

**ARBITRATION OF INVESTMENT DISPUTES: EXPERIENCES OF THE
REPUBLIC OF MOLDOVA**

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1 INTRODUCTION

There is a wide range of factors that a foreign investor would take into account before making the ultimate decision regarding potential investment in a particular country: geographic location, political situation, economic indicators, legal environment, business opportunities, etc. And although it is true that none of these factors alone is sufficient for making an informed decision, some of them bear a particular importance for successful investment overseas. The focus of this paper will be on a particular aspect of the legal environment – arbitration of investment disputes.

In the south-eastern European region the rule of law still has to be solidified and the legislative environment is characterised by constant reforms, reorganisations and attempts to implement international (or adopt foreign) concepts and accommodate them in the national legal system. In such conditions, a profound analysis of the existing practice could be a useful resource for the foreign business

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community interested in conducting business in the region, exploring the hidden potential of liberalising economies that was limited by the decades of Socialist rule.

Unfortunately, there have been only a few attempts to explore the regional legal environment through legislative reviews or case law analyses.¹ Domestic legal scholarship is typically more preoccupied with disciplines such as constitutional, administrative, criminal and other fields of law closely linked to State building and the maintenance of legal order.

The majority of modern cutting edge fields in commercial law, including alternative dispute resolution methods, electronic commerce, securities markets, and international antitrust to name a few, are usually the domain of local legal practitioners who are generally not very interested in research for academic purposes. Foreign legal scholars, understandably, encounter significant obstacles when trying to access relevant information. These might appear in the form of language barriers, since the majority of national laws and judgments are never translated, or in the form of restricted access to information, which is usually available only from the court dockets and archives of state agencies and is hardly accessible to researchers or the general public. As a result, a foreign observer often has either a distorted or a very generalised and stereotyped impression about the true legal environment for the purposes of securing potential investments and contracts.

The Republic of Moldova, as a newly independent State, a former Soviet republic and an emerging free market democracy suffers from all the above-mentioned problems. Since the proclamation of its independence in 1991, it has undergone a long and often contradictory process of transformation of its legal order. Its judicial and administrative system has been reorganised at least three times over the past decade. Old laws, remaining from the Soviet State, were applied simultaneously with newly adopted national legislation.² New democratic

¹ Messmann, S. and Tajti, T. (eds.), *Investing in South Eastern Europe – Foreign Direct Investment in the Stability Pact Countries*, 2005, European University Press, Bochum, is the most recent comprehensive review of the commercial and investment laws in the region. The editors have been awarded The Dr. Elemer Hantos Prize for Promoting Economic Cooperation in Central Europe, available at: <<http://www.hantosprize.org/prize2006.htm>>.

² *Legea Republicii Moldova Codul Civil* [Civil Code], Monitorul Oficial al R.Moldova nr.82-86/661 din 22 June 2002, Nr.1107-XV din 6 June 2002 was adopted only in 2002 replacing an old Civil Code that was in force from 1964 and has experienced numerous amendments that did not add to the clarity and consistency of its provisions. The new civil code introduced a coherent system of private law, regulating general concepts of rights, property and transactions including regulations of specific contracts such as leasing,

governments have struggled to transform the country into a modern democracy embracing the principles of a free market economy and protection of the fundamental rights of citizens.

The changing political environment of the mid-90s has produced diversity in legislation reflecting the political interests of the governing political forces.³ Dependent on Russian energy supply, Moldovan foreign policy has shuttled between the Commonwealth of Independent States (CIS) under Russian dominance and the perspective of integration in the European Community. Recent developments have finally made Moldovan foreign policy choose a pro-European vector. Poor on natural resources, the country proclaimed European integration, international trade and attraction of foreign investment as its main foreign economic policy priorities.⁴

2 LEGAL FRAMEWORK FOR ARBITRATION

The advantages of arbitration were recognised as early as 1994, when the law on arbitration was passed by Parliament even before the first national Constitution which was adopted several months later. Since then, Moldova has ratified the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and the 1961 Geneva Convention on International Commercial Arbitration, adhering to the internationally recognised norms in the field of commercial arbitration. It established a Court of International Arbitration at the Moldovan Chamber of Commerce and Industry (CCI), independent from the state, in 2001.⁵ A new Code of Civil Procedure (CCP) and laws regulating the jurisdiction of the courts related to the enforcement of foreign arbitral awards have also been drafted, taking into account international law and practice in this area.

factoring, and franchising that constituted a novelty in the Moldovan legal system and were later regulated in detail by separate laws.

³ The most illustrative example of the role of politics in the transformation of the legal system is administrative reform. It has changed three times according to the political interests of the parliamentary majority. First, Moldova has been divided into *raioane*, with autonomous local councils and administration. Then, the new Parliament has attempted to strengthen the role of the central government by dividing the country into two levels of administrative units: *judete*, administered by the government-appointed prefect and *raioane*, which have been left with little authority. This system was changed again after four years, reverting to the initial *raioane* structure.

⁴ Information on the investment climate in Moldova is available at: <<http://www.trade.moldova.md/investments-moldova.shtml>>.

⁵ *Regulations of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of the Republic of Moldova*, 13 July 2001, Monitorul Oficial of the Republic of Moldova N 131-2 of 31 October 2001, available at: <<http://www.chamber.md/en/index.shtml?arbitration/regulament>>.

Still, for various reasons Moldova is not considered to be an attractive country for commercial arbitration, and its arbitral institutions have not yet gained international or even regional recognition or prestige. Arbitrating under Moldovan law could still be considered to be a risky venture because of the lack of knowledge and the alleged instability of the legal system. The investment climate assessment reports supplied by international organisations usually refer only to State courts and ‘out of court’ or informal methods of commercial dispute settlement that are available to foreign investors.⁶ As a result, investment arbitration remains out of the picture, which is an unfortunate outcome, taking into account the numerous advantages of this widely used dispute resolution method.

In the field of investment arbitration, Moldova is still way behind other developing countries. It remains among the very few countries which have signed but never ratified the most important international investment arbitration instrument – the 1965 Washington Convention.⁷ Thus, foreign investors can rely only on the few specialised multilateral treaties that would allow them to initiate investment arbitration against the Republic of Moldova, although only in certain sectors of industry and types of claims. Among these instruments stands the Energy Charter Treaty that provides foreign investors with a right to arbitrate alleged violations of the Treaty by Member countries.⁸

The development of investment arbitration in Moldova took a different shape reflected in domestic legislation, international agreements and judicial practice. Thus, Moldovan legislation provided for investment arbitration from the early years of independence. The First Law of Foreign Investments stipulated that investment-related disputes fall under the competence of economic courts, or alternatively – following the agreement of the parties – could be subject to foreign or international arbitration.⁹

⁶ See for example, *Moldova Investment Climate Assessment*, IBRD and IFC, May 2004, 33-3 available at: <<http://rru.worldbank.org/Documents/EnterpriseSurveys/ICA/MoldovaICA.pdf>>.

⁷ *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, signed by Moldova on 12 August 1992, status available at: <<http://www.worldbank.org/icsid/constate/c-states-en.htm>>.

⁸ Article 26 of the Energy Charter Treaty provides various options for investors to take host governments to international arbitration in the event of an alleged breach of the Treaty’s investment provisions. For details, see Jagusch, S. and Sinclair, A., *The Energy Charter Treaty: Settlement of Disputes between an Investor and a Member State*, Energy Charter Secretariat, Brussels, 20 October 2005, available at: <http://www.encharter.org/fileadmin/user_upload/Conferences/20_Oct_2005/Jagusch_-_Sinclair.pdf>.

⁹ Article 45(1) *Legea privind investitiile straine* [Law on Foreign Investments] nr. 998, adopted on 1 April 1992, in force since 13 January 2000, *Monitorul Oficial al R. Moldova* nr. 5/2000.

It is understandable that this kind of formulation would not be of much benefit to the foreign investor because of the nature of investment disputes and because it does not provide a foreign investor with a right but with a mere possibility. When establishing a mixed company or joint venture, foreign investors do not usually enter into a formal contractual relationship with the government where an arbitration agreement could be inserted. Investment disputes usually arise when the government unilaterally violates its obligations to protect the foreign investor from indirect expropriation, discrimination or less favourable conditions brought about by changes in legislation. In this situation, it is hard to imagine that the government would agree to use arbitration as a potential dispute resolution method, where it is acting as a respondent.

Therefore, this formal recognition of investment arbitration will be useful mainly in disputes where there is an arbitration clause in the contract between the government and foreign investor, which might be the case in respect of investments made in Free Economic Zones, cessions, privatisations, etc. The new Law on Foreign Investments adopted in 2004 has preserved the provision on investment arbitration without giving foreign investors any special right to commence arbitration.¹⁰

In the meantime, the foreign economic policy of the Republic of Moldova was designed to increase the level of protection of foreign investments by providing foreign investors from certain countries with the right to arbitrate their investment claims. This right has been fixed in numerous Bilateral Investment Treaties (BITs) that Moldova has concluded with its major trading partners.¹¹ Written in a standardised form, BITs provide for the possibility of initiating arbitration after a period of unsuccessful negotiations with the Government. Usually this period is fixed at six months as in the BIT between Moldova and Bulgaria.¹² These BITs usually allow a foreign investor to choose between institutional and ad-hoc arbitration. If the former option is chosen, then ICSID is assigned as an administering body, although Moldova has not yet ratified the Washington

¹⁰ Article 14 *Legea cu privire la investițiile în activitatea de interprinzător* [Law on Investments in Entrepreneurial Activity], adopted 18 March 2004, *Monitorul Oficial al R. Moldova* nr. 064, 23 April 2004.

¹¹ The Republic of Moldova has concluded BITs with about 20 countries including Austria, Belgium, France, Germany, Greece, Netherlands, Switzerland, UK and the USA. Apparently there is no specific preference of the BIT partners. The countries range from big trading partners like Russia and Germany to Finland, Croatia, Latvia and Lithuania, which contribute only a very small percentage of foreign direct investment (FDI), if any. Full texts available at: <<http://www.unctadxi.org/templates/DocSearch.aspx?id=779>> and <<http://www.kluwerarbitration.com/arbitration/arb/BITS/Moldova.asp>>.

¹² Article 9(2) *Agreement between Government of the Republic of Moldova and Government of the Republic of Bulgaria on the Promotion and Reciprocal Protection of Investments*, adopted 17 April 1996, *Monitorul Oficial al R. Moldova* nr. 069, 23 October 1997.

Convention.¹³ In the case of an ad hoc arbitration, the UNCITRAL Arbitration Rules¹⁴ will automatically govern the procedure if the parties fail to agree otherwise.¹⁵ So far, Moldova has very limited experience with investment arbitration under BITs: there are about ten cases reported by UNCTAD, two of which will be analysed in detail below.

3 LINK-TRADING AND INDIRECT EXPROPRIATION

This arbitration arose out of a dispute between Link-Trading (Claimant), a US-Moldovan joint venture established in the Free Economic Zone Chisinau (FEZ) and the Moldovan Department for Customs Control (Respondent). The Claimant was operating a retail business engaging in the sale of tax-free imported goods to individuals who could then take them out of the FEZ, also without paying VAT. When the Claimant first established its business in the FEZ, Moldovan legislation allowed VAT-free import out of the FEZ only up to the amount of \$600. In 1997 a new Budget Law reduced this exemption to \$250 and then the amended Budget Law of 1998 abolished the exemption altogether. The Claimant alleged that this change in legislation amounted to indirect expropriation. It commenced arbitration proceedings allowed under Art. VI(8) of the US-Moldova BIT,¹⁶ which – like the other standardised BITs discussed above – provides a foreign investor with the right to resort to arbitration even in the absence of a formal arbitration clause or any contract with the State.

This ad hoc arbitration was conducted under the UNCITRAL Arbitration Rules, as mandated by the BIT. In the absence of the cooperation of the Respondent, the Secretary of the Permanent Court of Arbitration designated the Arbitration Institute of the Stockholm Chamber of Commerce as appointing authority. As a result, the second arbitrator and the chairman of the arbitral tribunal were appointed by the Stockholm Chamber.

¹³ See for example, Art. 10(2)(b) *Agreement between the Republic of Croatia and the Republic of Moldova on the Promotion and Reciprocal Protection of Investments*, signed on 5 December 2001.

¹⁴ UNCITRAL Arbitration Rules, General Assembly Resolution 31/98, available at: <<http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>>.

¹⁵ See for example, Art. 9(2)(c) *Agreement between Government of the Republic of Moldova and Government of the Republic of Belarus on the Promotion and Reciprocal Protection of Investments*, adopted 28 May 1999, *Monitorul Oficial al R. Moldova* nr. 000, 28 May 1999.

¹⁶ *US–Moldova Bilateral Investment Treaty*, signed on 21 April 1993, entered into force on 25 November 1994, full text available at: <<http://www.state.gov/documents/organization/43578.pdf>>.

The award on jurisdiction rendered by the Tribunal addressed the contentions of the Respondent that the Tribunal lacked jurisdiction in the case.¹⁷ The Moldovan Government attempted to challenge the right of the investor to engage in arbitration. The Respondent argued amongst other things, that there was no agreement to arbitrate between the parties and that the Claimant should first attempt to settle the dispute in the prescribed six months or litigate in the Moldovan courts.

The Tribunal rejected all these arguments, emphasising that according to the provisions of the BIT, there was no need for a separate agreement to arbitrate or contractual arbitration clause, and that litigation in Moldovan courts is only an option that the Claimant is free to pursue. The Tribunal also noted that the prescribed period of six months providing for amicable settlement had elapsed and there was no need to interpret this term broadly as the history of negotiations demonstrates that the Moldovan authorities never admitted any fault or offered any compensation to the Claimant. The Tribunal also found a *prima facie* case for indirect expropriation and decided to proceed further on the merits.¹⁸

For the purposes of the present analysis, it is useful to note the Government's strategy in this arbitration case. As it appears from the Decision on Jurisdiction, issued by the Tribunal in February 2001, the Respondent filed its objections only once. After that there was no communication from the Respondent until the jurisdictional award was rendered. More than five months later, in August 2001, the Government informed the Tribunal that a special commission for the examination of the case had been established and that the Respondent intended to participate in further proceedings. To meet the needs of the Respondent, the Tribunal allowed it several extensions of time, when the proceedings were stayed, and the Government's agents delivered their final submissions only in January 2002.

The final award, in which the Tribunal decided the substantive issues of the case, was delivered in April 2002.¹⁹ The arguments of the Claimant were insufficient to allow the Tribunal to find indirect expropriation in the actions of the Government and the claim was ultimately dismissed. This award set an important precedent for future investment disputes as the Tribunal interpreted the key provisions of the

¹⁷ *Link-Trading v Republic of Moldova*, Decision on Jurisdiction, issued on 16 February 2001, available at: <<http://www.investmentclaims.com/decisions/Link%20Trading%20-%20Moldova%20-%20Award%20on%20Jurisdiction.pdf>>.

¹⁸ Article X(2)(a) of the BIT provides that matters of taxation, if they give rise to the expropriation of an investment, may be subject to arbitration. The Tribunal found the term 'taxation' was broad enough to include also customs duties.

¹⁹ *Link-Trading v Republic of Moldova*, Final Award, issued on 18 April 2002, available at: <<http://www.investmentclaims.com/decisions/26a%20-%20Link-Trading-Moldova.pdf>>.

national legislation regulating the protection of foreign investments and its compatibility with international law in this field.

As mentioned earlier, the Claimant submitted that the new Budget Law of 1998 that abolished the duty free imports from the FEZ should be found to amount to indirect expropriation, as the business of the Claimant had become economically unsound when the conditions which existed when it was established in Moldova had changed as a result of this law. The Claimant relied on several provisions of the Law on Investments, namely on its Art. 43(1) which guarantees that in case of changes in legislation which would create less favourable conditions for the investor, the latter is entitled during a ten year period to be subject to the legislation in force on the date of establishment of its enterprise.²⁰ However, paragraph (2) of the same article provides that paragraph (1) does not apply to 'customs, tax, financial, money-credit, currency and anti-monopoly legislation'. Thus, the Claimant's argument relying on this questionable guarantee had failed.

The Government was also able to defend its position regarding international standards applied to indirect expropriations. The Tribunal noted in the Final Award that 'fiscal measures only become expropriatory when they are found to be an abusive taking'. The Respondent demonstrated a continuous fiscal policy of the state that reduced and ultimately abolished the exemptions on the imports from the FEZ. It was an undisputed fact that the FEZ was created with the aim of promoting export activities and not import ones. For this purpose, the FEZ was determined as being outside the customs territory of Moldova. Thus, all products that were imported from the FEZ to the customs territory should be subject to VAT and other applicable duties, which is a normal practice in other countries.

The Tribunal also found that the Claimant was aware of the fact that the exemptions were based exclusively on the budget laws, which were subject to change on an annual basis. The position of the Claimant was held not to be unfavorable or discriminatory by comparison with that of other investors or domestic economic agents. The exemptions that existed in 1996 when the Claimant established its enterprise in the FEZ were rather exceptional privileges based on the annual State budgets, and therefore the Government had not assumed any obligations to the Claimant for the purposes of the BIT. As a result, the Tribunal did not find indirect expropriation in the actions of the Government.

This case is an important milestone for the Moldovan experience in investment arbitration in several respects. First, it confirmed the unconditional right of an investor to engage in arbitration under the existing BITs. This right exists regardless of any existing contractual arbitration clauses or agreements to arbitrate

²⁰ Here, the Claimant relied on the old Law on Investments of 1992. The new Law on Investments of 2004 does not contain this guarantee.

and does not require the foreign investor to exhaust any domestic remedies other than respecting the six month period reserved for the attempt to settle the dispute amicably.

Second, it has produced an important interpretation of the domestic laws regarding the protection of investments. The arbitration revealed the weakness and lack of clarity of the guarantees in case of the change in legislation which at that time were part of the Law on Investments.²¹ Nevertheless, the Tribunal held the Government responsible under the international standards of protection against expropriation which are provided for in the BIT.

Third, despite its outcome, it served as an indicator of the real efficiency of investment arbitration in Moldova for the foreign investor. The Government proved to be unprepared for participation in international arbitration at least in the initial stages of the proceedings. It took almost six months for the Respondent to submit its arguments in this relatively unsophisticated dispute. This behaviour, as we shall see later in the discussion, will account at least in part for the Government's failure in another arbitration case. Ultimately, *Link-Trading v Moldova* was a 'launch event' that has set the ground for the more effective use of the investment protection measure contained in the BITs.

4 RUSSIAN INVESTOR *v* MOLDOVA AND THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

In December 2005, Mr. Iurii Bogdanov, a private investor from the Russian Federation who was a shareholder in Agurdino-Invest SRL and Agurdino-Chimia SA, applied to the Economic Court of Appeals²² for enforcement of the arbitral award, rendered by the arbitral tribunal appointed by the Arbitration Institute of the Stockholm Chamber of Commerce against the Republic of Moldova.²³ The dispute arose out of a privatisation contract between the foreign investor and the Government of Moldova. The Russian investor committed to transfer certain assets of the privatised company to the state. In exchange he was offered a certain

²¹ The new Law on Investments in Entrepreneurial Activity, *supra* fn 10, does not contain any guarantees of this kind. It would be logical to assume that when revising the law, the national Parliament realised that the guarantee became ephemeral with so many exceptions and it was better not to mention it at all in such form.

²² Article 29(1)(e) Code of Civil Procedure provides that the economic courts decide cases regarding objections to arbitral awards and issues enforcement orders. Art 36(1)(h) CCP specifies that matters of enforcement of arbitral awards fall under the specific jurisdiction of Economic Court of Appeals.

²³ *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v Republic of Moldova, SCC*, (Russia/Moldova BIT), rendered in Stockholm on 22 September 2005, full text available at: <<http://ita.law.uvic.ca/documents/Bogdanov-Moldova-22September2005.pdf>>.

amount of the so-called ‘compensation shares’, which the State held in other privatised enterprises.

When the time for the transfer of shares came, it appeared that on 17 December 2001 the Government ordered that only shares of those companies where the State was holding less than 30% ownership could be offered as compensation shares. The foreign investor considered this and a subsequent ownership cap of 25% as depriving the compensation mechanism of its substance, because the nominal value of the compensation shares that were offered by the Government according to this new standard were allegedly below their market value. The case was decided by a sole arbitrator in favour of the Russian investor, ordering the Moldovan state to pay compensation and costs of the arbitration.²⁴

The application to enforce the award was dismissed by the Economic Court of Appeals for the following reasons: (1) the dispute was not arbitrable, (2) the case could not be decided by the sole arbitrator, and (3) the Government of the Republic of Moldova was not properly informed about the institution of the proceedings.

Hearing the appeal on this decision, the Supreme Court of Justice (SCJ)²⁵ rejected all three arguments.²⁶ For the purposes of the present analysis it is important to

²⁴ For a brief description of the case, see Vis-Dunbar, D. and Peterson, L. E., ‘Russian Investor Pursues Multiple Treaty Arbitrations Against Moldova in Stockholm’, *Investment Treaty News*, 17 February 2006, available at: <http://www.iisd.org/pdf/2006/itn_feb17_2006.pdf>.

²⁵ The Supreme Court of Justice is the highest court in the Moldovan judicial hierarchy. Its decisions have persuasive authority for the lower courts and judicial practice has proven that they are usually followed. In any case, the SCJ itself proved to be faithful to its own case law and occasions where a previous decision has been overruled are rare and usually related to legislative reforms. The SCJ is also a last instance for recourse in recognition and enforcement cases, so its case law will provide a valuable guidance to a party that moves to enforce a foreign arbitral award in the Moldovan courts. Article 2(e) of the *Legea Republicii Moldova cu privire la Curtea Suprema de Justitie* [Law on the Supreme Court of Justice], Nr.789-XIII din 26 March 1996, Monitorul Oficial al Republicii Moldova nr.32-33/323 din 30 May 1996 available at: <<http://www.scjustice.md/>>. Note: republished in Monitorul Oficial nr.196-199 din 12 September 2003, 5 Art. 764 provides that the SCJ as the highest court in the nation is responsible for summarising and clarifying existing judicial practice and advising lower courts on the correct interpretation of legislation in deciding particular disputes.

²⁶ *Decizia Colegiului economic al Curtii Supreme de Justitie a Republicii Moldova* [Decision of the Economic College of SCJ] nr. 2re-46.2006 din 16 February 2006, Buletinul Curtii Supreme de Justitie a Republicii Moldova, 2006, nr. 3, 18: *Cererea de recunoastere si executare a hotaririi arbitrale straine poate fi respinsa de instanta de judecata doar daca sina dovedite imprejurarile aratate in Art. 476 Codului de Procedura Civila* – Recognition and enforcement of the foreign arbitral award can be denied only under the conditions set out in Art. 476 of the Code of Civil Procedure.

note that the SCJ agreed with the arbitral tribunal that the arbitrability of the claim should be established solely on the basis of the BIT between Moldova and the Russian Federation.²⁷ This BIT contains an arbitration clause allowing investment disputes to be resolved in arbitration proceedings under the rules of the international institutions as chosen by the applicant.

The argument regarding the ability of a sole arbitrator was dismissed even without discussing the issue of her authority. The SCJ referred the parties to the Rules of Procedure of the Stockholm Arbitration Institute, which was the administering organisation in the case and which, amongst other things, provided for the option of having a sole arbitrator in a case where the parties did not agree otherwise.²⁸

It also appeared from the case documents that the Government of the Republic of Moldova had also been adequately informed according to the Rules of the Arbitration Institute.²⁹ The documentary evidence showed that all arbitration correspondence including notification about the initiation of the arbitral proceedings was forwarded to the Government³⁰ and that on 17 August 2005 it appointed its legal representative in these proceedings.³¹

²⁷ *Agreement between Government of the Republic of Moldova and Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments*, signed on 17 March 1998.

²⁸ Article 13 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (1999) provide as follows: ‘the SCC Institute shall (i) decide the number of arbitrators if not agreed by the parties ... (ii) when so required pursuant to Art. 16, appoint a sole arbitrator...’. Article 16(1) states:

Where the parties have not agreed on the number of arbitrators, the Arbitral Tribunal shall consist of three arbitrators, unless the SCC Institute, taking into account, inter alia, the complexity of the case, the amount in dispute and other circumstances, decides that the dispute is to be settled by a sole arbitrator.

Available at: <<http://www.sccinstitute.com/uk/Rules/>>.

²⁹ Articles 10, 28 of the Rules provide that all communications to the arbitral tribunal shall be forwarded to both parties and failure of any party to respond or appear before the tribunal without showing a valid cause shall not prevent the tribunal from rendering the award.

³⁰ Article 1.4 of the award demonstrates that Respondent (Government of Moldova) was in procedural default: although it was informed about the commencement of the proceedings, all procedural actions and documents forwarded to the tribunal by the claimants, choice of language of arbitral proceedings, as well as about the intention to continue the arbitration even if Respondent fails to participate, it failed to respond.

³¹ The question of the appointment of the Government’s representatives remains unclear since Pt. 1.4 of the award provides that the arbitral tribunal was aware of the decision of the government requesting the Ministry of Economy and Commerce to examine the case. In the proceedings before SCJ it appeared that by this decision a legal representative of the government was appointed. Although the situation is not completely clear, it was evident that Respondent never contacted the arbitral tribunal or submitted any documents.

In addition to the analysis of the SCJ on the merits of this case, it is interesting to discuss the Government's strategy in this arbitration and how it affected its outcome. As it follows from the final award, the Respondent was in procedural default.³² The Government did not respond to a single request of the Tribunal and as a result, the arbitration went on without oral hearings and was primarily based on analysis of the Claimant's position. Apparently this absence from the process played against the Respondent. The Claimant's arguments were rejected by the Tribunal almost on all instances. The Claimant failed to prove violation of Art. 43 of the Law on Foreign Investments (referred to above).³³ It also did not succeed in pleading unfair and discriminatory treatment³⁴ or indirect expropriation.³⁵

The only argument that decided the case in favour of the Claimant was the argument about 'compensation mechanism without substance'.³⁶ The Claimant submitted *inter alia* that by establishing an ownership cap on eligible shares, the Government avoided paying the fair compensation expected by the Claimant and thus deprived the compensation mechanism of its substance. Here, the Tribunal itself confirmed the fact that the Government's participation could have defeated this argument.

There were about 150 companies eligible for transfer under the existing ownership cap. While the Claimant showed that some of these shares were offered at prices above their true market value it did not prove this fact for all the applicable shares. The remaining options were still significant. Only because the Government did not participate, no evidence to the contrary was produced in the arbitration, from which the Tribunal reached the conclusion that the Respondent was unable to produce evidence to the contrary. On this sole reason, the case was decided in favor of the Claimant.

Nevertheless, despite the relatively easy victory of the foreign investor, based in large degree on the absence of the Government from the arbitration proceedings, the following conclusions can be drawn. First, for the first time the unconditional right of a foreign investor to arbitrate under a BIT has been confirmed not only by the arbitral tribunal but also reinforced by the highest court in the country – the Supreme Court of Justice. As its judgments have the informal weight of judicial precedents for the lower courts, this has again reconfirmed the strong position of

³² *Supra* fn 28.

³³ In this case again, the Claimant was pleading violation of the principle of non-retroactivity of legislation. However, the Tribunal found that the privatisation contract concluded between the parties did not provide for a fixed method of determining shares eligible for transfer. Thus, it was stated that the Claimant assumed the risk that the Government's standards might change: Art. 4.1 Final Award.

³⁴ Article 4.2.4 Final Award.

³⁵ Article 4.2.5 Final Award.

³⁶ Article 4.2.1 Final Award.

the foreign investor vis-à-vis the choice of method for resolution of investment disputes under a BIT.

Second, once again, State actions were scrutinised under international standards rather than under the provisions of domestic law. As it follows from the case, the Tribunal did not find any violation of the domestic law regarding protection of investments; it based its award on international principles of contractual fairness and justice not allowing the state to avoid its obligation to compensate the investor for assets transferred to the State.

Third, almost five years after the *Link-Trading* award, the Government appeared to be unprepared for effective participation in an investment arbitration and its passivity in large degree determined the outcome of this arbitration. All of these conclusions should once again demonstrate to the foreign business community and their legal counsel the advantages of arbitrating investment disputes in Moldova under the existing BITs.

5 CONCLUSION

The Moldovan experience in investment arbitration – although limited and relatively recent³⁷ – permits certain conclusions to be drawn regarding the efficiency of this method of dispute resolution provided under numerous BITs. Foreign parties should be fully aware and take advantage of this particular legal ground for arbitration available in investment disputes. It is particularly important in investment disputes where a foreign investor might claim compensation for breach of the long-term obligations to which the government has committed when entering the investment agreement. This could be the case for example in disputes regarding conditions of privatisation, cessions, and contracts regarding public procurement of goods and works, where the national government or any state agency is a party. This is also true in cases of indirect expropriation where the government has allegedly violated its obligations of fair and equitable treatment or non-discrimination.

There is a stable record of successful investment arbitration based on BITs that has been supported by the arbitration tribunals and enforced by the Moldovan courts. And while the amount of FDI continues to increase annually; the importance of this dispute resolution method will be also be increasing.

Another important factor is that the Moldovan judiciary has always been a continuous supporter of the general pro-arbitration policy effectively sustaining the

³⁷ According to the statistical data requested from UNCTAD for the present research, there are at least seven pending arbitration cases under the Moldova-Russia BIT initiated by foreign investors and administered by the Institute of Arbitration of the Stockholm Chamber of Commerce, which was assigned as appointing authority according to the UNCITRAL Rules.

recognition and enforcement of foreign arbitral awards in accordance with the national law and international commitments of the Republic of Moldova. Key decisions of the SCJ in this field serve as signs for foreign investors and businessmen indicating the favourable and developed stage of the Moldovan legal environment for commercial arbitration and the recognition and enforcement of its results.³⁸ The Moldovan judiciary has also proved its independence and impartiality dealing with enforcement cases, following a pro-arbitration policy even in complicated investment disputes where economic interests were at stake or when one of the parties appeared to be a state-owned company.³⁹ This means that following a successful arbitration, a foreign investor can also be confident about the effective recognition and enforcement of the arbitral award by the national judiciary.

Of course, investment arbitration alone, however effective it might be, would not play a decisive role in the building of the overall investment climate of a particular country. Moreover, the advantages offered by the existing BITs cannot compensate for the failures of domestic legislation and State policy to create stable and attractive conditions for foreign investment. However, this and many other legal factors stimulating foreign investment need to be, and should be, debated by academics, lawyers, the business community and policy makers so that all points of view may be considered. It is the author's hope that the present work will contribute to this continuing discussion.

³⁸ *Decizia Colegiului economic al Curtii Supreme de Justitie a Republicii Moldova* [Decision of the Economic College of SCJ] nr. 2re-28/2003 din 24 July 2003, retrieved from Practica Judiciara database on 20 July 2006: *Instanta judecatoreasca scoate cererea de pe rol, in cazul, in care partile au incheiat un contract, prin care litigiul urmeaza a fi solutionat pe cale arbitrala, iar pina la judecarea pricinii in fond, piritul a avansat obiectii impotriva solutionarii litigiului in judecata* – the Court shall dismiss a claim in a case where the parties have stipulated in the contract that the dispute has to be resolved through arbitration, and in the present case the claimant has advanced the objections even before the claim was decided on the merits by the court.

³⁹ *Hotarirea Plenului Curtii Supreme de Justitie a Republicii Moldova* [Decision of the Plenum of SCJ] nr. 4-2r/a-41/2000 din 11 September 2000, *Buletinul Curtii Supreme de Justitie a Republicii Moldova*, [Bulletin of the SCJ] 2002, nr. 2, 14 *Hotarirea instantei de fond, prin care s-a recunoscut executarea hotaririi Instantei de Arbitraj strain, a fost mentinuta ca legala cu respingerea recursului in anulare* – Decision of the first instance, by which the award rendered by the foreign arbitral tribunal was upheld and appeal was dismissed. In this case, the interests of the State-owned company against Polish economic agents were represented by the Prosecutor General, who was pleading that the New York Convention on Enforcement of Foreign Arbitral Awards 1958 was not applicable in Moldova. The SCJ ruled in favour of the enforcement.