Bilaga 1

SCC Case 2020/074

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE (2017)

- between -

KOMAKSAVIA AIRPORT INVEST LTD

(the "Claimant")

- and -

THE REPUBLIC OF MOLDOVA

(the "Respondent", and together with the Claimant, the "Parties")

FINAL AWARD

Tribunal
Ms. Jean Kalicki (Chair)
Prof. Philippe Sands QC
Prof. Brigitte Stern

Administrative Secretary to the Chair
Dr. Joel Dahlquist

Seat of Arbitration: Stockholm, Sweden

3 August 2022

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Airport	The Chisinau International Airport
Avia Invest	Avia Invest SRL
BIT	Agreement between the Government of the Republic of Cyprus and the Government of the Republic of Moldova for the Reciprocal Promotion and Protection of Investments, entered into force on 27 March 2008
C-[#]	Claimant's Exhibit
CL-[#]	Claimant's Legal Authority
Claimant or Cl. or Komaksavia	Komaksavia Airport Invest Ltd
Cl. Counter-Memorial	Claimant's Counter-Memorial on Bifurcated Jurisdictional Issues, dated 31 July 2021
Cl. Rejoinder	Claimant's Rejoinder on Bifurcated Jurisdictional Issues, dated 31 January 2022
Cl. PHB	Claimant's Post-Hearing Brief dated 9 June 2022
Companies Law	The Companies Law of the Republic of Cyprus
Concession Agreement	The "Concession Agreement for assets under management of S.E. 'Chisinau International Airport' and their adjacent land", dated 30 August 2013
[First/Second/] [Name] Report	Expert reports
[First/Second/Third] [Name] Statement	Witness statements
Hearing	Hearing on Bifurcated Jurisdictional Issues, held in London on 3-4 May 2022
IDRC	International Dispute Resolution Centre
Notice of Dispute	Komaksavia's Notice of an Investment Dispute, dated 2 October 2019
October 2019 Shareholder Decision	The 11 October 2019 resolution adopted by an Avia Invest general shareholder's meeting

PO5	The Tribunal's Procedural Order No. 5 on The Respondent's Request for Summary Procedure and/or Bifurcation, dated 26 March 2021
R-[#]	Respondent's Exhibit
RL-[#]	Respondent's Legal Authority
Request for Arbitration	Claimant's Request for Arbitration, dated 15 May 2020
Respondent or Resp. or Moldova	The Republic of Moldova
Resp. Memorial	Respondent's Memorial on Bifurcated Jurisdictional Issues, dated 28 May 2021
Respondent's PHB or Resp. PHB	Respondent's Post-Hearing Brief dated 10 June 2022
Resp. Reply	Respondent's Reply on Bifurcated Jurisdictional Issues, dated 11 November 2021
SCC Rules	The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, which entered into force on 1 January 2017
SPA	Share Purchase Agreement between Komaksavia and OOO Komaksavia, dated 16 September 2016
TB Team	TB Team Management LLP
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing
VCLT	1969 Vienna Convention on the Law of Treaties

I. PARTIES AND REPRESENTATIVES

1. The Claimant is Komaksavia Airport Invest Ltd ("**Komaksavia**").

2. The Claimant is represented in these proceedings by:

Mr. Eli Cohen
Mr. Shai Sharvit
Mr. Nir Keidar
Ms. Nuna Lerner
Ms. Myriam Feinberg

Gornitzky & Co
Vitania Tel-Aviv Tower
20 HaHarash St.
Tel-Aviv, Israel
6761310

elic@gornitzky.com;
ssharvit@gornitzky.com;
nirke@gornitzky.com;
nunal@gornitzky.com;
myriamf@gornitzky.com

3. The Respondent is the Republic of Moldova ("**Moldova**" or "**Respondent**").

4. The Respondent is represented in these proceedings by:

Mr. Mihail Buruiana

Buruiana & Partners
Mihail Kogalniceanu Street No. 81/4, Ap. 220 HaHarash St.
MD-2009 Chisinau
Republic of Moldova

info@buruiana.com

II. ARBITRAL TRIBUNAL

5. The Tribunal was constituted as follows:

   a. On 15 May 2020, the Claimant appointed Prof. Philippe Sands QC as the first arbitrator.

b. On 9 July 2020, the Respondent appointed Prof. Brigitte Stern as the second arbitrator.

c. On 23 July 2020, the Board of the Arbitration Institute of the Stockholm Chamber of Commerce (the "**SCC Board**") appointed Ms. Jean Kalicki as Chair.

6. The Tribunal's contact details are as follows:

Professor Philippe Sands QC
Griffin Building
Grays Inn Rd
Holborn
London, United Kingdom
Email: philippesands@matrixlaw.co.uk

Professor Brigitte Stern
7 rue Pierre Nicole
Code A1672
Paris 75007
France
Email: Brigitte.stern@jstern.org

Ms. Jean E. Kalicki
Arbitration Chambers
201 West 72nd St., #6A
New York, NY 10023
U.S.A.
Email: jean.kalicki@kalicki-arbitration.com

III. PROCEDURAL HISTORY

A. Earlier Developments

7. By a Request for Arbitration dated 15 May 2020, (the "**Request for Arbitration**"), Komaksavia commenced arbitration proceedings against Moldova pursuant to Article 10 of the Agreement between the Government of the Republic of Cyprus and the Government of the Republic of Moldova for the Reciprocal Promotion and Protection of Investments, entered into force on 27 March 2008 ("the **BIT**") and the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2017) (the "**SCC Rules**").

8. On 9 July 2020, Moldova filed with the SCC its Answer to the Claimant's Request for Arbitration.

9. On 22 July 2020, Komaksavia filed with the SCC its Comments on the Respondent's Answer.

10. In accordance with Article 8 of the SCC Rules, these arbitration proceedings are deemed to have commenced on 15 May 2020, the date on which the SCC received the Request for Arbitration.

11. In accordance with Article 22 of the SCC Rules, the case was referred to the Tribunal on 9 September 2020.

12. The Tribunal issued its Procedural Order No. 1 on 29 October 2020 ("**PO1**"). Among other procedural matters, Procedural Order No. 1 confirmed the appointment of Dr. Joel Dahlquist as Administrative Secretary to the Chair (to which the Parties already had consented).

13. On 27 November 2020, Moldova submitted its Application for the Revocation of the Emergency Award on Interim Measures. Following further briefing by both Parties, and a hearing via video conference on 15 February 2021, the Tribunal issued its Procedural Order No. 4 ("**PO4**"), in which it granted Moldova's request to revoke the interim measures ordered by an emergency arbitrator prior to the institution of these proceedings, and denied certain other requests made by Moldova.

14. On 5 February 2021, Moldova submitted its Request for Summary Procedure, in which it also stated that if the Tribunal was not inclined to grant the requested summary procedure, the request instead "should be deemed the Respondent's Request for Bifurcation." Komaksavia submitted its Reply on 5 March 2021, objecting against the use of either a summary procedure or bifurcation.

B. The Bifurcated Stage

15. On 26 March 2021, the Tribunal issued its Procedural Order No. 5 on the Respondent's Requests for Summary Procedure and/or Bifurcation ("**PO5**"). In PO5, the Tribunal denied Moldova's request for a summary procedure pursuant to Article 39 of the SCC Rules, but granted Moldova's alternative request for bifurcation to consider three separate jurisdictional

objections (the "**Bifurcated Jurisdictional Objections**"), as well as a potential fourth objection if Moldova were to pursue that objection (which Moldova ultimately did not do). The nature of the Bifurcated Jurisdictional Objections is described further below.

16. Also in PO5, the Tribunal denied bifurcation with respect to a series of other jurisdictional objections which Moldova had raised (the "**Non-Bifurcated Jurisdictional Objections**"). The Tribunal found these to be more suitable for evaluation in conjunction with the merits, should the case in fact continue to a merits phrase following consideration of the Bifurcated Jurisdictional Objections.

17. The same PO5 also contained an Annex, with an updated timetable for the bifurcated phase of the proceedings. This timetable led up to a Hearing on Bifurcated Jurisdictional Issues (the "**Hearing**"), which was then tentatively scheduled for 10-11 January 2022.

18. On 20 April 2021, the Tribunal communicated its decision that the Hearing "be held in London (if not held remotely)" and also requested that the Parties make appropriate contingency bookings at the International Dispute Resolution Centre (the "**IDRC**").

19. On 6 May 2021, the Tribunal issued its Procedural Order No. 6 ("**PO6**"), which adjusted the procedural schedule in accordance with the Parties' agreement.

20. On 20 May 2021, the Tribunal confirmed the Parties' agreements to extend the deadlines for each side's upcoming memorials.

21. On 28 May 2021, the Respondent submitted its Memorial on Bifurcated Jurisdictional Issues ("**Resp. Memorial**").

22. Another adjustment to the schedule, again following the Parties' agreement, was made by Procedural Order No. 7 ("**PO7**"), on 12 July 2021.

23. On 30 July 2021, Komaksavia submitted its Counter-Memorial on Bifurcated Jurisdictional Issues ("**Cl. Counter-Memorial**").

24. On 31 August 2021, the Tribunal granted Komaksavia's request, in the absence of any assertion of prejudice by Moldova, for a seven-day extension of the forthcoming deadline for the Parties' objections to document production requests, with a consequential seven-day extension of all procedural steps outlined in PO7.

25. On 6 September 2021, the Tribunal communicated to the Parties that it considered it time to review the options available for the Hearing, referring back to its decision on 20 April 2021 that the Hearing should take place in London, if it were to take place in person. The Tribunal directed the Parties to communicate, jointly or separately, (i) what arrangements had been made for the Hearing; (ii) the Parties' preference as to the modality of the Hearing (*i.e.*, in person or remote); (iii) whether the Parties still considered that two days were necessary; and (iv) the Parties' availability for a pre-hearing conference in December 2021.

26. Following the Parties' exchanges of document production requests, on 15 September 2021 the Tribunal issued its Procedural Order No. 8 ("**PO8**"), in which it ruled on the Parties' outstanding document requests.

27. On 15 September 2021, Moldova replied to the Tribunal's questions about the Hearing. Moldova confirmed that it had made arrangements with the IDRC for both an in-person hearing and a possible remote or hybrid modality, but indicated that Moldova's preference remained for an in-person hearing. Moldova also stated that it was not yet in a position to express a view as to whether two days would be necessary for the Hearing. On 20 September 2021, the Tribunal invited Komaksavia to confirm its agreement with the Respondent's arrangements with the IDRC. Komaksavia provided such confirmation on 27 September 2021. On the same day, the Tribunal confirmed receipt of Moldova's communication and indicated that the arrangements with the IDRC should be maintained "subject to eventual decision as between an in-person, remote or hybrid modality."

28. On 21 October 2021, James Ramsden QC notified the Tribunal and the Parties that he and his firm no longer would be acting for Komaksavia. On 27 October 2021, following correspondence, Komaksavia's remaining counsel also confirmed their withdrawal from the case, and asked that all future correspondence be directed to Komaksavia's representative Mr. Andreas Menelaou. The Tribunal confirmed the withdrawal of counsel on 28 October 2021. Upon inquiry from the Tribunal, Mr. Menelaou confirmed on 1 November 2021 that Komaksavia intended to "continue with its claims in this case," and asked for two weeks to retain replacement counsel.

29. On 27 October 2021, Moldova sought a one-week extension to submit its Reply on Bifurcated Jurisdictional Issues ("**Resp. Reply**"). The Tribunal granted the extension on the same day.

Moldova then sought a further three-day extension on 4 November 2021. The Tribunal granted this second extension on the same day, while noting that the two extensions "will require shifts of the subsequent deadlines." The Tribunal indicated that it would revisit the case schedule, as well as the feasibility of the January 2022 Hearing dates, as soon as the issue of Komaksavia's replacement counsel had been resolved.

30. On 8 November 2021, Moldova submitted its Reply.

31. On 16 November 2021, attorneys from Gornitzky & Co informed the Parties and the Tribunal that they would represent Komaksavia, effective immediately. The Tribunal confirmed the notification of the new counsel on the same day, advising counsel of the upcoming procedural steps and inviting Komaksavia "to submit any observations it may have on the feasibility in maintaining this schedule, bearing in mind the need to get up to speed on the case file."

32. On 25 November 2021, Komaksavia requested that in the view of its new counsels' need for "on-boarding," the deadline for its Rejoinder on Bifurcated Jurisdictional Issues ("**Cl. Rejoinder**") be extended until 13 January 2022, with resulting changes to the dates for the Pre-Hearing Conference and the Hearing.

33. The Tribunal granted Komaksavia's request for an extended deadline for its Rejoinder on 28 November 2021. In the same communication, the Tribunal also indicated its availability for a re-scheduled Hearing on several potential dates in April or May 2022, and instructed the Parties to revert back by 3 December 2021.

34. On 3 December 2021, Moldova communicated its view that it had been prejudiced by the Tribunal's extension of Komaksavia's Rejoinder deadline. In the same communication, Moldova also indicated its availability for a rescheduled Hearing.

35. On 4 December 2021, Komaksavia requested leave to indicate its availability for a rescheduled Hearing by 7 December 2021. The Tribunal granted the request on the same day. On 7 December 2021, Komaksavia indicated its availability.

36. On 8 December 2021, the Tribunal confirmed that the Hearing would take place on 3-4 May 2022, and offered five potential dates for the Pre-Hearing Conference. Following

confirmation from the Parties, the Tribunal confirmed on 15 December 2021 that the Pre-Hearing Conference would take place on 4 April 2022.

37. On 6 January 2022, Komaksavia requested a further extension for the deadline to submit its Rejoinder, until 31 January 2022. On the Tribunal's invitation to indicate its views, Moldova objected to the request on 10 January 2022. The Tribunal granted Komaksavia's request on 12 January 2022 "in the absence of any demonstrated prejudice." The Tribunal also noted its "disappointment [with] the apparent absence of any effort by either Party to reach a reasonable accommodation of this procedural dispute directly between themselves." Separately, the Tribunal also reminded the Parties that the modality of the Hearing was yet to be determined, and instructed the Parties to renew the previously made provisional arrangements with the IDRC, "pending an intended final Tribunal decision on that issue in early March 2022."

38. On 26 January 2022, Moldova informed the Tribunal of the arrangements made with the IDRC. On the Tribunal's invitation, Komaksavia confirmed these arrangements on 27 January 2022.

39. Komaksavia submitted its Rejoinder on 31 January 2022.

40. On 7 February 2022, Moldova notified the names of the Claimant witnesses that it intended to cross-examine. On 21 February 2022, Komaksavia submitted its corresponding notification of the Respondent witnesses that it intended to cross-examine.

41. On 24 February 2022, the Tribunal invited the Parties to indicate their updated preferences with respect to the modality of the Hearing – including the Parties' estimates on the number of expected participants – and also indicated that the Tribunal was open to proceed in person, subject to future developments.

42. On 4 March 2022, Komaksavia submitted an indication of its expected hearing participants, while not indicating a modality preference. Later that same day, Moldova provided its corresponding indication of participants, and stated that it would "leave it to the Tribunal to determine and decide on the modality" of the Hearing.

43. On 8 March 2022, having inquired directly with the IDRC about the available social distancing protocols, the Tribunal requested that the Parties "explore promptly the possibility

of booking a larger hearing room." After receiving further input and confirmations from the Parties, the Tribunal confirmed on 14 March 2022 that the Hearing would proceed in person.

44. On 15 March 2022, Komaksavia submitted an application for interim relief, seeking a number of separate forms of interim relief, and also requested that the Tribunal "issue an emergency *ex-parte* order for the reliefs requested above, until such time it makes a decision on the requested reliefs." In a decision communicated *via* email on 22 March 2022, the Tribunal declined to order the requested relief on an *ex parte* basis. On 31 March 2022, Moldova submitted its response to Komaksavia's application. On 13 April 2022, the Tribunal issued its Procedural Order No. 10 ("**PO10**"), in which it denied the requests sought by Komaksavia, further explained its earlier decision to decline the request for an *ex parte* relief, and deferred all issues of costs for later consideration.

45. On 18 March 2022, the Tribunal requested a clarification from Moldova as to whether it wished to cross-examine any of Komaksavia's witnesses at the Hearing (such intention having been absent from the Respondent's 7 February 2022 notification). On the same day, Moldova confirmed its intention to cross-examine Komaksavia's two fact witnesses, as well as Komaksavia's expert. Accordingly, the following individuals were scheduled to be cross-examined at the Hearing:

The Claimant

Mrs. Aimilia Efstathiou (Respondent's fact witness)

Prof. Thomas Papadopoulos (Respondent's expert witness)

The Respondent

Mr. Andreas Menelaou (Claimant's fact witness)

Mr. Antonis Michaelides (Claimant's fact witness)

Mr. George Pamboridis (Claimant's expert witness)

46. On 21 March 2022, the Tribunal circulated a draft procedural order containing provisions for the organization of the Hearing. The Tribunal instructed the Parties to consult with one another, and to report back with joint or separate edits on the draft by 31 March 2022.

47. The Parties submitted separate views on the draft procedural order on 31 March 2022.

48. The Pre-Hearing Conference took place on 4 April 2022.

49. Following the Pre-Hearing Conference, on 11 April 2002, the Tribunal issued its Procedural Order No. 9 on the Organization of the Hearing on Bifurcated Jurisdictional Issues ("**PO9**").

50. On 21 April 2022, counsel for Komaksavia provided an updated list of its exhibits and legal authorities, renumbered in a manner compliant with the Tribunal's Procedural Order No. 1. Komaksavia previously had used a number of different and inconsistent numbering conventions for its exhibits throughout these proceedings. For the avoidance of doubt, in this Award the Tribunal uses this updated and final numbering when referring to Komaksavia's exhibits and authorities.

51. The Hearing took place on 3-4 May 2022 at the IDRC in London. The following individuals were present:

Tribunal

Ms. Jean E. Kalicki	Chair of the Tribunal
Prof. Philippe Sands QC	Arbitrator
Prof. Brigitte Stern	Arbitrator
Dr. Joel Dahlquist	Administrative Secretary to the Chair

For the Claimant

Mr. Eli Cohen	Gornitzky & Co
Mr. Shai Sharvit	Gornitzky & Co
Mr. Nir Keidar	Gornitzky & Co
Ms. Nuna Lerner	Gornitzky & Co

For the Respondent

Mr. Mihail Buruiana	Buruiana & Partners
Ms. Marina Foltea	Buruiana & Partners

Ms. Laura Banealite	Party Representative

Court Reporter

Ms. Diana Burden	European Deposition Services

52. The following individuals were examined:

On behalf of the Claimant

Mr. Andreas Menelaou (fact witness)

Mr. Antonis Michaelides (fact witness)

Mr. George Pamboridis (expert witness)

On behalf of the Respondent

Mrs. Aimilia Efstathiou (fact witness)

Prof. Thomas Papadopoulos (expert witness)

53. At the conclusion of the Hearing, the Parties indicated a shared preference for post-hearing briefs, and for cost submissions in the form of schedules. In separate communications on 11 May 2022, the Parties confirmed their subsequent agreement as to the timing and format of the post-hearing briefs and the cost submissions.

54. Komaksavia submitted its post-hearing brief ("**Cl. PHB**") on 9 June 2022, and Moldova submitted its post-hearing brief ("**Resp. PHB**") on 10 June 2022.

55. Between 20 June 2022 and 8 July 2022, the Parties submitted various correspondence regarding their respective claims for costs in connection with these proceedings.

56. On 21 July 2022, the Tribunal declared the proceedings closed, pursuant to Article 40 of the SCC Rules.

IV. PARTIES' REQUESTS FOR RELIEF

57. In its Reply, Moldova requests that the Tribunal:

533.1. dismiss the Claimant's claims for lack of jurisdiction *ratione personae*; or

533.2. dismiss the Claimant's claims for lack of jurisdiction *ratione materiae*; or

533.3. dismiss the Claimant's claims for lack of jurisdiction *ratione temporis*; or

533.4. dismiss the Claimant's claims for failure of the Claimant to properly request and proceed with the amicable settlement under Article 10 of the BIT; and

in any event

533.5. order the Claimant to pay the Respondent's costs of the arbitration on a full indemnity basis, i.e., the Respondent's costs, including but not limited to the fees and expenses of the Tribunal and the Respondent's costs of legal representation and assistance, experts, witnesses, and consultants, and all other fees and expenses incurred in participating in the arbitration, including internal costs, with post-award interest at a commercially reasonable rate;

and

533.6. order such other relief as the Arbitral Tribunal, in its discretion, deems appropriate.[1]

58. In its Rejoinder, Komaksavia requests that the Tribunal:

(a) *Decide* that Respondent's "Seat Objection" and "No Investment Objection" shall not be dealt with as part of the bifurcated proceedings (which shall then only deal with the "Cooling-Off Objection"); or

(b) In the alternative, *order* that Respondent's "Seat Objection" and "No Investment Objection" shall only be addressed in these bifurcated proceedings in the narrow context determined by the Honorable Tribunal in PO5, and that all of Respondent's allegations relating to fraud contained in its Memorial and Reply shall be disregarded in full.

(c) In addition, *order* that Respondent's "*ratione tempori*" jurisdictional objection shall not be dealt with as part of the bifurcated proceedings or in these proceedings as a whole.

(d) In the alternative to the relieves sought in subsections (a) and (b) above, *deny* on their merits, each and every jurisdictional objections raised by Respondent in accordance with the Honorable Tribunal's PO5, and amongst other:

(1) *Deny* Respondent's objection to *ratione personae* jurisdiction of the Honorable [Tribunal] (the "no seat" objection); and

(2) *Deny* Respondent's objection to *ratione materiae* jurisdiction of the Honorable Tribunal (the "no investment" objection); and

(3) *Deny* Respondent's objection to the jurisdiction of the Honorable Tribunal for failure to follow the dispute resolution provisions of the Cyprus-Moldova BIT (the "cooling off" objection.

(e) *Order* Respondent to indemnify Claimant for any and all costs related to these bifurcated proceedings including legal fees, experts and witnesses costs, as well as any and all costs associated with the hearing and the submissions.

[1] Resp. Reply ¶ 533.

(f) *Order* Respondent to pay pre and post award interest on any amount to be paid in accordance with any monetary relief awarded in favour of Claimant.

(g) *Order* any other relief that the Honorable [Tribunal] deems appropriate in this matter.[2]

V. FACTUAL SUMMARY

59. The following is a short summary of the background facts as pleaded by the Parties, as relevant only to the bifurcated jurisdictional objections considered by the Tribunal in this Award. The summary is without prejudice to any legal conclusions by the Tribunal, which will be addressed in later sections, and is not intended as an exhaustive statement of the Tribunal's findings. The absence of reference to particular facts or assertions, or to the evidence supporting any particular fact or assertion, should therefore not be taken as an indication that the Tribunal did not consider those matters; the Tribunal has carefully considered *all* evidence and arguments submitted to it in the course of these proceedings. Following this factual summary, the Parties' positions on the Bifurcated Jurisdictional Objections, as argued in their written pleadings and at the Hearing, are briefly summarized.

A. *Dramatis Personae*

60. In addition to the Claimant (Komaksavia Airport Invest Ltd, referred to as Komaksavia in this Award), the Moldovan company Avia Invest (over which Komaksavia asserts a 95% shareholding interest), and the Respondent (The Republic of Moldova), the factual background relevant to the Bifurcated Jurisdictional Objections involves a cast of other corporate entities and individuals. These are introduced briefly below, based on the evidence and assertions in the record, to provide an understanding of the circumstances leading up to the issues presently before the Tribunal:

1. Corporate entities

- OOO Komaksavia: a Russian-incorporated entity and subsidiary to TB Team Management LLP ("**TB Team**"),[3] OOO Komaksavia was managed by Mr. Modrish

[2] Cl. Rejoinder ¶ 349.
[3] R-37, Extended Excerpt from State Register on OOO Komaksavia (ООО Комаксавиа), Russian Federation, 3 September 2020, pp. 3, 5, 6, 7.

Karklinsh.[4] OOO Komaksavia sold to Komaksavia the 95% stake in Avia Invest which constitutes (part of) Komaksavia's purported investment in this arbitration.[5]

- Komaksavia Investment Ltd.: a Cyprus-incorporated entity with the same registered office address as Komaksavia, and with Mr. Marin Mihov Tenev as its Director and Secretary.[6]

- TB Team: the UK-incorporated sole shareholder of OOO Komaksavia.[7]

- NR Investments Limited: a Guernsey-incorporated entity, NR Investments Limited was the sole shareholder of Komaksavia until it sold the shares to Mr Tenev.[8]

2. Individuals

- Mr. Marin Mihov Tenev: a Bulgarian national,[9] Mr. Tenev is the former Director and Secretary of Komaksavia[10] as well as of Komaksavia Investment Ltd. Mr. Tenev was also the 75% owner of OOO Komaksavia until its liquidation, and a former controlling shareholder of TB Team.[11] Mr. Tenev is also the former holder of 100% of Komaksavia shares,[12] current holder of 70% of Komaksavia shares[13] and, according to Komaksavia, one of two ultimate beneficial owners of Komaksavia.[14] (According to Moldova, Mr.

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[4] R-103, Extract from the Unified State Register of Legal Entities of the Russian Federation with regard to the Limited Liability Company Komaksavia (OOO Komaksavia, ООО Комаксавиа), PSRN 1147746005571, issued on 25 October 2016, p. 2; R-104, Extract from the Unified State Register of Legal Entities of the Russian Federation with regard to the Limited Liability Company Komaksavia (OOO Komaksavia, ООО Комаксавиа), PSRN 1147746005571, issued on 28 August 2020, p. 2; R-151, Decision No. 16/1 of TB Team Management LLP, the Sole shareholder of OOO Komaksavia (ООО Комаксавиа), adopted in Moscow, Russian Federation, on 4 May 2016, p. 1.

[5] C-30, Contract for the Sale-Purchase of Share.

[6] R-17, Komaksavia Investment Ltd, Cyprus, registered on 19.08.2016 (with Marin Mihov Tenev as the director and secretary), p. 3; R-86, A screenshot, dated 26.08.2020, of the information on file with the Registrar of Companies of the Republic of Cyprus regarding the directors of Komaksavia Investment Ltd, a company registered on 19.08.2016, registration Number HE359254, p. 1; R-147, Notification of the Address of the Registered Office of a Company or Change in Address of Komaksavia Investment Ltd (HE359254), signed by Marin Mihov Tenev, dated 4 July 2018, filed on 31 October 2018 with the Registrar of Companies,.

[7] R-37, Extended Excerpt from State Register on OOO Komaksavia (ООО Комаксавиа), Russian Federation, 3 September 2020, pp. 3, 5, 6, 7, 34; R-103, Extract from the Unified State Register of Legal Entities of the Russian Federation with regard to the Limited Liability Company Komaksavia (OOO Komaksavia, ООО Комаксавиа), PSRN 1147746005571, issued on 25 October 2016, p.2; R-104, Extract from the Unified State Register of Legal Entities of the Russian Federation with regard to the Limited Liability Company Komaksavia (OOO Komaksavia, ООО Комаксавиа), PSRN 1147746005571, issued on 28 August 2020, p. 2.

[8] R-3, Transfer of shares in Komaksavia Airport Invest Ltd from NR Investments Limited to Marin Mihov Tenev, 12 December 2019; R-4, Certificate of Registration of NR Investments Limited, 30 April 2007.

[9] R-62 *bis*, Copy of Marin Mihov Tenev's Bulgarian passports (No. 382298652, issued on 01 July 2013; No. 384936603, issued on 07 November 2017).

[10] R-6, Notification of Change of Director and Secretary of Komaksavia Airport Invest Ltd, 22 August 2016, p. 1.

[11] R-38, Certificate of Incorporation of TB Team Management LLP, dated 7 December 2012, p. 28.

[12] R-3, Transfer of shares in Komaksavia Airport Invest Ltd from NR Investments Limited to Marin Mihov Tenev, 12 December 2019, p. 1.

[13] Transfer of shares in Komaksavia Airport Invest Ltd from Marin Mihov Tenev (Марин Михов Тенев) to Andrey Goncharenko (Андрей Гончаренко), 23 December 2019, p. 1.

[14] First Menelaou Statement, ¶¶ 16, 36.2; Cl. Counter-Memorial ¶ 54.2.

Tenev is only a "purported" ultimate beneficial owner.)[15] For at least some time, Mr. Tenev's Bulgarian phone number was listed in the Cypriot Registrar of Companies as the contact information for Komaksavia.[16]

- Mr. Modris Karklinsh: a Russian national[17] who replaced Mr. Tenev as the Director of Komaksavia on 4 April 2018,[18] until he was himself replaced by Mr. Andreas Menelaou on 5 November 2019.[19] Mr. Karklinsh was previously the sole shareholder in Komaksavia,[20] and from 23 December 2019 was the holder of 30% of Komaksavia shares.[21]

- Mr. Andreas Menelaou: the current Director of Komaksavia since 5 November 2019,[22] as well as Secretary of the same company from the same date until the appointment of Ms. Lydia Menelaou to that position on 23 December 2019.[23] Sole owner of the law firm Andreas Menelaou LLC[24] and a witness in this arbitration.

- Ms. Lydia Menelaou: the Secretary of Komaksavia since 23 December 2019.[25]

- Mr. Andrey Goncharenko: a Russian national,[26] Mr. Goncharenko is the holder of 30% of Komaksavia shares as of 23 December 2019[27] and, according to Komaksavia, one of two ultimate beneficial owners of Komaksavia.[28]

- Mr. Ilan Shor: a Moldovan national[29] alleged by Moldova to be the person with "actual control" of Komaksavia, as well as of TB Team, OOO Komaksavia Investment Ltd and

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[15] Resp. Reply ¶¶ 45, 208.
[16] See below ¶ 115.
[17] R-76 *bis*, Copy of the passport of Modris Karklinsh (Карклиньш Модрис Зигмундович), a citizen of the Russian Federation (passport No. 71 3112121, issued on 31 January 2011, by the FMS 77110).
[18] R-8, Notification of Change of Director and Secretary of Komaksavia Airport Invest Ltd, 4 April 2018, p. 1.
[19] R-10, Notification of Change of Director and Secretary of Komaksavia Airport Invest Ltd, 5 November 2019, p. 1.
[20] R-75, Decision of the sole shareholder of Komaksavia Airport Invest Ltd, Модрис Karklinsh (Карклиньш Модрис Зигмундович), to buy the 95% share in Avia Invest, 5 September 2016.
[21] Transfer of shares in Komaksavia Airport Invest Ltd from Marin Mihov Tenev (Марин Михов Тенев) to Andrey Goncharenko (Андрей Гончаренко), 23 December 2019, p. 1.
[22] R-10, Notification of Change of Director and Secretary of Komaksavia Airport Invest Ltd, 5 November 2019. Mr. Menelaou contends that he assumed the role as Komaksavia's director from 23 October 2019, notwithstanding the 5 November 2019 date in the corporate registry exhibit. First Menelaou Statement, ¶ 6; Second Menelaou Statement, ¶ 14. The Tribunal sees no need to resolve this dispute for purposes of the Bifurcated Jurisdictional Objections.
[23] R-11, Notification of Change of the Secretary of Komaksavia Airport Invest Ltd, 23.12.2019, p. 1.
[24] R-144, Memorandum and Articles of Association in English of the law firm Andreas Menelaou LLC (HE357259), dated 17 June 2016, p. 8.
[25] R-11, Notification of Change of the Secretary of Komaksavia Airport Invest Ltd, 23.12.2019, p. 1.
[26] R-107, Copy of the passport of Andrey Goncharenko (Андрей Николаевич Гончаренко), a citizen of the Russian Federation, passport No. 71 3152007, issued on 3 February 2011, valid to 3 February 2021.
[27] Transfer of shares in Komaksavia Airport Invest Ltd from Marin Mihov Tenev (Марин Михов Тенев) to Andrey Goncharenko (Андрей Гончаренко), 23 December 2019, p. 1
[28] First Menelaou Statement, ¶¶ 16, 36.2; Cl. Counter-Memorial ¶ 54.2.
[29] R-63, Copy of the ID Card of Ilan Şor (Ilan Shor, Илан Шор) issued on 13 Mach 2012, valid to 6 March 2032.

Avia Invest.[30] Mr. Shor was the Chairman of Avia Invest's Board of Directors from 17 July 2014 to 11 October 2019.[31]

- Mr. Nathaniel Rothschild: the ultimate beneficial owner of NR Investments, Mr. Rothschild signed the Notice of Dispute dated 2 October 2019 on behalf of Komaksavia (the "**Notice of Dispute**").[32]

B. Events Directly Relevant to the Bifurcated Jurisdictional Issues

61. After having won a concession tender for the design, financing, and operation of the Chisinau International Airport (the "**Airport**"), Avia Invest entered into the Concession Agreement for assets under management of S.E. 'Chisinau International Airport' and their adjacent land (the "**Concession Agreement**") with the Agency of Public Property of the Republic of Moldova on 30 August 2013.[33]

62. On 23 August 2016, an extraordinary meeting of Avia Invest shareholders decided to sell 95% of Avia Invest shares (at the time controlled by OOO Komaksavia) to Komaksavia.[34] On 5 September 2016, a resolution was adopted by Komaksavia's then-sole shareholder, Mr. Karklinsh, to acquire the 95% stake in Avia Invest.[35]

63. The following day, 6 September 2016, Komaksavia and Komaksvia OOO concluded a share purchase agreement (the "**SPA**") for the purchase by Komaksavia of 95% of the shares in Avia Invest.[36] As will be explained below, the Parties disagree as to whether (and how) Komaksavia paid consideration for these shares, as well as the legal implications of the SPA for the present arbitration.

64. OOO Komaksavia was dissolved on 10 January 2019.[37]

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[30] Resp. Reply ¶¶ 161-163, 208, 212, 221, 227, 321, 345, 371.
[31] R-129, Minutes No. 14 of the extraordinary general meeting of Avia Invest dated 17 July 2014, p. 2.
[32] C-88, Notice of an Investment Dispute, 2 October 2019.
[33] C-21, Concession Agreement for assets under management No. 4.03_30.08.2013, 30 August 2013.
[34] R-130, Minutes No. [n/n] of the extraordinary general members' meeting of Avia Invest dated 23 August 2016, p. 2.
[35] R-75, Decision of the sole shareholder of Komaksavia Airport Invest Ltd, Модрис Karklinsh (Карклиньш Модрис Зигмундович), to buy the 95% share in Avia Invest, 5 September 2016, p. 1.
[36] C-30, Contract for the Sale-Purchase of Share in the Share Capital, 6 September 2016.
[37] R-37, Extended Excerpt from State Register on OOO Komaksavia (ООО Комаксавиа), Russian Federation, 3 September 2000, p. 32.

65. Komaksavia sent its Notice of Dispute to Moldova on 2 October 2019. As noted above, the Notice of Dispute was signed on behalf of Komaksavia not by Mr. Karklinsh, the Director and Secretary at the time, but by Mr. Rothschild.[38]

66. On 11 October 2019, an Avia Invest general shareholder's meeting adopted a Shareholder's Resolution ("the **October 2019 Shareholder Decision**") to "make a partial distribution of undistributed profits in the amount of MDL 40,000,000" to its shareholders. The shareholders further resolved that the remaining amount of Avia Invest's undistributed profits of MDL 411.616,312.57 would "remain at [Avia Invest's] disposal until it is further distributed."[39] As will be explained below, the Parties disagree as to the legal implications of these resolutions for the present arbitration.

67. On 19 January 2021, Mr. Menelaou wrote to the Cyprus Department of Companies Registrar and Official Receiver that Andreas Menelaou LLC's "customers" Komaksavia were in the process, "in cooperation with their auditors [...] of completing the preparation of due annual returns [...] and audited financial statements" but that there was some delay in the process due to COVID-19 and associated emergency measures.[40] On the same date, an identically-worded letter was also sent by Mr. Menelaou on behalf of Komaksavia Investment Ltd.[41]

68. On 16 March 2021, Mr. Menelaou submitted Komaksavia's annual returns from the years 2016,[42] 2017,[43] 2018,[44] 2019[45] and 2020,[46] together with financial statements for 2016/2017,[47] 2018,[48] and 2019.[49] The contact information provided on each annual return form refers to

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[38] C-88, Notice of an Investment Dispute, 2 October 2019.
[39] C-73, Minutes of the general meeting of shareholders of Avia Invest dated 11 October 2019, p. 3.
[40] R-215, Letter of Komaksavia Airport Invest Ltd to the Registrar of Companies of Cyprus dated 19 January 2021.
[41] R-216, Letter on behalf of Komaksavia Investment Ltd to the Registrar of Companies of Cyprus dated 19 January 2021.
[42] R-178, Komaksavia Airport Invest Ltd's Management Report (dated 27 May 2019) and Financial Statements (dated 27 May 2019) for the period from 19 August 2016 to 31 December 2017.
[43] R-174, Komaksavia Airport Invest Ltd's Annual Return for the years 2016/2017 (Form HE32(I)).
[44] R-175, Komaksavia Airport Invest Ltd's Annual Return for the year 2018 (Form HE32(I)).
[45] R-176, Komaksavia Airport Invest Ltd's Annual Return for the year 2019 (Form HE32(I)).
[46] R-177, Komaksavia Airport Invest Ltd's Annual Return for the year 2020 (Form HE32(I)).
[47] R-178, Komaksavia Airport Invest Ltd's Management Report (dated 27 May 2019) and Financial Statements (dated 27 May 2019) for the period from 19 August 2016 to 31 December 2017.
[48] R-179, Komaksavia Airport Invest Ltd's Management Report (dated 6 August 2020) and Financial Statements (dated 6 August 2020) for the year ended on 31 December 2018
[49] R-180, Komaksavia Airport Invest Ltd's Management Report (dated 6 August 2020) and Financial Statements (dated 6 August 2020) for the year ended on 31 December 2019.

"Andreas Menelaou LLC". When examined at the Hearing, Mr. Menelaou confirmed (i) that the financial statements from the years 2016 and 2017 had been prepared by Komaksavia's previous Director Mr. Karklinsh, (ii) that Mr. Menelaou himself prepared the returns and financial statements for 2018 and 2019, and (iii) that Komaksavia's financial statement for 2020 had not yet been submitted.[50]

VI. BURDEN AND STANDARD OF PROOF

69. As a preliminary matter, the Parties disagree as to the burden and standard of proof relevant to the issues in dispute at this stage of the proceedings.

A. Moldova's Position

70. In Moldova's submission, it is the Claimant which bears the burden of establishing the Tribunal's jurisdiction. This starting point emanates not only from fundamental principles, but also from extensive arbitral practice as well as directly from Article 29(1) of the applicable SCC Rules. In Moldova's submission, as will be developed below, Komaksavia has failed to meet its burden of proof with respect to the Tribunal's jurisdiction.[51]

B. Komaksavia's Position

71. By contrast, Komaksavia argues that it has established a *prima facie* case for the Tribunal's jurisdiction, which has shifted the burden of proof to Moldova for its jurisdictional "defences" raised at this stage of the proceedings. Pursuant to the principle *actori incumbit (onus) probatio,* it is Moldova, as the moving party, which bears the burden of substantiating its assertions, Komaksavia says, and Moldova has failed to do so – especially with respect to its allegations based on fraud on behalf of Komaksavia representatives and other individuals, which Komaksavia argues must be assessed against a higher standard of proof.[52]

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[50] Tr. Hearing Day 2, Buruiana/Menelaou/Kalicki, 254:21-25, 257:11-259:25.
[51] Resp. Memorial ¶ 8; Resp. Reply ¶¶ 18-28, with further references.
[52] Cl. Rejoinder ¶¶ 30-60; Cl. PHB ¶¶ 11-12.

VII. *RATIONE MATERIAE* – THE "NO INVESTMENT OBJECTION"

A. Moldova's Position

72. Moldova objects to the Tribunal's jurisdiction *ratione materiae* on the grounds that Komaksavia has not made an investment, and has no investment, protected by the terms of Article 1(1) of the Agreement Between the Government of the Republic of Moldova and the Government of the Republic of Cyprus for the Reciprocal Promotion and Protection of Investments of 13 September 2007 (the "**BIT**"). Article 1(1) provides as follows:

> The term 'investments' means every kind of asset invested by investors, for the purpose of acquisition of economic benefit or other business purpose, of one Contracting Party in the territory of the other Contracting Party in accordance with the legislation of the latter and in particular, though not exclusively, shall include:
>
> a) Movable and unmovable property as well as any other property rights;
>
> b) Rights derived from shares, bonds and other kinds of interests in companies;
>
> c) Claims to money or other claims and rights having an economic value;
>
> d) Intellectual property rights, technical processes and knowhow;
>
> Provided that a possible change in the form in which the investments or reinvestments have been made shall not affect their character as investments so long as such a change does not contravene laws and regulations of the Contracting Party in the territory of which the investments were made.

73. Moldova emphasizes that in order to benefit from protection, Komaksavia must have "invested" in a protected asset, "for the purpose of acquisition of economic benefit or other business purpose in the territory" of Cyprus. The burden to show that Komaksavia has met these cumulative requirements rests with Komaksavia, Moldova submits, and Komaksavia has failed to meet that burden.[53]

74. Moldova further asserts that Komaksavia has made repeated contradictory statements about its purported investment. Moldova seizes on the different wording used to describe the precise nature of Komaksavia's investment in Avia Invest, which has been described in different Komaksavia submissions as alternatively: (a) purchasing 95% of the shares; (b) payment of the share purchase price; (c) agreeing to purchase the shares; (d) agreeing to pay the share purchase price; (e) acting as parent company surety and/or guarantor on loans; (f) "incurring

[53] Resp. Memorial ¶¶ 369-370.

substantial liability to make payment" for the shares; and (g) forgoing dividends. As will be developed below, Moldova says that Komaksavia has submitted no evidence to demonstrate that Komaksavia ever paid anything to obtain its shares in Avia Invest, and that Komaksavia therefore has not discharged its burden of proof.[54]

75. In terms of the applicable legal standard, Moldova argues that the term "investment" has an inherent meaning. This is true regardless of whether the ICSID Convention applies to the dispute; the need to demonstrate the inherent characteristics of an investment, Moldova says, is based on the BIT and international law, and not on whether an arbitration is pursued under the SCC Rules rather than the ICSID Rules. Moldova also draws the Tribunal's attention to several non-ICSID awards which have recognized that there is an objective understanding of the term "investment," and urges the Tribunal to do the same. These awards include *KT Asia v. Kazakhstan*,[55] *Alps Finance v. Slovak Republic*,[56] *Romak v. Uzbekistan*,[57] *Yury Ghenadevich Bogdanov v Moldova*,[58] *Christian Doutremepuich, Antoine Doutremepuich v Mauritius*,[59] and the presiding arbitrator's dissent in *Energoalians v. Moldova*,[60] all of which applied a "*Salini*-like" objective definition of investment outside of the ICSID sphere.[61]

76. Separate from its arguments about the inherent meaning of "investment," Moldova also argues that Komaksavia's alleged investment is not covered by the plain language of the BIT itself. Most notably, Article 1(1) requires that "any kind of asset" be "invested by investors for the purpose of acquisition of economic benefit or other business purpose." According to Moldova, Komaksavia has failed to demonstrate that its alleged investment fits under this definition, because Komaksavia has not "invested" – or, in other words, "made" – an

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[54] Resp. Memorial ¶¶ 375-390; Resp. Reply ¶¶ 174-178.
[55] RLA-61, *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013 ("***KT Asia***"), ¶ 165.
[56] RLA-15, *Alps Finance and Trade AG v. The Slovak Republic* (UNCITRAL), Award, 5 March 2011 ("***Alps Finance***"), ¶ 240.
[57] RLA-18, *Romak S.A. v. Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009 ("***Romak***"), ¶ 180.
[58] RLA-75, *Yury Ghenadevich Bogdanov (Russia) v The Republic of Moldova*, SCC Arbitration V 2012/162, Award, 29 September 2014 ("***Bogdanov***"), ¶¶ 170-171.
[59] RLA-116, *Christian Doutremepuich, Antoine Doutremepuich v The Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019 ("***Doutremepuich***"), ¶ 118.
[60] RLA-111, *Energoalians TOB v Republic of Moldova*, UNCITRAL, Dissenting Opinion of Arbitrator Dominic Pellew, 25 October 2013.
[61] Resp. Memorial ¶¶ 436-449; Resp. Reply ¶¶ 183-193, 436-449, 458.

investment; it has not committed any resources to Avia Invest. While Komaksavia might "hold" 95% of Avia Invest's shares, as it contends, Moldova says that Komaksavia has not "invested" in those shares, because this term presupposes an active contribution beyond the holding of a mere legal title. Moldova invokes for this point decisions in the *Quiborax v. Bolivia*,[62] *KT Asia v. Kazakhstan*,[63] and *Caratube v. Kazakhstan*[64] cases.[65]

77. Moldova emphasizes that merely agreeing to purchase 95% of Avia Invest shares is not an investment. Pursuant to Clause 5 of the SPA, it appears that Komaksavia agreed to pay EUR 3,658,247.70 to OOO Komaksavia,[66] but Komaksavia has not furnished any evidence that it actually ever paid that price.[67] In this respect, Moldova points out a change between Mr. Menelaou's first and second witness statements, whereby the original assertion that "Komaksavia made a significant investment [...] as the purchase price for its shares in Avia Invest was EUR 3,658,247.7" was changed to the assertion that "Komaksavia has agreed to make a significant investment [...] as the purchase price for its shares in Avia Invest was EUR 3,658,247.7" (emphasis added), in a section that otherwise was unchanged. In Moldova's submission, this change in Mr. Menelaou's testimony was prompted by Moldova's contesting Komaksavia's initial submissions with regard to the purchase price ever having been made.[68]

78. Even if Komaksavia *arguendo* had paid the EUR 3,658,247.70, such payment still would not be sufficient to meet the definition under Article 1(1), Moldova says, because that price reflects the nominal rather than real value of the shares. In its view, an asset purchased at a nominal price does not equate to an investment, as recognized by numerous arbitral tribunals.[69] In this case, Moldova argues that the SPA was simply a "re-arrangement of [...]

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[62] RLA-73, *Quiborax S.A., Non Metalic Minerals S.A. and Allan Fosk Kaplun v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 ("***Quiborax***"), ¶ 233.
[63] RLA-61, *KT Asia*, ¶¶ 188-206.
[64] RLA-70, *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012 ("***Caratube***"), ¶ 455.
[65] Resp. Reply ¶¶ 194-231.
[66] C-30, Contract for the Sale-Purchase of Share in the Share Capital, 6 September 2016, Clause 5.
[67] Resp. Memorial ¶¶ 391-416; Resp. Reply ¶¶ 232-239.
[68] Resp. PHB ¶¶ 26-27, referencing Tr. Hearing Day 2, Kalicki/Menelaou, 298:16-17; 298:24-299:1; 299:7-8; First Menealoau Statement ¶ 12.1; Second Menealoau Statement ¶ 34.1.
[69] RLA-61, *KT Asia*, ¶¶ 204-206; RLA-70, *Caratube*, ¶ 435; RLA-69, *Mr. Saba Fakes v Republic of Turkey* (ICSID Case No. ARB/07/20), Award, 14 July 2010 ("***Saba Fakes***"), ¶¶ 139, 147; RLA-22, *Phoenix Action, Ltd. v The Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009 ("***Phoenix***"), ¶ 119.

assets among [...] related companies," rather than reflecting a *bona fide* investment by Komaksavia.[70]

79. No other arrangements between Komaksavia and OOO Komaksavia for the payment of the Avia Invest shares have been put on the record by Komaksavia, Moldova says.[71]

80. Moldova has also raised a number of concerns about Komaksavia's annual returns, as well as the company's financial statements. With respect to the former, Moldova argues that the annual returns from the years 2016,[72] 2017,[73] 2018,[74] 2019[75] and 2020[76] were each completed *post factum* by Komaksavia, with the "date of completion" on each form backdated in March 2021, when all returns were submitted concurrently. Moldova argues that these errors are evidence that the returns were created belatedly for the purposes of this Arbitration. Moldova also posits that the returns produced as part of the document production in this arbitration have not been properly registered and/or published with the Cypriot authorities. Even if they were properly submitted to those authorities on 16 March 2021, as Komaksavia claims, all but one return (the one for the year 2020) was submitted well past the statutory deadline, which is a criminal offence under the Cypriot Companies Law (the "**Companies Law**").[77]

81. As for the financial statements, Moldova asks the Tribunal to draw adverse inferences from Komaksavia's failure to produce the audited financial statement from 2020, as well as the annexes to the statements from 2016-2019.[78] Moldova also argues that the three statements

[70] Resp. Memorial ¶¶ 347-376; Resp. Reply ¶¶ 199, 347-376.
[71] PHB ¶¶ 28-31 with further references therein.
[72] R-178, Komaksavia Airport Invest Ltd's Management Report (dated 27 May 2019) and Financial Statements (dated 27 May 2019) for the period from 19 August 2016 to 31 December 2017.
[73] R-174, Komaksavia Airport Invest Ltd's Annual Return for the years 2016/2017 (Form HE32(I)).
[74] R-175, Komaksavia Airport Invest Ltd's Annual Return for the year 2018 (Form HE32(I)).
[75] R-176, Komaksavia Airport Invest Ltd's Annual Return for the year 2019 (Form HE32(I)).
[76] R-177, Komaksavia Airport Invest Ltd's Annual Return for the year 2020 (Form HE32(I)).
[77] Resp. Reply ¶¶ 260-282; R-52 *ter*, The Companies Law of Cyprus, 1968 (full version as of 2014, English Translation); R-173, The Companies Law of the Republic of Cyprus, version as of 4 October 2021; TP-16, The official English translation and consolidation of the Cyprus Companies Law, which was conducted by the Office of the Law Commissioner of the Republic of Cyprus.
[78] Resp. Reply ¶¶ 260, 299.

that *have* been produced in this Arbitration – for 2016/2017,[79] 2018,[80] and 2019[81] respectively – do not properly "present the financial position, financial performance, cash flows, as well as many other aspects" of Komaksavia, as required by the Companies Law. Among other things, despite purportedly having been signed by different people[82] at different times, the three returns consistently contain the same typographical mistakes, which Moldova says suggests they were in fact produced by the same person on the same computer. According to Moldova, the statements really were all drafted in early 2021, which Mr. Menelaou indeed confirmed during his examination.[83] Moldova submits that this constitutes an admission that Komaksavia has fabricated the statements. Moldova also says that the 19 January 2021 letter which accompanied the submission of the statements to the Cypriot authorities was submitted not by Mr. Andreas Menelaou in his capacity as Director of Komaksavia, but rather by Andreas Menelaou LLC in its capacity as Komaksavia's legal counsel (a point on which Moldova says Mr. Menelaou was inconsistent during cross-examination at the Hearing).[84] Moldova points to a number of other inconsistencies with the statements, and emphasizes that there is no information which would "indicate and/or prove that the Claimant has made the payment of the share nominal price to OOO Komaksavia, or that OOO Komaksavia has received the payment of the share price."[85]

82. In fact, Moldova suggests that the share transaction memorialized in the SPA on 6 September 2016, between Komaksavia and OOO Komaksavia, was a "sham transaction" that was not conducted at arm's length. The balance sheets of OOO Komaksavia, as well as those from its sole shareholder TB Team, do not reflect any amounts received as part of a share transaction,[86] and the alleged transaction is described in the financial statements of Komaksavia Investment

[79] R-178, Komaksavia Airport Invest Ltd's Management Report (dated 27 May 2019) and Financial Statements (dated 27 May 2019) for the period from 19 August 2016 to 31 December 2017.
[80] R-179, Komaksavia Airport Invest Ltd's Management Report (dated 6 August 2020) and Financial Statements (dated 6 August 2020) for the year ended on 31 December 2018
[81] R-180, Komaksavia Airport Invest Ltd's Management Report (dated 6 August 2020) and Financial Statements (dated 6 August 2020) for the year ended on 31 December 2019.
[82] The statement for 2016/2017 was signed by Mr. Karklinsh, the one for 2018 by Ms. Lydia Menelaou and the one for 2019 by Mr. Andreas Menelaou.
[83] Transcript, Hearing Day 1, Buruiana/Menelaou, 216:4-17.
[84] Resp. PHB ¶¶ 40-43; Transcript, Hearing Day 2, Buruiana/Menelaou, 260:25-261:11.
[85] Resp. Reply ¶¶ 283-316.
[86] R-37, Extended Excerpt from State Register on OOO Komaksavia (ООО Комаксавиа), Russian Federation, 03 September 2020.

Ltd, under the headline "related party transactions," as being "interest free" and with "no specified repayment date."[87] Moldova says that these circumstances support its general assertion that the 95% ownership of Avia Invest was transferred between related companies with no consideration ever having been paid.[88]

83. Turning to Komaksavia's alternative theories of its qualifying "investment" under the BIT – about its forgoing of dividends and its otherwise "incurring substantial liability" – these are not supported by the evidence either, Moldova asserts. At most, Komaksavia is holding the shares for its beneficial owner Mr. Tenev, who is the only one who, *arguendo*, could have made the alleged contributions (which he did not).[89]

84. On the dividends point, Moldova makes several assertions to refute Komaksavia's arguments. First, Moldova says that based on Moldovan law, a shareholder of a company cannot claim against that company for profits that have not been distributed. In other words, any undistributed dividends of Avia Invest are not property of Komaksavia, but of Avia Invest. Moldova further argues that it has not been established that a right of Komaksavia to dividends ever "crystallised," because Avia Invest only proposed to distribute profits. Under Moldovan law, dividends must be paid within 30 days from the date of the decision about the distribution of the company's profits, Moldova argues, and Komaksavia does not even allege that it received any such dividends.[90]

85. In any event, Moldova contends, Avia Invest did not have the right to distribute net profits from multiple previous years, but only for the financial year considered at the relevant shareholders' meeting. Since the alleged forgoing of dividends was decided in the October 2019 meeting, Moldova says that dividend resolutions legally could cover only the 2018 financial year. This was confirmed by the sole arbitrator in *Bogdanov*.[91] Furthermore, that

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[87] R-193, Komaksavia Investment Ltd's Annual Return for the year 2019 (Form HE32(I)) and the Financial Statements for the year 2018 as received from the physical folder of the Registrar of Companies of Cyprus on 15 September 2021, Note 16.2; R-194, Komaksavia Investment Ltd's Annual Return for the year 2020 (Form HE32(I)) and the Financial Statements for the year 2019 as received from the physical folder of the Registrar of Companies of Cyprus on 15 September 2021, Note 16.2
[88] Resp. Memorial ¶¶ 363, 404-415; Resp. Reply ¶¶ 324-329, 341-342.
[89] Resp. Reply ¶¶ 205-219; 260, 343-346.
[90] Resp. Reply ¶¶ 205, 377-400.
[91] RLA-75, *Bogdanov*, ¶ 157.

same October 2019 Shareholder Resolution was never submitted to the Moldovan Company Register, Moldova says.[92]

86. Applying a *Salini*-style legal test to the facts of Komaksavia's alleged investment, Moldova argues that the alleged investment not only fails to meet the "contribution" element for the reasons discussed above, but also fails to meet any of the other elements of the test .

87. For example, Komaksavia has failed to demonstrate that it has assumed risk, Moldova says: having made no capital contribution (either to acquire the Avia Invest shares or thereafter to fund Avia Invest's operations), Komaksavia by definition stands no risk of losing anything. In particular, Moldova disputes Komaksavia's contention that it has taken on any risk by undertaking to support Avia Invest's obligations. Nothing in the Concession Agreement, nor for that matter in the SPA, supports Komaksavia's contention in this respect, Moldova points out. Moldova also says that Komaksavia must use "its own financial means at its own financial risk" when acquiring the shares which, again, there is no evidence that it did.[93]

88. As for duration, Moldova argues that Komaksavia has failed to establish that it intended to hold the Avia Invest share for a sufficient period of time. While the Concession Agreement – which is not alleged to constitute an investment of Komaksavia – has a duration of 49 years, Komaksavia has held its Avia Invest shares only for a few years, since 2016. Moldova also says that Komaksavia is a short-term vehicle created to hold the shares for its beneficial owners, as supported by the lack of documentation (such as business plans or contracts) which would suggest an intended duration for Komaksavia's alleged investment.[94]

89. Finally, Moldova says, Komaksavia has failed to show that it has made any contribution to the economic development of Moldova. Moldova's primary position in this respect is that Komaksavia, as discussed above, has not made any financial contribution at all, but even if the Tribunal *arguendo* were to find that Komaksavia did indeed pay for its shares in Avia

[92] Resp. Memorial ¶¶ 417-430; Resp. Reply ¶¶ 205, 400-425.
[93] Resp. Memorial ¶ 455; Resp. Reply ¶¶ 467-483.
[94] Resp. Memorial ¶ 456; Resp. Reply ¶¶ 484-491.

Invest, such payment (at the nominal value of those shares) is not significant enough to meet the test of a required "contribution" to Avia Invest and to its operation of the Airport.[95]

B. Komaksavia's Position

90. Komaksavia says that it has made an investment qualifying for protection under Article 1 of the BIT, in three ways: (i) by having acquired 95% of the shares in Avia Invest, (ii) by having incurred "substantial liability" to make payments for those shares, and (iii) by having forgone considerable dividend payments from Avia Invest, which Komaksavia was entitled to receive but decided not to.[96]

91. Turning first to Komaksavia's reading of the legal test for what constitutes a protected "investment" under the BIT, it argues that shareholding itself suffices, and that no further requirements should be read into the definition. It is undisputed, Komaksavia says, that it holds 95% of shares in Avia Invest, and that Avia Invest constitutes an investment in Moldova. On a proper reading of Article 1 of the BIT – which protects "every form of asset," including "shares [...] in companies" – this is the beginning and the end of the analysis. Komaksavia submits that there are no further requirements for it to meet the definition of investment in the BIT, beyond showing that it holds shares in Avia Invest. In this respect, Komaksavia contrasts the BIT with other Moldovan BITs – such as the one concluded with the UAE[97] – which it says contain additional criteria. When a treaty definition does not contain such additional criteria, tribunals are generally cautious to read them into the treaty, a caution which Komaksavia urges the Tribunal to adopt.[98]

92. Contrary to Moldova's assertion, there is no requirement that Komaksavia be the "beneficial" owner of the Avia Invest shares. Komaksavia is legally separate from its shareholders, who may or may not be individuals; it is Komaksavia which owns the Avia Invest shares, and the

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[95] Resp. Reply ¶¶ 492-496.
[96] Cl. Rejoinder ¶ 252.
[97] CLA-190, The Republic of Moldova and The United Arab Emirates Bilateral Investment Treaty (2017), Art. 1(1), requiring that an investment "has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, or a certain duration"
[98] Cl. Rejoinder ¶¶ 259-266.

identity and status of Komaksavia's own shareholders are irrelevant for the present purposes, it says.[99]

93. Komaksavia also disputes Moldova's contention that Komaksavia must have invested its own funds in order to qualify under the BIT. It notes that this contention has been rejected by a number of investment treaty tribunals that have found that the origin of invested funds is not relevant for jurisdictional purposes.[100]

94. As for Moldova's argument that Article 1 of the BIT requires that an investment has been "invested by an investor," Komaksavia relies on the *Saluka* case, which it says rejected a similar argument.[101] Komaksavia also argues that the BIT requires only a "holding" of the shares, and that the particularities of the transaction leading to such a shareholding are not relevant for the purposes of the definition of investment.

95. In Komaksavia's view, the logic behind this approach is strengthened by what it asserts is an explicit protection for restructured investments provided for by the last paragraph of Article 1, which provides that "a possible change in the form in which the investments or reinvestments have been made shall not affect their character as investments so long as such a change does not contravene laws and regulations" of the host State. Komaksavia asserts that restructurings usually do not involve the kind of payment or consideration which Moldova purports to be necessary to meet the BIT's definition of investment.[102] In its post-hearing brief, Komaksavia also argues that this language demonstrates the Contracting Parties intended a "special meaning" for the term "investment" in the BIT, within the rubric of Article 31(4) of the Vienna Convention on the Law of Treaties ("**VCLT**").[103]

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[99] Cl. Rejoinder ¶¶ 268-271, 278.
[100] Cl. Rejoinder ¶¶ 272-275, referencing CLA-208, *Wena Hotels Ltd. V. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 ("***Wena***"), ¶ 126; CLA-155, *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction, 21 March 2007 ("***Saipem***"), ¶ 106; and CLA-58, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017 ("***Eiser***"), ¶ 228.
[101] Cl. Rejoinder ¶ 276, citing CLA-157, *Saluka Investments BV v Czech Republic, Partial Award,* UNCITRAL, 17 March 2006, ICGJ 368 (PCA 2006) ("***Saluka***"), ¶¶ 210-211.
[102] Cl. Rejoinder ¶¶ 282-285; Cl. PHB ¶¶ 62-65.
[103] Cl. PHB ¶¶ 62-63; *see also id.* ¶¶ 66-70 (contending that the testimony of its witness Mr. Michaelides confirms the intended "special meaning").

96. In any event, separate from its shareholding in Avia Invest, Komaksavia says that it has made a number of other "contributions" which qualify it as having a protected investment under the BIT.

97. First, Komaksavia says it decided to forego dividends, with a minimal value of EUR 1,943,280, that it could have accepted from Avia Invest, "in order to allow surplus revenues to be reinvested in the development of [the Airport]." Komaksavia describes the October 2019 Shareholder Decision as an operative decision to distribute dividends, not a mere recommendation or proposal as suggested by Moldova. It is also incorrect to seize on the ownership of the undistributed dividends, as Moldova has done; instead, the proper focus should be that Komaksavia was entitled to receive dividends but declined to exercise this entitlement. The present situation is therefore different from the one in *Bogdanov*, where the shareholders decided not to distribute any profits at all, Komaksavia says.[104]

98. Komaksavia also disputes Moldova's arguments about dividend rights based on Moldovan law. First, with respect to Moldova's point that dividends must be paid within 30 days from the date of a distribution decision, Komaksavia argues that the choice not to do so is precisely what it says constitutes a contribution, and that the resulting "failure" to distribute dividends within 30 days hardly makes the distribution decision itself null and void. Second, as for the point that Avia Invest was permitted to distribute only annual net profits – as opposed to earlier accumulated assets – this is a "theoretical" point for Komaksavia, as the withheld sum of 40,000,000.00 Moldovan Lei (for all shareholders) was less than Avia Invest's net profit for 2018.[105] In any event, Komaksavia also says that Moldova has not supported its contentions about the content of Moldovan law on this point, beyond the sole arbitrator's finding in *Bogdanov,* which according to Komaksavia does not express a view on the matter at hand.[106]

99. As a further alternative theory of its investment, Komaksavia argues that both it and its shareholders have undertaken to invest "significant further funds" in Moldova: the shareholders to the tune of €170 million, in the form of a loan facility (as confirmed by a May

[104] Cl. Rejoinder ¶¶ 282-287(a)-(c); Cl. PHB ¶¶ 80-81.
[105] R-212, Audited Financial Statements of Avia Invest SRL for the year 2015, p. 10.
[106] Cl. Rejoinder ¶¶ 282-287(f)-(i).

2020 press release), while Komaksavia itself had planned to invest at least €152 million in Avia Invest. These further investments have not come into fruition solely as a result of Moldova's actions, Komaksavia says.[107]

100. Moldova's reliance on a purported need to satisfy the *Salini* criteria other than "contribution" is equally "misplaced," Komaksavia says. In general, these requirements to satisfy an inherent notion of "investment" have been developed in the context of ICSID arbitration, with reference to Article 25 of the ICSID Convention as well as the Convention's preamble referencing "economic development." Even in that context they are far from universally embraced. But the criteria are not relevant at all in this SCC arbitration, Komaksavia says, and all of Moldova's cited non-ICSID awards supposedly suggesting otherwise are inapposite.[108]

101. In any event, even if the Tribunal were to apply the *Salini* criteria, those criteria are met in the present case, Komaksavia argues, for the following reasons. First, its investment in Avia Invest was "made with a view to a certain regularity of profit and return over a certain period of time." Second, Komaksavia assumed the risk of having to support Avia Invest's obligations under the Concession Agreement with respect to necessary renovations of the Airport. Finally, Komaksavia has made a "substantial commitment with significance for [Moldova's] economic, infrastructural and strategic development"; the modernization of the country's only international airport is a significant project for Moldova, Komaksavia insists.[109]

102. At the end of the *ratione materiae* section of its Rejoinder, Komaksavia also objects to what it says is Moldova's repeated allegation that Komaksavia's share purchase was made only in order to access investment arbitration. This type of "abuse of process" objection was explicitly *not* included by the Tribunal in its bifurcation decision in PO5, Komaksavia says, and should therefore not be entertained at this stage.[110] In any event, Komaksavia says, the argument

[107] Cl. Rejoinder ¶ 288; Cl. PHB ¶¶ 82-84; Second Menelau Statement ¶ 34.3; C-105, Press release of Avia Invest dated 14 May 2020; C-60, Letter from Komaksavia to Avia Invest dated 18 May 2020.
[108] Cl. Counter-Memorial ¶¶ 60-64; Cl. Rejoinder ¶¶ 290-292.
[109] Cl. Counter-Memorial ¶ 65; Cl. Rejoinder ¶ 289.
[110] Cl. Rejoinder ¶ 300.

makes no sense, as the prior shareholder of Avia Invest (OOO Komaksavia) also would have been entitled to BIT protection, under the Russia-Moldova BIT.[111]

VIII. *RATIONE PERSONAE* – THE "SEAT OBJECTION"

A. Moldova's Position

103. Moldova further objects that Komaksavia has failed to demonstrate that it is a protected investor under the BIT. Article 1(3) of the BIT provides in relevant part:

> 3. The term "investor" means:
>
> a) In respect of the Republic of Moldova:
>
> [...]
>
> (ii) Legal persons or any other legal entity incorporated, constituted or otherwise duly organized under the applicable law of the Republic of Moldova, as well as individual entrepreneurs, having its seat and performing real business activity in the territory of the Republic of Moldova.
>
> b) In respect of the Republic of Cyprus:
>
> [...]
>
> (ii) Legal persons constituted or incorporated in compliance with law of the Republic of Cyprus and having their seat in the territory of the Republic of Cyprus.[112]

104. Moldova's contention, which it says is undisputed, is that this provision contains two separate nationality criteria which Komaksavia must meet cumulatively: Komaksavia must be "constituted or incorporated in compliance with" Cypriot law, and it must also "have its seat in the territory" of Cyprus.[113]

105. The requirement of a "seat" in Cyprus should be interpreted autonomously under the BIT, *i.e.*, without reference to domestic law, Moldova submits. This approach was endorsed by the tribunal in the *Orascom v. Algeria* case, as well as the tribunal in *Tenaris and Talta v.*

[111] Cl. Rejoinder ¶ 301.
[112] RLA-1 *bis*, the BIT, Article 1(3).
[113] Resp. Memorial ¶¶ 15-17.

Venezuela.[114] This autonomous interpretation should be guided by the VCLT, Moldova argues.[115]

106. The term "seat" in the BIT is an additional, distinct criterion separate from incorporation. In Moldova's submission, the "seat" criterion connotes a "location where [a] company's 'effective management' takes place." Both Cypriot and Moldovan BIT practice recognize this distinction between "seat" and "incorporation," Moldova says.[116]

107. The same distinction, with seat being separate from incorporation and requiring "effective management," is reflected by arbitral practice, Moldova suggests, referring, among others, to the awards in the *Alps Finance v. Slovak Republic*,[117] *Tenaris v. Venezuela*,[118] *Tokios Tokeles v. Ukraine*[119] and *CEAC v. Montenegro*[120] cases.[121]

108. Assuming that the term "seat" should be understood as the place of "effective management" and "control," the ordinary and plain meaning of those terms must be understood to represent a "substantial, not a formal, criterion" which focuses on the location of the individuals who "actually, genuinely manage" the business affairs of a corporation, Moldova argues.[122]

109. Moldova disputes Komaksavia's argument that the Tribunal should look to the law of Cyprus in interpreting the term "seat," pointing out that unlike the first criterion in the BIT's definition of an investor (incorporation), the seat requirement does not refer to the application of Cyprus law. Moldova also refers to the *Tenaris* tribunal's finding that the absence of a reference to domestic law, for the purpose of determining corporate nationality, means that the matter is governed by international law.[123] In any event, if, *arguendo*, the Tribunal were to seek

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[114] Resp. Memorial ¶¶ 34-34; Resp. Reply ¶¶ 49-54; CLA-131, *Orascom TMT Investments S.à r.l. v People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017 ("***Orascom***"), ¶ 278; RLA-37, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016 ("***Tenaris***"), ¶ 165.
[115] Resp. Memorial ¶¶ 44-50.
[116] Resp. Memorial ¶¶ 58-70.
[117] RLA-15, *Alps Finance*, ¶¶ 215-217.
[118] RLA-37, *Tenaris*, ¶ 150.
[119] CLA-192, *Tokios Tokėles v. Ukraine* (ICSID Case No. ARB/02/18), Decision on Jurisdiction, 29 April 2004, ¶ 28.
[120] RLA-17, *Central European Aluminum Company (CEAC) v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016 ("***CEAC***"), ¶¶ 160-200, 208-212.
[121] Resp. Memorial ¶¶ 71-86.
[122] Resp. Memorial ¶¶ 87-89.
[123] Resp. Memorial ¶¶ 50-57; Resp. Reply ¶¶ 53-54; RLA-37, *Tenaris*, ¶ 165.

recourse to municipal law, Cypriot law also recognizes "seat" as meaning effective management and financial control, Moldova submits.[124]

110. Moldova also contends that it would be inappropriate to equate Komaksavia's seat with its registered office in Cyprus, for a number of different reasons relating to the effective management and control having been exercised outside of Cyprus; Moldova suggests that these facts also call into question whether Komaksavia even qualifies as having a properly registered office in Cyprus.

111. First, the effective management and shareholder control of Komaksavia is exercised outside of Cyprus, Moldova says. Komaksavia's "nominal" shareholders,[125] Messrs. Tenev and Goncharenko, should be deemed "shadow directors" under Cyprus law as they are neither citizens nor residents of Cyprus, and have carried out "the most important corporate governance decisions" for Komaksavia outside of Cyprus.[126] Mr. Tenev, as well as former shareholder[127] Mr. Karklinsh, were both also the sole Director (as well as, simultaneously, the Secretary) of Komaksavia – Mr. Tenev from August 2016 to April 2018 and Mr. Karklinsh from April 2018 until November 2019 – as was a separate individual and former shareholder,[128] Mr. Kyriakos Panagos, for a few days in August 2016. At all times, regardless of who was Director and/or Secretary at any given time, the activities performed by the individual in question took place outside of Cyprus, Moldova argues.[129]

112. Moldova also questions the role of Komaksavia's current director, Mr. Andreas Menelaou, calling him a director "in name only." Mr. Menelaou provides services to over 50 companies incorporated in Cyprus, and his law firm Andreas Menelaou LLC rents the same working spaces alleged to function as Komaksavia's physical premises in Cyprus to more than 25 other companies. This limits his ability, in Moldova's characterization, to function as a proper director. Instead, Moldova says, Mr. Menelaou acts under the instructions of the shareholders and the ultimate beneficial owner of Komaksavia (who Moldova alleges to be Mr. Shor), and

[124] Resp. Memorial ¶¶ 90-112; Resp. Reply ¶¶ 93-105; First Papadopoulos Report pp. 7-24.
[125] Resp. Memorial ¶¶ 123-128.
[126] Resp. Memorial ¶¶ 116-122, 148-169; Resp. Reply ¶¶ 107-119.
[127] Resp. Memorial ¶¶ 135-137.
[128] Resp. Memorial ¶¶ 130-134.
[129] Resp. Memorial ¶¶ 170-183.

Mr. Menelaou's relationship to Komaksavia is better characterized as one between attorney and client. This situation also means that Mr. Menelaou has no direct knowledge of the disputed facts of this arbitration, Moldova says, which significantly limits the probity of his testimony. Finally, Moldova also argues that Mr. Menelaou was appointed director (on 5 November 2019, not 23 October 2019, Moldova says)[130] in order for Komaksavia to achieve tax residency in Cyprus, at a time when Komaksavia was preparing for this arbitration.[131]

113. Furthermore, Komaksavia has not shown that it has physical premises in Cyprus, Moldova says. As noted above, the space that the company alleges to be its office space is shared by an "exceptionally large number of companies" as their registered office, and no documentation has been submitted to show the physical premises allegedly used by Komaksavia at the site. Moldova also says that the sub-lease Komaksavia submitted to address this point is not valid, but that in any event no proof has been furnished that Komaksavia has paid the rent due under that agreement.[132]

114. Moldova also relies on the testimony of Mrs. Aimilia Efstathiou, a Cypriot lawyer whom Moldova retained to ascertain the nature of the alleged registered office of Komaksavia. Mrs. Efstathiou reached out to Mr. Menealou over both email and phone, and also made three failed attempts to physically access Komaksavia's alleged registered office; Moldova says the Companies Law requires companies to give third parties access to its premises to inspect a company's register. According to Mrs. Efstathiou, on her visits a board outside the entrance of the building in question listed "Andreas Menelaou LLC" among the firms occupying the building, but did not list Komaksavia.[133]

115. Furthermore, Moldova says there is no certificate on the record of a registered office in Cyprus (and even if there were, such certificate would not in and of itself confirm that there is a *de facto* office at the designated address). There is a "notification of address,"[134] however, which lists a Bulgarian phone number as Komaksavia's point of contact; Mrs. Efstathiou called this

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[130] R-10, Notification of Change of Director and Secretary of Komaksavia Airport Invest Ltd, 05.11.2019.
[131] Resp. Memorial ¶¶ 184-270; Resp. Reply ¶¶ 120-152.
[132] Resp. Memorial ¶¶ 272-299.
[133] Resp. Memorial ¶¶ 314-316; Efstathiou Statement ¶¶ 11-18.
[134] R-61, Notification of the Change in Address of the Registered Office of Komaksavia, made on 04 July 2018, received by and registered with the Registrar of Companies on 31 October 2018.

number and believes the person who answered was speaking Bulgarian, and Moldova alleges that other evidence indicates the number in question belongs to Mr. Tenev.[135] Moldova also alleges further issues with inconsistent contact details, as well as "confusions about its own address" in different submissions by Komaksavia in this arbitration.[136]

116. Finally, Moldova contends that Komaksavia has been "delinquent" in its compliance with statutory obligations, by not filing annual returns, financial statements and tax returns as required by the Companies Law.[137] In Moldova's view, the reality is that Komaksavia "holds someone else's shareholding in Avia Invest," noting in particular that Komaksavia was incorporated solely to take over OOO Komaksavia's 95% holding in Avia Invest.[138]

B. Komaksavia's Position

117. As its primary position, Komaksavia argues that it is "plainly" a legal person incorporated in Cyprus, and as such has its seat in Cyprus for the purposes of the BIT.[139]

118. The requirement in Article 1(3)(a)(ii) that an investor has its "seat in the territory of the Republic of Cyprus" does not mean that Komaksavia must demonstrate any additional connections to that State, such as "substantial business activities," "effective management," or "financial control," Komaksavia says. It contends that this position is consistent with recent arbitral case law, as well as academic commentary.[140]

119. Komaksavia also argues that when negotiating the specific BIT under consideration – the one between Cyprus and Moldova – the Government of Cyprus intended for the notion of "seat" to be synonymous with "registered office," without any additional requirements imposed on an investor beyond having a physical presence in Cyprus. In support of this argument, Komaksavia relies on a witness statement by Mr. Antonis Michaelides, former Minister of

[135] Resp. Memorial ¶¶ 317-336.
[136] Resp. Memorial ¶¶ 337-352.
[137] Resp. Memorial ¶¶ 353-361; Resp. Reply ¶¶ 157-160.
[138] Resp. Memorial ¶¶ 362-363; Resp. Reply ¶¶ 155-156.
[139] Cl. Counter-Memorial ¶ 7; Cl. Rejoinder ¶¶ 72-75.
[140] Cl. Counter-Memorial, ¶¶ 8-17; Cl. Rejoinder ¶¶ 76-84 with further references.

Commerce, Industry and Tourism, who was involved in the negotiations and the drafting of the BIT.[141] Mr. Michaelides was also examined at the Hearing.

120. Komaksavia further points out that, as emphasized in Mr. Michaelides' statement and testimony, Article 3 of the BIT contains two different definitions of investors as legal persons, establishing different tests for Cypriot legal persons and Moldovan legal persons. Notably, the test for Moldovan entities explicitly contains the requirement that a legal person – beyond having its seat in Moldova – also performs "real business activity" in Moldova. There is no similar additional requirement for Cypriot investors, which Komaksavia says further supports its conclusion that no such additional requirement should be applied to it.[142]

121. Komaksavia also submits that the tribunal majority in *CEAC* was incorrect, and instead draws the Tribunal's attention to the position expressed in Professor Park's dissenting opinion in that case, in which Professor Park stated that there is no "ordinary meaning" in international law for the concept of a legal entity's "seat." Komaksavia also relies on the subsequent *Mera v. Serbia* case ("***Mera***"), which questioned the *CEAC* majority's analysis, and instead adopted Professor Park's view. The *Mera* tribunal, faced with a clause in the Cyprus-Serbia BIT worded identically to the one at issue here, explicitly rejected the view that this BIT language required "effective management or control." Komaksavia says this finding clearly supports its position in this arbitration.[143]

122. Even assuming, *arguendo*, that the Tribunal follows the *CEAC* majority, Komaksavia argues that it fulfills the more "onerous" requirements that the *CEAC* tribunal proposed, which go beyond the mere existence of a registered office. The five elements addressed by the *CEAC* majority are all met by Komaksavia, it says:

    a. Komaksavia's registered office[144] meets the test of physical premises in Cyprus;

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[141] Cl. Rejoinder ¶¶ 87-95, 106-107; Michaelides Report ¶¶ 16-20.
[142] Cl. Rejoinder ¶¶ 96-109.
[143] Cl. Counter-Memorial, ¶¶ 11-21; Cl. Rejoinder ¶¶ 85-86, 172-185; CLA-112, *Mera Investment Fund Limited v Republic of Serbia (ICSID Case No. ARB/17/2)* and CLA-34, *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Separate Opinion of William W. Park, 4 July 2016.
[144] C-5, Certificate of Registered Office; C-8, Register of Registered Office Addresses of Komaksavia.

b. Komaksavia has the right to use its premises, as evidenced by its sublease agreement;[145]

c. Komaksavia's registered office is accessible to the public, as evidenced, among other things, by the fact that Moldova's witness could visit the office on three separate occasions;[146]

d. Komaksavia's books and records are kept at the registered office;[147]

e. Komaksavia's name is affixed outside its registered office.[148]

In Komaksavia's submission, it therefore meets even the more extensive test for "seat" as outlined in the *CEAC* award.[149]

123. Komaksavia asserts that in addition to the evidence cited in the previous paragraph, it has established its "seat" in Cyprus – as it argues the term should be interpreted – by submitting its certificate of incorporation dated 19 August 2016,[150] a certified true copy of its Tax Certificate dated 14 June 2021,[151] and a certificate of incumbency dated 29 July 2021,[152] as well Mr. Menelaou's witness statements in support of Komaksavia's contentions.[153]

124. Komaksavia rejects Moldova's reliance on the *Alps Finance* award, because the BIT at issue in that case contained additional requirements as part of its definition of investor that are not present in the BIT relevant to this case. Furthermore, it says, several "well-established" cases have also reached a different conclusion from *Alps Finance*.[154]

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[145] C-2, Sub-lease Agreement, 4 July 2018.
[146] Efstathiou Statement ¶¶ 14, 15, 17.
[147] Third Menelaou Statement ¶ 7.
[148] C-98, Picture of the sign affixed on the door at the entrance of "working space 02" taken on 8 March 2021; C-99, Picture of the sign outside Claimant's office taken on 8 March 2021.
[149] Cl. Counter-Memorial ¶¶ 22, 50-52; Cl. Rejoinder ¶¶ 219-240.
[150] C-1, Certificate of Incorporation, 19 August 2016.
[151] C-9, Tax Certificate, 14 June 2021.
[152] C-10, Incumbency Certificate, 19 August 2016.
[153] Cl. Counter-Memorial, ¶¶ 50-54; Cl. Rejoinder ¶¶ 217-218.
[154] Cl. Counter-Memorial ¶¶ 23-39, 49, with further references therein.

125. Komaksavia also argues that the terms "seat" and "*siège social*" are not the same and cannot, contrary to Moldova's assertion, be used interchangeably.[155]

126. While recognizing that other Cyprus BITs include additional requirements for the definition of "investor," Komaksavia says that these additional requirements were explicitly included *in addition to* the requirement of "seat." This is not the case for the Cyprus-Moldova BIT.[156]

127. Komaksavia further argues, based on investment arbitration jurisprudence, that even when a treaty contains a stricter test such as "effective management and financial control" – which Komaksavia reiterates that the relevant BIT does not – these requirements are generally treated with more flexibility with respect to holding companies, such as Komaksavia.[157]

128. Reading further requirements into the seat requirement in the Cyprus-Moldova BIT would also be "at odds with the long-standing status of Cyprus as a leading offshore jurisdiction," by excluding foreign-controlled companies from the protection of Cyprus's BITs, Komaksavia says.[158]

129. Turning to municipal law to determine the nationality requirement – which Komaksavia argues is appropriate because there is no accepted understanding of the term "seat" in international law[159] – Komaksavia says that Cyprus Companies Law is based on English company law, and that the term "seat," as in English common law, does not mean anything beyond "registered office." Referring to the first opinion by its expert Dr. Pamboridis (the "**First Pamboridis Report**"), Komaksavia also argues that under Cypriot law, the terms "seat" and "registered office" are used interchangeably.[160] This is further confirmed by, among other things, a comparative study by the European Union recognizing Cyprus as an "incorporation jurisdiction" without any "real seat" influence, as well as the official

[155] Cl. Rejoinder ¶¶ 199-216; Cl. PHB ¶¶ 34-44.
[156] Cl. Rejoinder ¶¶ 110-118.
[157] Cl. Rejoinder ¶¶ 192-198, with further references.
[158] Cl. Counter-Memorial, ¶ 53.
[159] Cl. Counter-Memorial ¶¶ 11.6-11.7; Cl. Rejoinder ¶¶ 135-142; Cl. PHB ¶¶ 15-16.
[160] Cl. Counter-Memorial, ¶¶ 18-20, 41-43; Cl. Rejoinder ¶¶ 119-120, 143-170; First Pamboridis Report. A.11, A.14, A.15; Second Pamboridis Report.

translation of the Companies Act using the English term "registered office" as the translation for the Greek term "*edra.*"[161]

IX. "COOLING-OFF OBJECTION"

A. Moldova's Position

130. Moldova's third bifurcated jurisdictional objection is that the Tribunal lacks jurisdiction because Komaksavia failed to comply with the so-called cooling-off provision in Article 10 of the BIT.

131. In relevant part, Article 10 provides:

> **Settlement of Disputes between an Investor and a Contracting Party**
>
> 1. Any dispute which may arise between one Contracting Party and an investor of the other Contracting Party in connection with an investment on the territory of that other Contracting Party shall be settled amicably through consultations and negotiations.
>
> 2. If a dispute cannot be settled in accordance with paragraph 1 of this Article within a period of six months from the date on which either party to the dispute requested amicable settlement, the investor concerned may submit the dispute either to:
>
> a) The competent court or administrative tribunal of the Contracting Party in the territory of which the investment has been made; or [...]
>
> d) The Arbitration Institute of the Arbitral Tribunal of the Chamber of Commerce in Stockholm [...]

132. In Moldova's submission, Komaksavia has failed to comply with the requirements of both Article 10(1) and Article 10(2), which require that an investor attempt amicable settlement of a dispute prior to initiating arbitration, with the consequence that the Tribunal lacks jurisdiction over the dispute if this preliminary step is not followed.

133. Moldova argues that the Notice of Dispute, dated 2 October 2019,[162] by which Komaksavia allegedly notified Moldova of an investment dispute under the BIT, is faulty on a number of grounds, rendering it "invalid" and unable to trigger the six-month cooling-off period.[163]

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[161] Cl. Rejoinder ¶ 133; Cl. PHB ¶¶ 17, 20-22; CLA-62, European Commission, Study on the Law Applicable to Companies, Final Report.
[162] C-88, Notice of an Investment Dispute, 2 October 2019.
[163] Resp. Memorial ¶¶ 482, 485.

134. First, the Notice of Dispute is "null and void," Moldova submits, because it lacked sufficient details – about the investor, the investment and the dispute – for Moldova to engage in meaningful consultations.[164]

135. Second, Moldova says, the Notice of Dispute was invalid as it was not signed by the Director of Komaksavia, nor did it contain any power of attorney or any details, such as address or other details about how to contact Komaksavia.[165]

136. Finally, Moldova also says that Komaksavia has failed to show that it responded to the Government's reply letter, opting instead to "wait" out the six months as a mere formality. In Moldova's view, this approach is not sufficient under the BIT's Article 10, which in its reading requires "meaningful" consultations and negotiations.[166]

B. Komaksavia's Position

137. Komaksavia disputes Moldova's factual and legal contentions with respect to the Cooling-Off Objection.

138. On the facts, Komaksavia says that its Notice of Dispute sufficiently summarized the nature of the dispute and put Moldova on notice.[167] Komaksavia also points out that the Moldovan Ministry of Justice did in fact respond to the Notice of Dispute on 11 December 2019,[168] referring Komaksavia to the Ministry of Economy and Infrastructure (which never contacted Komaksavia). In fact, Moldova did not make any attempts to negotiate during the cooling-off period at all, Komaksavia claims.[169]

139. Komaksavia also argues that Moldova's reply was not addressed to the Claimant but rather to Avia Invest, a fact upon which Komaksavia seizes to argue that Moldova is estopped from now arguing that Komaksavia did not properly engage in amicable settlement attempts. In Komaskavia's submission, the incorrectly addressed reply letter is also part of a broader pattern of bad faith on Moldova's side, which means there was never no real prospect of an

[164] Resp. Memorial ¶¶ 471-472, 483; Resp. Reply ¶¶ 504-508.
[165] Resp. Memorial ¶¶ 473-477; Resp. Reply ¶¶ 519-522.
[166] Resp. Reply ¶¶ 509-514.
[167] Cl. Rejoinder ¶¶ 303-307.
[168] Original C-4.
[169] Cl. Rejoinder ¶¶ 328-332

amicable settlement – as a result of which, any requirement of more active efforts should be waived on grounds of futility.[170] Furthermore, Komaksavia submits, the BIT does not contain any formal requirement for a valid notice of dispute,[171] and in any event the purported formal "deficiencies" are not sufficient to deprive the Notice of Dispute of having validly notified the Respondent.[172]

140. Finally, the Cooling-Off Objection does not properly go to the Tribunal's jurisdiction but is "procedural" in nature, Komaksavia contends. Accordingly, even if Moldova's Cooling-Off Objection were accepted by the Tribunal, that would not deprive the Tribunal of jurisdiction.[173]

X. "*RATIONE TEMPORIS* OBJECTION"

A. Moldova's Position

141. Moldova finally objects that the Tribunal lacks jurisdiction *ratione temporis*. In Moldova's submission, by failing to prove its status as an investor in possession of an investment *at the time of the alleged breach* of the BIT, Komaksavia has also failed to demonstrate that the Tribunal has jurisdiction *ratione temporis*.[174]

B. Komaksavia Position

142. Komaksavia argues that Moldova is precluded from objecting to the Tribunal's jurisdiction on this ground, because the *Ratione Temporis* Objection was first raised in Moldova's Reply, *i.e.*, *after* the Tribunal's PO5, which determined the scope of issues to be dealt with at the bifurcated jurisdictional stage. Komaksavia therefore requests that the Tribunal order that the *Ratione Temporis* Objection not be entertained.[175]

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[170] Cl. Rejoinder ¶¶ 333-344.
[171] Cl. Counter-Memorial ¶¶ 73-75; Cl. Rejoinder ¶¶ 311-313.
[172] Cl. Rejoinder ¶¶ 314-323.
[173] Cl. Counter-Memorial ¶¶ 70-71; Cl. Rejoinder ¶¶ 324-327.
[174] Resp. Reply ¶¶ 167; 497-502.
[175] Cl. Rejoinder ¶¶ 27-29.

XI. TRIBUNAL'S ANALYSIS

A. The *Ratione Materiae* Objection

1. Interpretation of the BIT

143. The Parties broadly agree that the BIT should be interpreted in accordance with the rules set forth or reflected in the VCLT, in particular by reference to the principles set forth in VCLT Articles 31 and 32. In conducting this analysis, the Tribunal bears in mind several propositions. First, under VCLT Article 31, the provisions of the BIT are to be interpreted and applied in accordance with the "ordinary meaning" of their terms, in the "context" in which they occur and in light of the Treaty's "object and purpose."[176] While the Contracting Parties' use of unambiguous terms may be an indication of their clear intent, context and purpose must also be considered. The relevant "context" for construing the provisions of a treaty can include the words and sentences found in close proximity to that passage, including definitional terms, as well as other provisions of the same treaty which help illuminate its object and purpose.[177] In accordance with VCLT Articles 31(2) and 31(3), a tribunal construing the terms of the BIT should also take into account any other agreements between the Contracting Parties relating to the BIT, including "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions," as well as "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[178] If it is established that the Contracting Parties intended a term to have a "special meaning," then that intent should be given effect.[179]

144. In accordance with Article 32 of the VCLT, "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion," but only "to confirm the meaning" resulting from the textual approach required by Article 31, or in the event the textual approach leaves a meaning "ambiguous or obscure"

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[176] VCLT, Article 31(1).
[177] *See generally Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No ARB/10/1, Award ¶ 5.2.6 (2 July 2013) ("Treaty terms are obviously not drafted in isolation, and their meaning can only be determined by considering the entire treaty text. The context will include the remaining terms of the sentence and of the paragraph; the entire article at issue; and the remainder of the treaty [...].").
[178] VCLT, Article 31(3).
[179] VCLT, Article 31(4).

or would lead to a result that is "manifestly absurd or unreasonable."[180] More generally, the ICJ has explained (in a case preceding the VCLT but cited by the International Law Commission in preparing the VCLT) that "a decisive reason" (such as unmistakable evidence of the State Parties' intentions from supplementary materials) would be required "[t]o warrant an interpretation other than that which ensues from the natural meanings of the words" of a provision.[181]

145. In applying these principles to the definition of "investments" in Article 1(1) of the BIT, the Tribunal starts with the ordinary meaning of the text. The Article begins with the following paragraph:

> The term 'investments' means every kind of asset invested by investors, for the purpose of acquisition of economic benefit or other business purpose, of one Contracting Party in the territory of the other Contracting Party in accordance with the legislation of the latter and in particular though not exclusively, shall include
>
> (a) Movable and immovable property as well as any other property rights,
>
> (b) Rights derived from shares, bonds and other kinds of interests in companies,
>
> (c) Claims to money or other claims and rights having an economic value,
>
> (d) Intellectual property rights, technical processes and know-how, ...

146. The structure of this paragraph is that it (a) states a definition ("[t]he term 'investments' means every kind of asset invested by investors, for the purpose ..."), and (b) then adds that this definition "shall include" an illustrative list of assets. The clear implication of the latter step is that the Contracting Parties expected that assets falling within the list generally would satisfy their understanding of the definition that preceded it. Since one of the examples given is "rights derived from shares, bonds and other interests in companies," this aspect of the text gives rise to a clear presumption that shareholding interests held by nationals "of one Contracting Party in the territory of the other Contracting Party in accordance with the legislation of the latter" will be entitled to the BIT's protections.

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[180] VCLT, Article 32.
[181] *Admission of a State to Membership in the United Nations* (Charter, Art.4), Advisory Opinion: 1948 I.C.J Reports 57, p. 63.

147. The Tribunal accepts that shareholdings presumptively do satisfy the relevant test, and that in the great majority of cases, this will be the end of the matter. Ownership of shares by an investor, be it a physical person or a company, will in general be considered as sufficient for fostering international protection.

148. However, the existence of an illustrative list of assets in a BIT (and a presumption flowing from inclusion of a particular asset on that list) is not necessarily the end of the interpretative analysis. Presumptions can be rebutted in unusual circumstances, based on particular facts. In this instance, the illustrative list does not trump the objective, ordinary meaning of the definition that precedes it. This is both because words in a treaty do have an ordinary meaning, which VCLT Article 31 requires be taken into account, and because of the very fact that the list is stated not to be exclusive. As the *Romak* tribunal and others have observed, unless the term "investment" is given some inherent meaning, the non-exclusive nature of the list would provide no benchmark by which a tribunal could evaluate the qualifications of other forms of assets outside the illustrative list.[182] But without any such benchmark, Article 1(1)'s generality ("every kind of asset invested by investors") could be seen as encompassing even transactions that bear none of the traditional hallmarks of investment, such as (for example) a one-time purchase of goods.[183]

149. An example is useful to illustrate the point. No one would suggest that a home State buyer who orders a product over the internet from a host State seller has "invested in" the host State, simply by wiring funds into the country. This is despite the fact that, purely formalistically, the money sent for the purchase might be characterized as an "asset" of a national of one Contracting Party which was introduced into the territory of the other Contracting Party. Correspondingly, it seems implausible to argue that the seller of the product had "invested in" the buyer's State by shipping the product back in return, even though this could be seen as

[182] *See* CLA-149, *Romak,* ¶¶ 178-180 (rejecting claimant's argument that it "should simply confirm that [its] assets fall within one or more of the categories listed," because this approach would "deprive[] the term 'investments' of any inherent meaning," an outcome which is inconsistent with the non-exhaustive nature of the categories enumerated; the tribunal explained that "there may well exist categories different from those mentioned in the list," and "[a]ccordingly, there must be a benchmark against which to assess those non-listed assets … in order to determine whether they constitute an 'investment' within the meaning of" the BIT).

[183] *See* CLA-149, *Romak,* ¶ 184-185 (explaining that a "mechanical application of the categories listed" in the BIT "would eliminate any practical limitation to the scope of the concept of 'investment," and "render meaningless the distinction between investments, on the one hand, and purely commercial transactions on the other").

another cross-border placement of an "asset," and even though both buyer and seller evidently considered the transaction to be "profitable" (*i.e.*, worth conducting) from their separate perspectives. The point is that even though the funds transmitted in one direction, and the product transmitted in the other direction, might be covered by the breadth of the "every kind of asset" terminology in many BITs – and perhaps even could fall within certain categories of a typical illustrative list of assets – that terminology cannot function on its own as a sufficient definition of investment. Rather, it requires interpretation by reference to the ordinary meaning of the concepts of "investment" and "investing."

150. According to common dictionary definitions, the noun "investment" means variously:

- the outlay of money usually for income or profit: capital outlay"[184];
- "the act of putting money, effort, time, etc. into something to make a profit or get an advantage, or the money, effort, time, etc. used to do this"[185]; or
- "the act of investing money in something," or "the money that you invest, or the thing that you invest in."[186]

151. In other words, inherent in the notion of an investment is some *contribution* which is made in an attempt to earn a return over *a period of time*, a process that necessarily involves the possibility or risk of not earning a return. Other tribunals, employing similar "ordinary meaning" analyses, have found these three basic elements to be inherent in any objective definition of "investment." Although some tribunals have reached this conclusion solely through an analysis of the ICSID Convention, others have stated that the same interpretation of the word "investment" applies independently to investment treaties, whether or not a case is proceeding at ICSID.[187]

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[184] Merriam-Webster, https://www.merriam-webster.com/dictionary/invest.
[185] Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/invested.
[186] Oxford Learner's Dictionaries, https://www.oxfordlearnersdictionaries.com/us/definition/american_english/invest.
[187] *See, e.g.*, RLA-61, *KT Asia*, ¶¶ 164-166 (observing that the claimant was right not to even argue that "the mere fact of holding an asset which falls within the scope of [the BIT's illustrative list] is sufficient to conclude that a person has made an investment under the BIT," because the word "investment" has an inherent ordinary meaning, "irrespective of the application of the ICSID Convention"; that meaning "presuppose[s] … a commitment of resources," without which "the asset belonging to the claimant cannot constitute an investment within the meaning of

152. In this particular case, the definition of investment in Article 1(1) of the BIT contains additional markers that confirm the Contracting Parties' intention that the term be given this objective meaning. For example, after the initial reference to "every kind of asset" in the introductory clause, the Article continues immediately thereafter with the phrase "invested by investors ...." The same sentence clarifies which investors must have invested the assets in question ("investors ... of one Contracting Party"). In other words, by the ordinary meaning of the sentence, the BIT extends protections to assets that were "invested" by qualifying nationals of the home State.

153. The phrase "invested by investors" is not present in all BIT definitions of investment.[188] In the Tribunal's view, although this phrase is not essential to its conclusion about an objective meaning of "investment," the phrase does reinforce the understanding that these Contracting Parties expected that any investor seeking to invoke the BIT would have made an actual contribution of some sort, in connection with its putative investment. This flows from the ordinary meaning of the term "invested," which is a past tense verb, referring to a prior act of "investing."

154. Notably, "investing" an asset connotes something different from merely "owning" or "holding" an asset; the latter terms connote legal title or possession, while the former refers to a form of conduct, the taking of an act. The Tribunal is unable to accept Komaksavia's argument that the terms necessarily can be conflated, so that a qualifying national who comes to own an asset in the host State, without having made any contribution in respect of that

... the BIT"); CLA-149, *Romak,* ¶ 207 ("The term 'investment' has a meaning in itself that cannot be ignored when considering the list contained in ... the BIT," because the term in the BIT "has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk ...").

[188] Many of the cases cited by the Parties do not involve BITs with this operative language *See, e.g.,* RLA-61, *KT Asia,* ¶¶ 89, 162 ("every kind of asset"); RLA-69, *Saba Fakes,* ¶ 92 (same); RLA-71, *Malicorp Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/08/18, Award, 7 February 2011, ¶ 108 (same); CLA-149, *Romak,* ¶ 174 (same); RLA-116, *Doutremepuich,* ¶ 111 ("all categories of assets"); CLA-202, *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/04/06, Award, 16 January 2013 ("***Vannessa Ventures***"), ¶ 109 ("any kind of asset owned or controlled by an investor ... including through an investor of a third state"); RLA-73, *Quiborax,* ¶ 51 ("any kind of assets or rights related to an investment"). Other cases the Parties cite do include equivalent language. *See, e.g., Phoenix,* ¶ 56 ("any kind of assets *invested* in connection with economic activities *by an investor* ...") (emphasis added); RLA-75, Bogdanov, ¶ 9 ("all kinds of pecuniary and intellectual values that are *invested by the investor*") (emphasis added); CLA-157, *Saluka,* ¶ 198 ("every kind of asset invested either directly or through an investor of a third State"); CLA-93, *Investmart,* ¶ 186 (same). As noted above, the Tribunal does not consider that this case turns on such distinctions, but the presence of this additional language makes even more clear that Contracting Parties intended to an objective meaning of investment.

ownership, can be considered to have "invested" that asset. The term "invested," like the term "investment," has a particular meaning, one that is not akin to mere ownership alone. According to common dictionary definitions, the verb "invest" means variously:

- "to commit (money) in order to earn a financial return"[189];
- "to put money, effort, time, etc. into something to make a profit or get an advantage"[190]; or
- "to buy property, shares in a company, etc. in the hope of making a profit."[191]

155. In other words, inherent in the act of "investing" is an objective element: a requirement of a positive act that involves some sort of contribution to acquire the asset or enhance its value, coupled with an expectation or desire that the asset will produce a return over a period of time, with the possibility or risk that it may not do so (with the result that the contribution might be forfeited in part or in whole). Indeed, Article 1(1) of the BIT refers to this "return on contribution" element, in the sense that it qualifies the phrase "asset invested by investors" with additional words: "for the purpose of acquisition of economic benefit or other business purpose." These passages confirm the Tribunal's interpretation of the definition of "investment" included in the BIT.

156. The Tribunal recognizes that any VCLT interpretation must rest not on construction of a treaty provision in isolation, but rather on the interpretation of the provision in the context of surrounding or otherwise relevant treaty provisions. For this reason, it is important to have regard to the following paragraph of Article 1(1), which states:

> Provided that a possible change in the form in which the investments or reinvestments have been made shall not affect their character as investments so long as such a change does not contravene laws and regulations of the Contracting Party in the territory of which the investments were made.

157. According to Komaksavia, this passage provides explicit protection for restructured investments, given that corporate restructurings often do not involve payment of market value

[189] Merriam-Webster, https://www.merriam-webster.com/dictionary/invest.
[190] Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/invested.
[191] Oxford Learner's Dictionaries, https://www.oxfordlearnersdictionaries.com/us/definition/american_english/invest.

consideration.[192] Komaksavia contends that the passage goes so far as to connote an intention for the term "investment" to have a "special meaning" in the context of corporate restructuring.[193]

158. The difficulty with Komaksavia's argument is that that, as discussed below, the terms of the passage bear no real resemblance to the facts of the case. By its terms, the passage appears to address a change in "the form" of an investment after it has been made, a subject which is not synonymous with a mere change in the identity of its owner. An example of a change in the form of an investment might be where a qualified foreign investor initially sets up a business in the host State as a sole proprietorship, but later incorporates it and takes possession of shares; the form of investment has changed from an initial investment in the underlying business to a subsequent investment in the shares of a local company, even if the identity of the investor remains the same. According to the BIT, the investor should not be disqualified from protection, simply because of this change in form in the underlying asset into which it had invested. Similarly, a change in form of investment might occur where a qualified foreign investor who originally owned shares in a local enterprise sets up an intermediate enterprise to hold those shares, with the investor taking shares in the intermediate holding company. In that context, the investor's investment has changed from a direct to an indirect investment in the host State, but this type of corporate restructuring would not disqualify the investor from invoking the protection of the BIT.

159. The common feature in these examples, and in the "change in form" notion generally – which appears, for example, in Article 1(6) of the Energy Charter Treaty[194] – is that they are "aimed

[192] Cl. Rejoinder ¶¶ 282-285; Cl. PHB ¶¶ 62-65.
[193] Cl. PHB ¶¶ 62-63.
[194] The leading commentary to the Energy Charter Treaty, authored by Prof. Dr. Kaj Hober, states that the *travaux preparatoires* "do not shed much light on the intention underlying this language." Prof. Hober suggests that "[o]ne category of changes which is probably covered by the language are changes in the corporate form of the investment, for example, transformation from a limited liability company to a joint stock company. Such a change may have various consequences, legal and economic, but will not affect the status of the assets in question as an Investment under the ECT. Another category of change that might have been intended are changes resulting from privatization of state-owned enterprises. When the ECT was drafted and negotiated, many Eastern European countries, including Russia, were in the process of launching and/or implementing privatization programmes affecting, *inter alia*, the energy sector in these countries. Consequently, an Investment in a state-owned enterprise would remain an Investment under the ECT also subsequent to privatization of the enterprise in question." Kaj Hobér, *The Energy Charter Treaty*, Oxford University Press, 2020, pp. 95-96.

first and foremost at covering the form [in] (sic) which 'investments' may take."[195] As Dominic Pellew explained in his dissenting opinion in the *Energoalians* case, the idea is that "all forms of assets which belong to an Investor as a result of the carrying out by him of investment activity ... should be protected."[196] However, the critical predicate is that there must have been an "investment activity" by the investor in the first place.[197]

160. The present case, however, raises precisely that predicate question. It does not involve any "change in the form" in the putative investment that Komaksavia made in Moldova: at all times, this was in the form of shares of Avia Invest. Komaksavia obtained those shares in the same form from their prior owner, OOO Komaksavia. The claim is now brought by Komaksavia in its own right, not by any alleged corporate parent of both entities that oversaw a corporate restructuring that included a "change in form" to its subsisting investment. In these circumstances, the Tribunal cannot accept that either Article 1(1)'s provision about a "change in form" of a prior investment, or prior investment cases about corporate restructurings in general, have any relevance to the question at hand.[198]

161. Looking beyond the terms of Article 1(1), do any other BIT provisions cast further light on the intended scope and interpretation of the term "investments," as defined in Article 1(1)? The preamble of the BIT sets forth its object and purpose, which is "to extend and intensify the long term economic cooperation between the Contracting Parties on the basis of equality and mutual benefit," and "to create favorable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party." The reference to "mutual benefit," taken together with the notion of "investments by investors," tends to affirm that the purpose of the BIT was to encourage and protect investments in the ordinary sense, namely

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[195] RLA-111, *Energoalians TOB v Republic of Moldova*, UNCITRAL, Dissenting Opinion of Arbitrator Dominic Pellew, 25 October 2013, ¶ 111.
[196] *Id.* (emphasis added).
[197] *Id.*
[198] The case in that sense bears some similarities to *KT Asia*, where the tribunal reasoned as follows: "Assuming for the sake of discussion that no new contribution is required when an investment is transferred from one group affiliate to another, the obvious question whether in the present case there exists a corporate group." It found that the facts suggested "*the antithesis of a group*": an "aggregation of assets in the form of a myriad of companies" that may have been beneficially held by one man "through nominees and individuals whom he trusted," but without any holding company or common shareholder connecting the companies, or any "single economic unity" or consolidation for financial reporting or tax purposes. In these circumstances, the *KT Asia* tribunal declined to make any exception to the general requirement of a contribution within the definition of investment. RLA-61, *KT Asia*, ¶¶ 194-197 (emphasis added).

those that involved some act of contribution. Nothing in the preamble suggests an intent on the part of the drafters to protect mere transfers of legal title to recipients who contributed nothing to obtain such title or to enhance the value of the assets so obtained, and as a result neither conveyed any benefits to the host State nor, in any real sense, assumed any risks.

162. To round out the VCLT analysis, neither Party has submitted excerpts from the *travaux préparatoires*, the official record of BIT negotiations, to shed light on the source or evolution of the relevant terms, or to reveal communications between the State Parties regarding their respective or shared interpretation and intent. The Claimant did introduce testimony from Mr. Michaelides purporting to reflect his understanding of the intent of the Contracting Parties in negotiating and concluding the BIT. The Tribunal does not, however, consider after-the-fact testimony by a negotiator for one side to a treaty, rendered without any support from contemporaneous documents – and at best reflecting his personal recollections about his own State's intent – to be particularly persuasive regarding the shared intent of both Contracting Parties in the selection of particular treaty language. Such testimony cannot displace or modify the ordinary meaning of the treaty's text. Nor has the Tribunal been shown anything that could qualify under VCLT Article 31(3) either as a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions," or "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[199] In these circumstances, the Tribunal's interpretation necessarily rests on the ordinary meaning of the BIT's terms, in their context and in the light of the BIT's object and purpose, as outlined above.

2. Application to the Facts

163. As discussed above, this has not been shown to be a corporate restructuring case, so the Tribunal expresses no view on whether, in that different context, the acquiror of shares in a local company from a prior affiliated company would need to show that it made any new contribution of its own, either as consideration paid to the seller to obtain the shares or through subsequent infusions of funds into the local company. The Claimant has not presented this case as one about corporate restructuring and the issue therefore does not arise on the facts.

[199] VCLT, Article 31(2).

164. Nor does the Tribunal need to inquire about the *reasons* for the 6 September 2016 SPA transaction. Moldova has suggested that this may have been for treaty-shopping purposes, *i.e.*, to bring the Avia Invest shares under the umbrella of the BIT.[200] Komaksavia denies this and contends that the prior owner, OOO Komaksavia, would have had BIT protection anyway under the Russia-Moldova BIT.[201] Be that as it may, the Tribunal expressly declined to bifurcate the Respondent's abuse of process objection, so such arguments are not ripe for assessment at this point.[202]

165. The question before the Tribunal is this: does the evidence show[203] that Komaksavia has an "investment" (within the meaning of the BIT) in Moldova that qualifies for protection under the BIT's terms?

166. Komaksavia clearly holds an asset in a form that on its face falls within Article 1.1's illustrative list, namely its shares in Avia Invest, a Moldovan company. But as discussed in Section XI.A.1, that is not the end of the inquiry, both because of the particular language of Article 1.1 (which defines an investment as an asset "invested by" Komaksavia in Moldova), and because of the elements inherent in the notion of the term "investment," which in the Tribunal's view includes considerations relating to contribution, duration and risk.

167. Turning, first, to the issue of contribution, the evidence confirms that Komaksavia never made a payment, in any amount or by any apparent means, to acquire OOO Komaksavia's 95% share in Avia Invest. The SPA stated that this share was "sold" for 80,852,030 MDL,[204] an amount stated to be the nominal value of the shares,[205] and the two companies declared this

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[200] Resp. Reply ¶ 222.
[201] Cl. Rejoinder ¶ 301. According to UNCTAD, the Russia-Moldova BIT entered into force in July 2001. *See* https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2551/moldova-republic-of---russian-federation-bit-1998.
[202] PO5, ¶ 73.
[203] The Tribunal sees no need to delve at length into a debate about burdens of proof. Suffice it to say that in general, a claimant bears the burden of demonstrating that the jurisdictional requirements of a BIT under which it seeks to proceed are met. Once a claimant has established a *prima facie* case, based on evidence and not just allegation, then the burden may shift to a respondent to prove applicable defenses. But the issue of defenses does not arise until the elements of claimant's affirmative case on jurisdiction have been met. Given the Tribunal's interpretation of the BIT, the issues of contribution, duration and risk are part of that affirmative case on the existence of a qualifying investment. These issues also inherently involve evidence that is more likely to be in Komaksavia's possession than Moldova's.
[204] C-30, ¶ 5 (corresponding to ¶ 6 in the English translation submitted).
[205] C-30, ¶ 1 (corresponding to ¶ 2 in the English translation submitted).

to be the "real price of the transaction,"[206] a phrase which does not actually speak to the real value of the shares. But aside from the amount involved, the evidence before the Tribunal indicates that the stated sale price was never paid. The SPA obligated Komaksavia to pay this "within 90 days from the date of signing this agreement,"[207] but the seller, OOO Komaksavia, does not appear to have been particularly worried about whether this would occur. The SPA provided for no interest in the event of late payment and no security in the event of non-payment. To the contrary, OOO Komaksavia expressly agreed in the SPA that "the ownership of the share passes from the Seller to the Buyer without any reservations, encumbrances and in full. The Seller disclaims repurchase and retention rights."[208]

168. As Moldova has shown, Komaksavia (and its witness Mr. Menelaou) engaged in some ambiguous drafting in the initial pleadings, in such a way as to avoid drawing attention to the question of whether the contractual consideration was ever actually paid. Mr. Menelaou's first witness statement stated that "Komaksavia made a significant investment in the Republic of Moldova as the purchase price for its shares in Avia Invest was EUR 3,658,247,70."[209] This reference to the "purchase price" does not actually state that Komaksavia ever paid the agreed sum, but that was certainly implied by the past-tense term "made." Subsequently, after Moldova observed that OOO Komaksavia's balance sheets show no receipt of payment,[210] Mr. Menelaou submitted a second witness statement with a revised description of events, now averring that "Komaksavia has agreed to make a significant investment in the Republic of Moldova as the purchase price for its shares in Avia Invest was EUR 3658,247,70."[211] Under questioning at the hearing, Mr. Menelaou – who did not become a director of Komaksavia until 23 October 2019, some three years after the SPA transaction[212] – admitted that this revision reflected the reality that the "purchase price" for the Avia Invest shares has never been paid.[213]

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[206] C-30, ¶ 6 (corresponding to ¶ 5 in the English translation submitted).
[207] C-30, ¶ 6 (corresponding to ¶ 5 in the English translation submitted).
[208] C-30, ¶ 6 (corresponding to ¶ 5 in the English translation submitted).
[209] First Menelaou Statement ¶ 12.1.
[210] R-37, Extended Excerpt from State Register on OOO Komaksavia (ООО Комаксавиа), Russian Federation, 3 September 2020.
[211] Second Menelaou Statement ¶ 34.1.
[212] First Menelaou Statement ¶ 6; Second Menelaou Statement ¶¶ 14, 18.
[213] Tr. Day 2 Menelaou 301:22-302:2, 303:22-24.

169. Komaksavia contends that the obligation to make payment (a "substantial liability") is itself a form of consideration qualifying as a contribution, to the extent that any contribution is required for purposes of the definition of investment.[214] But even if (*arguendo*) a *bona fide* outstanding debt could so qualify,[215] in this case it is clear that the debt never will be paid. The creditor, OOO Komaksavia, was dissolved on 10 January 2019.[216] Neither Komaksavia nor its witness Mr. Menelaou had volunteered this fact, which was unearthed by Moldova in the course of its investigations.

170. Because Komaksavia paid no consideration at all to obtain the Avia Invest shares, and will never pay any such consideration in light of OOO Komaksavia's subsequent liquidation, the Tribunal need not decide whether an acquisition of shares for only nominal value would constitute sufficient contribution to satisfy the requirement of "investment." Some past investment tribunals have suggested that nominal payments might still qualify as sufficient, depending on the circumstances.[217] But tribunals nonetheless have treated these circumstances as a "red flag" that justifies greater scrutiny into the *bona fides* of a transaction, for example to determine if there may have been an abuse of process.[218] In this case, as discussed above, Moldova's abuse of process objection was not bifurcated and therefore is

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[214] Cl. Rejoinder ¶ 252.

[215] *Cf.* CLA-157, *Saluka*, ¶ 71 (finding that the claimant had "bought the[] shares by issuing promissory notes to [the seller], those notes being secured by a pledge over the shares").

[216] R-37, Extended Excerpt from State Register on OOO Komaksavia (ООО Комаксавиа), Russian Federation, 3 September 2000, p. 32.

[217] *See, e.g.,* RLA-22, *Phoenix Action, Ltd. v The Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009, ¶ 119 ("If there is indeed a real intent to develop economic activities on that basis, the existence of a nominal price is not a bar to a finding that there exists an investment"); RLA-61, *KT Asia,* ¶ 203 ("a payment of a nominal price for a shareholding is but one aspect out of a number of factors that may assist in ascertaining the existence of an investment"); CLA-202, *Vanessa Ventures*, ¶ 122 ("The nominal purchase price does not of itself necessarily indicate that there was no real investment by Claimant"); RLA-116, *Doutremepuich*, ¶¶ 126 ("On the one hand, a contribution of EUR 1 seems insufficient to qualify as an investment. On the other hand, a fixed numerical threshold seems arbitrary .... [T]he reality of the contribution is to be assessed taking into account the totality of the circumstances and the elements of the economic goal pursued").

[218] *See, e.g.,* RLA-22, *Phoenix*, ¶ 119 (with reference to "the low price paid by Claimant for the acquisition of the shares, whose payment the Tribunal considers acknowledged by the submitted bank accounts ... [t]he Tribunal considers that the existence of a nominal price for the acquisition of an investment raises necessarily some doubts about the existence of an 'investment' and requires an in depth inquiry into the circumstances of the transaction at stake"); RLA-70, *Caratube*, ¶¶ 433, 438 ("the nominal price, if any, paid for the acquisition of the shares raises doubts about the existence of an investment in which at least USD 9.4 million had already been sunk .... In such situation the Tribunal is required to review closely the circumstances of the transaction.... A putative transaction [on such terms] calls for explanation and justification."); CLA-202, *Vannessa Ventures*, ¶ 121 (explaining that "[t]he purely nominal purchase price" of the shareholding "is a notable feature of this case, which required examination of the broader context, to determine "whether Claimant can propertly be regarded as having made an investment in mining in Venezuela").

not ripe for assessment.[219] The issue of only a nominal payment for the shares moreover has become moot, given the established fact that Komaksavia actually never paid anything at all to acquire them.

171. Komaksavia contends, however, that it subsequently made contributions to Avia Invest. It does not suggest that it ever injected any of its own funds into Avia Invest to support the latter's operations, and indeed, Komaksavia's financial statements and the testimony of its Director suggest that it never had any such funds to inject.[220] Rather, Komaksavia invokes an alleged decision to "reinvest" back into Avia Invest certain dividends that it otherwise would have been entitled to draw. It appears, however, that Avia Invest's shareholders never resolved that the company should pay dividends during the first three years after Komaksavia obtained its shares in the company, and not until after a dispute between the Parties already had arisen. The shareholder resolution to which Komaksavia refers is dated 11 October 2019,[221] which was shortly after the 2 October 2019 Notice of Dispute that Komaksavia says put Moldova on notice of an investment dispute under the BIT.[222] It is true that this curiously timed October 2019 Shareholder Decision did resolve to make a partial distribution of profits to shareholders,[223] but in fact Avia Invest never made such a distribution (and therefore Komaksavia did not ever formally "reinvest" any dividends received. There is no contemporary documentation to explain this course of events.

172. More to the point, Komaksavia's decision not to use its control over Avia Invest to secure dividends is not evidence of a "reinvestment" qualifying as a "contribution," in circumstances where Komaksavia received its shareholding interest in Avia Invest essentially *gratis*. At most, this reflects restraint in not immediately seeking to realize completely unearned profits.

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[219] PO5, ¶ 73.

[220] *See generally* Tr. Day 2 Buruiana/Menelaou 296:1-10; *see also* R-174, Komaksavia Airport Invest Ltd's Annual Return for the years 2016/2017 (Form HE32(I)); R-175, Komaksavia Airport Invest Ltd's Annual Return for the year 2018 (Form HE32(I)); R-176, Komaksavia Airport Invest Ltd's Annual Return for the year 2019 (Form HE32(I)); R-177, Komaksavia Airport Invest Ltd's Annual Return for the year 2020 (Form HE32(I)); R-178, Komaksavia Airport Invest Ltd's Management Report (dated 27 May 2019) and Financial Statements (dated 27 May 2019) for the period from 19 August 2016 to 31 December 2017; R-179, Komaksavia Airport Invest Ltd's Management Report (dated 6 August 2020) and Financial Statements (dated 6 August 2020) for the year ended on 31 December 2018; R-180, Komaksavia Airport Invest Ltd's Management Report (dated 6 August 2020) and Financial Statements (dated 6 August 2020) for the year ended on 31 December 2019.

[221] C-73, Minutes of the general meeting of shareholders of Avia Invest dated 11 October 2019, p. 3.

[222] C-88, Notice of an Investment Dispute, 2 October 2019.

[223] C-73, Minutes of the general meeting of shareholders of Avia Invest dated 11 October 2019, p. 3.

The Tribunal is unable to accept that such exercise of restraint – as such and without more – can qualify as a legally protected investment by Komaksavia into the territory of Moldova.

173. Finally, Komaksavia contends that its contribution is reflected in its having assumed the risk of having to support Avia Invest's obligations under the Concession Agreement with respect to the Airport.[224] But the Concession Agreement does not appear to impose any obligations on Avia Invest's shareholders,[225] and Komaksavia does not point to any provisions to the contrary. Nor was the Concession Agreement accompanied by any shareholder guarantee or other undertaking that could bind Komaksavia in any way.

174. At most, Komaksavia invokes a 14 May 2020 press release and a short 18 May 2020 letter to Avia Invest which supposedly reflect Komaksavia's "plans to invest" significant funds "for the fulfilment of Avia Invest's obligations under the Concession Agreement."[226] These documents were issued more than seven months after the Notice of Dispute and on the days immediately surrounding Komaksavia's 15 May 2020 Request for Arbitration. In any event, by definition, the words "plans to invest" necessarily must concern a future act, not a past act. Moreover, nothing in these documents suggests that Komaksavia is bound to pay any funds at all. To the contrary, Komaksavia describes them as referring to an "agreement" by Komaksavia's shareholders to extend a loan facility to Komaksavia, which in turn would enable it to make a capital investment in Avia Invest.[227] Komaksavia has not produced the underlying agreement referenced in the press release and the letter. In these circumstances, it appears that any potential future investments were entirely at the election of Komaksavia and its shareholders. None of these developments (whose timing is again unexplained) demonstrate any financial contribution (or even a firm financial commitment) that Komaksavia actually has made to Avia Invest or to its operations in Moldova.

175. Based on this record, the Tribunal is unable to find any contribution of Komaksavia in connection with its shareholding of Avia Invest. Rather, by virtue of a transaction that appears murky at best, Komaksavia became the holder of a legal title to 95% of Avia Invest's shares,

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[224] Cl. Counter-Memorial ¶ 65.
[225] C-21, Concession Agreement for assets under management No. 4.03_30.08.2013, 30 August 2013.
[226] Cl. Rejoinder ¶ 288; Second Menelaou Statement ¶ 34.3, C-105, Press release of Avia Invest dated 14 May 2020; C-60, Letter from Komaksavia to Avia Invest dated 18 May 2020).
[227] Cl. PHB ¶¶ 82-83.

which were transferred to it without payment of any consideration, and without Komaksavia undertaking any obligation to fund Avia Invest in the future. On this basis, and in the absence of any evidence of a contribution having been paid, the Tribunal finds that Komaksavia has no qualifying investment within the particular terms of Article 1(1) of the BIT.

176. For the avoidance of doubt, the Tribunal's finding has nothing to do with the origin of capital used in investments, which was the subject of several of the cases Komaksavia cited.[228] Whatever the ultimate origin of funds used by an investor, "the capital must still be linked to the person purporting to have made an investment," in the sense of proof that the putative investor itself actually engaged in the activity of investing, through making a contribution. In this case, there is no evidence that Komaksavia ever did. All that has been shown is that it received shares in Avia Invest. But as the *Quiborax* tribunal found, a distinction must be made between the objects (or "legal materialization") of an investment, such as shares or title to property, and the action of investing, which requires some contribution of money or assets.[229] The plain terms of Article 1(1) of the BIT requires the latter, *i.e.,* that there be cognizable assets in Moldova which were "invested by investors [of Cyprus] for the purpose of acquisition of economic benefit or other business purpose."

177. Because Komaksavia made no contribution of its own to acquire the shares of Avia Invest or to fund Avia Invest's operations, it undertook no cognizable risk. It may be true that *Avia Invest* faced substantial risk, including the risk of losing the Airport Concession and the value of the operations that the Concession allowed it to conduct. But for Komaksavia the failure of Avia Invest would simply result in its not receiving the profits it had hoped to receive through becoming Avia Invest's shareholder without even paying for the shares. In the absence of any contribution, a lack of returns is not a loss. Accordingly, Komaksavia faced no risk of loss on an "investment" because, in reality, it invested nothing, either in the purchase of the shares or in Avia Invest's operations.[230]

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[228] *See* Cl. Rejoinder ¶¶ 272-275, referencing CLA-208, *Wena*, ¶ 126; CLA-155, *Saipem*, ¶ 106; and CLA-58, *Eiser*, ¶ 228.
[229] RLA-73, *Quiborax*, ¶ 223.
[230] *See similarly,* RLA-61, *KT Asia,* ¶ 219 ("KT Asia has made no contribution and, having made no contribution, incurred no risk of losing such (inexistent) contribution."); *cf.* RLA-22, *Phoenix*, ¶¶ 120, 127 (where a claimant did contribute some funds for the purchase of shares, even a "small price," there is a risk "that the investor loses the amount he has paid"); RLA-116, *Doutremepuich*, ¶ 145 ("[t]he risks must be inherent in the contribution").

178. Given the absence of any contribution or risk, there is no need to assess the additional factor of duration at any length. But to complete the discussion, the Tribunal notes that had contribution and risk been apparent, it would have found sufficient duration, given the length of time that Komaksavia has already held its interest in Avia Invest, and the absence of any evidence that it originally intended that interest to be merely fleeting, for example as a short-term holder before transferring the shares on to another recipient. The case is different in that respect from prior cases which have found insufficient duration to satisfy the definition of investment.[231]

B. Adjudicatory Prudence and Economy

179. The Tribunal appreciates that the Parties have devoted significant effort to briefing Moldova's other Bifurcated Jurisdictional Objections, particularly the "Seat Objection" under Article 1(3) of the BIT. At the same time, the Tribunal recalls the observation of the *Eskosol* tribunal (on which two members of this Tribunal sat), to the effect that tribunals should exercise "prudence, in not reaching out to decide ... points of law that are not strictly necessary to the resolution of the issues before it."[232] That is particularly the case where such points involve "unsettled" issues, which would require the rendering of "interpretations of arguably ambiguous treaty language," or which have "potential doctrinal consequences for future cases that should not be lightly ignored."[233] These principles of prudence are reinforced by rationales of procedural economy, since the more issues are addressed in an Award, the more resources will be required to produce that Award and inevitably the longer the Parties will have to wait to learn the outcome of their case.

180. In this case, the Tribunal already has found that it has no jurisdiction *ratione materiae* to proceed with the case. In these circumstances, it declines to provide an additional and unnecessary analysis of Moldova's other Bifurcated Jurisdictional Objections. Neither principles of adjudicatory prudence nor economy would be served by extending this Award

[231] *See, e.g.*, RLA-61, *KT Asia*, ¶¶ 210-216; RLA-116, *Doutremepuich*, ¶ 143.
[232] *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020, ¶ 229.
[233] *Id.*, ¶¶ 228-229.

further, for the purpose of dealing with other objections that in the end could not change the result.

XII. COSTS

A. The Costs of Arbitration

181. Pursuant to Article 49(2) of the SCC Rules, the SCC Board has determined the Costs of the Arbitration upon request of the Tribunal. In compliance with Article 49(5) of the SCC Rules, the Tribunal sets out below the individual fees and expenses of each member of the Tribunal and of the SCC, as determined by the Board on 25 July 2022:

Jean Kalicki

Fee EUR 150,000.00
Expenses EUR 12,190.00

Philippe Sands QC

Fee EUR 90,000.00

Brigitte Stern

Fee EUR 90,000.00 + EUR 18,000.00 (20% VAT)
Expenses EUR 1,799.00 + EUR 359.80 (20% VAT)

Stockholm Chamber of Commerce

Administrative Fee EUR 70,000.00 + EUR 17,500.00 (25% VAT)

182. Consequently, the Costs of Arbitration as determined by the SCC Board amount to EUR 449,848.80 inclusive of applicable VAT.

B. The Costs Claimed by the Parties

183. Each Party submitted its costs and attorney's fees for the Tribunal's consideration on 20 June 2022, followed by further correspondence and comments.

184. Komaksavia submitted a schedule showing incurred costs and fees in the total amount of USD 2,042,249.00 which includes the advances on costs of USD 983,998.00 (EUR 840,450.00) which Komaksavia paid to the SCC on behalf of both Parties, as per the following breakdown:

Costs	Payees	Comments	Currency	Amount
Legal Fees	Gornitzky & Co.		USD	500,000
Legal Fees	Hillmont Group/Astrae Group	Includes fees related to application for summary procedure, bifurcation and counter-memorial	USD	418,063
SCC Costs	SCC	Paid in full by Claimant. Includes Respondent's share. (EUR 840,450)	USD	983,998
Expert/Witness Evidence			USD	71,997
Gornitzky Hearing Costs	IDRC, EDS and Counsel Team		USD	46,255
Claimant's Internal Costs			USD	21,936
Total			**USD**	**2,042,249**

185. Moldova submitted a schedule showing incurred costs and fees in the total amount of EUR 216,678.75 (EUR 154,500.00 in legal fees, EU 35,887.00 in expenses incurred by counsel and EUR 26,291.75 in expenses incurred directly by Moldova), as per the following breakdown:

ANNEX NO 1*

A. LEGAL COUNSEL'S COSTS AND EXPENSES	
Buruiana & Partners' Fees	**154,500.00**
Buruiana & Partners' Expenses, including expenses for obtaining documents in Moldova, Cyprus, and other jurisdictions; costs for translation of documents; costs for legal advice from Cyprus and other jurisdictions related to the documents obtained from those jurisdictions; travel and accommodation costs; costs related to preparing for and attending the Hearing; costs for courier services; phone charges	**35,887.00**
B. MOLDOVA'S DISBURSEMENTS	
Moldova's expenses related to:	
- the expert and witness	16,700.00
- the Hearing dated 15 February 2021 (the EDS's fees)	1,075.39
- the Hearing dated 3 and 4 May 2022 (the IDRC's and EDS's fees)	8,516.36
Total of Moldova's Directly Incurred Costs	**26,291.75**
C. ARBITRATION COSTS	
Arbitration Costs, also including the Administration Fee and Expenses of the Tribunal and SCC (Moldova's share thereof)	***(422,500.00)*** *This is the amount of the advance on the arbitration costs as indicated by the SCC in its invoice issued to Moldova. However, since Moldova denied that the Tribunal had jurisdiction, it did not pay the advance on the arbitration costs.*
D. LEGAL COSTS IN ARBITRATION SCC EA 2020/075	
Moldova's legal costs	**900.00**
E. ARBITRATION AND LEGAL COSTS IN ARBITRATION SCC EA 2020/130	
Moldova's legal costs	**3,200.00**
Moldova's share of arbitration costs	**10,500.00**

TOTAL to be reimbursed / compensated by the Claimant: A + B + D + E = EUR 231,278.75

TOTAL to be paid by the Claimant: A + B + C + D + E = EUR 653,778.75

* All amounts are in Euro (EUR), unless stated otherwise.

186. As can be seen from the breakdown, Moldova is also requesting legal costs from the emergency arbitration SCC EA 2020/075 (the "**First Emergency Arbitration**"), as well as arbitration and legal costs from the emergency arbitration SCC EA 2020/130 (the "**Second Emergency Arbitration**").

187. In its 24 June 2022 submission on costs, Moldova says that Komaksavia's incurred costs are "unreasonable, disproportionate and excessive," and notes in particular that both current and former counsel appeared to have relied on larger teams of lawyers than what Moldova argues to have been justified by the nature of the case.[234] Moldova also questions the fees and expenses associated with Komaksavia's fact and expert witnesses, pointing out that the claimed average cost for one witness is three times that of Moldova's equivalent average. Furthermore, Moldova says that all of Komaksavia's costs are paid by Komaksavia's shareholders, rather than by Komaksavia itself.[235]

188. In its 1 July 2022 submission on costs, Komaksavia argues that its costs are "entirely reasonable," that its change of counsel did not unreasonably cause any delay to the proceedings, and that its new counsel "made every effort to limit the impact of this change."[236] By contrast, Komaksavia argues that Moldova is responsible for "significant delays" of the proceedings, by (i) requesting summary procedure and/or bifurcation, and (ii) filing unnecessarily long and complicated submissions, accompanied by "numerous unnecessary and irrelevant exhibits beyond the scope of bifurcation." Komaksavia also objects to Moldova's fees on the ground that Moldova's counsel has already exceeded the fee cap which was indicated for the entire arbitration in Moldova's public tender for representation in this case.[237] Finally, Komaksavia objects to Moldova's request for costs associated with the Emergency Arbitrations.[238]

189. In its further submission on costs dated 8 July 2022, Moldova argues that its own counsel fees are "entirely reasonable," and that Komaksavia cannot validly object to those fees on the basis of an agreement between Moldova and its counsel, especially considering that Moldova's legal fees are significantly lower than Komaksavia's.[239] Moldova also says that its other costs and expenses are reasonable,[240] and should, together with its fees, be paid in full by Komaksavia.

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[234] Respondent's First Cost Submission, 24 June 2022 ¶¶ 8-18.
[235] Respondent's First Cost Submission, 24 June 2022 ¶¶19-21.
[236] Claimant's Cost Submission, 1 July 2022 ¶¶ 18-33.
[237] Claimant's Cost Submission, 1 July 2022 ¶¶ 6-17.
[238] Claimant's email of 24 June 2022.
[239] Respondent's Second Cost Submission, 8 July 2022 ¶¶ 10-16.
[240] Respondent's Second Cost Submission, 8 July 2022 ¶¶ 17-21.

190. Moldova also rejects Komaksavia's suggestion that it is responsible for delaying and complicating the proceedings. Instead, Moldova argues, it is Komaksavia which has caused unreasonable delays, by changing counsel (leading among other things to a 4-month delay of the Hearing) and by its inconsistent and changing listing of exhibits and legal authorities.[241]

C. The Tribunal's Allocation of Costs

191. Pursuant to Article 49(6) of the SCC Rules, the Tribunal has discretion to "apportion the Costs of the Arbitration between the parties, having regard to the outcome of the case, each party's contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances."

192. Pursuant to Article 50 of the SCC Rules, the Tribunal also has discretion to "order one party to pay any reasonable costs incurred by another party, including costs for legal representation," likewise "having regard to the outcome of the case, each party's contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances."

193. In this case, Moldova is the clear prevailing Party: it has demonstrated a lack of jurisdiction *ratione materiae* under the BIT to proceed with Komaksavia's claims. Moldova also prevailed in a number of applications which were made in the course of these proceedings, including its application for an order revoking a 2 August 2020 decision in an emergency arbitration between the Parties,[242] and Komaksavia's application for interim relief.[243] Moldova also prevailed in part in its application for bifurcation (in the alternative to a summary procedure).[244] By contrast, Komaksavia prevailed only with respect to Moldova's application for an order of security for costs,[245] and with respect to non-bifurcation of Moldova's jurisdictional objections other than the three Bifurcated Jurisdictional Objections.[246]

194. With respect to the various "conduct" issues that the Parties have contended increased the costs of the proceeding, the Tribunal considers that these were do not tip the balance squarely

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[241] Respondent's Second Cost Submission, 8 July 2022 ¶¶ 24-35.
[242] Procedural Order No. 4 ("**PO4**"), ¶ 143(a).
[243] Procedural Order No. 10, ¶ 73.
[244] PO5, ¶¶ 71, 79.
[245] PO4, ¶ 143(b).
[246] PO5, ¶ 73.

in either direction. All counsel acted professionally and contributed in course to the Tribunal's understanding of the case.

195. Taking all these factors into account in a holistic manner, the Tribunal determines, first, that in light of the Tribunal's findings regarding lack of jurisdiction, Komaksavia shall bear the full Costs of Arbitration determined by the SCC Board as per Section XII(A) above. Given that Komaksavia already has paid both its own share and Moldova's share of the advance on costs to the SCC, the result is that no shifting of costs (or reimbursement by either side of the other) is required with respect to this category of costs.

196. With respect to the other costs claimed by Moldova which were incurred in connection with these arbitral proceedings (Categories A and B of its schedule, covering legal representation, experts, and associated costs and expenses, for a total of EUR 216,678.75), the Tribunal determines that these costs were reasonable and that Komaksavia shall bear them in full.

197. However, the Tribunal declines Moldova's request that it also order Komaksavia to pay Moldova's fees and costs related to the Emergency Arbitrations that preceded constitution of the Tribunal (Categories D and E of its schedule). The Tribunal has serious doubt – and Moldova certainly has not demonstrated – that it has jurisdiction to enter a costs award regarding proceedings that took place before separate adjudicators, prior to this Tribunal's constitution. In any event, as the Tribunal previously noted in its PO4, it sees no basis to revisit and overrule such costs orders as were entered in those separate proceedings.[247]

198. Accordingly, Komaksavia shall pay a total of EUR 216,678.75 to Moldova.

D. Section 41 of the Swedish Arbitration Act

199. Finally, the Tribunal wishes to remind the Parties that pursuant to Section 41 of the Swedish Arbitration Act, any Party may apply to amend the award regarding the decision on the fees of the arbitrators. Such application should be filed with the Stockholm District Court within two months from the date when the Party received this Award.

[247] PO4, ¶ 141.

XIII. DECISIONS

200. For the reasons stated above, the Tribunal unanimously:

a) DISMISSES Komaksavia's claims in their entirety, on the basis of lack of jurisdiction *ratione materiae* under the BIT; and

b) AWARDS Moldova a total of EUR 216,678.75 from Komaksavia, for compensation of Moldova's legal fees and other expenses connected with these proceedings.

Seat of Arbitration: Stockholm, Sweden

3 August 2022

Pursuant to Section 36 of the Swedish Arbitration Act, any Party may bring an action to amend the Award within two months from the date when the party received the Award. This action should be brought before the Svea Court of Appeal.

Professor Philippe Sands QC
Arbitrator

Date: 1 August 2022

Professor Brigitte Stern
Arbitrator

Date:

Ms. Jean E. Kalicki
President of the Tribunal

Date:

Seat of Arbitration: Stockholm, Sweden

3 August 2022

Pursuant to Section 36 of the Swedish Arbitration Act, any Party may bring an action to amend the Award within two months from the date when the party received the Award. This action should be brought before the Svea Court of Appeal.

Professor Philippe Sands QC
Arbitrator

Date:

Brigitte Stern.

Professor Brigitte Stern
Arbitrator

Date: 1 August 2022

Ms. Jean E. Kalicki
President of the Tribunal

Date:

Seat of Arbitration: Stockholm, Sweden

3 August 2022

Pursuant to Section 36 of the Swedish Arbitration Act, any Party may bring an action to amend the Award within two months from the date when the party received the Award. This action should be brought before the Svea Court of Appeal.

Professor Philippe Sands QC
Arbitrator

Date:

Professor Brigitte Stern
Arbitrator

Date:

Jean E. Kalicki

Ms. Jean E. Kalicki
President of the Tribunal

Date: 3 August 2022