

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**  
WASHINGTON, D.C.

In the arbitration proceeding between

**MR. FRANCK CHARLES ARIF**

Claimant

and

**REPUBLIC OF MOLDOVA**

Respondent

**ICSID Case No. ARB/11/23**

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**AWARD**

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*Members of the Tribunal*

Prof. Dr. Bernardo M. Cremades, President

Prof. Dr. Bernard Hanotiau

Prof. Dr. Rolf Knieper

*Secretary of the Tribunal*

Ms. Alicia Martín Blanco

*Date of dispatch to the Parties: April 8, 2013*

## REPRESENTATION OF THE PARTIES

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## FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Arbitration Rules or ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT or Treaty	Agreement between the Government of the Republic of France and the Government of the Republic of Moldova on the Reciprocal Promotion and Protection of Investments dated September 8, 1997
ICSID Convention or Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for the Settlement of Investment Disputes

## **I. INTRODUCTION AND PARTIES.-**

1. This case concerns a dispute submitted to the Centre on the basis of the BIT, which entered into force on November 9, 1999, and the ICSID Convention. The dispute relates to the delayed or prevented opening of several duty free stores, and to the breach of an exclusivity undertaking.
2. Claimant is Mr. Franck Charles Arif and is hereinafter referred to as “Mr. Arif” or the “Claimant.”
3. Claimant is a natural person having the nationality of the French Republic.
4. Respondent is the Republic of Moldova and is hereinafter referred to as “Moldova” or the “Respondent.”
5. Claimant and Respondent are hereinafter collectively referred to as the “Parties.” The Parties’ respective representatives and their addresses are listed above on page (i).

## **II. PROCEDURAL HISTORY.-**

6. On August 3, 2011, ICSID received a Request for Arbitration dated July 29, 2011 from Mr. Arif against Moldova (the “Request”).
7. On August 23, 2011, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the Centre’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“Institution Rules”).
8. In the absence of an agreement between the Parties, Claimant elected to submit the arbitration to a Tribunal constituted of three arbitrators, as provided in Article 37(2)(b) of the ICSID Convention.

9. The Tribunal is composed of Dr. Bernardo M. Cremades, a national of the Kingdom of Spain, President, appointed by agreement of the Parties; Prof. Bernard Hanotiau, a national of the Kingdom of Belgium, appointed by Claimant; and Prof. Dr. Rolf Knieper, a national of the Federal Republic of Germany, appointed by Respondent.
10. On December 2, 2011, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (“Arbitration Rules” or “ICSID Arbitration Rules”) notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted and the proceeding to have begun on that date. Ms. Alicia Martín Blanco, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
11. The Tribunal held a first session with the Parties by telephone conference on January 31, 2012. The Parties confirmed that each Member of the Tribunal had been validly appointed in accordance with the ICSID Convention and Arbitration Rules. It was agreed *inter alia* that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural language would be English and that the place of proceedings would be Paris, France. The Parties agreed on a schedule for the proceedings, which was embodied in Procedural Order No. 1, signed by the President and the Secretary of the Tribunal and circulated to the Parties.
12. As agreed at the first session, Claimant submitted his Memorial on February 15, 2012. On February 27, 2012, Claimant submitted correctly numbered electronic copies of exhibits C-89 to C-95.
13. During the first session, Respondent indicated that it would appoint counsel by February 15, 2012. On March 6, 2012, Claimant noted that Moldova had officially selected counsel in February 2012, and requested that counsel for Respondent be introduced into the record. On the same day Respondent indicated that it would soon be retaining counsel and noted that this delay would

have an impact on the schedule agreed at the first session. On March 7, 2012, Claimant stated that a delay by Respondent in appointing counsel should not affect Claimant, given that the schedule had been agreed with the understanding that any extension of time would be justified by exceptional circumstances only.

14. On March 20, 2012, Respondent requested that the time limit to file its Counter-Memorial, due on March 21, 2012, be postponed or extended on the basis of parallel proceedings before the European Court of Human Rights, the resolution of which might affect the present proceeding. On March 21, 2012, Claimant requested the Tribunal to reject Respondent's request and order it to submit its Counter-Memorial immediately, and to consider it otherwise in default pursuant to Rule 42 of the ICSID Arbitration Rules. On March 28, 2012, the Tribunal decided to reject Respondent's request, and ordered Respondent to submit its Counter-Memorial immediately. In its decision, the Tribunal (i) indicated that it was not persuaded that the proceedings before the European Court of Human Rights qualify as a circumstance of exceptional nature that would reasonably justify an extension or postponement under paragraph 13.4 of Procedural Order No. 1; (ii) noted that requesting a postponement of the ICSID proceedings was in contradiction with the position taken by Respondent before the European Court of Human Rights, where Respondent had raised an objection to admissibility in favour of the ICSID proceedings; and (iii) indicated that it was not persuaded that the proceedings before the European Court of Human Rights were substantially similar to the ICSID proceeding, given that they relate to different claimants, different scope of claims and different relief. Finally, the Tribunal informed the Parties that it would have to entertain Claimant's alternative request that Moldova be considered in default as envisaged by ICSID Arbitration Rule 42 should Respondent fail to do as instructed.
15. On March 29, 2012, Respondent informed that it expected to sign an agreement with DLA Piper UK LLP by March 30, 2012 and that, as soon as counsel had been retained, it would instruct them to contact the Tribunal in order to address the procedural timetable. Respondent noted that the timetable was put in place at a time when it had no legal representation and no experience of arbitral proceedings pursuant to the ICSID Arbitration Rules. On March 30, 2012,

Respondent indicated that Mr. Michael Ostrove and Mr. Théobald Naud of DLA Piper UK LLP, and Mr. Igor Odobescu of ACI Partners, had been retained as counsel as of that day. Regarding the procedural timetable, Respondent indicated that it expected to have jurisdictional objections, and announced that it would try to reach an agreement with Claimant to modify the timetable.

16. On April 2, 2012, Claimant submitted that any jurisdictional objection by Respondent would be time-barred under Rule 41(1) of the ICSID Arbitration Rules, and requested the Tribunal to reiterate its order for the immediate submission by Respondent of its Counter-Memorial, and to otherwise hold Respondent in default under ICSID Arbitration Rule 42. On the same day, Respondent submitted a proposal to amend the schedule in accordance with section 13(4) of Procedural Order No. 1. On April 5, 2012, the Tribunal decided that, in light of the circumstances, an extension of time for the filing of the Counter-Memorial was justified under section 13(4) of Procedural Order No. 1 and granted Respondent 8 weeks from the date of its decision, with the subsequent amendment of the schedule contained in paragraph 13(2)(2) of Procedural Order No. 1. In addition, the Tribunal considered that it was necessary to hold a conference call with the Parties in order to discuss the procedural timetable to follow.
17. On April 6, 2012, Claimant informed the Tribunal that Mr. Ion Paduraru no longer represented Claimant as a result of his nomination as General Secretary of the Administration of the President of Moldova.
18. The Tribunal held a telephone conference with the Parties on April 17, 2012. During the conference call, the Parties discussed the schedule of submissions following the Tribunal's decision of April 5, 2012. On April 20, 2012, the Tribunal confirmed the 8 week extension granted to Respondent for the submission of its Counter-Memorial and decided to maintain the schedule set out in sections 13(2)(3) and 13(2)(4) of Procedural Order No. 1.

19. On April 17, 2012, Respondent submitted a power of attorney authorizing DLA Piper UK LLP and ACI PARTNERS to represent Moldova in the present proceeding.
20. On May 31, 2012, Respondent filed its Counter-Memorial on Jurisdiction, Merits and Quantum.
21. On June 20, 2012, the Tribunal, after consultation with the Parties, confirmed that the Hearing would take place in Paris from November 6 to 9, 2012.
22. On June 22, 2012, Claimant requested a five-week extension to file his Reply until August 9, 2012. On June 26, 2012, Respondent indicated that even a one-week extension at this stage would cause significant hardship for Respondent, having organized its work around the current schedule, and requested the Tribunal to maintain it. On June 27, 2012, the Tribunal decided to grant Claimant a two-week extension to file his Reply, provided that the Hearing dates were maintained.
23. On July 2, 2012, Respondent requested that its Rejoinder be due on October 5, 2012 in light of the Tribunal's decision to grant Claimant a two-week extension to file his Reply. On the same day, Claimant stated that he had no objection to Respondent receiving additional time to file its Rejoinder, provided that Claimant was allowed to file his Reply on August 2, 2012. On the same day, Respondent noted that Claimant's request that the Tribunal reconsider its decision and grant an additional extension to Claimant was improper. On July 5, 2012, the Tribunal decided to grant Respondent's request to submit its Rejoinder on October 5 as well as Claimant's request to submit his Reply on August 2, 2012. The Tribunal indicated that these extensions should give the Parties sufficient time to organize their respective schedules without having to postpone the Hearing dates.
24. On July 9, 2012, Respondent objected to the Tribunal's revision of the procedural schedule and requested that it be reconsidered as soon as possible. On July 10, 2012, Claimant objected to Respondent's letter and requested the

Tribunal to reject Respondent's request and maintain the schedule set forth in the Tribunal's letter of July 5, 2012. On July 11, 2012, the Tribunal referred to the Parties' requests and noted that the Tribunal had each time thoroughly considered the Parties' allegations on the extensions requested and granted the extensions it considered fair and reasonable under the circumstances. The Tribunal stated that it had reconsidered its decision in light of Respondent's latest request and was satisfied that there was no procedural inequality justifying revision of its earlier decision. However, the Tribunal decided to grant Respondent an additional two weeks until October 19, 2012 for the submission of its Rejoinder in light of Respondent's difficulties to reorganize its schedule. On July 17, 2012, Claimant observed that the latest two-week extension granted to Respondent placed Claimant in a difficult position to prepare for the Hearing, and reserved Claimant's right to request corrective measures if and when needed.

25. On July 16, 2012 Claimant requested that the Tribunal order Respondent to produce a number of documents referred to by Respondent's quantum expert, Mr. Timothy Hart. On July 18, 2012, Respondent requested the Tribunal to deny Claimant's request on the basis that it was improperly extensive, not relevant and material, unduly burdensome and pertaining to confidential information. On July 18, 2012, the Tribunal rejected Claimant's request for production of documents because it considered that it was directed towards potentially confidential information of one of Claimant's competitors, which was not a party to these proceedings. In addition, the Tribunal considered the request to be unduly burdensome.
26. On August 3, 2012, Claimant filed his Reply.
27. On September 7, 2012, Respondent requested the disclosure of certain documents in Claimant's possession. On September 10, 2012, the Tribunal requested Claimant to disclose the requested documents or state the reasons for objecting within the next seven days. On September 17, 2012, Claimant responded producing some of the documents requested and rejecting the disclosure of other documents on the basis that they were not relevant and material to the outcome of the proceedings, that each party had the burden of

proving its own factual allegations, that the request was unduly belated or that they were already in Respondent's possession. On September 20, 2012, the Tribunal (i) ordered the production, within the next seven days, of certain documents referred to by Claimant's quantum expert but not produced in the arbitration, and (ii) rejected the production of other documents on the grounds that the request was unduly burdensome and lacked sufficient relevance to the case. On September 21, 2012, Claimant produced some documents. On September 27, 2012, Claimant submitted the documents the production of which had been ordered by the Tribunal.

28. On September 6, 2012, the Tribunal circulated a draft agenda for the Hearing and invited the Parties to submit a joint proposal by September 27, 2012. On September 26, 2012, the Parties requested an extension to file their joint proposal regarding the Hearing agenda. On October 5, 2012, Claimant submitted a joint procedural agreement, which was confirmed by Respondent on the same day. The joint procedural agreement envisaged a first Hearing day devoted to oral submissions, a second Hearing day for examination of experts, and a third Hearing day for oral submissions. It was apparent in the proposal that the Parties would only require 3 days for the Hearing. Accordingly, on October 11, 2012, the Tribunal proposed that the Hearing dates be November 6 to 8, 2012. On October 12, 2012, the Parties agreed with the Tribunal's proposal that the Hearing be held from November 6 to 8, 2012.
  
29. On October 3, 2012, Claimant submitted a second request for document production relating to documents relied on by Respondent's quantum expert. In the alternative, Claimant requested that Respondent and its quantum expert be prohibited from using data that Claimant considered to have been obtained illegally. On October 9, 2012, Respondent requested the Tribunal to deny Claimant's request on the basis that the documents requested were confidential and that the request was unduly burdensome, and to deny Claimant's alternative request. On October 11, 2012, the Tribunal decided to reject Claimant's document production request and to exclude from the record the information contained in exhibit RQE-3 as well as any evidence based on it. The Tribunal (i) noted that the information requested by Claimant was much broader than the

information that had been used by Respondent's expert, and included extensive source data from a competitor in the duty free sector, which was not a party to the arbitration; (ii) indicated that it was not persuaded that the information requested by Claimant was directly relevant for the quantification of Claimant's damages or material to the outcome of the case; and (iii) indicated that it was not persuaded that the information relied upon by Respondent's expert did not affect potentially confidential information, and therefore rejected any evidence based on this information.

30. On October 19, Respondent filed its Rejoinder.
31. On October 23, 2012, the Tribunal proposed to the Parties that the experts be heard together at the Hearing, and that they give a brief didactic presentation of their respective reports.
32. On October 30, 2012, the President held a pre-hearing telephone conference call with the Parties on behalf of the Tribunal. During the pre-hearing conference call the Parties confirmed their procedural agreements as contained in Claimant's letter of October 5, 2012, and the President of the Tribunal proposed a sequence of examination of the experts. It was agreed that Respondent would submit the dispositive part of the decision of the Supreme Court of Moldova dated October 17, 2012, to which Respondent refers in its Rejoinder. On the same day, the Secretary of the Tribunal circulated the minutes of the pre-hearing conference call in electronic format, and transmitted to the Parties the Tribunal's request that the Parties revert to the Tribunal on the President's proposal for the sequence of examination of the experts by November 5, 2012. The Tribunal also requested the Parties to use their best efforts to locate and produce the entire decision of the Supreme Court of Moldova dated October 17, 2012 by November 5, 2012, and Respondent to produce the dispositive part of the decision of the Supreme Court of Moldova dated October 17, 2012 by November 1, 2012.
33. On October 30, 2012, Respondent submitted the dispositive part of the decision of the Supreme Court of Moldova dated October 17, 2012.

34. On November 2, 2012, Claimant submitted an amended version of Exhibit C-212 to be put on record as Exhibit C-221, and requested that all references to Exhibit C-212 be read as references to Exhibit C-221.
35. The Hearing took place on November 6 through 8, 2012 at the World Bank Conference Centre and the ICC Hearing Centre in Paris. The following representatives of Claimant were present at the Hearing: Dr. Hamid Gharavi, Ms. Mélanie van Leeuwen, Ms. Nada Sader, Mr. Andrian Berengoi, Mr. Franck Charles Arif and Ms. Irina Chirilescu. The following representatives of Respondent were present at the Hearing: Mr. Michael Ostrove, Ms. Kiera Gans, Mr. Théobald Naud, Mr. Jonathan Chevry, Mr. Igor Odobescu, Ms. Carolina Parcalab, Mr. Vladimir Grosu and Mr. Lilian Apostol.
36. Claimant's quantum expert, Mr. John Ellison, and Respondent's quantum expert, Mr. Timothy Hart, were examined at the Hearing. At the beginning of Mr. Hart's examination, Claimant's counsel indicated that they had only learned upon seeing Mr. Hart at the Hearing that Claimant had previously approached Mr. Hart when seeking to engage a quantum expert, and that eventually Claimant had rejected Mr. Hart's offer for his services. According to Claimant, this situation created a conflict. After Respondent had the opportunity to reply to Claimant's statement, the Tribunal decided to give the Parties the opportunity to put some questions to Mr. Hart before asking Claimant to decide whether to make a formal application in this regard. After questioning him, Claimant decided to wave any possible conflict with regard to Mr. Hart.
37. At the end of the Hearing, the Parties stated that they had no objections to the manner in which the Hearing had been conducted. Respondent indicated that it withdrew any objections it may have had based on the timetable and with respect to the amounts of time that had been given to Moldova to present its case.
38. On November 16, 2012, the Tribunal referred to certain statements made during the Hearing, and requested Claimant to confirm whether he had amended his claim for relief to include restitution as an alternative to damages. If so, the Tribunal invited Claimant to formulate this amendment in a precise manner and

in writing on or before December 3, 2012. The Tribunal further invited Respondent to make any comments it may have in relation to the issue of restitution in light of Claimant's statements at the Hearing, including any consequential amendment to Respondent's claim for relief (and in particular paragraph 490(e) of the Rejoinder) on or before December 3, 2012. The Parties submitted their comments on restitution on December 3, 2012. On December 4, 2012, the Tribunal requested the Parties' comments on each other's submissions on restitution by December 11, 2012. The Parties submitted their comments on December 11, 2012.

39. On December 3, 2012, the Parties requested an extension to submit their costs submissions until December 14, 2012. This request was granted by the Tribunal on December 4, 2012. The Parties submitted their costs submissions on December 14, 2012. The Parties indicated that they had no comments on each other's costs submissions on December 21, 2012.
40. On March 15, 2013 the Secretary of the Tribunal informed the Parties that the proceedings were declared closed as of that date in accordance with Rule 38(1) of the ICSID Arbitration Rules.

### **III. FACTUAL BACKGROUND.-**

#### **A. The Tender.-**

41. On February 18, 2008, the Government of Moldova issued Decision No. 172 by which it resolved to organise and conduct a tender for the creation of a network of duty free stores at the border with Romania (the "Tender")<sup>1</sup>. The Ministry of Economy and Commerce issued Announcement No. 47-48 on conducting the

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<sup>1</sup> See Decision No. 172 on the creation of a network of duty-free stores at state border crossing stations, dated February 18, 2008, Exhibit C-8 to Request for Arbitration.

public tender for the creation of a network of duty free stores at the border with Romania on March 7, 2008.<sup>2</sup>

42. Paragraph 2.8 of the Technical Specifications of the Tender documentation required “*a proof of experience in this field of activity at least 5 years*”.<sup>3</sup>
43. ICS “Le Bridge Corporation Limited”, SRL (hereinafter “Le Bridge”), a Moldovan company 100% owned and controlled by Claimant,<sup>4</sup> submitted its tender offer to the Tender Commission on April 9, 2008<sup>5</sup> and on May 20, 2008 the Chair of the Tender Commission informed Le Bridge that it had won the Tender.<sup>6</sup>
44. Le Bridge and the Customs Service of the Republic of Moldova formalised the Tender results in the “Agreement on location of duty-free store network at the state border crossing points” dated July 1, 2008 (the “July 1, 2008 Agreement”).<sup>7</sup> Accordingly, the investor was authorised to build and manage the duty-free store network at the following pre-established state border crossing points: Costesti-Stinca, Cahul-Oancea, Leuseni-Albita, Sculeni, and Ungheni-Cristesti custom station (hereinafter “Costesti”, “Cahul”, “Leuseni”, “Sculeni”, and “Ungheni”).<sup>8</sup>
45. Clause 2.1 of the July 1, 2008 Agreement provides that: “*The objectives of this Agreement consist in granting to the investor the right to create, operate and administrate the duty-free store network at the state border crossing points within the entire term of this Agreement, aiming at the same time at the realization of these goals in the most appropriate, efficient, reasonable and quick manner adaptable to the customers’ needs.*”

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<sup>2</sup> See Announcement on conducting the public tender for the creation of a network of duty free stores at crossing state border points (“Call for Tender”), dated 7 March 2008, Exhibit R-25 to Respondent’s Counter-Memorial.

<sup>3</sup> See Decision no. 172 on the creation of a network of duty-free stores at state border crossing stations, dated February 18, 2008, Attachment no. 1, Exhibit C-8 to Request for Arbitration.

<sup>4</sup> See Extract from the State Register of Legal Entities (State Registration Chamber) regarding Le Bridge, dated June 2, 2011, Exhibit C-3 to Request for Arbitration.

<sup>5</sup> See Le Bridge’s duty free tender offer, dated April 9, 2008, Exhibit C-9 to Request for Arbitration.

<sup>6</sup> See Letter from Mr. Tudor Copaci, Chair of the Commission, to Mr. Arif, Director of Le Bridge, dated May 20, 2008, Exhibit C-10 to Request for Arbitration.

<sup>7</sup> See Agreement on location of duty-free store network at the state border crossing points dated July 1, 2008 (the “July 1, 2008 Agreement”), Exhibit C-11 to Request for Arbitration.

<sup>8</sup> See, July 1, 2008 Agreement, Exhibit C-11 to Request for Arbitration, Whereas No. 3.

46. Clause 4.1 of the July 1, 2008 Agreement provides: *“Under this Agreement, the Authority grants to the Investor that accepts according to the provisions of this Agreement an exclusive right as is defined in the p.1.1 to create and manage the duty-free stores within the area of activity”*, whereas p.1.1 defined the exclusive rights as follows: *“exclusive rights of the Investor to manage and administrate the duty-free store network at the state border crossing points is established by the Government Decision No. 172 of 18 February 2008 at the exclusive managerial risk of the Investor according to the provisions of this Agreement. The exclusive rights of the Investor shall not be opposable any longer to the Authority when, following the organization, according to the legislation, of a public tender, a third party shall obtain the right to build and open duty-free stores at the state border crossing points.”*
47. Clause 7.2 further provides that: *“According to the provisions of the business plan, the parties agreed on the need to consider the possibility of granting the right to open a duty free store to the Investor at the Chisinau International Airport and at the Giurgiulesti state border crossing point in the conditions foreseen by the effective law.”*
48. Clause 19.1 reads: *“In order to locate the duty-free stores at the state border crossing points, the Investor shall conclude agreements of location with each customs office in which area the state border crossing points exist foreseen in the Government Decision no. 172 of 18 February 200(8)”*.

**B. The Dispute in Relation to Claimant’s Border Duty Free Stores.-**

49. Lease agreements between Le Bridge and each of the local customs offices were executed on July 23, 2008 with Cahul,<sup>9</sup> on July 24, 2008 with Leuseni,<sup>10</sup> on July

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<sup>9</sup> See Agreement concerning the placement of a duty-free shop at Cahul-Oancea State border crossing between Cahul Customs Checkpoint and Le Bridge, dated July 23, 2008, Exhibit C-12 to Request for Arbitration.

<sup>10</sup> See Agreement concerning the placement of a duty-free shop at Leuseni-Albita State border crossing between Leuseni Customs Checkpoint and Le Bridge, dated July 24, 2008, Exhibit C-13 to Request for Arbitration.

25, 2008 with Sculeni<sup>11</sup> and on July 31, 2008 with Costesti.<sup>12</sup> No duty free store was ever opened at Ungheni.<sup>13</sup>

50. On September 3, 2008 Le Bridge obtained License No. 029662 issued by the Licensing Chamber of the Government of Moldova authorising it to operate duty free stores.<sup>14</sup> License No. 029662 was updated to include the four border-crossing stations at Cahul, Leuseni, Sculeni and Costesti on October 19, 2009.<sup>15</sup>
51. By November 2009 the Leuseni, Cahul and Sculeni duty free stores were ready to open.<sup>16</sup> On November 23, 2009 the Leuseni duty free store opened.<sup>17</sup>
52. On November 27, 2009 the fire inspection authorities informed the national Customs Service of Moldova that Le Bridge had failed to comply with mandatory fire safety regulations and on that ground requested that the opening of Claimant's duty free stores be blocked until Le Bridge complied with the regulations.<sup>18</sup>
53. On the same date, the customs office in Leuseni informed Le Bridge that the duty free store had to close on the grounds of an alleged failure to comply with mandatory fire safety regulations based on a letter of the fire inspection authorities received by the Customs Service of Moldova.<sup>19</sup>
54. Le Bridge closed its duty free store in Leuseni on November 30, 2009.<sup>20</sup>

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<sup>11</sup> See Agreement concerning the placement of a duty-free shop at Sculeni State border crossing between Ungheni Customs Checkpoint and Le Bridge, dated July 25, 2008, Exhibit C-14 to Request for Arbitration

<sup>12</sup> See Agreement concerning the placement of a duty-free shop at Costesti-Stanca State border crossing between Balti Customs Checkpoint and Le Bridge, dated July 31, 2008, Exhibit C-15 to Request for Arbitration.

<sup>13</sup> See Claimant's Memorial, paras. 73 and 74.

<sup>14</sup> See License No. 029662 dated September 3, 2008, and License Annex, dated April 22, 2011, Exhibit C-68 to Claimant's Memorial.

<sup>15</sup> *Idem.* See also Claimant's Memorial, para. 83.

<sup>16</sup> See Claimant's Memorial, para. 215.

<sup>17</sup> See Letter No. 148 from Claimant to the Customs Service of Moldova and to the Customs Office of Leuseni, dated November 30, 2009, Exhibit C-28 to Request for Arbitration.

<sup>18</sup> See Letter from Mihail Harabagiu, Chief of CP and SE, Colonel of rescue service, to the General Director of the Customs Service of Moldova, dated November 27, 2009. Exhibit C-29 to Request for Arbitration.

<sup>19</sup> *Idem.*

<sup>20</sup> See Claimant's Memorial, para. 219.

55. On December 4, 2009, Le Bridge received from the fire inspection authorities Prescription No. 178, detailing alleged irregularities which had to be corrected before the Leuseni store could open.<sup>21</sup>
56. On December 15, 2009 Le Bridge received from Respondent Prescription No. 72, alleging that the Sculeni store did not comply with mandatory fire safety regulations and that until compliance was achieved the store could not open.<sup>22</sup>
57. On December 21, 2009, Le Bridge received from Respondent Prescription No. 835, alleging that the Cahul store did not comply with mandatory fire safety regulations and that until compliance was ensured, the store could not open.<sup>23</sup>
58. On December 30, 2009, Le Bridge obtained confirmation from the fire inspection authorities that the duty free store in Leuseni was compliant with the fire safety regulations.<sup>24</sup> This store subsequently reopened on December 31, 2009.<sup>25</sup>
59. On the same day, Le Bridge's competitor in the duty free business – Dufremol – initiated proceedings against Le Bridge, the Ministry of Economy and Commerce and the national Customs Service before the Economic Circuit Court, seeking to cancel the Tender results and the four lease agreements signed with the customs offices of Leuseni, Cahul, Sculeni and Costesti and requesting the suspension of the Tender results pending a decision on the merits.<sup>26</sup>
60. On January 2, 2010, the Leuseni customs office informed Le Bridge that the store had to close.<sup>27</sup> On January 4, 2010, Leuseni customs officers prevented Le

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<sup>21</sup> See Prescription No. 178, received on December 4, 2009, Exhibit C-134 to Claimant's Memorial.

<sup>22</sup> See Prescription No. 72, dated December 15, 2009, Exhibit C-142 to Claimant's Memorial.

<sup>23</sup> See Prescription No. 835, dated December 21, 2009, Exhibit C-143 to Claimant's Memorial.

<sup>24</sup> See Notice of final acceptance of construction No. 197, dated December 30, 2009, Exhibit C-136 to Claimant's Memorial.

<sup>25</sup> See Claimant's Memorial, para. 224 and Respondent's Counter-Memorial, para. 138.

<sup>26</sup> See Statement of Claim submitted by Dufremol requesting cancellation of Tender results and Lease Agreements, dated December 31, 2009, Exhibit C-145 to Claimant's Memorial.

<sup>27</sup> See Witness Statement of Ms. Irina Chirilescu, para. 56.

Bridge's employees from entering the store.<sup>28</sup> The duty free store in Leuseni reopened on January 16, 2010.<sup>29</sup>

61. The Cahul duty free store opened on January 18, 2010<sup>30</sup> and the Sculeni duty free store on January 22, 2010.<sup>31</sup>
62. On January 29, 2010, the Economic Circuit Court issued an interim order suspending the Tender results pending a decision on the merits in Dufremol's claim of December 31, 2009.<sup>32</sup>
63. On March 22, 2010, the Economic Court of Appeal affirmed the Economic Circuit Court's decision of January 29, 2010 and clarified that the Tender results had been suspended only in relation to duty free stores that had not yet opened.<sup>33</sup>
64. On May 28, 2010, The Economic Circuit Court cancelled the Tender results and the July 1, 2008 Agreement, and ordered the Customs Service of Moldova to withdraw its approval of the four lease agreements signed with the local customs offices.<sup>34</sup>
65. On June 24, 2010 Le Bridge appealed the decision of the Economic Circuit Court of May 28, 2010.<sup>35</sup>
66. On June 30, 2010, The Ministry of Economy and Commerce confirmed to Claimant that the Tender results were in conformity with the applicable law.<sup>36</sup>

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<sup>28</sup> See Witness Statement of Ms. Irina Chirilescu, para. 57.

<sup>29</sup> *Idem*, para. 57.

<sup>30</sup> See Screenshot from Le Bridge's duty free sales software, Exhibit C-139 to Claimant's Memorial.

<sup>31</sup> *Idem*.

<sup>32</sup> See Decision of the Economic Circuit Court, dated January 29, 2010, Exhibit C-31 to Request for Arbitration.

<sup>33</sup> See Decision of the Economic Court of Appeal, dated March 22, 2010, Exhibit C-148 to Claimant's Memorial.

<sup>34</sup> See Decision of the Economic Circuit Court, dated May 28, 2010, Exhibit C-150 to Claimant's Memorial.

<sup>35</sup> See Claimant's Memorial, para. 259 and Respondent's Counter Memorial, para. 207.

<sup>36</sup> See Letter from Respondent's Ministry of Economy and Commerce to Claimant, dated June 30, 2010, Exhibit C-32 to Request for Arbitration.

On July 1, 2010 the Ministry filed an appeal against the Economic Circuit Court's decision of May 28, 2010.<sup>37</sup>

67. On July 28, 2010, Dufremol filed a petition before the National Agency for Competition Protection ("NACP"), challenging the legality of the exclusivity allegedly granted to Le Bridge in the July 1, 2008 Agreement.<sup>38</sup>
68. On September 7, 2010, the Economic Court of Appeal affirmed the decision of the Economic Circuit Court dated May 28, 2010, and declared that Dufremol had won the Tender.<sup>39</sup>
69. On September 8, 2010, Le Bridge wrote to the NACP to protest against Dufremol's actions.<sup>40</sup>
70. On November 9, 2010, the NACP issued its decision in Dufremol's July 28, 2010 application concerning the legality of the July 1, 2008 Agreement's exclusivity clause finding that the clause violated Moldovan competition Law.<sup>41</sup>
71. On November 24, 2010 the Supreme Court of Justice affirmed the decision of the Economic Court of Appeal of September 7, 2010. This decision definitively invalidated the Tender results and the July 1, 2008 Agreement, but did not address the cancellation of the lease agreements with the local customs offices.<sup>42</sup>
72. On December 15, 2010, the customs office of Leuseni signed a lease agreement with Dufremol.<sup>43</sup>

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<sup>37</sup> See Appeal filed by the Ministry of Economy, dated July 1, 2010, Exhibit C-152 to Claimant's Memorial.

<sup>38</sup> See Claimant's Memorial, para. 270 and Respondent's Counter-Memorial, para. 223.

<sup>39</sup> See Economic Court of Appeal decision dated September 7, 2010, Exhibit C-153 to Claimant's Memorial.

<sup>40</sup> See Letter No. 26 from Claimant to the Administrative Board of the National Agency for Protection of Competition, dated September 8, 2010, Exhibit C-156 to Claimant's Memorial.

<sup>41</sup> See Regulation No. CNP-38-10/34 issued by the Administrative Board of the National Agency for Protection of Competition, dated November 9, 2010, Exhibit C-158 to Claimant's Memorial.

<sup>42</sup> See Decision of the Supreme Court of Justice, dated November 24, 2010, Exhibit C-155 to Claimant's Memorial.

<sup>43</sup> See Agency for Land Resources and Cadastre, Hincesti Territorial Cadastral Office, Extract from the Register of real estate for performing transactions for Le Bridge / Leuseni, dated May 23, 2011, Exhibit C-159 to Claimant's Memorial.

73. On December 19, 2010, Mr. Arif left Moldova.<sup>44</sup>
74. On December 22, 2010, the NACP informed Claimant of its decision to suspend the exclusivity clause included in the July 1, 2008 Agreement, pursuant to Dufremol's petition.<sup>45</sup>
75. On December 26, 2010, the duty free store in Costesti opened.<sup>46</sup>
76. On January 1, 2011, Dufremol opened a duty free store in Leuseni.<sup>47</sup>
77. On January 18, 2011, the customs office of Cahul signed a lease agreement with Dufremol.<sup>48</sup>
78. On April 27, 2011, Dufremol initiated a new set of legal proceedings before the Economic Circuit Court, seeking to cancel Le Bridge's four lease agreements with the Customs Services of Leuseni, Cahul, Costesti and Sculeni.<sup>49</sup>
79. On May 20, 2011, Dufremol filed an additional claim before the Economic Circuit Court, requesting the closure of Le Bridge's four border stores.<sup>50</sup>
80. On July 8, 2011, Dufremol opened a duty free store in Cahul.<sup>51</sup>
81. On July 29, 2011, the Economic Circuit Court granted Dufremol's claim of April 27, 2011, thereby cancelling all four agreements between Le Bridge and the local

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<sup>44</sup> See Claimant's Memorial, para. 306.

<sup>45</sup> See Letter No. 114 from the Deputy Director of the National Agency for Protection of Competition, dated December 22, 2010, Exhibit C-157 to Claimant's Memorial. See also Regulation No. CNP-38-10/34 issued by the Administrative Board of the National Agency for Protection of Competition, dated November 9, 2010, Exhibit C-158 to Claimant's Memorial.

<sup>46</sup> See Claimant's Memorial, para. 235.

<sup>47</sup> See Claimant's Memorial, para. 273.

<sup>48</sup> See Agency for Land Resources and Cadastre, Cahul Territorial Cadastral Office, Extract from the Register of real estate for performing transactions for Le Bridge / Cahul, dated May 24, 2011, Exhibit C-160 to Claimant's Memorial.

<sup>49</sup> See Statement of Claim submitted by Dufremol requesting cancellation of Lease Agreements, dated April 27, 2011, Exhibit C-163 to Claimant's Memorial.

<sup>50</sup> See Additional Statement of Claim submitted by Dufremol requesting closure of Le Bridge's four border stores, dated May 20, 2011, Exhibit C-164 to Claimant's Memorial.

<sup>51</sup> See Claimant's Memorial, para. 273.

customs offices and ordering Le Bridge to close its border stores.<sup>52</sup> Claimant filed his Request for Arbitration to ICSID on the same date.

82. On August 19, 2011, Le Bridge lodged an appeal with the Economic Court of Appeal against the decision of the Economic Circuit Court dated July 29, 2011, which had cancelled all four lease agreements between Le Bridge and the local customs service offices.<sup>53</sup>
83. On August 22, 2011, Le Bridge was granted the right to open a duty free store in Mirnoe and, on August 28, 2011, Le Bridge was granted the right to open a duty free store in Soroca. On September 22, 2011, Le Bridge opened a new border store in Giurgiulesti.<sup>54</sup>
84. On December 28, 2011, the Court of Appeal of Chisinau rejected Le Bridge's appeal of August 19, 2011 and confirmed the Economic Circuit Court's decision of July 29, 2011.<sup>55</sup>
85. On March 6, 2012, Le Bridge filed an appeal to the Supreme Court of Justice, against the Chisinau Court of Appeal's decision of December 28, 2011.<sup>56</sup>
86. On October 17, 2012, the Supreme Court of Justice overturned the decision of the Chisinau Court of Appeal of December 28, 2011, sending the case back to the lower courts for further proceedings.<sup>57</sup>

**C. The Dispute in Relation to Claimant's Airport Duty Free Store.-**

87. Le Bridge signed Lease Agreement No. 446/08-AI with State Enterprise Chisinau International Airport (the "Airport State Enterprise") on July 28, 2008 ("Lease Agreement" or "Airport Lease Agreement").<sup>58</sup>

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<sup>52</sup> See Decision of the Economic Circuit Court dated July 29, 2011, Exhibit C-165 to Claimant's Memorial.

<sup>53</sup> See Claimant's Memorial, para. 285 and Respondent's Counter-Memorial, para. 216.

<sup>54</sup> See Claimant's Memorial, paras. 310 and 312; see also Respondent Counter-Memorial, paras. 270 and 271.

<sup>55</sup> See Claimant's Memorial, para. 288; Respondent's Counter-Memorial, para. 217.

<sup>56</sup> See Claimant's Reply, para. 173.

<sup>57</sup> See Respondent's Rejoinder, para. 106. See also Decision of the Supreme Court of Justice of Moldova of October 17, 2012, Supplemental Exhibit R-135.

88. The Lease Agreement provides in its Clause 1.1 that: “*The Landholder undertakes to provide to the Tenant for temporary use the premises indicated in p.1.2 of this Agreement, and the Tenant undertakes to pay the rent in the amount and the terms indicated in the p.2 of this Agreement.*”
89. Clause 8.1 of the Lease Agreement provides: “*The Location agreement and the amendments to it are effective only upon their approval by the State Administration on Civil Aviation of the (R)epublic of Moldova.*”
90. The Lease Agreement was approved by the State Administration of Civil Aviation (“SACA”) on August 5, 2008.<sup>59</sup>
91. On August 13, 2008, the Lease Agreement was approved by the Board of Directors of the Airport State Enterprise. This approval was recorded in the Minutes No. 9 of the same date.<sup>60</sup>
92. On October 16, 2008, License No. 029662 of September 3, 2008, issued by the Licensing Chamber of the Government of Moldova and authorising Le Bridge to operate duty free stores, was updated to include the airport.<sup>61</sup>
93. On November 10, 2009, Dufremol initiated proceedings against the Airport State Enterprise and Le Bridge before the Economic Circuit Court, seeking to cancel the Lease Agreement and requesting its suspension pending a decision on the merits.<sup>62</sup> On the same day, through an *ex parte* judgement the Economic Circuit Court suspended the Lease Agreement pending a decision on the merits in Dufremol’s claim.<sup>63</sup> That very day, the Director-General of the Airport State

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<sup>58</sup> See Location Agreement No. 446/08-AI (“Lease Agreement”), between State Enterprise Chisinau International Airport and Le Bridge, July 28, 2008, Exhibit C-16 to Request for Arbitration.

<sup>59</sup> See Letter No. 2124 from the Director-General of the SACA to the Airport State Enterprise, dated August 5, 2008, Exhibit C-65 to Claimant’s Memorial.

<sup>60</sup> See Minutes No. 9 of August 13, 2008, Exhibit C-67 to Claimant’s Memorial.

<sup>61</sup> See License No. 029662 dated September 3, 2008, and License Annex, dated April 22, 2011, Exhibit C-68 to Claimant’s Memorial.

<sup>62</sup> See Claimant’s Memorial, paras. 144 and 145.

<sup>63</sup> See Decision of the Economic Circuit Court, November 10, 2009, Exhibit C-18 to Request for Arbitration.

Enterprise informed Le Bridge of the suspension of the Lease Agreement and restricted access of its personnel to airport premises.<sup>64</sup>

94. The following day, Le Bridge filed an appeal against the Economic Circuit Court's decision of November 10, 2009.<sup>65</sup>
95. The 12<sup>th</sup> of November 2009 was the day scheduled for the opening of the airport duty free store.<sup>66</sup>
96. In his November 19, 2009 letter to the Chairman of the Supreme Court of Justice, the French Ambassador to Moldova objected to the measures taken by Moldova's judiciary.<sup>67</sup>
97. On December 17, 2009, the Special Transport Prosecutor, an officer under the responsibility of the Attorney General of Moldova, wrote to Claimant confirming that the Airport State Enterprise had allocated premises to Le Bridge in conformity with the applicable legislation.<sup>68</sup>
98. On December 18, 2009, the Economic Court of Appeal affirmed the Economic Circuit Court's decision of November 10, 2009 suspending the Lease Agreement pending a decision on the merits.<sup>69</sup>
99. On February 2, 2010, Le Bridge filed before the Economic Court of Appeal a petition for a review of the court's decision of December 18, 2009.<sup>70</sup>

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<sup>64</sup> See Letter No. 1/525e from the Airport State Enterprise to Le Bridge dated November 10, 2009, Exhibit C-101 to Claimant's Memorial. See also Order No. 255 on suspension of performance dated November 10, 2009, Exhibit C-102 to Claimant's Memorial.

<sup>65</sup> See Appeal filed by Le Bridge against Economic Circuit Court decision of November 10, 2009, Exhibit C-103 to Claimant's Memorial.

<sup>66</sup> See Claimant's Memorial, para. 129; Respondent's Counter-Memorial, para. 159.

<sup>67</sup> See Letter from H.E. Mr. Pierre Andrieu to the Chairman of the Supreme Court of Justice, dated November 19, 2009, Exhibit C-104 to Claimant's Memorial.

<sup>68</sup> See Letter from State Prosecutor's Office to Claimant dated December 17, 2009, Exhibit C-105 to Claimant's Memorial.

<sup>69</sup> See Decision of the Economic Court of Appeal, dated December 18, 2009, Exhibit C-106 to Claimant's Memorial.

<sup>70</sup> See Petition for review filed by Le Bridge, dated February 2, 2010, Exhibit C-107 to Claimant's Memorial.

100. On May 7, 2010, Dufremol wrote to the Ministry of Economy and Commerce, requesting the cancellation of Minutes No. 9 of August 13, 2008.<sup>71</sup>
101. On May 12, 2010, in the proceedings initiated by competitor Moldclassica against Le Bridge, the Airport State Enterprise and the Ministry of Economy and Commerce, the Economic Circuit Court suspended the Lease Agreement through an *ex parte* order.<sup>72</sup>
102. On May 13, 2010, the Airport State Enterprise suspended the Lease Agreement.<sup>73</sup> On the same date, the Economic Court of Appeal overturned its decision of December 18, 2009, as well as the decision of the Economic Circuit Court of November 10, 2009.<sup>74</sup> Also at this time, the Minister of Economy and Commerce rejected Dufremol's request to cancel Minutes No. 9 of August 13, 2008.<sup>75</sup> That very day, Dufremol brought an action before the Court of Appeal of Chisinau for the cancellation of Minutes No. 9 of August 13, 2008 and their suspension pending a decision on the merits.<sup>76</sup>
103. The next day, the Court of Appeal of Chisinau suspended the Minutes No. 9 pending a decision on the merits in Dufremol's claim of May 13, 2010.<sup>77</sup>
104. On the same date, Claimant sent a letter to the Government of Moldova aimed at amicably solving the investment dispute between Moldova and Mr. Arif.<sup>78</sup>
105. On May 17, 2010, the Airport State Enterprise appealed the decision of the Chisinau Court of Appeal of May 14, 2010.<sup>79</sup>

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<sup>71</sup> See Claimant's Memorial, para. 173; Respondent's Counter-Memorial, para. 177.

<sup>72</sup> See Decision of the Economic Circuit Court, dated May 12, 2010, Exhibit C-20 to Request for Arbitration.

<sup>73</sup> See Order No. 126 on suspension of agreement, dated May 13, 2010, Exhibit C-109 to Claimant's Memorial.

<sup>74</sup> See Decision of the Economic Court of Appeal dated May 13, 2010, Exhibit C-108 to Claimant's Memorial.

<sup>75</sup> See Letter from the Ministry of Economy to Dufremol, dated May 13, 2010, Exhibit C-115 to Claimant's Memorial.

<sup>76</sup> See Statement of Claim submitted by Dufremol requesting cancellation of Minutes No. 9 of August 13, 2008, dated May 13, 2010, C-116 to Claimant's Memorial.

<sup>77</sup> See Court of Appeal of Chisinau Decision, dated May 14, 2010, Exhibit C-117 to Claimant's Memorial.

<sup>78</sup> See Letter from Claimant to the Government of Moldova, May 14, 2010, Exhibit C-34 to Request for Arbitration.

106. On June 28, 2010, Le Bridge lodged an appeal against the decision of the Chisinau Court of Appeal of May 14, 2010, with the Supreme Court of Justice.<sup>80</sup>
107. On September 1<sup>st</sup>, 2010, the Supreme Court quashed part of the Court of Appeal of Chisinau's decision of May 14, 2010.<sup>81</sup>
108. On September 8, 2010, Le Bridge wrote to the NACP to protest against Dufremol's actions.<sup>82</sup>
109. On September 9, 2010, competitor Trivoli-com obtained an order of the Economic Circuit Court suspending the Lease Agreement.<sup>83</sup>
110. On October 21, 2010, the Economic Court of Appeal overturned the decision of the Economic Circuit Court of September 9, 2010.<sup>84</sup>
111. On November 8, 2010, the Economic Court of Appeal overturned the decision of the Economic Circuit Court of May 12, 2010. The Court noted "*that suspension of the Lease Contract that had been executed for approximately two years is a disproportionate and unjustified provisional remedy*".<sup>85</sup>
112. On November 11, 2010, the Airport State Enterprise issued Order No. 268, suspending the Lease Agreement based on the Economic Circuit Court's decision of September 9, 2010.<sup>86</sup>

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<sup>79</sup> See Appeal filed by the Airport State Enterprise against the Court of Appeal of Chisinau's Decision of May 14, 2010, dated May 17, 2010, Exhibit C-118 to Claimant's Memorial.

<sup>80</sup> See Appeal filed by Le Bridge against the Court of Appeal of Chisinau's Decision of May 14, 2010, dated June 28, 2010, Exhibit C-119 to Claimant's Memorial.

<sup>81</sup> See Decision of the Supreme Court dated September 1, 2010, Exhibit C-120 to Claimant's Memorial.

<sup>82</sup> See Letter No. 26 from Claimant to the Administrative Board of the National Agency for Protection of Competition, dated September 8, 2010, Exhibit C-156 to Claimant's Memorial.

<sup>83</sup> See Decision of the Economic Circuit Court, dated September 9, 2010, Exhibit C-110 to Claimant's Memorial.

<sup>84</sup> See Decision of the Economic Court of Appeal, dated October 21, 2010, Exhibit C-111 to Claimant's Memorial.

<sup>85</sup> See Decision of the Economic Court of Appeal, dated November 8, 2010, Exhibit C-21 to Request for Arbitration.

<sup>86</sup> See Order No. 268 of the Airport State Enterprise suspending the Lease Agreement, dated November 11, 2010, C-26 to Request for Arbitration.

113. On November 12, 2010, competitor Ghermivali obtained from the Economic Circuit Court an order suspending the Lease Agreement.<sup>87</sup>
114. On November 15, 2010, the Airport State Enterprise suspended the Lease Agreement based on the Economic Circuit Court's decision of November 12, 2010.<sup>88</sup>
115. On November 16, 2010, the Economic Circuit Court ruled on the merits in Dufremol's claim of November 10, 2009 and cancelled the Lease Agreement.<sup>89</sup>
116. On December 14, 2010, the Economic Court of Appeal overturned the decision of the Economic Circuit Court of November 12, 2010 ordering provisional measures.<sup>90</sup>
117. On December 22, 2010, Le Bridge obtained from the Airport State Enterprise the authorisation to access its airport duty free store.<sup>91</sup>
118. On the same date, the Economic Court of Appeal rendered a decision granting Dufremol's request to prevent Le Bridge from accessing its airport duty free store on the grounds that the Lease Agreement had been cancelled by decision of the Economic Circuit Court of November 16, 2010.<sup>92</sup>
119. On December 25, 2010, airport security service personnel prevented Le Bridge from opening its airport duty free store.<sup>93</sup> On December 27, 2010, a court-appointed bailiff was dispatched by the Economic Court of Appeal to seal the doors of the airport store.<sup>94</sup>

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<sup>87</sup> See Decision of the Economic Circuit Court of November 12, 2010, Exhibit C-112 to Claimant's Memorial.

<sup>88</sup> See Order No. 272 on suspension of agreement, dated November 15, 2010, Exhibit C-113 to Claimant's Memorial.

<sup>89</sup> See Decision of the Economic Circuit Court, dated November 16, 2010, Exhibit C-127 to Claimant's Memorial.

<sup>90</sup> See Decision of the Economic Court of Appeal, dated December 14, 2010, Exhibit C-114 to Claimant's Memorial.

<sup>91</sup> See Claimant's Memorial, para. 195; Respondent's Counter-Memorial, para. 188.

<sup>92</sup> See Claimant's Memorial, paras. 201, 205; Respondent's Counter-Memorial, para. 189.

<sup>93</sup> See Witness Statement of Ms. Irina Chirilescu, para. 45.

<sup>94</sup> See Claimant's Memorial, para. 203; Respondent's Counter-Memorial, para. 190.

120. On February 28, 2011, the Economic Court of Appeal affirmed the Economic Circuit Court's decision of November 16, 2010 invalidating the Lease Agreement.<sup>95</sup>
121. On March 30, 2011, the Supreme Court of Justice cancelled Minutes No. 9 of August 13, 2008.<sup>96</sup>
122. On April 28, 2011, the Supreme Court of Justice affirmed the Economic Court of Appeal's decision of December 22, 2010, ordering provisional measures.<sup>97</sup> On June 10, 2011, the Supreme Court of Justice dismissed as inadmissible Le Bridge's appeal on cassation against the Economic Court of Appeal's decision of February 28, 2011.<sup>98</sup> As a result, the decision of the Economic Court of Appeal invalidating the Lease Agreement became final and binding.
123. On July 12, 2011, Claimant sent a letter to Respondent granting it two weeks in order to resolve the dispute amicably.<sup>99</sup>
124. On September 19, 2011, the Airport State Enterprise initiated legal proceedings for the eviction of the airport store.<sup>100</sup> On October 25, 2011, an order of eviction was obtained.<sup>101</sup> On November 17, 2011, Le Bridge appealed the order to the Chisinau Court of Appeal.<sup>102</sup> On November 25, 2011, Claimant was granted access to the airport store in order to retrieve his goods.<sup>103</sup> On February 23, 2012, the Chisinau Court of Appeal confirmed the order of eviction.<sup>104</sup>

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<sup>95</sup> See Decision of the Economic Court of Appeal, dated February 28, 2011, Exhibit C-129 to Claimant's Memorial.

<sup>96</sup> See Decision of the Supreme Court of Justice, dated March 30, 2011, Exhibit C-133 to Claimant's Memorial.

<sup>97</sup> See Decision of the Supreme Court of Justice, dated April 28, 2011, Exhibit C-128 to Claimant's Memorial.

<sup>98</sup> See Decision of the Supreme Court of Justice, dated June 10, 2011, Exhibit C-130 to Claimant's Memorial

<sup>99</sup> See Notice Letter sent by Derains & Gharavi to Respondent, July 12, 2011, Exhibit C-35 to Request for Arbitration.

<sup>100</sup> See Writ of Summons filed by Airport State Enterprise against Le Bridge, Exhibit R-71 to Respondent's Counter-Memorial.

<sup>101</sup> See Respondent's Counter-Memorial, para. 192.

<sup>102</sup> *Idem*.

<sup>103</sup> See Claimant's Memorial, para. 210.

<sup>104</sup> See Decision of the Court of Appeal of Chisinau, dated February 23, 2012, Exhibit R-78 to Respondent's Counter-Memorial.

#### **D. Investigations conducted over Le Bridge.-**

125. Le Bridge was subject to several tax inspections such as the ones taking place on October 18, 2010 and November 12, 2010.<sup>105</sup> Le Bridge was also subject to an inspection conducted by the customer protection authorities on November 18, 2010<sup>106</sup> and to an investigation from the Centre for Combating Economic Crimes and Corruption (“CCECC”) that commenced on December 17, 2010<sup>107</sup> and lasted until August 2011.<sup>108</sup>

### **IV. SUMMARY OF THE PARTIES’ CLAIMS AND RELIEFS.-**

#### **A. Jurisdiction.-**

##### **1. Respondent’s Counter-Memorial.-**

###### ***a) Amicable Settlement***

126. Firstly, Respondent claims that, under Article 7 of the BIT, an investor’s right to submit a dispute to arbitration arises only if it was impossible to reach amicable settlement with the State within six months from the moment the dispute was first notified. Respondent alleges that Mr. Arif has failed to abide by this mandatory negotiation provision that conditions Respondent’s consent to arbitrate.

127. The two letters sent by Claimant to Respondent on May 14, 2010, and July 12, 2011, do not meet the requirements of the six-month amicable discussions period. Indeed, no dispute could have materialised when Mr. Arif sent his first notice to Respondent on May 14, 2010. This letter sought to give notice to the State of three decisions of first instance courts, the actions of which cannot be deemed to engage the State’s responsibility and, therefore, cannot amount to

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<sup>105</sup> See Claimant’s Request for Arbitration, para. 63.

<sup>106</sup> *Idem*.

<sup>107</sup> See Resolution of the Buiucani Court of Chisinau, dated December 16, 2010, Exhibit C-168 to Claimant’s Memorial; Search warrants issued by the Anti-Corruption Prosecutor to the CCECC, dated December 16, 2010, Exhibit C-169 to Claimant’s Memorial; Witness Statement of Mr. Franck Arif, para. 64.

<sup>108</sup> See Witness Statement of Ms. Irina Chirilescu, para. 73.

Treaty disputes. Even if this letter is considered a valid notice of a dispute, Mr. Arif did not pursue in good faith the negotiations he started. In any case, the majority of the claims presented by Mr. Arif to the Tribunal today are based on decisions of the judiciary and/or conduct of the State that intervened after May 14, 2010; moreover, the nature and scope of the claims raised in that letter are entirely different from the claims at stake in this arbitration.

128. Claimant's letter of July 12, 2011 does contain a description of the dispute now before the Tribunal. However, Claimant filed his Request for Arbitration a mere two weeks after sending his letter of July 12, 2011, thereby depriving Respondent of its right to address the dispute referred to by Claimant within six months, *as per* Article 7 of the BIT.

***b) Many of the claims raised are not disputes ripe for arbitration***

129. Respondent further notes that several of Mr. Arif's claims relate to alleged mistreatment by the Moldovan judiciary, therefore these claims cannot be raised at the international level until the highest court in the State has had a chance to act. More specifically, Mr. Arif asserts claims of complete expropriation and breach of specific undertakings with regard to the border duty free stores, this, in spite of the fact that the stores continue to operate, even as proceedings on the validity of the four lease agreements between Le Bridge and the local Customs Services are on-going. Not having exhausted local remedies in respect of the four border stores, Claimant's claims cannot stand, as they are yet not ripe for arbitration.
130. It is an agreed principle of international law that a fundamental pre-requisite for a claim of breach by judicial action is exhaustion of local remedies. A concern that Le Bridge might likely lose on the merits in the local proceedings is not a basis for filing an international claim prior to a final decision of the national judiciary. Therefore, to the extent that Mr. Arif's claims for the violation of the BIT and international obligations relate to the border stores, this Tribunal does not have jurisdiction.

**c) *Nationality***

131. Respondent alleges that, for the purposes of international jurisdiction, a determination of a person's nationality turns on an analysis of the law of the State the nationality of which it is being claimed.
132. Claimant has not carried his burden of proving that he obtained French nationality in conformity with French law. In other words, Claimant has not proved that he acquired French nationality by naturalisation.
133. In any event Claimant shares no real and effective link with France and therefore cannot seek protection under the BIT.

**d) *Claimant has no investment subject to Treaty protection***

134. Firstly, Respondent alleges that a review of every investment listed in the Request for Arbitration shows that (i) most of these alleged rights are not actually the subject of any claim in this proceeding, and (ii) many of these alleged rights do not fit the BIT definition of an investment because they are not assets of any kind under Moldovan law.
135. Secondly, Respondent submits that the rights claimed to have been expropriated in Claimant's Memorial (i.e. the right to exclusivity under the July 1, 2008 Agreement, the right to create and develop a duty free network at the border stores under the Tender and the July 1, 2008 Agreement, and the lease of the airport store with the Airport State Enterprise under the Lease Agreement) are patently invalid as a matter of Moldovan law, and therefore are not capable of founding the Tribunal's jurisdiction. It is a well-established rule that an asset can benefit from international protection only if it was validly acquired under local law. In confirmation of this general principle, the BIT includes in the definition of "investment" in Article 1(1) a condition that the investment be made in conformity with local law. Therefore, because they are not assets and were not invested in accordance with Moldovan law Mr. Arif's alleged investments are not subject to Treaty protection.

136. Thirdly, Respondent claims that the alleged investments belong to Le Bridge, a Moldovan company, and not to Mr. Arif. However, the alleged rights could be subject to Treaty protection only if they were owned by a national of the contracting Party who invoked their protection. The assets of a company and those of its shareholders are necessarily distinct, at least as corporate formalities have been respected and the applicable law recognizes the separate legal personality of these entities. It is a settled proposition in international law that shareholders may not seek protection against injuries suffered by the companies they own.

137. Le Bridge would have had standing in this arbitration if France and Moldova had agreed that, for purposes of Article 25(2)(b) of the ICSID Convention, a legal person having the nationality of the State party to the arbitration should be treated as a national of the other State due to foreign control. Because no language to this effect was included in the BIT, Le Bridge cannot bring an ICSID arbitration against Moldova. That limitation, however, is not a basis for granting jurisdiction over claims by Le Bridge's shareholders, where it otherwise does not exist.

138. Fourthly, Respondent alleges that, for the purposes of the BIT and the ICSID Convention, Mr. Arif's "investment" fails to qualify as such due to the absence of any transfer of capital or technology from France to Moldova, a key objective of the BIT.

***e) The BIT contains no "specific undertakings" clause and such claims would be inadmissible***

139. Respondent submits that the Tribunal should refuse to exercise jurisdiction over Mr. Arif's claims for the violation of a "specific commitment", because the BIT contains no such obligation. Moreover, the Most Favoured Nation Clause ("MFN clause") included in Article 4 of the BIT cannot properly be invoked to import such an obligation. Finally, even if such an obligation could be invoked under the BIT, Claimant's claim would still be inadmissible.

140. Firstly, the BIT contains no “umbrella” clause. Claimant improperly reads Articles 5 and 9 of the BIT as containing an independent international obligation to honour specific commitments made towards Claimant.
141. Article 9 of the BIT permits States to offer more favourable investment conditions in order to promote foreign direct investment in particular sectors of the economy. It does not act as an “umbrella” clause providing a procedure to sanction a mere contractual breach as a violation of the BIT itself.
142. Article 5(2) of the BIT contains a similarly narrow “specific undertakings” provision. This “specific undertakings” clause only applies if a state party entices a foreign national or company to invest in a regulated industry by providing specific incentives.
143. Secondly, Claimant also improperly turns to the BIT’s MFN clause to import an “umbrella” clause from either the Moldova-UK or the Moldova-USA BIT. Claimant tries to take domestic rights that are subject to separate dispute resolution provisions established by contract and to subject them to ICSID arbitration. “Specific undertakings” clauses are procedural in nature, in that they give an international remedy for a separate undertaking, rather than any particular undertaking. MFN clauses can only import substantive obligations that are similar in kind to the obligations that are the subject of the BIT. This principle prohibits the expansive use of MFN clauses to bring in commitments of any kind and subject them to BIT protection.
144. Thirdly, with regard to the contractual arguments made by Claimant pursuant to the July 1, 2008 Agreement, Mr. Arif should not be permitted to bring such claims for the breach of the specific commitments unless and until (i) Le Bridge has exercised its right to litigate or arbitrate these alleged breaches pursuant clause 20.10 of the July 1, 2008 Agreement and (ii) the Customs Services is shown to have failed to abide by the award rendered by the competent arbitral tribunal. Only under these circumstances would a claim for the violation of these specific commitments be admissible.

## 2. Claimant's Reply.-

145. Claimant asserts that Respondent's objections to the Tribunal's jurisdiction are inadmissible because Respondent has committed two violations of Rule 41(1) of the ICSID Arbitration Rules. First, Respondent failed to file its objections to jurisdiction as soon as possible after receipt of the Request for Arbitration. Second, Respondent failed to submit its jurisdictional objections before the expiration of the time limit fixed for the filing of the Counter-Memorial. While the Tribunal may have the power to extend the time limit for the submission of the Counter-Memorial after the expiry of the originally agreed-upon time limit, which it did, it does not have the power to extend the deadline established by the ICSID Rules for the submission of jurisdictional objections.

### *a) Amicable settlement*

146. Firstly, Claimant argues that he complied with the waiting period set forth in Article 7 of the BIT. Mr. Arif confirms that a dispute did exist at the time the letter of May 14, 2010 was sent. First instance court decisions can be wrongful acts under the BIT and can crystallize into BIT disputes because, under international law, there is no requirement to exhaust local remedies for a treaty claim to exist, unless such claim is for denial of justice.

147. Secondly, ripeness cannot constitute a pre-requisite to the initiation of amicable settlement discussions, because requiring that local remedies be exhausted before attempting to amicably settle a dispute would deprive any investor of the possibility of preventing a State from aggravating an already existing dispute.

148. Thirdly, the notice letter of May 14, 2010, which summarised the dispute, fully complied with the "amicable settlement" requirements laid out in Article 7 of the BIT. It is well settled that the notice of a dispute need not be detailed or exhaustive.

149. Fourthly, Respondent was granted an opportunity to settle the dispute amicably but refused to do so. Compliance with the "amicable settlement" requirement is a

mostly fact-driven question, namely whether the State was given a fair opportunity to negotiate and failed to do so.

150. Claimant submits that in any case compliance with this waiting period is not a pre-requisite to this Tribunal's jurisdiction. Further, it is well settled that compliance with a waiting period is not mandatory if there are no prospects of reaching a settlement, or if the Parties do not show a willingness to enter into negotiations.

***b) The claims raised are ripe for arbitration***

151. Claimant notes that Respondent does not raise its objection to jurisdiction on the basis of Article 26 of the ICSID Convention. Nor can it do so because the BIT does not contain any specific obligation for the investor to exhaust local remedies before resorting to ICSID arbitration. Claimant alleges that his claims in relation to the border duty free stores are ripe for arbitration. It is a well settled rule under international law that the "exhaustion of local remedies" requirement relates to the merits of a dispute, and not to the Arbitral Tribunal's jurisdiction or to the admissibility of the claims.
152. In any case, the principle of exhaustion of local remedies does not apply to Mr. Arif's claim of complete expropriation of his border stores, or to his claim that Moldova breached its specific commitments by completely depriving Claimant of his investment in the border stores. It is a well established rule in international arbitration that the exhaustion of local remedies does not constitute a substantive requirement of a finding of expropriation by a court.
153. Assuming for the sake of argument that the exhaustion of local remedies does constitute a pre-requisite for the finding of a breach by Moldova of its international obligations, it is deemed to be waived if the remedies left are obviously futile.
154. Claimant further submits that local remedies have in fact been exhausted in relation to the border stores. This occurred on November 24, 2010, when the Supreme Court irrevocably cancelled the Tender results and the July 1, 2008

Agreement formalising them, and declared that Dufremol had won the Tender. The cancellation of the four lease agreements with the local customs offices is thus inevitable and has already been declared by the first and second instance courts, in their decisions.

*c) Nationality*

155. Firstly, Claimant alleges that Mr. Arif has acquired French nationality in conformity with French law.

156. Claimant submits that the Arbitral Tribunal does not have the power to check whether Mr. Arif obtained French naturalization in accordance with French law because neither the ICSID Convention, nor the BIT, nor even international law, grant it such powers. Respondent cannot contest that Mr. Arif held French nationality on the relevant dates for purposes of the ICSID Convention (i.e. the date of the consent to arbitrate and the date of registration of the Request for Arbitration). Claimant further submits that, contrary to Respondent's allegation, while it is a well settled principle of international law that international tribunals have to review the validity of nationality in State to State disputes, this principle does not apply in investor-State disputes, because preventing abusive practices of diplomatic protection is not needed in this latter context.

157. There is no requirement under the ICSID Convention that nationality be granted in accordance with the law of the State granting nationality. Nor is there such a requirement in the BIT either. The principle applicable to the circumstances at hand is the general principle that every State has the power to grant nationality to individuals in accordance with its laws. France granted Mr. Arif French nationality by Decree dated March 10, 2005.<sup>109</sup> Therefore, Respondent's objection to jurisdiction on the grounds that Claimant did not prove that he acquired French nationality in accordance with French law must be rejected.

158. In any case, Respondent has not discharged its burden of proof that Mr. Arif is not a French national pursuant to French law, as it did not prove that Mr. Arif

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<sup>109</sup> See Official Journal of the French Republic, March 12, Exhibit R-17 to Respondent's Counter-Memorial.

acquired French nationality by fraud or as a result of a material error. In any event, Mr. Arif satisfied the residency requirements of French law for naturalization.

159. Secondly, Claimant alleges that there is no requirement of “effective nationality” in ICSID arbitration. The only requirement in Article 25 of the ICSID Convention is the investor not having the nationality of the host State. The text of the BIT leaves no room for the application of the effective nationality principle. Respondent’s argument that Mr. Arif’s French nationality must be effective finds no support in ICSID case law. In any event, Mr. Arif has genuine links with France.

***d) Claimant’s investments are subject to BIT protection***

160. Firstly, Claimant alleges that his investment is valid.

161. In Claimant’s view, Respondent confuses the issues of the existence of an investment with that of the validity of the same. Claimant argues the following: (i) relying on domestic law for purposes of qualifying an “investment” within the meaning of the BIT is not a practice under international law. Domestic law requirements only come into play to determine whether an existing investment within the meaning of the BIT must be protected, i.e. whether or not it was made in violation of fundamental principles of law; (ii) Respondent’s allegation that an “asset” within the meaning of Article 1(1) of the BIT must be determined by reference to domestic laws is contrary to customary international law and ICSID case law; (iii) in any event Respondent cannot contest that Claimant’s investments, consisting of the exclusive right to create and develop a duty free network at the border stores on a long term basis and the right to open a flagship store at the airport on a long term basis are assets according to Moldovan law, that they fall within the definition of “investment” contained in Article 1(1) of the BIT, and that they are investments within the meaning of Article 25 of the ICSID Convention. It is well settled that, pursuant to the principle of the “general unity of an investment operation”, the definition of an investment does not turn on the ownership of specific assets, but rather on the combination of rights that are necessary for the economic activity at issue. Therefore, even if

each of the separate investments made by Mr. Arif were to be considered outside the scope of Article 1(1) of the BIT (which they are not), the Tribunal would still have jurisdiction over this dispute, as all the rights and assets comprising the investment should be analyzed collectively, not individually.

162. With regard to the legality of the investment, Claimant has shown that the investments were not made in violation of Moldovan law. Assuming that the Tribunal found a violation of local law, such violation only affects the validity of the investment under international law if it relates to the host State's investment law. In any case, not any violation of the host State's laws affects the validity of the investment under international law. The breach must have a certain degree of gravity and a connection to the investment. In any event, a State cannot preclude an investor from seeking protection under the BIT when its own actions are illegal under its own laws.

163. Further, the BIT's definition of investment in its Article 1(1) includes indirect investments. This is confirmed by a good faith reading of the BIT. The fact that neither indirect nor direct investments are expressly mentioned in the definition can only mean that both are included. Respondent's interpretation of the BIT is therefore contrary to the express wording of the definition of "investment" contained in Article 1(1)(b).

164. Finally, Claimant alleges that the origin of the capital is irrelevant to the jurisdiction of the Tribunal. Indeed, there is no requirement, neither under the ICSID Convention nor in the BIT, that there be a transfer of capital from France to Moldova for the Tribunal to have jurisdiction.

***e) Claimant's claims on the basis of a breach by Moldova of its specific undertakings are admissible***

165. Claimant first submits that Article 9 of the BIT imposes on Moldova the obligation to honour its specific obligations towards foreign investors. Adopting Respondent's interpretation of Article 9 would turn it into a tautology (a specific commitment is regulated by its provisions) and would thus deprive Article 9 of any real effect. A good faith interpretation of Article 9 of the BIT, pursuant to

Article 31 of the Vienna Convention, cannot be one which leads to an absurd result. This could not have been the Parties' intention. The purpose of Article 9 is to include within the scope of BIT protection Moldova's specific commitments in favour of foreign investors, including provisions that are more favourable to the foreign investor than those contained in the BIT.

166. Moldova's obligation to honour its specific commitments is also set forth in Article 5(2) of the BIT. In Claimant's view, Respondent's interpretation distorts this Article's clear wording, by reading into the text limitations which it does not include, such as a limitation on its applicability to circumstances where a State Party encourages a foreign national to invest in a regulated industry. Respondent's interpretation is also contradicted by the case law.
167. Secondly, Claimant notes that Respondent does not contest that a MFN clause can import an "umbrella" clause in relation to the claim for breaches by Moldova of its specific commitments contained in the Lease Agreement. Respondent only disagrees with this possibility with regard to the commitments contained in the July 1, 2008 Agreement and the Tender.
168. Claimant's claims based on the breach by Moldova of its specific undertakings contained in the July 1, 2008 Agreement and in the Tender are not contractual claims, but rather Treaty claims. Mr Arif is not asking the Tribunal to decide his claims under the July 1, 2008 Agreement for breach of contract.
169. It is well settled that "umbrella" clauses are substantive in nature, not procedural. Respondent's allegation pursuant to which MFN clauses can only import substantive obligations that are similar in kind to the obligations that are the subject matter of the BIT is unsupported. To the contrary, the principle that "umbrella" clauses can be imported via an MFN clause is well accepted.
170. Finally, Respondent's allegation with regard to the mandatory application of the dispute resolution provision in the July 1, 2008 Agreement is unsubstantiated. The forum selection clause contained in the July 1, 2008 Agreement cannot divest the Tribunal of jurisdiction because Claimant has advanced no claims

under that agreement, but rather has asserted BIT breaches. Dismissing claims raised via “umbrella” clauses on the ground that forum selection clauses exist in contracts would be, in effect, to read an implied waiver of BIT rights into every investment agreement that specifies a dispute resolution mechanism other than investment arbitration. The remedies provided under the BIT and the July 1, 2008 Agreement are not mutually exclusive, but complementary. The BIT’s dispute resolution clause is not limited in its terms to breaches of the BIT itself, but rather extends to any disputes related to investments, which encompasses contract disputes. The subject of the dispute resolution clause contained in the July 1, 2008 Agreement has already been the subject of litigation in Moldova, Respondent’s judiciary having annulled the Agreement. It would therefore be impossible for Claimant to initiate a dispute against the Customs Services on the basis of the July 1, 2008 Agreement.

### **3. Respondent’s Rejoinder.-**

171. Respondent contends that its jurisdictional objections are admissible. Respondent complied with Rule 41(1) of the Arbitration Rules. Respondent filed its jurisdictional objections with its Counter-Memorial. Respondent in good faith submitted its jurisdictional objections as early as possible in light of the procedural calendar established by the Tribunal. Even if the Tribunal were to consider that Respondent’s jurisdictional objections were filed after the deadline for the filing of the Counter-Memorial, such a belated submission would not in any event prevent the Tribunal from examining Respondent’s objections.

#### ***a) Amicable settlement***

172. Respondent alleges that ripeness does constitute a pre-requisite to the initiation of amicable settlement discussions, because a lack of ripeness means that there is yet no dispute, and in the absence of a dispute there is nothing to settle.

173. In relation to the letter of May 14, 2010, Respondent further alleges that Le Bridge applied for a Security Certificate for the airport store only on February 4,

2010 and obtained it on June 18, 2010; therefore, no dispute could have existed in May 2010, as Le Bridge had no right to open the airport store.

174. In addition, Respondent alleges that it never had a fair opportunity to engage in settlement discussions at any time after the dispute had actually ripened. Respondent further notes that Moldova did not ratify the ICSID Convention until May 2011, and that, at the time of Mr. Arif's letter in 2010, the Government could not have imagined that any arbitral procedure would be forthcoming. Claimant therefore cannot be excused for failing to satisfy the condition precedent to arbitration. Moreover, Respondent alleges that Claimant's first attempt at settlement discussions occurred on July 12, 2012, 17 days before the Request for Arbitration. Nevertheless, the settlement discussion obligation is a mandatory pre-requisite to this Tribunal's jurisdiction. Finally, Respondent submits that Claimant fails to demonstrate that any settlement discussions would have been futile.

***b) Many of the claims raised are not ripe for arbitration***

175. Respondent further argues that Mr. Arif's claims of a judicial expropriation of his investment in the duty free stores are not ripe for arbitration. These claims are directed at decisions of the lower courts of Moldova. On October 17, 2012, the Supreme Court of Justice overturned the decision of the Chisinau Court of Appeal of December 28, 2011. The case was sent back to the lower courts for further proceedings. As a result thereof, Le Bridge can continue to operate the border stores.

***c) Nationality***

176. Firstly, Respondent submits that international tribunals are competent (and indeed obliged) to make their own assessment of a claimant's nationality when it is challenged. In Respondent's view, Claimant can offer no support for his assertion that, in investor-State disputes, unlike State-to-State disputes, this principle does not apply. Once a claimant's nationality is challenged, it becomes a jurisdictional fact in dispute to be decided by the tribunal. There can be no doubt that the Tribunal is authorised to verify and must be satisfied of Mr. Arif's nationality before proceeding to adjudicate this dispute.

177. Secondly, a party bears the burden of proving its allegations. Only after that party has actually carried this burden does it shift to the opposing party. Mr. Arif has decided not to produce a certificate of French nationality as proof of his nationality in the present case. A decree of naturalization in and of itself is no proof of nationality as a matter of French law. Having failed to disclose a certificate of nationality, it is clear that even as a matter of French law the burden of proof still lies with Mr. Arif to establish that he is a genuine French national. In any event, Mr. Arif has not met the requirements for acquiring French nationality.
178. Thirdly, Claimant confuses dominant nationality and effective nationality. Mr. Arif cannot benefit from protection under the Treaty because he shows no real and effective link with France.

***d) Claimant has no investment subject to Treaty protection***

179. Firstly, Claimant confuses the question of the law applicable to the qualification of a right as an “investment” under the BIT with that of the law relevant to identifying whether a right exists in the first instance. Claimant has not demonstrated that all of the alleged “investments” actually exist under Moldovan law, their existence being a matter of domestic law. One cannot rely on an abstract principle of the unity of an investment operation to avoid demonstrating why any alleged “right” actually exists, and in order to obtain protection for that right.
180. Regarding the three core investment rights that are actually alleged to be subject to an investment dispute (i.e. the alleged rights under the Tender, the alleged exclusivity right under the July 1, 2008 Agreement, and the Lease Agreement on the airport store), they were invalid pursuant to Moldovan law. The ordinary meaning of Article 1 of the BIT, “*in accordance with the legislation of the Contracting Party*”, does not limit legal compliance to specific investment legislation. It is a fundamental governing principle of international law that investments made in violation of the law of the host country cannot be afforded protection.

181. Secondly, the ordinary meaning of the wording of Article 1.1(b) of the BIT is that, if an investor proves a shareholding in a company, then that shareholding is a category of investment protected by the Treaty. The default position in international law is that, absent a clear language to that effect, the corporate form is recognised as legally independent from the shareholders and confers only on the corporate entity the right to assert claims for damages suffered with regard to its assets. Contrary to Claimant's assertion, therefore, the absence of an express reference to "indirect investments" is of important significance.

***e) The BIT contains no "specific undertakings" clause and such claims would be inadmissible***

182. Respondent further submits that the MFN clause in the BIT cannot, under any circumstances, import an "umbrella" clause. This applies in relation to all claims for breach of specific commitments made by Claimant: in relation to the Lease Agreement, the July 1, 2008 Agreement and the Tender.

183. Claimant seeks to rely on the MFN clause in order to secure rights that do not exist in the BIT, rather than to extend more favourable standards of protection than those set out in the BIT, as intended by Article 4. This type of manipulation of the MFN clause should be rejected.

184. Respondent does not allege that there is a waiver of the BIT's dispute resolution clause, but rather that it is premature to invoke it in support of a claim for the breach of a specific undertaking until after the agreed forum has reviewed the question. Claimant's argument that the July 1, 2008 Agreement has been annulled and that it would therefore be impossible for him to initiate a dispute under its terms ignores the fundamental principle of the separability of arbitration clauses.

**B. Merits.-**

185. In addition to the factual and legal arguments of the Parties stated below regarding Claimant's claims on the merits, the Parties have also developed

further legal argument which has been closely analysed, and expressly addressed by the Tribunal where appropriate in the relevant parts of the Award.

## **1. Claimant's Request for Arbitration and Memorial.-**

186. In his Request for Arbitration and his Memorial, Claimant alleges that Respondent has breached its obligations under the BIT and international law through the acts and omissions of its organs including: the judiciary, the Customs Service, the Airport State Enterprise, the Ministry of Internal Affairs, the NACP, the Attorney General, the Ministry of Finance (including the tax inspection authorities), and the CCECC.

### ***a) Alleged Breaches***

#### ***(i) Expropriation of Claimant's investment: Article 5 of the BIT***

187. Claimant submits that his investment was taken not on the basis of any alleged wrongdoing attributable to him, but on the basis of the alleged misapplication of Moldovan laws by the organs of the State that granted him these rights. It is a well established principle of international law that a State cannot rely on its internal law to invalidate its own obligations. Article 5 of the BIT expressly provides that an expropriation by the State cannot be contrary to a specific commitment of that State towards the investor.

188. The initial expropriatory act with regard to the airport store was the Economic Circuit Court's decision of November 10, 2009 suspending the Lease Agreement. The Lease Agreement was subsequently cancelled by the Economic Circuit Court on November 16, 2010. This decision was later confirmed by the Economic Court of Appeal on February 28, 2011 and affirmed by the Supreme Court on June 10, 2011.

189. With regard to the border stores, Respondent's expropriation of Claimant's exclusivity right, attributed through the Tender and recorded in the July 1, 2008 Agreement, occurred on January 1, 2011 for Leuseni, and July 8, 2011 for Cahul, when the Customs Service authorised Dufremol to open duty free stores at these

locations. Respondent's complete expropriation of Claimant's investment in the border stores took place on November 24, 2010, when the Supreme Court of Justice irrevocably cancelled the Tender results and the July 1, 2008 Agreement. The only reason Claimant is still able to operate his stores is based on a mere technicality, i.e. the local lease agreements have not been finally cancelled yet.

(ii) *Breach of the "specific commitments" obligation: Articles 9, 5 and 4 of the BIT*

190. With regard to the airport store, Claimant alleges that, on June 10, 2011, Respondent's judiciary irrevocably cancelled the Lease Agreement entered into by Le Bridge and the Airport State Enterprise. This was in breach of the specific commitment which Respondent had undertaken by the signature of the Lease Agreement on July 28, 2008.

191. With regard to the border stores, Claimant alleges that Respondent failed to allocate land and/or premises that would have made the opening of a duty free store in Ungheni possible. This was in breach of Respondent's specific commitments contained in the Tender and the July 1, 2008 Agreement.

192. Respondent's specific commitments regarding the exclusivity right contained in the July 1, 2008 Agreement and implied in the Tender were also breached via the suspension of the exclusivity clause by the NACP, as well as by the Customs Service's decision to permit Dufremol to open border stores in Leuseni and Cahul.

193. Regarding the entire investment in relation to the border stores, on November 24, 2010, Respondent's judiciary irrevocably cancelled the Tender results and the July 1, 2008 Agreement, in breach of the specific commitments made through these instruments.

(iii) *Breach of Fair and Equitable Treatment ("FET"): Article 3 of the BIT*

194. The long-term rights granted by State organs in relation to the airport and border stores induced Claimant to make substantial investments. In spite of Moldova's specific commitments, its organs took away Claimant's rights via multiple acts and omissions which were in breach of Respondent's obligation to act

consistently towards the investor. Respondent's acts and omissions constitute a breach of Claimant's legitimate expectation that Moldova would honour its specific commitments to him. Moldova's acts and omissions are in breach of the well-settled international law rule that a State cannot rely on its domestic laws to breach its international obligations.

195. Firstly, Respondent and its organs unfairly and inequitably harassed Claimant and his companies and attempted to intimidate him.
196. Secondly, with regard to the airport store, Claimant makes the following arguments. On June 10, 2011, Respondent's judiciary irrevocably cancelled the Lease Agreement, thus breaching Claimant's legitimate expectations and Respondent's consistency and good faith obligations. The grounds for the cancellations were never established.
197. The Airport State Enterprise unfairly and inequitably seized Claimant's goods at the airport on December 25, 2010. Moreover, it prevented Claimant from accessing the store until November 25, 2011.
198. The Attorney General failed to pursue disciplinary proceedings against Judge Namasco, despite the express admission that there were grounds to discipline him for his decision of November 10, 2009. This was in breach of Claimant's legitimate expectations and Respondent's good faith obligations.
199. Thirdly, with regard to the border stores, Claimant submits the following. The Customs Service failed to allocate land and/or premises to Claimant in order to open a duty free store in Ungheni. This was in breach of Claimant's legitimate expectations and Respondent's consistency and good faith obligations pursuant to the Tender and the July 1, 2008 Agreement.
200. The fire inspection authorities unfairly and inequitably delayed the opening of the duty free stores in Leuseni, Cahul and Sculeni for two months, alleging non-compliance with safety regulations. This was in breach of Claimant's legitimate

expectations and Respondent's consistency and good faith obligations as Le Bridge had already obtained the required certifications.

201. The NACP unfairly and inequitably suspended the July 1, 2008 Agreement's exclusivity clause. This was in breach of Claimant's legitimate expectations and Respondent's consistency and good faith obligations pursuant to the Tender and the July 1, 2008 Agreement.

202. The customs offices of Leuseni and Cahul unfairly and inequitably entered into lease agreements with Dufremol. This was in breach of Claimant's legitimate expectations and Respondent's consistency and good faith obligations pursuant to the Tender and the July 1, 2008 Agreement.

203. The customs offices of Leuseni and Cahul unfairly and inequitably attributed better locations to Dufremol for its border stores than they did to Le Bridge. This was in breach of Claimant's legitimate expectations and Respondent's consistency and good faith obligations.

204. On November 24, 2010, the Supreme Court irrevocably cancelled the Tender results and the July 1, 2008 Agreement in breach of Claimant's legitimate expectations and Respondent's consistency and good faith obligations.

(iv) *Arbitrary and unreasonable measures: Article 4 of the BIT*

206. Claimant further alleges that all of Moldova's acts and omissions in breach of the FET standard also constitute breaches of Moldova's obligation not to impose unreasonable/arbitrary measures. *Full Protection and Security: Article 5 of the BIT*

207. Claimant alleges that Respondent is under an obligation to provide him with FPS, pursuant to both the BIT's Article 5 and customary international law.

208. Claimant further argues that all of Moldova's acts and omissions in breach of the FET standard also constitute breaches of Moldova's obligation to grant full protection and security.

(vi) *Discriminatory measures: Article 4 of the BIT*

209. Respondent's obligation not to discriminate is set forth in Article 4. Moreover, Article 4 is an MFN clause that imports the obligation not to impose discriminatory measures from the UK-Moldova BIT and the USA-Moldova BIT.
210. All of Moldova's acts and omissions in breach of FET also constitute breaches of Moldova's obligation not to impose discriminatory measures.
211. In particular, Respondent cancelled Le Bridge's Lease Agreement on the pretext that it had not been obtained via a tender, despite the fact that Respondent authorised Dufremol to lease premises at the airport without such a tender. Respondent granted Le Bridge the exclusive right to operate border duty free stores after winning a tender and then authorised Dufremol to open stores at Leuseni and Cahul without a tender.
212. The national Customs Service and the customs offices of Leuseni and Cahul discriminated in favour of Dufremol by attributing better locations to Dufremol for its border stores in Cahul and Leuseni, by preventing customers from shopping at Le Bridge, and erecting a fence in front of Le Bridge's store in Leuseni.

(vii) *Denial of Justice*

213. As an alternative claim to the claims presented in detail above, Claimant submits that Respondent's judiciary, through its acts and omissions, breached Moldova's obligation not to deny justice. In this respect Claimant refers to two sets of decisions. The first concerns the airport store, and was rendered at the request of Dufremol and other companies that it owns and/or is connected to. These decisions resulted in the cancellation of the Lease Agreement on the grounds that the Airport State Enterprise had unlawfully attributed the premises to Le Bridge and that the Lease Agreement had not been preliminarily approved by the SACA. A second set of decisions concerns the border stores and was also rendered at the request of Dufremol. These decisions resulted in the cancellation of the Tender results and the July 1, 2008 Agreement on the grounds that the

Tender Commission had unlawfully awarded the Tender to Le Bridge, despite it not having the requisite commercial experience.

(a) *Procedural denial of justice*

(i) *Collusion*

214. Claimant argues that there was collusion between the local parties in interest (i.e. Le Bridge's local competitors in the duty free business: Dufremol, Moldclassica, Trivoli-Com and Ghermivali), and Moldova's judiciary, as well as a close coordination between the different instances within Moldova's judiciary. The ultimate goal of these actors' conduct was to permanently prevent the opening of Claimant's airport duty free store.

215. Claimant asserts procedural denial of justice. He alleges that the Economic Circuit Court, the Economic Court of Appeal and Le Bridge's interconnected competitors that brought an action have acted in collusion to prevent the execution of the valid Lease Agreement and the opening of the airport shop. This was done by ordering provisional measures without any legal basis in the Moldovan Civil Procedure Code. The different applications for interim measures were made in connection with an action by Le Bridge's competitors for the invalidation of the Lease Agreement.

(ii) *Lack of jurisdiction*

216. In its decision of May 28, 2010, the Economic Circuit Court ruled that it had jurisdiction over Dufremol's claim to cancel the Tender results and the July 1, 2008 Agreement. However, in Claimant's view, the court patently did not have such jurisdiction given the administrative nature of the contested acts. Moreover, the Economic Court of Appeal and the Supreme Court of Justice failed to exercise their duty to verify the procedural and material legality of the decisions rendered by the lower instances.

(iii) *Failure to abide by the mandatory preliminary application procedure*

217. Claimant argues that on May 28, 2010, the Economic Circuit Court ruled in favour of Dufremol without taking into consideration that it had not complied

with the mandatory preliminary application procedure that is a pre-condition for initiating legal proceedings to challenge administrative acts. In the same proceedings, Dufremol also produced a false preliminary application that it had purportedly filed with the Ministry of Economy on December 5, 2009. Claimant further notes that the Economic Court of Appeal and the Supreme Court of Justice should have remedied these defects of the Economic Circuit Court's decision on their own motion, by quashing it. Instead, Claimant argues, the Supreme Court of Justice unlawfully shifted the burden of proof on Le Bridge, holding that it should have demonstrated that Dufremol had not complied with the preliminary application procedure.

(iv) Failure to abide by the mandatory limitation period

218. On May 28, 2010, the Economic Circuit Court ruled in favour of Dufremol disregarding that it had failed to institute legal proceedings within the statutory 30-day limitation period applicable to actions seeking the cancellation of administrative acts. The Economic Court of Appeal also disregarded the expiry of the applicable limitation period, while the Supreme Court of Justice failed to justify why Dufremol would not be barred from instituting legal action after the limitation period had lapsed.

(v) Violations of due process

219. During the hearing of May 28, 2010, the Economic Circuit Court admitted irregular changes to Dufremol's claim (which was orally amended), while simultaneously refusing to afford the defendant (i.e. Le Bridge) any opportunity to present its case in respect of such amended claim. In Claimant's view, the Economic Court of Appeal ignored these procedural irregularities, and the Supreme Court of Justice refused to admit Le Bridge's appeal on cassation, while overstepping its authority and examining the substance of the matter in detail.

(b) Substantive denial of justice

220. Claimant argues that Moldova's judiciary, on several occasions and in relation to both the airport and the border store proceedings, misapplied the law so

blatantly, arbitrarily and unjustly that the resulting decisions also qualify as a substantive denial of justice.

(i) Cancellation of the Lease Agreement

221. On November 16, 2010, the Economic Circuit Court cancelled the Lease Agreement on the grounds that the premises allotted to Le Bridge should have been granted through a tender and that the Lease Agreement had not been preliminarily approved by the SACA. The Economic Court of Appeal affirmed this decision on February 28, 2011, as did the Supreme Court of Justice on June 10, 2011, both courts thereby failing to correct the grave misapplications of the law.

(ii) Cancellation of the Tender results and of the July 1, 2008 Agreement

222. On May 28, 2010, the Economic Circuit Court cancelled the Tender results and the July 1, 2008 Agreement on the grounds that Le Bridge did not have the requisite experience in the field of duty free to have won the Tender, thus reformulating the original Tender requirements. The Economic Court of Appeal, on September 7, 2010, and the Supreme Court of Justice, on November 24, 2010, both confirmed the Economic Circuit Court's decision, equally ignoring the clear and unambiguous language of the Tender.

(iii) Ultra petita decisions

223. On May 28, 2010, the Economic Circuit Court ordered the national Customs Service to withdraw its acceptance of the lease agreements entered into by the local customs offices and Le Bridge, despite the fact that Dufremol had never requested such relief. On September 7, 2010, the Economic Court of Appeal ruled that Dufremol was the winner of the Tender, again despite the fact that Dufremol had never requested such relief. The Supreme Court of Justice failed to address and remedy these violations in its decision of November 24, 2010.

(viii) Compensation

224. In the further alternative, Claimant notes that, even assuming that the acts and omissions of Respondent and its organs were not committed in breach of the BIT

and international law, and further assuming that the decisions of the judiciary do not constitute a denial of justice, it remains undisputed that a taking of his investment in the duty free sector took place. For this he is owed compensation. Respondent's compliance with international law requirements in relation to expropriation would only make the taking lawful, but would still leave Claimant uncompensated, in breach of the BIT and international law.

## **2. Respondent's Counter-Memorial.-**

### ***a) Alleged Breaches***

#### ***(i) Expropriation of Claimant's investment: Article 5 of the BIT***

225. Even if the Tribunal were inclined to define "investment" in a broader way than Respondent submits is possible under the Treaty, and thus to find that it has jurisdiction to hear this dispute, the expropriation claim nevertheless fails on the merits.

226. Firstly, the specific wording of Article 5 of the BIT limits expropriation claims to losses of directly-owned investments. Only Le Bridge had a possessory interest in the rights at issue and thus only Le Bridge would be protected against being dispossessed of that interest.

227. Secondly, the application of existing law of general application to rights arising in areas concerning the lease of State property, the organisation of State tenders and regulation of competition is classically understood to be at the core of a State's police power. The application of such laws leading to the loss of property is consistently understood to amount to a non-compensable regulatory measure and not a compensable taking. In most cases, these regulatory measures were applied not as a result of any interference by the State, but rather as a result of the actions of private competitors who disliked the fact that Le Bridge had obtained all of its rights unlawfully. All of Mr. Arif's alleged "deprivations" in fact result from the application of the generally applicable regulatory power of Moldova.

228. The fundamental flaw in Claimant’s position with regard to the airport duty free store and the alleged exclusivity right pursuant to the Tender and the July 1, 2008 Agreement, is that he seeks to be excused from complying with local legislation regarding his investment. If the law applicable to a property right properly calls for the annulment of that right, then the mere effect of that existing law cannot be expropriatory because the investor has no legitimate right to protect.
229. With regard to the exclusivity right, the application of existing rules regulating competition, which were in force at the time an investor made his investment, cannot support a claim for expropriation under international law.
230. With regard to the border stores, the Supreme Court’s decision of November 24, 2010 cancelled the results of the Tender and the July 1, 2008 Agreement because of violations of mandatory tender requirements, but that decision did not cancel the individual leases for the border stores. Le Bridge continues to operate the border duty free stores in Moldova and to derive substantial revenue from them. Moreover, Mr. Arif has not lost his title in his shares of Le Bridge and Le Bridge maintains an active profitable duty free business, such that Mr. Arif has not been deprived of the use and benefit of his investment. Under these circumstances, it is not possible to find an expropriation under international law.

(ii) *Breach of the “specific commitments” obligation: Articles 9, 5 and 4 of the BIT*

231. Respondent cannot have violated a “specific undertakings” obligation under the Treaty because the Treaty neither contains nor imports any such obligation. In any event Respondent did not breach any commitments to Claimant.
232. With regard to the Lease Agreement, the essence of Claimant’s argument is that rights created by a contractual “undertaking” were taken by judicial action. The claim as stated is indistinguishable from the expropriation claim and the Tribunal is referred to Respondent’s analysis with regard to expropriation.
233. With regard to the July 1, 2008 Agreement, all of the undertakings included in it are subject to Moldovan law. However, the entire Agreement is a nullity under

Moldovan law because (i) the exclusivity clause was in flagrant violation of Moldovan law and (ii) the exclusivity clause being a *sine qua non* for the entry into the Agreement, the nullity of that clause leads to the nullity of the entire agreement. Because the July 1, 2008 Agreement is a nullity under Moldovan law, Respondent cannot have breached any of its provisions.

234. In relation to the alleged exclusivity rights, the NACP's review of the July 1, 2008 Agreement to see if it complies with mandatory legislation cannot possibly amount to a breach of that same contract merely because another State entity was a party. The NACP simply performed its regulatory function. Respondent never made any undertaking to Claimant that he or Le Bridge would be exempt from Moldovan competition law.
235. Claimant has argued that Respondent breached its specific commitments when the Supreme Court decided on November 24, 2010, to cancel the Tender results and the July 1, 2008 Agreement. Respondent replies that a court's review of the legality of a Tender or a contract and its subsequent decision to annul them cannot possibly amount to a breach of the Tender or contract obligations merely because the State was a party.
236. Even if the July 1, 2008 Agreement were valid, it is patently false to allege that the Customs Service did not allocate appropriate premises to Le Bridge for the duty free store in Ungheni.

*(iii) Breach of FET: Article 3 of the BIT*

237. With respect to FET, Respondent contends that Claimant could not legitimately expect that he could acquire rights in violation of local law or that the local authorities and courts would not apply it. It is incontrovertible that, pursuant to the Treaty, investors must make their investments in compliance with local legislation. Absent any specific and explicit State assurance that the investor was for some proper reason exempt from these generally applicable provisions, the investor cannot make out a violation of international law merely because he found himself properly subjected to the domestic law governing his actions.

238. In particular, with regard to the airport store, the Lease Agreement was signed in contravention of the applicable laws on the lease of state property; therefore, no legitimate expectations could be derived from it. It was entirely illegitimate to consider that Le Bridge could negotiate directly with the airport based on the Tender because the Tender simply did not relate to the airport. The tender offer created no legitimate expectation of obtaining the Lease Agreement. Legitimate expectations must be based on explicit representations by the authorities that are competent to make those statements as an inducement to invest.
239. Regarding the seizure of the goods at the airport store, because the duty free premises are in a restricted zone of the airport, the authorities could not permit Le Bridge to access the area when the lease was suspended by a court order. Le Bridge ultimately recovered its goods once the litigation was finished.
240. Regarding the disciplinary proceedings against Judge Namasco, this matter could not affect an investment and did not relate to the decision to invest. Therefore, Respondent could not have breached any Treaty obligation in this respect.
241. With regard to the border stores, Respondent makes the following arguments. In relation to Ungheni, Respondent claims that the Customs Service did in fact offer the exact the location that Claimant had expected to have since the Tender began.
242. A contractual commitment is not the type of specific assurance that can create legitimate expectations for an investor. The insertion into a State contract does not, without more, provide the type of specific representation to promote investments that can found a FET claim.
243. Neither Mr. Arif, nor Le Bridge had any legitimate expectation that Le Bridge would not be required to make changes in order for the stores to comply with fire safety regulations. Mr. Arif's claim that the fire inspection authorities acted improperly is inconsistent with the facts. Investors have a due diligence obligation; they must be aware of and comply with local regulations. The

application of such regulations in the interest of public safety cannot amount to a violation of the FET standard or of any other international law obligation.

244. The fact that Le Bridge was allowed to open additional duty free stores at other border crossing points is evidence that it and Mr. Arif were treated fairly and equitably.
245. Regarding the NACP, Claimant provides no analysis of how he could possibly have legitimately expected that he would be exempt from mandatory Moldovan law protecting consumers from anti-competitive measures. There was never any promise of exclusivity in the Tender. And with respect to the July 1, 2008 Agreement, the insertion of a right into a State contract does not, without more, provide the type of specific representation to promote investments that can found a FET claim.
246. Regarding the alleged better locations granted to Dufremol, the State never promised that competitors would not receive more favourable positions at the border crossings. Even if he had any basis for such a legitimate expectation, Mr. Arif fails to demonstrate that the Customs Services in fact gave better locations to Dufremol or did so for improper motives.
247. In relation to the cancellation of the Tender by the Supreme Court on November 24, 2010, the Supreme Court accurately described the legal requirements of the Tender and the illegality of the Tender award.
248. With regard to the alleged harassment of Claimant due to the tax investigation, Respondent alleges that it commenced an investigation for tax violations by Mr. Arif and Le Bridge because it had very serious concerns that Le Bridge was illegally selling cigarettes and using its duty free business as a cover to avoid tax payments. The CCECC raid that Mr. Arif considers harassment was carried out pursuant to a warrant in furtherance of this investigation.

(iv) *Arbitrary and unreasonable measures: Article 4 of the BIT*

249. The Treaty does not contain an express obligation not to impose unreasonable or arbitrary measures. Accepting Claimant's logic that this standard is applicable via the MFN clause and that it does not differ from the FET standard, (i) unreasonable and arbitrary measures protections are the same as FET protections, (ii) unreasonable and arbitrary measures protections are therefore by definition not more favourable than the protections already afforded in the treaty, and (iii) such protections therefore cannot be imported as an independent treaty standard via the MFN clause in Article 4, which requires application of other provisions only if they are more favourable.

250. Claimant's arguments in favour of a violation of this obligation are indistinguishable from his arguments with respect to FET.

(v) *Full Protection and Security: Article 5 of the BIT*

251. The text and context of Article 5(1) clearly indicate that the FPS obligation is to be understood in the classic sense of offering a level of due diligence on the part of the State to ensure the physical safety and integrity of protected investments.

252. In any case, because Claimant relies entirely on an alleged violation of FET to establish a breach of FPS, Respondent's defences to the former are a full defence to the latter. Respondent reserves its right to address this issue further if Claimant seeks to present an independent basis for this claim.

(vi) *Discriminatory measures: Article 4 of the BIT*

253. To the extent that Claimant seeks to import a "no discriminatory measures" obligation from other Moldovan BITs via the MFN clause in Article 4, his claim for the breach of that obligation should be dismissed for the same reasons as those pertaining to the claim over arbitrary and unreasonable measures.

254. In the alternative, Claimant appears to equate the national treatment standard in Article 4 with a no discriminatory measure standard and to argue that

Respondent has breached Article 4. Respondent alleges that there was no discrimination on the facts for the reasons stated below.

255. With regard to the annulment of the Lease Agreement, the courts did not decide that Le Bridge's lease was invalid because no tender was held, but because the SACA had not given its prior approval either to a direct lease arrangement, after considering whether a tender should or should not be held, or to the terms of the Agreement itself. Mr. Arif cannot prove discrimination unless he can show that other lessees have been treated more favourably than Le Bridge under the same legal framework; or that the other airport tenant's leases were challenged in court and not cancelled.
256. With regard to Dufremol's authorization to open border duty free stores, nothing in the Moldovan Customs Code requires the holding of a tender to grant a license to operate a duty free store. Moreover, the tender process held in 2008 nowhere indicated that the winner would have exclusive rights to operate border duty free stores.
257. With regard to Dufremol's and Le Bridge's respective locations at Leuseni and Cahul, it was Le Bridge who selected its locations in both cases. The fence in front of Le Bridge's store in Leuseni was a legitimate measure meant to prevent admittedly illegal duty free shopping from occurring at Le Bridge's premises. And with regard to Claimant's argument that customers were prevented from shopping at Cahul, Respondent alleges that this incident is trivial and that a single incident in October 2011 can hardly show a pattern of discriminatory treatment by the Cahul Customs Service against Le Bridge.

*(vii) Denial of Justice*

258. With respect to denial of justice, Respondent first notes that it refers to the treatment of litigants, not to the treatment of investments. Mr. Arif was not a party to any litigation in Moldovan courts and therefore he cannot demonstrate that Respondent administered justice to him in a fundamentally unfair way.

259. Secondly, there is no evidence of corruption. In the absence of any proof of corruption or collusion with regard to any decision taken after November 2009 and thus in particular with respect to any decision of the Supreme Court of Justice, Respondent requests that these allegations be withdrawn by Mr. Arif and if not withdrawn, rejected by the Tribunal.

(a) *No substantive denial of justice*

260. An international tribunal hearing a claim of substantive denial of justice is not authorised to act as an ultimate appellate court, reviewing decisions of domestic supreme courts for correctness. The only way a State judiciary's substantive decisions can amount to a violation of international legal standards is if they reach such a level of arbitrariness and egregiousness that they could not possibly have been rendered in good faith.

261. The decisions rendered by the Moldovan Supreme Court in relation to the invalidity of the Lease Agreement and the Tender award are correct as a matter of substance. With regard to the Lease Agreement, at the time it was concluded there was no prior approval by the SACA (which chooses the lessee) and no authorization by the SACA to conclude the contract without prior tender (i.e. by direct negotiation), although this was required by law. With regard to the Tender, Respondent alleges that it was awarded to Claimant in breach of the requirement of experience of at least five years in the duty free sector.

262. Claimant's allegation that the courts rendered *ultra petita* decisions by granting relief not requested by Dufremol – obliging the Customs Services to withdraw their consent to the border lease agreements and declaring Dufremol the winner of the Tender – does not withstand scrutiny. In neither of these cases did the Moldovan judiciary order relief that was anything more than the obvious consequence of the courts' legal findings based on the plaintiff's submission. In any case, Claimant has not even alleged that the *ultra petita* rulings themselves caused any prejudice relevant to this case. Even if they were considered *ultra petita*, the analysis by which the lower courts arrived at their decisions and the Supreme Court affirmed them is by no means so arbitrary or egregious to allow a finding of a substantive denial of justice.

(b) *No procedural denial of justice*

263. With regard to the allegation of collusion, there is no evidence that the Moldovan judiciary colluded in any way with Le Bridge's competitors. The primary decisions regarding which Mr. Arif alleges collusion (the Economic Circuit Court's decisions ordering provisional measures at the airport) were consistently overturned by the Economic Court of Appeal in favour of Le Bridge. Given that only final decisions of the judiciary can be the basis for the international responsibility of a State, it follows that the decisions of the Economic Circuit Court do not engage the international responsibility of Moldova. Mr. Arif's allegation regarding the provisional measures issued by the Court of Appeal is presented in incredibly misleading terms.
264. With regard to the lack of jurisdiction, Respondent notes that the boundaries between the civil and the administrative law courts are often blurred on issues of jurisdiction in cases involving conflicting private interests and the grant by state entities of leases and other typical private law instruments. The question of jurisdiction was not so simple that the mistake could be explained only by arbitrariness and egregious bad faith.
265. With regard to the mandatory preliminary application procedure even though Dufremol was not able to produce the proof of registration of the application with the Ministry of Justice, it did provide proof of its preliminary application letter, which was accepted by the courts. And, with regard to the 30-day limitation period, the Supreme Court relieved Dufremol of this procedural bar after devoting an extensive analysis to the question and finding that Dufremol could not have had access to Le Bridge's Tender application, and thus to the necessary facts, within the statutory limit. Both issues were therefore thoroughly and thoughtfully debated by the courts. In any case, the analysis of the courts was not so arbitrary or egregiously wrong that the good faith of the Moldovan Supreme Court can be put into question.
266. The allegation of a due process violation following the admission of an irregular oral amendment to Dufremol's claim during the hearing on the merits of May 28,

2010, is unfounded. Indeed, the amendment was in fact properly made and Le Bridge was provided with an opportunity to respond.

*(viii) Compensation*

267. Claimant's alleged investment was not expropriated so no compensation is due.

***b) Reparation***

268. Respondent cannot be required to make reparations unless Claimant has established a causal link between the alleged wrongful act and the alleged loss. No acts attributable to Respondent could have caused any loss to Claimant, even if those acts are determined to be internationally wrongful, because the rights that Claimant allegedly acquired were in fact unlawful by reason of conduct attributable to Claimant himself and Le Bridge.

269. Restitution is the primary form of reparation for an internationally wrongful act. Although Claimant does not seek restitution, Respondent reserves the right to request that restitution be the relief ordered, if any, to the extent it is possible and lawful under the circumstances and in light of the particular obligation the Tribunal may determine that Respondent has breached.

270. In the event that the Tribunal finds that it has jurisdiction and that there has been a denial of justice, but it also finds that Mr. Arif's alleged investments were invalid under Moldovan law, and therefore not subject to substantive protection, then Mr. Arif would be entitled to satisfaction in the form of a simple declaration of the wrongfulness of the State's actions. He would not be entitled to restitution or compensation.

271. Should the Tribunal determine that damages are warranted, Respondent submits that the amount of compensation Claimant requests is grossly inflated. Moreover, Claimant is not entitled to moral damages.

### 3. Claimant's Reply.-

#### a) *Alleged Breaches*

##### (i) *Expropriation: Article 5 of the BIT*

272. In his Reply, Claimant further makes the following submissions. Claimant's case of expropriation is not about "expropriation by denial of justice". Claimant does not need to show that he was denied justice for his claim of expropriation to prevail. It suffices, for a finding of unlawful expropriation, that the State has deprived Claimant of his investment (i) without a public purpose, and/or (ii) in a discriminatory manner; and/or (iii) contrary to a specific commitment; there is no need to show that Respondent denied justice to Claimant. This is a case of a taking by a State organ, namely the judiciary, whose acts can constitute an expropriation under international law.

273. Respondent contends that Mr. Arif never "possessed" the rights that have allegedly been expropriated and therefore cannot be deprived of any investment. Claimant replies that Article 5 of the BIT protects investments indirectly owned by investors. Had the Parties intended to limit the protection against expropriation to investments directly belonging to an investor, they easily could have done so expressly. The fact that the BIT does not differentiate between direct or indirect investments can only mean that both are included.

274. Respondent alleges that Mr. Arif's deprivation of his investments resulted from the application of the regulatory power of Moldova. Respondent does not allege, let alone prove, that its acts and omissions that led to the loss of Claimant's investment were aimed at the general welfare, or were required to protect the population. It is well settled that the exercise by the State of its "police powers" cannot excuse the State from complying with its specific commitments. In any event, in order not to entail compensation, a regulatory measure should be exercised legitimately, i.e. in a non-discriminatory manner, in good faith and for the sake of general welfare.

275. With regard to the Lease Agreement and the exclusivity right, Claimant alleges that, assuming for the sake of argument that they were invalid pursuant to

Moldovan law, Moldova is estopped from invoking their invalidity because it was Moldova itself that granted him these rights. Moreover, under international law, a State cannot rely on its internal law to invalidate its own obligations.

276. Claimant further alleges that, by irrevocably cancelling the Tender results and the July 1, 2008 Agreement, Respondent took away his right to operate the duty free stores at the borders –the very basis of his investment. Although he still operates these stores on the basis of a mere technicality in order to mitigate his damages Claimant’s investment has lost its value.

(ii) *Breach of the “specific commitments” obligation: Article 9, 5 and 4 of the BIT*

277. Claimant makes several additional submissions. With regard to the airport duty free store, all of Respondent’s defences in relation to expropriation which fail, for the reasons set forth regarding expropriation, are also misplaced in relation to Respondent’s breach of its specific commitments. Irrespective of whether the Tribunal finds that Claimant’s investment was expropriated, be it unlawfully or lawfully, the Tribunal can find that Respondent breached its specific undertakings towards Claimant, and award Claimant compensation for this reason alone.

278. With regard to the border stores, the July 1, 2008 Agreement is valid pursuant to Moldovan law, irrespective of the validity of the exclusivity provision. In any event, the exclusivity clause is valid. Irrespective of the validity and/or legality of the July 1, 2008 Agreement, the deprivation by Respondent still violates its specific undertaking.

279. Respondent’s argument with regard to Ungheni fails on the facts. Moreover, whether the NACP acted within the scope of its competence when it considered the validity of the exclusivity clause, or whether the NACP’s decision was legal is irrelevant for a finding that Respondent breached its specific commitments. In any event, the NACP’s decision was illegal.

(iii) *Breach of FET: Article 3 of the BIT*

280. Claimant submits that Respondent does not dispute that it breached its good faith obligations by ignoring its specific commitments. Even if the Tribunal found that Respondent did not breach Claimant's legitimate expectations, it would still have to find that Respondent breached the FET standard as it has breached its obligations of good faith and consistency.
281. Claimant argues that the invalidity of rights under municipal law, if they created expectations to the investor, cannot be invoked against him to allege that those expectations were not legitimate. Claimant does not allege a breach of his legitimate expectations because Respondent failed to perform a contractual agreement, but because the State declared that agreement invalid after having agreed to it. The State cannot assert the invalidity of a contract which it drafted and concluded.
282. With regard to the airport store, Mr. Arif was certain that Moldova fully approved and supported his investment. The legality of the Lease Agreement is irrelevant for purposes of Mr. Arif's legitimate expectations. There is no reason why Le Bridge could have reasonably known that, by putting its goods at the airport, it would never be able to have access to them before they became outdated and/or expired.
283. Claimant's legitimate expectation that he would finally be allowed to open his flagship store at the airport arises out of the express admission of the Attorney General that there were grounds to discipline Judge Namasco for his decision of November 10, 2009, which prevented Mr. Arif from opening the store. Claimant was left hanging in limbo and was eventually told that the disciplinary proceedings had been terminated, without any further explanation.
284. With regard to the border stores, Claimant further alleges the following. In relation to Ungheni, the Customs Service did not offer to Le Bridge the location that Claimant expected to have since the Tender began. Le Bridge's legitimate

expectation to open a duty free store in Ungheni arose out of both the Tender, and the July 1, 2008 Agreement.

285. The fire inspection authorities interfered just before the opening of Claimant's stores, despite Claimant's legitimate expectation to be able to open his stores after having received all necessary certificates.
286. Regarding the intervention of the NACP, Claimant's legitimate expectations for exclusivity do not arise out of purely contractual rights. They arise out of the fact that different organs of Moldova promised him exclusivity. Claimant is not claiming a breach by Moldova of the July 1, 2008 Agreement but a breach of international law. Claimant legitimately expected that the State would act with consistency and transparency, and that his exclusivity right, granted by various organs of Moldova, would not be taken away by other organs, namely the NACP and subsequently the local Customs Services.
287. Regarding the locations granted to Dufremol in Leuseni and Cahul, Claimant legitimately expected to be granted exclusivity on the border crossings. Claimant also legitimately expected that the State would act in good faith towards his investment and himself.
288. Regarding the cancellation of the Tender and the July 1, 2008 Agreement by the Supreme Court's decision of November 24, 2010, the judiciary, an organ of the State, took away from Claimant what other organs had granted him and what he believed in good faith to be valid. Irrespective of the correctness of the court's decision, it has resulted in a breach of Claimant's legitimate expectations. Indeed, Claimant legitimately expected to be treated with consistency by the State, and that the State would act in good faith in relation to his investment.
289. With regard to Claimant's harassment, Claimant did also have legitimate expectations that the State would act in good faith in relation to his investment. He could not have legitimately expected that he would be subject to tax evasion allegations without any justification, having been one of the most reliable

Moldovan taxpayers over the years, and without allegations of wrongdoing having ever been raised against him.

(iv) *Arbitrary and unreasonable measures: Article 4 of the BIT*

290. Claimant maintains by way of precaution that he is entitled to be protected against such measures pursuant to the MFN clause of the BIT, in case the Tribunal should find that the standard differs from that of the FET standard.

(v) *Full Protection and Security: Article 5 of the BIT*

291. Claimant further argues that a treatment that is unfair and inequitable automatically entails the absence of full protection and security, and that the FPS standard is related to the FET standard of the BIT.

292. If the Parties had intended to limit the State's obligation of FPS to physical interferences, they would have expressly stated so in the BIT, but they did not. Consistent ICSID case law confirms that the FPS standard encompasses the legal security in which an investment operates.

(vi) *Discriminatory measures: Article 4 of the BIT*

293. Claimant had an exclusive right to operate duty free stores at the Romanian borders. This right arose from both the Tender and the July 1, 2008 Agreement. Indeed, the July 1, 2008 Agreement specifically indicated that the only way a competitor would be able to open a duty free store at the border crossings was by winning a public tender organized to this effect after the expiry of the Agreement. This notwithstanding, Dufremol was granted the right to open duty free stores at Leuseni and Cahul via a directly negotiated lease contract and before the expiry of the July 1, 2008 Agreement.

294. Mr. Arif points out that Respondent does not dispute that Article 4 of the BIT encompasses protection against discriminatory measures. Claimant adds that this protection also stems from the MFN clause of the BIT.

(vii) *Denial of Justice*

295. Claimant further alleges in his Reply that, if a judicial system is unable, incapable or unwilling to correct the actions of individual judges who patently disregarded fundamental procedural rules, then the State which is responsible for the administration of justice cannot be excused from the international delict that stems from that failure of the judiciary. The State therefore has full responsibility for the damage that the foreigner suffered as a result of the judiciary's delict.
296. Mr. Arif has not made any specific claims of corruption against the Moldovan judiciary, other than noting the content of reports published by international organizations.
297. Denial of justice is a breach of FET. As such, there is no need for Mr. Arif to have been denied justice personally, as alleged by Respondent. Rather, it is sufficient for a denial of justice to have taken place which deprived Mr. Arif of his investment; this in turn, constitutes a breach by Moldova of its obligations to accord FET to Claimant's investments. Given that the BIT protects indirect investments, it is undisputable that Mr. Arif in his capacity as an indirect investor, has standing before this Tribunal to bring a claim against Moldova for breaches of its obligations under the BIT and international law.
298. Claimant reiterates his position that he was the victim of both a procedural and a substantive denial of justice. With regard to the latter Moldova egregiously misapplied the law by unlawfully cancelling the Lease Agreement, the Tender results and the July 1, 2008 Agreement.
299. Claimant alleges that the Airport State Enterprise sent to the SACA for approval the Airport Lease Agreement, which is virtually identical to the sample lease agreement contained in Regulation No. 483. The Airport Lease Agreement itself makes clear, at Articles 3.1 and 8.1, that it is effective only once it has been approved by the SACA. The lessee selection procedure, i.e. direct negotiations as opposed to a tender, is also implicitly indicated in the Airport Lease Agreement, as there is no reference to a tender, but rather a preamble stating that the Airport State Enterprise and Le Bridge "*have concluded the following*

*Agreement.*” On August 5, 2008, the SACA approved the Airport Lease Agreement including, implicitly, the lessee selection procedure, and returned it to the Airport State Enterprise. The Board of Directors of the Airport State Enterprise then officially endorsed the Airport Lease Agreement by way of Minutes No. 9, dated August 13, 2008.

300. With regard to the Tender, Claimant reiterates that the Moldovan courts dishonestly reformulated one technical specification in the Tender documents, by requiring 5 years of experience in the duty free sector rather than in commercial activity in general.

*(viii) Compensation*

301. Respondent’s non-payment of compensation for the expropriation of Claimant’s investment constitutes a further breach of its obligations under the BIT and international law.

***b) Reparation***

302. With regard to causation, neither Le Bridge’s successful participation in the Tender nor the July 1, 2008 Agreement nor the Lease Agreement are invalid pursuant to Moldovan law. The Tender, the July 1, 2008 Agreement, and the Lease Agreement are State acts that were fully endorsed by Moldova, and it is on this basis that Mr. Arif made his investment in the duty free sector. In any event, any invalidity under Moldovan law would be inapposite to Mr. Arif under international law.
303. With regard to restitution, the Tribunal should either deny Moldova’s reservation of rights or accept such reservation and acknowledge the corollary of a request for restitution, namely that Mr. Arif’s rights cannot be illegal under Moldovan law.
304. With regard to satisfaction, Mr. Arif reiterates that his denial of justice claim is an alternative claim and further reiterates that the Tender results, the July 1, 2008 Agreement and the Lease Agreement were all carried out in accordance with Moldovan law. In any event, Respondent’s contention that satisfaction is the

appropriate remedy is unsupported by ICSID case law, as it applies solely to State-to-State disputes.

**c) *Claim for Relief***

305. Claimant respectfully requests the Arbitral Tribunal, without prejudice to any other/further claims Claimant might be entitled to in this Arbitration, to:

a) Dismiss Respondent's objections to the Tribunal's jurisdiction in their entirety;

b) Find that it has jurisdiction over Mr. Arif's claims and find Claimant's claims are admissible;

c) Declare that Respondent has breached its obligations toward Claimant under the BIT and international law;

d) Order Respondent to pay Claimant damages in the amount of €27,962,700 for Respondent's breaches of its obligations under the BIT and international law, which resulted in delays to the opening of all four border duty free stores, in the loss of exclusivity at two stores, and the taking of his investment, as set forth at paragraph 701 of Claimant's Reply;

d.1) Alternatively, order Respondent to pay Claimant damages in the amount of €23,326,700, as set forth at paragraph 702 of Claimant's Reply;

d.2) As a second alternative, order Respondent to pay Claimant damages in the amount of €19,149,800, as set forth at paragraph 703 of Claimant's Reply;

d.3) As a third alternative, order Respondent to pay Claimant damages in the amount of €16,120,800 as set forth at paragraph 704 of Claimant's Reply.

e) Order Respondent to pay Claimant damages in the amount of €5,407,600 for Respondent's breaches of its obligations under the BIT

and international law, which prevented Claimant from ever opening his airport duty free store, and resulted in the cancellation of the Airport Lease Agreement;

e.1) Alternatively, order Respondent to pay Claimant the sunk costs associated with the airport store, which amount to €2,455,110;

f) Order Respondent to compensate Claimant in the amount of EUR 5,000,000 for the damages Claimant suffered, including harassment, intimidation, humiliation, shame, shock, stress, degradation, loss of personal reputation as well as loss of corporate credit affecting his broader business activities;

g) Order Respondent to pay Claimant the costs of this arbitration, including all expenses that he has incurred, and including all of the fees and expenses of the arbitrators, ICSID, legal counsel, experts and consultants, as well as Claimant's expenses in pursuing this arbitration;

h) Order Respondent to pay Claimant compound interest at a rate of LIBOR +2 compounded semi-annually, to be established on the above amounts as of the date these amounts are determined to have been due to Claimant;

i) Order Respondent to pay the above amounts outside of the Republic of Moldova without any right of set-off; and

j) Order any other and further relief as the Arbitral Tribunal shall deem appropriate.

306. In his letter of December 3, 2012 to ICSID, Claimant amended his claim for relief in the following terms:

*"In closing, Claimant reiterates his amended relief sought as follows:*

*12. Claimant's request for relief remains for compensation of damages arising out of Moldova's breaches of the BIT and/or international law, which resulted in (i) the delayed opening of the four duty free border stores, (ii) the loss of exclusivity at two stores, (iii) the taking of his investment in respect of the four border stores, (iv) the taking of his investment in relation to the Airport, and (v) moral damages, namely, as set forth at paragraph 812 of the Reply:*

*12.1. Dismiss Respondent's objections to the Tribunal's jurisdiction in their entirety;*

*12.2. Find that it has jurisdiction over Mr. Arif's claims and find Claimant's claims are admissible;*

*12.3. Declare that Respondent has breached its obligations toward Claimant under the BIT and international law;*

*12.4. Order Respondent to pay Claimant damages in the amount of €27,962,700 for Respondent's breaches of its obligations under the BIT and international law, which resulted in delays to the opening of all four border duty free stores, in the loss of exclusivity at two stores, and the taking of his investment in respect of the border stores, broken down, as also set forth in the Reply at paragraph 701, as follows:*

- €554,791 for the delays,*
- €22,765,500 for the loss of exclusivity,*
- €4,636,010 for the taking of his investment in respect of the four border stores.*

*12.4.1. In the alternative, if the Tribunal believes that the dispute in relation to the taking of Claimant's investment in respect of the border stores is not ripe, Claimant's claim is for damages in the amount of €23,326,700, as set forth at paragraph 702 of the Reply, comprising of €554,791 for the delays, and €22,765,500 for the loss of exclusivity, together with the amended request for declaratory relief set forth below at paragraph 13.*

12.4.2. As a second alternative, if the Tribunal were to determine that the dispute in relation to the border stores is ripe, and in case it deems that Claimant would only have benefited from the limited period from November 2009 until August 1, 2023, and that the border stores would be definitively closed by 2013, Claimant's claim is for damages in the amount of €19,149,800, broken down, as set forth at paragraph 703 of the Reply, as follows:

- €542,037 for the delays,
- €15,572,400 for the loss of exclusivity,
- €3,029,030 for the taking of his investment in respect of the four border stores.

12.4.3. As a third alternative, if the Tribunal believes that the dispute in relation to the taking of Claimant's investment in the border stores is not ripe, and in case it deems that Claimant would only have benefited from the limited period from November 2009 until August 1, 2023, Claimant's claim is for damages in the amount of €16,120,800, as set forth at paragraph 704 of the Reply, comprised of €542,037 for the delays, and €15,572,400 for the loss of exclusivity, together with the amended request for declaratory relief set forth below at paragraph 13 below.

12.5. Order Respondent to pay Claimant damages in the amount of €5,407,600 for Respondent's breaches of its obligations under the BIT and international law, which prevented Claimant from ever opening his Airport duty free store, and resulted in the cancellation of the Airport Lease Agreement;

12.5.1. Alternatively, order Respondent to pay Claimant the sunk costs associated with the Airport store, which amount to €2,455,110.

12.6. Order Respondent to compensate Claimant in the amount of EUR 5,000,000 for the damages Claimant suffered, including harassment, intimidation, humiliation, shame, shock, stress,

*degradation, loss of personal reputation as well as loss of corporate credit affecting his broader business activities;*

*12.7. Order Respondent to pay Claimant the costs of this arbitration, including all expenses that he has incurred, and including all of the fees and expenses of the arbitrators, ICSID, legal counsel, experts and consultants, as well as Claimant's expenses in pursuing this arbitration;*

*12.8. Order Respondent to pay Claimant compound interest at a rate of LIBOR +2 compounded semi-annually, to be established on the above amounts as of the date these amounts are determined to have been due to Claimant;*

*12.9. Order Respondent to pay the above amounts outside of the Republic of Moldova without any right of set-off; and*

*12.10. Order any other and further relief as the Arbitral Tribunal shall deem appropriate.*

*13. As an alternative to Claimant's claim for damages arising out of the taking of the border stores, in case the Tribunal were to find that the dispute is not ripe in respect of the taking of Claimant's investment in the border stores, Claimant requests a declaratory relief to the effect that Claimant has an entitlement under international law to continue operating the four border stores, reinforced by an order against Respondent to pay a sum of 10,000 USD per store, per day of interruption, throughout the duration of the four border lease agreements, plus the renewal period, i.e. until August 1, 2038, in case Respondent or one of its organs, authorities or agencies were to prevent the operation of the four border stores save for any fundamental breach under international law by Claimant of its obligations in relation to the lease agreements.*

*14. In such case, the claims for damages as a result of the breach of the BIT in relation to the delays and the loss of exclusivity will remain unchanged, namely in the amount of €23,326,700, as set forth at paragraph 12.4.1. above."*

#### 4. Respondent's Rejoinder.-

##### a) *Alleged Breaches*

##### (i) *Expropriation: Article 5 of the BIT*

307. Respondent reiterates its arguments and further alleges the following. Claimant must demonstrate that the “investment” allegedly expropriated actually “belonged” to him, as required by Article 5 of the BIT. All of Respondent’s measures were aimed at the “general welfare” and fall squarely within the scope of police powers. Claimant cannot identify any specific commitment of the State in the Tender, the July 1, 2008 Agreement or the Lease Agreement to the effect that the State would have exempted Le Bridge and Mr. Arif from the application of Moldovan law as a special inducement for the investment. With regard to the airport store, Respondent submits that the cancellation of the Lease Agreement does not constitute an expropriation within the meaning of Article 5 of the BIT because it resulted from the application of Moldovan law on the lease of unused State Property to a lease that had been entered into in violation of those laws. Respondent also alleges that successive arbitral awards have held that expropriation by court decisions requires a finding of a denial of justice, whether procedural or substantive. The Moldovan law on the lease of unused State assets is not contrary to Moldova’s international obligations, Respondent argues. Therefore, the application of that law does not put Moldova in contradiction with its international obligations.

308. With regard to the exclusivity right, Respondent notes that the list of state monopolies excluded from the scope of the Law on Protection of Competition does not include the duty-free business, fact which Claimant himself recognized in a letter to the Ministry of Economy. With regard to the border stores, Respondent submits that, on October 17, 2012, the Supreme Court of Justice overturned the decision of the Chisinau Court of Appeal of December 28, 2011 invalidating the local lease contracts and, as a result thereof, Le Bridge continues to operate the border stores.

(ii) *Breach of the “specific commitments” obligation: Articles 9, 5 and 4 of the BIT*

309. Respondent further alleges in relation to the July 1, 2008 Agreement that Le Bridge and a State organ simply entered into a contract that was subject to Moldovan law. Rather than providing any guarantee that the entire Agreement was valid or not subject to local law, the Agreement (i) was explicitly subject to Moldovan law and (ii) specifically contemplated the potential invalidity of provisions by including a severability clause in Clause 20.5. Neither the NACP nor the Moldovan Courts, which were undeniably competent to apply the law, can be accused of having purported to accept the validity the July 1, 2008 Agreement, only to reverse that position at a later date.

(iii) *Breach of FET: Article 3 of the BIT*

310. This is not a case of a State reneging on its own promises, but rather of the normal operation of State regulation - moreover instigated by claims of a private competitor, and not the government - to verify whether a private actor behaved in conformity with the law.

311. Le Bridge itself committed acts in violation of Moldovan law in order to lay claim to a number of “investment” rights. Claimant cannot now rely on these rights to argue that these created legitimate expectations. Le Bridge entered into those contracts with full knowledge of the risk it was taking. No State actor ever made any representations to Mr. Arif to make him believe that he had complied with the law.

312. With regard to the cancellation of the Tender by the Supreme Court on November 24, 2010, Respondent further argues that it is entirely consistent with the proper administration of the State that the judiciary should review and cancel contractual arrangements when those have been entered into by reason of a misrepresentation made by the investor, as that is the only guarantee of fair and open competition.

(iv) *Arbitrary and unreasonable measures: Article 4 of the BIT*

313. Given that Claimant has refused to withdraw this improper claim, despite admitting to its flaws, Respondent requests that the Tribunal dismiss it.

(v) *Full Protection and Security: Article 5 of the BIT*

314. Claimant has failed entirely to make an independent claim of violation of the full protection and security obligation. The BIT addresses FPS and FET in two separate articles.

(vi) *Discriminatory measures: Article 4 of the BIT*

315. Respondent further alleges that it does not accept that non-discrimination is a stand-alone standard of the Treaty, as opposed to an element of FET.

(vii) *Denial of Justice*

316. Respondent further submits that all of Claimant's arguments relating to the court proceedings are at their heart merely requests that this Tribunal review and reconsider decisions of the Moldovan judiciary as if they were before it on appeal.

(viii) *Compensation*

317. Respondent has already refuted Mr. Arif's claim that he should be compensated even if no illegal expropriation is established.

**b) *Reparation***

318. With regard to causation, should the Tribunal find that Mr. Arif and Le Bridge did act illegally, but agree with Claimant that this is irrelevant, then, even if Respondent's judicial and competition authorities violated international legal norms when they reacted to that illegality, it remains the case that, but for Mr. Arif's and Le Bridge's unlawful acts, Claimant would have suffered no harm.

319. With regard to restitution, should the Tribunal find that it has jurisdiction in this case and that Moldova has committed one or more internationally wrongful acts,

Respondent requests that it should be granted the right to determine within 60 days, in light of each of the breaches thus found, if restitution appears materially possible and, in that case, to provide restitution as an alternative to any damages the Tribunal may award. Such a remedy would put Claimant exactly in the position he would have been in had there not been any violation of the BIT. Such a remedy would avoid giving Claimant windfall profits for the exclusivity that he seeks to obtain by an order of damages.

320. With regard to satisfaction, should the Tribunal find that the Moldovan judiciary engaged in egregious conduct amounting to a procedural denial of justice, but that Mr. Arif's investments were in any event unlawful, then a declaration of wrongfulness and an apology for the conduct of the courts would be the appropriate remedy.

***c) Claim for Relief***

321. For the foregoing reasons, Respondent respectfully requests the Tribunal to:

- a) Declare that it does not have jurisdiction over Claimant's claims;
- b) To the extent it decides it has jurisdiction over Claimant's claims for a breach of a "specific undertaking," declare that such claims are inadmissible;
- c) To the extent it decides it has jurisdiction over Claimant's claims, and that they are admissible, declare that Respondent has not breached any of its obligations toward Claimant;
- d) To the extent it decides that Respondent committed an internationally wrongful act through a denial of justice, declare that satisfaction by way of a declaration of wrongfulness is the appropriate form of reparation;
- e) To the extent it declares Respondent responsible for any internationally wrongful acts towards Claimant for which compensation is required, decide that Respondent's duty of reparation shall be in the form of either

restitution, to be provided at Respondent's option within 60 days of receipt of the final award, or payment in amounts not to exceed those indicated in paragraphs 826/827 of the Counter-Memorial;

f) To the extent it declares Respondent liable to pay damages for the expropriation of any investment, to order Claimant to transfer all rights and interests in such investments to Respondent upon payment of the ordered damages; and

g) Order Claimant to pay Respondent's expenses (including legal and expert fees and disbursements) and the other costs of the arbitration, pursuant to Article 61(2) of the ICSID Convention and Article 47(1)(j) of the ICSID Arbitration Rules.

322. In its letter of December 3, 2012 to ICSID Respondent stated that: *“Respondent indicated at the hearing, restitution of exclusivity rights would in the event not be possible to implement, as such rights would violate the mandatory rules of Moldovan law on the protection of competition... Respondent does not consider it necessary to amend the relief requested at paragraph 490(E) of the Rejoinder, as set out above, except as clarified in this letter with respect to exclusivity.”*

## **V. JURISDICTION.-**

### **A. Provisions Applicable to the Tribunal's Jurisdiction.-**

323. The provisions applicable to the Tribunal's jurisdiction are Article 25 of the ICSID Convention and Articles 1 and 7 of the BIT.

324. Article 25 of the ICSID Convention reads in its relevant part:

*“(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which*

*the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*

*(2) “National of another Contracting State” means:*

*(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute...”*

325. Article 7 of the BIT is entitled “Settlement of disputes between an investor and a Contracting Party” and reads:

*“Any disputes relating to investments between one of the Contracting Parties and a national or a company of the other Contracting Party will be settled amicably between the two parties involved.*

*If such dispute cannot be settled within six month following a party to the disputes’ raising of it, it will be submitted, at the request of one of these parties, to the arbitration of the International Centre for the Settlement of Investment Disputes (ICSID), created by the Convention on the Settlement of Investment Disputes between States and nationals of Other States, signed in Washington, on March 18, 1965.”*

326. Article 1 of the BIT contains the definition of the term “investment” and “national” and reads in its relevant part:

*“For the purposes of the application of this Treaty:*

*1) The term “investment” means all the assets, such as goods, rights and interests of all kinds and, particularly, but not exclusively:*

*a) movable and immovable assets, as well as all other property rights, such as mortgages, privileges, beneficial rights, guarantees and all similar rights;*

*b) Shares, share premiums and other forms of participation, even minor or indirect, in companies established in the territory of one of the Contracting Parties;*

*c) Bonds, receivables, and claims to any performance having an economic value;*

*d) Intellectual, commercial and industrial property rights, such as copyrights, patents, licenses, registered trademarks, industrial models and prototypes, technical processes, know-how, brand names and goodwill;*

*e) Concessions granted by law or under an agreement, namely concessions concerning research, exploitation, extraction or mining of natural resources, including those located in the maritime area of the Parties.*

*It is understood that the mentioned assets must be or have been invested in accordance with the legislation of the Contracting Party, on the territory or maritime area of which the investment is made, before or after the entry into force of the present Agreement...*

*...2) The term “nationals” means any natural person having the nationality of one of the Contracting Parties...”*

## **B. Analysis.-**

### **1. Admissibility of Respondent's Objections to Jurisdiction.-**

327. Rule 41(1) of the ICSID Arbitration Rules states: “*Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder-unless the facts on which the objection is based are unknown to the party at that time.*”

328. Respondent requested an extension for the filing of its Counter-Memorial by letter of April 2, 2012. Under the authority granted to the Tribunal by the Parties, pursuant to Sections 10.2 and 13.3 of the Minutes of the First Session, by letter of the Secretariat to the Parties on behalf of the Tribunal of April 5, 2012,<sup>110</sup> the Tribunal amended the calendar of the proceedings granting to Respondent an extension for the filing of its Counter-Memorial on jurisdiction, merits, and quantum until May 31, 2012.

329. Respondent filed its jurisdictional objections with its Counter-Memorial within the time limit fixed in the amended calendar, in compliance with Article 41(1) of the Arbitration Rules. Moreover, the Tribunal is satisfied that Respondent filed its jurisdictional objections in good faith as early as possible in light of the amended procedural calendar. Claimant's argument that the Tribunal has authority to amend time limits for the filing of the Counter-Memorial but not for the filing of jurisdictional objections finds no support in the ICSID Arbitration Rules and is based in an improper reading of Article 41(1) of the Arbitration Rules. Therefore it is rejected by this Tribunal.

330. Accordingly, Claimant's objections to the admissibility of Respondent's objections to jurisdiction are rejected.

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<sup>110</sup> See letter from ICSID to the Parties dated April 5, 2012, Exhibit R-127 to Respondent's Rejoinder.

## 2. Amicable Settlement.-

331. Article 7 of the BIT provides:

*“Any disputes relating to investments between one of the Contracting Parties and a national or company of the other Contracting Party will be settled amicably between the two parties involved.*

*If such dispute cannot be settled within six month following a party to the disputes’ raising of it, it will be submitted, at the request of one of these parties, to the arbitration of the International Centre for Settlement of Investment Disputes (ICSID), created by the Convention on the Settlement of Investment Disputes between States and nationals of Other States, signed in Washington, on March 18, 1965.”*

332. Article 26 of the ICSID Convention provides that: *“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”*

333. Firstly, the Tribunal notes that Article 26 of the ICSID Convention constitutes an express waiver of the rule of exhaustion of local remedies in ICSID arbitrations. The Tribunal further notes that Article 7 of the BIT does not provide for the exhaustion of local remedies before arbitration can commence.

334. In light of the above, the Tribunal agrees with Claimant that there is no general requirement to exhaust local remedies for a treaty claim to exist (unless such a claim is for denial of justice). The fact that the alleged wrongful acts mainly relate to acts of the judiciary does not necessarily mean that local remedies should be exhausted before an international claim can arise. A court may violate a BIT standard directly and this breach will be attributable to the respondent

State without there being any requirement to exhaust local remedies, unless it is a breach for denial of justice.<sup>111</sup>

335. Therefore, the Tribunal rejects Respondent's argument that no dispute existed when Mr. Arif sent his notice on May 14, 2010 because first instance court decisions cannot be deemed to engage the State's responsibility and the dispute was not ripe for this reason.

336. The Tribunal further notes that in the letter of May 14, 2010<sup>112</sup> to Respondent, Claimant refers not only to wrongful acts by the judiciary, but also to "*abusive acts of the authorities of the Republic of Moldova*" and the "*lack of adequate actions of the authorized central public authorities.*" Claimant is therefore alleging wrongful acts not only of the Moldovan judiciary, but also of other organs of Moldova.

337. Secondly, in his letter of May 14, 2010, Claimant expressly states that: "*This note is being sent under Article 7 of the Agreement on Mutual Encouragement and Protection of Investments as of 08.09.1997 entered into by the Government of the Republic of Moldova and the Government of the French Republic (Bilateral Agreement) and is aimed at amiably solving the investment dispute that arose between the Republic of Moldova and the foreign investor Arif Franck Charles, citizen of the French Republic.*" Claimant makes it clear that he considers this letter to be a notice for purposes of compliance with the "cooling off" period in Article 7 of the BIT. Claimant identifies therein three possible breaches of the BIT: a breach for unlawful expropriation, a breach of the Full Protection and Security standard ("FPS") and a breach of the Fair and Equitable Treatment standard ("FET"). Finally, Claimant states that: "*The foreign investor Arif Franck Charles, citizen of the French Republic has declared to be open for any constructive suggestion aimed at amicable and effective settlement of appeared disagreements by means of elimination of illegal and destructive actions related to investments of the undersigned.*"

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<sup>111</sup> See Newcombe A., Paradell, L., *Law and Practice of Investment Treaties. Standards of Treatment*, Kluwer Law International, 2009, para. 6.6.

<sup>112</sup> See Letter from Claimant to the Government of Moldova, dated May 14, 2010, Exhibit C-34 to Request for Arbitration.

338. On July 12, 2011, Claimant sent a second letter seeking to settle the dispute amicably.<sup>113</sup> Although by July 2011 the dispute had significantly aggravated, the Tribunal finds that Claimant’s allegations in the above letter, which Respondent admits does contain a description of the dispute now at stake before the Tribunal,<sup>114</sup> are essentially the same as those contained in his letter of May 14, 2010: a breach for unlawful expropriation, a breach of FET and a breach of FPS<sup>115</sup> due to wrongful acts of both the judiciary and of other organs of the Republic of Moldova. Therefore, even if the letter under consideration further develops the allegations made by Claimant in his letter of May 14, 2010, mainly in light of the aggravation of the dispute, the essence of Claimant’s complaints is the same in both letters. The Tribunal therefore rejects Respondent’s argument that the nature and scope of the claims raised in the letter of May 14, 2010 are entirely different from the claims at stake in this arbitration. In this letter, Claimant reiterated his desire to settle the dispute amicably.<sup>116</sup>

339. Moreover, the Tribunal agrees with Claimant that the notice of a dispute need not be detailed or exhaustive. The Tribunal agrees with the *Salini* Tribunal’s finding that: “*The Tribunal considers that the attempt to reach an amicable settlement should essentially include the existence of grounds for complaint and the desire to resolve these matters out-of-court. It need not be complete or detailed*”.<sup>117</sup> The International Court of Justice has defined a dispute as “*a disagreement on a point of law or fact, a conflict of legal views or interests between the parties.*”<sup>118</sup> The Tribunal is satisfied that the letter of May 14, 2010 was a valid notice of a dispute between the Parties, irrespective of the actual

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<sup>113</sup> See Notice Letter sent by Derains & Gharavi to Respondent, dated July 12, 2011, Exhibit C-35 to Request for Arbitration.

<sup>114</sup> See Respondent’s Counter-Memorial, para. 318.

<sup>115</sup> See Notice Letter sent by Derains & Gharavi to Respondent, dated July 12, 2011, Exhibit C-35 to Request for Arbitration, in which Claimant further alleges a breach for discriminatory and arbitrary measures.

<sup>116</sup> See Notice Letter sent by Derains & Gharavi to Respondent, dated July 12, 2011, Exhibit C-35 to Request for Arbitration, para. 30: “*Yet, we hereby call, in a last effort to settle this dispute amicably, for the amicable resolution of the dispute. Failing a positive response within two weeks committing to amicably resolve the dispute, however we will have no choice but to initiate ICSID proceedings for the settlement of this dispute.*”

<sup>117</sup> See Claimant’s Reply, para. 205 and *Salini Costruttori S.p.A and Italstrade S.p.A v. Kingdom of Morocco*, Decision on Jurisdiction of July 16, 2001, ICSID Case No. ARB/00/4, para. 20.

<sup>118</sup> See Schreuer, C.H., *The ICSID Convention. A Commentary*, Second Edition, 2010, Cambridge University Press, p. 93.

existence or validity of the specific legal rights involved. Therefore, it rejects Respondent's argument that no dispute with regard to the airport store could have existed in May 2010 because Le Bridge had not yet obtained the Security Certificate for the store (which it only obtained on June 18, 2010).

340. The Tribunal further notes that the fact that by May 14, 2010 the Republic of Moldova had not yet ratified the ICSID Convention<sup>119</sup> is irrelevant for a finding of a dispute under the BIT and for the assessment of Moldova's opportunity to engage in settlement discussions with Claimant. Claimant sent two formal letters to Respondent giving notice of the existence of a dispute and expressing his willingness to find an amicable solution with Respondent. In light of the record, the Tribunal rejects Respondent's arguments that it never had a fair opportunity to engage in settlement discussions at any time after the dispute had actually ripened and that Mr. Arif did not pursue in good faith the negotiations he had started.

341. The Tribunal therefore finds that Claimant's letter of May 14, 2010 is a valid notice of a dispute for the purposes of Article 7 of the BIT. The Request for Arbitration was filed on July 29, 2011, i.e. more than 14 months after the first notice of a dispute. Consequently, the Tribunal decides that the "cooling off" period of six months provided for in Article 7 has been amply complied with by Claimant.

342. Given the finding that Claimant complied with the "cooling off" period in Article 7, the Tribunal need not address the remaining arguments of the Parties regarding this objection. For the above reasons, Respondent's objection to jurisdiction on the grounds of a failure by Claimant to comply with the amicable settlement provision in Article 7 is dismissed.

### **3. Ripeness of the Claims.-**

343. The Tribunal notes that Respondent does not raise its objection to jurisdiction on the basis of Article 26 of the ICSID Convention. It already noted above that the

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<sup>119</sup> The ICSID Convention was ratified by Moldova on May 2011.

BIT contains no requirement to exhaust local remedies before commencing arbitration.

344. According to Article 4 of the ILC Articles on State Responsibility: “*The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other function...*”<sup>120</sup>
345. The ICSID system is not intended to be a subsidiary system of dispute settlement in case the host State’s legal system fails, but rather it is set up as an alternative to the host State’s remedies in case of an investment dispute. As already mentioned above, there is no general requirement to exhaust local remedies for a treaty claim to exist, unless such a claim is for denial of justice. In a claim for denial of justice, the conduct of the whole judicial system is relevant, while in a claim for expropriation, it is the individual action of an organ of the State that is decisive.<sup>121</sup>
346. Even for claims for denial of justice, the exhaustion of local remedies is a question to be addressed with the merits of the dispute. It is a substantive standard, rather than a procedural bar.<sup>122</sup> Moreover, according to ICSID case law, no such substantive requirement applies in principle to expropriation claims.<sup>123</sup>
347. In light of the above, the Tribunal finds that, as a matter of principle, in accordance with Article 4 of the ILC Articles on State Responsibility, court decisions can engage a State’s responsibility, including for unlawful

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<sup>120</sup> See Crawford, J., *The International Law Commission’s Articles on State Responsibility. Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 94.

<sup>121</sup> See Ursula Kriebaum, *Local Remedies and the Standards for the Protection of Foreign Investment*, in Binder C., Kriebaum, U., Reinisch, A., Wittich, S., *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer*, Oxford University Press, 2009, p. 426, 456.

<sup>122</sup> See Ursula Kriebaum, *Local Remedies and the Standards for the Protection of Foreign Investment*, in Binder C., Kriebaum, U., Reinisch, A., Wittich, S., *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer*, Oxford University Press, 2009, p. 424.

<sup>123</sup> See *Saipem S.p.A v. The People’s Republic of Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures of March 21, 2007, ICSID Case No. ARB/05/07, para. 151: “*As a matter of principle, exhaustion of local remedies does not apply in expropriation law*”. See also Ursula Kriebaum, *Local Remedies and the Standards for the Protection of Foreign Investment*, in *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer*, Oxford University Press, 2009, p. 429.

expropriation, without there being any requirement to exhaust local remedies (unless claims for denial of justice have been made). Respondent's argument that there can be no international wrongful act or Treaty dispute arising from a court decision until the entire justice system has heard the case is therefore rejected. The Tribunal notes that to develop this argument Respondent has only relied on cases where a denial of justice claim was under consideration.

348. In other words, the Tribunal finds that Mr. Arif's claims for complete expropriation and breach of specific undertakings regarding the border duty free stores are jurisdictionally ripe for arbitration, notwithstanding the fact that the Supreme Court of Justice's decision of October 17, 2012 overturned the decision of the Chisinau Court of Appeal of December 28, 2011 regarding the validity of the local lease agreements, and that the case was sent back to the lower courts for further proceedings.

349. The decision of the Supreme Court of Justice of October 17, 2012 and its potential effects, if any, over the alleged claims under the BIT, is a question to be addressed with the merits.

350. In light of the Tribunal's finding that the claims are jurisdictionally ripe for arbitration, notwithstanding the decision of the Supreme Court of October 17, 2012, there is no need to address the remaining arguments made by the Parties regarding this objection.

351. For the above reasons, Respondent's objection to jurisdiction with regard to the claims in relation to the creation and opening of the border duty free stores (i.e.: claim for complete expropriation and for breach of specific undertakings regarding the border stores) based on the lack of ripeness of these claims, is dismissed.

#### **4. Nationality.-**

352. Article 1(2) of the BIT provides that: "*The term "nationals" means any natural person having the nationality of one of the Contracting Parties.*"

353. And Article 25(2)(a) of the ICSID Convention provides that “national of another Contracting State” means “...any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute...”

354. The Tribunal notes that both Parties agree that it is an established principle of international law that a State is sovereign in establishing the legal conditions which must be fulfilled by an individual in order to be considered to be vested with its nationality. In other words, nationality is within the domestic jurisdiction of the State.<sup>124</sup> The Tribunal finds that it has the authority to review the nationality of Claimant at the relevant dates *as per* Article 25(2)(a) of the ICSID Convention.<sup>125</sup>

355. The Tribunal further notes that Respondent is not alleging that Mr. Arif did not hold French nationality under Decree dated March 10, 2005 at any of the relevant dates pursuant to Article 25(2)(a) of the ICSID Convention, but rather alleges that Claimant’s nationality was not granted in accordance with French law, implying that the Decree granting nationality of March 10, 2005 is invalid.

356. It is undisputed between the Parties that Claimant was granted French nationality by Decree dated March 10, 2005.<sup>126</sup> The Tribunal finds that this is strong and

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<sup>124</sup> See Respondent’s Counter-Memorial, para. 350; Claimant’s Reply, para. 268.

<sup>125</sup> The Parties seem to agree on this point. See Hearing Transcript, Day 1, p. 17 where Claimant’s counsel states that: “...*The Arbitral Tribunal, you have obligation, the duty, the right to check the nationality of the Claimant at the date of the request for arbitration, and on the date of registration...*” and p. 91 where counsel for Respondent states that: “*It is not disputed that French law applies and it is well established, and I think it was virtually admitted this morning, that this tribunal, or in general, at least, international tribunals have the authority to review and in fact must review the nationality of a claimant...*”

<sup>126</sup> See French Naturalisation Decree, Official Journal of the French Republic, dated March 12, 2005, Exhibit R-17 to Respondent’s Counter-Memorial. Respondent admitted at the first day of the Hearing that the Decree is a constitutional act, i.e. that the Decree is the act that grants nationality under French law, as opposed to a certificate of nationality which is a declaratory act which is simply *prima facie* evidence for nationality (see Hearing Transcript, Day 1, p. 230 and 231). This admission from Respondent at the Hearing contrasts with its previous position regarding this issue under which “*a Decree of naturalisation*

convincing evidence that Mr. Arif acquired French nationality in accordance with French law. Claimant has also presented his French passport and his French nationality identity card before this Tribunal.<sup>127</sup>

357. This Tribunal does not consider appropriate to exercise its control over the French authorities' decision to grant French nationality to Mr. Arif. Following the reasoning of the Tribunal in *Micula*,<sup>128</sup> it would only be inclined to disregard the decision of the French authorities if "*there was convincing and decisive evidence*" that Mr Arif's acquisition of French nationality "*was fraudulent or at least resulted from a material error. It is for Respondent to make the showing. For this purpose casting doubt is not sufficient.*" Respondent has not proved that Mr. Arif's nationality was obtained fraudulently or resulted from a material error of the French authorities.

358. This Tribunal is therefore satisfied of Claimant's French nationality for the purposes of requesting international arbitration protection. It further notes that neither the BIT nor the Convention include an express requirement that nationality has to be acquired in conformity with the national law of the host State. Had this been the case, it might have opened the door for the Tribunal's investigation of Claimant's file pursuant to which he was granted nationality by the French authorities.

359. Respondent further alleges that even if Claimant is deemed to have acquired French nationality legally, he has not established effective links with France. The Tribunal notes that neither Article 25 of the ICSID Convention, nor the BIT require the application of the effective nationality principle. The Tribunal moreover notes that the effective nationality test has little support in ICSID proceedings and that there is a clear reluctance to apply the test where only one

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*is itself no proof of nationality as a matter of French law, pursuant to Article 30 of the French Civil Code...contrary to a certificate of French nationality.*" (see Respondent's Rejoinder, para. 29).

<sup>127</sup> See Copies of Mr. Franck Charles Arif's French Passport and of Mr. Franck Charles Arif's French National Identity Card, Exhibit C-2 to Request for Arbitration.

<sup>128</sup> See *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (September 24, 2008), paras. 94 and 95.

nationality is at issue.<sup>129</sup>This is the case here<sup>130</sup> and therefore the Tribunal is not persuaded that an effective nationality test is applicable.

360. In light of the above, it is not necessary to address the additional arguments of the Parties regarding the issue of nationality. The Tribunal dismisses Respondent's objection to jurisdiction *ratione personae* based on Mr. Arif's lack of French nationality for the reasons stated above.

## 5. Investment.-

361. Article 1(1) of the BIT provides the definition of "investment":

*"The term "investment" means all the assets, such as goods, rights and interests of all kinds and, particularly, but not exclusively:*

*a) movable and immovable assets, as well as all other property rights, such as mortgages, privileges, beneficial rights, guarantees and all similar rights;*

*b) Shares, share premiums and other forms of participation, even minor or indirect, in companies established in the territory of one of the Contracting Parties;*

*c) Bonds, receivables, and claims to any performance having an economic value;*

*d) Intellectual, commercial and industrial property rights, such as copyrights, patents, licenses, registered trademarks, industrial models*

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<sup>129</sup> See Schreuer, C.H., *The ICSID Convention. A Commentary*, Second Edition, 2010, Cambridge University Press, p. 266-267; see also *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (September 24, 2008), paras. 98-103. The Tribunal notes that Respondent actually admits this test to be relatively exceptional, see Hearing Transcript, Day 1, p. 106: "...yes, it is relatively exceptional, as was mentioned this morning, but the concept of effective nationality actually survives in ICSID..."

<sup>130</sup> Claimant alleges that Mr. Arif lost Iraqi nationality when he gained French nationality in 2005, pursuant to Article 11(1) of Law No. (46) of 1963 on Iraqi Nationality, Exhibit C-220 to Claimant's Reply. Respondent accepts that this is not a case involving dual or multiple nationalities (see Respondent's Rejoinder, para. 59).

*and prototypes, technical processes, know-how, brand names and goodwill;*

*e) Concessions granted by law or under an agreement, namely concessions concerning research, exploitation, extraction or mining of natural resources, including those located in the maritime area of the Parties.*

*It is understood that the mentioned assets must be or have been invested in accordance with the legislation of the Contracting Party, on the territory or maritime area of which the investment is made, before or after entry into force of the present Agreement.*

*Any modification of the form of the assets' investment does not affect its qualification as an investment, provided that this modification does not contravene the legislation of the Contracting Party in whose territory or maritime area the investment was made.”*

362. The ICSID Convention contains no definition of “investment”.

363. Firstly, the Tribunal considers that it is important to clarify what is exactly the “investment” the protection of which is alleged to have been breached in this case.

364. Claimant in his Reply defines his investment as follows:

*“331.1. The rights arising out of the Tender and State Agreements, namely:*

*331.1.1 The exclusive right to create and develop a duty free network at five border stores, granted by the State tender and corresponding State Agreements entered into with the Customs Service of Moldova on a long term basis, namely 15 years with a priority right of renewal;*

*331.1.2 The right to open a flagship store at the Airport, granted by the Lease Agreement entered into with the Airport State Enterprise on a long term basis, namely a seven year and five months period with a priority right of renewal.*

*331.2. Claimant's shareholding in Le Bridge;*

*331.3. The creation of Le Bridge's duty free division, Le Bridge Travel Retail, with its own departments and premises;*

*331.4. The renovations of the premises where the Airport store would be located;*

*331.5. The construction of four duty free stores at the Romanian border;*

*331.6. Securing luxury goods and the support of luxury brands;*

*331.7. The development of the "Le Bridge Duty Free" brand and trademark at the international level, through the sale of luxurious products, including inter alia, items from Chopard, Guerlain, Bulgari and La Prairie, events and national advertising campaigns on billboards, the internet, television and in newspapers and magazines and Mr. Arif's know-how contributions;*

*331.8. Hiring of qualified management and staff;*

*331.9. The launch of Le Bridge Travel Retail; and*

*331.10. The application and attribution of all required authorizations and licences to build duty free stores and operate the duty free business, and the right to use the premises as per the Agreements with the Customs Service and the Airport State Enterprise."*

365. The Parties agree that paragraph 331.1 of the Reply defines the ‘core’ rights in dispute in this arbitration.<sup>131</sup> Claimant further argues that even if some elements of this list “do not qualify as an investment pursuant to the BIT, the operation as a whole would still qualify as an investment.”<sup>132</sup> Claimant also argues that if the rights arising from the Tender and State Agreements fall within the definition of investment, then Mr. Arif’s further steps in furtherance of these rights, as set out in paragraphs 331.2 to 331.10 of the Reply, are also investments.<sup>133</sup>
366. Respondent does not accept Claimant’s theory of the unity of the investment. It states that Claimant has not demonstrated that many of the alleged elements of the investments exist as rights under Moldovan law, which is the law applicable to the definition of the rights.<sup>134</sup> As to the ‘core’ rights referred to in paragraph 331.1, they “were acquired by Mr. Arif in violation of Moldovan law and are by operation of that law, invalid.”<sup>135</sup>
367. Claimant concentrates on specific rights arising from his agreements with Respondent, and particularly the right of exclusivity allegedly confirmed by the Tender and the July 1, 2008 Agreement. The Tribunal considers that this approach confuses the “investment” with the individual rights of particular value. Where multiple contracts are entered into by an investor, then it is sufficient that the contracts and their good faith performance as a whole satisfy the definition of an investment, and Claimant does not need to go further and justify individual rights in the contracts.
368. The question as to whether a particular right granted by an agreement is valid or invalid may affect liability or the valuation of damages, but is not a question of jurisdiction.
369. In the present case, the Tribunal is satisfied that the agreements entered into by Claimant with Moldova (the Lease Agreement, the July 1, 2008 Agreement, and

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<sup>131</sup> See Respondent’s Counter-Memorial, para. 410-415; Claimant’s Reply, para. 348; Respondent’s Rejoinder, para. 131.

<sup>132</sup> See Claimant’s Reply, para. 345.

<sup>133</sup> See Claimant’s Reply, para. 346.

<sup>134</sup> See Claimant’s Reply, paras. 118-131.

<sup>135</sup> See Respondent’s Rejoinder, para. 132.

the subsequent agreements with the individual customs offices) are ‘assets’ within the meaning of Article 1 of the BIT.

370. The dispute in this arbitration arises from these agreements and the beginning of their performance, and Claimant seeks damages arising from the alleged loss of these agreements, the rights derived from them, and his good faith belief that they were valid. The Tribunal can consider events preceding these agreements, such as the Tender, and the steps taken by Claimant in execution of the rights they conferred without needing to individually consider whether preliminary or subsequent steps satisfy the definition of investment. These agreements constituted an investment within the meaning of Article 1 of the BIT. This is sufficient to confer jurisdiction on this Tribunal over a dispute relating to Respondent’s treatment of such agreements and the steps taken by Claimant on the basis thereof.

371. Respondent has a further argument that the alleged rights under the Tender, the July 1, 2008 Agreement, and the Airport Lease Agreement are invalid under Moldovan law, and therefore *“even if they could have fulfilled the Treaty’s definition (under international law) of ‘investments’ if they validly existed, they are in any event not capable of grounding the Tribunal’s jurisdiction.”*<sup>136</sup>

372. This argument relies on the part of the definition of “investment” in Article 1(1) that states that: *“It is understood that the mentioned assets must be or have been invested in accordance with the legislation of the Contracting Party.”*

373. The investments in dispute in the present case have been declared invalid by the Moldovan judiciary, including by the Supreme Court, except for the local lease agreements which are still under consideration by the Moldovan courts. In particular the July 1, 2008 Agreement and the Tender were declared invalid by decisions of the Economic Circuit Court of May 28, 2010,<sup>137</sup> the Economic

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<sup>136</sup> See Respondent’s Rejoinder, para. 132.

<sup>137</sup> See Decision of the Economic Circuit Court, dated May 28, 2010, Exhibit C-150 to Claimant’s Memorial.

Court of Appeal of September 7, 2010,<sup>138</sup> and the Supreme Court of Justice of November 24, 2010.<sup>139</sup> The Lease Agreement was invalidated by decisions of the Economic Circuit Court of November 16, 2010,<sup>140</sup> the Economic Court of Appeal of February 28, 2011,<sup>141</sup> and the Supreme Court of Justice of June 10, 2011.<sup>142</sup>

374. Respondent's argument based on the invalidity of the Lease Agreement and the July 1, 2008 Agreement is formalistic in that it relies on a judicially declared invalidity that applies retrospectively to the date of the investment. The reality was that at the time the investment was made, and for many months thereafter, both Parties believed and were allowed to trust that the July 1, 2008 Agreement and the Lease Agreement were valid, and that the investment had been made in accordance with the legislation of Moldova. Both Parties acted in good faith on this basis.

375. In fact, the process by which the Lease Agreement and the July 1, 2008 Agreement were declared invalid, and the actions in furtherance thereof, are the basis of Claimant's claims pursuant to the BIT in this arbitration. Respondent seeks to rely on its own law and decisions of its own courts to deny juridical existence to agreements that existed in fact, and were relied upon by both Parties.

376. There are temporal limitations on a jurisdictional argument based on the illegality of an investment, where the legality of the investment has been accepted and acted upon in good faith by both parties over a period of time. This is not a case of a concealed illegality, or a class of assets prohibited to foreign investors such as, in some jurisdictions, a concession contract for a strategic

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<sup>138</sup> See Economic Court of Appeal decision dated September 7, 2010, Exhibit, C-153 to Claimant's Memorial.

<sup>139</sup> See Decision of the Supreme Court of Justice, dated November 24, 2010, Exhibit, C-155 to Claimant's Memorial.

<sup>140</sup> See Decision of the Economic Circuit Court, dated November 16, 2010, Exhibit C-127 to Claimant's Memorial.

<sup>141</sup> See Decision of the Economic Court of Appeal, dated February 28, 2011, Exhibit C-129 to Claimant's Memorial.

<sup>142</sup> See Decision of the Supreme Court of Justice, dated June 10, 2011, Exhibit C-130 to Claimant's Memorial.

resource. The investment was not made fraudulently or on the basis of corruption. In cases like the present one, the passage of time and the actions of the parties on the mutual assumption of legality cannot be ignored in the determination of jurisdiction. The ‘normative power of facticity’ requires illegality in a case like the present one to be treated as an issue of liability and not jurisdiction.

377. Respondent also alleges that it is a settled proposition in international law that a shareholder may not seek protection for injuries to companies it owns.<sup>143</sup> Respondent further alleges that only direct investments are protected under the BIT.<sup>144</sup>

378. The Tribunal notes that the BIT does not define the term “investor”. Article 7 refers to “*Any disputes relating to investments between one of the Contracting Parties and a national or a company of the other Contracting party...*”. The term national is defined in Article 1(2) of the BIT as “*any natural person having the nationality of one of the contracting Parties.*” The term “investment” is defined in a broad and non-exhaustive manner in Article 1(1) of the BIT.

379. The BIT does not limit or restrict the protection granted to direct investments. In fact, under Article 1(1)(b), which refers to “*Shares, share premiums and other forms of participation, even minor or indirect, in companies established in the territory of one of the Contracting Parties*”, indirect investments are expressly included within the definition of investment. Therefore, Respondent’s argument to the contrary is rejected.

380. In addition, the Tribunal finds that shareholder protection is not restricted to ownership in the shares, it extends to the assets of the company.<sup>145</sup> Mr. Arif is the sole shareholder of Le Bridge and has to be afforded protection under the BIT accordingly.

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<sup>143</sup> See Respondent’s Counter-Memorial, para. 484.

<sup>144</sup> See Respondent’s Counter-Memorial, para. 474 and Respondent’s Rejoinder, para. 185.

<sup>145</sup> See Dolzer, R., Shreuer, C., *Principles of International Investment Law*, Oxford University Press, 2008, p. 59.

381. Finally, Respondent alleges that Claimant’s “investment” further fails to qualify as such for the purposes of the BIT and the ICSID Convention because of the absence of any transfer of capital or technology from France to Moldova.<sup>146</sup>
382. The fact that the preamble of the BIT provides that “*Persuaded that the encouragement and protection of such investments will stimulate the transfer of capital and technology between the two States, in the interest of their economic development*”, cannot be read as a requirement of the term “investment”, which is expressly defined in Article 1(1) and which clearly makes no mention of any such requirement.
383. The ICSID Convention does not impose any such requirement either. Moreover, under ICSID jurisprudence, Tribunals have generally found the origin of capital used in investments immaterial. According to doctrinal authorities, the origin of the funds is irrelevant for purposes of jurisdiction. Whether investments are made from imported capital, from profits made locally, from payments received locally or from loans raised locally, makes no difference to the degree of protection enjoyed.<sup>147</sup>
384. In light of the above, the Tribunal finds that the July 1, 2008 Agreement, the Lease Agreement and the local lease agreements qualify as an “investment”, both under the BIT and the ICSID Convention, and rejects Respondent’s arguments to the contrary. Respondent’s objection to jurisdiction based on Claimant not having an investment subject to Treaty protection is therefore dismissed.

## **6. Specific Undertakings.-**

385. Article 9 of the BIT is entitled “Specific Commitments” and provides that: “*Investments having been the subject of a particular [the] specific commitment of one of the Contracting Parties towards the nationals and companies of the other Contracting Party, are regulated, without prejudice to the dispositions of*

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<sup>146</sup> See Respondent’s Counter-Memorial, para. 493.

<sup>147</sup> See Schreuer, C.H., *The ICSID Convention. A Commentary*, Second Edition, 2010, Cambridge University Press, p. 136, 137.

*the present Agreement, by the provisions of such commitment as far as it contains more favourable provisions than those provided for in the present Agreement.”*

386. Article 5(2) of the BIT provides with regard to expropriation that: *“The Contracting Parties shall not take any measures of expropriation... save for a public purpose and on the condition that such measures not be discriminatory or contrary to a specific commitment.”*

387. The interpretation of the BIT as a public international law instrument is subject to the Vienna Convention on the Law of Treaties. According to its Article 31(1): *“[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”*

388. Firstly, the ordinary meaning of these Articles within their context and in light of the BIT’s object and purpose makes the Tribunal find that Article 9 (and Article 5(2) to the extent that it refers to “a specific commitment”) has its own specific meaning and purpose, separate from that of an “umbrella” clause, and agrees with Respondent in this regard. According to the ordinary meaning of the text, the specific purpose of these clauses is not to guarantee the observation of obligations assumed by the host State vis-à-vis the investor, but rather to provide investors with the right to claim the application of any rule of law more favourable than the provisions of the BIT. The doctrine refers to such clauses as preservation of rights clauses.<sup>148</sup>

389. This type of clause, in its usual wording, simply says that in applying or enforcing the existing protections offered by the BIT, attention should be paid to any more favourable provisions contained in domestic law or specific agreements. It therefore confirms that the investor may benefit from more

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<sup>148</sup> See Newcombe, A., Paradell, L., *Law and Practice of Investment Treaties. Standards of Treatment*, Kluwer Law International, 2009, p. 477.

favourable treatment, but does not add a new, specific or distinct, treaty obligation to respect commitments made.<sup>149</sup>

390. The position of Article 9 within the BIT further confirms the Tribunal's finding. Article 9 is included at the end of the BIT and after the BIT's dispute resolution clause (Article 7), instead of with the rest of the BIT's substantive standards of protection (Articles 2 to 6).
391. The interpretation of these Articles as preservation of rights clauses in any event does not deprive them of their *effet utile*, which is precisely to ensure that the investment enjoys the most favourable legal regime. They have their own legitimate function within the BIT, which relates to the specific issue of what is the law applicable to the investment. The Tribunal does not accept that the interpretation of these Articles as preservation of rights clauses would turn them into a tautology, leading to an absurd result not intended by the Parties.
392. Therefore, the Tribunal does not find that these Articles are "umbrella" clauses, but rather preservation of rights clauses, even though it does not completely agree with Respondent's reading of them either.
393. Secondly, Claimant alleges that, even if the Tribunal could not find that Articles 9 and 5 are "umbrella" clauses, in any case an "umbrella" clause would be imported into the BIT via the MFN clause contained in its Article 4.
394. Article 4 of the BIT provides in its relevant part as follows: "*Each Contracting Party shall extend, in its territory and in its maritime area, to nationals and companies of the other Contracting Party, regarding their investments and activities connected with these investments, treatment not less favourable than that granted to its nationals or companies, or treatment granted to the nationals and companies of the most favoured nation, if the latter is more favourable...*"

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<sup>149</sup> See Newcombe, A., Paradell, L., *Law and Practice of Investment Treaties. Standards of Treatment*, Kluwer Law International, 2009, p. 478.

395. The Tribunal agrees with Claimant that “umbrella” clauses are substantive in nature. A breach of specific undertakings covered by an “umbrella” clause will give rise to a substantive breach of the BIT.<sup>150</sup> In this sense, the Tribunal rejects Respondent’s argument that “umbrella” clauses are procedural in nature and cannot be imported through an MFN clause because they give a means of protection for contractual and other undertakings, rather than a unique standard of behaviour.<sup>151</sup>
396. Both Parties agree that an MFN clause applies to substantive obligations.<sup>152</sup> The MFN clause in Article 4 is broadly drafted and does not restrict its application to any particular kind of substantive obligation under the BIT. Therefore, the Tribunal finds that the MFN clause of the BIT can import an “umbrella” clause (which is substantive in nature), from either the Moldova-UK or Moldova-USA BIT<sup>153</sup>, thereby extending the more favourable standard of protection granted by the “umbrella” clause in either one of these BIT’s into the BIT at hand. Respondent’s arguments to the contrary are rejected. The Tribunal therefore has jurisdiction over Claimant’s “specific commitments” claim via the MFN clause of Article 4.
397. The Tribunal moreover notes that the whole debate of whether there is an “umbrella” clause in the BIT, be it directly through Articles 5 and 9, be it indirectly via Article 4, is not a jurisdictional matter, even though the Parties have chosen to argue it as such. The issue in dispute between the Parties is whether a specific substantive standard of treatment is included in the BIT and

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<sup>150</sup> See Newcombe, A., Paradell, L., *Law and Practice of Investment Treaties. Standards of Treatment*, Kluwer Law International, 2009, p. 466: “For the majority of scholars, the clause imposes a substantive treaty obligation on the host state to comply with its undertakings towards investments, including contractual commitments. Any non-compliance with or breach of such undertakings, even if of a commercial nature, constitutes a violation of this treaty obligation.”

<sup>151</sup> See Respondent’s Rejoinder, para. 215.

<sup>152</sup> Respondent admits that substantive standards included in other agreements could be “imported” to the dispute at hand pursuant to the application of the MFN clause (see Respondent’s Rejoinder, para. 215).

<sup>153</sup> See Exhibit C-L2, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Moldova of March 19, 1996 (and which entered into force on July 30, 1998), Article 2, “Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.” Available at [http://www.unctad.org/sections/dite/ia/docs/bits/uk\\_moldova.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/uk_moldova.pdf). And see Exhibit C-L3, Treaty between the United States of America and the Republic of Moldova concerning the Encouragement and Reciprocal Protection of Investment of April 21, 1993 (and which entered into force on November 25, 1994), Article II.3, “Each Party shall observe any obligation it may have entered into with regard to investments.” Available at [http://www.unctad.org/sections/dite/ia/docs/bits/us\\_moldova.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/us_moldova.pdf).

this is a merits issue, which in any case confirms the Tribunals' jurisdiction over this claim.

398. Finally, the Tribunal notes that the July 1, 2008 Agreement and the Lease Agreement, as well as the rights under the award of the Tender, on which Claimant's "specific commitments" claim rely, have been irrevocably annulled by the whole of the Moldovan judicial system, up to the Supreme Court. The validity of these instruments has been extensively debated before the Moldovan courts, which have consistently, repeatedly and irrevocably decided that these instruments were invalid under Moldovan law. This Tribunal is persuaded that there has been no denial of justice towards the investor and that the judiciary has applied Moldovan law legitimately and in good faith (see Section VI.B.2). This Tribunal cannot and should not act as a court of appeal of last resort. Under these circumstances, it does not consider appropriate to decide on Claimant's "specific undertakings" claim to the extent it implies analysing *ex novo* the validity of these instruments under Moldovan law. This issue has already been decided by the Moldovan courts. For this reason Claimant's claim on specific undertakings is inadmissible.

399. In light of the above, the Tribunal need not address the Parties' further arguments regarding the admissibility of Claimant's claim for specific commitments.

400. The Tribunal finds that it has jurisdiction under Article 25 of the ICSID Convention and Articles 1 and 7 of the BIT to decide the merits of the dispute. It further finds that Claimant's claim for breach of specific undertakings is inadmissible.

## **VI. LIABILITY.-**

### **A. Applicable Law.-**

401. Article 42 of the ICSID Convention provides in its relevant part:

*“(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”*

402. The BIT does not contain any specific provision regarding the applicable law to the dispute.

## **B. Analysis.-**

### **1. Expropriation -**

403. Article 5(2) of the BIT provides:

*“The Contracting Parties shall not make any measures of expropriation or nationalization or any other measure that has the effect of dispossessing, directly or indirectly, the nationals and companies of the other Contracting Party of their investments, on their territory and on their maritime area, save for a public purpose and on the condition that such measures not be discriminatory or contrary to a specific commitment.*

*Any measures of dispossession that could be taken have to result in the payment of a prompt and adequate compensation, an amount equal to the real value of the concerned investments, which shall be valued in relation to a normal economical situation, prior to any threat of dispossession.*

*This compensation, its amount and payment methods are established on the date of dispossession at the latest. This compensation shall be effectively encashable, paid without delay and freely transferable. It shall produce, until the date of payment, interest calculated according to the appropriate market rates.”*

404. As established above the dispute in this arbitration arises from an investment comprised of the July 1, 2008 Agreement, the subsequent agreements with individual customs offices and the Lease Agreement.

405. The July 1, 2008 Agreement formalised the results of the Tender. According to Decision No. 172, the “General characteristics of the object of the contest” included:

*“1.1 identification of participants in creation of a network of duty-free stores at state border crossing stations (legal persons of the Republic of Moldova, except for provided for in the legislation in force), except public administration authorities, state-owned and municipal companies, institutions funded from the budget of state or local budgets.*

*1.2 Construction of one duty-free store in each of the state border crossing stations: Costesti-Stinca customs stations; Cahul-Oancea customs stations, Leuseni-Albita customs station; Sculeni customs station; Ungheni-Cristesti customs station...”<sup>154</sup>*

406. The July 1, 2008 Agreement established in its “Whereas” No. 3 and 4 that:

*“3...the investor was authorised with the right to build and manage the duty-free store network at the following pre-established state border crossing points: the Costesti-Stinca, Cahul-Oancea, Lesueni-Albita, Sculeni, Ungheni-Cristesti customs station;*

*“4. The Authority grants, as it is foreseen in p.1.1, to the Investor the exclusive right to manage and administrate the duty-free store network on the pre-established territories, at the exclusive managerial risk of the Investor, according to the provisions of this Agreement. The parties acknowledge that the creation and operation of this store network shall need a substantial investment from the part of the Investor in order to assure the realization of business plan provisions accepted by the organization commission...”*

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<sup>154</sup> See Decision No. 172 on the creation of a network of duty free stores at state border crossing stations, dated February 18, 2008, Exhibit C-8 to Request for Arbitration.

407. Clause 2.1 of the July 1, 2008 Agreement stipulates that:

*“The objectives of this Agreement consist in granting to the investor the right to create, operate and administrate the duty-free store network at the state border crossing points within the entire term this Agreement, aiming at the same time at the realization of these goals in the most appropriate, efficient, reasonable and quick manner adaptable to the customers’ needs.”*

408. And Clause 4 provides that:

*“4.1 Under this Agreement, the Authority grants to the Investor that accepts according to the provisions of this Agreement an exclusive right as it is defined in the p.1.1 to create and manage the duty-free stores within the area of activity;*

*4.2 Granting this right, the Authority assures as its integral and compulsory part, the possibility to use without impediments the area necessary to create and serve the duty-free store network;*

*4.3 The authority shall not conclude any agreement of any nature with third parties that could affect substantially and negatively those rights granted to or obligations imposed to the Investor.”*

409. Clause 1 (“p.1.1” as referred to in Clause 4 of the Agreement) of the July 1, 2008 Agreement defines “Exclusive rights” in the following manner: *“exclusive right of the Investor to manage and administrate the duty-free store network at the state border crossing points is established by the Government Decision no. 172 of 18 February 2008 at the exclusive managerial risk of the Investor according to the provisions of this Agreement. The exclusive rights of the Investor shall not be opposable any longer to the Authority when, following the organization, according to the legislation, of a public tender, a third party shall obtain the right to build and open duty-free-stores at the state border crossing points.”*

410. Clause 6 of the Agreement provides that:

*“6.1 According to the provisions foreseen in the clause 3, the present Agreement is concluded for a term of 15 (fifteen) years and shall become effective from the date of its signing.*

*6.2 The Agreement shall be automatically ceased upon expiration of the term foreseen in p.6.1 except for:*

*6.1.1 it is terminated according to its provisions; or*

*6.1.2 it is renewed according to the provisions of the clause 6.2.*

*6.2 The Agreement term can be extended with the written consent of the parties. The Investor has the priority right to extend the Agreement term or to conclude a new one if he duly fulfilled his obligations undertook under the previous agreement. This clause does not operate if the conditions of the new Agreement are essentially different from those of this Agreement.”*

411. Finally, Clause 19.1 of the Agreement states that: *“In order to locate the duty-free stores at the state border crossing points, the Investor shall conclude agreements of location with each customs office in which area the state border crossing points exist foreseen in the Government Decision no. 172 of 18 February 200(8)...”*

412. And Clause 7.2 provides that: *“According to the provisions of the business plan, the parties agreed on the need to consider the possibility of granting the right to open a duty free store to the Investor at the Chisinau International Airport and at the Giurgiulesti state border crossing point in the conditions foreseen by the effective law.”*

413. The Lease Agreement provides in its Clause 1.1 that: *“The Landholder undertakes to provide to the Tenant for temporary use the premises indicated in p.1.2 of this Agreement, and the Tenant undertakes to pay the rent in the amount and the terms indicated in the p.2 of this Agreement.”*

414. Clause 1.5 states that: “*The respective premises shall be used in order to locate the duty-free store.*” Clause 1.6 provides: “*The Agreeem(e)nt is concluded for a period till 31 December 2015.*” And Clause 1.7 reads: “*The Tenant has the preferential right to extend the agreement for a new term.*”
415. The Tribunal has carefully considered the Parties’ positions. As established above, the July 1, 2008 Agreement (as well as the Tender) and the Lease Agreement have been annulled by the Moldovan judiciary. It is significant that Claimant does not allege that there is any flaw in Moldovan law or that it is unfair in any way *per se*. Claimant’s position in essence is rather that the actual misapplication of Moldovan law by the courts amounts to expropriation.<sup>155</sup> As established above, these agreements have been declared invalid under Moldovan law by the whole of the Moldovan judicial system, including the Supreme Court. The Tribunal is not persuaded that there has been collusion between the courts and the investor’s competitors in the proceedings before the Moldovan courts over these agreements or that the Moldovan courts have acted in denial of justice in any way (see Section VI.B.2). Moreover, there is no evidence in the record that persuades the Tribunal to conclude that the Moldovan judiciary has not applied Moldovan law legitimately and in good faith in the proceedings commenced by Claimant’s competitors.
416. Le Bridge has had a fair opportunity to defend its position under Moldovan law before the Moldovan courts. This Tribunal is not a court of appeal of last resort. There is no compelling reason that would justify a new legal analysis by this Tribunal regarding the invalidity of these agreements which has already been repeatedly, consistently and irrevocably decided by the whole of the Moldovan judicial system.
417. In light of the fact that the agreements have been found to be invalid under Moldovan law this Tribunal is not persuaded that there can be deprivation of invalid rights.<sup>156</sup> The invalidity of these agreements (and hence of the rights

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<sup>155</sup> See Claimant’s Reply, para. 467 *in fine*.

<sup>156</sup> See Newcombe, A., Paradell, L., *Law and Practice of Investment Treaties. Standards of Treatment*, Kluwer Law International, 2009, p. 351: “*Where the investment in question is a contract governed by host*

recognised under these agreements, including the purported exclusivity right under the July 1, 2008 Agreement) resulting from the application of Moldovan law by the Moldovan courts as a result of lawsuits filed by private competitors cannot be interpreted as an expropriation of Mr. Arif's rights, as Claimant pretends. No wrongful taking results from the legitimate application of Moldova's legal system (which the Tribunal notes has not changed since the time the investment was made) and the subsequent invalidity of the rights at stake.<sup>157</sup>

418. Moreover, with regard to the border stores, they continue to operate and generate considerable revenues to the investor. Claimant has even opened several more stores.<sup>158</sup> Claimant alleges that the fact that the local lease agreements are still in force and the border stores are still operating<sup>159</sup> is irrelevant for Claimant's expropriation claim, because Claimant has irrevocably lost the right to operate his border stores<sup>160</sup> and he is only able to operate them based on a mere technicality (the local lease agreements have not been cancelled yet although this seems imminent because they are based on the Tender and the July 1, 2008 Agreement, already cancelled).<sup>161</sup> Although the Tribunal agrees that the situation of Claimant's investment at the border stores is subject to significant legal insecurity, this cannot amount to an expropriation of Claimant's investment in the border stores because, for the moment, Claimant has not been deprived of the use and benefit of his investment.

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*state law and the contract is invalid or otherwise nullified based on the host state law, in principle there can be no expropriation because there has been a judicial determination that there is no contract to expropriate. The investor will either have to show that the judicial determination of the contract rights amounted to a denial of justice or that the law in question cancelling or nullifying the contract was itself expropriatory."*

<sup>157</sup> According to the doctrine: "To the extent that [this] state of the law was transparent and did not violate minimum standards, an investor will hardly convince a tribunal that the proper application of that law has led to an expropriation. This position is consistent with the power of the host state to accept and define the rights acquired by the investor at the time of the investment." See Dolzer, R., Schreuer, C., *Principles of International Investment Law*, Oxford University Press, 2008, p. 105.

<sup>158</sup> See Claimant's Memorial, paras. 310 and 312.

<sup>159</sup> These local lease agreements have so far been annulled by the Economic Circuit Court (see Decision of the Economic Circuit Court dated July 29, 2011, Exhibit C-165 to Claimant's Memorial) and by the Court of Appeal of Chisinau (see Decision of the Chisinau Court of Appeal dated December 28, 2011, Exhibit C-211 to Claimant's Reply). By Decision of the Supreme Court of October 17, 2012 /Supplemental Exhibit R-135) the Decision of the Court of Appeal was overturned and the case was referred back to the first instance courts before which it is pending.

<sup>160</sup> This allegedly occurred on November 24, 2010 when the Supreme Court irrevocably cancelled the Tender results and the July 1, 2008 Agreement.

<sup>161</sup> See Claimant's Reply, paras. 510 and 511.

419. Thirdly, Claimant argues that in any event Respondent is estopped from alleging that Mr. Arif had an invalid right pursuant to Moldovan law because it was Moldova itself that granted him this right.<sup>162</sup> The Tribunal cannot accept Claimant's argument which would inevitably imply that Moldova can be liable at an international level for the correct application by the Moldovan courts of Moldovan law in lawsuits filed by a private competitor.
420. Finally, Claimant alleges that it is a well settled principle of international law that a State cannot rely on its internal law to invalidate its own obligations.<sup>163</sup> This principle is reinforced by Article 5 of the BIT, which expressly provides that an expropriation by the State cannot be contrary to a specific commitment of that State towards the investor.<sup>164</sup> The Tribunal has already accepted the invalidity of these rights as declared by the Moldovan judicial system as a result of the legitimate application of Moldovan law and has found that this invalidity cannot be interpreted as an expropriation of the investor's rights, i.e., the Tribunal has found that there is no possible expropriation of invalid rights. Therefore, Claimant's argument that a State cannot rely on its internal law to invalidate its own obligations is not applicable with respect to Claimant's claim for expropriation. It is therefore rejected.
421. In light of the above, the Tribunal dismisses Claimant's claim for expropriation. Because the Tribunal has already found that there is no expropriation in the case in dispute, there is no need to address Respondent's allegations that the substantive protection provided for in Article 5 of the BIT only extends to direct investments, that Mr. Arif's deprivation of his investments resulted from the application of the regulatory power of Moldova or that expropriation by court decisions requires a finding of a denial of justice, whether procedural or substantial.

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<sup>162</sup> See Claimant's Reply, para. 491.

<sup>163</sup> See Claimant's Reply, para. 492.

<sup>164</sup> See Claimant's Memorial, para. 436.

## 2. Denial of Justice.-

422. The party to the legal proceedings before the Moldovan courts was Le Bridge, a company incorporated under Moldovan law, and not Mr. Arif. In the Tribunal's view, this precludes a claim for denial of justice under customary international law by Mr. Arif, but it does not preclude such claim pursuant to the fair and equitable treatment obligation included in the France-Moldova BIT.

### a) *Denial of Justice under Customary International Law*

423. Claimant alleges denial of justice as both a breach of the fair and equitable treatment standard and as an independent breach of customary international law. Denial of justice on both bases was treated separately by the Parties, although the decisions of the Moldovan judiciary are also invoked by Claimant in his other allegations of a breach of fair and equitable treatment argued.

424. Mr. Arif has explicitly and repeatedly insisted that he meant to submit a claim for denial of justice as an alternative to his claims for Moldova's alleged breaches of its obligations under the BIT. The same allegations of wrongdoing by the judiciary, which represent the basis for his claim for denial of justice, also represent the grounds for other – distinct – claims for the violation of the BIT.<sup>165</sup>

425. Claimant argues that the fact that Mr. Arif has not been personally involved in the national court proceedings is not a prerequisite for his claim for denial of justice, because the BIT and international law protect him in his “*capacity of an indirect investor*”<sup>166</sup> since “*a denial of justice is a breach of the fair and equitable treatment standard*”.<sup>167</sup>

426. Neither Party has presented case law or doctrinal positions, nor is the Tribunal aware of any, where a party to an international arbitration claiming denial of justice is legally distinct from the party in the incriminated local court proceedings. In *Loewen*, Mr. Loewen, the shareholder and manager of Loewen

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<sup>165</sup> See Claimant's Memorial, paras. 422 and 423.

<sup>166</sup> See Claimant's Reply, para. 605.

<sup>167</sup> See Claimant's Reply, para. 607.

Inc., had made a personal and separate application to the arbitral tribunal under special circumstances, but Loewen Inc. was also a party to the proceedings. The application failed for various reasons and the tribunal did not have to elucidate whether Mr. Loewen would have had standing without Loewen Inc. also being a party.<sup>168</sup>

427. As for the distinction between claims for denial of justice and for violation of investment protection treaties such as BITs or NAFTA, tribunals have chosen different approaches. In *Rumeli*, the tribunal found that:

*“the violations alleged by Claimants and allegedly constituting a denial of justice, have also been invoked by the Claimants as constituting a violation of the fair and equitable treatment principle. The Arbitral Tribunal considers that these violations are better qualified and dealt with as issues falling under the fair and equitable treatment standard which also includes in its generality the standard of denial of justice. [...] Consequently, the alleged violations will not be separately dealt with under the denial of justice standard.”*<sup>169</sup>

428. Conversely, the tribunal in *Loewen* clearly distinguished between “*an element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice*”<sup>170</sup> and confirmed:

*“an intervention on our part would compromise them [the purposes of NAFTA] by obscuring the crucial separation between the international obligation of the State under NAFTA, of which the fair treatment of foreign investors in the judicial sphere is but one aspect, and the much broader domestic responsibilities of every nation towards litigants of whatever origin to appear before its national courts.”*<sup>171</sup>

429. In his monograph on *Denial of Justice in International Law*, Jan Paulsson consistently distinguishes between the violation of an independent international obligation and denial of justice: courts may violate an international obligation

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<sup>168</sup> See *Loewen v. USA*, ICSID Case No. ARB(AF)/98/3 Award (June, 26, 2003), at paras. 3 ss./239/241.

<sup>169</sup> See *Rumeli v. Kazakhstan*, ICSID Case No. ARB/05/16 Award (July, 29, 2008), at para. 654.

<sup>170</sup> See *Loewen v. USA*, ICSID Case No. ARB (AF)/98/3 Award (June, 26, 2003), at para. 132.

<sup>171</sup> See *Loewen v. USA*, ICSID Case No. ARB (AF)/98/3 Award (June, 26, 2003), at para. 242.

when they refuse to comply with a treaty obligation “*but it is not a denial of justice*”<sup>172</sup>. He argues that the principle of denial of justice neither covers the responsibility of States for the misapplication of national law by its judiciary, nor its breaches of international law by procedure or decisions. He insists that the core of the principle is rather the duty of States “*to create and maintain a system of justice which ensures that unfairness to foreigners either does not happen or is corrected*”<sup>173</sup>. In fact, the major thrust of the monograph is the foundation of an international delict to protect aliens against a fundamentally unfair administration of justice in proceedings before courts of a foreign nation.

430. Claimant is not in disagreement with the specificities of the different claims nor even with the principle of necessity of the denial of justice to a foreigner. He argues:

*“Claimant’s case of expropriation is not about “expropriation by denial of justice”. Claimant does not need to make a showing that it was denied justice for its claim of expropriation to prevail. It suffices, for a finding of unlawful expropriation, that the State deprive Claimant from its investment (i) without a public purpose, and/or (ii) in a discriminatory manner; and/or (iii) contrary to a specific commitment, without the need to show that Respondent denied justice to Claimant. It is if, and only if Claimant had raised its treaty claims against Respondent before local courts, which it has not, and had been denied justice, that it would constitute a denial of justice claim. Yet, this is not the case.”*<sup>174</sup>

431. The Tribunal has pondered these arguments. It recalls that the standard of denial of justice has been developed by international tribunals as an international delict to protect aliens against acts of the judiciary of a foreign State – as opposed to “*non-judicial branches of government*” – which “*amount to an outrage, bad faith, willful neglect of duty, or insufficiency of actions apparent to any unbiased*

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<sup>172</sup> See Paulsson, J., *Denial of Justice in International Law*, Cambridge University Press, 2005, at page 72; also pages 84 ss.

<sup>173</sup> See Paulsson, J., *Denial of Justice in International Law*, Cambridge University Press, 2005, at page 7 and passim.

<sup>174</sup> See Claimant’s Reply, at para. 467 (underlining by the Tribunal).

*man*”<sup>175</sup>. The specific restrictive appraisal of judicial acts was owed to the “*political and international delicacy to disacknowledge the judicial decision of a court of another country.*”<sup>176</sup>

432. This was long before international treaties started to protect investors by establishing specific and well defined responsibilities of States which can be violated by any organ of the State, including the judiciary. The standard of denial of justice was not incorporated into the catalogue of obligations. That is also due to the fact that treaty obligations, such as the promise not to unlawfully expropriate or to provide fair and equitable treatment are of a contractual nature, whereas denial of justice has always been characterized as delictual.

433. It is true that many of the terms to describe one or the other sphere of international rights and obligations (denial of justice or fair and equitable treatment) – such as ‘arbitrariness’, ‘discrimination’ ‘unfairness’ or ‘bias’ – are used interchangeably. This semantic overlap might contribute to certain confusion. It does not imply, however, that both standards and principles have merged into one and that the prerequisites as well as the consequences of a claim for denial of justice and for the violation of a treaty standard of fair and equitable treatment have become identical. Both types of claims are based in international law, there is certainly and inevitably a continuous “*cross-pollination*”<sup>177</sup> between the two, but they remain distinct and specific.

434. Claims under international investment protection treaties protect foreign investment against breaches of obligations that States have promised to respect. Claims for denial of justice protect foreigners against delictual acts of the judiciary. They engage the State’s responsibility because it has a non-contractual obligation under international law to provide a system of justice which treats aliens fairly, honestly and impartially. Whether that is the case or not can only be tested by the foreigner in court proceedings.

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<sup>175</sup> See *B.E. Chattin (USA) v. United Mexican States*, Award of 23 July 1927 (*Chattin v. Mexico*), at para. 10.

<sup>176</sup> See *B.E. Chattin (USA) v. United Mexican States*, Award of 23 July 1927 (*Chattin v. Mexico*), at para. 11.

<sup>177</sup> See Paulsson, J., *Denial of Justice in International Law*, Cambridge University Press, 2005, at page 6.

435. It follows from there, firstly, that international law allows a free-standing claim for denial of justice and secondly, that such claim can only be successfully pursued by a person that was denied justice through court proceedings in which it participated as a party. Mr. Arif was no party to any national proceedings. His ‘alternative’ and independent claim for denial of justice is therefore dismissed.

**b) Denial of Justice under the Fair and Equitable Treatment Standard**

436. The fact that Claimant’s ‘alternative’ and independent claim for denial of justice fails does not, however, exonerate the Tribunal from carefully appraising the alleged facts and deciding whether they amount to a breach of the fair and equitable treatment standard.

437. Claimant alleges in his Reply<sup>178</sup> that: “... *there is no need for Mr. Arif to have been denied justice personally, as alleged by Respondent. Rather, it is sufficient for a denial of justice to have taken place which deprived Mr. Arif of his investment which, in turn, constitutes a breach by Moldova of its obligation to accord fair and equitable treatment to Claimant’s investments.*”

438. Conversely to a free-standing claim for denial of justice which can only be brought by a person that has participated in the national court proceedings, the standard of fair and equitable treatment also protects the foreign shareholder in a local company. If the standard is breached by a denial of justice, the State will be held responsible towards the indirect investor for a breach of fair and equitable treatment.

439. International law has evolved in recent decades and the previous conviction as expressed in the *Chattin* award that acts of the judiciary had to be judged with more ‘delicacy’ and circumscription than acts committed by the other branches of government, is obsolete. The Tribunal shares the modern opinion<sup>179</sup> according

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<sup>178</sup> See Claimant’s Reply, para. 607.

<sup>179</sup> See for instance Paulsson, J., *Denial of Justice in International Law*, Cambridge University Press, 2005, at page 72.

to which the State has to be seen as a unity and the acts of any of its organs, including the judiciary, may violate international law.

440. Two *caveats* need to be made, however. The first one was convincingly formulated by the *Loewen* tribunal:

*“Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself”*<sup>180</sup>.

441. Indeed, international tribunals must refrain from playing the role of ultimate appellate courts. They cannot substitute their own application and interpretation of national law to the application by national courts. It would blur the necessary distinction between the hierarchy of instances within the national judiciary and the role of international tribunals if “[a] simple difference of opinion on the part of the international tribunal is enough” to allow a finding that a national court has violated international law.<sup>181</sup> The opinion of an international tribunal that it has a better understanding of national law than the national court and that the national court is in error, is not enough. In fact – as Claimant formulated – arbitral tribunals cannot “*put themselves in the shoes of international appellate courts*”.<sup>182</sup>

442. The second *caveat* concerns the issue of exhaustion of national remedies. The responsibility of States not to breach the fair and equitable treatment standard through a denial of justice is engaged if and when the judiciary has rendered final and binding decisions after fundamentally unfair and biased proceedings or which misapplied the law in such an egregiously wrong way, that no honest, competent court could have possibly done so.

443. As long as such decisions are not final and binding and can be corrected by the internal mechanisms of appeal, they do not deny justice. In other words, as long

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<sup>180</sup> See *Loewen v. USA*, ICSID Case No. ARB (AF)/98/3 Award (June, 26, 2003), at para. 242.

<sup>181</sup> See, indeed, Paulsson, J., *Denial of Justice in International Law*, Cambridge University Press, 2005, at page 72.

<sup>182</sup> See Claimant’s Memorial, at para. 368.

as the judicial system is not tested as a whole, the fair and equitable treatment standard is not violated via a denial of justice. The State does not mistreat a foreign investor unfairly and inequitably by a denial of justice through an appealable decision of a first instance court, but only through the final product of its administration of justice which the investor cannot escape. The State is not responsible for the wrongdoings of an individual judge as long as it provides readily accessible mechanisms which are capable of neutralizing such judge.

444. The Tribunal concurs with *Jan de Nul* where the tribunal held:

*“The Tribunal considers that the respondent State must be put in a position to redress the wrongdoings of its judiciary.*

*[...]*

*The Tribunal cannot concur with the Claimant’s expert that an unjust judgment of a lower court may per se constitute unfair and inequitable treatment and, therefore, denial of justice without any prior conditions being met.*

*[...]*

*Thus, the Claimants do not complain of the failure of the Egyptian legal system as such, but merely of the conduct of the Ismailia Co and its appointed experts. This is not sufficient to justify a claim for denial of justice, let it be through the fair and equitable claim, at least when there is no claim that the appellate proceedings are in any manner dysfunctional.”<sup>183</sup>*

445. The Tribunal holds that the State can be held responsible for an unfair and inequitable treatment of a foreign indirect investor if and when the judiciary breached the standard by fundamentally unfair proceedings and outrageously wrong, final and binding decisions. It will therefore turn to the two sets of court actions which were each time initiated by local competitors against Le Bridge, and it will determine whether the judiciary denied Le Bridge justice and thereby breached the fair and equitable treatment standard to which Mr. Arif is entitled.

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<sup>183</sup> See *Jan de Nul NV and Dredging International NV v. Egypt*, ICSID Case No.ARB/04/13 Award (November 6, 2008) at paras. 258-260.

**c) *Appraisal of court proceedings around the Lease Agreement***

446. Claimant has asserted a procedural denial of justice by alleging that the Economic Circuit Court, the Economic Court of Appeal and the different interconnected competitors that brought an action have acted in collusion to prevent the execution of the valid Lease Agreement and the opening of the airport shop, by ordering provisional measures, without any legal basis in the Moldovan Civil Procedure Code. The different applications were made in connection with an action by the competitors for the invalidation of the Lease Agreement.

447. The Tribunal has carefully studied the different decisions of the Economic Circuit Court, the Economic Court of Appeal and the Supreme Court dealing with the provisional measures. It has come to the conclusion that the Moldovan judiciary and in particular the Economic Circuit Court have committed procedural errors, but that these errors do not amount to such a manifest disrespect of due process that they offend a sense of judicial propriety:

-The delays of the local proceedings<sup>184</sup> through the instances leading to temporary measures were not excessive. They started in November 2009 to find their conclusion in a decision of the Supreme Court of 28 April 2011.<sup>185</sup>

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<sup>184</sup> See Claimant's description of the matter in Claimant's Memorial, paras. 495 and 496: "*On November 10, 2009, the Economic Circuit Court ordered the suspension of the Airport Lease Agreement pursuant to the application of Dufremol. On May 12, 2010, the Economic Circuit Court again ordered the suspension of the Airport Lease Agreement pursuant to the application of Moldclassica. On the very next day, i.e., May 13, 2010, the Economic Court of Appeal quashed the provisional measure that the Economic Circuit Court had issued in favor of Dufremol on November 10, 2009, that was the same measure as had been granted to Moldclassica the day before. On September 9, 2010, the Economic Circuit again ordered the exact same provisional measures suspending the Airport Lease Agreement pursuant to the application of Trivoli-Com. On October 21, 2010, the Economic Court of Appeal quashed the provisional measure ordered by the Economic Circuit Court on September 9, 2010 in favor of Trivoli-Com. However, at that time the Moldclassica provisional measure was still in force. It was only on Thursday, November 8, 2010, that the Economic Court of Appeal quashed the provisional measure that the Economic Circuit Court had issued in favor of Moldclassica on May 12, 2010, while immediately after the weekend on Monday November 12, 2010, the Economic Circuit Court again ordered the same provisional measure suspending the Airport Lease Agreement, this time pursuant to the application of Ghermivali. On Friday December 14, 2010, the Economic Court of Appeal quashed the provisional measure issued by the Economic Circuit Court on November 12, 2010 in favor of Ghermivali. Since as of December 14, 2010, there were no longer any provisional measures in place preventing Le Bridge from opening the Airport store, Le Bridge applied to the Director-General of the Airport State Enterprise for permission to open, which was withheld – for no apparent reason – until December 22, 2010. That happened to be the exact same date that – this time – the Economic Court*

- Le Bridge was at no moment prevented to lodge appeals, to access the courts and to present its arguments.

-As a system, the judiciary devoted the necessary time to the applications and gave overall reasoned decisions. It is true that the first decision of the Economic Circuit Court was extremely short and did barely go beyond the – correct – quotation of procedural norms on which it was based.<sup>186</sup> Conversely, the handling of the matter by the Economic Court of Appeal was transparent and reasoned. It first upheld the first instance court’s decision on the grounds that it was adequate and did not violate interests of Le Bridge,<sup>187</sup> but then reversed its own decision after an application by Le Bridge, in recognition of the fact that the suspension of the Lease Agreement “*is exaggerated and causes damages*”.<sup>188</sup> The Economic Court of Appeal consistently acted on these considerations and overturned all further decisions of the Economic Circuit Court ordering provisional measures. The latter court in turn took the reasons of the Court of Appeal into account by asking the plaintiffs/competitors to provide security. When the Economic Court of Appeal finally ordered a sequester to be put in place, thereby admitting provisional measures itself, the situation had changed: a first decision on the merits, annulling the airport Lease Agreement, had been rendered, and was before it on appeal by Le Bridge. The Supreme Court finally rejected the cassation appeal against provisional measures by a fully reasoned majority decision, which was objected to in a dissenting opinion. At that moment the Economic Court of Appeal had already confirmed the first instance court’s decision on the merits to invalidate the Lease Agreement.

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*of Appeal granted Dufremol a provisional measure preventing Le Bridge from accessing the Airport store. It is essential to note that the same Economic Court of Appeal had quashed provisional measures identical to the one it issued on December, 22, 2010 at four prior occasions, the last one as recent as December 14, 2010, on grounds of violation of Moldovan law.”*

<sup>185</sup> See Decision of the Supreme Court Justice, dated 28 April 2011, Exhibit C-128 to Claimant’s Memorial.

<sup>186</sup> See Ruling of the Economic Circuit Court, dated 10 November 2009, Exhibit C-18 to Request for Arbitration.

<sup>187</sup> See Decision of the Economic Court of Appeal, dated 18 December 2009, Exhibit C-106 to Claimant’s Memorial.

<sup>188</sup> See Decision of the Economic Court of Appeal dated 13 May 2010, Exhibit C-108 to Claimant’s Memorial, at page 2.

448. When appreciating these facts, the sequence of the decisions, the partial success of Le Bridge's appeal and the reasons given by the higher instances (including a dissenting opinion), the Tribunal is not convinced that the judiciary acted in collusion with outside plaintiffs, that it was guided by a spirit of bias and partiality and that it was grossly incompetent as a system.
449. The next step is for the Tribunal to determine whether the final and binding decision on the merits invalidating the Airport Lease Agreement denied Mr. Arif substantive justice, as asserted by Claimant. It takes the following facts and arguments into consideration.
450. The Lease Agreement was concluded on 28 July 2008 between Le Bridge and the Airport State Enterprise. At that time there was no prior approval by SACA (which chooses the lessee) and no authorization by the SACA to conclude the contract without a prior tender, i.e. by direct negotiation.
451. The authorization is intended to guarantee the best and most profitable use of unused State property. It is specified in the law that the tender should only be avoided if there are good reasons for it (disproportionately high costs for instance). Claimant's expert, Prof. Rosca, testifies therefore, understandably, that a contract concluded without this authorization is void. Rosca goes on to say that the authorization was given, but he errs, because he quotes the approval which was given after the conclusion of the contract.<sup>189</sup> This posterior approval exists indeed. The SACA approved the Lease Agreement on August 5, 2008.<sup>190</sup> In formal legal terms, however, the posterior approval is not equivalent to the prior authorization as required in the law, a requirement that is not void of economic sense.
452. A competitor attacked the validity of the contract arguing that it was null and void because no prior authorization had been given. The Economic Circuit Court followed this reasoning, explained at length that the contract contradicted

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<sup>189</sup> See Expert Report by Dr. Nicolae Rosca, dated 12 February 2012, at para. 123.

<sup>190</sup> See Letter No. 2124 from the Director-General of the SACA, dated August 5, 2008, Exhibit C-65 to Claimant's Memorial.

imperative rules of law, that it was null and void in accordance with Article 220 of the Civil Code, and invalidated it. The court argued that the Law on Administration and Privatization of Public Property and Regulation No. 483 stipulated that, under normal circumstances public assets “*can be rented with the prior agreement of the central or local public authority, which will decide the mode of selection of the tenant*” and that, under specific circumstances, which the court held did not exist, the authority may accept to rent the unused assets “*through direct negotiations*”.<sup>191</sup> Upon Le Bridge’s appeal, The Economic Court of Appeal upheld this decision with a detailed motivation,<sup>192</sup> and the Supreme Court also confirmed the decision.<sup>193</sup>

453. The decisions are carefully drafted and can be followed in their reasoning from A to Z. As a matter of general interpretation, they are not fundamentally different from Claimant’s expert, Prof. Rosca, insofar as they argue that the lack of a prior approval leads to absolute and irreparable nullity. It is well possible that courts in jurisdictions with a different legal tradition would have been less formalistic, that they would have reasoned in a more teleological way, that they would have tried to remedy the formal defect by economic considerations. All these arguments are valid in appeal proceedings. They may be better than the ones used by the Moldovan courts. They do not disqualify, however, the national courts’ application to such a degree to be so egregiously wrong that no competent and honest court would use them. This is all the less so, because the argument in favour of an imperative prior authorization is not void of economic sense.

454. The Tribunal finds therefore that the final and binding decision of the judiciary to invalidate the Lease Agreement does not as such amount to a denial of justice.

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<sup>191</sup> See Decision of the Economic Circuit Court, dated 16 November 2010, Exhibit C-127 to Claimant’s Memorial, at page 2.

<sup>192</sup> See Decision of the Economic Court of Appeal, dated 28 February 2011, Exhibit C-129 to Claimant’s Memorial.

<sup>193</sup> See Decision of the Economic Court of Appeal, dated 10 July 2011, Exhibit C-130 to Claimant’s Memorial.

**d) *Appraisal of court proceedings around the Tender and lease contracts on the border stores***

455. Claimant contends that the State treated him unfairly and inequitably by allowing the judiciary to deny him justice in a variety of ways: by dishonestly reformulating one technical specification in tender documents; by arrogating jurisdiction in bad faith; by egregiously violating three fundamental procedural rules: the mandatory preliminary procedure, the 30-days limitation period and due process.
456. The Tribunal notes that the original disputes with respect to the border stores are not between the State and Le Bridge. On the contrary, the national Tender Commission and in particular the Moldovan Ministry of Economy took sides with Le Bridge and indirectly with Claimant, and defended their position as the winner of the Tender organised by the government.
457. The dispute was initiated by a competitor who had participated in the Tender and lost, and who alleged that Le Bridge had won although not fulfilling the requirements of the Tender specifications. That is a serious matter and complicated in most jurisdictions.
458. The original dispute originates from the controversial understanding of one word in the “Technical Specifications” to conducting a public contest for creation of a network of duty-free stores at state border crossing stations”. Its paragraph 2.3. No. 8 requests, in the Moldovan language version, that each participant must prove an experience of activity “*in domeniul*” of at least 5 years.<sup>194</sup> The Russian version asks for experience in the “*given sphere*”.<sup>195</sup> The English translation, as submitted by Claimant, reads “*in this field of activity*”.<sup>196</sup>

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<sup>194</sup> See Decision no. 172 on the creation of a network of duty-free stores at state border crossing stations, dated February 18, 2008, Exhibit C-8 to Request for Arbitration.

<sup>195</sup> See Russian version of Decision No. 172, Exhibit R-119 to Respondent’s Rejoinder. The translation is not contested.

<sup>196</sup> See Decision no. 172 on the creation of a network of duty-free stores at state border crossing stations, dated February 18, 2008, Exhibit C-8 to Request for Arbitration.

459. In the original dispute, Le Bridge asserted that the requirement referred to a general experience in the field of export-import commerce and that it and Mr. Arif largely met the requirement. Le Bridge was supported in this opinion by the Ministry of Economy. The competitor asserted that the requirement referred to a specific experience in the field of duty-free. It was supported in this opinion by another member of the Tender Commission.

460. The stakes of the “proper” understanding of the requirement were high, in particular since only two competitors had participated in the contest. Had it referred to a general experience in the field, Le Bridge and the competitor would both have been qualified; had it referred to an experience in the field of duty-free, only the competitor would have qualified.

461. The Moldovan courts considered the controversial matter and came to the conclusion that the wording as well as the economic and political context favored an interpretation requiring a 5 years’ experience in the field of duty-free.

The Supreme Court gave reasons, which it summarized as follows:

*“It is obvious that it follows from the text, the meaning and the legal standards regulating such legal relations, that the experience in the sphere in this case is inseparably related to the final objective, i.e. setting up a network of duty-free stores; this is why there was an eliminatory provision for the competitors, such as having a real experience no less than five years, exactly in the duty-free store market, not in any other sphere, including related spheres, such as usual commerce or even import-export commerce.”<sup>197</sup>*

462. Do these decisions document bad faith and a lack of impartiality? The Tribunal does not think so. It has carefully studied the text in the three languages. It has found that the Moldovan text is the least precise but, seen in the context of the other provisions and project description of the Technical Specifications which specify indeed each time the sphere of duty-free, allows to uphold the restrictive

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<sup>197</sup> See Decision of the Supreme Court of Justice of 24 November 2010, Exhibit C-155 to Claimant’s Memorial, at page 10; confirming the decisions of the Economic Circuit Court of 28 May 2010, Exhibit C-150 to Claimant’s Memorial, at page 3; and of the Economic Court of Appeal of 7 September 2010, Exhibit C-153 to Claimant’s Memorial, at page 7.

argumentation of the Supreme Court. It seems that the English translation, which was apparently produced in good faith, reflects an identical understanding. In addition, the Russian text, which has its importance in Moldova although Russian is not an official language, also seems to orient to the duty-free sector.

463. The Tribunal is not entitled to make a final finding on the question. That would amount to a revision of the merits and be beyond its competence. The Tribunal is, however, convinced that the Moldovan courts did not render decisions that no competent and honest court would have possibly been able to render when they decided that the Technical Specifications required an experience of 5 years in the field of duty-free and that therefore Le Bridge did not qualify.

464. The Tribunal is reinforced in this opinion by a further consideration. The present case is different from other cases presented in these proceedings insofar as in the other cases the allegedly unjust court decisions had normally led to the termination of the claimants' economic activities. In the present case, the judiciary invalidated the Tender results and the subsequent July 1, 2008 Agreement, but not the lease contracts themselves. Not only do these contracts remain in force today, but Le Bridge and Claimant have created a network of duty free shops without a tender and they are apparently profitable even without exclusivity clauses.

465. Claimant concedes that the Tender was not a prerequisite for the opening of duty free shops in general, that they could be opened on the basis of individually negotiated contracts and that is what Le Bridge did,<sup>198</sup> just like its competitor. In the face of this uncontested evidence, the Tribunal does not believe that there was a general *animus* against Mr. Arif's and Le Bridge's business, and that the judiciary tried to destroy Mr. Arif's business in Moldova in general.

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<sup>198</sup> Counsel for Respondent stated at the hearing that: "*And now Le Bridge itself has been allowed to open further border stores without a tender, so there's no discrimination there either*", Hearing Transcript, Day 1, p. 167. Counsel for Claimant did not rebut this statement.

466. Claimant further contends that the Economic Circuit Court and the Economic Court of Appeal rendered decisions *ultra petita* by ascertaining advantages which were not requested by the competitor.

467. The Tribunal has checked the request before the Economic Circuit Court. The competitor asked “*to declare as illegitimate the land lease agreement made between the Custom Service of the Republic of Moldova and “Le Bridge Corporation Limited LLC according to results of attacked contest.”*”<sup>199</sup> It seems that during the hearing Dufremol requested that this claim regarding the illegality of the local lease agreements be withdrawn and Dufremol requested instead that the July 1, 2008 Agreement be declared invalid and that the national Customs Service was ordered to “*revoke the resolutions of acceptance of the lease agreements*”.<sup>200</sup> The Tribunal does not see how ordering the national Customs Service to withdraw its acceptance of the lease agreements on the border shops was not claimed, as Claimant alleges.

468. The Tribunal has also considered the decision of the Economic Court of Appeal that declared the competitor “*as the winner of the tender for the setting-up of a network of “duty-free” stores at the state border crossing points*”<sup>201</sup>, although it stated before that the plaintiff had only asked for a declaration of illegality of the Tender results. The court argued that the Tender results had infringed upon the rights of the competitor and that the competitor had been the only other participant in the Tender. The Supreme Court reconsidered the matter and found that the decision of the Economic Court of Appeal did not disadvantage Le Bridge. It declared that:

*“the cassation court is convinced that this is the only way reestablishing the plaintiff in its rights taking into consideration the fact that there are no other competitors which are claiming their rights of winners, and the*

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<sup>199</sup> See Dufremol’s Statement of Claim, dated 31 December 2009, Exhibit C-145 to Claimant’s Memorial, at pages 2 and 3.

<sup>200</sup> See Decision of the Economic Circuit Court dated May 28, 2010, Exhibit C-150 to Claimant’s Memorial at page 2.

<sup>201</sup> See Decision of the Economic Court of Appeal of 7 September 2010, Exhibit C-153 to Claimant’s Memorial, at pages 8 and 9.

*authority in charge of the tender has not referred to any objections regarding the plaintiff's incompatibility with the tender requirements.*"<sup>202</sup>

469. The Tribunal realizes that the competitor did not make a formal request to be declared the winner of the contest. It did, however, explicitly pursue its action to push Le Bridge aside and – logically – to take its place. In Le Bridge's appeal in cassation, the competitor evidently defended the decision of the Economic Court of Appeal. The Tribunal believes that the Economic Court of Appeal did decide *ultra petita* by substituting a formal request by its logical deduction. That was an error and remained an error despite the excuses formulated by the Supreme Court.

470. Is the error tainted by impermissible bias and bad faith? The Tribunal is not convinced for the following reasons: the court's decisions had no negative impact on Le Bridge's position and business. For Le Bridge, the important part of the decision was the invalidation of the Tender result declaring it the winner. The further and unwarranted declaration of another winner did in fact neither disadvantage Le Bridge nor, indirectly, Mr. Arif. That might have been different if the status of exclusivity of entitlement on duty-free business had been maintained. But the State had already invalidated the exclusivity right to open and operate border shops for reasons of competition law. Moreover, the Tender results and the July 1, 2008 Agreement had been cancelled, including the alleged rights to exclusivity. This allowed Le Bridge to continue its operations, side by side with the winning competitor, in its shops at the border crossings which had been identified in the Tender documents. The erroneous decision of the Economic Court of Appeal had therefore no effect on Le Bridge. It was wrong, but not manifestly unjust.

471. The Tribunal notes that Claimant also states in his Memorial<sup>203</sup> that Moldova's judiciary unlawfully issued provisional measures<sup>204</sup> suspending the Tender

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<sup>202</sup> See Decision of the Supreme Court of Justice, dated 24 November 2010, Exhibit C-155 to Claimant's Memorial, at page 13.

<sup>203</sup> See Claimant's Memorial, para. 489.

results, as a result of which Claimant was unable to open his border store at Costesti for eleven months. Claimant does not elaborate on this statement and fails to show in what way these provisional measures constituted a denial of justice. Therefore, the Tribunal rejects this argument.

472. Claimant further asserts that the State violated the fair and equitable treatment standard by an administration of justice where the judiciary breached fundamental principles of procedure.

473. The Tribunal has examined the alleged four instances of procedural denial of justice.

474. The first allegation concerns an arrogation of jurisdiction by the Economic Circuit Court, where in reality the Court of Appeal was competent in the first instance, given the administrative nature of the contested acts, i.e. the Decision of the national Tender Commission, the 1 July, 2008 Agreement<sup>205</sup> and the lease contracts concluded with the local customs offices.

475. The Economic Circuit Court argued that it had jurisdiction because the “*object of action does not constitute the violated right or the interest of the state or a territorial administrative unit, but the violated right of an economic agent, which relate to the jurisdiction of the Economic Circuit Court*”.<sup>206</sup> Before coming to this conclusion, it enumerated the possible administrative law matters.

476. Nevertheless, Claimant and Claimant’s experts developed a different argumentation. They argued that the decision of the Tender Commission, the July 1, 2008 Agreement and the four lease contracts with the local customs offices had to be qualified as administrative acts and contracts in accordance with Article 2 of the Law on Administrative Disputes, and that claims contesting such administrative acts were, in accordance with Article 33(3)(b) of the

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<sup>204</sup> See Decision of the Economic Circuit Court, dated January 29, 2010, Exhibit C-31 to Request for Arbitration; see also Decision of the Economic Court of Appeal, dated march 22, 2010, Exhibit C-148 to Claimant’s Memorial.

<sup>205</sup> See July 1, 2008 Agreement, Exhibit C-11 to Request for Arbitration.

<sup>206</sup> See Decision of the Economic Circuit Court, dated 28 May 2010, Exhibit C-150 to Claimant’s Memorial, at page 3.

Moldovan Code of Civil Procedure, within the exclusive jurisdiction of the Court of Appeal.<sup>207</sup> Prof. Belei explained that the Economic Circuit Court wrongly applied a law which had been abolished in 2011.<sup>208</sup>

477. The Economic Court of Appeal confirmed the first instance decision, insisting on the fact that the “*object of litigation represents the violated right of an economic agent*”<sup>209</sup>.

478. The Supreme Court, in its final and binding decision confirmed the previous decisions and stated that the courts,

*“faced to a number of connex claims some of which are under jurisdiction of administrative court, yet some of them are under the jurisdiction of economic court, guided by imperative law provisions, have absolutely correctly considered the jurisdiction of economic court in a justified way.”*<sup>210</sup>

479. The Tribunal has studied the different legal provisions. It has learned from Prof. Belei’s expert report that many of the changes in procedural law and particularly in administrative law are of very recent origin and new for the Moldovan legal system. It has also looked at the July 1, 2008 Agreement and the lease contracts with the local customs offices. It realizes that in both cases one party to the agreements is a public authority and that the object is the use of public land, as provided in the definition of Article 2 of the Law on Administrative Disputes. The Tribunal is, however, equally conscious of the fact that the Agreement and the lease contracts contain to a large extent provisions which are not alien to lease contracts under private law. The Tribunal is not sure whether they are “*for the advantage of public power prerogatives*”, as stipulated in the same Article 2.

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<sup>207</sup> See Expert Report by Dr. Nicolae Rosca, at para 49; Expert Report by Dr. Elena Belei, dated 12 February 2012, (Annex 9 to Claimant’s Memorial) at para 45.

<sup>208</sup> See Expert Report by Dr. Elena Belei, at paras. 8 and 9.

<sup>209</sup> See Decision of the Economic Court of Appeal, dated 7 September 2010, Exhibit C-153 to Claimant’s Memorial, at page 8.

<sup>210</sup> See Decision of the Supreme Court of Justice, dated 24 November 2010, Exhibit C-155 to Claimant’s Memorial, at page 9.

480. On the other hand, the Tribunal has noticed that Article 29 of the Moldovan Code of Civil Procedure established jurisdiction of the “*economic judiciary instances*” over disputes arising, among others, from land-related relationships and, under certain circumstances, from administrative acts, necessarily involving the administration.
481. In other words, the Tribunal is confronted with a complex question of Moldovan procedural law which has been answered differently and contradictorily by the judiciary and by learned experts on Moldovan law. Both interpretations are based on arguments and on the words and objectives of the law. The Tribunal is not in a position and has no competence to take sides in this controversy. If it tried, it would indeed sit as a court of appeal over decisions of the Moldovan judiciary.
482. The Tribunal’s role is limited to determine whether the judiciary has denied justice by applying procedures that are so void of reason that they breathe bad faith. The Tribunal has not found such type of conduct.
483. The second allegation of procedural denial of justice concerns the mandatory preliminary application procedure which, according to Claimant, the competitor did not respect and which should have been taken into account *ex officio* by the judiciary. Claimant submits that the plaintiff/competitor forged such an application.
484. Respondent has not denied the necessity of a preliminary procedure. It insists, however, that the plaintiff/competitor provided proof of the application which was accepted by the courts in good faith.
485. The Tribunal is not in a position and has no competence to retrace and reappraise the factual evidence. It notes that the first instance court examined and accepted the plaintiff’s/competitor’s letter as application to the Ministry of Economy for a preliminary procedure, that the Court of Appeal examined and confirmed the ruling and held that the existence of the letter was *prima facie* evidence that

respondent had to invalidate,<sup>211</sup> and that the Supreme Court “*does not agree that no pertinent evidence of failure to receive such preliminary applications was presented.*”<sup>212</sup>

486. The Tribunal does not find a violation of fundamental principles of procedure in the courts’ handling of the letter and dismisses the contention of a procedural denial of justice.

487. Claimant alleges a third fundamental violation of due process and submits that the courts did not take into consideration that the plaintiff/competitor had not respected the mandatory limitation period of 30 days within which a claim must be brought and had not provided any justification for this.

488. The Tribunal has studied Article 17 of the Law on Administrative Disputes. The normal deadline for a claim is 30 days. It starts to run when the applicant is informed of the act. The Supreme Court found:

*“The applications for taking part in the tender were collected and kept confidentially by the authority in charge of the tender. The Panel does not find any plausible evidence that the plaintiff-appellee had free access to other competitors’ applications, in order to oppose his right of contestation to the appellant-defendant’s participation in the public tender.”*<sup>213</sup>

489. The Supreme Court deducted from this statement of fact that the first instance and the appellate courts had correctly decided to accept the late claim. The Tribunal is not in a position and has no competence to retrace and reappraise the facts. In these circumstances it cannot find an egregious misapplication of procedural law and a procedure which is tainted by bad faith.

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<sup>211</sup> See Decision of the Economic Court of Appeal, dated 7 September 2010, Exhibit C-153 to Claimant’s Memorail, at page 5.

<sup>212</sup> See Decision of the Supreme Court of Justice, dated 24 November 2010, Exhibit C-155 to Claimant’s Memorial, at page 9.

<sup>213</sup> See Decision of the Supreme Court of Justice, dated 24 November 2010, Exhibit C-155 to Claimant’s Memorial, at page 12.

490. The fourth and last contention of procedural denial of justice concerns an alleged violation of due process. It is uncontested that the plaintiff/competitor orally amended its claim during a hearing on the merits before the Economic Circuit Court and submitted the amendment in hand-written form. The court accepted the amendment without handing a copy of the hand-written document to Le Bridge. Claimant's expert expressed that it was fundamentally unfair that the copy was not given to Le Bridge because it was "*prevented from making submissions on the issue and from formulating objections thereto*".<sup>214</sup>

491. Both the Economic Court of Appeal and the Supreme Court validated the decision of the first instance court. The Supreme Court stated:

*"The panel considers that the representatives of the appellants were present during the examination of the case by the lower courts, they were heard on factual and legal issues, the principles of due-process were respected and the representative of the appealing party, F.C.E. Le Bridge Corporation Limited L.L.C. had the possibility respond and give evidence against the arguments of the opponent party."*<sup>215</sup>

492. The Tribunal has studied the amendment of the claim and the subsequent procedure. The plaintiff/competitor had initially requested to annul the four border store lease contracts with the local customs offices. He withdrew this request (only to introduce it later in a separate lawsuit) and replaced it by the request "*to acknowledge as illegal the Agreement concluded between "Le Bridge" company and Custom Service*".<sup>216</sup>

493. The Tribunal has noted that *Le Bridge* reacted immediately, as documented by the Economic Circuit Court. The court stated – and that is not contested - :

*"The representative of the defendant, the Company "Le Bridge Corporation Limited", during the hearing stated that, given the fact that the plaintiff modified its initial requests, the claim of the plaintiff*

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<sup>214</sup> See Expert Report by Dr. Elena Belei, dated 12 February 2012, Annex 9 to Claimant's Memorial at para 71.

<sup>215</sup> See Decision of the Supreme Court of Justice, dated 24 November 2010, Exhibit C-155 to Claimant's Memorial, at page 11.

<sup>216</sup> See Application dated 20 May 2010, Exhibit C- 151 to Claimant's Memorial.

*regarding the declaration as illegal of the lease agreements concluded according to the results of the tender, have to be removed from the Docket.”<sup>217</sup>*

494. The quotation documents that Le Bridge was fully aware of the amendment of the claim, did not object to it and drew the consequences which it found appropriate. The court decision demonstrates that it took Le Bridge’s request into account. In fact, it was this amended claim at the exclusion of the initial request for an invalidation of the lease contracts that was carried through the instances. Le Bridge had at each step and from the very formulation of the amendment an opportunity to comment it, and it did.
495. The Tribunal deducts from these circumstances that the party’s right to be heard was respected during the national court proceedings and that the oral amendment of the claim and its subsequent submission in hand-written form, however peculiar they may seem, have not violated due process.
496. Finally, with regard to Claimant’s further argument that a violation of due process also occurred when the Supreme Court of Justice, in its decision of November 24, 2010, refused to admit Le Bridge’s appeal on cassation, thereby refusing to hear the appeal, but nevertheless proceeded to examine the substance of the matter and elaborate on it, the Tribunal notes that the reasoning of the Supreme Court was sufficiently detailed and gave a grounded basis for rejecting Le Bridge’s appeal. Under these circumstances, the Tribunal finds no breach of due process.
497. In conclusion, the Tribunal dismisses the claim for procedural and substantive denial of justice during the court proceedings around the Decision of the Tender Commission and the July 1, 2008 Agreement.

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<sup>217</sup> See Decision of the Economic Circuit Court, dated 28 May 2010, Exhibit C-150 to Claimant’s Memorial, at page 2.

### 3. Specific Undertakings.-

498. The Tribunal has already found in Section V that Claimant's claim for specific undertakings is inadmissible and therefore there is no need to address the merits of this claim.

### 4. Unreasonable or arbitrary measures.-

499. Claimant argues that this standard does not differ from the FET standard and that, to this extent, all the acts and omissions alleged to have breached the FET standard are also in breach of Respondent's obligation not to impose unreasonable or arbitrary measures. Alternatively, and in case the Tribunal should consider this as a standard independent of the FET standard, Claimant argues that this obligation is brought in via the MFN clause in Article 4 of the BIT.<sup>218</sup>

500. Firstly, the Tribunal notes that there is no independent obligation not to impose arbitrary or unreasonable measures under the BIT. Even though non-arbitrariness may be considered as one of the elements of the FET standard a breach of FET does not necessarily imply the existence of arbitrariness. Claimant's general argument that all the acts and omissions alleged to have breached the FET standard also are in breach of Respondent's obligation not to impose unreasonable or arbitrary measures is rejected. Claimant has to successfully prove how the alleged acts and omissions are in breach of Respondent's alleged obligation not to impose arbitrary or unreasonable measures.

501. Secondly, the Tribunal notes Claimant's definition of an "arbitrary measure", as established in his Memorial: "...*“not so much something opposed to a rule of law, as something opposed to the rule of law [...] It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.” An act is arbitrary because it is “not founded on reason or fact [...] but on mere fear reflecting national preference.”*"<sup>219</sup>

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<sup>218</sup> See Claimant's Reply, para. 583.

<sup>219</sup> See Claimant's Memorial, para. 393.

502. Claimant has not successfully proved before this Tribunal in what way each of the alleged acts and omissions of Respondent would amount to a breach of Respondent's alleged obligation not to impose unreasonable or arbitrary measures.<sup>220</sup>

503. For the reasons stated above, and irrespective of whether this obligation can be imported via the MFN clause, this claim is rejected by the Tribunal.

## **5. Full Protection and Security.-**

504. Article 5(1) of the BIT provides that: "*Investments made by the nationals or companies of one of the Contracting Parties shall enjoy, in the territory and in the maritime area of the other Contracting Party, full protection and security.*"

505. The Tribunal is not persuaded by Claimant's argument that if a State breaches the FET standard, it is *ipso facto* also in breach of the FPS standard. The standard of FPS is clearly addressed in a separate article in the BIT. The Tribunal therefore finds that FPS is a separate and independent standard to that of FET. By the same token, Claimant's general argument that all of Moldova's acts and omissions in breach of FET also constitute breaches of Moldova's obligation to grant FPS is rejected. Claimant has to prove how the alleged acts and omissions are in breach of Respondent's alleged obligation to grant FPS.

506. Claimant has not successfully proved before this Tribunal in what way each of the alleged acts and omissions are in breach of Respondent's full protection and security obligation, and therefore this claim is rejected. The Tribunal need not address the further arguments made by the Parties regarding this question.

## **6. Discrimination.-**

507. The Tribunal notes that there is no independent obligation not to discriminate under the BIT. Claimant's argument that there was such a breach would only make sense if this obligation were analysed in the context of national treatment

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<sup>220</sup> Claimant just argues that this standard does not differ from the FET and that to this extent all the acts and omissions alleged to have breached the FET standard also are in breach of Respondent's obligation not to impose unreasonable or arbitrary measures.

(Article 4 of the BIT) or if an independent obligation not to discriminate could be imported via the MFN clause.<sup>221</sup>

508. Article 4 of the BIT provides in its relevant part that: “*Each Contracting Party shall extend, in its territory and in its maritime area, to nationals and companies of the other Contracting Party, regarding their investments and activities connected with these investments, treatment not less favourable than that granted to its nationals or companies...*”

509. Discrimination is an essential element of a “national treatment” clause, such as that contained in Article 4 of the BIT. Discriminatory measures towards the foreign investor in relation to more favourable treatment awarded to national investors will imply a breach of the national treatment standard. Claimant has to prove how the alleged acts and omissions are in breach of Respondent’s obligation not to discriminate in order for the Tribunal to find a breach of national treatment for discrimination.

510. Claimant indeed tries to prove discrimination based on certain facts. Nevertheless, the Tribunal is not persuaded that there has been discrimination against Claimant for the reasons stated below.

511. With regard to the cancellation of the Lease Agreement, the Tribunal has already found that it was the result of the application by the Moldovan courts of Moldovan law, under which the Lease Agreement was invalid. The legitimate application of Moldovan law cannot be considered discriminatory against Claimant and Claimant’s argument to the contrary is rejected by this Tribunal.

512. With regard to Dufremol’s authorization to open border duty free stores without a tender, the Tribunal notes that both Parties agree that, under Moldovan law, such authorization may be granted.<sup>222</sup> In fact, it seems that Le Bridge has been

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<sup>221</sup> The Tribunal notes that Claimant alleges discrimination of the investor only with regard to Moldovan investors.

<sup>222</sup> See Respondent’s Counter-Memorial, para. 647 and Respondent’s Rejoinder, para. 342. During the Hearing Professor Knieper asked counsel for Claimant the following: “...I asked whether you still agree that these lease agreements at the border can be concluded without any tender or without any other

granted the authorization for the opening of several border stores without a tender.<sup>223</sup> The Tribunal further notes that the local customs office of Leuseni signed the lease agreement with Dufremol on December 2010<sup>224</sup> and the local customs office of Cahul signed the lease agreement with Dufremol on January 2011,<sup>225</sup> both dates being posterior to the irrevocable cancellation by the Supreme Court of both the July 1, 2008 Agreement and the Tender results (November 24, 2010). The Tribunal finds no discrimination against Claimant in these circumstances.

513. With respect to Dufremol and Le Bridge's respective locations at Leuseni and Cahul, based on the aerial photographs submitted by Respondent as Exhibits R-102 to R-103, the Tribunal is not persuaded that the locations granted to Dufremol are better than those granted to Le Bridge. Moreover, the Tribunal notes that Claimant does not contest Respondent's argument that Le Bridge selected its locations at both border crossing points because at that time it considered they were the best locations. Further, regarding the fence erected in front of Le Bridge's border store in Leuseni, Claimant has not proved that there were no legitimate reasons for this measure or that the Dufremol shop was similarly positioned as Le Bridge's shop, which would have justified the erection of a fence in front of it too.<sup>226</sup> Finally, Claimant alleges in his Memorial<sup>227</sup> that Respondent prevented customers from shopping at Le Bridge's duty free store in Cahul. The Tribunal is not persuaded, based on the evidence,<sup>228</sup> that the isolated incident alleged by Claimant by which a customer "*asked to be served quickly*

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*formality...*" to which counsel for Claimant answered that: "...Now, on the question of the validity of lease agreements, absent a tender, we believe today that it is possible...", Hearing Transcript, Day 1, p. 213 and 215.

<sup>223</sup> Counsel for Respondent stated at the Hearing that: "*And now Le Bridge itself has been allowed to open further border stores without a tender, so there's no discrimination there either*", Hearing Transcript, Day 1, p. 167. Counsel for Claimant did not rebut this statement.

<sup>224</sup> See Agency for Land Resources and Cadastre, Hincesti Territorial Cadastral Office, Extract from the Register of real estate for performing transactions for Le Bridge / Leuseni, dated May 23, 2011 Exhibit C-159 to Claimant's Memorial.

<sup>225</sup> See Agency for Land Resources and Cadastre, Cahul Territorial Cadastral Office, Extract from the Register of real estate for performing transactions for Le Bridge / Cahul, dated May 24, 2011 Exhibit C-160 to Claimant's Memorial.

<sup>226</sup> The Tribunal notes that Claimant has not rebutted either in its Reply or at the Hearing Respondent's argument that the erection of the fence was necessary in order to prevent illegal sales at the frontier with Romania.

<sup>227</sup> See Claimant's Memorial, para. 280.

<sup>228</sup> See internal note from Ms. Elena Garnet to Ms. Irina Chirilescu, dated November 4, 2011, Exhibit C-162 to Claimant's Memorial.

*because a customs officer had not allowed her to stop in front of Le Bridge's store" and that "She also requested that her purchase not be put in a Le Bridge branded bag to avoid problems with the Customs Officers", can be considered discriminatory per se or amount to a breach of Respondent's obligation not to discriminate.<sup>229</sup>*

514. Because this Tribunal finds no discrimination on the basis of the above facts, Claimant's claim for discrimination is rejected and there is no need to address Claimant's argument that the obligation not to impose discriminatory measures is imported through the MFN clause.

515. Finally, the Tribunal notes that even though discrimination may also be considered an element of FET, the actions and omissions in breach of FET will not necessarily imply a breach with respect to non-discrimination. Therefore, Claimant's general argument that all of Moldova's acts and omissions in breach of FET also constitute breaches of Moldova's obligation not to discriminate is dismissed. Claimant has to prove that each of the alleged acts and omissions were in breach of Respondent's obligation not to discriminate in order for the Tribunal to find such breach. Claimant has not satisfied his burden of proof.

## **7. Compensation.-**

516. Claimant alleges that Respondent's non-payment of compensation for the expropriation of his investment constitutes a further breach of its obligations under the BIT and international law.<sup>230</sup>

517. The Tribunal has already found in Section VI.B.1 above that there was no expropriation of Claimant's investment. Therefore, Claimant's claim for compensation for an expropriation is dismissed.

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<sup>229</sup> The Tribunal further notes that this allegation is not pursued by Claimant either in Claimant's Reply or at the Hearing.

<sup>230</sup> See Claimant's Reply, para. 676.

## 8. Fair and Equitable Treatment.-

518. Denial of justice under customary international law and the fair and equitable treatment obligation has already been considered. This section considers all other arguments raised in relation to fair and equitable treatment.

### a) *The Position of the Parties*

519. Claimant alleges that arbitral jurisprudence has identified five principles that are encompassed by the fair and equitable treatment standard; namely: (i) that the State must act consistently vis-à-vis the investor and cannot modify the legal framework when specific commitments have been made; (ii) the State's conduct cannot breach the investor's legitimate expectations; (iii) the State must act in a transparent manner; (iv) the State must act in good faith; and (v) the State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process.<sup>231</sup>

520. Claimant alleges specific breaches of the FET standard through inconsistency "*as Moldova's organs did not act as part of the same unit, but in opposite ways*";<sup>232</sup> through "*breach of Claimant's legitimate expectations that Moldova would honor its specific commitments undertaken towards Mr. Arif*"<sup>233</sup>; through breach of legitimate expectations and good faith in that Respondent's judiciary irrevocably cancelled the Lease Agreement on June 10, 2011,<sup>234</sup> the Airport State Enterprise prevented Claimant from accessing the store at the airport for eleven months;<sup>235</sup> and through failure to pursue disciplinary proceedings against Judge Namasco.<sup>236</sup>

521. Claimant alleges breaches of legitimate expectations, good faith and consistency obligations in relation to the border stores in that the Supreme Court irrevocably cancelled the Tender results and the July 1, 2008 Agreement on November 24, 2010; Respondent failed to allocate land and/or premises in Ungheni; through

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<sup>231</sup> See Claimant's Memorial para. 333-355.

<sup>232</sup> See Claimant's Memorial, para. 450.

<sup>233</sup> See Claimant's Memorial, para. 450; Claimant's Reply, para. 538.

<sup>234</sup> See Claimant's Memorial, para. 452.

<sup>235</sup> See Claimant's Memorial, para. 453; Claimant's Reply, paras. 565-566.

<sup>236</sup> See Claimant's Memorial, para. 454; Claimant's Reply para. 567.

the delay in opening stores caused by fire inspection authorities when Le Bridge had already complied with all applicable fire safety regulations; through the suspension by the NACP of the July 1, 2008 Agreement's exclusivity clause; through the lease agreements entered into by the customs offices with Dufremol, and in the better locations granted by Dufremol for its stores; and through harassment and intimidation.<sup>237</sup>

522. Claimant also argues that the invalidity of rights under domestic law, if they created expectations on the part of the investor, cannot be invoked against Claimant to allege that his expectations were not legitimate.<sup>238</sup> He states that the legality of the Airport Lease Agreement is irrelevant for the purposes of his legitimate expectations.<sup>239</sup>

523. In summary, Claimant alleges a breach of the fair and equitable treatment standard through treatment that, in multiple forms, was inconsistent, in breach of legitimate expectations and not in good faith. These concepts are closely inter-related and overlapping, and are to a large extent different expressions of the same idea. They are considered together by the Tribunal.

524. Respondent contends with respect to fair and equitable treatment that Claimant could not legitimately expect that he could acquire rights in violation of local law, or legitimately expect that local authorities and courts would not apply local law. Respondent states that it is incontrovertible that investors must make their investment in compliance with local legislation. Claimant had an obligation to learn and comply with local law. Respondent states that Claimant does not explain why he had a legitimate expectation that he could ignore local law by signing the Lease Agreement. Further, the Tender gave him no right to expect that he would obtain the Lease Agreement, and the alleged legitimate expectations regarding access to the airport store or the disciplinary proceedings against Judge Namasco are without substance.<sup>240</sup>

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<sup>237</sup> See Claimant's Memorial, paras. 449-463; Claimant's Reply para. 568.

<sup>238</sup> See Claimant's Reply, para. 551.

<sup>239</sup> See Claimant's Reply, para. 564.

<sup>240</sup> See Respondent's Counter-Memorial, paras. 581-603; Respondent's Rejoinder, paras. 298-317.

525. As regards the border stores, Respondent states that Claimant's arguments are flawed because contractual commitments are not the type of specific assurances that can create legitimate expectations for an investor. Further, in relation to Ungheni, Respondent argues that in fact it did offer exactly the location that Claimant had expected to have since the Tender began. Respondent also argues that Claimant does not identify any specific assurance that he would not be subject to fire safety regulations, or (in respect of the exclusivity clause) any basis that he could legitimately expect to be exempt from Moldovan competition law, or any basis for a legitimate expectation that competitors would not receive better border locations. In any event, Claimant has not demonstrated that competitors in fact received better locations.<sup>241</sup>

**b) Article 3 of the France-Moldova BIT**

526. The FET obligation appears in Article 3 of the BIT and reads as follows:

*“Fair and equitable treatment*

*Each Contracting Party binds itself to ensure, on its territory and maritime zone, in accordance with Public International Law principles, fair and equitable treatment to the investments of the nationals and companies of the other Contracting Party, and to guarantee that the exercise of the recognized right to fair and equitable treatment will not be impaired either by statute or de facto. Particularly, although not exclusively, are considered as statutory or de facto obstacles to fair and equitable treatment any restriction to the purchase or the transportation of raw materials and of auxiliary materials, or energy and fuel, as well as means of production and exploitation of any kind, any obstacles to the sale and transportation of the products within the state and abroad, as well as any other measure having similar effects.*

*The Contracting Parties shall consider in good faith, in accordance with their internal legislation, the requests for entry and authorization to reside, employment and travel, made by the nationals of a Contracting*

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<sup>241</sup> See Respondent's Counter-Memorial, paras. 604-626; Respondent's Rejoinder paras. 318-330.

*Party, pursuant to any investment made in the territory or the maritime area of the other Contracting Party.”*

527. The content of the fair and equitable treatment obligation is well known through elaboration in many awards and doctrinal writings, but must still be interpreted in each treaty in accordance with Articles 31 to 33 of the Vienna Convention on the Law of Treaties.
528. The objects and purposes of the France-Moldova BIT, as expressed in its Preamble, include “*to create favourable conditions for French investments in Moldova and Moldovan investments in France*” as well as to encourage and protect such investments.
529. The specific language adopted by France and Moldova in Article 3 connects fair and equitable treatment with ‘public international law principles’, although neither party has raised the question of whether this language limits the fair and equitable treatment standard to the minimum standard of treatment of aliens in customary international law. This question, except in some very specific contexts such as Article 1.105 of NAFTA, is increasingly of historic significance as the rapidly expanding practice on FET clauses in treaties accelerates the development of customary international law.<sup>242</sup> In any event, the Tribunal is satisfied that the fair and equitable treatment standard in Article 3 of the France-Moldova BIT is an autonomous standard given: the title of Article 3; the use of the expression ‘fair and equitable treatment’ three times in Article 3; the elaboration of a series of non-exclusive obstacles to fair and equitable treatment in Article 3, as well as the object and purpose of the BIT already referred to.
530. Article 3 also expressly connects fair and equitable treatment with good faith at least in the context of the employment and movement of nationals of the other State party. The non-exclusive elaboration of obstacles to fair and equitable treatment are of a logistical and regulatory nature showing that measures of this nature were expressly contemplated as breaching the standard. The reference to

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<sup>242</sup> See Rudolf Dozler and Christoph Schreuer ‘*Principles of International Investment Law*’ (Oxford University Press, 2008) page 128.

‘obstacles’ confirms that the fair and equitable treatment obligation relates less to proactively stimulating the inflow of investment than to ensure that investment does not suffer unjustified obstruction. Indeed, the fair and equitable treatment standard has been connected with the concept of a ‘hospitable climate’ for investment.<sup>243</sup>

**c) *The Content of the Fair and Equitable Treatment Obligation: Legitimate Expectations***

531. The express undertaking by a State to ensure that an investment receives fair and equitable treatment, and the link of this undertaking to a hospitable investment climate and good faith, provides the foundation on which the State, by its representations or conduct, or even by inactivity, might encourage certain expectations in investors before the investments are made as to their future treatment or of regulatory or administrative action.
532. Where these expectations have an objective basis, and are not fanciful or the result of misplaced optimism, then they are described as ‘legitimate expectations’. “*Their expectations, in order to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances*”.<sup>244</sup>
533. Legitimate expectations as a basis for the analysis of whether a State has failed to accord an investment fair and equitable treatment are now an established feature of investment arbitration, but remain problematic. They are susceptible to a certain easy circularity of argument; investors normally have expectations in relation to a wide range of contingencies, great and small, and it is often relatively easy for a claimant to postulate an expectation to condemn the very conduct that it complains of in the case before it. An example from the current case is Claimant’s assertion that the delay of two months leading up to the opening of three border duty free stores by reason of additional requirements of the fire inspection authorities breached Claimant’s legitimate expectations,

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<sup>243</sup> See *Pope and Talbot, Inc v. Government of Canada*, Award on the Merits, Phase 2, paragraph 116; *Saluka Investment B.V. v. The Czech Republic* Partial Award dated March 17, 2006, para. 286.

<sup>244</sup> See *Saluka Investments B.V. v. The Czech Republic*, supra, para. 304, emphasis in the original.

without initially articulating what those legitimate expectations exactly were, and how they had arisen.<sup>245</sup>

534. Another problem is that a single expectation might be expressed at multiple levels of generality. The multiplication of legitimate expectations may create a ‘moving target’ for a respondent that in an extreme case might raise issues of due process.

535. Accordingly, a claim based on legitimate expectations must proceed from the exact identification of the origin of the expectation alleged, so that its scope can be formulated with precision.

536. Further, a breach of an investor’s legitimate expectations does not *ipso facto* amount to a breach of the fair and equitable treatment obligation. Quite simply, not every expectation of an investor is protected; rather it must be an expectation recognised and protected in international law. Some expectations may simply be too minor for this end. Expectations may relate to matters that the investor has expressly or impliedly agreed will be subject to determination by a State organ, and therefore exist on the domestic but not the international plane. An investor might well consider that it has a legitimate expectation that a State will comply with all its obligations under an investment contract, but if the investor has also agreed that compliance with the investment contract is subject to the law of the State party and the jurisdiction of the courts of the State party, then in the absence of aggravating factors, such as an element of *puissance publique* or sovereign power in the breach,<sup>246</sup> non-performance is outside the scope of the fair and equitable treatment standard.

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<sup>245</sup> See Claimant’s Memorial, para. 456. In his Reply (paragraph 572) Claimant identifies the applicable legitimate expectation as ‘to open his stores, upon receipt of all necessary certificates’.

<sup>246</sup> See *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3 at para. 260 (“*In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority (‘puissance publique’), and not as a contracting party, may breach the obligations assumed under the BIT.*”); *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17 paras. 284-331.

537. The fair and equitable treatment standard also involves a balancing exercise that might take into account “*the host State’s legitimate right subsequently to regulate domestic matters in the public interest.*”<sup>247</sup> However, even where the State action has a reasonable basis in public policy, the fair and equitable treatment standard still requires that the State respect the legitimate expectations insofar as the investor should be treated with an appropriate degree of due process and, if possible, the State should seek to ameliorate the effects of the change of policy on the investor.
538. Accordingly, an investor’s legitimate expectations might be breached not only by a substantive change in policy, but also by the treatment of the investor during the process of the change of policy. It has been said that an investor’s legitimate expectations should be treated with transparency, free from ambiguity, consistently, and within a framework of a proper exercise of powers.<sup>248</sup> Consistency by the State in its relations with the investor is an important element of the fair and equitable treatment standard, whether viewed independently or within the context of legitimate expectations. For example, in *MTD Equity Sdn Bhd v. Republic of Chile*, the inconsistent treatment of an investment by two arms of the government of Chile, where the Foreign Investment Commission approved an investment that was contrary to the urban policy of the government, was found to be a breach of the obligation to treat an investor fairly and equitably.<sup>249</sup>
539. Finally, the relationship between legitimate expectations and domestic law is important in this case. The Tribunal has already noted that certain expectations, such as those arising pursuant to a contract, are properly dealt with in domestic law and do not amount to expectations protected at the international level. Conversely, the acts of an organ or official, for which the State is responsible in international law, might create legitimate expectations on the international plane, even though the official or organ has acted legally in domestic law. The international responsibility of a State is not determined by the legality of an act

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<sup>247</sup> See *Saluka Investments B.V. v. The Czech Republic*, at para. 305.

<sup>248</sup> See *Técnicas Medioambientales Tecmed S.A. v. United Mexican States* (2004) 43 ILM 133.

<sup>249</sup> See *MTD Equity Sdn v. Republic of Chile* (2005) 44 ILM 91.

under domestic law, but by the principle of attribution in international law. As explained by the Tribunal in *SPP v Arab Republic of Egypt*:<sup>250</sup>

*“Whether legal under Egyptian law or not, the acts in question were the acts of Egyptian authorities, including the highest executive authority of the Government. These acts, which are now alleged to have been in violation of the Egyptian municipal legal system, created expectations protected by established principles of international law. A determination that these acts are null and void under municipal law would not resolve the ultimate question of liability for damages suffered by the victim who relied on the acts.*

...

*The principle of international law which the Tribunal is bound to apply is that which establishes the international responsibility of States when unauthorized or ultra vires acts of officials have been performed by State agents under cover of their official character. If such unauthorized or ultra vires acts could not be ascribed to the State, all State responsibility would be rendered illusory.”*

**d) The Airport Shop**

540. The object of the Lease Agreement was to lease certain premises at Chisinau Airport for the purposes of a duty free shop (Article 1 of the Lease Agreement). The Lease Agreement was subject to the approval of the SACA of the Republic of Moldova and the premises were not to be transmitted to the investor until this approval was given (Articles 3.1 and 8.1). The Lease Agreement was approved by the SACA on August 5, 2008, was further approved by the Board of Directors of the Airport State Enterprise on August 13, 2008 in Minutes N° 9, and the licence of Le Bridge to operate duty free stores issued by the Licensing Chamber of the Government of Moldova was updated to include the airport.

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<sup>250</sup> See *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case ARB/84/3, Award of May 20, 1992, para. 83 and 85.

541. Accordingly, there was a contract entered into by a state entity, approval of the contract by a regulatory authority, and an updated licence. The Tribunal considers that Claimant invested in good faith on the basis of these acts of organs of the Moldovan State. In these circumstances the Tribunal finds that Claimant had a legitimate expectation, created by Respondent, that there was a secure legal framework to operate a duty free store in his leased premises in Chisinau Airport. Further, Claimant made his investment in the duty free shop at Chisinau Airport in reliance on this legitimate expectation.
542. This legitimate expectation strengthened over time as Le Bridge made its investment in the preparation of the Airport shop with the knowledge and consent of the Airport State Enterprise and other organs of the State. Le Bridge and Claimant spent considerable amounts in the restoration of the premises, in the acquisition of goods and in hiring and training of personnel. The expectation of a secure legal framework for the investment was confirmed over a period of 16 months.
543. As the investment increased and matured, the consequences of any failure to fulfil the legitimate expectations became increasingly severe. The implications for the state's obligations under the fair and equitable treatment standard are not the same when a legitimate expectation is breached at the commencement of an investment, as when the investment is well advanced.
544. The more time passed and the more efforts were made, the more Mr. Arif was entitled to trust Respondent that it would stand by the contract terms and would allow the realization of the investment. The contract was only a first step upon which Mr. Arif based his expectation that he was entitled to run the airport shop. The open, transparent and continuous performance of his investment contributed to building legitimate trust in the validity of his position.
545. The problems with the Lease Agreement began on November 10, 2009 with the suspension of the Lease Agreement by the Economic Circuit Court. On the same date, the Airport State Authority wrote to Le Bridge advising that the Lease Agreement had been suspended by court order, and issued Order 255 of 2009

setting out the terms of the suspension.<sup>251</sup> Subsequent court orders produced further suspension orders, confirming the contract suspension, the access restrictions on the Le Bridge employees, and the paralysis of any business activity on the premises. This situation of investment paralysis prevailed from November 10, 2009, two days prior to the scheduled opening of the store, until the decision of the Economic Court of Appeal on December 14, 2010. On this date Claimant requested the cancellation of the suspension order in force at that time (Order 272 of 2010),<sup>252</sup> access was granted on December 22, 2010 and revoked again by the Airport authorities on December 25, 2010 on the basis of the decision of the Economic Court of Appeal of December 22, 2010. The premises were sealed and Claimant was denied access. Judicial proceedings concluded with the Supreme Court decision of June 10, 2011.<sup>253</sup>

546. After the Supreme Court decision, Claimant sought immediate access to the premises to remove his stock. There was apparently no legal impediment to immediate access. In fact Claimant was not granted access to the premises until November 25, 2011; that is, over five months after the termination of the legal proceedings.

547. The legitimate expectation of the investor of a secure legal framework to operate a duty free store at Chisinau Airport was breached by actions of Respondent. The Tribunal refers to the following considerations that demonstrate this breach of Claimant's legitimate expectation and the standard of fair and equitable treatment under the BIT:

(a) Claimant has not been able to open a duty free store at Chisinau Airport for reasons that are the responsibility of Respondent under public international law, namely the decisions by the Moldovan courts that the Airport Lease Agreement was null and void and the cancellation of Minutes N° 9. The fact that Claimant has legitimate expectations of an investment does not make the State guarantor

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<sup>251</sup> See Letter No. 1/525e from the Airport State Enterprise to Le Bridge dated November 10, 2009, Exhibit C-101 to Claimant's Memorial, and Order No. 255 on suspension of performance dated November 10, 2009, Exhibit C-102 to Claimant's Memorial.

<sup>252</sup> See Exhibit C-27 (Claimant's letter of December 14, 2010) to Request for Arbitration and C-113 (Order 272 of 2010) to Claimant's Memorial.

<sup>253</sup> See Exhibit C-130 to Claimant's Memorial.

that the expectations will be fulfilled; rather the State is obliged to respect the legitimate expectations and not be the operative cause of their frustration. In this case, the frustration of the legitimate expectation was the direct result of the intervention of a State organ;

(b) There is a direct inconsistency between the attitudes of different organs of the State to the investment. The Airport State Enterprise and the State Administration of Civil Aviation endorsed and encouraged the investment in the airport premises, while the courts found the same investment to be illegal. This type of direct inconsistency in itself amounts to a breach of the fair and equitable treatment standard: see *MTD Equity Sdn Bhd v. Republic of Chile*<sup>254</sup>;

(c) The Airport Lease Agreement was subject to Moldovan law and the proper jurisdiction to determine its legality were the Moldovan courts. The judicial review of administrative action is a normal occurrence in any State, and of course the administrative authorities of Moldova, such as the Airport State Enterprise, have to respect and comply with the judicial decisions at the domestic level. However, at the international level, the State has a unitary nature, and a contradiction in the actions of the State cannot be resolved on the international plane by reference to its internal legal order. It is well established that a State cannot rely on its internal law to justify an internationally wrongful act;

(d) The investor here does not complain of non-performance of the contract (that might be adjudicated and remedied in domestic courts without invoking international responsibility) but of the non-existence of a contract entered into by the State and on the basis of which Claimant has made a substantial investment. It is important to emphasise that the legitimate expectation that is breached in this case is not that Respondent has failed to perform a lease contract for a duty free shop at Chisinau Airport, but rather the expectation of a secure legal framework based on the conduct of State organs that authorised and encouraged the investment in the leased premises at Chisinau Airport;

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<sup>254</sup> (2005) 44 ILM 91.

(e) Where a state creates a legitimate expectation which it cannot subsequently fulfil in breach of the fair and equitable treatment standard under the BIT, then the State has a secondary legal obligation to remedy or ameliorate the consequences of its breach;

(f) Respondent has breached the legitimate expectation that Claimant could operate a duty free shop in his leased premises at Chisinau Airport, but also breached its secondary obligation to remedy or ameliorate its inability to fulfil this legitimate expectation. In response firstly to the provisional measures suspending the Lease Agreement, and then to the decisions cancelling the Airport Lease Agreement, the Airport State Authority took no remedial action. It behaved as a powerless bystander, rather than as an organ of the State whose illegal actions first paralysed and then destroyed an investment that it had encouraged. It was quick to enforce court orders against Claimant, but slow to facilitate access to Claimant's staff or to permit the movement of goods when legal impediments were removed. There seem to have been no initiatives to investigate temporary or alternative arrangements to preserve Claimant's business opportunity or goods, or to minimise or compensate Claimant for his losses. The manner that the Airport State Enterprise washed its hands of the consequences of its own illegality is the most reprehensible element of Respondent's conduct. Independently of the legitimate expectations created and not fulfilled, this inertia in the face of the paralysis and then destruction of an investment is a breach of the fair and equitable treatment standard under the BIT.

***e) The Border Stores***

548. Claimant also alleges breaches of legitimate expectations in Respondent's treatment of his border stores. He refers specifically to the failure of the Customs Service to allocate land and/or premises to Claimant to open a duty free store in Ungheni, the delays caused by the requirements of the fire service, the unfair and inequitable suspension by the NACP of the July 1, 2008 Agreement's exclusivity clause, the agreements of the Customs Offices of Leuseni and Cahul with better locations given to Dufremol; the annulment by the Supreme Court on November 24, 2010 of the Tender results and the July 1, 2008 Agreement formalising them

and the decisions of the first and second instance courts to invalidate the lease agreements for the border stores. Claimant finally alleges that various organs of Respondent harassed and attempted to intimidate him in respect of his investment.<sup>255</sup>

549. Claimant also expressed the legitimate expectation more generally as “*Claimant’s legitimate expectations that Moldova would honor its specific commitments undertaken towards Mr. Arif.*”<sup>256</sup>

550. The Tribunal has already noted that not every expectation of an investor amounts to a legitimate expectation protected under the fair and equitable treatment standard in public international law. Expectations that are purely contractual by nature are protected by the applicable jurisdiction under the contract; other expectations of a minor nature might not be of sufficient significance to entail responsibility of the State. These distinctions are particularly important in relation to the allegations of breach of the legitimate expectations in relation to Claimant’s border stores.

551. Claimant participated in a Tender for the creation of a network of duty free stores at five border locations.<sup>257</sup> The Tender contains no mention of exclusivity. Claimant was successful in the Tender and subsequently entered into the July 1, 2008 Agreement with the Customs Service of the Republic of Moldova. The July 1, 2008 Agreement referred in its Whereas 4 to an ‘exclusive right’:

*“4. The Authority grants, as it is foreseen in p.1.1, to the Investor the exclusive right to manage and administrate the duty-free store network on the pre-established territories, at the exclusive managerial risk of the Investor, according to the provisions of this Agreement. The parties acknowledge that the creation and operation of this store network shall need a substantial investment from the part of the Investor in order to assure the realization of business plan provisions accepted by the organization commission;”*

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<sup>255</sup> See Claimant’s Memorial, paras. 455-461.

<sup>256</sup> See Claimant’s Reply, para. 538.

<sup>257</sup> See Decision No. 172 on the creation of a network of duty-free stores at state border crossing stations, dated February 18, 2008, Exhibit C-8 to Request for Arbitration.

552. This 'exclusive right' was defined in Clause 1.1.:

*“Exclusive rights: exclusive right of the Investor to manage and administrate the duty-free store network at the state border crossing points is established by the Government Decision no. 172 of 18 February 2008 at the exclusive managerial risk of the Investor according to the provisions of this Agreement. The exclusive rights of the Investor shall not be opposable any longer to the Authority when, following the organization, according to the legislation, of a public tender, a third party shall obtain the right to build and open duty-free-stores at the state border crossing points.”*

553. This is a qualified and ambiguous exclusive right. It refers to the Tender (“Government Decision no. 172 of 18 February 2008”) but this Tender, as already mentioned, did not offer or establish any exclusive right. Further, the definition in fact recognised that the Authority could conduct another tender to allow a third party to build and open duty free stores, so the 'exclusivity' was not expected to endure any longer than the Authority required to organise such a tender.

554. The qualified and ambiguous references to exclusivity do not support a legitimate expectation that Claimant would have an exclusive right to operate duty free stores at the border locations. The only legitimate expectation of Claimant for the purposes of the fair and equitable treatment obligation in Article 3 of the BIT in relation to the border stores was the more generalised expectation that Claimant was entitled to open duty free stores at five named border locations, and that the State would co-operate with him in this regard.

555. The legitimate expectation of Claimant thus identified has not been breached by Respondent. The Tribunal refers to the following considerations to confirm the proper identification of the legitimate expectation and the fact that it has not been breached:

(a) The Tender issued by the government, Claimant's success in the Tender, and the July 1, 2008 Agreement created and confirmed a legitimate expectation that Claimant could open duty free stores at five border locations;

(b) There was no exclusivity offered in the Tender. The exclusivity rights in the July 1, 2008 Agreement were qualified and ambiguous and not supported in the Tender. These exclusivity rights were subject to the law of Moldova and the dispute resolution clause in the July 1, 2008 Agreement and any expectations were protected in accordance with the terms of the Agreement and not pursuant to the BIT;

(c) The suspension of the exclusivity clause did not involve any inconsistency at the international level between two organs of the Moldovan State. Claimant had no legitimate expectation of exclusivity and the NACP was duly authorised under domestic law to decide on the legitimacy of the exclusivity obligation. This decision did not affect Claimant's expectation to establish five border duty free shops, merely one aspect of the contractually negotiated terms of the implementation of this expectation;

(d) It has not been demonstrated that the delays caused by the fire authorities were not the result of justifiable concerns by the appropriate authorities;

(e) The various complaints against individual customs offices, if justified, did not breach Claimant's legitimate expectation to open duty free stores at five border locations. Exclusivity was not an element of Claimant's legitimate expectations, as already explained, so Claimant cannot complain that the customs offices entered into agreements with Claimant's competitors. Further, the respective locations negotiated with individual customs offices by Claimant and Claimant's competitor is not a matter that engages legitimate expectations under the fair and equitable treatment standard;

(f) The most serious threat to Claimant's legitimate expectation to open his duty free stores at the border locations has been the litigation initiated by Dufremol to declare illegal the success of Claimant in the Tender, and the subsequent

agreements with the customs offices. Dufremol has been successful in this litigation, including before the Supreme Court which confirmed the declarations of illegality of the lower courts in its decision dated November 24, 2010.<sup>258</sup> The outcome of this litigation challenges the expectations created by Respondent through the Tender, the July 1, 2008 Agreement, subsequent agreements with individual customs offices, and the fact of Claimant's investment development and opening of the four border stores. The Tribunal recognises that the potential inconsistency between the expectations created by Respondent's administrative organs and the decisions of its judicial organs may be a source of problems in the future;

(g) However, this litigation has not resulted in the closure of Claimant's four border stores. Having created the legitimate expectation that Claimant is entitled to operate these stores, Respondent has an obligation to ensure that Claimant's investment in the four border stores is respected or Claimant is compensated for any loss. Accordingly, should subsequent judicial proceedings arising from the Dufremol litigation lead to court orders for closure of these stores, Respondent would be required to take action to remedy the consequences of a breach of Respondent's legitimate expectations. However, as the closure of these stores has not occurred or been ordered at the time of this award, there is not yet any breach of Claimant's legitimate expectations in relation to the four border stores.

***f) Fair and Equitable Treatment: Conclusions***

556. For these reasons, the Tribunal considers that Claimant's investment in the Airport store has not received fair and equitable treatment in accordance with Article 3 of the France-Moldova BIT. Claimant is entitled to reparation. On the other hand, there is no breach of the fair and equitable treatment obligation in respect of the border stores.

557. The Tribunal has analysed Respondent's treatment of Claimant's investment primarily through the prism of legitimate expectations, referring as well to consistency and good faith. Claimant presented his case in a similar manner. The

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<sup>258</sup> See Decision of the Supreme Court of Justice, dated November 24, 2010, Exhibit C-155 to Claimant's Memorial.

Tribunal has also considered other expressions of the fair and equitable treatment obligation referred to by the Parties or in the case law cited by them (such as the need for transparency, or to avoid harassment or arbitrary or discriminatory treatment) and has concluded that they do not raise additional questions that require separate analysis.

558. There were also additional factual allegations that in the Tribunal's view do not affect the analysis of Claimant's legitimate expectations in relation to the airport store or the border stores. For example, the allegations relating to the failure to discipline Judge Namasco for his November 10, 2009 decision, or those relating to the Customs Service's failure to allocate land and/or premises to Claimant in order to open a duty free store in Ungheni, do not affect the Tribunal's assessment of the treatment of Claimant's legitimate expectations.

## **VII. REPARATION.-**

559. It is a general obligation of a State guilty of an internationally wrongful act to make reparation. This principle was famously stated in the *Chorzów Factory Case*,<sup>259</sup> and is summarised in Article 31 of the International Law Commission's Articles on State Responsibility.

*“ARTICLE 31*

*Reparation*

*The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*

*Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”*

560. The Tribunal also refers to the principles of international law summarised in Articles 34, 35 and 36 of the International Law Commission's Articles on State Responsibility which are relevant to the analysis that follows in this case.

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<sup>259</sup> See 1927, P.C.I. J, Series A, N° 9 pages 21 and 47.

*“ARTICLE 34*

*Forms of reparation*

*Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination...”*

*“ARTICLE 35*

*Restitution*

*A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:*

*(a) is not materially impossible;*

*(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.”*

*“ARTICLE 36*

*Compensation*

*1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.*

*2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”*

561. Claimant claimed damages under three broad headings: (i) loss of profits in relation to the border stores; (ii) loss of profits in relation to the airport store; and (iii) moral damages. Claimant also seeks interest at a compound rate of LIBOR plus 2% compounded semi-annually on the awarded Euro amounts. Claimant

provided two expert reports by Mr. John Ellison, a Consultant to KPMG, quantifying Claimant's alleged losses. Mr. Ellison's reports valued the loss of profits on the border stores under various scenarios. He calculated the loss of the airport shop on two bases: loss of profits and wasted costs, which he identified as alternative and not cumulative. The wasted costs include capital expenditure (such as installing escalators at the airport), operating expenditures related directly to the airport (such as advertising, payroll expenses and rent) and stock purchases.

562. Claimant also seeks moral damages in the amount of € 5,000,000 for the pain, stress, shock, anguish, humiliation and shame suffered as a result of Moldova's acts and omissions in relation to his investments, and the fact that he had to leave the country for his own safety, depriving him of the opportunity to personally manage his own business and to pursue new business opportunities.

563. Claimant has not established any breach by Respondent of its international obligations in respect of the border stores, and so his quantification of his alleged losses will not be further considered. The claims in relation to the airport store and for moral damages will be further examined in light of Respondent's submissions and evidence, and the principles of public international law.

564. The starting point of Respondent's position is that the primary form of reparation for internationally wrongful acts is restitution. Respondent requested that, in the event of the Tribunal finding liability, the possibility of restitution should be investigated as an alternative to any damages that the Tribunal may award.<sup>260</sup> Respondent also submitted that satisfaction would be an alternative remedy for an adverse finding of a denial of justice, in certain circumstances,<sup>261</sup> but as the premises for this submission do not accord with the findings of the Tribunal in this case, satisfaction does not need to be further considered.

565. Respondent rejects the use of a DCF analysis for the calculation of Claimant's damages in relation to the airport store, particularly on the grounds that it is not

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<sup>260</sup> See Respondent's Rejoinder, para. 413.

<sup>261</sup> See Respondent's Rejoinder, paras. 416-418.

an appropriate methodology to value a business that was not a going concern at the relevant time, and is premised on faulty and uncertain outputs. Respondent accepts however that the wasted costs methodology could be employed to value Claimant's losses relating to the airport store, but rejects Claimant's calculation on the basis that (i) Claimant has failed to present evidence that the sums requested are accurate; (ii) Claimant's expenses are objectively unreasonable; and (iii) Claimant failed to mitigate his damages. Respondent relies upon the expert report of Mr. Timothy Hart who provides an alternative calculation of Claimant's alleged losses on a wasted costs basis. Respondent also argues that the claim for moral damages is baseless, as Claimant "*cannot satisfy the extraordinary tests required for the recognition of separate and additional moral damages.*"<sup>262</sup>

**a) Restitution**

566. There was some discussion by the Parties at the Hearing regarding restitution, leading the Tribunal to request that the Parties clarify their positions on restitution after the Hearing. Much of the subsequent exchanges related to the border stores, and are no longer relevant. In relation to the airport store, Claimant stated that "*...restitution would require Respondent to allow and to enable Claimant to open and operate his duty free store at Chisinau International Airport without undue interruption. This would require all relevant licenses and authorizations to be (re)issued by Respondent and its organs to Le Bridge, as well as a new lease agreement, at identical or essentially similar terms as the former Airport Lease agreement, leasing out the exact same premises at the Airport to Le Bridge for the same duration (and preferential renewal rights), which would start to run at the date of the actual opening of the Airport store.*"<sup>263</sup>

567. Claimant went on to state that, in his view, "*the reality is that Respondent is unwilling or unable to extend a firm offer for restitution, backed by adequate guarantees*" and so insisted on reparation in the form of damages. He was more direct in his letter of December 3, 2012, where he stated (paragraph 10) that

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<sup>262</sup> See Respondent's Counter-Memorial, para. 813; Respondent's Rejoinder para. 475.

<sup>263</sup> See Claimant's letter to the Tribunal dated December 11, 2012, para. 8.

*“Claimant has at this stage no alternative claims to damages in relation to his investment at the Airport”.*

568. Respondent in its letters requested time to consider the form of any restitution in relation to the airport store. Respondent stated in its letter of December 3, 2012 (page 2):

*«Were the Tribunal to decide that Moldova bears responsibility for the cancellation of the Airport Lease Agreement, Moldova stands by its request for 60 days to determine if it can provide some form of restitution, for example by arranging signature of a new lease agreement with Le Bridge in conformity with applicable law, in lieu of whatever damages the Tribunal might determine.»*

569. The first issue that the Tribunal needs to consider is whether restitution can be considered in circumstances where Claimant insists on damages. Respondent argues that it should have the opportunity to provide restitution as an alternative to damages, as this remedy would restore Claimant to the position he would have been in without any violation of the BIT, and also avoids the uncertainties of the calculation of damages, including the possibility of risk free windfall profits.

570. The Tribunal notes that the general position in international law is that the injured State may elect between the available forms of reparation and may prefer compensation to restitution.<sup>264</sup> On the other hand, restitution is more consistent with the objectives of bilateral investment treaties, as it preserves both the investment and the relationship between the investor and the Host State.

571. The Tribunal considers restitution to be the preferable remedy, but as in the present case Respondent has not been able to confirm that restitution is possible, and the Tribunal cannot supervise any restitutionary remedy, the best course is to order restitution and compensation as alternatives, with the remedy of compensation suspended for a period of ninety days. This provides Respondent with the opportunity, in light of the findings of this award, to formulate and

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<sup>264</sup> See Commentary to Article 43 of the International Law Commission’s Articles on State Responsibility.

propose to Claimant the exact mechanism of restitution. If restitution is not possible, or the terms of restitution proposed by Respondent are not satisfactory to Claimant then the damages awarded will satisfy the violation of Claimant's right to fair and equitable treatment. This solution provides a final opportunity to preserve the investment, while also preserving Claimant's right to damages if a satisfactory restitutionary solution cannot be found.

572. Accordingly, the Tribunal decides that, within a period of no more than sixty days, Respondent will make a proposal to Claimant for the restitution of the investment in the Airport store, including its proposals as to appropriate guarantees for the legality of a new lease agreement. The Tribunal expects the Parties to negotiate regarding this proposal in good faith, but confirms that Claimant at any time within a period of ninety days from the date of this award may elect to take the compensation as quantified in this Award *in lieu* of restitution and Respondent is obliged to make the payment accordingly.

**b) Damages**

573. Claimant's loss of profits from the fact that the Chisinau airport store never opened has been considered in two expert reports of Mr. John Ellison, submitted on behalf of Claimant, and two expert reports by Mr. Timothy Hart submitted on behalf of Respondent. The Tribunal has also heard the oral evidence of Mr. Ellison and Mr. Hart at the Hearing.

574. Mr. Ellison calculated the loss of profits on two alternative bases. Firstly, using the DCF methodology, Mr. Ellison estimated the loss of profits as the difference between the actual financial performance of the airport shop (which never opened or earned revenue, but did incur expenses) and the cash flows that the airport shop would have achieved had it not been prevented from opening as scheduled. Secondly, and in the alternative, Mr. Ellison calculated the wasted costs of Claimant in relation to the airport costs. The DCF calculation was made for two periods (depending on whether or not the Lease Agreement was renewed for a second seven year term), and on three scenarios ('low', 'base' and 'high') based on distinct projections of the growth in passenger figures at Chisinau

Airport, and the proportion of duty free business obtained by Claimant at Chisinau Airport.

575. Mr. Hart rejected the DCF methodology as inappropriate for the calculation of loss of profits at the airport shop. Mr. Hart states that the DCF is not appropriate for a business that never opened or generated any revenue, and where no reliable business plan has been produced. Mr. Hart challenged the assumptions on which Mr. Ellison had projected the airport store's revenue, as well as a discount rate that, in Mr. Hart's opinion, did not reflect the many risks associated with this business venture.
576. After considering the testimony of these experts, the Tribunal considers that the DCF methodology is not appropriate for a business that never operated and where a satisfactory basis for its projected revenues has not been demonstrated. Use of a DCF methodology in these circumstances gives an excessively speculative outcome. Accordingly, the Tribunal calculates Claimant's damages on the second basis proposed by Mr. Ellison, namely the wasted costs calculation.
577. Mr. Ellison calculated wasted costs by considering capital expenditures (to ensure that the design, layout and facilities of the airport shops met international standards) the operating costs, and the stock purchased for the airport shop (some of which, mainly confectionary items, have been written off as being past their expiry date). The loss of profits on this basis (as updated in Mr. Ellison's second report) amounts to MDL 38,481,637.
578. Mr. Hart agreed that wasted costs were an appropriate measure of potential damages in relation to the airport shop.<sup>265</sup> However, Mr. Hart did not accept the inclusion of stock that had not been written off, as even selling this stock in other locations at a significant discount from market prices could yield a substantial recovery of costs. He also makes an adjustment for tax. Mr. Hart also notes that he has not had access to the supporting documentation made available to KPMG

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<sup>265</sup> See Expert Report of Timothy H. Hart, para. 191; Second Report of Timothy H. Hart, paras. 74-75 and 83.

in Moldova, so has not been able to independently check the accuracy of the costs figures. Mr. Hart in his second report calculates the wasted costs at MDL 20,400,000.

579. In relation to these costs, the Tribunal accepts the accuracy of the records on which Mr. Ellison calculated his wasted costs figures. Mr. Ellison stated that in his professional opinion “*the costs I have been provided by Le Bridge are the true costs that they incurred in setting up the airport shop*”.<sup>266</sup> Mr. Ellison states that he relied on copies of Le Bridge’s internal accountancy ledgers and that he selected a sample of costs to be checked by KPMG Moldova, who reported back that the costs were supported by genuine invoices.

580. Claimant was required by his contracts with suppliers to sell certain items at the airport store, so with the closure of this store the border stores did not provide an alternative outlet. Claimant paid cash for his stock, so that the prospects of returning stock to suppliers are not good. Mr. Hart also pointed out that the stock had not been written off in Claimant’s own books, and Mr. Ellison responded doubting the relevance of the internal book-keeping and noting that they may well be written off in the next audited accounts. Mr. Ellison accepted that some of this stock would be successfully sold, and to avoid double recovery, there should be an adjustment for this amount. He accepted that a 20% reduction would not be objectionable.<sup>267</sup>

581. The evidence regarding stock in the airport store is not entirely satisfactory as it is clear that some will be sold in future, but not all, so an amount for stock should be included in the wasted cost calculation, but the actual amount remains uncertain. In these circumstances the Tribunal accepts a 20% reduction in Mr. Ellison’s figure as an acceptable adjustment. Accordingly, it accepts the following calculation of damages on the basis of airport wasted costs.

	<b>MDL</b>
Capital expenditure	15,189,495
Operating expenditure	4,199,530
2009 share of operating costs	2,070,327

<sup>266</sup> See Expert Accountant’s Report to the Tribunal on Quantum prepared by John Ellison, dated February 10, 2012, para. 12.1.3.

<sup>267</sup> See Hearing Transcript, Day 2, pages 194-199.

Confectionary stock written off	295,572
Stock	<u>13,381,370</u>
Total	<u>35,136,294</u>

582. This figure of MDL 35,136,294 represents Claimant’s wasted costs if the airport store never opens. No further adjustment for tax is required. If the airport store does open, in accordance with the restitutional remedy ordered by the Tribunal, then the capital expenditure and the stock not already written off will no longer be wasted. In this scenario Claimant can only recover for the stock actually written off as well as the operating costs that have been wasted as a result of the delays in opening the store. Accordingly, if the airport store were to open, Claimant’s recovery for wasted costs would be limited to MDL 6,565,429.

583. Accordingly, the Tribunal orders that Respondent pay to Claimant by way of damages for its breaches of the BIT in relation to the airport store the sum of MDL 6,565,429 if Respondent makes a satisfactory proposal to Claimant for his investment and the Parties agree to the opening and operation of the airport store. If no satisfactory restitution occurs, then Respondent shall pay damages of MDL 35,136,294.

**c) Moral Damages**

*(i) The Legal Position*

584. There is no doubt that moral damages may be awarded in international law (see, for example, Article 31(2) of the International Law Commission’s Articles on State Responsibility) although they are an exceptional remedy.

585. Claimant asserts that *“the notion of moral damages encompasses a broad range of elements which include personal injury [...], emotional harm [...], pathological harm [...], and minor consequences of a wrongful act (such as, for example, the affront associated with the mere fact of a breach).”*<sup>268</sup>

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<sup>268</sup> See Claimant’s Memorial, at para 588.

586. Claimant relies on case law and asserts that tribunals and umpires have regularly awarded compensation for moral damages in situations of “*injury to a corporation’s credit, reputation and prestige*”<sup>269</sup> and refers to *Fabiani*, where:

*“the President of the Swiss Confederation concluded that the repeated denials of justice to which Fabiani had been subjected led to his bankruptcy and loss of prestige.*

*As a result, Fabiani was awarded moral damages on the ground that, had it not been for the pain and suffering inflicted, he would have given another dimension to his business in general, and explored other sources of revenues, earning him profits over and beyond the lost profits”*.<sup>270</sup>

587. The Parties both referred to the award in *Joseph Charles Lemire v Ukraine*<sup>271</sup> and particularly the passage of paragraph 333 after discussion of three previous cases:

*“333. The conclusion which can be drawn from the above case law is that, as a general rule, moral damages are not available to a party injured by the wrongful acts of a State, but that moral damages can be awarded in exceptional cases, provided that:*

*-the State’s actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;*

*-the State’s actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and*

*-both cause and effect are grave or substantial.”*

588. Respondent submitted that the gravity of the harm suffered by Mr. Arif “*could not be likened to the hurt caused by armed threats, or by witnessing the deaths of others, or the other types of suffering endured by claimants in earlier cases*

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<sup>269</sup> See Claimant’s Memorial, at para 591, in quoting *DLP v. Yemen, ICSID Case No. ARB/05/17*, Award of 29 January 2008.

<sup>270</sup> See Claimant’s Memorial, at para 590.

<sup>271</sup> See *Joseph Charles Lemire v. Ukraine, ICSID Case ARB 06/18 Award*, March 28, 2011.

where moral damages were awarded.”<sup>272</sup> Respondent also suggests that Claimant has not demonstrated the other two elements of the test in *Lemire*.

589. Claimant emphasised the second element of the *Lemire* formula, which is derived from the *Lusitania* case.<sup>273</sup>
590. The Tribunal notes that the formulation of the principles of the award of moral damages in *Lemire* was based on a limited discussion of three cases, with no broader consideration of underlying principles or policies. The statement might serve as a summary of the issues in these cases, but it should not be taken as a cumulative list of criteria that must be demonstrated for an award of moral damages. The first element, in particular, might reflect the particular circumstances of the *Desert Line Projects LLC v Republic of Yemen* case<sup>274</sup> but the facts of a single case do not define the availability of moral damages as a remedy.
591. In the Tribunal’s view, the older *Lusitania* case, the basis of the second factor in *Lemire*, correctly states the criteria the Tribunal should take into account. This leaves the Tribunal with an element of discretion, but within the general framework that moral damages are an exceptional remedy.
592. The element of exceptionality must be acknowledged and respected. A breach of a contract or any wrongful act can lead to a sentiment of frustration and affront with the victim. A pecuniary premium for compensation for such sentiment, in addition to the compensation of economic damages, would have an enormous impact on the system of contractual and tortious relations. It would systematically create financial advantages for the victim which go beyond the traditional concept of compensation. The fundamental balance of the allocation of risks would be distorted. It would have similar effects if permitted in investment arbitration. The Tribunal is therefore aligning itself to the majority of arbitral decisions and holds that compensation for moral damages can only be

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<sup>272</sup> See Respondent’s Counter-Memorial, para. 817.

<sup>273</sup> R.I.A.A. Vol. VII (1923).

<sup>274</sup> See ICC Case N° ARB 05/17, Award of February 6, 2008.

awarded in exceptional cases, when both the conduct of the violator and the prejudice of the victim are grave and substantial.

(ii) *Claimant's position*

593. Claimant requests “*compensation for the moral damages he has suffered, caused by (i) the pain, stress, shock, anguish, humiliation and shame that he has suffered as a result of Moldova's acts and omissions in relation to his investments in the duty free sector; and (ii) the fact that he had to leave the country for his own safety, which deprived him of the opportunity to personally manage and further develop the business activities of the Le Bridge group of companies, and pursue new business opportunities.*”<sup>275</sup>

594. Claimant details elements which lead him to claim an amount of € 5,000,000.<sup>276</sup>

595. Claimant alleges that he and his companies have been mistreated and harassed, not only by the court proceedings and decisions at the instigation of competitors, but also by endless attempts of state authorities to intimidate him and his business, starting from December 2010, with a raid executed by the CCECC. He relates that, on 17 December 2010, CCECC officers raided his home, where he was lying sick, and the offices of his companies in Chisinau. He claims that the raid continued until the 1<sup>st</sup> of February and then again until August 2011, under the pretext of an investigation for tax evasion. He states that the CCECC traveled to Kyiv and informed business partners about the criminal investigations, and that it equally informed local banks. Although the investigations have not brought any results, they have not been terminated, with the consequence that he had to leave the country, fearing for his personal security.<sup>277</sup> In addition, the Anticorruption Section of the Prosecutor's Office maneuvered to have his duty free licenses cancelled. This was, however, refused by the Licensing Chamber of the Ministry of Economy, which contented itself to issue a warning.<sup>278</sup> During a

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<sup>275</sup> See Claimant's Memorial, para. 586.

<sup>276</sup> See Claimant's Memorial, para. 600; reiterated in Claimant's Reply, para. 811.

<sup>277</sup> See Claimant's Memorial, paras. 291-300; reiterated in Claimant's Reply, paras. 805-809.

<sup>278</sup> See Claimant's Memorial, paras. 302 and 303.

visit in Chisinau on February 2011, he was so concerned about possible attacks against him, that he left Moldova by car, under private escort.<sup>279</sup>

596. Claimant summarizes the harassment allegations by stating that “[f]rom a devoted and groundbreaking investor in the duty free sector, who was moreover encouraged to invest therein by Moldova, Mr. Arif was turned into a beggar, forced to defend himself and fight for his survival”<sup>280</sup>.

(iii) *Respondent’s Position*

597. Respondent refutes Claimant’s assertions with respect to a free-standing claim for moral damages. It asserts that such a separate claim is only available under “the rarest of circumstances” and that in any event Respondent’s conduct was legal and did not cause humiliation or shame to Claimant<sup>281</sup>.

598. Respondent submits that investigations by Moldovan authorities were legitimate, in *bona fide* and following procedural rules. It recalls that the duty free business at border crossings had previously been closed by Moldova because of heavy cigarette smuggling and that it was normal that the authorities had remained suspicious and wanted to prevent repetitions of that kind of business.<sup>282</sup> The fact that the investigators did not find evidence of wrong-doing is not a reason to conclude on their bad faith, but rather a sign of thoroughness and fairness.

599. It further submits that Claimant has not provided any evidence:

- that the investigations were conducted with an aim to intimidate him or his employees,
- that his personal security was endangered,
- that a plot against him was planned.

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<sup>279</sup> See Claimant’s Memorial, paras. 306 and 307.

<sup>280</sup> See Claimant’s Memorial, para. 593.

<sup>281</sup> See Respondent’s Counter-Memorial, paras. 814, 818 and 819; reiterated in Respondent’s Rejoinder, paras. 476 and 481.

600. It finally alleges that the government actions, which Claimant complains of, had no impact on his business reputation and did not cause lasting prejudice. It is uncontested:

- that the business partners from Kyiv continue their business relations,
- that Claimant's companies have not been prevented from doing profitable business in different spheres, and
- that even in the duty free sector, Claimant has expanded and created new border duty free shops, while the four shops in dispute continue to operate.<sup>283</sup>

601. Respondent finally asserts that *"to the extent Claimant has suffered any such loss, he already would be sufficiently compensated for that loss by any award of monetary damages"*.<sup>284</sup>

(iv) *The Tribunal's Decision*

602. The Tribunal has to determine whether in the case at hand the conduct of Respondent and the suffering of Claimant have been so grave and substantial, as to amount to such exceptional circumstances that necessitate a pecuniary compensation for moral damages.

603. The dividing line between what is normal and what is exceptional in commercial life (a mere breach, versus a breach causing grave and substantial pain and suffering) can only be determined by a precise appreciation of the facts. They cannot be considered in isolation, but against the background of the Moldovan economy and governance.

604. Mr. Arif is *"an experienced professional and seasoned entrepreneur"*.<sup>285</sup> In 1998 he took the courageous decision to invest in the emerging market economy of Moldova and he succeeded to build and manage a sound and profitable business during a period when the country transited from a Soviet to a market economy, a difficult and contradictory path indeed, characterized by instability and the unpredictability of economic and political institutions. In that situation,

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<sup>283</sup> See Respondent's Rejoinder, paras. 481 s.

<sup>284</sup> See Respondent's Counter-Memorial, para 819.

<sup>285</sup> See *Lemire*, at 337.

the country – such as other post-soviet States – offered exceptional business opportunities, but at the same time high risks.

605. Mr. Arif was and is aware of this situation and the necessity of mental fortitude to meet the incidents of commercial and political life in a transition economy. He knows that in Moldova State institutions are weak, that governance is improving, but is not yet comparable to the situation in long established democracies and market economies.
606. These circumstances do not lower the standard of investment protection provided by a BIT or excuse breaches of that standard. They have, however, an inevitable bearing on what characterizes “exceptional circumstances” as a threshold for the pecuniary compensation for moral damages. The perception of an egregious behavior is different in different business traditions. On the one hand, the loss of reputation as a consequence of governmental and police interference is much less dramatic in countries where the rule of law and protection against administrative discretion are low and any business is exposed to this risk, irrespective of its conduct, and, on the other hand, the individual’s expectations are different and less easily to be shocked.
607. Neither Mr. Arif, nor any of his relatives or employees have been exposed to physical violence, armed threats, deprivation of liberty or a forceful taking of property. One of top ranking managers of Le Bridge has testified that she and other employees personally and physically resisted the closing of border shops. They finally could not prevent it. But only days later the shops were allowed to open again and none of the employees suffered any prosecution.<sup>286</sup> No property was taken, let alone by force.
608. Claimant submits:
- that he left Chisinau at one point in time by car to Romania “*under private escort*”, thus insinuating that the protection was necessary, a fact that however is not proved,

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<sup>286</sup> See Witness Statement of Ms. Irina Chirlescu, paras. 56 and 57.

- that CCECC officers started the raid when he was lying sick in bed, but there is no evidence that this was intentional,
- that everything happened to him short of being killed, but again there is no evidence to confirm this.

609. The prolonged raids of the CCECC play an important role in the recital of harassment. Claimant quotes an Investment Climate Statement by the US Embassy as highlighting that “*companies out of favor with the government or with politically-connected individuals can rapidly become the target of politically motivated investigations*” conducted by the CCECC,<sup>287</sup> while the Statement itself only writes about “*allegations in recent years from companies*” in that sense.<sup>288</sup>
610. The search and investigations by the CCECC may have been unpleasant and painful, but they were conducted in accordance with Moldovan procedural law, upon an order and under the supervision of a judge after a request from a prosecutor,<sup>289</sup> and carefully minuted. The CCECC report seems fair, was consented to by Le Bridge’s deputy director, Mrs. May Arif, it exonerated Le Bridge and Mr. Arif on most counts and was signed by CCECC officers, but also by Claimant and Le Bridge’s accountant on 5 August 2011,<sup>290</sup> i.e. almost one year after Mr. Arif left the country.
611. As a result of the investigations, Le Bridge had to pay minor penalties for tax irregularities<sup>291</sup> which were later reduced by Decision of the Director of the CCECC.<sup>292</sup> There is no evidence of any threat or intimidation against Mr. Arif, no sign of danger for his personal security and liberty or the security of his employees, no hint as to a plot and apparently no sign of a real risk for him to be present in Chisinau.

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<sup>287</sup> See Claimant’s Memorial, para 33.

<sup>288</sup> See 2011 Investment Climate Statement, Exhibit C-43 to Claimant’s Memorial, at page 6.

<sup>289</sup> See Resolution by a judge from Buiucani Court of Chisinau Municipality, dated 16 December 2010, Exhibit C-169 to Claimant’s Memorial.

<sup>290</sup> See CCECC Report, dated August 5, 2011, Exhibit C-170 to Claimant’s Memorial.

<sup>291</sup> See CCECC Decision, dated August 22, 2011, Exhibit C-171 and C-171 to Claimant’s Memorial.

<sup>292</sup> See CCECC Decision, dated September 7, 2011, Exhibit C-172 to Claimant’s Memorial.

612. It is true that in addition to the penalties, the prosecutor asked the Licensing Chamber of the Ministry of the Economy on July 1<sup>st</sup>, 2011 to withdraw Le Bridge's licenses for the sale of goods in duty-free shops,<sup>293</sup> but the Licensing Chamber did not grant the request and only issued a "disposition" on 5 September 2011 to "*warn about the possible withdrawal of the license, if the said violations will not be liquidated in the designed period*". The violation was described as alleged non-compliance with the Customs Code requirements.<sup>294</sup> The warning did not materialize and the licenses are valid until today.
613. Claimant suggests that the government's conduct turned him into a beggar. He refers to the *Fabiani* decision where Mr. Fabiani had been expropriated of all his property in Venezuela and thus driven into bankruptcy, and where the Umpire had granted moral damages based on these facts.
614. The Tribunal has weighed the facts of the present case and compared them with *Fabiani*. It is unable to see the same type of gravity and consequences. It is uncontested that Claimant's companies are not hindered to do profitable business in Moldova and grow; there is no evidence of a threatening bankruptcy. This is particularly true for the duty free stores at the border, where Claimant was able to expand and create new border shops while the ones in dispute continue to operate. The different investigations have apparently not hurt his reputation: Le Bridge continues to work with Moldovan banks. His business partners in Kyiv asked him for explanations after the visit by CCECC officers,<sup>295</sup> which were apparently considered satisfactory for them, since they continue their business relationship.
615. After having carefully considered all the circumstances, the Tribunal is convinced that the conduct of the Moldovan authorities provoked stress and anxiety to Claimant. However, the different actions did not reach a level of gravity and intensity which would allow it to conclude that there were

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<sup>293</sup> See Request submitted by Anti-Corruption Prosecutor to Acting Director of the Licensing Chamber of the Ministry of Economy of the Republic of Moldova, dated July 1, 2011, Exhibit C-173 to Claimant's Memorial.

<sup>294</sup> See Disposition on the liquidation of violations regarding the licensing conditions, issued by the Licensing Chamber, dated August 20, 2011, Exhibit C-174 to Claimant's Memorial.

<sup>295</sup> See Claimant's Memorial, para. 295.

exceptional circumstances which would entail the need for a pecuniary compensation for moral damages. For these reasons, the claim for moral damages is dismissed.

**d) Interest**

616. Claimant seeks “*an award of compound interest at a rate of LIBOR + 2 compounded semi-annually, to be established on the awarded Euro amounts as at the date these amounts are determined to have been due to the Claimant.*”<sup>296</sup>

Claimant referred to three awards, but made no further submissions in relation to the entitlement to interest, the rate, the right to compound interest or the date from which interest should begin to run. Respondent made no submissions on this issue. There is no provision in the France-Moldova BIT relevant to the issue of an award of interest in relation to the breach of the FET standard.

617. Article 38 of the International Law Commission’s Articles on State Responsibility confirms that interest will be payable “*when necessary in order to ensure full reparation*”. It also confirms that the general view in international law is in favour of simple and not compound interest, although other commentators suggest the trend in investment arbitration is in favour of compound interest.<sup>297</sup>

618. In the current case, there is no single date when the breach of Claimant’s legitimate expectations occurred or was manifested; rather the breach was the result of a combination of factors over a period of time. Further, Claimant’s damages, including the moral damages, were not capable of quantification until the Hearing. In these circumstances, the Tribunal considers that the obligation to pay interest only arises from the date of the award.

619. Claimant has not justified the use of a LIBOR rate with a premium in a claim made in Moldovan currency or Euro equivalent, and where the investor is a national of a Euro state. Claimant has not justified compound interest, and given

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<sup>296</sup> See Claimant’s Reply, para. 609 (footnote omitted).

<sup>297</sup> See, for example, Sergey Ripinsky & Kevin Williams, *Damages in International Investment Law* (BIICL, 2008) section 9.4

the nature of the damages in this case, the Tribunal considers simple interest is more appropriate.

620. Accordingly, the Tribunal awards interest on Claimant's damages from the date of the award until the date of payment on a simple basis at the EURIBOR rate.

***e) Currency and Payment Issues***

621. Claimant sought certain ancillary relief in relation to damages. Firstly, the claim for relief sought the award of damages expressed in Euros. Secondly, Claimant sought payment of damages 'outside of the Republic of Moldova without any right of set-off'.

622. Neither party made further submissions on these questions, although they had the opportunity to do so in the extensive discussion of damages. Accordingly, the Tribunal deals with these ancillary questions in accordance with general principles.

623. The expert witnesses analysed the wasted costs question in terms of Moldovan Leu, and not in Euros. The Tribunal has accordingly quantified Claimant's losses in Moldovan Leu.

624. The general position in international law is that compensation should be paid in a freely convertible currency, and tribunals have frequently ordered compensation in the currency of the claimant's nationality, although another possibility is the currency in which the investment is made.<sup>298</sup> There is no evidence in this case of currency related factors such as abnormal movement in rates that might affect the Tribunal's choice of currency or date of conversion. Nor have the Parties identified the appropriate date or rate of conversion if the Tribunal orders damages to be paid in Euros.

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<sup>298</sup> See Sergey Ripinsky & Kevin Williams, *Damages in International Investment Law* (BIICL, 2008) section 10.1.1.

625. The principle of free transfer of funds forms part of the obligations of Moldova to French citizens under Article 6 of the France-Moldova BIT which specifically refers to the right of free transfer of:

*“d) Value of partial and total liquidation or disposition of the investment, including capital gains on the capital invested;*

*e) Compensations for dispossession or loss, in accordance with Article 5 and paragraph 2) and 3) stated above [which related to compensation for expropriation, and circumstances of war or civil emergency].”*

626. Article 6 continues to state that transfers *“shall be made without delays, and at the normal exchange rate officially applicable on the date of transfer.”*

627. The Tribunal considers that it is appropriate in this case to award the payment of damages in Euros, as the currency of Claimant’s nationality. As to the date of conversion, the obligation of Respondent to pay damages in this case arises from the date of the Award, although the amount will not be fixed until Claimant decides whether to accept or reject restitution. In accordance with Article 6, Moldova then has an obligation to pay damages *“without delays, and at the normal exchange rate officially applicable on the date of transfer”*. Accordingly, the date of payment is the date of conversion, and any delay by Respondent will involve a breach of the BIT. Further, in accordance with Article 6, Moldova must permit the free transfer of Claimant’s damages, and the Tribunal so orders.

## **VIII. COSTS.-**

628. Both Parties have claimed costs in this arbitration and filed short submissions quantifying their fees and costs. Claimant in his closing submissions, in support of his claim for costs, argued that Respondent raised needless jurisdictional objections that delayed the proceedings and substantially raised the costs for Claimant.<sup>299</sup>

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<sup>299</sup> See Hearing Transcript, Day 3, pages 28-29.

629. Article 61(2) of the Washington Convention leaves the award of costs to the discretion of the Arbitral Tribunal “*except as the parties otherwise agree*”.
630. Article 7 of the France-Moldova BIT makes no mention of the question of the costs of an investor-State arbitration. There are two strands of ICSID jurisprudence in relation to costs, with one strand favouring the principle that the fees and expenses of the Centre and of the arbitrator should be shared equally, and that each party should bear its own legal fees and expenses. The second and perhaps more modern strand is for the costs to be awarded on the basis of the relative success of the parties in the arbitration.
631. In the current case, Claimant has been successful on the issue of jurisdiction, has established a breach by Respondent of the fair and equitable treatment standard of the France-Moldova BIT, and has established his right to restitution and damages. On the other hand, his claims for expropriation, denial of justice and moral damages have failed, as well as his claims of specific undertakings, unreasonable or arbitrary measures, full protection and security, discrimination and compensation. The questions of liability and the quantification of damages in relation to the border stores occupied a significant part of the proceedings. The Tribunal is not satisfied that Respondent’s jurisdictional objections justify an award of costs in favour of Claimant.
632. For these reasons, the Tribunal decides that each party should bear equally the costs and expenses of the arbitration, and each party should bear its own legal fees and costs.

## **IX. AWARD.-**

633. For the foregoing reasons the Tribunal decides as follows:

(a) The Tribunal has jurisdiction over Claimant's claims and dismisses Respondent's objections to the Tribunal's jurisdiction in their entirety;

(b) Claimant's claim for breach of specific undertakings of the Lease Agreement, the Tender and the July 1, 2008 Agreement is inadmissible;

(c) Respondent has breached Article 3 of the France-Moldova Bilateral Investment Treaty in that it has failed to ensure fair and equitable treatment to Claimant's investment in the duty free store at Chisinau Airport;

(d) Within a period of no more than sixty days from the date of this Award Respondent shall make proposals to Claimant for the restitution of the investment in the airport store, including proposals as to appropriate guarantees for the legality of a new lease agreement;

(e) Claimant may elect to accept or reject the restitution offered by Respondent at any time within a period of ninety days from the date of this Award;

(f) If Claimant elects to accept restitution, Respondent shall pay to Claimant by way of damages for its breaches of the BIT in relation to the airport store the sum of MDL 6,565,429;

(g) If Claimant elects to reject restitution, or if for any reason Respondent fails to make proposals to Claimant within the sixty days referred to in (d) above, then Respondent shall pay damages of MDL 35,136,294;

(h) Respondent shall pay interest on Claimant's damages from the date of this Award until the date of payment on a simple basis at the EURIBOR rate;

(i) Respondent will pay the damages awarded by this Tribunal in Euros without delays and at the normal exchange rate officially applicable on the date of transfer, and will permit the free transfer of the damages by Claimant;

(j) All other claims and requests for relief of Claimant or Respondent are dismissed;

(k) Each Party shall bear equally the costs and expenses of the arbitration, and each Party shall bear its own legal fees and costs.

**Date:**

**Signature:**

[Signed]

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Prof. Dr. Rolf Knieper  
Arbitrator

[Signed]

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Prof. Dr. Bernard Hanotiau  
Arbitrator

[Signed]

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Prof. Dr. Bernardo M. Cremades  
President