



ARBITRATION INSTITUTE
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FINAL ARBITRAL AWARD

made in Stockholm on 30 March 2010

Arbitration No. V (114/2009)
pursuant to the Rules of
The Arbitration Institute of
The Stockholm Chamber of Commerce

between

Claimant: Yury Bogdanov, citizen of the Russian Federation
2 Trifan Balte str., MD-2021, Chisinau, MOLDOVA

Claimant's Counsel: Isai Chibac, Attorney at Law
31/2 Dimo str., appt. 42, Chisinau, MD-2045, MOLDOVA

and

Respondent: Republic of Moldova
Government of the Republic of Moldova
1 Piata Marii Adunari Nationale
Casa Guvernului, Chisinau, MOLDOVA

Respondent's Counsel: Ion Paduraru, Attorney at Law
Paduraru Brasoveranu & Partners
44/2 Armeneasca str., of. 9-10, MD 2012, Chisinau, MOLDOVA

before

Advokat Bo G.H. Nilsson, *Sole arbitrator*
Advokatfirman Lindahl KB
P.O. Box 1065, SE-101 39 Stockholm, SWEDEN

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THE DISPUTE IN BRIEF

- 1 Claimant Yury Bogdanov is a Russian citizen resident in Moldova. He is founder and previous owner of the Enterprise with Foreign Capital GRAND TORG LLC (“GRAND TORG”), a company limited by shares registered in Moldova on 29 December 2000 and domiciled in the Free Enterprise Zone Expo-Business-Chisinau (“FEZ”), registered as resident there on 2 February 2001.
- 2 In connection with an assignment by Mr Bogdanov of his shareholding in GRAND TORG it was resolved that all profits, losses, lost profits, amounts claimed for redemption and any other interests related to the company’s activity during the period 29 December 2000 until 31 December 2008 should exclusively belong to Mr Bogdanov and that his share of profits would remain in GRAND TORG as working capital.
- 3 The Republic of Moldova and the Russian Federation are parties to a Bilateral Investment Treaty (the “Treaty”) which prescribes in Article 10 that disputes between one Contracting Party and an investor of the other Contracting Party may be referred *inter alia* to arbitration at the Arbitration Institute of the Stockholm Chamber of Commerce (the “Institute”).
- 4 Mr Bogdanov has requested such arbitration with reference to said Article, alleging that the Republic of Moldova is in breach of Treaty provisions designated to protect his rights as investor in Moldova, through GRAND TORG.
- 5 The Republic of Moldova denies this allegation and disputes that Mr Bogdanov is entitled to bring claims under the Treaty.

THE DISPUTE RESOLUTION CLAUSE AND THE ARBITRATION

6 Article 10 of the Treaty reads as follows (in an unofficial English translation):

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 that the investor shall send to the Contracting Party participating in 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 from the date of the written notification mentioned 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 in 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 International Trade Law (UNCITRAL).*

3. *The arbitral award shall be final and binding for both parties to the dispute. Each of the Contracting Parties shall undertake to enforce the award in accordance with its legislation.*

7 Mr Bogdanov filed a Request for Arbitration dated 24 June 2009.

8 On 8 July the Institute informed Mr Bogdanov that the arbitration proceedings were initiated and the case was registered under No. V (114/2009). The same information was communicated by the Institute to the Government of the Republic of Moldova which was asked to submit comments with reference to Article 5 of the Rules of the Institute (the “SCC Rules”), in particular regarding Mr Bogdanov’s request for a sole arbitrator. According to the Institute, should the parties agree, they would have an opportunity to jointly appoint the sole arbitrator.

9 On 14 August the Republic of Moldova accepted the suggestion of a sole arbitrator and requested additional time for submitting further comments.

10 On 20 August the Institute decided that

- (i) it did not manifestly lack jurisdiction over the dispute,
- (ii) the dispute should be resolved in accordance with the SCC Rules,
- (iii) the Tribunal should consist of a sole arbitrator,
- (iv) the place of arbitration should be Stockholm,
- (v) the Advance on Costs to be paid by the parties in equal amounts totalled EUR 24 500.

11 The Institute granted the parties 30 days to jointly select their sole arbitrator, failing which the sole arbitrator would be appointed by the Stockholm Chamber of Commerce (the “SCC”).

12 On 21 August Mr Bogdanov asked the Institute that the sole arbitrator be appointed by the SCC.

13 On 10 September the Republic of Moldova submitted its comments on the merits of the Request for Arbitration which it supplemented on 18 September stating that the claims were ungrounded and the dispute unnecessary and thus, with regard to the difficult economic situation in the Republic and Art. 45 of the SCC Rules, Mr Bogdanov should pay the entire amount of the Advance on Costs.

14 On 21 September the SCC Board appointed Mr Bo G. H. Nilsson as the sole arbitrator.

15 On 30 September the Institute informed the Sole Arbitrator that Mr Bogdanov had paid the entire amount of the Advance on Costs (EUR 24 500) and the case was referred to the Sole Arbitrator; the final award should be made by 30 March 2010.

16 On 22 October the Sole Arbitrator issued Procedural Order No 1 in which he found himself duly appointed and ordered *inter alia* that

- (i) the place of arbitration be Stockholm,
- (ii) the languages of the arbitration be English and Russian, at the parties' choice,
- (iii) a Statement of Claim be filed by 30 November 2009
- (iv) a Statement of Defence be filed 30 December 2009
- (v) further exchange of briefs might follow if appropriate
- (vi) 23 February 2010, with 24 February as a reserve day, be reserved for the final hearing if such would be requested by either party.

17 Mr Bogdanov filed a Statement of Claim dated 25 November 2009, with appendices.

18 The Republic of Moldova filed a Statement of Defence dated 30 December 2009, with appendices.

19 On 13 January the Sole Arbitrator issued Procedural Order No 2 by which the Claimant was offered until 4 February to submit a Statement of Reply.

20 Mr Bogdanov filed a Reply dated 3 February 2010 with one appendix (auditors' report).

21 In his e-mail to the parties dated 8 February 2010 the Sole Arbitrator expressed his opinion that the questions to resolve were of a legal nature and had been fully briefed in the written submissions of the parties. Thus, both sides were invited to consider the possibility to decide the matter on the basis of the documents only.

22 On 10 February the Republic of Moldova answered that it found it acceptable to have the dispute resolved both with and without a hearing. In either case the Republic of Moldova intended to submit a Rejoinder, by the end of February.

23 Mr Bogdanov through counsel Mr Chibac requested that the hearing be held
as originally envisaged.

24 In Procedural Order No 3 dated 17 February the Sole Arbitrator informed
the parties that pursuant Art. 27(1) of the SCC Rules the hearing would be
held on 23 February upon the request of Mr Bogdanov.

25 The Republic of Moldova filed a Rejoinder dated 19 February, with
appendices, by e-mail on 20 February 2010.

26 An oral hearing was held in Stockholm on 23 February 2010. Mr Bogdanov
attended the hearing personally, represented also by his legal counsel
Mr Chibac and the accountant of GRAND TORG, Mr Ion Braga. The
Republic of Moldova was represented by its legal counsel, Mr Paduraru.

27 At the commencement of the hearing Mr Bogdanov through Mr Chibac
objected to the admissibility of the Rejoinder filed by the Republic of
Moldova on the ground that it had been filed too late but expressly declared
that he was prepared to address the Rejoinder if it were admitted. The Sole
Arbitrator decided to admit the Rejoinder since the Republic of Moldova
had announced its desire to file a Rejoinder and since the oral hearing was
held on the date originally scheduled on Mr Bogdanov's insistence.

28 At the hearing the Parties developed their respective cases and presented
relevant legislation and documents but no evidence was taken. At the end of
the hearing the Sole Arbitrator declared the proceedings closed, save for the
right of the Parties to file their submissions on costs during the week that
followed and to file their comments, if any, on the cost submissions of the
other Party within another week.

29 The Parties filed their respective costs submissions on 26 February 2010
(Mr Bogdanov) and 3 March 2010 (the Republic of Moldova). On 10 March
the Republic of Moldova submitted its comments on the costs claimed by
Mr Bogdanov.

RELEVANT LEGAL MATERIALS

30 The Treaty contains *inter alia* the following provisions (in an unofficial
English translation):

Article 1

Definitions

1. *The term “investor” means in relation to each Contracting Party:*
 - a. *any physical person, the citizen of the state of the Contracting Party and legally qualified under its legislation to carry out investment in the territory of the other Contracting Party;*
2. *The term “investment” means all kinds of pecuniary and intellectual values that are invested by the investor of one Contracting Party in the territory of the other Contracting Party under its legislation, including particularly:*
 - a. *movable and immovable property, as well as corresponding rights of property;*
 - b. *monetary funds, as well as shares of stock, investments and other forms of participation;*
 - c. *a claim to money invested to perform economic values or to services of economic value, associated with an investment;*
 - d. *exclusive rights on the intellectual property (author’s rights, rights on inventions, industrial designs, utility models, trademarks or service marks, trade names, technology, confidential business information, and know-how);*
 - e. *right on carrying out business activity granted under the Law or a contract, including particularly rights on natural resources exploration, development and working.*

Article 2

Encouragement and protection of investment

1. *Each Contracting Party shall encourage investors of the other Contracting Party to carry out investment in its territory and allow such investments under its legislation.*

2. *Each Contracting Party guarantees under its legislation a complete and unconditional legal protection of the capital investments of the investors of the other Contracting Party.*

Article 3

Investment treatment

1. *Each Contracting Party shall provide in its territory for investments carried out by the investors of the other Contracting Party and for the activity in connection with such investment a fair and equitable treatment, excluding discriminatory measures than could impede an investment management and command.*

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31 The Moldovan Law on Foreign Investments No. 998-XII of 1 April 1992 (“Law 998/1992”) provides *inter alia*

Article 43: Guarantees when laws are being amended

1. *When new laws are introduced changing the conditions for operation of the companies with foreign investments founded prior to introduction of such laws, such companies may rely upon the laws in the wording in force at the moment when the company was founded for ten years from the date when the new law became effective.*
2. *Paragraph 1 does not apply to the customs, tax, monetary, foreign currency and anti-trust laws[...]*

32 The Moldovan Law on the FEZ No. 625-XIII of 3 November 1995 contains the following provision (in Article 5 or Article 7 depending on the version of the Law, but hereinafter for simplicity referred to as “Article 7 of Law 625/1995”):

Should new laws be adopted worsening the conditions of Free Zone residents’ activities with regard to the customs and tax regimes stipulated by the present Law, the residents shall have the right to be guided – during 10 years as from the new law enactment date - by the legislation of the Republic of Moldova

that was in force on the date of the resident's registration in the Free Zone.

33 The Moldovan Law 440-XV of 27 July 2001 on Free Enterprise Zones (“Law 440/2001”) contains the following provision:

15 (4) Residents of free economic zones registered before the enactment of this law may for 10 years after enactment conduct the business based on the provisions of the customs and tax regimes of the specific free zones applicable as of the date of their registration.

34 The Moldovan Law on Customs Tariffs 1380 contains in Article 4 the following (in unofficial translation):

*(5) Fees for carrying out the customs procedures are charged in accordance with **Appendix 2**, which is an integral part of this law.[...]*

35 Law 156-XVI of 21 July 2005 (“Law 156/2005”) amended said Appendix 2, List of the customs services and rates of customs fees for carrying out the customs procedures. The amended table includes *inter alia* the following:

<i>Nr</i>	<i>Type of customs service</i>	<i>Fee (in euro)</i>
12.	<i>Issuing of a permit (per each contract) for:</i>	
-	<i>processing in the customs territory, except for the commodities listed in §15 below.</i>	<i>10</i>
-	<i>processing outside the customs territory</i>	<i>40</i>
-	<i>processing under customs control</i>	<i>100</i>
	<i>[...]</i>	<i>[...]</i>
15.	<i>Issuing of a permit to process in the customs territory the goods exported from a free economic zone situated in the Republic of Moldova, for each customs declaration separately</i>	<i>200</i>

THE POSITIONS OF THE PARTIES

Mr Bogdanov

36 Mr Bogdanov requests that the Republic of Moldova be ordered to pay him the sum of 443 772.78 lei plus interest accrued thereon in an amount of 216 930 lei (as of 30 November 2009).

37 Mr Bogdanov also requests that the Republic of Moldova be ordered to pay him a further sum of EUR 5 000 as moral damages.

38 Mr Bogdanov finally requests that the Republic of Moldova be ordered to reimburse him for costs of the arbitration.

39 At the hearing Mr Bogdanov through Mr Chibac explained that the reference in his Statement of Claim to “*a decision confirming the violation of rights*” should not be understood as a request for a declaratory relief but merely as a statement addressing the basis for his payment claim.

The Republic of Moldova

40 The Republic of Moldova requests that all claims of Mr Bogdanov be denied and for its part claims reimbursement for costs.

41 In case the Sole Arbitrator comes to the conclusion that Mr Bogdanov is entitled to compensation, the Republic of Moldova requests that the claims in respect of 2005 (as specified below) be dismissed as time-barred, and in any event claims for all years be reduced to take account of the tax effects, as further explained below. If the Republic of Moldova is ordered to compensate Mr Bogdanov for his legal expenses, the Republic of Moldova requests that the sum be reduced according to the objections made.

THE PARTIES' LEGAL GROUNDS AND DEVELOPMENT OF THEIR CASES

Mr Bogdanov

42 GRAND TORG was founded by Mr Bogdanov on 29 December 2000 and was registered as a resident of the FEZ on 2 March 2001.

43 By Article 43 of the Law 998/1992, Article 7 of the Law 625/1995 and Article 15(4) of the Law 440/2001 the Republic of Moldova guaranteed the

investors and residents in the FEZ stability of legal norms for a period of ten years. That stability was explicitly to include the customs regime, by which concept must be understood the whole process of bringing goods into and out of the FEZ.

44 GRAND TORG imports certain chemicals into the FEZ, removes them from the FEZ under the customs regime for processing on the customs territory of Moldova, and re-imports the finished goods into the FEZ, from where the goods are ultimately exported.

45 The customs regime for processing on the customs territory of Moldova is regulated by the Customs Code of the Republic of Moldova in the edition of 2001 applicable as of the date of registration of GRAND TORG as a FEZ resident.

46 In order to take the goods from the FEZ for processing, GRAND TORG has to apply for a permit to the Customs Service.

47 The processing is undertaken by a domestic producer, JSC MIDGARD TERRA based on a contract with GRAND TORG of 2 April 2001. The finished products are recognized as originating from the FEZ.

48 For all years 2001-2008, with the exception of the year 2006, GRAND TORG has obtained from the customs authorities one single annual permit for all lots of goods taken out for processing during the (annual) term specified in the permit.

49 Upon an initiative of the Customs Service, the Parliament of the Republic of Moldova adopted Law 156/2005 amending Law on Customs Tariff No. 1380-XIII of 20 November 1997. Since the year 2005 the Customs Office Centru has unilaterally collected from GRAND TORG a fee of EUR 200 for each customs declaration. This practice is unlawful since it imposes on GRAND TORG a new and more onerous customs regime than that existing at its time of registration, and also since in effect only one permit was issued annually so that the fee is collected for services never rendered.

50 This means that Mr Bogdanov has not received the protection to which he is entitled under Article 2.2 of the Treaty.

51 Furthermore, the measures are discriminatory and unfair since no other enterprises have received similar treatment, whereby he has received treatment in violation of Article 3.1 of the Treaty.

52 GRAND TORG brought legal proceedings in Moldova on account of these unlawful measures. The Court of Appeal of Chisinau found for GRAND TORG on the basis of the facts that (i) the Customs Office did not in fact issue a permit for each customs declaration separately and (ii) GRAND TORG enjoyed a right to the guaranteed stability of the customs regime. The Supreme Court, however, reversed this decision as a result of political pressure, thus breaching Mr Bogdanov's right to a fair trial.

53 Mr Bogdanov has repeatedly notified the Republic of Moldova as required by Article 10.1 of the Treaty, but to no avail.

54 According to Mr Bogdanov the damage inflicted on him is computed as the total of the customs charges collected. To this should be added interest calculated from the date of each charge until 30 November 2009, according to Articles 585 and 619 of the Moldovan Civil Code, at a rate equal to the official refinancing rate of the National Bank of Moldova plus 9 percentage units.

The Republic of Moldova

55 Mr Bogdanov does not enjoy any rights under the Treaty in this case. The Treaty protects his capital investment, but not his personal rights. It is GRAND TORG and not Mr Bogdanov which has been subjected to the customs fees complained about. The position might have been different, had Mr Bogdanov made the investment in another form than through an LLC or had he based his case on Article 6 (expropriation) or Article 8 (right to capital export) of the Treaty.

56 Furthermore, Mr Bogdanov had already ceased to have the status of investor when the Request for Arbitration was filed as he no longer was a shareholder of GRAND TORG. The "Protocol" pursuant to which he purportedly retains certain rights with respect to the profits of GRAND TORG cannot change this.

57 Article 43 of Law 998/1992 does not apply to tax and customs issues. This follows directly from the second paragraph of the Article. Furthermore, Law

625/1995 applies only to the “*customs and tax regimes stipulated by the present Law*”. The same is true for Law 440 – Article 15 (4) applies only to the provisions of Law 625/1995 and not to customs legislation in general.

58 Furthermore, the customs regime as a concept does not include administrative fees for the issue of permits, as opposed to customs charges.

59 The change in Annex No. 2 to the Law on Customs Tariff No. 1380-XIII of 20 November 1997, introduced by Law 156/2005, applies to all residents of all free economic zones without exception and is thus not discriminatory.

60 The fees paid by GRAND TORG are in any event not personal losses of Mr. Bogdanov.

61 Moral damages may be awarded only for personal damage to an individual, not for damage inflicted to a juridical person. Not even an individual may claim moral damages on the basis of the passing of legislation.

62 The claim is time-barred as regards the amount of 33 724.46 lei of fees charged in 2005 and as regards 67 700.19 lei of interest; the statutory limitation period is 3 years.

63 Furthermore Mr Bogdanov’s damage calculation fails to recognize any taxes payable on the amounts claimed. Any additional income in 2005 would have been subject to 15% company income tax, whereas no tax was levied on dividends, and from 1 January 2007 while there was no longer any company income tax applicable, a 15% tax on dividends was introduced. Mr Bogdanov would in any case have receive dividends reduced by 15% tax.

64 Other than that Mr Bogdanov’s claim calculation is as such not disputed and in the event that the Sole Arbitrator would find for him, the Republic of Moldova admits to pay an amount of 475 386.41 lei.

REASONS

Is Mr Bogdanov an investor enjoying protection of an investment under the Treaty?

65 As demonstrated by the copy of his passport presented to the Sole Arbitrator, Mr Bogdanov is a Russian citizen and as such unquestionably in principle falls under the definition of investor in Article 1.1.a of the Treaty.

- 66 The Republic of Moldova argued that Mr Bogdanov in the present case does not enjoy protection under the Treaty since the measures of which he complains have not been undertaken against him personally but against GRAND TORG. This argument is in the opinion of the Sole Arbitrator not valid. One common way to make a capital investment on the territory of a foreign State is to form a local company. This is implicitly supported by Article 1.2.b of the Treaty whereby all “*monetary funds, as well as shares of stock, investments and other forms of participation*” are included in the definition of investment.
- 67 It is generally accepted that “*shareholding in a company is a form of investment that enjoys protection. Even if the affected company does not fulfil the nationality requirements under the relevant treaty, there will be a remedy if the shareholder does*”¹. Thus, damage inflicted on such company, which indirectly concerns the investor, entitles the investor to seek treaty protection. “*The shareholder may then pursue claims for adverse action by the host State against the local company that affects its value and profitability*”². If not, the protection offered by bilateral and multilateral investment treaties would become rather illusory.
- 68 In the case of shareholders, “*the participation in the locally incorporated company becomes the investment*”, and even “*if the local company is unable or unwilling to pursue the claim internationally, the foreign shareholder in the local company may pursue the claim in his own name.*”³
- 69 The remaining issue is whether Mr Bogdanov still, at the time when the arbitration was initiated, had any investment on the territory of the Republic of Moldova, despite the fact that he no longer possessed any shares in GRAND TORG.
- 70 To illustrate his investment, Mr Bogdanov submitted a Protocol of 17 February 2009, signed by the former and new shareholders of GRAND TORG, which reads *inter alia* (in the provided English translation):

¹ Alexandrov S., The “Baby Boom” of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as “Investors” and Jurisdiction *Ratione Temporis*, The Law and Practice of International Courts and Tribunals 2005, page 45.

² Schreurer, C., Shareholder Protection in International Investment Law, in Transnational Dispute Management Volume 2 – Issue No. 03, p. 6

³ Schreurer, C., op. cit., p. 6.

“[The Parties] DECIDED

[...]

1. *To approve the financial report of EFC “GRAND TORG LLC for the year 2008 (attached to the Protocol) with a profit of 3591645 lei.*

The profit in the amount of 3591645 lei shall remain on the company’s balance for refilling the circulating assets.

2. *As for the division balance-sheet of the EFC “GRAND TORG LLC:*

- 2.1. *The profit of 2008 in the amount of 3591645 lei is property of Bogdanov Yury but remains at the disposal of the shareholder Bogdanova Yulia. [sole shareholder of GRAND TORG as of the date of the Protocol]*

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 activity in the year 2009 and in the forthcoming years.

- 2.2. *All the results of activities conducted by EFC “GRAND TORG” LLC from 29.12.2000 and until 31.12.2008, namely: profits, losses, lost profits, amounts claimed or redemption and any other interests related to the company’s activity during the period above specified shall relate exclusively to the rights of Bogdanov Yury and shall not be assigned to other persons.*

- 2.3. *All the results of activities conducted by EFC “GRAND TORG” LLC from 01st January 2009 shall pass to the sphere of rights, interests, obligations and liabilities of Mrs Bogdanova Yulia.”*

71 The definition of “investment” in Article 1.2 of the Treaty is broad. It includes not only “*monetary funds, as well as shares of stock, investments and other forms of participation*” but also “*a claim to money invested to perform economic values or to services of economic value, associated with an investment*”.

72 It is not disputed that Mr Bogdanov was no longer a shareholder of GRAND TORG at the moment when this arbitration was initiated. It is, however, clear that Mr Bogdanov had assets placed in GRAND TORG which must be considered as a form of participation in the company and be seen as a continuation of his original investment.

73 The Protocol in the opinion of the Sole Arbitrator thus means that Mr Bogdanov at the time of the initiation of the arbitration had, and still has today, an economic interest in GRAND TORG which qualifies as an investment under the Treaty.

74 At the hearing the Republic of Moldova further questioned whether the Protocol had been made in proper form. The Sole Arbitrator has been presented with no evidence, however, which would indicate that the Protocol is not binding and the Sole Arbitrator accordingly accepts that Mr Bogdanov has indeed the kind of economic interest referred to in the preceding paragraphs.

75 It may be added that in the event that Mr Bogdanov's shares were not as a matter of Moldavian law validly transferred, he would today still hold stock in GRAND TORG and thus have an investment in such capacity.

76 Since the Sole Arbitrator thus accepts that Mr Bogdanov qualifies as an investor who at all relevant times had an investment in the sense of the Treaty, it is not necessary to determine whether the objection made by the Republic of Moldova goes to jurisdiction or to the merits of the case since in any event the objection fails.

Have Mr Bogdanov's rights under Article 2.2 of the Treaty been violated?

77 Under Article 2.2 of the Treaty, Mr Bogdanov is guaranteed a complete and unconditional protection for his capital investment in accordance with the laws of the Republic of Moldova.

78 The parties are in agreement that it was the entry into force of law 156/2005 which triggered the change in the practice of the customs authorities which in turn caused the disputed fees to be levied on GRAND TORG. Whether or not this entailed a violation of Mr Bogdanov's rights under the laws of the Republic of Moldova depends on whether the law 156/2005 could properly be applied to GRAND TORG and thus indirectly to him, in view of the

stabilisation clauses in laws 625/1995 and 440/2001 quoted above. The Sole Arbitrator accepts the argument by the Republic of Moldova that Article 43 of Law 998/1992 is not relevant in view of the exception in paragraph two of the Article.

79 The Republic of Moldova contends that the disputed fees were entirely proper since the stabilisation clauses did not extend to the regulation contained in the Moldovan Law on Customs Tariffs 1380 and its Appendix 2 and since in any event the concept of customs regime does not extend to administrative charges.

80 The Republic of Moldova at the hearing explained that had law 156/2005 introduced a customs duty not previously applicable to GRAND TORG, this would have been a violation, but maintained that the charge of fees in the lei equivalent of EUR 200 is not to be regarded as such a customs duty but as an administrative charge not forming part of the customs regime.

81 Mr Bogdanov contested this position relying on Article 1 (“Main terminology”) of the Moldovan Customs Code which defines a Customs Regime (paragraph 17 in unofficial translation) as “*the entirety of customs rules defining the status of the commodities and transport vehicles according to the purpose of the commercial operation and the purpose of the commodities; any customs regime starts by submitting the commodities and vehicles to the customs authorities and ends by issuance of a customs warrant*”.

82 Mr Bogdanov also called the Sole Arbitrator’s attention to the disproportionate size of the charges in question, comparing the charges of EUR 200 listed under No. 15 (applied to GRAND TORG) and other charges, such as EUR 10 per each contract under No. 12 in the same Appendix 2 to the Law on Customs Tariffs.

83 The Sole Arbitrator does not exclude that there may be some room for administrative charges which conceptually are to be distinguished from customs duties. In the present case, however, the charges were of such size and construed so that the cost to GRAND TORG exceeded a total of 440 000 lei for the three years 2005, 2006 and 2008. Charges of such magnitude are quite obviously designed to fulfil the purposes typical for customs duties, viz. to give income to the State and/or to be an instrument of

the State's trade policy. Even if administrative charges in a narrow sense would fall outside the concept of customs regime, something which seems uncertain, the fees levied on GRAND TORG in the opinion of the Sole Arbitrator unquestionably fall inside.

84 It is further not reasonable to construe the stabilisation clauses in Law 625/1995 and Law 440/2001 so narrowly that they would leave it open to the Republic of Moldova to change the customs regime at will as long as so was done by legislation other than these two particular Laws. To so construe the clauses would make them void of any real meaning.

85 The Sole Arbitrator accordingly must find that the application of law 156/2005 to GRAND TORG as regards the fees complained about by Mr Bogdanov was in contravention of the stabilisation clauses in Law 625/1995 and Law 440/2001 and that consequently such application entailed a violation of Article 2.1 of the Treaty.

Has the obligation to give Mr Bogdanov fair, equitable and non-discriminatory treatment been violated?

86 Mr Bogdanov alleges that GRAND TORG is the only entity which has been subjected to the EUR 200 fees under Law 156/2005.

87 The Republic of Moldova responds that the Law applies to all enterprises in all free economic zones without exception and that accordingly there has been no discrimination of Mr Bogdanov.

88 However, that argument of the Republic of Moldova is wholly abstract: if other companies in other zones were to conduct activities of the same nature as GRAND TORG, then they would also be subjected to the same charges. The Republic of Moldova has not, however, pointed to any specific case where another company has in fact been subjected to the fees.

89 Furthermore, the drastically different fees applying to the goods for processing under Annex 2 depending on whether or not they originate in a free economic zone, something which the Republic of Moldova has in no way attempted to explain, seem *prima facie* unfair.

90 Failing any explanation of this fee structure and failing demonstration of any single instance where a company other than GRAND TORG has been subjected to the EUR 200 fee per declaration, the Sole Arbitrator is forced to

conclude that Mr Bogdanov has not received fair, equitable and non-discriminatory treatment.

91 The Republic of Moldova is thus liable to compensate Mr Bogdanov in damages for violations of Articles 2.2 and 3.1 of the Treaty.

What is the reimbursable damage sustained by Mr Bogdanov?

92 The Republic of Moldova points out that the damage, if any, has been sustained by GRAND TORG, not Mr Bogdanov personally. That is in itself correct. However, it is at the same time clear that Mr Bogdanov has indirectly suffered since the profits available for distribution from GRAND TORG to him, which under the Protocol of 17 February 2009 were left as working capital in the company, were also reduced and accordingly so was the value of his investment.

93 The Republic of Moldova has made no objection to the manner of calculation submitted by Mr Bogdanov as regards the principal amount of these charges or the applicable interest rate and thus implicitly accepted that interest at the official refinancing rate of the National Bank of Moldova increased by 9 percentage units runs from the date of each particular charge. This seems sensible from a practical point of view since even if the corresponding funds would not have been available for distribution immediately, they would then instead have been potentially interest-bearing within GRAND TORG.

94 The Republic of Moldova has made an objection based on statutory limitation arguing that the charges for the year 2005 are time-barred. The Treaty itself does not say anything about limitation as regards claims based on the Treaty. It would, however, appear that the limitation period applying under the laws of either Contracting Party must be applicable lest claims could be made indefinitely. Mr Bogdanov does not contest that the limitation period is 3 years under Moldovan law and does not invoke any provisions of Russian law which would entail a longer period. This objection on the part of the Republic of Moldova thus appears to the Sole Arbitrator to be well founded.

95 The Republic of Moldova objected further that Mr Bogdanov's claim does not take account of the fact that dividends to him from GRAND TORG

would have been subjected to a 15 per cent tax – either as a company income tax (until 1 January 2007) or as tax on dividends (after 1 January 2007). Mr Bogdanov has not denied this, but asserts that he will be forced to pay such tax on any amount awarded, thus no reduction should be made “in advance”.

96 A claim for damages under an international treaty is, however, of a nature different from dividends from a company. The burden of proving that such damages accruing to a Russian citizen residing in Moldova would be subject to taxation by the Republic of Moldova must rest on Mr Bogdanov. As no such proof has been furnished the Sole Arbitrator must conclude that also this objection on the part of the Republic of Moldova is well founded. It is therefore to be assumed that the further amount available to be distributed to Mr Bogdanov absent the EUR 200 charges would have been reduced by 15%.

97 It should be added that since the Republic of Moldova in the course of the arbitration explicitly declared that any damages due to Mr Bogdanov will not be subject to taxation in Moldova, it would raise a further issue of violation of the Treaty in the event that such taxation were nevertheless to occur.

98 As regards moral damages, the Sole Arbitrator finds that Mr Bogdanov has not against the objections of the Republic of Moldova been able to demonstrate that he is entitled to such as a matter of Moldovan law.

COSTS

99 The outcome of the arbitration is thus that Mr Bogdanov will be awarded a considerable part of what he has claimed for the customs charges and that the claim for moral damages fails. The parties have accordingly each been partly successful in the arbitration, but Mr Bogdanov has been more successful.

100 The Costs of the Arbitration have been decided by the Institute as specified below. The parties shall be jointly and severally liable to pay these Arbitration Costs. As between the parties, taking account of the outcome of the case and the conduct of the proceedings, the Sole Arbitrator finds that Mr Bogdanov should bear 1/3 and the Republic of Moldova should bear 2/3

of the Arbitration Costs, while each party should be responsible for its own costs in connection with this arbitration.

AWARD

1. The Republic of Moldova is ordered to pay to Mr Yury Bogdanov the amount of 475 386.41 lei.
2. Mr Yury Bogdanov's other claims are denied.
3. The fee of the Sole Arbitrator is fixed at EUR 12 500. The Administrative Fee of the Institute is fixed at EUR 5 000, and the Tribunal's expenses (for the use of the hearing facilities) are fixed at EUR 500. Thus, the total Costs of Arbitration are EUR 18 000.
4. As 2/3 of the Costs of Arbitration (EUR 12 000) are to be borne by the Republic of Moldova and as the entire amount of the Advance on Costs was paid by Mr Bogdanov, the Republic of Moldova is ordered to reimburse Mr Bogdanov its share of the Costs of Arbitration amounting to EUR 12 000.

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 action within three months from receipt of this award.



Bo G.H. Nilsson
Sole Arbitrator