DISSENTING OPINION OF ARBITRATOR DOMINIC PELLEW

1. Unfortunately I have not managed to reach agreement with my fellow arbitrators in relation to some of the matters dealt with in Section IV of the Award (Jurisdiction). Because those matters are decisive for the outcome of this arbitration I consider it appropriate to record my conclusions in this Dissenting Opinion.

2. For the avoidance of doubt I agree with the following conclusions my fellow arbitrators have reached:

   - that this Tribunal has no jurisdiction to hear Claimant's claim under the BIT;
   - that this Tribunal has no jurisdiction to hear Claimant's claims relating to Contract No. 53/01, whether under the BIT or the ECT; and
   - that this Tribunal has jurisdiction *ratione temporis* and *ratione personae* under the ECT to hear Claimant's claim relating to Contract No. 24/02.

3. However, I disagree with my fellow arbitrators' conclusion that the Tribunal has jurisdiction *ratione materiae* under the ECT to hear Claimant's claim relating to Contract No. 24/02. Specifically, I disagree that Claimant's right to payment against Moldtranselectro arising in connection with Contract No. 24/02 is an "Investment" for the purposes of the ECT. In my view, this dispute does not concern an "Investment" at all, and thus, the Tribunal has no jurisdiction.

4. This case raises the fundamental question, can someone who acquires a right to payment which originally arose under a contract for the supply of a good make an "Investment" for the purposes of the ECT?

5. Of course, Claimant does not put its argument exclusively on the basis that it made its Investment when it acquired Derimen's right to payment. It argues in the alternative that it made an "Investment" at the moment it supplied electricity under Contract No. 24/02, and/or at the moment it signed Contract No. 24/02. However, these alternative arguments miss the point that the present dispute does not concern such an "Investment". None of the rights which Claimant allegedly acquired by virtue of signing Contract No. 24/02 or supplying electricity under it were in any way affected by the issuing by Respondent of Decree No. 1000 or by the Decree of the Audit

Chamber. Contract No. 24/02 remained valid throughout 2000 and, as far as we know, Claimant continued to supply electricity under it throughout 2000, and to be paid regularly by Derimen for these supplies. Further, Claimant's rights to payment against Derimen were in no way affected by Respondent's actions (Claimant made clear at the hearing that it was paid in full by Derimen for all electricity it supplied under Contract No. 24/02). In simple terms, if Claimant had not acquired Derimen's right to payment against Moldtranselectro on 30 May 2000 pursuant to Contract No. 06-20, Claimant would not have commenced this arbitration.

6. In my view, the above conclusion is not affected by the provision in Article 1(6) of the ECT to the effect that "a change in the form in which assets are invested does not affect their character as investments". There is no factual basis for considering that the original (alleged) "Investment" of Claimant, in the form either of its "right" to supply electricity under Contract No. 24/02 or of its right to payment against Derimen under Contract No. 24/02, was converted into another "Investment" in the form of its right to payment against Moldtranselectro. As already stated above, the assignment of 30 May 2000 did not have the legal effect of terminating Contract No. 24/02. Thus, the "right" of Claimant to supply electricity under Contract No. 24/02 was preserved after 30 May 2000. Furthermore, there is no evidence, or even any argument from Claimant, that its right to payment against Derimen was converted into a right to payment against Moldtranselectro.

7. Thus, I return to my original question. Did Claimant make an "Investment" when it acquired Derimen's right to payment on 30 May 2000? The starting point for answering this must be Article 1(8) of the ECT, which provides that

> *"Make Investments" or "Making of Investments" means establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity.*

8. The first possibility is therefore that Claimant acquired an existing "Investment" belonging to Derimen on 30 May 2000. But Derimen's right to payment against Moldtranselectro cannot have been an "Investment", since the definition of "Investment" in Article 1(6) requires that an "Investment" be "owned or controlled directly or indirectly by an Investor" (emphasis added). Derimen was not a qualifying

"Investor" because it was incorporated in the British Virgin Islands, which is not a party to the ECT. Therefore, Derimen never owned an "Investment".

9. The only possibility is therefore that Claimant established a new "Investment" when it acquired Derimen's right to payment. In order to assess whether this did, in fact, happen, it is necessary to examine in some detail the meaning of the word "Investment" as used in the ECT.

10. The definition of "Investment" in Article 1(6) of the ECT makes clear, first of all, that, in order for an asset to qualify as an "Investment", it must be "associated with an Economic Activity in the Energy Sector". I agree with my fellow arbitrators that Claimant's right to payment against Moldtranselectro was "associated with an Economic Activity in the Energy Sector", since it arose as a result of the supply of electricity. This requirement therefore presents no obstacle to Claimant's claim. However, the more difficult question is whether Claimant's right to payment is the type of "asset" encompassed by the remainder of the definition in Article 1(6).

11. The first point I wish to make in this context is that, although Article 1(6) appears to define "Investment" as meaning literally any asset ("'Investment' means every kind of asset…"), in my view, properly interpreted, Article 1(6) and the ECT as a whole require that such asset be acquired as a result of, or in connection with, an economic process of investment (*kapitalovlozhenie*). I say this for the following reasons.

12. First, in accordance with Article 26(1) of the ECT the Tribunal has jurisdiction to hear disputes "which concern an alleged breach of an obligation under Part III" of the ECT. Part III contains the substantive protections applying to "Investments" and is headed (in capitals) "INVESTMENT[1] PROMOTION AND PROTECTION". Accordingly, it is apparent that the purpose of Article III is to protect "*kapitalovlozhenii*", not merely rights of ownership over assets.

13. Secondly, there are provisions within the ECT which assume that an "Investment" will possess the economic characteristics generally associated with "investments" in the ordinary sense, including an initial capital outlay and the expectation of a return. For example, Article 9(1) guarantees Investors access to capital markets in the host

[1] Translator's note: "*KAPITALOVLOZHENIE*" in Russian.

country "for the purpose of Investment". This assumes that investments require capital. Article 14 also provides that each Contracting Party guarantees:

> *the freedom of transfer into and out of its Area, including the transfer of:*
>
> *(a) the initial capital plus any additional capital for the maintenance and development of an Investment;*
>
> *(b) Returns* (...).

14. Thirdly, Article 1(6) of the ECT refers in several places to the word "investment" with a small "i". For example, the last paragraph begins:

> *"Investment" refers to any investment associated with an Economic Activity in the Energy Sector* (…)*."* (Emphasis added).

15. The use of the small "i" suggests that the word "investment" is deliberately used in its non-specific (i.e. ordinary) sense. In the same way, as noted above, Article 1(6) includes the word "invest" with a small "i":

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

16. The verb "invest" here apparently bears its ordinary meaning and not a meaning deriving from the term "Investment" in the sense of "asset". I note that this same formulation in the definition of "investment" in the bilateral investment treaty between Germany and the Ukraine was enough for the arbitral tribunal in *GEA Group v. Ukraine* to conclude that:

> *according to the BIT itself, its terms have to be interpreted in the broader context of an investment operation.*[2]

17. Fourthly and finally, the ECT includes in various places the adjective "Investment",[3] without defining it (for example, in the phrase "Investment activity" in Article 1(8), in the phrase "Investment climates" in Article 9(3) and in the phrase "investment projects" in Article 19(1)(i)). In none of these phrases is it possible to ascribe to the adjective "Investment" a meaning deriving exclusively from the term "Investment" in

---

[2] *GEA Group Aktiengesellschaft v. Ukraine*, ICSID case no. ARB/08/16, decision of 31 March 2011, para. 149.

[3] Translator's note: "*Investitsionniy*" in Russian.

the sense of "asset". On the contrary, it must relate to the economic process of investment.

18. For the above reasons I conclude that in order for assets to qualify as "Investments" within the meaning of the ECT they must have characteristics which allow them to be characterised as "investments" (*kapitalovlozhenii*) in the ordinary sense. This conclusion derives, in part, from the wording of Article 1(6) itself (i.e. the definition of "Investment"), and in part from the rest of the ECT. In essence, I consider that the definition in Article 1(6) is aimed first and foremost at covering the <u>form</u> which "Investments" may take. When read together with Parts II and V of the ECT, Article 1(6) provides that all forms of assets which belong to an Investor as a result of the carrying out by him of investment activity/*kapitolovlozhenie* should be protected, even if they are not the direct or sole consequence of the investment activity. However, there has to be an investment activity/*kapitalovlozhenie* in the first place.

19. Thus, it is necessary to consider not just whether Claimant acquired an "asset" when it acquired Derimen's right to payment against Moldtranselectro (which it certainly did), but also whether, in doing so, Claimant was carrying out an economic process of investment (i.e. *kapitalovlozheniye*).

20. For these purposes it is necessary to establish what exactly the economic process of investment (*kapitalovlozheniye*) consists of. There are, of course, a significant number of decisions of arbitral tribunals appointed under ICSID Rules relating to the question of what does and does not constitute an "investment" for the purposes of article 25(1) of the Washington Convention. Such jurisprudence does not directly relate to the present matter, as this Tribunal is not constituted under ICSID Rules. However, given that the word "investment" is not defined in article 25(1) of the Washington Convention, so that those tribunals are effectively determining the ordinary meaning of "investment", I find such precedents to be relevant to my analysis. In summary, I consider that the normal meaning of the word "investment" is the expenditure of capital or effort in the expectation of a return. I also consider that in most cases the word connotes (i) some delay (i.e. "duration") before the return is realised, and (ii) some uncertainty in the amount of the return (i.e. commercial risk). (I note that both parties, in their submissions, appear to agree that duration is an essential part of an "Investment"). Finally, as my fellow arbitrators have observed, an

investment usually involves a contribution to the economy of the host state. I emphasise that not all of these elements need necessarily be present in order for an investment (in the sense of the economic process) to have taken place. However, the fewer elements are present, the less easily it can be said that a claimant has made an investment.

21. Applying these conclusions to the facts of the present case, the first and most obvious difficulty Claimant faces in establishing that it carried out an economic process of investment (*kapitalovlozheniye*) when it acquired Derimen's right to payment against Moldtranselectro on 30 May 2000, is that there is no evidence that Claimant spent any capital or effort. Although Contract No. 06-20 formally provides that Claimant "is accounting for the assigned right to payment from [Derimen] on terms agreed in a separate agreement being signed by [Derimen] and [Claimant]", such separate agreement was not produced in evidence. During the hearing Claimant's representative stated that Claimant had paid for these rights, however he did not provide any evidence of this. (It may be noted that the amount paid by Claimant to Derimen for the latter's right – if it there was such payment – might have been relevant in the context of establishing Claimant's loss; however, this is not relevant for present purposes).

22. I have considered whether there might have been the necessary expenditure of capital or effort by virtue of the receipt by Respondent of some benefit from Contract No. 06-20, rather than by virtue of any payment having been made by Claimant. However, the acquisition by Claimant of its right to payment against Moldtranselectro was not accompanied by any provision of credit by Claimant to Moldtranselectro, since the date for payment of the debt had already arisen when it was acquired. Claimant did not grant Moldtranselectro an extension in the repayment date. In this regard I note that in *Fedax v. The Republic of Venezuela*, where the arbitral tribunal came to the conclusion that the assignment of the benefit of promissory notes was an "investment" notwithstanding the fact that the respondent state received no capital injection as a result of such assignment, the date for payment under the promissory notes had not yet been reached:

> *In such a situation, although the identity of the investor will change with every endorsement, the investment itself will remain constant,*

> *while the issuer will enjoy a continuous credit benefit until the time the notes become due. To the extent that this credit is provided by a foreign holder of the notes, it constitutes a foreign investment which in this case is encompassed by the terms of the [Washington Convention] and the [bilateral investment treaty between the Netherlands and Venezuela]."*[4]

23. Similarly, in *Société Générale v. Dominican Republic*, the arbitral tribunal had to consider whether a claimant who had acquired an interest in an electricity generating company in the Dominic Republic owned a qualifying "investment" under the bilateral investment treaty between France and the Dominican Republic, notwithstanding the fact that it had bough the interest for just two US Dollars. The arbitral tribunal decided that it did. Explaining its reasoning, the arbitral tribunal noted:

> *The issue of the specific contribution made to the local economy by a transaction of this kind might not be as easy to identify as if a factory was built, but this of course does not disqualify financial investments from protection under the Treaty. The Claimant has convincingly identified as part of such contribution the continuing supply of electricity, the improvement of distribution and the contribution to employment within the country. Moreover, the Claimant has also expressed its intention to undertake the capitalization of EDE Este if the obligations relating to the investment are met (...) the important role of distribution of electricity in the overall performance of a complex economy can be considered as one additional element of the Claimant's involvement in and contribution to the economy of the Dominican Republic."*[5] (Emphasis added).

24. Thus, if, at the same time as acquiring Derimen's rights, Claimant had undertaken new obligations conferring a benefit on Respondent, Claimant could probably have claimed to have made an "investment" in the ordinary sense, even without any evidence that it had actually paid for those rights. However, Claimant did not undertake any such new obligations.

25. In addition to the fact that, in my judgment, Claimant made no contribution of capital or effort, I also note that the acquisition of a debt which has already fallen due for payment does not contain the element of duration. On the contrary, the acquisition of Derimen's right to payment was apparently aimed precisely at facilitating a more rapid

---

[4] *FEDAX N.V. v.Venezuela*, ICSID case no. ARB/96/3. Decision on jurisdiction of 11 July 1998, para. 40.

[5] *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribudora de Electricidad del Este, S.A. v. Dominican Republic*, LCIA case no. UN 7927, Decision of 19 September 2008, para. 35.

recovery of the debt than would have been the case had Derimen remained Moldtranselectro's creditor. In simple terms, as Respondent correctly observes, Claimant was acting as a "debt collector".

26. Finally, as already indicated, Claimant made no contribution to the economy of Respondent by acquiring the debt. The acquisition of the debt was in fact damaging to the interest of Respondent, to the extent that it was intended to facilitate the recovery of the debt from Moldtranselectro.

27. For these reasons I do not think that Claimant's acquisition of the debt from Derimen can be described as an investment in the sense of the economic process of investment (*kapitalovlozhenie)*. I therefore do not think that the asset Claimant acquired (namely the right to payment against Moldtranselectro) is an "Investment" within the meaning of Article 1(6).

28. So far I have not considered the specific categories of "Investments" listed in Article 1(6)(c). However, an analysis of those categories supports my conclusion.

29. Claimant relies, in the first place, on Article 1(6)(c) of the ECT ("claims to money and claims to performance pursuant to a contract having an economic value and associated with an Investment").[6] However, Claimant's argument ignores the effect of the words "associated with an Investment". The word "Investment" in this context is written with a capital "I" and must, therefore, relate to the term "Investment" as defined in the rest of Article 1(6). In my view, an example of a situation in which Article 1(6)(c) would apply would be where a factory owned by an Investor on the territory of a Contracting Party has a right to payment under a supply contract with local business, and the Contracting Party prevents that right from being enforced. In other words, the right to payment must arise in the context of a separate, pre-existing Investment.

30. I am unable to identify any separate Investment belonging to Claimant which falls within the rest of Article 1(6) and which could be said to be associated with Claimant's right to payment against Moldtranselectro. Although I accept that Claimant's right to payment against Moldtranselectro was associated with Claimant's original "right" to supply to electricity under Contract 24/02, for the reasons set out

[6] I note that there appears to be a typographical error in the official Russian language version of Article 1(6)(c). The last word should be "Investitsiyey".

below, I do not consider that such "right" was an "Investment" within the meaning of Article 1(6). I also note that, at the time Claimant acquired its right to payment against Moldtranselectro, it apparently had no financial claims against Derimen (since it had been paid in full by Derimen). Thus, it had no asset which it had acquired as a result of supplying electricity under Contract 24/02. If it had no asset, it can have had no "Investment".

31. For these reasons I conclude that Claimant's alleged "Investment" does not fall within the scope of Article 1(6)(c) of the ECT.

32. Claimant relies on *Remington v. Ukraine* in support of its argument that it owned an "Investment" within the meaning of Article 1(6)(c) of the ECT. In *Remington*, the claimant was the assignee of rights to payment which had originally arisen under a contract for the supply of equipment to an electricity generation plant located in the Respondent state. The arbitral tribunal in *Remington* came to the conclusion that such rights fell within Article 1(6)(c) as well as Article 1(6)(f) of the ECT.

> *In contrast to Global Trading v. Ukraine, 1 December 2010 ICSID case no. ARD/11, in a dispute under the ECT, even a simple trade transaction, if it was carried out in the energy sector, qualifies as an Investment (articles 1(6)(c) and 1(6)(f)).*[7]

33. With all due respect, I do not agree with the above–stated conclusions. In relation to Article 1(6)(f) of the ECT, my reasons are set out below. In relation to Article 1(6)(c), I note that the requirement in the ECT that claims falling within this Article should arise a contract which is "associated with an Investment" is intended to limit the scope of Article 1(6)(c) so that not all claims pursuant to contracts should be considered "Investments". This was noted by the arbitral tribunal in *Fedax*:

> *only very exceptionally do bilateral investment treaties explicitly relate the definition of the assets or transactions included in this concept to questions such as the existence of a lasting economic relation, or specifically associate titles to money and similar transactions strictly to a concept of investment.*[8] (Emphasis added).

---

[7] *Remington Worldwide Limited v. Ukraine,* SCC case no. V(116/2008), decision of 28 April 2011, paragraph 200.

[8] *FEDAX N.V. v.Venezuela*, ICSID case no. ARB/96/3, decision on jurisdiction of 11 July 1998, para. 34.

34. In *Fedax* the relevant bilateral investment treaty, which was concluded by The Netherlands and The Republic of Venezuela, provided simply: "title to money, to other assets or to any performance having an economic value".

35. Similarly, in *Mytilineos v. Serbia and Montenegro* (where the formula used in the relevant bilateral investment treaty also covered claims to money without any addition requirement that they be "associated with an investment"), the arbitral tribunal noted that some treaties

> *include 'a claim to money or a claim to performance having economic value, and associated with an investment' (emphasis added). In these cases, it is clear that loans or payment claims arising from sales contracts as such do not qualify as 'investments'.*[9]

36. The same conclusion was reached by the arbitral tribunal in *Global Trading v. Ukraine* (which was the case referred to by the arbitral tribunal in *Remington*). That case related to claims for payment arising under contracts for the supply of poultry to Ukraine. The arbitral tribunal had to determine, among other things, whether such claims fell within the definition "a claim to money or a claim to performance having economic value, and associated with an investment" in article I(1)(a)(iii) of the bilateral investment treaty between the Ukraine and the USA. The arbitral tribunal concluded that:

> *under the text of Article I(1)(a), the Tribunal finds that (as here) claims to moneys alleged to be due can only fall within the scope of Article I, and therefore of the BIT as a whole, whatever the circumstances, if they are (as sub-paragraph (a)(iii) says in plain words) 'associated with an investment'.*
>
> *In the tribunal's view, the Claimants' case under this sub-paragraph founders on the fact that their contracts were simply contracts which lacked the necessary connecting factor of being 'associated with an investment'.*
>
> *Rested on this basis, the Claimants' claims based on Article I(1)(a)(iii) are therefore 'manifestly without legal merit' as provided in Rule 41(5).*[10]

---

9 *Mytilineos Holdings SA v. Serbia and Montenegro*, para. 134.

10 *Global Trading Resource Corp. and Globex International, Inc v. Ukraine*, decision of 1 December 2010, paras. 50-52.

37. In my view, Article 1(6)(c) of the ECT does not substantially differ from the bilateral treaty which the arbitral tribunal in *Global Trading* had to apply. I agree with the conclusions of the arbitral tribunals in *Mytilineos* and *Global Trading* that the words "… and associated with an Investment" are significant. I note that this view is also shared by two of the authors whom Claimant cites, Rudolf Dolze and Christoph Schreuer:

> *In practice, the terms "rights conferred by contracts" or "rights granted by the general laws" will often be part of the definition. If this is the case, there is no need further to elaborate or speculate on the notion of "investment". The matter becomes more complicated if the category in question itself contains a reference to the term "investment"(e.g. "a claim to money related to an 'investment'"), as is the case in a clause contained in the Energy Charter Treaty. In such circumstances, recourse to a general concept of "investment" will be necessary.*[11] (Emphasis added).

38. My interpretation of Article 1(6)(c) as excluding simple claims to payment under supply contracts where those contracts are not "associated with an Investment" (meaning an Investment within the meaning of the rest of Article 1(6)) is consistent with another circumstance, which is a unique feature of the ECT. Namely, the ECT contains a separate part (Part II) relating to "Commerce". Measures aimed at the liberalisation of commerce are an important part of the Treaty, but they are separate from the measures for the protection of "Investments"/"*kapitalovlozhenii*".

39. Claimant relies, in the second place, on Article 1(6)(f) ("any right conferred by (…) contract (…) to undertake any Economic Activity in the Energy Sector"). As has already been discussed, even if the "right" of the Claimant to supply electricity under Contract No. 24/02 could properly be characterised as an "Investment" falling within this Article, the current dispute does not concern such "Investment". However, we need to consider the further possibility that Claimant's "right" to supply electricity was a separate "Investment", and that Contract No. 06-20 was associated with this "Investment". If that were the case, then Claimant's right to payment under Contract No. 06-20 would be an "Investment" pursuant to Article 1(6)(c), discussed above.

---

[11] Rudolf Dolze and Christopher Schreuer, *Principles of International Investment Law*, Oxford University Press 2008, pp. 64-65 (footnote omitted).

40. In my view, Claimant's "right" to supply electricity under Contract 24/02 was not an "Investment" falling within Article 1(6)(f). The kind of "right" which Article 1(6)(f) encompasses is a right to carry out an activity which the Investor would not otherwise have. Further, such right must have an economic value in itself (i.e. it must be something that is capable of being expropriated). The kind of right which most obviously falls within Article 1(6)(f) is a right under a concession agreement. In the present case, Claimant already had the right to supply electricity on the Ukrainian wholesale market; it did not acquire such right by virtue of Contract No. 24/02.

41. I also consider that Claimant was not given any "right" under Contract No. 24/02 except for the right to be paid by Derimen for the electricity supplied. I do not think it is correct to characterise an obligation to supply electricity as a "right". I am reassured in this conclusion by the fact that, as already noted, article 1(6)(c) of the ECT provides that rights to payment under a contract may qualify as an "Investment" only if the contract is "associated with an Investment". It cannot be correct that an Investor may get round this limitation – i.e. argue that a right to payment under ANY contract is an "Investment" – by re-casting such right as a "right" to supply the underlying good which gave rise to the right to payment. This would deprive the words "…and associated with an Investment" in Article 1(6)(c) of all legal significance.

42. It is true that a contract for the supply of a good may represent an asset with quantifiable economic value for the supplier. The value in principle is the profit the supplier expects to make on the contract. However, the mere conclusion of such contract by the supplier does not normally involve the economic process of investment (*kapitalovlozheniye*) described above. Therefore, for the reasons already given, I do not think a contract, as opposed to a specific right under a contract, can be an asset falling within Article 1(6).

43. Even if I am wrong in my conclusion that a "right" to supply a good is not a "right" falling within Article 1(6)(f), I note that the substantive protections set out in Part III of the ECT apply only to Investments "in the Area" of the host State.[12] Claimant's

[12] Article 10(1) provides, for example, that each Contracting Party shall "encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area" (emphasis added).

"right" to supply electricity under Contract 24/02 clearly was not a right which was located "in the Area" of Respondent. Claimant had no physical presence in Moldova and supplied electricity only to the Moldovan frontier (indeed, it had no licence to supply electricity within Moldova). In my view, the kind of "Investment" referred to in Article 1(6)(c) (i.e. the "Investment" which is separate to the claims to money pursuant to contract) must be an Investment located in the Area of the host State.

44. Claimant relies on *Remington* and *Petrobart v. Kyrgyz Republic* in support of its argument that it owned a qualifying "Investment" under Article 1(6)(f) of the ECT.

45. In *Petrobart* the claimant had supplied gas condensate to a state enterprise in Kyrgyzstan and acquired a right to payment of around USD 1.5 million which, according to the claimant, had then been expropriated as a result of various acts by the state. The arbitral tribunal in *Petrobart* concluded that the claimant's right to payment fell within Article 1(6)(f) of the ECT:

> *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.*[13]

46. The arbitral tribunal in *Remington* did not carry out any separate analysis of why it considered that the claimant's rights to payment fell within Article 1(6)(f) of the ECT in addition to Article 1(6)(c).

47. The first observation I would make in relation to the *Petrobart* case is that the facts of that case were different to the facts in this case in one fundamental respect: in *Petrobart*, the claimant was not a debt collector but the original supplier/creditor. The tribunal was not, therefore, considering whether the act of acquiring the debt by the debt collector was an "Investment". Further, the claimant was seeking compensation for, among other things, its loss of future profits under the supply contract. Finally, I also note that the arbitral tribunal in *Petrobart* did not have the benefit of submissions from the respondent (as opposed to from the claimant) on whether the claimant had made an "Investment" for the purposes of the ECT: the respondent merely argued that the Tribunal was obliged to hold that it had no jurisdiction for *res judicata* reasons. In any event, regretfully and with all due respect, I cannot agree with the conclusion

[13] *Petrobart v. Kyrgyzstan*, SCC case No. 126/2003, decision of 29 March 2005, page 72.

of the arbitral tribunal in *Petrobart* (and the apparent conclusion of the arbitral tribunal in *Remington*) that the "right" to supply a good is a right falling within Article 1(6)(f) of the ECT. I have already given my reasons above.

48. In conclusion, I do not consider that Claimant's right to payment against Moldtranselectro which it acquired on 30 May 2000 pursuant to Contract No. 06-20 was an "Investment" falling within Article 1(6)(c) or Article 1(6)(f) of the ECT. This, therefore, reinforces my conclusion (which I had already reached, independently of my analysis of Article 1(6)(c) and Article 1(6)(f)) that Claimant's right to payment did not involve an economic process of investment, and thus does not fall within Article 1(6) as a whole.

……[Signature]……..
Dominic Pellew

Date: ……[25/10/13]……