ARBITRATION INSTITUTE

OF THE

STOCKHOLM CHAMBER OF COMMERCE

SCC Arbitration EA (2016/095)

KOMPOZIT LLC

(Russian Federation)

Claimant

v.

REPUBLIC OF MOLDOVA

Respondent

EMERGENCY AWARD ON INTERIM MEASURES

Place of Arbitration: Stockholm

14 June 2016

I. Parties and Counsel

1. Claimant

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Russian Federation

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2. Respondent

REPUBLIC OF MOLDOVA

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3. The Claimant and the Respondent will hereinafter be referred to jointly as the "**Parties**". The Respondent may hereinafter be referred to as "the Republic of Moldova" or the Respondent.

II. Procedural History

4. On 9 June 2016, the Claimant filed an Application for the Appointment of an Emergency Arbitrator and for an Emergency Decision on Interim Measures (the "**Application**") with the Arbitration Institute of the Stockholm Chamber of Commerce (the "**SCC**"), pursuant to Appendix II of the 2010 SCC Arbitration Rules.

5. In its Application the Claimant confirmed, *inter alia*, that the SCC had jurisdiction over the dispute between the Parties and that the relevant fees in the total sum of EUR 15,000 had been transferred to the SCC's account.[1]

6. On 9 June 2016, the SCC Secretariat sent the Application and its exhibits to the Respondent by courier and by email, pursuant to Article 3 of Appendix II of the 2010 SCC Arbitration Rules. The receipts issued by the courier service provider and the corresponding signatures of the recipients apposed on the delivery sheet of the courier service provider, together with the reading receipts of the emails sent by the SCC, which the SCC has communicated to the Emergency Arbitrator, show that the SCC's notification of the Application was received by the Respondent. Copies of these receipts are attached hereto. According to the SCC Secretariat the Respondent did not make any contact with the SCC further to the SCC's notification.

7. By letter of 10 June 2016, the SCC Secretariat informed the Parties, *inter alia*, that the SCC Board appointed as Emergency Arbitrator (the "**Emergency Arbitrator**"):

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Bredgade 30
DK-1260 Køpenhavn K
Denmark
Tel: +33.6.08.72.67.22
E-mail: jose.rosell@arb-intal.com

8. In its letter of 10 June 2016, the SCC Secretariat also informed the Parties that the SCC did not manifestly lacked jurisdiction over this dispute and that the seat of the emergency proceedings shall be Stockholm.

9. On 10 June 2016, the SCC Secretariat sent by email a letter to the Emergency Arbitrator, with copy to the Parties, whereby it referred the Application, together with

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[1] Exhibit C-1.

the exhibits attached thereto, to the Emergency Arbitrator. In addition, the SCC Secretariat informed the Emergency Arbitrator that the emergency decision should be made by 15 June 2016 and that the costs of the emergency proceedings would be finally determined when the emergency decision would be made. A copy of this letter was also sent to the Parties.

10. By letter dated 10 June 2016, the Emergency Arbitrator:

    (a) invited the Respondent to inform the Emergency Arbitrator, the Claimant and the SCC, as to whether the Respondent would be represented by an outside counsel in the emergency proceedings, no later than 10 June 2016,

    (b) directed the Respondent to submit an answer to the Claimant's Application, no later than 11 June 2016,

    (c) invited the Parties to inform the Emergency Arbitrator, as to whether the emergency decision to grant or to deny the interim measures requested by the Claimant should take the form of an order or an award, no later than 10 June 2016.

11. The said Emergency Arbitrator's letter of 10 June 2016 was sent to the Parties by email. With respect to the Claimant, the Emergency Arbitrator used the email addresses, which were requested by the Claimant in its Application.[2] With respect to the Respondent, the Emergency Arbitrator used the email addresses proposed by the Claimant[3], i.e. secretariat@justice.gov.md and secdep@mfa.md. The Emergency Arbitrator has sent all the subsequent communications by email to the aforementioned email addresses. None of the emails sent by the Emergency Arbitrator to the Parties were rejected by the recipients.

12. By email dated 10 June 2016, the Respondent informed the Emergency Arbitrator, with copy to the Respondent, that the decision on the interim measures should take the form of an award, as permitted by Article 32(3) of the 2010 SCC Arbitration Rules.

13. By email dated 11 June 2016, the Emergency Arbitrator took note that the Respondent did not reply to the Emergency Arbitrator's letter of 10 June 2016, and asked the Respondent whether it wished to submit any comments.

14. By email of the same date, i.e. 11 June 2016, the Respondent stated that it had no further comments.

15. On 11 June 2016, the Emergency Arbitrator informed the Parties that he will commence the drafting of the award.

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[2] At #8.

[3] Application, #10

16. By email dated 12 June 2016, the Emergency Arbitrator took note that the Respondent had decided not to submit a reply to the Application within the time frame fixed in the Emergency Arbitrator's letter of 10 June 2016, and declared the emergency proceedings closed.

17. The Respondent has not participated in these emergency proceedings and has not made any contact with the Emergency Arbitrator; consequently the Emergency Arbitrator will solely refer herein to the positions expressed by the Claimant in the Application, and to the exhibits it has submitted in support of its allegations.

III. Summary of the Dispute

18. The Claimant contends that the Respondent has breached various provisions of the Convention between the Government of the Russian Federation and the Government of the Republic of Moldova on Encouragement and Mutual Protection of Investments dated 17 March 1998 (the "**Treaty**"), which was ratified by the Respondent on 9 July 1998 and by the Russian Federation on 28 May 2001.[4]

19. The Claimant alleges that by acquiring 10,160 shares (the "**Shares**") in JSC "Moldova Agroindbank" Commercial Bank[5] (the "**Bank**"), a Moldovan bank founded in 1991, made an investment, which was approved by the National Bank of Moldova (the "**National Bank**"). The Claimant further alleges that the National Bank is an organ of the Respondent, and, therefore, the latter is responsible and accountable for the National Bank's actions under the Treaty.

20. The Shares were acquired by the Claimant on or about 17 April 2015. On or about 24 April 2015, the National Bank requested the Claimant to provide various documents and information in order to carry out a review of the Bank's shareholders. The Claimant provided the documents and information on 6 August 2015.[6]

21. The Claimant participated in two shareholders' meetings of the Bank on 24 April 2015 and 22 September 2015, respectively. The National Bank did not raise any complaints regarding the Claimant's shareholding in the Bank or its participation in these two shareholders' meetings.[7]

22. Between 12 January 2016 and 24 February 2016, the National Anti-Corruption Center decided to block the Shares for short period of times, which were, thereafter, extended by the Buyukan district court in Chisinau for a longer period.[8]

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[4] Exhibit C-2.

[5] According to the Claimant the spelling in Moldovan language is BC "Moldova-Agroindbank"S.A.

[6] Exhibit C-11.

[7] Exhibit C-12.

[8] Exhibits C-13, C-14, C-15 and C-16.

23. On 2 March 2016, the National Bank issued the decision No. 43 (the "**Decision 43**")[9], which came into effect on the same date, whereby it decided that:

    i. the Claimant and 19 other shareholders in the Bank (the "**Decision 43 Investors**") were acting in concert and had acquired a "substantial share" in the share capital of the Bank without the National Bank's permission (paragraph 1 of the operative part of the Decision 43),

    ii. most of the shareholders rights of the Decision 43 Investors were immediately suspended, such as the right to vote, to call and hold general shareholders meetings, to add questions to the agenda, to nominate candidates for the Council of the Bank, the management bodies and the audit committee, and to receive dividends (paragraph 2 of the operative part of the Decision 43),

    iii. the Decision 43 Investors had to dispose of their shares in the Bank within a 3-month period from the date of the Decision 43, failing which their shares would be cancelled, pursuant to Article 15-6(3) of the Moldovan Law on Financial Institutions No. 550 dated 21 July 1995 (the "**Financial Institutions Law**") (paragraph 3 of the operative part of the Decision 43).[10]

24. On 16 March 2016, the National Anti-Corruption Center sent a letter to the Claimant's security broker, requiring the latter to notify the National Bank of any attempts by the Claimant to dispose of the Shares.[11]

25. The Claimant requested the National Bank to annul the Decision 43, but the National Bank rejected such request on 7 April 2016.[12]

26. On the same date, i.e. 7 April 2016, the National Commission of the Financial Market of Moldova (the "**Commission**") issued the decree No. 15/2 "*On stages, terms, sequence and procedures of the annulment of shares and issuance of new shares in JSC "Moldova Agroindbank" Commercial Bank*" ("**Decree 15/2**").[13] This decree was issued to implement the provisions of the Decision 43. According to the Claimant the Commission is an organ of the Respondent, and is thus responsible and accountable for Commissions' actions under the Treaty.[14]

27. The Claimant contends that the Commission (i) did not have any authority to issue the Decree 15/2 because it is not supposed to regulate banks and (ii) breached Article 46 of the Moldova's Constitution, which provides that no person should be deprived of

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[9] Exhibit C-18.

[10] Exhibit C-19.

[11] Exhibit C-17.

[12] Exhibit C-20.

[13] Exhibit C-21.

[14] Application, #35.

his property other than in case of public need as established by law and on the condition of fair and prior compensation.

28. In addition, the Claimant alleges that the Decree 15/2 contains unreasonable, arbitrary and/or punitive provisions and that the Claimant is independent and is not acting in concert with the other Decision 43 Investors with whom the Claimant is not in any way connected.

29. Moreover, the Bank's CEO has publicly confirmed that the Bank's management will proceed to cancel the shares belonging to the Decision 43 Investors, by reducing the Bank's share's capital by 43.11%.

30. The Claimant contends that there exists a grave and tangible risk that all the Shares will be cancelled, due to the fact that the 2 June 2016 deadline stipulated in the Decision 43 to sell them has elapsed. Indeed, pursuant to Article 15-6(3) of the Financial Institutions Law, the management board of the Bank is now obliged to pass a resolution to cancel the Shares within 15 days, i.e. by 17 June 2016.

IV. Interim Relief Sought by the Claimant

31. The Claimant requests the Emergency Arbitrator to order that:

(a) the National Bank refrain from taking any further steps concerning the enforcement/implementation of the provisions of (i) paragraph 2 and 3 of the operative part of its Decision No. 43 and (ii) paragraph 7 of the Decree No. 15/2 issued by the Commission on 7 April 2016,

(b) the Commission refrain from taking any further steps concerning the enforcement/implementation of the provisions of paragraph 2 of Decree 15/2, and

(c) the Respondent (whether acting through the national Bank and/or the Commission or otherwise) refrain from otherwise interfering with the Claimant's shareholding in the Bank, including (but not limited to) from taking any further steps relating to the cancellation of the Shares,

pending resolution of the present dispute by way of a final award on the merits.

V. The Arbitration Agreement

32. Article 10 of the Treaty provides that:

> *"1. Any dispute between one Contracting Party and investor of the other Contracting Party which occurred in connection with investment, including the disputes connected with amount, terms and conditions, procedure of payment of compensation provided in the article 6 of this Convention, or procedure of payment of compensation provided in the article 8 of this Convention, will be the subject of written notification followed by detailed comments which will be sent by investor to the Contracting Party involved in the dispute.*

A.1. The Applicability of the Emergency Arbitrator Rules

37. The Claimant submitted the Application on the basis of Article 1 of Appendix II to the 2010 SCC Arbitration Rules and contended that the dispute of the Parties should be resolved in accordance thereto, since Article 10 of the Treaty includes a reference to the SCC Arbitration Rules.[17]

38. As mentioned in paragraph 18 above, the Treaty is dated 17 March 1998, and was ratified by the Respondent on 9 July 1998 and by the Russian Federation on 28 May 2001. At the time of the signature of the Treaty, the 1988 version of the SCC Arbitration Rules were applicable. During the period between the signature and the ratification of the Treaty by the Russian Federation, the new 1999 version of the SCC Arbitration Rules came into effect. Thus, the contracting parties were aware that, during this period the SCC Arbitration Rules mentioned in Article 10 of the Treaty had been amended. Nonetheless, no specific mention or agreement was made regarding the version of the SCC Arbitration Rules that should apply to the disputes between one contracting state and the investors of the other contracting state. If, the contracting parties wished to be bound by a specific version of the SCC Arbitration Rules, they were free to make an agreement in this regard.

39. Therefore, it is fair to assume that when the contracting parties to the Treaty included a reference to the SCC Arbitration Rules, they anticipated that the SCC Arbitration Rules could be further amended in the future, as this is the case for the major arbitration rules.

40. This assumption is consistent with Article 31 of the Vienna Convention on the Law of the Treaties, which provides that the relevant provision of the treaty should be interpreted, *inter alia*, in accordance with its meaning, context and in light of its object and purpose.

41. Therefore, it can be concluded that *ratione temporis* the 2010 SCC Arbitration Rules can apply to the disputes, which may arise out of the Treaty, while the 2010 SCC Arbitration Rules are in force.

42. The following question to be addressed is whether the provisions related to the Emergency Arbitration contained in the 2010 version of the SCC Arbitration Rules can apply to the disputes related to the Treaty, since the emergency arbitration proceedings were neither contemplated in the 1988 version, nor in the 1999 version of the SCC Arbitration Rules.

43. The Preamble of the 2010 version provides that:

> "*Under any arbitration agreement referring to the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "Arbitration Rules") the parties shall be*

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[17] Application, ##1, 13 and 56.

deemed to have agreed that the following rules, or such amended rules, in force on the date of the commencement of the arbitration, or the filing of an application for the appointment of an Emergency Arbitrator, shall be applied unless otherwise agreed by the parties."

44. Since Article 10 of the Treaty refers to the SCC Arbitration Rules and its Preamble provides that the parties are deemed to have agreed to the rules contained therein, the contracting parties to the Treaty are deemed to have agreed to the provisions contained in Appendix II of the 2010 SCC Arbitration Rules, in the absence of an opt out agreement between the contracting parties[18], as this is the case in this emergency arbitration.

45. The Claimant, on his side, by filing the Application has agreed to the Respondent's standing offer to arbitrate under the SCC Arbitration Rules, for the duration of the validity of the Treaty, as contemplated therein; the SCC Arbitration Rules applicable are those in force at the time of such filing, i.e. the 2010 SCC Arbitration Rules.

46. The commentators of the 2010 SCC Arbitration Rules confirmed that the Emergency Arbitrator Rules are available to the parties, regardless the date when the arbitration agreement was made. Thus, they are applied retroactively to arbitration agreements entered into prior to the effective date of the 2010 SCC Arbitration Rules.[19]

47. Based on the foregoing analysis, the Emergency Arbitrator concludes that it has, *prima facie*, jurisdiction under the 2010 SCC Arbitration Rules.[20]

A.2. Claimant is an Investor having made an Investment under the Treaty

48. The Claimant states that it is a legal entity incorporated in accordance with Russian laws in the Russian Federation and is registered in Saint Petersburg, Russian Federation.[21] The Claimant also contends that it is an 'investor' under the Treaty.[22]

49. The Claimant states that, on or about 17 April 2016, it acquired the Shares for USD 615,757.58, using its own financial resources obtained as a result of its operational activity and, as a consequence, it made an investment, The Claimant contends that the Shares are an 'investment' under the Treaty.[23]

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[18] *International Arbitration in Sweden. A practitioner's Guide.* Ulf Franke, Annette Magnusson, Jakob Ragnwaldh and Martin Wallin (eds), p.111, Exhibit CA-8., n. 41

[19] *Ibid.*

[20] A similar conclusion was reached in a recent Award on Emergency Measures in *Evrobalt LLC v the Republic of Moldova* (SCC Emergency Arbitration EA 2016/082, ##24-30, Exhibit CA-7.

[21] Application, #6; Exhibit C-4.

[22] Application, #17.

[23] Application, ##18 and 27.

50. Based on the foregoing the Emergency Arbitrator concludes, *prima facie*, that the Claimant qualifies as an 'investor' under Article 1(1) of the Treaty and that the acquisition of the Shares by the Claimant qualifies as an 'investment' under Article 1(2) of the Treaty.

A.3. The Cooling-Off Period

51. Article 10(1) of the Treaty provides that "[t]*he Parties in dispute* [i.e. the investor and the host state] *will try, as far as possible, to resolve such dispute amicably*".

52. Furthermore, Article 10(2) of the Treaty provides that "[i]*f the dispute is not resolved in such a way within six months from the date of written notification*" (the "**Cooling-Off Period**"), which is mentioned in Article 10(1) of the Treaty, the dispute can, thereafter, be submitted to arbitration.

53. The Claimant has sent the written notice to the Respondent as required under Article 10(2), on 2 June 2016 (the "**Notice of Dispute**").[24]

54. Although the Cooling-Off Period has not yet expired, the Claimant contends that it is entitled to apply for the appointment of an emergency arbitrator and for an emergency decision on interim measures for various reasons, as set out in its Application[25], which may be summarized as follows:

    (a) the Cooling-Off is limited, if at all applicable, to commencement of substantive arbitration proceedings. If it would apply to appointment of an the Emergency Arbitrator then the Emergency Arbitrator procedure would be deprived of its purpose as means of providing urgent interim relief prior to the formation of the arbitral tribunal,

    (b) it would be unequitable and procedurally unfair to the Claimant if the Cooling-Off period would apply to the appointment of an Emergency Arbitrator, because interim measures could not be ordered as a matter of urgency and the Claimant would suffer serious and irreparable harm,

    (c) the Cooling-Off Period does not apply in this case due to the effect of the most favored nation clause, which is contained in Article 3 of the Treaty,

    (d) the Claimant attempted to resolve this dispute amicably, as explained below,

    (e) even if, the Cooling-Off Period would apply an Emergency Arbitrator ought to be appointed and interim measures ought to be made in this dispute for the following reasons:

        i. The Cooling-Off Period is a mere procedural requirement, directory and discretionary in nature, such that failure to comply does not affect the arbitral tribunal's jurisdiction. In support of this argument the Claimant relies on the following

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[24] Exhibit C-10.

[25] At #25

awards: *Ronald S. Lauder v Czech Republic*[26] and *Biwater Gauff Tanzania) Limited v United Republic of Tanzania.*[27]

ii. Article 10 of the Treaty provides that the dispute should be resolved by amicable means where possible. However, the Claimant's attempts proved impossible, since the Respondent failed to engage in such attempts. Among these attempts, the Claimant refers to the Notice of Dispute dated 2 June 2016, which requested that the Respondent should respond by 10 June 2016 due to the urgency of the matter. According to the Claimant, the Ministry of Justice of the Republic of Moldova provided a response on 3 June 2016, stating that the Ministry of Justice was not authorized to conduct negotiations with regard to the resolution of this dispute and was not in a position to take any actions aimed at suspending the National Bank's Decision 43 or the Decree 15/2, and that it deemed feasible and desirable to continue with measures aimed at amicable resolution of the dispute, including by way of negotiations with the National Bank.[28]

iii. Non-compliance with a notice of period does not affect a tribunal's jurisdiction when the negotiations are futile and when the notice period set forth in the Treaty has elapsed by the time the tribunal considers the matter, both of which are the case here, as alleged by the Claimant. In support of this latter argument, the Claimant relies on the words of the tribunal in the *Biwatter Gauff*'s case.[29] In support of the futility argument, the Claimant cites Professor Schreuer, who considers, in particular, that "*the decisive criterion for disregarding the waiting periods in the cases when the claimants had not complied with them was the evident futility of any negotiations*" and that "*[t]here would be no point in requiring negotiations if negotiations were not likely to lead to a settlement*".[30] The Claimant also relies on the *Biwatter Gauff*'s case in which the tribunal concluded that declining jurisdiction on the basis of non-compliance with a notice period "*would have curious effects*", including "*forcing the claimant to do nothing until six months have elapsed, even where further negotiations are*

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[26] Exhibit CA-4.

[27] Exhibit CA-5.

[28] Application, #25 f) ii), and #26.

[29] *Ibid.*

[30] Christoph Schreuer, *Travelling the BIT Route. Of Waiting Periods, Umbrella Clauses and Forks in the Road,* 5(2) J. World Inv. & Trade 231, 248-249 (2004), Exhibit CA-6.

obviously futile, or settlement obviously impossible for any reason".[31]

iv. Considering the utmost urgency, the Claimant argues that it is important that it is able to submit the Application without delay and subsequently commence substantive arbitral proceedings within the 30 days of the Emergency Arbitrator's Decision in order to avoid that the latter ceases to be binding pursuant to Article 9 of Appendix II of the 2010 SCC Arbitration Rules.

55. On this issue, the Emergency Arbitrator considers that, in this case, the Cooling-Off Period provided for in the Treaty is not applicable, primarily due to the Respondent's refusal to engage in settlement discussions when it received the Notice of Dispute. Indeed, Article 10(1) includes the language "*as far as possible*", which implies that when the parties are not able to resolve the dispute amicably, then the investor is entitled to submit the dispute to arbitration, pursuant to Article 10(2) of the Treaty. The Claimant has sent a Notice of Dispute containing detailed comments to the Respondent, as required in Article 10(1) of the Treaty. On his side, the Respondent has not made possible the amicable settlement of the dispute by refusing to negotiate with the Claimant.

56. In these circumstances, the Emergency Arbitrator concludes that since the dispute was not resolved within the Cooling-Off Period due to the Respondent's attitude, the Claimant became entitled to refer the dispute to arbitration, as provided for in Article 10(2) of the Treaty, without having to wait until the expiration of the six-month period. Since this finding suffices to exclude the requirement of the Cooling-Off Period, the Emergency Arbitrator does not deem necessary to examine the other grounds developed by the Claimant, in respect of this issue.

IX. The Standards to be met for the granting of Interim Measures

57. The powers of the Emergency Arbitrator with respect to the issuance of Interim Measures derive from Article 1 of the Appendix II of the 2010 SCC Arbitration Rules, which refer to Article 32 (1)-(3) of these rules.

58. Thus, the powers of the Emergency Arbitrator are the same than those conferred to the arbitral tribunals under Article 32(1) of the 2010 SCC Arbitration Rules, which provides that:

> "*The Arbitral Tribunal may, at the request of a party, grant any interim measures it deems appropriate.*"

59. The scope of these powers is sufficiently wide to enable the Emergency Arbitrator to grant the measures sought by the Claimant in this emergency arbitration. However,

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[31] *Ibid.*

Article 32 does not specify the standards, which have to be met by the Claimant in order to obtain the requested interim measures.

60. According to the Claimant, the standards to be met by its request for interim measures should be determined in accordance with Swedish law.[32]

61. This position is consistent with the SCC Board's decision to fix Stockholm as the place of this emergency arbitration.[33]

62. Since Swedish law is the *lex arbitrii* in this case, the Emergency Arbitrator has taken into account Article 25(4) of the Swedish Arbitration Act, which provides that the arbitrators have the authority to grant interim measures, unless the parties have agreed otherwise. Therefore, both the 2010 SCC Arbitration Rules and Swedish law gives the relevant authority to the Emergency Arbitrator to grant interim measures in this case.

63. The Claimant submits, alternatively, that the Emergency Arbitrator can be guided by international law, as the governing law of the Treaty.

64. Furthermore, the Claimant contends that the Emergency Arbitrator can be guided, in particular, by Article 17-17A of the UNCITRAL Model Law on International Commercial Arbitration (2006) (the "**Model Law**"). In this regard, the Claimant refers to the Emergency Decision rendered by the distinguished emergency arbitrator in the SCC Case No. EA 2014/072, in which the latter relied upon the Model Law when he justified his reasoning.[34]

65. The Emergency Arbitrator also considers that he can be guided by the Model Law in order to identify the conditions for granting interim measures in international arbitration, in the absence of any specific standards required by the Swedish Arbitration Act.

66. The Emergency Arbitrator will now examine whether the Claimant has met the applicable standards in order to prevail in this emergency proceedings, taking into account that the measures requested by the Claimant seek to suspend the cancelation process of the Shares and that the relief sought by the Claimant is pending of the resolution of this dispute by way of a final award on the merits, as stated at the end of paragraph 90 of the Application.

A.1. Urgency

67. The Emergency Arbitrator finds appropriate to require the Claimant to comply with the urgency test, in particular, since Article 7 of Appendix II of the 2010 SCC Arbitration Rules provide that the urgency is inherent in the emergency proceedings.

68. To comply with the urgency test it should be established *prime facie* that an imminent harm might be caused to the applicant, if the requested interim measure is not granted

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[32] Application, #14.

[33] See paragraphs 25-26.

[34] *TSIKinvest LLC v the Republic of Moldova* (SCC Emergency Arbitration No. EA 2014/053), Exhibit CA-1.

by the emergency arbitrator before such measure can be obtained from the arbitral tribunal.

69. The Claimant contends that it has met the urgency requirement, as explained in the Application and in particular in paragraph 42 of the Application.

70. According to the Decision 43 the Claimant was compelled to sell the Shares by 2 June 2016.[35] Since the Shares were not sold, the management board of the Bank has to pass a resolution to cancel the Shares within 15 days from that date, i.e. 17 June 2016, according to Article 15-6(3) of the Financial Institutions Law.[36]

71. Based on the above mentioned texts, it is obvious that there is an imminent risk that the Shares are cancelled by 17 June 2016. Therefore, the Emergency Arbitrator finds that the Claimant has established that there is urgency in granting an interim relief in order to prevent the cancelation of the Shares. However, the Emergency Arbitrator is not convinced that there is an urgency to decide, at this stage, on the restoration of the Claimant's rights, as shareholder[37], for the reasons expressed below in sub-section A.3.

A.2. *Prima Facie* Reasonable Possibility to Succeed on the Merits

72. In its Application, the Claimant relies on two previous Emergency Decisions rendered under the auspices of the SCC, which involved the Republic of Moldova in similar factual circumstances.[38] Although the two distinguished arbitrators reached different conclusions, both of them referred to this standard in their respective Emergency Decisions.

73. This standard is contemplated in Article 17A(1)(a) of the Model Law, which provides that the arbitrator has to be satisfied that there is "*a reasonable possibility that the requesting party will succeed on the merits of the claim*".

74. The Claimant has, therefore, to demonstrate that, *prima facie*, there is a reasonable possibility to succeed on the merits.

75. The Claimant's main argument in this regard is that the Decision 43 amounts to clear breaches of its rights as a shareholder of the Bank. The Claimant denies that it acted in concert with the other Decision 43 Investors regarding the acquisition of certain share capital of the Bank and that it acquired the Shares without the permission of the Bank, as stated in the Decision 43. Furthermore, the Claimant sustains that the

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[35] Exhibit C-18, operative part, b) 3.

[36] Exhibit C-19.

[37] See paragraph 2 of the operative part of the Decision 43.

[38] *TSIKinvest LLC v the Republic of Moldova* (SCC Emergency Arbitration No. EA 2014/053), CA-1 (reference to this case has already been made here above); *Evrobalt LLC v the Republic of Moldova* (SCC Emergency Arbitration No. EA 2016/082), Exhibit CA-7.

National Bank failed to provide "*any substantiated explanation or evidence*" on which the latter relied to render the Decision 43.[39]

76. Based on the explanations developed by the Claimant in its Application and on the exhibits submitted in support of the Claimant's arguments, the Emergency Arbitrator finds that, *prima facie*, there is a reasonable possibility that the Claimant succeeds on the merits of the dispute before the arbitral tribunal, once it is formed. Indeed, the Emergency Arbitrator considers that the actions of the Respondent, either directly or through its organs, namely the National Bank and the Commission, may lead the arbitral tribunal to determine that the Respondent has breached the provisions of the Treaty, in particular Articles 3.1, due to the *prima facie* discriminatory measures that it has taken against the Claimant.

A.3. Irreparable Harm – Substantial/Significant Prejudice

77. The Claimant submits that the test of "substantial/significant prejudice" should be applied in this case instead of the "irreparable harm", as required in Article 17A(1)(a) of the Model Law and as it is often applied by ICSID Tribunals. The Claimant also submits that it meets both criteria in this case.[40]

78. According to the Claimant, the latter will suffer substantial prejudice if the Decision 43 and the Decree 15/2 becomes effective. The result of this prejudice will be a complete loss of the Claimant's investment and, by extension, of its business in Moldova.[41]

79. The Claimant claims that it seeks to protect its legal rights to ownership of the Shares, and any and all related rights and interest which forms part of its investment in Moldova, such as the right to participate in shareholder meetings with voting rights, the right to appoint directors, the right to receive dividends on an indefinite basis; those rights being protected by articles 3(1), 3(2) and 6 of the Treaty.

80. The Claimant contends that the Respondent's actions bear the risk of indefinitely prohibiting the Claimant form purchasing any further shares in the Bank, and have the effect of preventing the Claimant from making investments in the banking industry in Moldova, due to the requirement to obtain the National Bank's prior approval prior to the acquisition of a "substantive stake", i.e. more than 1%, in any Moldovan bank, which may not be obtained by the Claimant based on the "integrity" criteria set forth in Article 32(3) and (4) of the Regulation, further to the National Bank's findings in the Decision 43.[42]

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[39] Application, #50.

[40] Application, footnote 34.

[41] Application, #68.

[42] Application, ##72-75; Exhibit C-19, Article 15-6(4); Exhibit C-12: the National Bank's Regulation on Holding Equity Interest in the Capital of Banks No. 127, dated 27 June 2013 (the "**Regulation**"), Article 71.

81. Therefore, due to the nature of the rights mentioned above and the actions taken by the Respondent, an award of monetary compensation would be insufficient to remedy the forced sale of the Shares.[43]

82. The Claimant requests the Emergency Arbitrator to preserve the *status quo*. In support of its request, the Claimant refers to the case *PNG Sustainable Development Program Ltd. V Independent State of Papua New Guinea.*[44] The Emergency Arbitrator agrees with the Claimant that the PNG tribunal's order the to refrain the respondent from transferring any of the claimant's shares to a third party supports the relief sought by the Claimant regarding (i) the provisions of paragraph 3 of the operative part of the Decision 43 and paragraph 7 of the Decree 15/2, and (ii) the actions that could be taken by the Respondent with respect to the cancelation of the Shares.

83. However, the Claimant also seeks to recover its shareholding rights, which were suspended by the Decision 43.[45] The Emergency Arbitrator finds, *prima facie*, that the National Bank's decision to suspend the Claimant's rights as shareholder, which are mentioned in paragraph 2. of the operative part of the Decision 43 is neither permanent nor irrevocable. Therefore, the Emergency Arbitrator considers that it is more appropriate for the arbitral tribunal that will examine the merits of the case to make a determination on this issue, should the Claimant decide to submit a new request for an interim measure to this effect, at a later stage.

84. The Claimant further contends that it has also a right to safeguard the procedural integrity of the arbitration and the enforceability of a final award, even if such measures are directed against the judiciary, as this was the case, notably, in the ICSID arbitration No. ARB/97/4[46], although no such request has been made by the Claimant in this emergency proceeding. In any event, the Emergency Arbitrator does not see how the argument related to the enforceability of a final award is relevant in the case of an emergency award.

85. Furthermore, the Claimant states that tribunals have granted provisional measures in order to prevent a host state from taking actions which may affect the investor's ability to operate its business, as this is the case here.[47] However, the Emergency Arbitrator is not convinced that this kind of requests for interim measures should be submitted to an emergency arbitrator, unless the exceptional circumstances of the case would justify it, which is not the case in this emergency arbitration.

86. Regarding the irreparable harm test, the Claimant quotes the *Burlington* tribunal:

> *"it is not essential that provisional measures be necessary to prevent irreparable harm, but that the harm spared the petitioner by such measures must be significant and that it*

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[43] Application, ##70-71, and 76.

[44] Exhibit CA-9.

[45] Paragraph b) 2. of the operative part.

[46] *Ceskoslovenska Obchodni Banka, A.S. v Slovak Republic, Procedural Order No. 4, 11 January 1999* (Exhibit CA-13)

[47] Application #82.

> *exceeds greatly the damage caused to the party affected thereby."*[48]

87. In the previously cited case of *PNG Sustainable Development Program Ltd. V Independent State of Papua New Guinea*[49], the tribunal noted as follows:

> *"The degree of "gravity" or "seriousness" of harm that is necessary for an order of provisional relief cannot be specified with precision, and depends in part on the circumstances of the case, the nature of the relief requested and the relative harm to be suffered by each party; suffice it to say that substantial, serious harm, even if not irreparable, is generally sufficient to satisfy this element of the standard for granting provisional measures."*

88. The Claimant, thus, stresses the trend to adopt a greater flexibility of the "substantial prejudice" test in investor-state arbitrations and cites in this regard the UNCITRAL case of *Paushok v Mongolia*[50] in which the tribunal observed that "*irreparable harm" in international law has a flexible meaning",* and that "[t]*he possibility of monetary compensation does not necessarily eliminate the possible need for interim measures*". The Emergency Arbitrator shares this view of the *Paushok* tribunal, which can be applied in the present case to the extent that even if it is assumed that the Claimants may receive certain compensation at the time of the sale of the Shares further to the Decision 43, this compensation will not necessarily reflect the real value of the Shares.

89. Based on the foregoing, the Emergency Arbitrator finds that the Claimant has established that it is very likely that it will suffer a harm, if the Respondent is not prevented from cancelling the Shares.

A.4. The Respondent's Prejudice

90. The Claimant contends that the Respondent will not suffer any harm if the requested interim relief is granted and that the Respondent will be able to proceed with the enforcement of the Decision 43 and the Decree 15/2 if the arbitral tribunal ultimately finds that the Respondent has not breached the provisions of the Treaty. Therefore, the requested interim relief constitutes an appropriate and proportional measure in this case, according to the Claimant. The latter sustains that in any event, the decisions of the Emergency Arbitrator have a limited temporal effect, which highlights the lack of any real prejudice.

91. The Emergency Arbitrator finds that there is a serious likelihood that the Claimant will suffer a significant prejudice if the Respondent is not ordered to refrain from

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[48] *Burlington Resources Inc. v Republic of Ecuador,* ICSID case No. ARB/08/5, Procedural order No. 1, 29 June 2009, #81, Exhibit CA-16.

[49] *Ibid.*

[50] *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v Government of Mongolia*, Order on Interim Measures, 2 September 2008, ##68-70, Exhibit CA-18.

cancelling the Shares. In contrast, the potential harm that may cause to the Respondent the granting of this specific interim relief seems to be, *prima facie*, limited. Therefore, an order to prevent the cancelation of the Shares would constitute a proportional measure in this emergency arbitration.

X. Decisions

92. For the foregoing reasons, the Emergency Arbitrator:

    (1) Orders that the National Bank refrain from taking any further steps concerning the enforcement/implementation of the provisions of paragraph 3 of the operative part of the Decision 43 and paragraph 7 of Decree 15/2 (in so far as the said provisions of Decree 15/2 concern the National Bank);

    (2) Orders that the Respondent (whether acting through the national Bank and/or the Commission or otherwise) refrain from taking any further steps relating to the cancellation of the Shares,

    pending resolution of the present dispute by way of a final award on the merits.

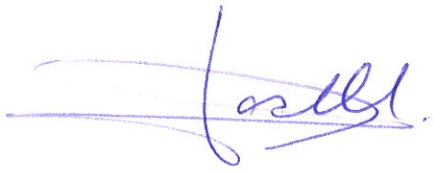
93. All other requests submitted by the Claimant, which have not been granted by the Emergency Arbitrator in paragraph 90 of this Emergency Award, are dismissed.

94. The decisions of the Emergency Arbitrator will cease to be binding in the cases set out in Article 9(4) of the 2010 SCC Arbitration Rules

Seat of the Emergency Arbitration: Stockholm, Sweden

Date: 14 June 2016

THE EMMERGENCY ARBITRATOR



José Rosell