribunal when estimating the loss inflicted by violations of the ECT by Respondent (including the interest as the component of that loss). Possibly, Claimant's argument is based on the assumption that it would claim interest from Moldtranselectro in accordance with Civil Code of Moldova, should it have to defend the claim for debt recovery in the Moldavian courts. However, for the reasons mentioned by the Tribunal above, it is not at all obvious that Claimant would have to defend the claim until the moment of its final Decree in the Moldavian courts. It is more likely that Claimant and Moldtranselectro would achieve an amicable settlement through negotiations, which imply a settlement through barter. For these reasons the Tribunal dismisses Claimant's argument that the interest should be calculated in accordance with the Civil Code of the Republic of Moldova.
419. As for the application of the UNIDROIT Principles, in principle, the rate of interest envisaged in Article 7.4.9(2), i.e. average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, the Tribunal considers it to be expedient in this case. In the absence of objections on the part of Respondent concerning the alternative procedure to be applied for calculation of interest, the Tribunal, therefore, will apply Article 7.4.9(2) of the UNIDROIT Principles.
420. However, Claimant's estimates are not convincing for the Tribunal. The Tribunal does not consider relevant the receipt by Claimant of a compensation for not using the debt principal amount (USD 16,287,185.94) starting from 8 August 2000. For the above reasons the Tribunal considers it to be justified to award the interest on the total amount of the debt principal (MDL 195,547,212) only starting from 1 August 2002.
421. As for the rate used by Claimant, the Tribunal notes that it was taken from the table published by the National Bank of Moldova (**C204**). The rate selected by Claimant is named in the table as "average bank lending rate in national currency". Although this wording does not precisely

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coincide with the definition in Article 7.4.9(2) of the UNIDROIT Principles, i.e. “average bank short-term lending rate to prime borrowers”, still it seems to be reasonably close to that definition. In the absence of any argument on the part of Respondent that the rate used by Claimant is improper or of any alternative rate proposed by Respondent, the Tribunal accepts Claimant’s rate.

422. Therefore, the Tribunal award the payment of interest on the debt principal in the amount of MDL 195,547, 212 in accordance with Article 7.4.9(2) of the UNIDROIT Principles, calculated as follows (using the information included in the table published by the National Bank of Moldova, presented by Claimant):

Period, amount and interest rate	Amount in Moldovan Leus
1 August 2002 - 31 December 2002 (153 days); debt amount - MDL 195,547,212; average rate for the period – 21.75%	17,828,280
1 January 2003 - 31 December 2003; debt amount - MDL 195,547,212; average rate for the period – 19.18%	37,505,955
1 January 2004 - 31 December 2004; debt amount - MDL 195,547,212; average rate for the period – 20.96%	40,986,696
1 January 2005 - 31 December 2005; debt amount - MDL 195,547,212; average rate for the period – 18.93%	37,017,087
1 January 2006 - 31 December 2006; debt amount - MDL 195,547,212; average rate for the period – 18.18%	35,550,483
1 January 2007 - 31 December 2007; debt amount - MDL 195,547,212; average rate for the period – 18.85%	36,860,649
1 January 2008 - 31 December 2008; debt amount - MDL 195,547,212; average rate for the period - 20.96%	40,986,696
1 January 2009 - 31 December 2009; debt amount - MDL 195,547,212; average rate for the period – 20.31 %	39,715 639
1 January 2010 - 31 December 2010; debt amount - MDL 195,547,212; average rate for the period – 16.25%	31,776,422
1 January 2011 - 31 December 2011; debt amount - MDL 195,547,212;	28,100,134

average rate for the period – 14.37%

1 January 2012 - 31 May 2012 (152 days); debt amount – MDL 195,547, 212; average rate for the period – 14.23%	11,587,967
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TOTAL	357,916,008
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C. Costs and fees of Claimant's lawyers

423. Claimant provided neither any breakdown of the sum of USD 200,000, which it claims as the costs, expenses and fees of its lawyers nor any evidence that this sum was spent. However, taking into account the duration and complicated nature of these proceedings, the Tribunal finds this sum to be justified.

424. The majority of demands within Claimant's claim have been satisfied, and the Tribunal assumes that for the purposes of Article 40.1 of the UNCITRAL Arbitration Rules, Respondent is the losing party. In this respect, the Tribunal awards the payment of **USD 200,000** in favour of (Respondent)⁶⁹.

D. Interest on the costs and fees of the lawyers

425. The Tribunal considers Claimant's claim for the payment of interest on the amount of costs, expenses and fees of its lawyers to be unjustified. In any case, given the lack of any information on how and when the sum of USD 200,000 was spent, it does not seem possible for the Tribunal to calculate any interest. For these reasons this claim shall be dismissed.

E. Interest for the period from 1 June 2012 to the date of the final award

426. The above claim of Claimant for the payment of interest includes the calculation only for the period until 1 June 2012, since this date immediately precedes the date when Claimant submitted the final calculation of its damages included in the of Alternative Calculation Statement. The Tribunal has already made a principal decision to award the payment of interest to Claimant on the basis of the UNIDROIT Principles. There are no grounds for this interest accrual period to end on 1 June 2012. The only obstacle to award the payment of interest for the period after 1 June 2012 is that the Tribunal does not have information on the average interest rate on credits in Moldova for the period after 1 June 2012 (certainly, Claimant has been able to submit such information only in respect of the period until the date of its Alternative Calculation Statement).

427. The solution of this problem as proposed by Claimant is such that the Tribunal should apply an average rate out of the rates applied by Claimant in respect of that period until 1 June 2012 (i.e. starting from 2000). However, the Tribunal prefers to apply an average interest rate only in respect of 2011. Therefore, it awards the payment of interest on the debt principal starting from 1 June 2012 to the date of this Award, to be calculated as follows:

Period, amount and interest rate

In Moldovan Leus

⁶⁹ Translator's note: Possibly an error. It should read Claimant (?).

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From 1 June 2012 to 25 October 2013 (512 days); 39,417,175
debt amount - MDL 195,547,212;
interest rate (average rate for 2011) – 14.37%

428. The Tribunal dismisses the additional claim of Claimant for the payment of interest on the amount of interest awarded to be paid by 1 June 2012.

F. Arbitrators' costs and fees

429. The Tribunal received USD 340,000 cumulatively as advances for its fees and costs. These advances were paid exclusively by Claimant. Starting from the moment of payment of this sum, the interest thereon received by the Tribunal totalled USD 219.

430. The Tribunal made the following expenses:

Travel expenses (travel and accommodation)	USD 13,957.91
Rent of premises in the ICC Hearing Center, Paris	USD 15,387.34
Courier delivery services	USD 2,977.83
Other expenses (international phone calls, copying)	USD 1,356.2
TOTAL	USD 33,679.28

431. As for the fees of the Tribunal members, since the ILC is a competent body and in accordance with Article 39(2) of the UNCITRAL Arbitration Rules, the Tribunal establishes the total amount of its fees according to the ICC's Schedule of Fees for arbitrators. Taking into account the amount of a claim (initially USD 20,287,682 without interest and inflation), the complicated nature of the reviewed issues and the time spent by the Tribunal members, the Tribunal establishes the total amount of arbitrators' fees at USD 310,000. These fees will be allocated between members of the Tribunal as follows:

Dominic Pellew (50%)	USD 155,000
Mikhail Yuryevich Savransky (30%)	USD 93,000
Viktor Kornelyevich Volchinsky (20%)	USD 62,000
TOTAL	USD 310,000

432. The amount of fees and costs of the Tribunal members totals USD 343,679.28, which is somewhat higher than the advance paid plus the interest (USD 340,219). In view of the insignificance of this difference, the Tribunal will not require the parties to make an additional payment. Instead, the Tribunal establishes that the arbitrators' fees will be reduced accordingly. Therefore, the total amount of the fees to be paid equals USD 306,539, while the fees of each member of the Tribunal will be as follows:

Dominic Pellew	USD 153,269
Mikhail Yuryevich Savransky	USD 91,962
Viktor Kornelyevich Volchinsky	USD 61,308

433. To avoid doubts, the fees of the Tribunal Secretary (Izabella Levonovna Sarkisyan) are included in one part of the above fees of Dominic Pellew.

434. Claimant did not request to issue an order on reimbursement by Respondent to Claimant of the advances paid by Claimant. However, in accordance with Article 40.1 of UNCITRAL Arbitration Rules, the parties agreed that "in principle the arbitration costs should be paid by the losing party", at that the Tribunal is entitled to allocate such costs between the parties. The Tribunal interprets this norm in such a way that the Tribunal is obliged to decide what Party shall pay the arbitration costs and to include an instruction in its Decision to provide for practical implementation thereof.

435. The Tribunal does not consider that with regard to the circumstances, the arbitration costs and fees should be allocated in a way other than in Claimant's favor. Therefore, the Tribunal orders Respondent to reimburse to Claimant the full amount of the advances paid by Claimant, i.e. **USD 340,000**.

VII. DECISIONS

436. For the reasons state forth above, the Tribunal issues the following decisions and orders:

- (i) Respondent, the Republic of Moldova, to pay in Claimant's favor, Energoalliance Ltd., the sum of **MDL 195,547,212**, being the cost of Claimant's Investments;
- (ii) In addition, Respondent to pay in Claimant's favor the sum of **MDL 357,916,008** as interest on the sum of MDL 195,547,212 for the period through 31 May 2012;
- (iii) In addition, Respondent to pay in Claimant's favor the sum of **MDL 39,417,175** as interest on the sum of MDL 195,547,212 for the period starting on 1 June 2012 through the date of the Award;
- (iv) In addition, Respondent to pay in Claimant's favor the sum of **USD 200,000** as reimbursement for the costs, fees and services of Claimant's lawyers;
- (v) In addition, Respondent to pay in Claimant's favor the sum of **USD 340,000** as reimbursement for the advances on costs paid by Claimant for the costs and fees of the Tribunal;
- (vi) All other claims shall be dismissed.

Dominic Pellew Chairman of the Tribunal

[Note: Mr. Pellew does not concur with certain conclusions of the majority of the Tribunal members in respect of jurisdiction (i.e. Section IV of this Arbitral Award) and therefore a dissenting opinion relating to these aspects is attached hereto.]

Mikhail Yuryevich Savransky
Member of the Tribunal

Viktor Kornelyevich Volchinsky
Member of the Tribunal