

SCC Arbitration V (2012/175)

In the matter of an arbitration pursuant to the Arbitration Rules 2010 of the Arbitration Institute
of the Stockholm Chamber of Commerce

between

STATE ENTERPRISE 'ENERGORYNOK" (UKRAINE)

and

THE REPUBLIC OF MOLDOVA

FINAL AWARD

Nancy B. Turck, Chairperson

Prof. Dr. Rolf Knieper, Arbitrator

Joseph Tirado, Arbitrator

Stockholm, Sweden 29 January 2015

Representing Claimant:

Sergei Adamovitch Voitovich
Grischenko and Partners
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Representing Respondent:

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I INTRODUCTION

A. The Parties

1. The Claimant, State Enterprise “Energorynok” (Ukraine) (“Claimant” or “Energorynok”), is a Ukrainian state enterprise, registered on 8 June 2000, and having its office at Simon Petlyura str. 27, 01032 Kyiv, Ukraine. The Claimant is represented in this arbitration by the duly authorized attorneys mentioned on the cover page.
2. The Respondent is the Republic of Moldova (“Respondent” or “Moldova”), a sovereign state, addressed through Government House, Piata Marii Adunari National 1, Chişinău MD 2033 and the Ministry of Justice of the Republic of Moldova, Str. 31 August 1989, 82 Chişinău MD 2012. The Respondent has been represented in this arbitration by the duly authorized attorneys mentioned on the cover page.
3. The Claimant and the Respondent are hereinafter collectively referred to as the “Parties”.

B. Commencement of the Arbitration

4. On 20 December 2012 the Claimant filed a Request for Arbitration with the Stockholm Chamber of Commerce (“SCC”) under Article 2 of the 2010 Arbitration Rules of the SCC (hereinafter the “SCC Rules”) and under Article 26(4)(c) of the Energy Charter Treaty (hereinafter the “ECT”). The ECT entered into force for Moldova on 16 April 1998 and for Ukraine on 27 January 1999.¹
5. SCC Rules, Article 5, permits the Secretariat of the Arbitration Institute of the SCC (hereinafter the “SCC Secretariat”) to set a time for the Respondent to file an Answer. By letter dated 21 December 2012, the SCC Secretariat set a one month time limit, or until 21 January 2013, as the date for the Respondent to submit an Answer.
6. On 21 January 2013, Lilian Apostol, Agent for the Government from the Ministry of Justice of Moldova, requested from the SCC, under SCC Rules, Article 7, a two month extension of time, until 21 March 2013, for the Respondent to file an Answer. The Respondent cited the time to gather materials, as well as the Government’s requirement for public selection of lawyers for international arbitrations, a procedure that Mr. Apostol wrote could take more than two months.

¹ www.encharter.org, “Members and Observers”

7. On 24 January 2013, the Claimant notified the SCC Secretariat that it objected to the Respondent's request, citing, *inter alia*, that the Respondent had filed its request on the last day it was to have filed its Answer, that it had not yet commenced the public selection of counsel, that it was well aware of the dispute and that the Answer, being limited, does not require a respondent to set out its position of the case.
8. By letter dated 28 January 2013, the SCC Secretariat granted the Respondent until 11 February 2013 to file its Answer to the Request for Arbitration. The Respondent filed its Answer on that date.
9. The Claimant, on 27 February 2013, commented on the Answer, stating that while the Respondent had jurisdictional objections, the Respondent had not disclosed the essence of the objections. The Claimant requested the SCC to proceed with the case. By letter dated 15 March 2013, the SCC advised the Parties that the SCC "*does not manifestly lack jurisdiction over the dispute*" and that it had appointed the Chairperson.

C The Arbitral Tribunal

10. The Claimant appointed as an arbitrator:

Mr. Joseph Tirado
WINSTON & STRAWN
CityPoint
One Ropemaker Street
London EC2Y 9HU
United Kingdom

11. The Respondent appointed as an arbitrator:

Prof. Dr. Rolf Knieper
Ferrière
F-21530 St. Andeux
France

12. The Arbitration Institute of the SCC on 15 March 2013 appointed as Chairperson:

Nancy B. Turck
Flat 3, 40 Lower Sloane Street
London SW1W 8BP
United Kingdom

13. The SCC Secretariat referred the case to the Tribunal on 2 May 2013.

D Background of the Dispute

14. On 20 March 1993, the Governments of Ukraine and Moldova signed an Agreement on Cooperation in the Field of Electricity (CCLA-117). That agreement, in Article 2.4, stated that the *“Contracting Parties through the relevant organizations shall in good time agree on the procedure of the technical exploitation of the existing and under construction power installations...”*.
15. On 20 February 1995, pursuant to the Agreement referenced in Paragraph 14 above, the Ministry of Energy, Industry and Electrification of Ukraine (hereinafter the “Ukrainian Ministry”) and the State Department of Energy Industry and Energy Resources of the Republic of Moldova (hereinafter the “Moldovan Ministry”) entered into an Agreement on the Parallel Operation of the Energy Systems of Ukraine and Moldova (the “APO”).²
16. The APO, in Article 4.3, provides that provision of surplus energy shall be compensated. *“Any deviation from the agreed flow balance shall be charged in money at a three-area tariff rate, subject to the following tariff rate area ratio. The agreement reached upon the tariff rate shall be documented.”* APO Article 4.4 provides for compensation for deviations from the agreed balance also to be paid in kind. The Claimant’s claim, however, relies on Article 4.3.
17. The APO, in Article 7.3 provides that *“[I]f the Parties are unable to reach a mutual agreement, all disputes and differences arising between them out of or in relation to this Agreement shall be resolved by a state arbitration court in the state of the Plaintiff’s choice.”*³ APO Article 7.4 states that *“[T]he arbitration’s court shall be final and binding upon both Parties.”*⁴
18. APO Article 9.3 provides that *“[T]he rights and obligations of the Parties under this Agreement may not be transferred thereby to any third party without mutual consent.”*

² CC-8, CC-9, CC-10 and CCLA-112. The Respondent disputed the validity of the Claimant’s copy of the APO (CC-8) and that the APO could be an exhibit, rather than a legal authority. Hence, the Respondent submitted its own copy as a legal authority (CCLA-112). The Claimant subsequently submitted two other certified copies of the APO (CC-9 and CC-10). The text of all the copies provided by both Parties in this arbitration is identical (and the Parties so agree) save for an identification number. The dispute over this identification number, or whether the APO is a treaty or an interstate agreement, or a legal authority or an exhibit, is not relevant, in the Tribunal’s view, for the Tribunal’s analysis in this arbitration.

³ The APO is written in Russian. The Claimant’s translation of the APO, (CC-8) capitalizes the word “Plaintiff” whereas the Respondent contends the word should not be capitalized in translation. The Tribunal believes the meaning is clear, irrespective of whether the word is capitalized or not.

⁴ Both Parties pointed out that, in the former USSR, an “arbitration” court is not an arbitration tribunal but rather an “arbitrazh” court dealing with economic issues. See SoD ¶116 and SoR fn 56.

19. APO Article 10 vests “[t]he performance of the technical and operational conditions” arising from the APO in two state enterprises, the National Control Centre of Ukraine (“NCC”) for the Ukrainian Ministry and Moldenergo SC (“Moldenergo”) for the Moldovan Ministry. Article 10 also contains the bank account sort codes for each of those two state enterprises. As will be discussed below, the Parties are agreed that the APO remains in force; it appears to be operated by the Ministries and, on the Ukrainian side, Ukrenergo as to execution and transmission.
20. Moldtranselectro is a state enterprise which, as a result of Decision No. 1059 of the Moldovan Government of 13 November 1997, became a successor to Moldenergo for electricity transmission as a result of the reorganization of Moldova’s energy sector (CC-204).
21. On 15 April 1998 the National Energy Company “Ukrenergo” was created as a state enterprise by Order No. 54 of the Ukrainian Ministry of Fuel and is the successor to NCC, including for purposes of APO Article 10 (CC-113).
22. In October 1998, there occurred an overflow of electricity in the amount of 50,000,000 kWh (the “Overflow”) from Ukraine to Moldova, triggering, under APO Article 4.3, compensation due in the amount of USD1,662,297.81. The fact of the Overflow and the amount of compensation due for that Overflow are not in dispute. The dispute in this arbitration involves, *inter alia*, whether compensation has already been made and, if not, from and to whom the compensation is owed.
23. On 25 November 1998, (a) Ukrenergo as Principal, (b) the International Fund for Emergency Assistance for the Black Sea Economic Cooperation States (the “Fund”) as the Guarantor and (c) Moldtranselectro entered in to Surety Agreement 463/01 (CC-169) whereby the Fund guaranteed to NPC [Ukrenergo] Moldtranselectro’s obligations to return “*the unscheduled received electricity..in the amount of 50,000,000 kWh*”. Should Moldtranselectro not fulfill its obligations by 28 November 1998, the Fund agreed to repay the existing indebtedness to NPC [Ukrenergo] by the supply of equipment equal to the value of the indebtedness. This Surety Agreement was one of several surety agreements arising out of the APO.
24. It appears that Neptun, subcontracted by the Fund, in 1999 delivered equipment to a “*structural subdivision*” of Ukrenergo⁵. According to the Claimant, as Ukrenergo had no contracts with the Fund, “*the equipment was capitalized off [Ukrenergo’s] balance sheet*”. (CC-172). When 80% of the obligation under the Surety Agreement was repaid through equipment, the Arbitration Court of Kiev, on the petition of Ukrenergo⁶, declared in December 1999 that the Surety Agreement was

⁵ SoD ¶143, Day 2/132, citing CC- 237 through CC-242.

⁶ CC-178.

null and void on the grounds that the Ukrainian Ministry had not authorized Ukrenergopro to sign the Surety Agreement.⁷ The Claimant asserts that, following the nullification of the Surety Agreement, the equipment was returned. The Respondent acknowledges equipment was returned but contends that it was equipment supplied by Moldova to Ukraine during the same period pursuant to other contracts than the Surety Agreement and, thus, compensation for the Overflow has been fully paid.⁸

25. Pursuant to Resolution No. 755 dated 5 May 2000 of the Ukrainian Cabinet Ministers, Energorynok, until then a division of Ukrenergopro, was established as a separate state-owned enterprise (CC-9). The Claimant's functions are set out in the ministerial resolution and a Charter⁹. The Claimant states, in Paragraph 56 of its SoR, that the transfer to it of the debt due by Moldova for the Overflow under the APO "was separately formalized by the Separation Balance Sheet"¹⁰ approved by the Ukrainian party to the APO—the Ministry of Fuel and Energy of Ukraine, the appropriate Separation Protocol¹¹ and by the Order No. 23 of Ukrenergopro¹²". The Claimant summarizes in SoR Paragraph 57 that, by virtue of these three documents, it is the "due legal successor of the receiver of the debt of the Moldova party under the APO" and thus has a right to a claim of money conferred by contract.¹³
26. The Claimant's counsel, at the Hearing in this arbitration held on 9-10 September 2014 in Stockholm, stated that the Claimant had over 5 years unsuccessfully tried to obtain compensation from Moldtranselectro. Having failed in that attempt, the Claimant brought an action in 2002 in the Economic Court in Kiev against the Moldovan Ministry (case No. 27/52 *Energorynok v. The Ministry of Energy Industry of the Republic of Moldova and InTA-AUDIT*).¹⁴ On 25 December 2002, the Kiev court ordered the Moldovan Ministry to pay the Claimant USD1,745,412.71 and litigation costs (hereinafter the "2002 Decision").¹⁵ The amount of money awarded the Claimant pursuant to the 2002 Decision is hereinafter referred to as "the Debt". The Claimant states that,

⁷ CC-127.

⁸ RPHM ¶15; Day 2/151.

⁹ CC-119 and CC-199. The Claimant's submission of excerpts of the Charter (CC-119) referenced Article 7, entitled "Purpose and Objects of the Enterprise Activities" as well as Articles 9-11 and 14-26. The Respondent's submission of excerpts of the Charter excluded Article 7 but included Articles 4, 6, 12-13, 16, 20, 27, 29-35, 42 and 46-53. Neither Party submitted the Claimant's complete Charter.

¹⁰ C113.

¹¹ C114.

¹² CC-2, p.1 last paragraph; CC-121.

¹³ In its written Hearing Presentation, the Claimant, on page 7, stated that it became the legal successor of the Debt only on 1 July 2000 in compliance with the Separated Balance Sheet.

¹⁴ Day 1/163-164. The Respondent, on Day 2/88-89, noted the Claimant by 2002 only had been in existence for 2, not 5, years. The record shows other parties attempted to seek payment of the Debt prior to 2000.

¹⁵ CC-2.

as a result of the 2002 Decision, its claim for money is not only a right conferred by contract but also by law.

27. Beginning in 2003, the Claimant sought recognition and enforcement of the 2002 Decision in Moldova. According to SoC Paragraphs 28-63, various judges remanded the case five times over five years for a new trial. On 4 July 2009, the Supreme Judicial Chamber of Moldova denied the appeals of two Moldovan ministries, thereby giving enforcement to the 2002 Decision (the “2009 Decision”). As described in the Claimant’s various pleadings, a Moldovan state enterprise, Energoatom, claimed a debt from the Claimant and transferred that debt to Remington Worldwide Limited who, in turn, transferred the debt subsequently to two other parties, the last being Pinar-Com, a Moldovan entity.
28. On 10 July 2009 the Claimant submitted to the Enforcement Bureau of Buiucani, Chisinau (hereinafter the “Enforcement Bureau”) an application for the initiation of executive proceedings to recover, pursuant to the 2009 Decision, the amount of the Debt plus interest (CC-41). The Moldovan Ministry of Economy issued a payment order to the Enforcement Bureau (dated 15 December and received (together with the funds) on 17 December 2009) to pay the Claimant in accordance with the enforcement order¹⁶. On 16 December 2009, pursuant to a request for an interim order by Pinar-Com, a Moldovan court ordered the attachment in favor of Pinar-Com of the funds destined for the Claimant at the Enforcement Bureau (CCB-56). Following a hearing on 24 December 2009, at which the Claimant was not present, and pursuant to a court order, the funds were transferred to Pinar-Com.
29. The Claimant appealed the 24 December 2009 decision in favor of Pinar-Com. There followed a series of court procedures; on 22 November 2011, the District Economic Court of Chisinau dismissed Pinar-Com’s claim (CC-94). As Pinar-Com lacked collectible assets, the state enforcement officer acknowledged the impossibility of enforcement of the decision in favor of Energorynok and closed the enforcement proceedings on 23 May 2013 (CC-95).
30. On 19 September 2012, the Claimant, by letter to the Government of Moldova, the Ministry of Justice of Moldova, the Ministry of Economy of Moldova and the Ministry of Foreign Affairs and for the European Integration of the Republic of Moldova (hereinafter “Moldovan Addressees”) (a) invited the Moldovan Addressees to consider the proposal of amicable settlement of the dispute according to Article 26(2) of the ECT and (b) notified the Moldovan Addressees to consider the 19 September 2012 letter a written request to start negotiations for the purposes of Article 9(2) of the

¹⁶ CC-55; CC-193. The Parties could not agree on the English translation and, therefore, each retained their own versions in the Common Core Bundle. In the Tribunal’s opinion, the slight variations of translation are irrelevant to consideration of the dispute.

Agreement between the Government of Ukraine and the Government of the Republic of Moldova on the Promotion and Reciprocal Protection of Investments (hereinafter, the “Ukrainian-Moldovan BIT”) (CC-3). On 26 November 2012, the Claimant sent a reminder letter to the Moldovan Addressees (CC-4).

31. On 7 December 2012, the Moldovan Ministry of Economy replied to the Claimant, citing a series of prior correspondence and stating that the court decisions of Moldova “*are beyond doubt*”, that the Claimant “*does not have any creditor rights on the territory of the Republic of Moldova*” and that the Claimant “*is not an investor, which excludes, in turn, the possibility to consider the dispute in international arbitration*” (CC-5).

E Procedural History

32. Following the events described in Sections I(B) and I(C) above, the SCC notified the Tribunal by letter dated 2 May 2013 that the Claimant had paid the total advance on costs for both Parties, the Respondent not having paid its share of the costs.
33. The Chair, on 9 May 2013, circulated to the Parties an agenda for a teleconference and a proposed Procedural Order (hereinafter “PO”) No. 1 setting out a timetable. By letter dated 15 May 2013, the Claimant proposed two rounds of written submissions, 3 months for the first and 2 months for the second. By letter of the same date, the Respondent also proposed two rounds of written submissions, 4 months for the first and 3 months for the second.
34. Following a conference call on 16 May 2013, in which Mr. Apostol participated on behalf of the Respondent, the Tribunal issued PO1 on 24 May 2013, which was mutually agreed by the Parties. PO1 contained the following provisions:
 - a. The Claimant clarified there was but one Respondent in the arbitration, namely the Republic of Moldova and, therefore, all references henceforth to the Respondent would be “The Republic of Moldova”;
 - b. The Parties were asked if they wished to bifurcate the Tribunal’s consideration of jurisdiction and the merits of the dispute; each Party declined and agreed that there should be no such bifurcation (Paragraph 2.1 of PO1);
 - c. Each Party was granted 3.5 months (using a 30 day month) for its initial submission;
 - d. Following submission of the Statement of Defense (“SoD”), the Parties and the Tribunal would consult on the further timetable but that it “*likely would be that each Party would not have more than 2.5 months to prepare its Reply and Rejoinder, as the case may be*” (Paragraph 2.4, PO1);

- e. Assuming two rounds of submissions, PO1 stated a hearing could take place between mid-May and the end of June 2014; and
 - f. Taking into account SCC Rules, Article 37, and pursuant to the Tribunal's request to the Board of Directors of the Arbitration Institute of the SCC (hereinafter the "SCC Board"), PO1 set forth that the Board agreed to extend the time limit for a final award to 1 September 2014.
35. On 18 June 2013, the Claimant requested the Tribunal to issue a separate award ordering the Respondent to reimburse the Claimant the amount of €77,000 for the latter's payment on 10 April 2013 of the Respondent's share of the advance payment, together with 9% interest p.a., starting to accrue on 10 April 2013. By PO2, dated 19 June, the Tribunal gave the Respondent until 5 July 2013 to reply to the Claimant's request. The Respondent objected to the request.
36. On 19 July 2013, the Tribunal issued PO3 stating that it would decide on the Claimant's request in its Final Award in the arbitration. The Tribunal stated that *"as long as it appears the Respondent may object to the Tribunal's jurisdiction, the issue of jurisdiction is pending. The Tribunal may not be empowered to render a partial award without first affirming its own jurisdiction."*
37. The Claimant filed its Statement of Claim (SoC) on 30 August 2013. Pursuant to PO1, the Respondent was to have filed its SoD on 13 December 2013. On 4 November, Mr. Mihael Buruiana notified the Tribunal and the Claimant that, on 28 October 2013, he had been retained to represent the Respondent; he requested an extension of time until 15 February 2014, or 3.5 months, to file the SoD because time was needed to obtain relevant documents and facts and to deal with various state agencies and officers *"and such procedures are usually lengthy and time consuming."* The Claimant, by letter to the Tribunal dated 6 November 2013, objected to the Respondent's request and submitted with its objection the official Moldovan resolution No. 737 dated 18 September 2013 awarding the tender for representation in this Arbitration to Buruiana & Partners. The Claimant contended that having 5.5 months to prepare the SoD *"will infringe the requirement of procedural fairness..and cause undue delay in the proceeding"*. The Claimant further contended that the Respondent's counsel had at least from 18 September to work on the case but, should the Tribunal find it necessary to grant an extension of time, that such extension be not later than until 30 December 2013. By PO4, dated 7 November 2013, the Tribunal granted the Respondent until 10 January 2014 to submit its SoD.
38. On 30 December 2013, the Respondent again requested a further extension of time from 10 January until 17 January 2014 to submit its SoD, citing public holidays on 1 January, 6-7 January and 13-14 January 2014 and asserting that many people would work only part time from 1-14

January 2014. The following day, the Claimant e-mailed the Tribunal with its objections and the Respondent e-mailed a reply on 1 January 2014. By PO5 dated 2 January 2014, the Tribunal granted Respondent a final extension until 17 January 2014 to submit its SoD.

39. In preparation for a teleconference on 29 January 2014, the Tribunal circulated for comments draft PO6 with a timetable for the remainder of the arbitration. The Claimant filed comments on 22 January and the Respondent on 23 January 2014. On 13 February 2014 the Tribunal issued PO6, which established the continued timetable and procedural aspects of the arbitration, including the dates of the hearing. PO6 also noted a second extension of time, until 31 December 2014, for the Tribunal to issue its award, as approved by the SCC Board. PO6, Paragraph 3.1, amended Paragraph 6.1 of PO1 by providing that should one Party object to the English language translation of a document submitted by the other Party, the Parties would first attempt to jointly agree a translation and that “[T]ranslations have to be certified at the specific request of the other Party, should the Parties be unable to agree a translation of the document or written submission in question.”
40. The Claimant filed its Reply (SoR), including an expert witness statement, on 28 March 2014. Pursuant to PO6, Paragraph 2.2, the Respondent was to have filed its Rejoinder (“RoRy”) on 6 June 2014, together with any witness statement. On 3 June 2014, by two e-mails, the Respondent requested the Tribunal to grant an extension of time to file its RoRy until latest 27 June 2014 because the “*Respondent encountered some unforeseeable and unpredictable problems and delays in obtaining a number of documents that are material to the proceedings and have an impact on the position of the Respondent*”. The Respondent claimed it anticipated receiving the last part of the requested documents around 23-24 June 2014. The Claimant, by two e-mails to the Tribunal on the same day, objected to the extension, stating the Respondent had sufficient time to collect any necessary documents, would have an unequal and preferential position for submission of documents and, pursuant to PO 6, Paragraph 5.2, could supplement the record with documents before 1 August 2014. By PO7 dated 4 June 2014, the Tribunal granted the Respondent a “final” extension of time until 13 June 2014 to file its RoRy.
41. On 6 June 2014, the Respondent not having paid its share of a second tranche of fees requested by the SCC Secretariat, the Claimant paid €18,634.50 on behalf of the Respondent.
42. On 13 June the Respondent submitted what it entitled the First Part of a RoRy. In Paragraph 2 thereof, the Respondent unilaterally, without leave of the Tribunal, stated it would submit the Second Part of its Rejoinder on 27 June 2014, as it had not yet received relevant documents and also would submit on 27 June 2014 “*a short Expert Opinion in response to the Expert Opinion*

submitted by Claimant on 28 March.” On 14 and 16 June 2014, the Claimant by e-mail to the Tribunal objected to the Respondent’s intent, citing what it described as the Respondent’s “*blatant*” disregard of PO7 and what it considered an unequal time to present its case. By email on 17 June 2014, the Respondent requested the Tribunal to permit it to file what it called the second part of its RoRy by 27 June 2014 or, in the alternative, to permit the Respondent to file at that time an amendment or supplement to its RoRy pursuant to SCC Rules, Article 25. By email to the Parties dated 18 June 2014, the Tribunal stated that:

“The Tribunal already had noted Respondent’s failure to meet the deadline set out in the Tribunal’s Procedural Order No. 7, finds little reasonable cause for such failure and reserves its right to make all appropriate inferences from such conduct and any late filing of additional materials.

As for a request under SCC Rule 25, the Tribunal cannot consider a Second Part of the RoRy as an amendment or supplement, as each of the latter Terms implies the existence of a complete submission which is to be complemented, and neither term contemplates being the second part of a submission split into two distinct parts.”

43. The Respondent never submitted a second part of the RoRy.
44. PO8, dated 23 June 2014, in furtherance of the timetable set out in PO6, advised the Parties to submit the Joint Chronological List (JCL) and the Common Core Bundle (CCB), each referred to in PO6, by 8 August 2014 and provided a suggested model for each.
45. The Tribunal, on 17 July 2014, advised the Parties of its decision regarding the referral to the Tribunal by the Parties of their respective requests for the production of certain documents.
46. On 1 August 2014, pursuant to PO6, Paragraph 5.2, each Party submitted additional documents. The Claimant submitted 15 new exhibits and 13 new legal references, some of which were not referenced in the Claimant’s pleadings. The Respondent submitted 40 new exhibits, 7 new legal references and, despite the Tribunal’s PO7, an Expert Opinion in response to the Claimant’s Expert Opinion submitted on 28 March 2014. The Respondent continued to submit further documents after 1 August 2014. Further, for a period of weeks the Parties had exchanged emails, copying the Tribunal, regarding mutual allegations of deliberate mistranslations, authentication of the APO, whether the original APO had a number or not, and whether the APO should be submitted as an exhibit (as the Claimant had done) or as a legal authority (as the Respondent had done, claiming the APO is a treaty).

47. On 5 August the Tribunal advised the Parties that:
- a. The cut-off date for additional documents had passed;
 - b. The Tribunal considered it inappropriate for either Party to continue to engage in pleadings via e-mail comments;
 - c. The Respondent had not yet submitted an index to all the documents it presented on 1 August;
 - d. The Respondent's Expert Opinion was submitted not only long after the Respondent had sight of the Claimant's Expert Opinion but also long after the 27 June 2014 date on which it was promised (which already was a delay of the specified submission date of 6 and then 20 June 2014);
 - e. Several of the Respondent's documents had been submitted without English translations and the Tribunal exceptionally would give two more days to receive such translations, after which the Tribunal would disregard said exhibits; and
 - f. The Tribunal fully expected the deadline for the JCL (8 August 2014) would be adhered to and it would draw appropriate conclusions if the deadline were not adhered to.
48. The Parties exchanged multitudes of e-mails disagreeing over their respective drafts of the JCL, which was, in the Tribunal's view, to be a list of dates and events which should not have been in dispute. The Parties, despite the Tribunal requesting them to work out their differences between themselves, copied the Tribunal on all such e-mails. On 28 August 2014, the Tribunal advised the Parties it would accept as the JCL the three documents submitted by the Claimant earlier that day, as the Tribunal felt too much time had been spent arguing about the content of a list which was meant solely to aid the Tribunal and to be provided to the Tribunal sufficiently in advance of the Hearing to assist the Tribunal's preparations.
49. The pre-Hearing conference call was held on 25 August 2014.
50. A Hearing was held in Stockholm on 9 and 10 September, 2014. Dr. Sergei Voitovich, and Messrs Sava Poliakov and Maksym Makhyna represented the Claimant. Mr Mihail Buruiana represented the Respondent. Also present for the Claimant were Messrs Andreii Andyshula and Dmytro Sakva and, for the Respondent, Ms Corinna Voda assisting Mr. Buruiana. There were no witnesses.
51. At the end of the Hearing each Party stated that it believed it had had a reasonable opportunity to present its case and had had reasonable equality of treatment.

52. The Parties submitted their respective Post-Hearing Memorials (hereinafter the “CPHM” and the “RPHM”) to the Tribunal on 16 October 2014 and the Tribunal, in turn, distributed each Party’s PHM to the other Party. On 19 October 2014, the Claimant wrote the Tribunal, objecting that the Respondent, in the RPHM, had not limited its comments to a summation of issues discussed at the Hearing but rather “*improperly refers*” to documents not in the record and “*attempts to belatedly rebut the Claimant’s written submissions... which had not been addressed within the written stage of the proceedings or at the hearing.*” On 21 October 2014, the Respondent wrote a lengthy rebuttal to the Tribunal. On the same day, the Tribunal directed the Parties by e-mail that there “*shall be no further communications from either Party regarding the post-hearing Memorials unless otherwise directed by the Tribunal.*”
53. The Parties submitted their respective legal costs and expenses to the Tribunal on 5 November 2014.

II. THE CLAIMS IN THIS ARBITRATION AND THE RELIEF SOUGHT

A The Claimant’s Position

54. The Claimant’s position, expressed in the SoC, the SoR and the CPHM, is that (a) its claim to money arising from the 2002 Decision is an energy-related financial asset which constitutes an investment in the energy sector of Moldova pursuant to the ECT, (b) the Tribunal has jurisdiction to hear the dispute pursuant to the ECT, (c) in violation of Moldovan and international law, the courts of the Respondent protracted for seven years the Claimant’s request to enforce the 2002 Decision, (d) the Claimant’s investment was *de facto* expropriated in violation of ECT, Article 13(1) and the Claimant has been deprived of its investment, and (e) the Respondent also has breached Article 10.1 (the fair and equitable treatment provision) and Article 10(12) (the “effective means provision”) of the ECT. The Claimant seeks the following relief, as set forth in Paragraph 60 of its Request for Arbitration, Paragraph 407 of the SoC, Paragraph 260 of the SoR and in Paragraph 127 of the CPHM:
- a. A declaration that the Republic of Moldova has violated Articles 10(1), 10(12) and 13(1) of the ECT and the Respondent’s obligations under general international law;
 - b. An order that the Respondent pay compensation for losses incurred by the Claimant in the amount of USD1,745,754.84;

- c. An order that the Respondent pay interest on the total sum awarded at a rate as determined in Paragraphs 393-400 of the SoC, compounded annually from 20 January 2003 and until payment is made;
- d. An order that the Respondent pay the costs of the arbitration;
- e. An order that the Respondent pay legal fees;
- f. An order that the Respondent pay €77,000 as reimbursement of the payment made by the Claimant on 23 April 2013 for the Respondent's share of the costs of the arbitration, and interest on the said sum at 9% per annum, starting to accrue on 10 April 2013 and until payment is made; and
- g. An order that the Respondent pay €18,634.50 as reimbursement of the payment made by the Claimant on 6 June 2014 for the Respondent's further share of the costs of the arbitration, and interest on the said sum at 9% per annum, starting to accrue on the relevant payment date and until payment is made.

B The Respondent's Position

55. It is the Respondent's position, expressed in the SoD, the RoRy and the RPHM, that (a) the Tribunal lacks jurisdiction to hear this arbitration, (b) the Respondent has not breached its obligations under the ECT, (c) the courts of Moldova have not violated Moldovan and international law in relation to the 2002 Decision, (d) the 2002 Decision violates international and national law and (v) the 2002 Decision is unlawful and unenforceable. The Respondent seeks the following relief, as set forth in Paragraph 347 of the SoD:

- a. A declaration that the Tribunal has no jurisdiction over the Claimant's claims;
- b. A dismissal by the Tribunal of all claims of the Claimant;
- c. A declaration that the Respondent has not violated any obligation arising under the ECT;
- d. An order that the Claimant pay the arbitration costs; and
- e. An order that the Claimant pay the legal fees incurred by Respondent.

C Applicable Law

56. As the Claimant brings its claim pursuant to the ECT, and also alleges violations of international law, the Tribunal will apply the provisions of the ECT in determining its jurisdiction and apply general principles of international law. The Parties (whose legal teams are Ukrainian and Moldovan lawyers) made references to Ukrainian and Moldovan law as relevant to many aspects

of their claims. As appears below, the Tribunal has not found it necessary to decide issues of Moldovan or Ukrainian law in order to address the claims in this arbitration.

57. In the arbitral procedure, the Tribunal is governed by the procedural provisions of the ECT (in particular, Article 26 of the ECT), the SCC Rules and, as Stockholm is the venue of arbitration, by the mandatory rules of the Swedish arbitration law, as well as by the procedural orders of the Tribunal.
58. In its analysis below, the Tribunal has considered not only the positions of the Parties as summarized in this Award, but also the numerous detailed arguments made in the Parties' respective written memorials, including case law, and at the Hearing on 9-10 September 2014 in Stockholm, Sweden. To the extent that these arguments and cases are not referred to expressly in this Award, they should be deemed to be subsumed in the Tribunal's analysis.

III JURISDICTION

59. The Tribunal first will turn to the issue of whether it has jurisdiction over the matter.

A The Claimant's Position on Jurisdiction

60. The Claimant contends that the Tribunal has jurisdiction over this matter pursuant to Article 26 of the ECT, which in relevant parts provides that

“(1) [D]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably” and that

“(2) [I]f such disputes cannot be settled amicably according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution to international arbitration or conciliation.”

61. The Claimant claims that the Respondent's unconditional consent to arbitrate is contained in Article 26(3)(a) of the ECT¹⁷ and that the Claimant has consented to the present arbitration by virtue of Paragraph 12 of its Request for Arbitration¹⁸. Therefore, the Claimant asserts, there is a valid arbitration agreement between the Parties.
62. The Claimant claims it is an Investor and has an Investment for purposes of the ECT. The ECT, Article 1(6), defines "Investment" as *"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. *[...]*
 - c. *Claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;*
 - d. *[...]*
 - e. *[...]*
 - f. *Any right conferred by law or contract or by virtue of any licenses or permits granted pursuant to law to undertake any Economic Activity in the Energy Sector."*
63. The Claimant has modified its position during the course of the arbitration. In its SoC, the Claimant states its claim is a claim to money arising from the 2002 Decision. The Claimant contends its claim to money arising from the 2002 Decision is an Investment because the claim (a) is an *"energy-related financial asset" arising "from a functional transfer of the electric energy to Moldova due to the specific parallel operation of the two energy systems"*¹⁹ and (b) as required by ECT Article 1(6)(c), is associated with an Economic Activity in the Energy Sector which, under Article 1(5) of the ECT includes *"transmission, distribution, trade and sale of Energy materials and Products"*.²⁰ According to the Claimant, in its SoR, Paragraph 72, the Overflow *"indisputably falls within the definition of Economic Activity in the Energy Sector' which is conducted by*

¹⁷ Article 26(3) states that "[S]ubject only to subparagraphs (b) and (c) [which do not apply in the instant case], each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article."

¹⁸ Paragraph 12 of the Request for Arbitration states that *"the offer (unconditional consent) of the Republic of Moldova to conclude the arbitration agreement, as contained in Art. 26(3) of the ECT, is hereby accepted by Energorynok in accordance with Art. 26(4)(c) of the ECT to constitute together a valid agreement to submit the dispute to arbitration."* In turn, Article 26(4)(c) provides that *"[I]n the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to.....an arbitral proceeding under the Arbitration institute of the Stockholm Chamber of Commerce."*

¹⁹ SoC ¶ 233.

²⁰ SoC ¶ 219.

Energorynok, which means that the Energorynok's investment 'is associated with an Economic Activity in the Energy Sector' as required by" ECT Art. 1(6) subsection 3.

64. The Claimant further contends, in SoC, Paragraph 234, that its claim to money, having been recognized by the 2002 Decision, acquired the additional characteristic of an Investment as being a right conferred by law or contract, meeting the criteria in ECT Article 1(6)(f).
65. The Claimant avers that (a) because APO Article 4.3 provides for the compensation of surplus energy, the APO *"gave rise to the payment obligation and respective contractual right of the Ukrainian side"*²¹ and (b) *"a right to compensation for an overflow of electric energy under the APO is fully covered by the protected Investment according to the ECT Article 1(6)(c) and (f)"*.²²
66. The Claimant further contends that, under Article 4 of the 2004 Law of Moldova on Investments in the Business Activity', *"an investment, among others, may take the form of 'rights arising out of debt obligations or other forms of obligations towards the investor having economic and financial value' "*.²³
67. The Claimant refined its position on jurisdiction during the course of the arbitration. In its SoR, Paragraph 68, the Claimant reiterates its *"claim to money/right conferred by contract/right conferred by law, which arose in 1998 and was confirmed by court in 2002, objectively fits the criteria of the protected 'Investment'"* under the ECT.²⁴ The Claimant speaks in SoR, Paragraph 63, of its Investment as being an *"asset covered by Article 1(6)(c) and (f)"* and that its Investment has the *"characteristics of"* a claim to money and a right conferred by law and contract.
68. During the Hearing the Claimant referred to having acquired an ownership right to its Investment and not a contractual right to it in the process of legal succession.²⁵ The Claimant stated its Investment is the right to compensation which originally arose from the APO and was confirmed by the 2002 Decision, itself a *"document which reflects the underlying economic operation"*. The Claimant's counsel continued that *"we do not say that APO is an investment or the 2002 decision is an investment. We say the investment is an energy-related asset, which is ... a right to compensation for the uncompensated overflow of electricity. We are saying that these [the APO*

²¹ SoR ¶112.

²² SoR ¶ 71.

²³ SoR ¶220.

²⁴ Claimant reiterates this position in CPHM ¶11.

²⁵ Day 2/142.

and the 2002 Decision] are two documents which reflect one and the same investment....right to compensation.”²⁶

69. The Claimant summarized its position on jurisdiction (its position on the merits being the same throughout the course of the arbitration) in CPHM Paragraph 13 as follows:

*“The Energorynok’s ‘right for compensation’ is determined by two legal instruments: (i) the APO and (ii) the 2002 Initial Decision. These two legal instruments may not be viewed in isolation, they constitute the protected Investment jointly. In the Claimant’s view, it is not methodologically correct to assert that, for example, ‘the APO is not an investment’ or that ‘the 2002 Initial Decision is not an investment’. To be accurate, Claimant does not assert that ‘the APO plus the Kiev court decision are the investments’²⁷, neither that the investment ‘is the overflow’. The investment, under the ECT, is an asset (in this case the right for compensation for the overflow), rather than a legal document (a contract or a court decision). These two legal instruments jointly determine the Investment..., which is ultimately owned **and** controlled by Energorynok.”* (Claimant’s emphasis)

70. The Claimant relies on several arbitral decisions that a claim to money is a protected Investment under ECT Article 1(6), notably the decisions in *Electrabel v. Hungary*, *Remington v. Ukraine*, *Petrobart v. Kyrgyz Republic* and *Plama v. Bulgaria*. The Claimant further cites several arbitral decisions arising out of Bilateral Investment Treaties (BITs) to support that a claim to money is a protected investment under many BITs. The Tribunal will deal with these cases as appropriate in its reasoning.

B The Respondent’s Position on Jurisdiction

71. The Respondent’s objection to jurisdiction is two-pronged: in the first instance, it claims that the Claimant’s claim was fraudulently and illegally obtained by the Claimant in the 2002 Decision and therefore that, like *Plama v. Bulgaria*, the Claimant should not be entitled to protection under the ECT.²⁸ The second argument against the Tribunal’s jurisdiction is that the Claimant does not meet the requirements of the ECT for bringing a claim.

²⁶ Day 1/70-71. The Claimant, in CPHM ¶139, reiterated that it “does not assert that the 2002 Initial Decision is an investment ‘on its own’, ‘in and of itself’. Claimant emphasizes that the 2002 Initial Decision adds an essential legal characteristic to the Energorynok’s Investment as a right conferred by law, and crystallises the basis for an investment treaty claim, rather than for a contract claim.”

²⁷ Indeed the Plaintiff, in CPHM fn 26, states that “for the sake of clarity, the Claimant does not assert, for example, that even if the right for compensation under the APO hypothetically had not been the right of Energorynok, the 2002 Initial Decision in itself would have established the right of Energorynok as an Investment.”

²⁸ RoRy ¶138, referring to *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award 27 August 2008 ¶s 135 and 138-140. CCLA-134.

72. With respect to the argument that the 2002 Decision was fraudulently and illegally obtained, the Respondent relies, *inter alia*, on *Inceysa v. El Salvador*²⁹ and *World Duty Free v. Kenya*.³⁰ Specifically, the Respondent alleges that:
- a. The Tribunal may decide this issue independently from the judgments of the Moldovan and Ukrainian courts;
 - b. The Claimant is not a Party to the APO and, therefore, had no standing to bring the claim against the Moldovan Ministry in the Kiev court in 2002;
 - c. Neither was there duality of APO parties and, therefore, the Claimant is not an integrated party to the APO;³¹
 - d. The APO is “a treaty concluded between the two States in written form, governed by international law”. Consequently, the Respondent argues the APO should be interpreted in accordance with the international law rules on the interpretation of treaties whereas, the Respondent contends, the Kiev court based the 2002 Decision on Ukrainian domestic substantive law;³²
 - e. The Claimant is not a legal successor of Ukrenergo with respect to the functions first of NCC and then of Ukrenergo under APO Article 10;³³
 - f. APO Articles 7.3 and 7.4 contain an “inter-State” arbitration clause which does not “offer international competence for the Economic Court of Kiev to entertain any claim of Enorgorynok”;³⁴ and
 - g. The Moldovan Ministry was not a proper respondent in the case, as it had no relationships with NCC, Ukrenergo or the Claimant;³⁵ rather, Moldtranselectro was the proper party.
73. In response to the Respondent’s position that the Claimant is not a party to the APO and hence has no standing to bring the arbitration, the Claimant contends that the Respondent did not challenge Claimant’s standing in the litigation surrounding the 2002 Decision nor in any of the subsequent Moldovan proceedings brought by Claimant.³⁶
74. As to the Respondent’s position that the Claimant is not a proper party to the arbitration because there was no mutual consent to transfer to the Claimant the Ukrainian Ministry’s rights and

²⁹ *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award ¶s 240-244. CCLA-150.

³⁰ *World Duty Free Company Limited v. the Republic of Kenya*, ICSID Case No. ARB/00/07, Award. CCLA-149.

³¹ RPHM ¶17.

³² RoRy ¶19.

³³ RPHM ¶12.

³⁴ RoRy ¶9.

³⁵ RPHM ¶13.

³⁶ SoR ¶29.

obligations under the APO, as required by APO Article 9.3, the Claimant asserts that it is not a third party but rather a legal successor to NCC/Ukrenergo with respect to repayment of the Debt; as such, the Claimant asserts that Article 9.3's requirement of mutual consent is not applicable.

75. The Respondent alleges that, were the Tribunal to find the 2002 Decision is a legal decision, which it denies, the Claimant does not meet the requirements of a claim under the ECT. Specifically, the Respondent maintains that:
- a. Under the ECT, the Claimant must demonstrate that it owns a protected Investment in the area of the Republic of Moldova and has failed to do so. The Respondent states that the Claimant is not a party to the APO and, therefore, has no claim to money thereunder and, if it had a claim to money, it did not own the claim. The Respondent contends the Claimant acted as a collector of debts for Ukraine's Ministry of Energy Industry and Electrification who, according to the Respondent, is the actual party to the APO;
 - b. The Claimant's "*claim to money*" is not an "*asset*" covered by ECT Article 1(6) because the Claimant's claim to money was not acquired as a result of or in connection with an economic investment process. The Respondent reasons that ECT Art. 1(6), when read in conjunction with Parts III and IV of the ECT, "*provides that all forms of assets owned by the Investor as a result of its investment activity be subject to protection, even if they are not the direct or only consequence of the investment activity*" but that "*[I]nitially, however, there should be an investment activity taking place.*"³⁷
 - c. The Claimant's investment does not meet the characteristics set forth in *Salini v. Morocco*³⁸, those characteristics being (a) a contribution of money or other assets of an economic value, (b) certain duration, (c) an expectation of commercial profit, (d) an element of risk and (e) a contribution to the host state's development. The Respondent alleges that the Claimant fails to prove any of these characteristics are present and, therefore, there is no Investment;³⁹ and
 - d. Moreover, a claim to money is not a "*right conferred by law*" under ECT Art. 1(6)(f).
76. The Respondent further alleges that the Overflow was fully compensated by the Fund and by Moldtranselectro and that the equipment provided to Ukrenergo pursuant to the Surety Agreement was never returned to the Fund.⁴⁰

³⁷ SoD ¶250.

³⁸ *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco* (Decision on Jurisdiction), ICSID Case No. ARB/00/4, dated 16 July 2001.

³⁹ SoD ¶s 252-256.

⁴⁰ RPHM ¶s 5 and 6.

C The Tribunal's Analysis

77. The Respondent's defense to the Tribunal's jurisdiction is, as above, two-fold, based first on an allegation that the 2002 Decision was illegally and fraudulently obtained and hence cannot be protected under the ECT and, secondly, even if the Tribunal were to find the 2002 Decision was not fraudulently obtained, the Claimant has not satisfied the criteria of the ECT to bring a claim thereunder.
78. The Tribunal believes, however, that it cannot determine whether the 2002 Decision was fraudulently or illegally obtained unless it finds it has jurisdiction to determine the dispute. Therefore, the Tribunal must first consider if it has jurisdiction under the ECT and, if it did so find, whether the 2002 Decision is a bar to that jurisdiction.

ECT Article 26

79. Article 26 of the ECT, set forth in paragraph 60 above, relates to the settlement of disputes between an "Investor" and a Contracting Party to the ECT. The Claimant claims it is the Investor and an Investor in its own name.⁴¹ In its CPHM, Paragraphs 71 and 72, the Claimant notes, as a matter of principle, that there are no limitations in the express language of the ECT for a governmental agency to be an investor. The Tribunal agrees that ECT Article 1(7) does not preclude a government agency from being an Investor. Further, Article 26(1) speaks of 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...*" The issues, then, are whether, under the ECT, there is an Investment, whether the Claimant is an Investor and whether the Investment, if there is one, is in the Area of Moldova.

ECT Article 1(6)

80. Relying on ECT 1(6), the Claimant alleges, that (a) its investment is a claim to money/right for compensation for the Overflow and (b) this right for compensation is the energy related asset having an economic value.⁴² It adds that this energy related asset (claim for money/right to compensation) is "*in three forms provided by Article 1(6) of the ECT: (i) claim to money, (ii) right conferred by contract and (iii) right conferred by law*".⁴³ The right for compensation originates, the Claimant contends, in the APO but the Claimant states that the APO in itself is **not** an investment.⁴⁴ The Respondent contends that the APO was a cooperation agreement/treaty

⁴¹ Day 1/74; CPHM ¶16

⁴² CPHM ¶9.

⁴³ Day 1/16; CPHM ¶10.

⁴⁴ Day 1/70. Claimant's counsel states "*we do not say that APO is an investment or the 2002 decision is an investment. So we say that the investment is an energy-related asset, which is right to—all is connected in*

between states in relation to the energy power market access and transit and was not an agreement for the sale, purchase, supply or delivery of electricity; accordingly, the Respondent contends the APO does not qualify as an Investment.⁴⁵

81. The Tribunal believes, in contrast, that the APO in itself can evidence an Investment. The APO is an agreement relating to the transportation, distribution and supply of Energy Materials and Products by way of transmission and distribution grids (meeting the requirement in ECT Understandings IV (2)(iii)); electrical energy is an Energy Material/Product (see ECT Annex EM 27.16). The Energy Material/Product was transmitted/distributed in Moldova and added economic value to Moldova. That the APO was signed by Ministries, and that two state entities, NCC and Moldenergo (neither being Parties to the APO), were designated in Article 10 to carry out the performance of the technical and operational functions under the APO, does not change the characterization of the APO. The APO confers to the Party/Ministry a right to undertake an economic activity concerning the transit of electricity in the host State; that activity, in the Tribunal's view, constitutes an Investment according to the ECT. However, as noted below, the Tribunal believes the Claimant has and had no role in the economic activity carried out under the APO.
82. The Tribunal also finds that the Overflow, which the Claimant describes as a "triggering event"⁴⁶ for its claim but which the Claimant describes as itself not an Investment,⁴⁷ is an Investment because it is in the Area of Moldova and arose out of the APO.
83. The Claimant relies heavily on two ECT cases for its position: *Petrobart Limited v. The Kyrgyz Republic* (SCC Arbitration No. 126/2003), Award of 29 March 2005, and *Remington Worldwide Limited v. Ukraine* (SCC Case No. V 116/2008), Award of 28 April 2011.⁴⁸ Petrobart asserted that a contract (in that case, for the sale of gas condensate), a court judgment (for money owed for the sale of gas) and a claim to money (for the sale of gas) all were Investments under the ECT. The *Petrobart* tribunal concluded that the "[C]ontract and the judgment are not in themselves assets but merely legal documents or instruments which are bearers of legal rights, and these legal rights, depending on their character, may or may not be considered as assets. The relevant

this construction... And we are saying that the Initial [2002] Decision crystalized not the investment but the basis for the present investment dispute."

⁴⁵ SoD ¶¶261-262.

⁴⁶ CPHM fn 21.

⁴⁷ CPHM ¶13, Day 1/159-160.

⁴⁸ The Claimant refers in SoC ¶228 to *Remington* involving a claim for money found to be an Investment; the Claimant refers in SoRy ¶105 to *Remington's* claim for money having been assigned several times over. However, as discussed below, in this arbitration the Tribunal does not believe the Claimant has proved it was assigned its claim for money.

question which requires consideration is therefore whether the rights provided for in the Contract and confirmed in the judgment constituted assets and were therefore an investment within the meaning of the Treaty”.⁴⁹ The *Petrobart* tribunal further concluded that “a right conferred by contract to undertake an economic activity concerning the sale of gas condensate is an investment according to the Treaty. This must also include the right to be paid for such a sale.”⁵⁰

84. But the *Petrobart* tribunal also recognized the circularity of ECT Article 1(6)(c), a position with which this Tribunal agrees. Specifically, the *Petrobart* tribunal observed:

“As regards the Energy Charter Treaty, the Arbitral Tribunal considers that the wording ‘claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment’ present certain ambiguities. In particular, it is not entirely clear whether the words ‘pursuant to contract having an economic value and associated with an Investment’ or parts of these words—‘having an economic value and associated with an Investment’ or ‘associated with an Investment’—relate only to ‘claims for performance’ or also to ‘claims for money’. If we assume that at least the terms ‘associated with an Investment’ also relate to ‘claims for money’, we are faced with the logical problem that the term ‘Investment’ is not only the term to be defined but is also used as one of the terms by which ‘Investment’ is defined. This means that the definition is in reality a circular one which raises a logical problem and creates some doubt about the correct interpretation.”⁵¹

The *Petrobart* Tribunal sought guidance in its interpretation of an Investment in ECT Article 1(6)(f), concluding under that provision that the gas condensate which *Petrobart* sold is to be regarded as Energy Materials and Products and is an Investment under the ECT for which *Petrobart* had the right to be paid.

85. The *Electrabel*⁵² tribunal also addressed the circularity of ECT Article 1(6)(c). Having first posed the question of whether the separate components of the overall investment alleged by that claimant constituted separate or stand-alone investments, the *Electrabel* tribunal concluded that “[H]owever the phrase ‘associated with an investment’ found in subparagraph (c) constitutes a limitation on the notion of ‘investment’... Under the Vienna Convention, the correct

⁴⁹ *Petrobart* at 71.

⁵⁰ *Petrobart* at 72.

⁵¹ *Petrobart* at 72.

⁵² *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012. The Claimant submitted in evidence (CCLA-22) five pages of the *Electrabel* award, but not the entirety of the award on jurisdiction and not including the paragraphs cited in this Award. The Respondent submitted in evidence (CCLA-128) the entirety of the award.

interpretation must give effect to the terms in their context and avoid obscure results. To this end, as a matter of common sense, it is necessary to understand ‘investment’ in sub-paragraph (c) to mean an investment other than the one addressed in the same sub-paragraph...In other words, the Tribunal agrees ..that this category of investment is dependent on the overall investment.”⁵³

86. Unlike *Electrabel*, on which the Claimant relies, and *Amto*,⁵⁴ which the *Electrabel* tribunal cited, the Claimant is not a shareholder in an entity directly or indirectly engaged in the underlying economic activities which those tribunals found constituted Investments. And while Petrobart, like the Claimant, obtained a court decision in its favor for a payment, unlike the Claimant Petrobart actually delivered the gas condensate for which payment was due, delivering the gas condensate in several instalments over a certain period of time. At all times during the period of the underlying contract, Petrobart had full control over its own sales and deliveries and was a full party to the sale and delivery contract.
87. Petrobart owned and controlled its claim to payment for the gas that it, and not another party, supplied; Petrobart made the Investment in the Area of the Kyrgyz Republic. Petrobart had a financial interest in the transmission of the gas condensate; it operated or had substantial influence in the operation of the transmission lines; it likely had substantial influence in the selection of the management operating the Investment. Petrobart, in the words of Prof. Zachary Douglas, committed “resources to the economy of the host state entailing the assumption of risk in expectation of commercial return”.⁵⁵
88. The Claimant, in CPHM footnote 65, dismisses as “not of the essence” that Petrobart was the initial supplier of the gas, on the grounds that, in the Claimant’s view, “the ECT does not require that an Investor personally supply/transmit energy related materials or be an ‘initial’ Investor. The similarity which is of essence, is that Petrobart and in the instant case each claimant owns or controls the right under the underlying contract and this right is confirmed by a court decision. This is sufficient for having a protected Investment under the ECT.”
89. The Tribunal agrees that ECT Article 1(6) requires the Investor to own or control the asset. But does this mean that the Claimant need only own or control the claim to money? Or must the Claimant have some ownership or control, directly or indirectly, of the Investment to which the

⁵³ *Electrabel*, ¶s 5.52 and 5.53.

⁵⁴ *Limited Liability Company Amto v. Ukraine* (SCC Arbitration No. 080/2005), Final Award of 26 March 2008.

⁵⁵ CCLA-168. Zachary Douglas *The Plea of Illegality in Investment Treaty Arbitration* at 37, citing Z. Douglas, *The International Law of Investment Claims*, fn 12, ch. 5.

claim of money, as per ECT Article 1(6)(c), must be related? In this regard, ECT Understandings ¶13 advises that

“control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor’s

(a) financial interest, including equity interest, in the Investment;

(b) ability to exercise substantial influence over the management and operation of the Investment; and

(c) ability to exercise substantial influence over the selection of members of the board of directors or any the managing body.

Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof such control exists.”

90. As to a financial interest in the Investment (the Investment here being the claim to money), the Claimant has a financial interest in recovering the Debt it acquired. But the Claimant has offered no proof that it has any financial or equity interest in the economic activity it claims its Investment arises out of. Indeed, as referenced below, the Claimant could not state what role it plays in the APO or in the transmission of electricity to Moldova.
91. The Claimant appears to have no ability to exercise substantial influence of the management and operation of the transmission of electricity under the APO and never had. If anyone has that ability, it would appear to be the Ukrainian Ministry or Ukrenergo.
92. The Claimant appears to have no right now or in the past to exercise any influence over the selection of members of the board of directors or any other managing body involved in the transmission of electricity to Moldova under the APO.
93. In fact, the Claimant at the Hearing could not respond to who controls the APO, stating that the *“factual side of all these things, which are beyond the scope of the dispute, were not the subject of our analysis.”*⁵⁶ Despite having two representatives of the Claimant present at the Hearing, the Claimant’s counsel could not answer the Tribunal’s questions as to what, if any, specific responsibilities the Claimant had acquired with respect to APO Article 10 and what, if anything, the Claimant had to do with the APO other than having *“acquired”* on its balance sheet the claim for payment for the Overflow.⁵⁷ Indeed, counsel could not even definitely answer at the Hearing whether the APO still was in force; counsel, on conferring with the representatives in

⁵⁶ Day 1/159.

⁵⁷ Day 2/109-111,

the room, responded that “to our knowledge” the APO is still functioning, and Respondent concurred.⁵⁸ Following the Hearing, in CPHM, footnote 36, the Claimant states, without further clarification, that “to Claimant’s best knowledge, from the Ukrainian side, the performance of the APO is controlled partly by the Ministry of Energy, partly by Ukrenerg and Energorynok as enterprises-executors”. Surely the Claimant must be able to know what its specific role is, if any, with regard to an ongoing activity, namely the transmission of electricity to Moldova under the APO.

94. Perhaps because the record is not clear who controls the APO now, the Claimant asserts “it is hardly material for the Claimant’s position who controls the APO now. It is rather material, who controls the right for compensation arising from the APO with respect to 50million kWh overflow_indisputedly Energorynok owns and controls this right.”⁵⁹

95. The Claimant alleges that “the only express requirement of Article 1(6) of the ECT is that an investor owns or controls an energy-related asset (in the territory of the host State). This requirement is fully met by Energorynok.”⁶⁰ “Energorynok legitimately and reasonably expects payment for the consumed electricity as a ‘return’ from its Investment. The economic operation (the overflow of electric energy from Ukraine to Moldova) undoubtedly assisted to the ‘development of the economic activity in the host State’.”⁶¹ The asset which the Claimant asserts is its Investment, namely a claim to money, is not in the territory of Moldova. What “return” is there on a claim to money other than receiving payment? The Claimant’s statement immediately above, found in CPHM Paragraph 25, makes no sense unless the Claimant also is stating that its investment is the transmission of electricity (for which it expects payment as a return on investment) and/or the Overflow. But the Claimant is stating neither. The Claimant is not and never was engaged in the transmission of electricity in Moldova; indeed, the Claimant had neither a right nor an obligation to be so engaged because the contractual position of the investor under the APO never was assigned to the Claimant. The Claimant did not exist at the time of the Overflow. Its Investment cannot be the Overflow. In summary, the APO appears to continue to operate but without the Claimant having any role, control or activity in it, and never having any role, control or activity in it.

96. In CPHM Paragraph 35, the Claimant states that both legal instruments (the APO and the 2002 Decision) “determining the Investment definitely indicate the required by the ECT territorial

⁵⁸ Day 1/72. Respondent on same page of the transcript stated that it “confirms that it [the APO] is still in force.”

⁵⁹ CPHM ¶122.

⁶⁰ CPHM ¶125.

⁶¹ CPHM ¶126 and Day 1/18-19.

nexus.” The Claimant first says that the electricity was transmitted to and consumed in Moldova and, therefore, the investment was originally made in Moldova. That an investment of that nature was made in Moldova the Tribunal does not disagree but it is not the Claimant’s claimed Investment; namely, a claim to money crystallized by a court decision. The Claimant states that the Supreme Court of Moldova recognized and approved for enforcement *in Moldova* that 2002 Decision and that, therefore, the Claimant’s right for compensation is the Investment in the territory of Moldova.⁶² The Tribunal cannot agree that a decision of a court in a host State to enforce a claim in that host State constitutes an investment in the territory of the host State by the plaintiff in the said case.

97. The Tribunal finds confusing and inconsistent the Claimant’s characterization of how it came to have the claim to money. How it obtained the claim is important to whether it is an Investor, although the Claimant denies it is important. *“How the right for compensation was acquired by Energorynok, and who had been the original owner of this right for compensation is immaterial under the ECT for the Claimant’s case. It is material, under the ECT, that Energorynok had acquired the right for compensation in question, which is undisputed.”*⁶³ The Claimant variously says that it acquired the general rights of enterprise-executor under the APO in the course of legal succession from NCC and Ukrenergo but that the *“specific right for compensation was acquired in the balance sheet”*.⁶⁴ But it also speaks of the *“investment position”* being assigned to and acquired by the Claimant.⁶⁵ The Claimant also states in the same paragraph that it acquired the **specific** (Claimant’s emphasis) right for compensation *“from Ukrenergo (not from a ministry or any other governmental agency) as the ‘ownership right’ rather than a ‘contractual right’ under the APO.”*⁶⁶ During the Hearing, Claimant’s counsel asserted *“[O]ur position is that Energorynok owns the ownership right on this balance sheet, **not** the contractual right. So the point is not with the contractual relationships between those entities [Ukrenergo and NCC], but that Energorynok was assigned ownership right, irrespective of what was written in the APO”* (Tribunal’s emphasis added).⁶⁷ It appears to the Tribunal that the Claimant is aware that, had it acquired, or been assigned, the right for compensation as a contractual right, the Moldovan Ministry’s assent would have been required pursuant to APO Art. 9.3.⁶⁸ No such assent was granted.

⁶² CPHM ¶135.

⁶³ CPHM ¶17.

⁶⁴ CPHM ¶120. Cf. SoR ¶s 30 and 56.

⁶⁵ CPHM ¶123.

⁶⁶ CPHM ¶123; Day 1/89-90.

⁶⁷ DAY 1/89-90.

⁶⁸ In SoR ¶105, the Claimant asserts an ownership right can be freely transferred and suggests it agrees with the Respondent that the contractual right of the Party-Receiver under APO Article 4.5 cannot be freely transferred.

98. The Claimant further states, in its CPHM, that “*on the one hand*” it was “*authorized by the respective provisions of its Charter.... to perform financial settlements under the APO generally*” and “*on the other hand..with permission of the Ukrainian Ministry..obtained the ownership right from Ukrenergo for compensation of the 50 million kWh overflow into its balance sheet*”.⁶⁹ However, the Claimant admits, in CPHM fn. 38, that “[T]he record of the case does not show in detail how Ukrenergo arrived at its rights or obligations under the APO, in particular, with respect to the right for compensation for the 50 million kWh overflow. It is only clear that Ukrenergo is a due fully-fledged successor of the NCC *inter alia* with respect to its rights and obligations under the APO.”⁷⁰ The Tribunal has not been convinced how Ukrenergo can pass on to another entity the former’s rights to a claim for money via transfer to a balance sheet. Such an act seems to disassociate, rather than associate, the Claimant from the APO and to make it a debt collector of a single debt. Indeed, the National Electricity Regulation Commission of Ukraine and the 2000 Ministerial Resolution establishing the Claimant each refers to the Claimant as a “*settlement operator in the wholesale electricity market of Ukraine*.”⁷¹ The Claimant’s Charter refers among its objects to “*perform the functions of the administrator of the settlement system and the manager of the funds of WEM [Wholesale Electricity Market]*.”⁷²
99. Indeed the Tribunal is struck by the degree to which the Claimant appears to remove itself from the APO. On the one hand, the Claimant claims it is part of the Ukrainian “*integrated Party*” to the APO⁷³ and not a third party. This argument, the Tribunal believes, is because were the Claimant a third party, pursuant to APO Article 9.3, the Respondent would have had to consent to a transfer of rights to the Claimant. No such consent was requested or given. But the Claimant adds that this term “*integrated Party*” does not mean that the Claimant was part of the Ukrainian Ministry. Rather, the Claimant says it is using the term “*solely for demonstration of how the APO was intended to operate with regard to the ‘functions’ of the respective governmental organs and enterprise-executors on each side*”.⁷⁴ The Tribunal does not believe the Claimant is a Party, integrated or otherwise, to the APO.
100. In another demonstration of distancing itself from the APO, the Claimant stated, as referenced in Paragraph 93 above, that the contractual relationships between NCC and Ukrenergo are not the point. The Claimant stresses, at the same time it claims to be part of the Ukrainian

⁶⁹ CPHM ¶¶55.

⁷⁰ CPHM fn. 38; SoR ¶¶48-49.

⁷¹ CC-9; CC-88

⁷² CC-119.

⁷³ CPHM ¶¶51. See also SoR ¶¶31, Day 1/32-34.

⁷⁴ CPHM ¶¶53.

integrated Party to the APO, that it is a separate legal entity from the Ministry, the legal Party to the APO.⁷⁵ The Claimant cannot be both. The Claimant further stated it saw no need to argue that the Ministry is an investor⁷⁶, or to consider how compensation was handled under the APO “because it is beyond the scope of our specific dispute...because we did not explore so much on the facts which are beyond the scope of October 1998.”⁷⁷ And yet if the Ministry is not the Investor in the transmission of electricity in Moldova, who is? And how is the Claimant’s Investment associated with an economic activity which constitutes an Investment if the Claimant sees no need to argue (1) who is an Investor other than itself who would have assigned the Investment to the Claimant (and that only with respect to a claim for money) and (2) what ownership or control the Claimant has in the economic activity with which its Investment must be associated?

Summary

101. In summary, taking “associated with an Investment” to mean an investment other than the one addressed in Article 6(1)(c), and the Claimant not having met the burden of proof that it has any direct or indirect control over the economic activity undertaken pursuant to the APO, the Tribunal finds the Claimant has not met the burden of proof under the ECT that its claim to money is associated with an Investment made by the Claimant or validly assigned it. The Claimant acquired a debt, or was authorized to collect a debt, but did not acquire an Investment under the ECT.
102. Having so concluded, the Tribunal need not consider the Respondent’s second argument in objection to jurisdiction.
103. Accordingly, the Tribunal concludes it has no jurisdiction over this dispute.

IV INTEREST

104. The Claimant, citing ECT Article 26(6) which gives a tribunal the right to decide issues in accordance with, *inter alia*, international law, seeks in compensation for damages compound interest on the sum of the 2002 Decision, being USD 1,745,754.84, from 20 January 2003, the date when the Economic Court of Kiev issued the formal enforcement order in respect of the 2002 Decision.

⁷⁵ Day 1/90. Cf also SoR ¶31 and SoC ¶45.

⁷⁶ Day 1/74, 87.

⁷⁷ Day 1/85-86.

105. The Respondent maintains the Claimant suffered no damages because it had no valid claim against the Moldovan Ministry in the courts of Ukraine or of Moldova, has no claim under the ECT, and has not proved any relationship of alleged wrongful acts of the Moldovan courts and its alleged damages.
106. Were the Tribunal to find that the Claimant suffered damages, the Respondent maintains that (a) the liability for damages is on the Claimant and not the Respondent, (b) the starting date cannot be 20 January 2003 because the Claimant had no valid claim at that time against any Moldovan ministerial body, (c) the rate should not be the commercial lending rate of Moldovan banks and (d) compound interest is not normal.
107. The Tribunal having determined that it does not have jurisdiction in this arbitration, the issue of interest for damages is moot.
108. The Claimant also seeks interest at 9% per annum on the funds that it paid the SCC Secretariat for the Respondent's share of the Arbitration Costs (as defined below) and for which the Claimant seeks an order for reimbursement in this arbitration. The Tribunal has determined, as discussed below, that each Party should bear its own legal costs and should equally share the Arbitration Costs. The Tribunal does not consider it appropriate that the Respondent pay interest on any funds in excess of the Arbitration Costs which the SCC Secretariat shall return to the Claimant. The Claimant has not sought interest in connection with its demand for an order that the Respondent pay all the costs of the arbitration and the Claimant's legal costs; accordingly, the Tribunal has not considered this point.

V COSTS

109. SCC Rules, Article 43(1), distinguishes between (a) 'Arbitration Costs' (e.g., arbitrators' fees, the SCC Arbitration Institute's administrative fee, arbitration expenses and the fees of any experts appointed by the Tribunal) and (b) the Parties' own costs for legal representation. The Arbitral Tribunal has the power to make orders with respect to both types of costs.
110. SCC Rules, Article 43(5), on Payment of Arbitration Costs states that:

"Unless otherwise agreed by the Parties, the Arbitral Tribunal shall, at the request of a party, apportion the Costs of the Arbitration between the parties, having regard to the outcome of the case and other relevant circumstances."

111. SCC Rules, Article 44, regarding the Costs incurred by a Party states:

“Unless otherwise agreed by the Parties, the Arbitral Tribunal may in the final award upon the request of a party, order one party to pay any reasonable costs of another party, including costs for legal representation, having regard to the outcome of the case and other relevant circumstances.”

112. The Claimant and the Respondent each have sought an award of costs in its favor, including counsel’s fees, and Arbitration Costs. The Claimant additionally requests an award that the Respondent reimburse the Claimant with interest the fees paid by the Claimant on behalf of the Respondent to the SCC Arbitration Institute. Each Party has submitted statements quantifying their respective legal costs and expenses; the Tribunal considers that both Parties’ counsel fees are appropriate under the complex circumstances of the case.

113. All issues in this arbitration have been strongly contested. Both Parties, sometimes despite instructions from the Tribunal to the contrary, copied the Tribunal in e-mails contesting, *i.e.*, the nature of exhibits (whether or not they were legal authorities), translations, and the timeline of events. The behavior of both Parties, and particularly of the Respondent, has substantially, and in the Tribunal’s view, unnecessarily, increased the amount of time that the Tribunal and each Party has had to devote to this case. Therefore, while the Claimant has failed to satisfy the Tribunal that the latter has jurisdiction in this case, the Tribunal believes that, given the complexity of the dispute, the uncertainty of facts alleged in the matter, the difficulty of the legal issues and the behavior of the Parties during the arbitration, it is appropriate that the Parties should (a) share equally the Arbitration Costs and (b) bear their own respective costs for legal representation and other expenses.

114. The SCC Arbitration Institute has determined the Arbitration Costs to be EUR 134,806.89 and SEK 212,717.13, comprised of the following:

SCC Arbitration Institute:

Administration Fee	EUR 15,487.00
Hearing Venue Expenses	SEK 122,062.00
Court Reporter Expenses	SEK 90,655.13

Tribunal's Fees and Expenses:

Nancy B. Turck

Fee	EUR 50,933.00
Travel Expenses	EUR 460.00
	EUR 52.00
Conference Calls	EUR 78.50
Courier Costs	EUR 48.18
Daily Allowance	EUR 1,500.00

Dr. Rolf Knieper

Fee	EUR 30,560.00
Travel Expenses	EUR 811.00
	EUR 52.00
Courier	EUR 20.00
Daily Allowance	EUR 1,500.00

Joseph Tirado

Fee	EUR 30,560.00
Travel Expenses	EUR 132.00
	EUR 1,113.21
Daily Allowance	EUR 1,500.00

115. The Respondent shall pay Swedish VAT of twenty-five per cent (25%) on a portion of its fifty per cent (50%) share of the SCC Arbitration Institute's fees and costs. The SCC Secretariat has determined that the amount of VAT payable by the Respondent is EUR 1,935.87 and SEK 26,589.64.

116. In accordance with Article 43(6) of the SCC Rules, the Parties are jointly and severally liable to the Tribunal and the SCC Arbitration Institute for the Arbitration Costs. As between the Parties, the Respondent shall reimburse the Claimant (a) EUR 67,403.45 and SEK 106,358.56 for the Respondent's fifty per cent share of the Arbitration Costs and (b) EUR 1,935.87 and SEK 26,589.64 for the VAT deducted by the SCC Arbitration Institute from the funds deposited with the SCC Arbitration Institute by the Claimant.

VI DECISION

117. Having considered the claims and defenses submitted by the Parties, and all the submissions and evidence in relation thereto, and in light of the Tribunal's analysis herein, the Tribunal decides and declares:

- a. The Tribunal lacks jurisdiction over the claims submitted by the Claimant;
- b. The Parties are jointly and severally liable for payment of the Arbitration Costs under Article 43 of the SCC Rules. The Arbitration Costs are determined to be EUR 134,806.89 and SEK 212,717.13, comprised of the following:

SCC Arbitration Institute:

Administrative Fee	EUR 15,487.00
Hearing Venue Expenses	SEK 122,062.00
Court Reporter Expenses	SEK 90,655.13

Nancy B. Turck

Fee	EUR 50,933.00
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Joseph Tirado

Fee	EUR 30,560.00
Travel Expenses	EUR 132.00
	EUR 1,113.21

Daily Allowance

EUR 1,500.00

- c. The Parties shall each be liable for fifty per cent (50%) of the Arbitration Costs.
 - d. The Respondent shall be liable for Swedish VAT of twenty-five (25%) on a portion of its fifty per cent (50%) share of the Arbitration Costs.
 - e. The Arbitration Costs will be drawn from the advances paid to the SCC Arbitration Institute.
 - f. The Respondent never having paid any funds toward the Arbitration Costs, as between the Parties the Republic of Moldova is ordered to reimburse State Enterprise “Energorynok” (Ukraine) the amounts of (1) EUR 67,403.45 and SEK 106,358.56 as the Respondent’s fifty per cent share of the Arbitration Costs and (2) EUR 1,935.87 and SEK 26,589.64 for the twenty-five per cent Swedish VAT payable on the Respondent’s share of the Arbitration Costs, for a total amount reimbursable to the Claimant of EUR 69,339.32 and SEK 132,948.20.
 - g. Each Party is to bear its own costs for legal representation and other expenses.
118. A Party may bring an action for the amendment of the Award within three months from the date upon which the Party received the Award. Such action shall be brought before the Svea Court of Appeal in Stockholm.

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119. A Party may bring an action against the Award regarding the decision on the fees of the arbitrators within three months from the date upon which the Party received the Award. Such action shall be brought before the District Court of Stockholm.

Place of Arbitration: Stockholm, Sweden

Date of Award: ___ January 2015

THE ARBITRAL TRIBUNAL

Nancy B. Turck
Chairperson

Mr Joseph Tirado
Arbitrator

Professor Rolf Knieper
Arbitrator