

Ink. till Svea Hovrätt
REGISTRATORSKONTORET

2013 -07- 15

SVEA HOVRÄTT

INKOM: 2013-07-15
MÅLNR: T 6877-13
AKTBIL: 2

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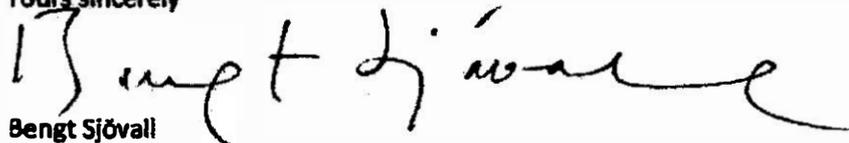
Mr. Erik Mårild
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P.O. Box 16050
103 21 STOCKHOLM

Lidingö, 16 April 2013

SCC Arbitration V (091/2012) Bogdanov & Bogdanova ./. Moldova

In the captioned arbitration, I enclose the Final Award.

Yours sincerely



Bengt Sjövall

Sole arbitrator

Ink. till Svea Hovrätt
REGISTRATORSKONTORET 1

2013 -07- 1 5

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FINAL AWARD

Made on 16 April, 2013

The seat of arbitration is Stockholm, Sweden

Arbitration No.: V (091/2012)

Claimants: Yuri Bogdanov & Yulia Bogdanova
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MD-2021 Chisinau
Moldova

Counsel: Mr. Cornel Marian
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SE- 111 46 Stockholm
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Respondent: The Republic of Moldova

Counsel: Mr. Lilian Apostol
Agent for the Government
Ministry of Justice
MD-2012 Chisinau
Moldova

Sole arbitrator: Mr. Bengt Sjövall
Oskarsstigen 4
SE-181 32 Lidingö, Sweden

1. INTRODUCTION

1. The Claimants in this arbitration are Russian citizens who operate a company which is involved in the production and sale of paints, varnishes and similar products in the Republic of Moldova. Claimants allege that their company has been the target of consistent discriminatory actions by Respondent, including arbitrary tax and environmental policy modifications. Claimants consider themselves as investors under the Bilateral investment Treaty entered into on 17 March 1998 between the Russian Federation and the Republic of Moldova (the "Treaty") and allege that the actions of Respondent violate their rights under the Treaty. Claimants seek damages for these violations.

2. Respondent denies these claims.

2. THE PROCEEDINGS

3. Claimants submitted their Request for Arbitration to the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC") on 5 July, 2012. Claimants requested that their claims should be reviewed under the Rules for Expedited Arbitration of the SCC.

4. On 9 July 2012, Claimants informed the SCC that they maintained the view that the use of the Rules for Expedited Arbitration would be best suited in this case but also that they were ready to proceed on the basis decided by the SCC. Claimants further requested that the Tribunal should consist of one arbitrator.

5. On 10 July, 2012, the SCC informed Respondent that arbitration had been initiated by Claimants and requested Respondent to submit, by 24 July, an answer to the SCC in accordance with Article 5 of the Arbitration Rules of the SCC (the "Rules"). Respondent was further invited to comment on the proposition that the dispute should be decided under the Rules for Expedited Arbitration or, alternatively, by a sole arbitrator. Respondent submitted no reply.

6. On 25 July 2012, Respondent was reminded to submit a reply by 1 August, but did not respond.

7. On 2 August 2012, the SCC informed the parties that the SCC "notes that there is no agreement between the parties regarding the applicability of the Rules for Expedited Arbitration" and that the arbitration was to proceed under the SCC Rules.

8. On 27 August 2012, the Board of the SCC decided that the arbitral tribunal was to consist of one arbitrator and that the seat of the arbitration was to be Stockholm. The Board also appointed me as sole arbitrator in the dispute and determined the costs of the arbitration in an amount which was finally fixed, on 28 August 2012, at EUR 16 500. It was then also decided that the advance on costs was to be paid by the parties by 11 September 2012. Payment was to be made by Claimants in the amount of EUR 6750 and by Respondent in the amount of EUR 8250, the registration fee having been credited to Claimants' part of the advance on costs.

9. Claimants paid their share of the advance on costs on 10 September 2012.
10. No payment was made by Respondent, who was reminded by the SCC on 18 September 2012 to pay its share of the advance on costs by 25 September 2012. This reminder was ignored.
11. On 21 September 2012, Respondent submitted to the SCC an Answer, pursuant to Article 5 of the Rules, in which the claims for damages were denied.
12. Since no payment had been forthcoming from Respondent on 27 September 2012, Claimants were then, in accordance with Article 45 (4) of the Rules, offered the opportunity to pay Respondent's share of the advance on costs. Claimants did so on 5 November 2012.
13. On 5 November 2012, the case was referred to me in accordance with Article 18 of the Rules.
14. On 7 November 2012, Claimants requested me to issue a Separate Award in accordance with Article 45 (4) of the Rules, pursuant to which Respondent should pay to Claimants Respondent's share of the advance on costs as well as certain transaction costs, in a total amount of EUR 8285 and interest.
15. On 7 November 2012, I issued my First Procedural Order, in which I invited Respondent to submit, no later than 23 November, a statement as to whether it admitted or denied the request for a Separate Award. I also directed the parties to submit their comments on a provisional timetable for the proceedings, contained in the Order, and further to submit comments on which language was to be used in the proceedings.
16. On 16 November, I issued my Second Procedural Order, in which I ordered that
- (i) the language of the arbitration was to be English;
 - (ii) by 23 November 2012, Respondent was to submit its response to the request for a Separate Award;
 - (iii) by 14 December 2012, Claimants were to submit a Statement of Claim;
 - (iv) by 1 February 2013, Respondent was to submit a Statement of Defence;
 - (v) Claimants would be given the opportunity to submit a Rejoinder by 15 February 2013;
 - (vi) Respondent would be given the opportunity to submit a Rebuttal by 1 March 2013;
 - (vii) since Claimants had expressly requested an oral hearing, this would take place in Stockholm on 14 March, 2013, and would continue on 15 March, if necessary
17. Respondent failed to submit any response to the request for a Separate Award.
18. On 6 December 2012, I issued a Separate Award in which I ordered Respondent to pay to Claimants, jointly and severally, an amount of EUR 8285 and interest.
19. On 11 December 2012, I issued amendments to the Separate Award, containing corrections of certain clerical errors.

20. On 14 December 2012, Claimants submitted a Statement of Claim, with appendices.
21. On 1 February 2013, Respondent was to submit its Statement of Defence, but failed to do so.
22. On 10 February 2013, I sent a letter to Respondent, in which I noted that the Republic had filed no Statement of Defence, and further reminded Respondent that it should avail itself of the opportunity to submit a Rebuttal by 1 March 2013. I also pointed out that an oral hearing was to take place in Stockholm on 14 March 2013.
23. On 11 February 2013, the SCC received a letter from Mr. Lilian Apostol, Agent for the Government of Moldova, in which he informed the SCC that he had been instructed to act on behalf of Respondent in this arbitration until another counsel was appointed.
24. On 12 February 2013, the SCC requested Mr. Apostol to submit a Power of Attorney, evidencing his mandate to act on behalf of the Republic.
25. On 14 February 2013, Claimants submitted a Rejoinder, as envisaged in the timetable for the proceedings.
26. On 14 February 2013, I informed Mr. Apostol in writing that I was the sole arbitrator appointed by the SCC and requested him to submit documents evidencing his mandate to act on behalf of the Republic. Mr. Apostol replied that he would revert to me on 21 February. I then reminded Mr. Apostol of the timetable for the proceedings, according to which Respondent was to submit a Rebuttal by 1 March, a hearing was to take place on 14 March and the Award was to be made by 2 May 2013.
27. On 25 February 2013, Mr. Apostol submitted a Power of Attorney, executed by the Prime Minister of Moldova and authorising Mr. Apostol to represent the Republic of Moldova in this arbitration.
28. On 6 March 2013, Mr. Apostol, acting on behalf of Respondent, submitted a brief, containing a Statement of Defence and a Rebuttal.
29. On 7 March 2013, I summoned both parties to a hearing on 14 March 2013 at 9:30 AM on the premises of Mannheimer Swartling Advokatbyrå, Stockholm
30. Both parties confirmed receipt of the summons, but Mr. Apostol stated that he would not be able to participate due to other previous engagements.
31. On 8 March, Claimants submitted comments on Respondent's Statement of Defence and Rebuttal.
32. On 14 March 2013, an oral hearing took place in Stockholm, in which Claimants participated but Respondent was absent.
33. On 16 March, written presentations used by counsel for Claimants at the oral hearing were sent to counsel for Respondent for his information.
34. On 18 March, counsel for Respondent requested to be given the opportunity to comment on the written presentations and previous submissions by Claimants. Counsel for Claimants requested me to close the proceedings.

35. On 20 March, I issued my Fourth Procedural Order, in which I granted Respondent's request and ordered him to submit certain clarifications concerning his position with regard to the dispute.

36. On 30 March, Respondent submitted a final submission, containing comments and a clarification.

37. On 2 April, I submitted to the parties a summing up of their claims and arguments in this arbitration and asked for corrections.

38. On 6 April, I received comments from Claimants on my summing up. No comments were received from Respondent.

39. On 6 April, I declared the proceedings closed in accordance with Article 34 of the Rules

3. REQUEST FOR RELIEF

40. Claimants request that Respondent should be ordered to:

- (i) pay the sum of 1 524 145 Moldovan Lei (MDL);
- (ii) pay interest on the aforementioned amount in accordance with Art. 619 (2) of the Civil Code of the Republic of Moldova, such interest amounting to MDL 554 383, 56 as per today's date;
- (iii) carry the costs of the arbitration as well as Claimant's costs for legal representation and interest thereon in accordance with Section 18:8 of the Swedish Procedural Code

41. Respondent denies these claims.

4. SUBMISSIONS OF THE PARTIES

4.1 Factual background

4.1.1 Claimants:

The investments

42. On 6 January 1999, Mr. Bogdanov established a company in Moldova, ICCS "Agurdino MLD" SRL. The name of this company was subsequently changed into ICS "RA Invest". It will be referred to in the following as "RA Invest".

43. On 10 April 1999, RA Invest, after participating in a public tender, acquired a majority shareholding in a state-owned chemical factory called "Fapochlm", one of the most important

producers of paints, varnishes and other chemical products in Moldova. The name of this enterprise was later changed into "Midgard Terra". It will be referred to in the following as "Midgard Terra"

44. Midgard Terra was a heavily indebted company. Under the agreement with the Moldovan government concerning the acquisition of the majority shareholding, Mr. Bogdanov, through RA Invest, undertook to pay off a significant portion of the debts of Midgard Terra and to invest MDL 10 000 000 in money and assets in the company. These undertakings were duly fulfilled in the course of the following years.

45. On 29 December 2000, Mr. Bogdanov established the Moldovan company ICS Casa de Comert "Agurdino" SRL with an authorised capital of MDL 5 400. The name of this company was later changed into ICS "Grand Torg" SRL and it will be referred to in the following as "Grand Torg".

46. In the spring of 2001, Grand Torg participated in a public tender for a licence to operate in the largest of seven so-called free economic zones, "Expo-Business Chisinau". Companies in this free economic zone, referred to in the following as "EBC", operate on certain particularly favourable terms, which will be further explained below.

47. On 2 April 2001, Grand Torg entered into an agreement with Midgard Terra. According to this agreement, Grand Torg would deliver to Midgard Terra raw materials for the production of paints and varnishes, and Midgard Terra would provide services to Grand Torg consisting of the manufacturing of such products and the delivery thereof back to Grand Torg.

48. On 17 February 2009, all shares in Grand Torg were acquired by Yulia Bogdanova. By then, the value of the shares had increased to MDL 431 147. Yuri Bogdanov retained full executive control of the operations of the company, however, pursuant to a power of attorney issued by Yulia Bogdanova.

49. Moreover, on the same date, the former and new shareholders of Grand Torg signed a protocol which reads *inter alia* as follows.

2.1 The profit of 2008 in the amount of 3 591 645 lei is the property of Bogdanov Yuri but remains at the disposal of the shareholder Bogdanov Yulia.

The mentioned amount of profit will be used for the procurement of raw materials, replenishment of circulating assets and procurement of equipment for the continuation and extension of the company's activities in the year 2009 and in the forthcoming years.

50. On 4 September 2009, Yulia Bogdanova, with the approval of Yuri Bogdanov, decided to invest an amount of MDL 419 872,64 out of the abovementioned remaining profits for the purchase of a bottling and capping line for technical and chemical liquids.

The legal framework

51. The business activities within the group of companies owned or controlled by Mr. Bogdanov in Moldova were structured so that raw materials for the production of paints and varnishes were imported from abroad into the EBC by Grand Torg. The raw materials were then delivered to Midgard Terra in accordance with the agreement of 2 April 2001. Midgard Terra was situated in the Republic of Moldova but outside the EBC. Pursuant to the agreement, Midgard Terra used the raw materials to manufacture paints and varnishes, which were then delivered back to Grand Torg. Finally, the finished products were sold by Grand Torg to customers in Moldova or abroad.

52. This structure was very carefully adapted to the legal framework and the express investment guarantees in force in the Republic of Moldova at the time when the investments were made. The relevant rules and provisions in this regard may be described as follows.

53. Law 998 on foreign investments of 1 April 1992 provides, in Article 43 (3), as follows:

if, after the conclusion of a commercial agreement with the participation of foreign or joint companies, any legislative acts are issued which worsen the economic position of the parties to such agreements, those agreements will nevertheless continue to be in force for the entire period of their validity, unless otherwise provided for by agreement between the parties.

54. This stabilisation clause protects, in particular, the agreement of 2 April 2001 between Grand Torg and Midgard Terra, which is instrumental to the entire structure of the business activities of the group of companies owned or controlled by Mr. Bogdanov.

55. The statute regulating the free economic zone Expo-Business Chisinau and the business activities conducted by companies registered in the EBC is Law No. 625-XIII of 3 November 1995. It was amended in several important respects by Law No. 1517-XIII of 18 February 1998. This amended version will be referred to in the following as Law 625.

56. Article 5 (2) of Law 625 exempted companies resident in the EBC from customs duties on (1) goods imported to the EBC for final consumption; (2) goods exported from the EBC if such goods were recognised as originating from the EBC; and (3) goods temporarily exported from the EBC for processing and then returned to the EBC in finished form.

57. Law 625 further provided that, if raw materials were imported to the EBC and sent for processing on the customs territory of Moldova, then the finished goods, if returned to the EBC, were recognised as originating, from a customs point of view, from the EBC. This meant that no customs duties were levied on such goods when they were exported from the EBC, as stipulated in Article 5 (2).

58. Article 6 (2) of Law 625 also exempted goods originating from the zone from value added tax (VAT).

59. This structure allowed Grand Torg to import raw materials, send them to Midgard Terra for processing, return the finished goods to the EBC and finally sell them to customers in Moldova or

abroad without paying any customs duties or VAT (except for administrative charges) at any stage of the operations.

60. Article 7 of Law 625 further contains a stabilisation clause which reads as follows:

Should new laws be adopted deteriorating the conditions of Free Zone residents' activities with regard to the customs and tax regimes stipulated by the present law, the residents shall be entitled to rely, for a period of ten years as of the date of the enactment of the new law, on the legislation of the Republic of Moldova in force on the date of the registration of the residents in the Economic Free Zone.

61. In 1998, the Republic of Moldova enacted new legislation for the protection of the environment (Law 1540-XIII). This statute ("Law 1540"), which was in force at the time of the investments, did not impose any charges on imported goods.

62. Amendments to this legislation were made in 2002, 2007 and 2008. Through these changes, charges were introduced on the import of raw materials used for the manufacturing of paints and varnishes as well as on the import of paint and varnishes in finished form. Also, charges were introduced on emissions and similar environmentally harmful effects resulting from the production process.

63. Successive amendments to the customs legislation as well as certain provisions in the environmental legislation led to significant changes in the customs treatment of goods which were considered harmful to the environment, as will now be described in further detail.

The imposition of so-called environmental charges

64. From 2002 until 2008, all charges collected or accrued by the customs authorities, including environmental charges, were imposed on imported goods when they crossed the national border. No environmental charges were, however, levied on goods imported by Grand Torg during this period since it was a resident of the EBC and as such exempt from all import duties

65. Before November 2005, the Customs Code of Moldova had defined as "re-import" the regime that included the transfer of the raw materials for processing on the territory of the Republic of Moldova, the processing itself, the transfer of the final goods to the EBC and the transfer of the goods from the EBC to Moldova. This customs regime was distinct from "import" and no customs or other charges were levied under these rules. This was now changed, so that operations of this kind were treated as ordinary "import" of goods into Moldova. Moreover, from 2008 and onwards, environmental charges were no longer imposed on goods at the time when they crossed the national border but rather when they were placed in the "customs regime of imported goods".

66. Goods which were sold from the EBC to customers in Moldova were therefore treated as being imported into Moldova and were placed in the customs regime of imported goods at the time of transfer (except goods which were sent out of the EBC for processing on Moldovan territory). This had no consequences for residents of the EBC with regard to the payment of customs duties or VAT, since they were exempt from these charges. It did, however, subject them to the payment of

environmental charges. Consequently, from 2008, environmental charges were levied on goods which Grand Torg sold to Moldova or to other countries.

67. As a result of these changes in legislation, Grand Torg and Midgard Terra paid environmental charges as follows during the period June 2008-September 2009. No charges were paid when raw materials were imported by Grand Torg and sent on to Midgard Terra for processing. However, Midgard Terra paid such charges for the production process, which was defined as environmentally harmful. The finished goods were sent to Grand Torg and sold to customers in Moldova or abroad. When these goods were transferred out of the EBC, environmental charges were levied since the goods were defined as being imported into Moldova. The charges were levied as a percentage of the cost, not of the finished goods, but of the raw materials used for the production of the finished goods.

68. By levying the charges in this manner, the Moldovan authorities treated Grand Torg and Midgard Terra equally with Moldovan companies outside the free economic zones which imported raw materials and used them to produce paint and varnishes. Those companies paid a percentage of the cost of the raw materials when importing them and they also paid environmental charges for the production itself.

69. In two separate answers (of 9 July 2008 and 10 November 2009) to inquiries by Grand Torg, the Moldovan Ministry of the Environment confirmed that Grand Torg should pay environmental charges on the raw materials used for the production of the finished products. This was also the position of the customs authorities who, in two decisions of 3 July and 15 October 2008, had confirmed this principle.

70. Nevertheless, in a decision of 3 September 2009, the customs authorities annulled the decision of 15 October 2008. The authorities then immediately started levying environmental charges on the cost of the finished goods, i.e. the paints and varnishes, when Grand Torg transferred them out of the EBC, despite the fact that these goods had been produced on the territory of the Republic of Moldova, as confirmed by documents concerning the origin of the products issued by local authorities.

71. Since the cost of the finished goods was considerably higher than that of the raw materials, and since the percentage charged on that cost was also much higher than the percentage charged on raw materials, this new application of the legislation led to a very dramatic increase indeed of the amounts levied by the customs authorities. The charges on finished goods were collected from 4 September 2009 until 5 September 2011, despite the fact that Claimants were determined to operate as a domestic producer. The period between these two dates will be referred to as the "Dispute Period".

72. The reason stated by the Customs Service for this very drastic measure was that, in a ruling dated 21 May 2009, the Court of Appeal of Chisinau had annulled the decision of the Customs Service of 15 October 2008. However, the ruling by the Court of Appeal concerned a company in a different economic zone operating under a different legal framework and therefore clearly is not applicable in this case.

73. By introducing so-called environmental charges on the import of finished goods which had not been imported into the Republic of Moldova, but had in fact been produced on its territory, the Moldovan authorities in reality imposed a concealed customs duty or VAT on Grand Torg. These measures amount to a breach of the stabilisation clause in Article 7 of Law 625 and Article 43 (3) of Law 998, as well as of the investment guarantees in the Treaty, as will be further explained below.

4.1.2 Respondent:

74. The obligation to pay for the import of goods, the use of which pollutes the environment, is laid down in Article 11 (1) of Law No. 102-XVI of 16 May 2008 ("Law 102") which reads as follows:

Payment for placing goods, the use of which pollutes the environment, in the customs regime of import, shall be made by legal and natural persons who put such goods in free circulation on the territory of the Republic of Moldova, and such payment shall be made in accordance with existing law before or at the moment when such goods are placed in the regime of import.

75. Thus, as from the date when this statute entered into force (10 June 2008), Grand Torg was under the obligation to pay these environmental charges. It should be noted that this piece of legislation is applicable to all importers of environmentally harmful goods; not just to Grand Torg.

76. On 15 October 2008, the Customs Service issued Decision No. 359-d which provided that environmental charges payable by residents of the free economic zones were to be computed on the basis of the cost of the raw materials contained in the imported product. However, in a ruling dated 21 May 2009, the Court of Appeal of Chisinau invalidated this decision, thus forcing the Customs Service to levy the environmental charges on the cost of the imported goods itself. An English translation of the ruling has been submitted to the arbitrator.

77. Grand Torg has challenged the practice of the Customs Service in the Moldovan Courts. It asked the Court of Appeal to refund the balance between the environmental charges levied on the finished products and the charges which would have been levied on raw materials. However, the Court denied this request on 9 September 2011, and this ruling was upheld by the Supreme Court on 18 January, 2012. Grand Torg's claim was denied on the grounds that the appeal against the decision of the customs authorities had not been lodged within the period prescribed by law.

78. The guarantees provided by the stabilisation clause in Law 625 only relate to VAT and customs duties and they do not concern the environmental legislation applicable in this case.

79. Claimants refer to and quote fragments of Moldovan legislation in a misleading manner. Thus, they state that the free economic zones are part of the Republic of Moldova and that the goods manufactured there originate from the EBC. They do not mention, however, that under Article 7 (10) of Law No. 440 of 27 July 2001 on free economic zones ("Law 440"), transfer of goods and services into the free economic zones from the remainder of the customs territory of Moldova is equivalent to export, while transfer of goods from the free economic zones to the remainder of the customs territory of Moldova is equivalent to import.

Article 10

Resolution of disputes between a Contracting Party and an investor of the other Contracting Party

- 1. Any dispute between a Contracting Party and an investor of the other Contracting Party arising in connection with an investment, including disputes concerning the amount, conditions or procedure of payment of compensation pursuant to Article 6 of this Agreement, or procedure of payment of the compensation pursuant to Article 8 of the present Agreement, shall be subject to a written notification with detailed comments which the Investor shall send to the Contracting Party participating in the dispute. The Parties in dispute shall seek to settle the dispute amicably to the extent possible.*
- 2. If the dispute cannot be settled amicably within six months of the date of the written notification referred to in Paragraph 1 of this Article, it shall be submitted for resolution to:*
 - (a) a competent court of general jurisdiction or arbitrazh court of the Contracting Party on the Territory of which the investment is carried out;*
 - (b) the Arbitration Institute of the Stockholm Chamber of Commerce;*
 - (c) ad hoc arbitration in accordance with the Arbitration Rules of the United Nations Commission on Trade Law (UNCITRAL).*
- 3. The arbitral award shall be final and binding on both parties to the dispute. Each of the Contracting Parties shall undertake to enforce the award in accordance with its legislation.*

84. With regard to the question of jurisdiction, the parties have submitted as follows.

4.2.1 Claimants:

85. The Arbitrator has jurisdiction since Claimants are Russian citizens and therefore are qualified as investors under the Treaty (jurisdiction *ratione personae*); the investments qualify as investments under the Treaty (jurisdiction *ratione materiae*); and the investments were retained throughout the Dispute Period and at the time when the claims were submitted to arbitration (jurisdiction *ratione temporis*). Moreover, all pre-arbitration requirements have been fulfilled.

86. The fact that Claimants are Russian citizens and therefore qualify as investors is undisputed and this argument need not be developed further.

87. The investments qualify as such under the Treaty for the following reasons. Yulia Bogdanova is a shareholder in Grand Torg and her investment therefore obviously falls under the definition of Article 1 (2) b of the Treaty. Pursuant to the protocol of 17 February 2009 (see Section 49 above), Mr. Bogdanov has retained a monetary interest in Grand Torg, which interest was invested to generate economic value, and this qualifies as an investment under Article 1 (2) c of the Treaty.

88. The fact that the investments were retained throughout the Dispute Period is also undisputed and need not be developed further.

4.2.2 Respondent:

89. Respondent is of the opinion that the Arbitrator has no jurisdiction over this dispute for the following reasons.

90. First, the amounts claimed by Claimants do not qualify as "investments" under the provisions of the Treaty.

91. The present case is about the refund of the environmental taxes levied on Claimants in the period 2009-2011. However, the payment of a tax, which follows as a consequence of a mandatory duty for all investors, cannot be considered as an investment.

92. Article 1 (2) c of the Treaty protects money "invested" to generate economic value. Taxes payable under domestic legislation cannot be considered as "invested" and the amounts paid in accordance with such legislation are not protected by the Treaty.

93. In fact, all investments are subject to taxation unless the relevant bilateral investment treaty provides a guarantee against taxation. The Treaty contains no such guarantee.

94. Any tax applicable to an "investment" is based on the costs or prices of the finished products. Therefore, the cost of a tax can be added to the final price and is in a sense controlled by the investor himself.

95. One purpose of the environmental taxes was to allow the government to control to some extent the prices of environmentally harmful products. Those prices were not supposed to be too low. However, if the taxes were to be charged on the raw materials only, this would give sellers a wider scope in setting prices at a lower level; thereby weakening the control of the state.

96. Second, the arbitrator lacks jurisdiction because the claims which are brought by Claimants in this arbitration were already adjudicated by domestic Moldovan courts.

97. Article 10 (2) of the Treaty provides for alternative dispute resolutions, i.e. either by the competent courts of a Contracting Party, or by one of two institutions administering international arbitrations. The Treaty does not prescribe a dispute resolution process in consecutive stages. The investor must choose one of the methods listed in the Treaty.

98. In this case, Claimants chose to bring their claims before the national courts of Moldova. Those courts rejected the claims because they were barred by the time limits prescribed by Moldovan law. Claimants have thus lost their access to international arbitration.

99. Article 10 (2) of the Treaty also reflects the principle of subsidiarity, which states that international arbitration should be subsidiary to the national courts, which should initially have the opportunity to determine issues concerning the possible breach of national law.

100. Finally, the Arbitrator lacks jurisdiction because Claimants did not exhaust all means available to them to settle the dispute amicably as prescribed by Article 10 (1) of the Treaty.

101. The Treaty requires the Parties to endeavour to settle the dispute. It is reasonable to conclude that this means that any settlement of the dispute should be made in accordance with domestic law. This, in turn, means that Claimants should have approached the domestic courts which could then have applied the Treaty in order to determine whether national legislation conflicts with the Treaty and, consequently, should be set aside.

102. This would have been the proper way to settle the dispute. However, Claimants failed to do so and therefore the requirement concerning settlement of the dispute in Article 10 (1) of the Treaty has not been met.

4.2.3 Claimants' reply

103. Claimants have replied and stated as follows.

104. The pre-arbitration requirements are twofold: A notice of the dispute by the investor, followed by a six-month negotiation period must have been observed; and the dispute must not previously have been adjudicated in any of the alternative fora listed in Article 10 (2) of the Treaty.

105. The notice was given and the negotiation period was observed, as evidenced by documentation submitted to the arbitrator.

106. Respondent argues that this dispute was already adjudicated in the domestic courts of Moldova since Claimants allegedly asked the courts to change the decision by the customs authorities to levy environmental charges on the finished goods rather than on the raw materials. Therefore, Respondent says, Claimants have lost access to international arbitration. This is incorrect, for several reasons.

107. The Claimants would have lost access to arbitration only if the previous case had concerned the same parties and the same matter as the present dispute. None of these requirements is met in the present instance.

108. In the Moldovan courts, a company, Grand Torg, was the Claimant, while in this case the Claimants are the private investors. In the Moldovan courts, the respondents were several individual Moldovan entities -the Customs Office, the Ministry of the Environment and the Ministry of Finance- while in this case the Respondent is the Republic of Moldova.

109. The dispute in the Moldovan courts did not concern the same matter as in the present case. The protection afforded by the Treaty is different from the protection afforded by Moldovan legislation and was not reviewed in the Moldovan courts. Moreover, the grounds relied on by Claimants in this arbitration were not reviewed at all in the Moldovan courts, because those courts ruled that the claim was barred by the fact that the appeal against the decision by the Customs Authorities had not been made within the time period prescribed by national legislation. Finally, the claim in the Moldovan courts was filed in October 2010, which is in the middle of the Dispute Period.

Consequently, a major part of the claim brought in this arbitration could not even theoretically have been reviewed by the national courts.

110. Finally, Respondent argues that payment of the environmental charges does not qualify as an "investment". This argument is fallacious. Claimants do not assert that the payments as such are investments, but rather that the imposition of the charges amounts to an unfair and inequitable treatment of the investments which is also discriminatory.

4.3 The Merits

4.3.1 Claimants:

111. Respondent is in breach of several of the investment guarantees in the Treaty, as will now be explained in further detail.

112. Article 3.1 of the Treaty reads as follows (In an unofficial English translation):

Article 3

Investment treatment

- 1. Each Contracting Party shall ensure in its territory a fair and equitable treatment for investments carried out by investors of the other Contracting Party and for the activity in connection with such investments, excluding discriminatory measures which could impede the management and control of the investments.*

113. Thus, the Treaty provides for protection against measures which are (i) unfair and inequitable; and (ii) discriminatory. Respondent is in breach of its obligations with respect to both these standards.

The measures are unfair and inequitable

114. First, the measures undertaken by Respondent are not fair and equitable.

115. While the expression "fair and equitable" is inevitably of a general nature, it has been defined more accurately by several international tribunals acting in investment disputes.

116. Thus, the tribunal in ICSID arbitration No. ARB/05/08, *Parkerings-Compagniet AS v. Republic of Lithuania* (award of 11 September 2007) found that the fair and equitable standard is violated "when the investor is deprived of its legitimate expectation that the conditions existing at the time of the Agreement would remain unchanged"

117. The tribunal further stated that the expectation of the investor is legitimate "if the investor received an explicit promise or guaranty from the host-State". The tribunal went on to say that a stabilisation clause is an example of such a promise or guaranty.

118. Claimants submit that these standards are applicable in the present case as well. The stabilisation clause in Article 7 of Law 625 is an explicit promise which created a legitimate expectation on the part of Mr. Bogdanov that no unfavourable changes would be made in the customs and tax regulations stipulated by Law 625 and in force at the time of the investments.

119. Therefore, Mr. Bogdanov had a legitimate expectation that the rules exempting Grand Torg from customs duties and VAT would remain unchanged for at least ten years from 2 March 2001 and that, consequently, no customs duties or VAT would have to be paid by Grand Torg during this period.

120. However, the charges imposed by Respondent on the finished goods leaving the EBC are in fact only concealed customs duties, and in reality they also function as a VAT.

121. The charges imposed on finished goods are not really environmental charges because they fulfil no environmental purpose. While a tax on raw materials may have some connection with environmental policy, a tax on final products does not. The Moldovan Ministry of the Environment confirmed this in its answer of 23 July 2008 to an inquiry by Grand Torg. The Ministry expressly described the purpose of Law 1540 as regulating the import of polluting materials, not the import of final goods containing polluting ingredients. The Ministry further emphasised that the purpose of the law was to introduce technologies for reducing waste and pollution; not to prevent the actual production of goods.

122. Moreover, the changes in Law 1540 which made it possible to levy the charges on goods which were transferred out of the EBC had nothing to do with the protection of the environment. They were in fact changes in customs regulations. In particular, the amendments to Law 1540 enacted in 2008 provided that environmental charges were to be levied when goods were placed "in the customs regime of imported goods" rather than when they crossed the national border. Since goods transferred from the EBC to Moldova were placed in the customs regime of imported goods, the authorities could impose charges on finished goods sold by Grand Torg which had been manufactured in the Republic of Moldova, while this would of course have been impossible if the charges had been levied at the national border.

123. Additionally, the environmental charges must be considered as a VAT, from which Mr. Bogdanov had absolute protection for at least ten years under the stabilisation clause. The charge was levied as a percentage (3%) of the value of the finished product. A value added tax, by definition, is "a tax assessed at each step in the production of a commodity, based on the value added at each step by the difference between the commodity's production cost and its selling price".

124. Claimants do not object to the legislation on environmental charges as such. There may, in some instances, exist justifiable reasons for imposing environmental charges on imported finished goods, such as ultra-toxic or highly hazardous substances.

125. What Claimants consider objectionable is the difference between the charges on raw materials and the charges on finished goods.

126. The charges on imported raw materials are reasonable but the charges on finished goods produced on the territory of the Republic of Moldova are not, especially since environmental charges were already levied when the goods were processed. The charges on finished goods have no correlation to the environmental impact of one type of paint as compared with another; they further do not correlate to the impact based on the ingredients of the paint.

The measures are discriminatory

127. Second, the measures undertaken by Respondent are discriminatory.

128. The imposition of environmental charges on finished goods discriminates against Claimants because it subjects goods, produced in the Republic of Moldova, to a tax which is not levied on domestic producers.

129. Domestic producers pay environmental charges only on the raw materials imported to be used in the production of paints and varnishes. They pay no such charges on finished products, for the obvious reason that those products are not imported into Moldova but are produced there.

130. Grand Torg, however, has been forced to pay charges on finished products, although these were produced on the territory of the Republic of Moldova. Grand Torg is thus singled out and subjected to a treatment which is more unfavourable than that extended to domestic producers.

131. Moreover, the legislation singles out Claimants to pay charges at a higher rate than other producers of allegedly environmentally harmful products. Paints and varnishes are taxed at a rate of 3 %, while raw materials used for the manufacturing of such products are taxed at 1,5 %. Even highly dangerous substances such as oils are taxed at a lower rate than paints and varnishes.

132. It is particularly noteworthy in this context that, as confirmed by the administrations of all the Free Economic Zones of Moldova, Grand Torg appears to be the only enterprise registered in any of the zones which has been selling paints and varnishes produced in the Republic of Moldova since such zones were introduced. Therefore, it seems that Grand Torg is the only entity which has paid environmental charges on finished products.

133. Finally, Claimants must emphasise that the conduct of the Moldovan Republic as recorded in the foregoing is part of a pattern of treaty violations in relation to Mr. Bogdanov and entities controlled by him. In particular, it is remarkable that in three awards rendered by international tribunals and in a ruling by the European Court of Human Rights, it has been found that the Republic breached its obligations under international law.

The loss

134. As a result of these breaches, Claimants have sustained a loss which has been calculated as follows

135. Between 23 September 2009, when the first customs declaration was submitted, and 5 September 2011, when the levying of environmental charges was discontinued by the Moldovan authorities, Grand Torg paid a total amount of MDL 1 879 287,65 in environmental charges on finished goods, excluding a credit balance at the end of the period of MDL 66,48.

136. If the customs service had instead collected the charges on the raw materials used for the production of the finished goods, as it should have done, Grand Torg would have paid MDL 355 075,49.

137. The difference between the actual amount paid ,MDL 1 879 287,65, and the amount which should have been paid, including the credit balance, MDL 355 141,97, is the loss sustained by Grand Torg. The loss thus amounts to MDL 1 524 145,28 .

138. The cost of the raw materials used for the production of the finished goods has been computed on the basis of customs declarations and audits by the Moldovan Chamber of Commerce as well as other relevant documents which have been submitted to the arbitrator.

139. Interest is payable on the capital amount of the loss. Claimants request that interest should be computed in accordance with Moldovan law, since the compensation sought is in Moldovan currency. The request that Moldovan law should apply with regard to interest is further consistent with the principle that Claimants should be put in the same position as if there had been a compliance with the investment guarantees in the Treaty.

140. Pursuant to Article 619 (2) of the Moldovan Civil Code, interest for late payment is computed at the base rate determined by the Moldovan Central Bank with the addition of 9 percent.

141. The total amount of accrued interest as of today's date is MDL 554 383, 56 , calculated from the date of each payment.

4.3.2 Respondent:

142. Initially, it should be emphasised that the measures adopted by the Republic of Moldova in terms of modifications of customs and environmental legislation were lawful. They did not violate any standards of Moldovan law.

143. Therefore, they also satisfied the requirement set out in Article 2 (2) of the Treaty that the host country must guarantee, in accordance with its own legislation, the full and unconditional legal protection of investments made by investors of the other contracting state. As long as restrictions imposed on an investor are in accordance with Moldovan law, the full protection standard of the Treaty is met.

144. The only remaining questions, therefore, are whether Claimants were subjected to unfair or discriminatory treatment.

145. The answer to the first of these questions must be based on a test of whether or not there was a reasonable proportion between the means employed by the Republic, i.e. the changes in legislation, and the aim it sought to attain.

146. There could be no doubt that the measures taken by Respondent had an objective and reasonable justification and a legitimate aim. The purpose of the legislative changes was to control and regulate the trade and use of products which represented a danger to the environment.

147. The question is then whether Claimants, in spite of the fact that the measures were proportionate, were treated unequally in relation to other investors and, if not, whether they were entitled to a more favourable treatment than other investors.

148. Claimants have suggested that the Customs Authorities had a wide discretion in applying the legislation concerning the environmental charges. This is not correct, however.

149. Initially, the Customs Authorities applied the law on environmental charges in a manner which was very favourable to Claimants by deciding to levy the charges on the basis of the cost of the raw materials.

150. This decision was overturned by the Court of Appeal on 21 May 2009 at the request of another investor, who considered it unlawful. The Customs Authorities complied with this ruling and issued a new decision, according to which all investors were to be treated equally, i.e. the charges were to be calculated on the basis of the cost of the finished goods.

151. Claimants disagreed with this. Their standpoint was that they should be treated differently from other investors, i. e. more favourably, because they were protected by the Treaty.

152. However, the protection afforded by the Treaty does not prevent national law from treating all investors, foreign and domestic, equally. The Treaty protects foreign investors from being treated less favourably than domestic investors. It does not give foreign investors the right to be treated more favourably than domestic investors.

153. The fact that the decision of the Customs Authorities to levy the charges on the basis of the cost of the raw material afforded a more favourable treatment to Claimants than to other investors was the only complaint on the part of the other investor who brought the case before the Moldovan courts. The Court of Appeal remedied this injustice in its decision of 21 May 2009.

154. Therefore, Claimants in fact abuse the expression "fair and equitable treatment" by arguing that it should warrant a treatment according to which investors should be treated unequally.

155. For these reasons, the treatment of Claimants has not been unfair or inequitable.

4.3.3 Claimants' reply

156. Claimants have replied and stated as follows.

157. Respondent appears to argue that the “full protection” standard of the Treaty is met if domestic laws are proportional to the aim sought. Claimants deny this. “Full and unconditional protection” as provided for in the Treaty, cannot be equivalent to “proportional”.

158. The ruling by the Court of Appeal in Chisinau of 21 May 2009, on which Respondent relies, is irrelevant to the present case for various reasons. With reference to the claimant in that dispute, the ruling will be referred to in the following as “Tagros Lux”.

159. In Tagros Lux, the court found that environmental charges levied on the products of a domestic producer operating under Law 440 were legal, but the charges in that case amounted to only 1,5 % and concerned finished products produced exclusively on the territory of the free economic zone where Tagros Lux operated.

160. Tagros Lux is clearly distinguishable from the present case because (i) It concerned a different economic zone under a different legislative framework which lacked the benefits provided to producers in the EBC; (ii) Tagros Lux, the Moldovan company involved in that case, enjoyed a different legislative protection as a domestic consumer; and (iii) Grand Torg is still disproportionately and discriminatorily affected by the environmental legislation since the charges on finished products are higher (almost exclusively 3 %) than those on raw materials (considerably lower than 3 %).

161. While Grand Torg operated in the EBC (the zone Expo-Business Chisinau) under Law 625, Tagros Lux operated in a different economic zone subject to a different regime, including Law 440. Only Law 625 as amended in 1998 gives residents the option to process raw materials on the territory of Moldova. Consequently, Tagros Lux was not guaranteed benefits in the form of exemption from customs duties and VAT for processing on Moldovan territory or any other benefits provided by Law 625. Law 440 is therefore inapplicable to Grand Torg and the Tagros Lux ruling is irrelevant to this dispute.

162. Moreover, Grand Torg enjoys protection against any changes in customs legislation by virtue of the stabilisation clause contained in Article 7 of Law 625. Therefore, environmental charges can be imposed only in accordance with the customs legislation in force before November 2005, when changes were made in the Customs Code. Before November 2005, the transfer of goods, which were produced in the Republic of Moldova, from EBC to Moldova was defined as “re-import”, and no charges could be imposed on such operations.

163. Finally, even if Tagros Lux were considered relevant under domestic Moldovan law, it can never exempt Respondent from the breaches of its Treaty obligations. Legality under domestic norms does not excuse violations of international law.

5. OPINION

5.1 Jurisdiction

164. The first issue I have to address is whether or not I have jurisdiction to adjudicate the dispute before me.

165. I note, initially, that Respondent has not objected to Claimants' assertion that Claimants qualify as "investors" under the Treaty or that Yulia Bogdanova's shareholding in Grand Torg and the monetary interest retained by Mr. Bogdanov in the same company qualify as "investments" under the Treaty. I also find the assertions well-founded and these issues, therefore, need not be addressed further.

166. Respondent has raised three objections concerning my jurisdiction: (i) The environmental charges paid by Grand Torg do not qualify as "Investments" and therefore are not protected by the Treaty; (ii) Claimants have lost access to arbitration because they already had their claims reviewed in one of the alternative fora listed in the Treaty; and (iii) Claimants did not exhaust all means available to them as prescribed by Article 10 (1) of the Treaty.

167. With regard to the first of these objections, it is true, of course, that the payments of environmental charges made by Grand Torg do not qualify as "investments" under the Treaty. The investments protected by the Treaty are the shareholding and the monetary interest otherwise held by Claimants in Grand Torg. But an excessive or unlawful taxation of an investment may of course cause harm in economic terms to that investment and involve a loss for the investor. If the investment is protected by a Bilateral Investment Treaty, and if such a taxation is held to be unfair or inequitable, this will qualify as a breach of the treaty in question.

168. Therefore, as I understand Claimants, they contend that the investments they made, which are protected by the Treaty, were unfairly and inequitably treated by Respondent when the environmental charges were introduced and that the investments sustained a loss as a result of such treatment. I find that I have jurisdiction over this issue.

169. The second objection raised by Respondent is that Claimants have lost access to arbitration because their claim was reviewed in the national courts.

170. So-called "fork in the road" provisions have been frequently reviewed by tribunals acting in International investment disputes. Provisions of this kind typically expressly require the investor to choose a method for dispute resolution and estop him from subsequently re-litigating the dispute in other fora.

171. Many investment treaties, however, are silent as to the preclusive effect to be accorded to the different modes of dispute resolution afforded to the investor, and this obviously applies to the Treaty relied on by Claimants in this arbitration. In these cases, as a main rule, a preclusive effect cannot be assumed.

172. In any event, even tribunals reviewing treaties expressly estopping the investor from bringing his claim to another forum, once he has chosen one method for dispute resolution, have been reluctant to give effect to such provisions. One important reason has been that tribunals have frequently found that there has been insufficient identity either of cause of action or parties between a previous proceeding before national courts and the case brought before an international tribunal.

173. Thus, if the investor has attempted to obtain relief in the local courts with claims which are not treaty-based, attempts by governments to invoke fork in the road provisions have mostly failed because the fundamental basis of the claims asserted in the previous proceedings has been found to be different.

174. Such is the case in this arbitration also. The fundamental issue in this dispute is whether or not the losses suffered by Claimants were attributable to breaches of the Treaty. This cause of action could not be, and was in fact never, reviewed by the Moldovan courts.

175. These are the main reasons why this objection to my jurisdiction must fall, but there are others, such as the fact that the parties to the dispute brought before the Moldovan courts were not the same as the parties to the present dispute.

176. Consequently, I find this objection to be baseless.

177. I turn now to the third objection advanced by Respondent in this regard.

178. As I understand it, Respondent's position here is that the pre-arbitration settlement of disputes provided for in Article 10 (1) of the Treaty should take place in the Moldovan courts. I cannot accept this argument. The language of the Treaty is unequivocal in that it states that the parties should seek to settle the dispute "amicably" to the extent possible. This means a settlement by negotiation and surely as a rule must exclude the involvement of the courts.

179. Therefore, this objection also must fail.

180. In summary, I find the objections regarding my jurisdiction to be unfounded, and I will therefore now proceed to consider the merits of the case before me.

5.2 The Merits

181. The fundamental basis of the claims in this arbitration is that the Republic of Moldova is in breach of its obligations under Article 3.1 of the Treaty; and this breach is asserted to relate to both those standards which are stipulated in the said provision; namely, to ensure a treatment of investments which is (i) fair and equitable and (ii) non-discriminatory. I will now in turn discuss each of these specific assertions.

Were the measures unfair and inequitable?

182. On this point, Claimants argue that the fair and equitable standard is violated if an investor is deprived of his legitimate expectations that the conditions existing at the time of the investment will remain unchanged and, since Claimants in this case were deprived of their legitimate expectations in this regard, the aforementioned standard was in fact violated.

183. Indeed, the protection of legitimate expectations must now be considered as firmly rooted in arbitral practice, and "a reversal of assurances by the host state which have led to legitimate expectations will be considered as a violation of the principle of fair and equitable treatment" (Dolzer & Schreuer: Principles of International Investment Law, 2008, p. 134).

184. Claimants state that the so-called stabilisation clause in Article 7 of Law 625 quoted above (Section 60) amounts to an assurance which has led to legitimate expectations on the part of Claimants.

185. The stabilisation clause provides in essence that, if new legislation is enacted which deteriorates the conditions of Free Zone residents' activities with regard to the customs and tax regime stipulated by Law 625, then such new legislation shall not apply to those residents for a period of ten years from its enactment. I agree that this certainly amounts to an assurance by the Republic of Moldova which must have led to legitimate expectations on the part of the residents of the Free Economic Zones, including Claimants.

186. On the other hand, as pointed out by the *Parkerings* tribunal quoted by Claimants above, "it is each state's undeniable right and privilege to exercise its sovereign legislative power... Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about an amendment brought to the regulatory framework existing at the time an investor made his investment"

187. In other words, if the Republic of Moldova has enacted new legislation deteriorating the conditions of Claimants and if such legislation falls within the scope of the stabilisation clause, then this would, at least *prima facie*, amount to a breach of the fair and equitable standard of the Treaty. But if such new legislation falls outside the scope of the stabilisation clause, its enactment by the Republic will not have deprived Claimants of any legitimate expectations created by the assurances in that clause.

188. The question, therefore, is what exactly the Republic promised by issuing the stabilisation clause. According to the wording of the clause itself, it covers new laws "deteriorating the conditions of Free Zone residents' activities with regard to the customs and tax regimes stipulated by the present law". Since the tax regime stipulated by Law 625 only concerns value added tax, the stabilisation clause in fact only relates to the specific customs and VAT privileges for residents of the Free Zones which are stipulated in Law 625. It created a legitimate expectation that the rules in Law 625 exempting them from customs duties and VAT would remain unchanged, but it did not extend to legislation in other fields.

189. According to Claimants, the imposition of environmental charges on finished goods is the measure which deprived them of their legitimate expectations in this case. Respondent has pointed out, however, that environmental charges are not customs duties or VAT and that, therefore, Claimants could have had no legitimate expectation that such charges would never be imposed.

190. Claimants, on the other hand, argue that the environmental charges on finished goods are in fact only concealed customs duties or VAT and therefore fall within the scope of the stabilisation clause. This issue now needs to be more closely examined.

191. I note here, first, that Respondent's position concerning the possible identity between environmental charges and customs duties has not been consistent throughout the proceedings. In its Answer to the SCC of 21 September 2012, Respondent clearly stated that environmental charges are not equivalent to customs charges and therefore are not comprised by the guarantees in the stabilisation clause. However, in its Statement of Defence, Respondent made certain statements

which could be understood as a concession of Claimants' standpoint that the environmental charges were in fact customs duties. Subsequent to a request from me for a clarification on this point, counsel for Respondent submitted an explanation according to which the standpoint stated in the Answer of 21 September- In other words that environmental charges are not comprised by the stabilisation clause- is still maintained. My conclusion, therefore, is that the parties are still in disagreement on this point.

192. In my opinion, it is quite clear that environmental charges in principle are something very different from customs duties or VAT. Such charges typically serve the specific purpose of protecting the environment and are introduced without the primary intention of regulating trade or generating income for the public treasury. The distinction is important and must be upheld even if, as in this case, a charge on the import of environmentally harmful goods in fact also happens to serve as a regulator of trade.

193. As emphasised by Respondent, protecting the environment is a legitimate aim and legislation to that effect has an objective and reasonable justification. This also means that the imposition of charges of this kind in itself can in no way violate the fair and equitable standard.

194. Claimants appear to accept this since they explicitly declare that they do not object to the legislation concerning environmental charges as such. What they find objectionable is specifically the charges on finished goods.

195. I understand this to mean that what deprived Claimants of their legitimate expectations was not the imposition of environmental charges in general; this measure did not as such fall within the scope of the stabilisation clause. It was only the imposition of environmental charges on finished goods (rather than on raw materials) which was counter to the assurances by the Republic of Moldova in the stabilisation clause.

196. This is so, Claimants say, because the charges on finished goods do not have any relation to environmental policy at all. While charges on the import of raw materials may fulfil the purpose of protecting the environment, charges on finished goods do not serve any environmental purpose. They have no relation to the environmental impact of one type of paint as compared with another, and they are not related to the impact of the ingredients of the paint.

197. I find this argument hard to accept. Law 1540 of 25 February 1998 (" Law 1540") introduced charges for the pollution of the environment. Appendix 8 to the Law (submitted by Claimants as evidence in this arbitration), issued on 14 December 2007, concerns "the import of goods, in the use of which the environment is polluted" and includes a long list of substances and goods, the import of which is subject to payment of environmental charges. This list includes raw materials as well as finished goods.

198. Law 1540 targets substances and goods, "the use of which" causes pollution of the environment. Raw materials are used for the production of finished goods and presumably may pollute the environment in that process. But it must be assumed that finished products also, such as paints, may cause pollution of the environment when they are used, for instance by emitting harmful substances into the air, or because they contain components which may cause harm to the

environment when the waste paint is disposed of. This, presumably, are some of the reasons for including such products in the list in Appendix 8.

199. In any event, I am not convinced by Claimants' suggestion that the use of finished products such as paints is environmentally completely harmless and that, therefore, the imposition of charges for the import of such products serves no environmental purpose.

200. Claimants also argue that the charges on finished goods have no relation to the environmental impact of one type of paint as compared with another, and that they do not relate to the impact of the various ingredients of the paint. This seems to me to be an argument in support of the assertion that the different charges do not correspond very well to the environmental impact of the different products; but it appears to have no bearing on the question whether or not such charges serve an environmental purpose.

201. Claimants further assert that the charges levied on finished products are in fact a value added tax, from which Claimants had protection under the stabilisation clause.

202. A value added tax, according to the definition provided by Claimants themselves, is "a tax assessed at each step in the production of a commodity, based on the value added at each step by the difference between the commodity's production cost and its selling price".

203. However, by Claimants' own admission, the charge in this case was levied as a percentage of the total selling price of the finished goods, and was not based on the value added by the difference between the production cost and the selling price. Therefore, it was not a value added tax.

204. In summary, I find that the charges on the import of finished paints and varnishes were environmental charges. They fall within the same category as other environmental charges, including the charges on raw materials, which are accepted by Claimants as being legitimate. Consequently, the charges on finished goods were not customs duties or VAT.

205. Therefore, those charges did not fall within the scope of the stabilisation clause. Their introduction did not deprive Claimants of any legitimate expectations created by the assurances of the Republic in that clause.

206. Claimants further argue that, under the stabilisation clause, Grand Torg enjoyed protection against any changes in customs legislation. Therefore, environmental charges could be imposed only in accordance with the customs legislation in force before November 2005, when changes were made in the Customs Code. Before November 2005, the transfer of goods from Free Zones to Moldova was defined as "re-import", and no charges could be levied on such operations.

207. It is not correct that the stabilisation clause provided protection against all changes in the customs legislation. The clause protected the residents of the Free Zones against changes with regard to the exemption from customs duties afforded by Law 625. It did not apply to more general changes in the customs legislation, unless, of course, such changes would have had the effect of abolishing the exemptions enjoyed by the residents. But since the environmental charges were not customs duties, the question is irrelevant in this context.

208. Finally, Claimants assert that the imposition of the charges on finished goods also amount to a breach of Article 43 (3) of Law 998. This provision stipulates in essence that commercial contracts where one of the parties is a foreign investor will remain in force even if legislation is introduced which adversely affects the economic position of the parties.

209. Claimants state that this clause protects the agreement of 2 April 2001 between Grand Torg and Midgard Terra, according to which Midgard Terra was to produce paints and varnishes from raw materials provided by Grand Torg, and then deliver the finished products to Grand Torg.

210. In principle, this appears to be correct, but I fail to understand, and Claimants have not explained, how the introduction of the environmental charges could have had any influence on the agreement between Grand Torg and Midgard Terra. It appears that the validity of the agreement has never been called in question, and Article 43 (3) of Law 998 therefore cannot be applied in this case.

211. I therefore find that the imposition of environmental charges on the finished goods sold by Grand Torg did not amount to a breach by the Republic of the obligation under the Treaty to ensure a fair and equitable treatment of Claimants' investments.

Were the measures discriminatory?

212. The second basic argument in support of the claims is that the measures taken by Respondent were discriminatory.

213. Specifically, Claimants assert that the imposition of environmental charges on finished goods discriminates against Claimants because it subjects goods, produced in the Republic of Moldova, to a tax which is not levied on domestic producers.

214. Article 3 (1) of the Treaty requires the host state to ensure "a fair and equitable treatment, excluding discriminatory measures that could impede the management and control of the investment".

215. Discrimination can take many different forms. In the context of the treatment of foreign investments, however, a very frequent problem for obvious reasons is discrimination on the basis of nationality.

216. Article 3 (1) of the Treaty does not specifically provide for "national treatment", i.e. a treatment which is no less favourable than that accorded to domestic investors. Article 3 (2), however, contains language to this effect.

217. However, Claimants have not asserted that this is a case of discrimination on the basis of nationality. And, in fact, the provisions which Claimants find objectionable do not single out any investor on that basis. They apply specifically to the residents of the free economic zones; not to foreign investors in general. Thus, if a foreign investor established a company in the Republic of Moldova outside the economic zones, he would presumably be subject to exactly the same rules for paying environmental charges as a Moldovan company.

218. In international arbitration practice concerning alleged discrimination, a standard method is to make a comparison between the foreign investor and another investor in like, or similar, circumstances. But finding a reasonable basis of comparison has sometimes proved to be a complicated matter.

219. Claimants assert that the proper basis of comparison in this case is other producers who enjoyed similar privileges under Law 625 or, alternatively, domestic producers in the Republic of Moldova outside the free economic zones.

220. However, a particular problem in the present case is that a comparison with domestic Moldovan companies is rendered rather difficult by the fact that the foreign investor (Grand Torg) operated under conditions which in important respects differed significantly from those of virtually all domestic investors.

221. During the Dispute Period, Grand Torg operated in a free economic zone where it enjoyed considerable privileges in terms of exemptions from customs duties and VAT as compared with domestic investors, and where it was also subject to a customs regime which was different from that which applied to domestic investors. A direct comparison is difficult to make under these circumstances.

222. Another possible basis of comparison in my view is other residents of free economic zones since they operated under similar circumstances with respect to several important issues which are of relevance in this arbitration.

223. Claimants say that this comparison should be restricted to producers who operated under Law 625. This means producers in the zone Expo-Business Chisinau, since Law 625 applied only there. I will return to this argument later. For now, I believe that the comparison should, at least tentatively, be extended to producers in all the economic zones, since all residents of all economic zones were subject to basically the same customs regime which did not apply to entities operating on the territory of Moldova and in this important respect operated in similar circumstances.

224. One such resident in another economic zone appears in the ruling of the Court of Appeal of Chisinau of 21 May 2009, submitted by Respondent (the "Tagros Lux" case). In this case, the company Tagros Lux, operating in a free economic zone other than Expo-Business Chisinau, had brought a claim for the annulment of the order issued by the customs authorities on 15 October 2008, according to which environmental charges on goods exported from free economic zones to Moldova were to be levied on the costs of the raw materials used for the production of the finished products.

225. Tagros Lux was in the business of importing raw materials for the production of plastics to the free economic zone, producing plastic products in its factory there and then exporting the finished products to Moldova.

226. Presumably, one reason why Tagros Lux found the order issued by the customs authorities so objectionable was that the charge for exporting finished plastic products was 1.5% of the price, while the charge, if calculated on the cost of the raw materials used, was 3%. In other words, for Tagros Lux the method of calculating the charge on the cost of the raw materials used was very much to its disadvantage and Tagros Lux asserted that it should be considered illegal.

227. This assertion was confirmed by the Court, which found that the order issued by the customs authorities was counter to the Customs Code and Law 1540 on environmental pollution. The Court clearly established that all goods crossing from free economic zones into the Republic of Moldova are to be considered as "foreign goods" and environmental charges are to be calculated on the basis of the price of such goods

228. Claimants say that Tagros Lux is irrelevant to the present case because (i) it concerned a different economic zone under a different legislative framework which lacked the benefits provided to producers in the EBC; and (ii) Tagros Lux was a Moldovan company which enjoyed a different legislative protection as a domestic consumer.

229. It is correct that Tagros Lux did not enjoy some of the benefits provided to residents of the EBC. Claimants have pointed in particular to the provisions of Law 625 which allowed Grand Torg to produce the finished goods on the territory of Moldova without paying customs duties or VAT.

230. This, however, does not change the fact that Tagros Lux and Grand Torg both operated in free economic zones which were subject to the same customs regime which differed from that which applied to entities operating on the territory of Moldova. In this regard, Grand Torg and Tagros Lux operated under similar circumstances.

231. Moreover, it is noteworthy that the provisions of Law 625, as pointed out by Claimants, also stipulated that if raw materials were imported to the EBC and sent for processing on the territory of Moldova, then the finished goods, if returned to the EBC, were considered to originate from the EBC. This means that the finished goods were treated in the same way as if they had been produced in the EBC. In this respect also, Grand Torg and Tagros Lux (which produced goods in the economic zone) operated in similar circumstances. For this reason, I also find it wrong to restrict the relevant comparison in this case to investors subject to Law 625, as suggested by Claimants.

232. These facts also may explain why Claimants insist on comparing Grand Torg (the entity which was subjected to the payment of the environmental charges) with other "producers". In fact, Grand Torg did not produce anything, but in legal and economic terms its situation was identical with that of a company which produced goods in the economic zone.

233. Moreover, this tends to undermine Claimants' argument that the imposition of environmental charges on finished goods discriminates against Claimants because it subjects goods, produced in the Republic of Moldova, to a tax which is not levied on domestic producers. The assertion that the goods were produced in the Republic of Moldova is true with regard to the physical location of the production facilities. It also appears that the goods produced by Midgard Terra received a certificate of origin, evidencing that they originated from the Republic of Moldova. It is not entirely clear to me exactly what this certificate signified. But the goods were returned to the free economic zone and, once there, they were, according to Law 625, treated as if they had been produced in the zone. As far as can be concluded from the facts presented in these proceedings, the goods produced by Midgard Terra and the goods produced by Tagros Lux therefore must be seen as similar in this regard.

234. Tagros Lux, therefore, in my view represents the category of investors which constitutes the proper basis of comparison in this case: investors in the economic zones which imported raw materials, produced finished goods in the economic zones and then exported the finished goods to

Moldova. These investors and Grand Torg operated in similar circumstances in the relevant sense, i.e. with respect to the levying of the environmental charges which Claimants assert are discriminatory.

235. This conclusion is not changed by the further argument advanced by Claimants, namely, that Tagros Lux was a Moldovan company. If anything, this serves to demonstrate that Grand Torg was not treated differently from domestic investors.

236. The fundamental reason why environmental charges were levied on the price of the finished goods appears to be that, at least from 2008 and onwards, the economic zones in reality were situated outside the customs border of Moldova. This meant that no charges were levied on any goods which were imported from abroad to the zones. This, in turn, meant that such charges had to be levied on all goods which crossed from the zones into Moldova. If these goods were finished goods, they were treated as such.

237. This was a principle which, according to the Court of Appeal of Chisinau, should be applied to all residents of the economic zones. I fail to see any discriminatory element in the fact that Grand Torg was treated equally with other entities which imported raw materials to the zones, produced finished goods there and then exported these goods to Moldova.

238. Claimants state that an alternative basis of comparison is domestic producers on the territory of Moldova outside the free economic zones. However, as I have explained above, I find that entities in the free economic zones and entities in the Republic of Moldova outside these zones did not operate in similar circumstances for the purpose of such comparisons as are proper in this context.

239. It is true that the system described above had certain slightly surprising consequences. For instance, Claimants correctly state that a producer of environmentally hazardous goods in the zones paid environmental charges on the cost of the finished goods when these were exported. A domestic producer paid charges on the import of the raw materials. In this regard, residents of the zones and domestic producers were treated differently.

240. However, this was a consequence of the fact that the customs regime of the free economic zones was essentially different from that which applied on the territory of Moldova. It is difficult to see how such a difference could be avoided altogether if a system of free economic zones is to be upheld.

241. Besides, the system was not universally disadvantageous to the residents of the zones. To some, like Tagros Lux, it was favourable, because the charges on finished goods were lower than on raw materials. To some, like Grand Torg, it was unfortunately unfavourable, because the charges on finished goods were higher than on raw materials.

242. On this particular note, Claimants have argued that Grand Torg is disproportionately and discriminatorily affected since the charges on finished goods are higher than on raw materials. But at least on the basis of the facts presented in this arbitration I cannot find that Claimants have demonstrated that this assertion is correct. The reasons for levying a certain charge on a specific commodity may be very diverse and I do not find the analysis of these reasons which has been presented in these proceedings to be sufficient to warrant the conclusion suggested by Claimants.

243. Claimants say that the fact that environmental charges came to be imposed on finished goods rather than on raw materials was due in important respects to changes in customs legislation. This was inevitably so, because the charges on the import of environmentally hazardous goods were, for obvious reasons, collected by the customs service and were therefore subject to the customs legislation with regard to the customs regime applied.

244. But the stabilisation clause in Law 625 did not protect Claimants against changes in customs legislation in general; only against changes in the customs regime stipulated by Law 625. In fact, Claimants have pointed out that the introduction of the new customs regime in 2005 was undertaken at the initiative of the United Nations which had developed a customs programme for developing countries. This is hardly a measure which in itself could be seen as discriminatory, particularly since it treated all residents of the economic zones equally.

245. Claimants also find objectionable the changes in the environmental legislation which took place in 2008 and made it possible to levy the charges when the goods were placed in the customs regime of imported goods rather than when they crossed the national border (see Section 122 above). However, changes in the environmental legislation, including the manner in which the charges were collected, did not fall within the scope of the stabilisation clause and consequently were comprised by the Republic's right to exercise its sovereign legislative power. Moreover, these changes applied equally to all residents of the free economic zones and therefore were not discriminatory.

246. For these reasons, I find that the imposition of environmental charges on the finished goods sold by Grand Torg did not amount to a breach by the Republic of its obligation under the Treaty to ensure a non-discriminatory treatment of Claimants' investments.

5.3 Costs

247. Since I have found that the Republic of Moldova is not in breach of its obligations under the Treaty, the claims brought in this arbitration must fail.

248. This also means that Claimants' request that Respondent should carry the costs of the arbitration and Claimants' own legal costs, must be denied.

249. Respondent has requested no compensation for its own legal costs and has refrained from stating its position as to the apportionment of the costs of the arbitration.

250. The Costs of the Arbitration have been determined by the SCC as specified below. The parties are jointly and severally liable to pay these arbitration costs. As to the apportionment of the costs between the parties, the issues in this arbitration have not been uncomplicated, and Claimants, although ultimately unsuccessful, had good reasons to bring the dispute to arbitration. As a matter of principle, therefore, an apportionment on the basis of equality between the parties would be reasonable. However, with regard to the Separate Award made on 6 December 2012, Claimants were successful and should be compensated additionally for their costs in that respect.

251. Pursuant to the Separate Award, Respondent was ordered to pay to Claimants EUR 8285 and interest. The Costs of Arbitration, as specified below, amount to EUR 14 347 and SEK 4518. I find a reasonable apportionment of costs to be that Respondent should bear EUR 8500 and Claimants the remainder, i. e. EUR 5847 and SEK 4518. Since Claimants paid the entire Advance on Costs, this means that Respondent should reimburse Claimants EUR 8500. Against this amount, Respondent should be entitled to deduct any amount it has paid to Claimants pursuant to the Separate Award.

252. Claimants have requested that the Separate Award should be appended to this Final Award, However, since the Separate Award has been duly served on both parties, I do not consider this to be necessary.

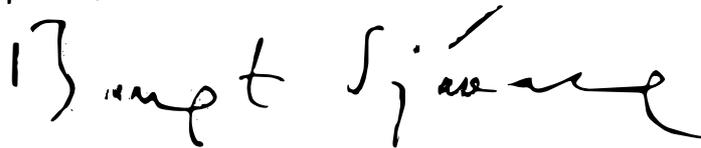
6. AWARD

1. Yuri Bogdanov's and Yulia Bogdanova's claims are denied.

2. The fee of the sole arbitrator is fixed at EUR 10 898. The Administrative fee of the Arbitration Institute of the Stockholm Chamber of Commerce is fixed at EUR 3 449. The expenses of the sole arbitrator are fixed at SEK 4 518. Thus, the total Costs of Arbitration are EUR 14 347 and SEK 4 518.

3. As between the parties, the Costs of Arbitration shall be apportioned so that the Republic of Moldova shall bear EUR 8500 and Yuri Bogdanov and Yulia Bogdanova shall bear EUR 5847 and SEK 4518. Since the entire amount of the Advance on Costs was paid by Claimants, the Republic of Moldova is ordered to reimburse Yuri Bogdanov and Yulia Bogdanova, jointly and severally, EUR 8500. Against this amount, the Republic of Moldova is entitled to set off any amount which has been paid pursuant to the Special Award made on 6 December 2012.

A party who is dissatisfied with this Award insofar as the fees of the sole arbitrator are concerned may bring the matter before the District Court of Stockholm by commencing proceedings within three months from the receipt of this Award.



Bengt Sjövall

Sole arbitrator