IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES
OF THE STOCKHOLM CHAMBER OF COMMERCE (2010)

EMERGENCY ARBITRATION EA 2016/082

BETWEEN

Evrobalt LLC

Claimant

AND

The Republic of Moldova

Respondent

Award on Emergency Measures

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30 May 2016

Georgios Petrochilos
Emergency Arbitrator

Seat of the Emergency Proceedings: Stockholm

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I. INTRODUCTION

1. This Award is made pursuant to the Rules of Arbitration of the Stockholm Chamber of Commerce (***SCC***) of 2010 (the ***Rules*** or, when context requires, the ***2010 SCC Rules***). Article 32(4) of the Rules provides: "Provisions with respect to interim measures requested before arbitration has been commenced or a case has been referred to an Arbitral Tribunal are set out in Appendix II".

2. The present emergency proceedings were commenced by the Claimant, Evrobalt LLC (***Evrobalt***), on 24 May 2016, by an "Application for the Appointment of an Emergency Arbitrator and for an Emergency Decision on Interim Measures" submitted pursuant to Article 1 of Appendix II of the Rules (the ***Application***). The Application was served by the SCC on the Respondent, the Republic of Moldova (for short, ***Moldova***), on 26 May 2016. The SCC has obtained proof of delivery of the Application to the Ministry of Justice and the Ministry of Foreign Affairs of Moldova.

3. The Emergency Arbitrator was appointed by the Board of the Arbitration Institute of the SCC (the ***Board***) on 25 May 2016. The matter was submitted to him within the day. Pursuant to Article 8 of Appendix II to the Rules, a decision must be rendered within five days of that date.

4. Article 5 of Appendix II provides: "The seat of the emergency proceedings shall be that which has been agreed upon by the parties as the seat of the arbitration. If the seat of the arbitration has not been agreed by the parties, the Board shall determine the seat of the emergency proceedings". As the parties had not agreed on the seat of the arbitration, the Board designated Stockholm as the seat of the emergency proceedings on 25 May 2016.

5. The Claimant is represented by Mr Egishe Dzhazoyan and Ms Aisling Billington of King & Spalding International LLP, London. The Emergency Arbitrator has made several efforts to ensure that the Application has received attention by competent authorities of the Respondent. He has also "strongly invited" the Respondent to participate in the proceedings, by communications of 25 and 26 May 2016. The Emergency Arbitrator's communications were addressed simultaneously to both Parties – in the Respondent's case, directed to two email addresses provided by the Claimant and associated with the Ministry of Justice and the Ministry of Foreign Affairs of Moldova (secretariat@justice.gov.md and secdep@mfa.md). Nevertheless, the Respondent has not participated in these proceedings.

6. The proceedings unfolded as follows. Following the Claimant's Application, a conference was held with counsel on 26 May 2016. A summary of the conference, together with a list of issues for each Party to address, was circulated to the Parties by email later the same day. Pursuant to the Emergency

Arbitrator's directions, the Claimant submitted Observations on its Application on 27 May 2016 (the ***Observations***). The Respondent did not make any submissions or answer the Claimant's Observations. The Emergency Arbitrator scheduled tentatively a second conference for 29 May 2016, but in the end there was no need to hold one.

7. The Emergency Arbitrator records his appreciation to the SCC and counsel for the Claimant for their timely and helpful contributions in these proceedings, and for remaining available to assist throughout this process.

II. BACKGROUND

8. The narrative which follows assumes provisionally the veracity and accuracy of the Claimant's factual allegations. Rather than traversing each of the Claimant's factual and legal allegations, this Award focuses on the issues that, in the view of the Emergency Arbitrator, are critical to the disposition of the Application. Nothing said here is meant in any way to prejudge the Tribunal's assessment of the case in due course.

9. The Parties' dispute concerns the Claimant's shareholding in Joint Stock Company "Moldova Agroindbank" Commercial Bank (the ***Bank***). The Claimant is a company incorporated under Russian law with a registered address in Saint Petersburg, Russian Federation.[1] The Claimant acquired shares in the Bank through two acquisitions. First, on or about 18 June 2013, it acquired 38,930 shares for US$3,259,992 or 40,097,900 Moldovan lei and then, on or about 17 March 2014, it acquired a further 7,787 shares in the Bank for US$593,240 or 8,020,610 Moldovan lei. These two purchases are referred to as the ***Investment*** in the Application.[2] The Claimant says it acquired its shares in compliance with Moldovan law and duly notified all competent organs of Moldova at the time.[3]

10. On a number of occasions in 2013-2015, the Respondent's central bank, the National Bank of Moldova (***NBM***), requested of the Claimant various documents and information in order to carry out a review of the Bank's shareholders. The Claimant complied with those information requests. The Claimant continued to participate in all general shareholders' meetings of the Bank between June 2013 and September 2015, with NBM's permission.[4]

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1 Claimant's Application, para 6.

2 Claimant's Application, para 29.

3 Claimant's Application, para 31.

4 Claimant's Application, paras 32-33.

11. Starting in January 2016, Moldovan authorities took various measures to block shares in the Bank. On 2 March 2016, the NBM issued Decision No 43 whose effect was in summary as follows:[5]

(a) In paragraph 1, the Claimant and 19 other shareholders in the Bank (the ***Decision 43 Investors***) were found to have been acting in concert in respect of the Bank and to have acquired a "substantial share" in the capital of the Bank without NBM's permission.

(b) In paragraph 2, all the Decision 43 Investors were to be notified within five days of a suspension of virtually all of their shareholder rights.

(c) In paragraph 3, the Decision 43 Investors were required to dispose of their shares in the Bank within a three-month period (ie before 2 June 2016), failing which their shares would be "cancelled", pursuant to Article 15(3) of the Law on Financial Institutions.

12. The Claimant denies that it acted in concert with other Decision 43 Investors to acquire a substantial share in the Bank without NBM's permission, and argues that the NBM failed to provide any substantiated explanation or evidence in issuing Decision 43.[6]

13. The Claimant has moved to annul Decision 43. An application to that effect was rejected by the NBM on 7 April 2016. On the same day, the National Commission of the Financial Market of Moldova (the ***Commission***) issued Decree No 15/2 in order to implement the provisions of Decision 43.[7] The Claimant's Application concerns Decision 43 and Decree 15/2.

14. The Claimant submitted a Notice of Dispute pursuant to Article 10 of the Treaty, on 16 May 2016. This was received by the Government of Moldova, includingthe Ministry of Finance and the Ministry of Foreign Affairs.[8] The Notice of Dispute characterizes Decision 43 and Decree 15/2 as "arbitrary violat[ing] [the Claimant's] rights and . . . creat[ing] unfair and unfavorable conditions of investment activity".[9] The six-month period for amicable resolution of the dispute, under Article 10 of the Treaty, expires on 15 November 2016. On 26 May 2016, the Ministry of Justice of Moldova responded to the Notice of Dispute, stating that it was not authorized to hold negotiations with the Claimant or to take any measures to suspend Decision 43

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5 Claimant's Application, para 35.

6 Claimant's Application, paras 48-52.

7 Claimant's Application, paras 36 and 37.

8 Claimant's Application, paras 26(d) and 27.

9 Claimant's Notice of Dispute, 16 May 2016, **Exhibit C-08**, para 33.

or Decree 15/2. The Ministry of Justice also stated that it is "possible and reasonable to continue taking measures in order to settle the dispute amicably".[10]

15. The Claimant alleges that the actions of the NBM and other organs of Moldova, taken individually or in the aggregate, constitute "a denial of fair and equitable treatment" and "an impairment by arbitrary and discriminatory measures of the management and use of the Claimant's investment", in breach of Articles 2(2), 3(1) and 3(2) of the Treaty.[11] The Claimant further argues that, if Decree 43 is implemented, the Claimant will be forced to dispose of its shares in the Bank without proper compensation and thus subjected to measures equivalent to unlawful expropriation, in breach of Article 6(1) of the Treaty.[12]

16. By its application the Claimant seeks that Decision 43 and Decree 15/2 be "stayed", that is to say suspended, pending the final resolution of the dispute.[13] The Claimant has further explained that it seeks that:

    (a) Decision 43 be stayed in respect of its two operative provisions (paragraphs 2 and 3);[14] and

    (b) both Decision 43 and Decree 15/2 be stayed in respect of all of the Decision 43 Investors.[15]

III. JURISDICTION

17. Issuance of emergency measures requires the Emergency Arbitrator to be satisfied that the jurisdictional basis invoked by the Claimant appears to be reasonably sound. Such a finding may only be made preliminarily (*prima facie*) in circumstances where the Tribunal is yet to pronounce on it. By definition, an Emergency Arbitrator, who steps in where a tribunal is yet to be constituted and who has very tight time-frames for a decision, may only make a *prima facie* finding; hence an Emergency Arbitrator's decision does not bind the Tribunal.[16]

18. In the present proceedings, the Emergency Arbitrator must be satisfied – albeit on a preliminary basis – that there is a good prospect for a finding (by the Tribunal) that (a) the Claimant is an "investor" and has an "investment" protected by the Treaty; (b) the Claimant may initiate arbitration proceedings

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10 Letter from the Ministry of Justice of Moldova to Vyacheslav Lych & Partners, 26 May 2016, **Exhibit C-20**.

11 Claimant's Application, para 23.

12 Claimant's Application, para 25(b)(i).

13 Claimant's Application, para 69.

14 Claimant's Observations, para 16.B.i-ii.

15 Claimant's Observations, para 16.C.

16 See Article 9(5) of Appendix II to the 2010 SCC Rules.

notwithstanding the pendency of the six-month period for amicable resolution of the dispute pursuant to Article 10(2) of the Treaty; and (c) the Parties have agreed upon the emergency interim-measures process set out in Appendix II to the Rules. Each of these issues is addressed in turn below.

A. EVROBALT'S STATUS AS A RUSSIAN "INVESTOR" WITH AN "INVESTMENT" IN MOLDOVA UNDER THE TREATY

19. The Claimant asserts that it qualifies as a Russian "investor" under Article 1(1)(b) of the Treaty, and that its acquisition of the shares in the Bank qualifies as a protected "investment" in Moldova under Article 1(2)(b) of the Treaty.[17] The Emergency Arbitrator notes that Moldova has not disputed the Claimant's status as "investor" or its qualifying "investment" in Moldova, in its response to the Notice of Dispute.[18] Thus, the Emergency Arbitrator concludes that the Claimant has demonstrated, *prima facie*, that it meets these two jurisdictional requirements.

B. COOLING-OFF PERIOD NO BAR TO PRESENT PROCEEDINGS

20. Article 10 of the Treaty requires that the Contracting Party and the investor involved in a dispute "which occurred in connection with investment" endeavour to resolve it "by amicable means where possible". It goes on to provide that "[i]f the dispute is not resolved in such a manner within six months from the date of written notification, it shall be submitted for consideration to: . . . (b) the Arbitration Institute of the [SCC]".[19]

21. As noted, the Claimant submitted a Notice of Dispute to the Respondent on 16 May 2016,[20] and the six-month amicable-resolution period (the ***Cooling-off Period***) has not yet expired. The Claimant submits that this does not prevent it from seeking interim measures by an Emergency Arbitrator on the grounds that:

    (a) the Cooling-off Period applies only to commencement of the main arbitration proceedings but not to emergency interim-measures proceedings;[21]

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17 Claimant's Application, paras 17 and 18.

18 **Exhibit C-20**.

19 Treaty, Article 10, paragraphs 1 and 2. The Emergency Arbitrator has used the translation of this Article as set out at paragraph 13 of the Claimant's Application, which differs from that in **Exhibit C-02**.

20 **Exhibit C-08**.

21 Claimant's Application, para 25(a)-(d).

(b) as the Respondent has failed to engage with the Claimant's attempts to resolve the dispute amicably, the Claimant is thus entitled to disregard the Cooling-off Period;[22] and

(c) the Cooling-off Period is a mere procedural requirement which is directory and discretionary in nature, such that non-compliance with it does not affect a tribunal's jurisdiction in circumstances where negotiations are obviously futile.[23]

22. The Emergency Arbitrator agrees with the Claimant that the pendency of the Cooling-off Period does not bar its Application. Whether the requirement for an attempt to resolve the dispute amicably be characterized as procedural or as one of admissibility, that requirement cannot be held to where to do so would be manifestly futile.[24] For present purposes, the question is whether it would be futile to insist on the exhaustion of the six-month Cooling-off Period in respect of the dispute that is pending before the Emergency Arbitrator – namely the injunctions sought by the Claimant.

23. The futility exception is met here. The Respondent has elected to implement Decision 43 within three months of its adoption.[25] And, as noted above, Respondent has further confirmed that it does not intend to suspend Decision 43 or Decree 15/2.[26] This was confirmed by letter issued on the day on which proof of delivery of the Claimant's Application to the Ministry of Justice and the Ministry of Foreign Affairs of Moldova was obtained by the SCC.

C. APPLICATION OF THE 2010 VERSION OF THE SCC RULES

24. The Treaty was signed on 17 March 1998, and ratified by Moldova on 9 July 1998 and by Russia on 28 May 2001.[27] The 1998 version of the SCC Rules, extant at the time of signature of the Treaty, did not include any Emergency Arbitrator process. Nor did equivalent procedures feature in other sets of Arbitration Rules. The subsequent versions of the SCC Rules, of 1999 and 2007, included no equivalent process either. This raises the question how the terms of Article 10 of the Treaty may be said to encompass the 2010 version of the SCC Rules and the emergency interim measures available under Appendix II.

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22 Claimant's Application, para 25(e).

23 Claimant's Application, para 25(f).

24 See, eg, *Biwater Gauff v Tanzania* (ICSID Case No ARB/05/22), Award, 24 July 2008, paragraphs 343-344; *Ronald S Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001, paras 187-191.

25 Decision No 43, 2 March 2016, **Exhibit C-16**.

26 Letter from the Ministry of Justice of Moldova to Vyacheslav Lych & Partners, 26 May 2016, **Exhibit C-20**.

27 **Exhibit C-02**, Claimant's Application, note 1.

25. To recall, Article 10 of the Treaty provides in material part as follows:[28]

> 1. Any dispute between one Contracting Party and an investor of the other Contracting Party, which arose in relation to an investment, including disputes regarding the amount, conditions or procedure for the payment of compensation under Article 6 of the Treaty, or procedure for the payment of compensation under Article 8 of this Treaty, shall be subject to a written notice accompanied by detailed comments which the investor shall send to the Contracting Party, which is a party to the dispute. Parties to the dispute shall endeavour to resolve such a dispute by amicable means where possible.
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> 2. If the dispute is not resolved in such a manner within six months from the date of the written notice referred to in paragraph 1 of this article, it shall be submitted for consideration to:
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> . . .
>
> b) the Arbitration Institute of the Stockholm Chamber of Commerce . . .

This provision is to be given effect to pursuant to the ordinary and natural meaning of its terms, in the light of their object and purpose within the context of the Treaty.[29]

26. The Claimant submits that the basis for the applicability of the 2010 SCC Rules is to be found in these Rules themselves.[30] First, the Preamble to the 2010 SCC Rules provides that they apply to any arbitration agreement referring to the Arbitration Rules of the Arbitration Institute of the SCC, irrespective of the date of the arbitration agreement. Second, it is said that there is a presumption that parties agreeing to the 2010 SCC Rules are deemed to have agreed to all of the Rules, including Appendix II, unless they specifically opt out Appendix II. The Claimant also refers to a decision by the Svea Court of Appeal that it is said to have adopted the interpretative canon that, where the parties have referred generically to a set of Arbitration Rules, such agreements are to be read as

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28 The Emergency Arbitrator has used the translation of this Article as set out at paragraph 13 of the Claimant's Application, which differs from that in **Exhibit C-02**.

29 See Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Article 31(1).

30 Claimant's Observations, para 17.

referring to the version of the Rules in effect at the time of the commencement of the arbitration, unless the parties' agreement indicates a contrary intent.[31]

27. The Emergency Arbitrator has no reason to doubt the Claimant's representation of the effect of the Svea Court's decision, nor its legal cogency. Article 10 of the Treaty, however, falls to be interpreted by reference to international law, as indicated above.

28. The Emergency Arbitrator considers that the question is whether it may be said that, on a *prima facie* basis, that the 2010 SCC Rules were within the reasonable contemplation of the Contracting Parties to the Treaty. By the time the Treaty entered into force following ratification by the two Contracting Parties, in 2001, the 1999 SCC Rules had come into effect. The 1999 text included a provision entitled "Effectiveness", which read as follows:

> These Rules enter into force on 1 April 1999 and will replace the [1988 SCC Rules]. These Rules will be applied to any arbitration commenced on or after this date, unless otherwise agreed by the parties.

As just noted, the 2010 SCC Rules contain the same intertemporal interpretative rule.

29. In a treaty that requires ratification by the contracting states for its entry into force, as is the case for the Treaty,[32] ratification constitutes "the international act . . . whereby a State establishes on the international plane its consent to be bound by a treaty".[33] It is therefore arguable that by 2001, when both Contracting Parties had indicated their consent to be bound by the Treaty, it was within the reasonable contemplation of the Republic of Moldova and the Russian Federation that arbitration pursuant to the Arbitration Rules of the "Arbitration Court of the Stockholm Chamber", in the terms of Article 10(2)(b) of the Treaty, meant arbitration pursuant to the version of the SCC Rules extant at the time the arbitration was commenced. The time of commencement of proceedings, pursuant to the 1999 SCC Rules (and also the 2010 SCC Rules), is the date on which a Request for Arbitration is received by the SCC.[34] In Appendix II proceedings such as the present ones, the time of commencement is the date on which the Claimant's Application is received by the SCC. On this basis, there is

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31 *Auto Connect Sweden A.B. v Consafe IT A.B.* (2009), described by P Shaughnessy, "Pre-Arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules", (2010) 27(4) Journal of International Arbitration 337, p 351.

32 See Article 14(1) of the Treaty, which refers to ratification as "performance of internal state procedures required in order to render effect to this Convention".

33 Vienna Convention on the Law of Treaties, note 29 above, Article 2(1)(b).

34 See 1999 SCC Rules, Article 8; 2010 SCC Rules, Article 4.

a sound *prima facie* basis that the 2010 SCC Rules apply pursuant to Article 10(2)(b) of the Treaty.

30. There is a further, independent basis for the same conclusion on a *prima facie* basis. It is inherent in a standing offer to arbitrate set out in an investment treaty that the offer may be acted upon by an investor throughout the life of the treaty. The Treaty provides in Article 14(2) that it "will be valid during fifteen years" (ie, to 2016) and remain in force thereafter unless and until either Contracting Party gives 12-month advance notice of its intention to terminate it. It is reasonable in this context, which is relevant context to a proper reading of Article 10(2)(b), that the reference to SCC arbitration therein should be construed as a dynamic reference[35] to the version of the SCC Rules in effect at the time of the commencement of the arbitration. At the time they signed the Treaty in 1998, and when they came to ratify it thereafter, the Contracting Parties would have known that the SCC Rules had been reissued several times in the past. If they so wished, it would have been straightforward to freeze the applicable version of the SCC Rules by inserting a few words in Article 10(2)(b). This they did not do.

IV. REQUIREMENTS TO BE SATISIFED FOR THE INJUNCTIONS SOUGHT BY EVROBALT

31. The 2010 SCC Rules refer to measures issued pursuant to Appendix II of the Rules, such as the injunctions sought by the Claimant here, as an "emergency decision on interim measures".[36] Appendix II measures are therefore a species of interim measures within the meaning of Article 32 of the 2010 SCC Rules.

32. Article 32 affords a power to issue interim measures in broad terms: "any interim measures . . . deem[ed] appropriate" by the Tribunal or Emergency Arbitrator. These terms plainly include injunctive relief of the type sought by the Claimant here.

33. By contrast, Article 32 does not spell out the requirements that must be satisfied in order to issue interim measures; nor does Appendix II. These requirements are, nevertheless, substantially uncontroversial, whether one applies Swedish law (as the law of the seat of the present Appendix II proceedings)[37] or international law (as the law which governs the Treaty claims asserted by the Claimant). Articles 17-17A of the UNCITRAL Model Law on International Commercial Arbitration (2006) and Article 26 of the UNCITRAL Arbitration

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35 See *Dispute regarding Navigational and Related Rights*, 2009 ICJ Reports 213, para 66.

36 2010 SCC Rules, Appendix II, Article 8(1).

37 As the Claimant suggests; see Application, para 14.

Rules 2010 helpfully codify these requirements.[38] Article 26 of the UNCITRAL Rules reads in material part as follows:

> 2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:
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> (a) Maintain or restore the status quo pending determination of the dispute;
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> (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
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> (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
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> (d) Preserve evidence that may be relevant and material to the resolution of the dispute.
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> 3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:
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> (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
>
> (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

[38] An earlier Emergency Arbitrator decision in apparently analogous circumstances also regarded the UNCITRAL texts as a codification of generally accepted principles; see *Tsikinvest LLC v Republic of Moldova*, Emergency Decision on Interim Measures (2014), **Exhibit CA-7**, paras 61 *et seq.*

34. One now turns to consider whether the Claimant's Application meets these requirements.

A. THE MEASURES SOUGHT BY THE CLAIMANT ARE ADMISSIBLE

35. A measure is interim, that is to say provisional or temporary, if granted for a period not exceeding the final adjudication of the claim in the main proceedings.[39] An Appendix II measure, in particular, may be revised or terminated by either the Emergency Arbitrator or by the Tribunal in the main proceedings.[40] The measures sought by the Claimant satisfy this requirement of provisional nature, directed as they are to the period "pending the resolution of the present [d]ispute by way of a final award on the merits".[41]

36. As to the nature and purpose of the measures sought by the Claimant, these in part (a) seek to preserve the present position, inasmuch as they seek suspension of the process that will lead to the alienation of the Claimant's shares (operative paragraph 3 of Decision 43), and in part (b) seek the restoration of the *status quo ante*, inasmuch as they seek suspension of operative paragraph 2 of Decision 43.[42] That latter paragraph imposes on the Claimant, as on all Decision 43 Investors allegedly acting in concert, a suspension of virtually all their rights as shareholders in the Bank. That suspension is said to have come into effect the latest on 7 March 2016.

37. Both of those two requests are admissible. Interim measures may seek either *to restore* something that has been taken away or *to maintain* something that exists at present and risks imminently to be taken. The term "*status quo*" must be read in a manner that achieves that objective. It is a flexible notion, seeking merely to identify a state of affairs – past or present – that is the object of interim measures.

38. By contrast, what cannot be sought by way of interim relief is a measure with effect equivalent to (still less superior than) the definitive relief sought in the main proceedings. That would amount to disposing of the claim on the merits, which is of course impermissible.[43] The Claimant's requests do not amount to

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39 See 2010 SCC Rules, Appendix II, Article 9(4)(ii).

40 See 2010 SCC Rules, Appendix II, Article 9(4)(i) and 9(5).

41 Claimant's Application, para 69.

42 See Claimant's Application, paras 35(ii) and 53.

43 See S Rosenne, *The Law and Practice of the International Court, 1920-2005* (4th edn 2006), p 1410 and authority cited there; *United Technologies International, Inc v Islamic Republic of Iran*, (1986-III) 13 Iran-US CTR 254, para 25 ("therefore, it appears that the request for interim measures is, in this respect identical to one of the Claimant's claims on the merits. Under such circumstances, to grant this request would amount to a provisional judgment on one of the Claimant's claims."); and *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v Costa Rica)*, Order of 13 December 2013, para 21 ("A decision by the Court to order Costa Rica to provide Nicaragua with such an Environmental Impact Assessment Study as

any such disposition, given the explicit temporary character which they have. They are therefore admissible in that respect as well.

39. Having dealt with admissibility, one now turns to a consideration of the other requirements that the Claimant's requests must satisfy in order for them to be granted in the circumstances of this case. As will be seen, it is unnecessary to take a view on each one of these requirements individually.

B. RISK OF NON-COMPENSABLE HARM OR UNENFORCEABILITY OF AWARD

40. The "essential justification" of interim measures has been described by President Jiménez de Aréchaga of the International Court of Justice as being that—

> the action of one party "*pendente lite*" causes or threatens a damage to the rights of the other, of such a nature that it would not be possible fully to restore those rights, or remedy the infringement thereof, simply by a judgment in its favour.[44]

41. This overall objective may call for measures which are directed either (a) to the rights in the main dispute, by maintaining or restoring the *status quo* pending final adjudication, or (b) to the proceedings themselves, for example by safeguarding their procedural integrity (exclusivity of agreed forum, etc) or by securing assets out of which an ultimate award may be satisfied. This distinction, analytically helpful as it may be, is in practice less than clear-cut. Thus, there are instances where a measure sought would in some measure serve both to preserve rights that are the subject of the main proceedings and the enforceability of an ultimate award.

42. The present Application straddles both possible justifications just outlined. The Claimant asserts that unless the relief requested is granted, it "will irrevocably lose its rights as a shareholder of the Bank (which rights are at the very centre of the Dispute) and any subsequent award in the Claimant's favour will be rendered effectively unenforceable".[45] It is proposed to address these two possible justifications separately.

Irrevocable Loss of Claimant's Rights as Shareholder

43. The Emergency Arbitrator must be satisfied that the rights whose protection is being sought must be the subject of, or closely related to, the dispute between

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well as technical reports at this stage of the proceedings would . . . amount to prejudging the Court's decision on the merits of the case.").

44 *Aegean Sea Continental Shelf*, ICJ Reports 1976, p 3 at pp 15-16 (Sep Op of President Jiménez de Aréchaga).

45 Claimant's Application, para 60.

the parties.[46] The relevant rights must, in other words, be actionable rights in the main arbitration proceedings. Here, this means that the putative rights must be rights derived from the Treaty.

44. The same conclusion is compelled by the fact that the Emergency Arbitrator's jurisdiction is grounded in Article 10 of the Treaty and the dispute between the parties concerns "actions of the NBM, as well as other state authorities of Moldova, contrary to the principles and norms of international law".[47] The Claimant's Notice of Dispute goes on to describe the Treaty as being the "key legislative act in this sphere [of international law]",[48] and to cite to specific provisions of the Treaty that afford substantive protection to qualifying "investors" under the Treaty.[49]

45. It follows that the Emergency Arbitrator has no power to protect the Claimant's putative right as a shareholder in the Bank (this being a right under the law of Moldova) except to the extent that this right is also protected by the Treaty.

46. The Claimant's actionable right under the Treaty is to obtain the protection – that is to say the relief – which international law affords for breaches of the Treaty such as those alleged by the Claimant in its Notice of Dispute. Given that the Claimant is yet to submit a Request for Arbitration articulating its claim in full, the definitive relief it will seek is yet to be seen. It is clear, however, that in respect of its claim for unlawful expropriation under Article 6(1) of the Treaty, the Claimant's position is that a breach of this Treaty provision is yet to occur.[50] Indeed, the suspension of the share-divestiture process seeks precisely to prevent such an alleged expropriation from occurring.

47. The Emergency Arbitrator finds himself unable to agree that the share-divestiture process mandated by operative paragraphs 2-3 of Decision 43, to be implemented as described in Decree 15/2, should be provisionally stayed in the circumstances.

48. The harm that the Claimant stands to suffer from Decision 43 and Decree 15/2 is purely economic in its nature and confined in its scope. That goes both for the suspension of the Claimant's shareholder rights (operative paragraph 2 of Decision 43) and the share divestiture (operative paragraph 3 of Decision 43). The suspension is of course a precursor to the divestiture, which is the ultimate

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46 See, eg, *Occidental Petroleum Corp v Ecuador* (ICSID Case No ARB/06/11), Decision on Provisional Measures, 17 August 2007, para 59.

47 Claimant's Notice of Dispute, para 23.

48 Ibid, para 24.

49 Ibid, paras 25-30.

50 See Claimant's Application, para 25(b)(i); and Observations, para 10.

objective of Decision 43. If all this comes to pass, which the Emergency Arbitrator is prepared to accept as a very real possibility, the Claimant will have been disenfranchised from its position as a shareholder in the Bank. The asset which will have been lost in the process is a purely economic asset, namely the Claimant's shares. Any resulting harm, if found to give rise to a duty by Moldova to make reparation under the Treaty, can by definition be made good by an award of monetary compensation. Indeed, there is no suggestion that anything other than compensation will be required to make good for that harm.

49. The Emergency Arbitrator acknowledges the Claimant's able assistance on the issue of availability of restitutionary or injunctive relief for economic harm under international law. On further consideration, the issue need not be decided in the present case. It is true that the tribunal in *Occidental v Ecuador* held, in the context of an interim injunction sought, that "[i]t is well established that where a State has, in the exercise of its sovereign powers, put an end to a contract or license, *or any other foreign investor's entitlement*, specific performance must be deemed legally impossible".[51] The "legal impossibility" test was relied upon by the *Occidental* tribunal because customary international law provides for an obligation on the part of the wrongdoing state "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 . . . is not materially impossible" or manifestly disproportionate in the circumstances. The *Occidental* tribunal held that the claimant had no actionable right to obtain restitutionary relief for an expropriation or other breaches of an investment treaty; and it could therefore have no entitlement to seek an interim injunction that safeguarded the prospect of obtaining such restitution by way of final award.

50. The Claimant has offered a number of cogent bases on which *Occidental* may not be apposite in the present case. It is also true that other tribunals have affirmed the availability of relief consisting in "measures concerning performance or injunction" as a matter of principle;[52] although in practice such relief is ordered rarely, as a complement to monetary compensation,[53] or as an

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51 *Occidental Petroleum Corp v Ecuador* (ICSID Case No ARB/06/11), Decision on Provisional Measures, 17 August 2007, para 79 (emphasis added); and the authorities cited therein.

52 See, eg, *Enron v Argentina* (ICSID Case No ARB/01/3), Decision on Jurisdiction, 14 January 2004, para 79; *Micula v Romania* (ICSID Case No ARB/05/20), Decision on Jurisdiction and Admissibility, 24 September 2008, paras 166-168.

53 See, eg, *Siemens v Argentina* (ICSID Case No ARB/02/8), Award, 6 February 2007, para 403(5) (Argentina to return to Siemens a performance bond); *ADC v Hungary* (ICSID Case No ARB/03/16), Award of the Tribunal, 2 October 2006, para 523 (ADC to hand over its shares to Hungary, in consequence of a full-compensation award in ADC's favour).

alternative to compensation at the election of the state,[54] or where compensation will not amount to full reparation.[55]

51. Ultimately, however, the question in the present case is a different one from that which was confronted by the tribunals cited above. The question here is whether the harm that the injunctions sought by the Claimant seek to avert is or is not "*adequately* reparable by an award of damages". The answer to that question is straightforward. Taking each of the Claimant's sources of actual or imminent harm:

- **Suspension of Shareholder Rights:** The harm that the Claimant says it has suffered to date, and will continue to suffer until it has finally divested itself of its shares in the Bank, is purely financial. It is the economic harm suffered by the owner of an asset from its inability to control, utilize, or derive benefits from that asset. The asset being purely economic in its nature – ie, shares in a financial institution (whose shares are, moreover, listed)[56] – it is unsurprising that the harm that has occurred and will continue to occur is also purely economic.

- **Divestiture of Shares:** The same applies to a future loss of the Claimant's shares by way of divestiture; that harm, too, is purely economic in nature. "At the centre", as the Claimant puts it, of its case is the protection of an investment consisting in shares of a present nominal value of approximately US$7 million.[57]

52. In short, all of the harm, actual and imminent, associated with the claimant's investment can be made good by an award of damages. And, as stated at paragraph 56 below, the Emergency Arbitrator sees no reason why that harm cannot be properly assessed by the Tribunal in the main proceedings.

53. The present case is therefore different from those where interim injunctive relief was ordered in respect of economic harm, such as *Paushok v Mongolia* and *Chevron v Ecuador*. In *Paushok*, the economic harm from Mongolia's measures (a new tax) would have economically ruined the claimant and was on that basis considered irreparable; and, what is more, the tribunal's order in effect "formalized" assurances and undertakings that Mongolia had placed on record of

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54 See *Antoine Goetz v Burundi* (ICSID Case ARB/95/3), Award, 10 February 1999, paras 132-133; *Franck Charles Arif v Moldova* (ICSID Case No ARB/11/23), Award, 8 April 2013, para 633.

55 See *ATA Construction, Industrial and Trading Company v Jordan* (ICSID No ARB/08/2), Award, 18 May 2010, paras 129-132 (Jordan to terminate domestic court proceedings that amounted to "extinguish[ing] the Claimant's right to arbitration, in violation of the applicable treaty).

56 See Claimant's Notice of Dispute, paras 7 and 8.

57 Claimant's Application, paras 29 and 30.

its own motion, and also required of the claimant to provide security for the order granted.[58] In *Chevron*, the tribunal enjoined Ecuador from permitting enforcement of a court judgment, at the time in the amount of US$18 billion, on grounds that the amounts at stake were "potentially huge" and that the enforcement and execution of the judgment in foreign jurisdictions by third parties threatened the right of the claimant to an "adequate remedy" in the arbitration.[59] In short, both the *Paushok* and *Chevron* cases involved harm which, as another tribunal put it, "though capable of financial compensation, [is] such that compensation cannot fully remedy the damage suffered".[60] By contrast with those cases, in the present case the Claimant's economic harm is confined and discrete, and there is no suggestion that it may economically ruin the Claimant.

Need to Ensure an Enforceable Final Award

54. As already noted, the Claimant argues that the interim measures it seeks are necessary to secure an enforceable award. It is difficult to see how this may be the case. Indeed, an award of compensation is in all respects more straightforward to enforce, in Moldova or elsewhere, than an injunction to stay the fulfilment of formal regulatory measures issued by Moldova's central bank – what is more, measures which concern some 19 shareholders of the Bank in addition to the Claimant.

55. The Claimant also asserts in that regard that "Moldova, having forced the sale of the Claimant's shareholding, does not offer any meaningful compensation".[61] The Emergency Arbitrator is prepared to take this at face value for present purposes, but it does not assist the Claimant's case. If the compensation that will be available under the Decree 15/2 process falls foul of the standard required by the Treaty, additional compensation may be sought in the main proceedings. The prospect of an award of "more damages" (as the *Occidental* tribunal put it) cannot be the basis for injunctive or restitutionary interim relief.

56. The Claimant also suggests in the same vein that (without prejudice to its pleadings in the main proceedings) "any ultimate award of monetary damages by an arbitral tribunal will inherently involve a speculative element – since, for example, rights to future dividends over an indefinite period . . . by their very

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58 *Sergei Paushok et al v Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, paras 78 and 89.

59 *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador*, PCA Case No 2009- 23, Fourth Interim Award on Interim Measures, 7 February 2013, para 83.

60 *CEMEX Caracas Investment BV and CEMEX Caracas II Investments BV v Venezuela* (ICSID Case No ARB/08/15), Decision on the Claimants' Request for Provisional Measures, 3 March 2010, para 49.

61 Claimant's Observations, para 4.

nature cannot be predicted with one hundred per cent certainty".[62] There is some force to the argument, but it too fails to make a case for emergency relief. Economic experts and arbitral tribunals – as well as investors for that matter – routinely make judgments about the value of economic assets. These judgments involve assessments of inherently uncertain future events. Such an assessment, although of course involving judgment, is hardly speculation; it is based on recognized valuation methodologies, of which examples abound in the annals of investment arbitration.

57. Finally, the Claimant suggests that there is an analogy here with the *CSOB* case, where the tribunal enjoined domestic insolvency proceedings on grounds that these risked "deal[ing] with matters under consideration by the Tribunal in the instant arbitration".[63] With respect, the analogy is misplaced. The *CSOB* case turned on the parties' obligation under Article 26 of the ICSID Convention to treat "consent to [ICSID] arbitration to the exclusion of any other remedy". There is no such parallelism or antagonism of remedies here. Decision 43 and Decree 15/2 are the Respondent's measures that give rise to the Claimant's Treaty claims; they are not collateral processes seeking to negate or prejudice the Claimant's entitlement to have recourse to international arbitration pursuant to Article 10(2) of the Treaty.

58. The Emergency Arbitrator adds that there is no suggestion, and rightly so, that the measures sought by the Claimant would serve to avoid aggravation or expansion of the parties' existing dispute. The existing dispute is about Decision 43 and Decree 15/2; the Claimant's Application concerns the operative paragraphs of Decision 43 and Decree 15/2, that is to say, matters of implementation which are part of the measures that give rise to the dispute.

C. PRIMA FACIE REASONABLE PROSPECTS OF SUCCESS ON THE MERITS

59. Given the conclusions above, it is strictly speaking unnecessary to consider the requirement of a *prima facie* reasonable prospect for the Claimant's Treaty claims on the merits. Given, however, that reliance has been placed on an earlier Emergency Arbitrator decision concerning what appear to be similar measures by the NBM in respect of another Moldovan bank,[64] it may be appropriate to add a few words on this point.

60. In the words of the distinguished Emergency Arbitrator in the prior case, "NBM does not appear to have presented any concrete evidence for [the] allegation [that the claimant had acted in concert with other investors, also to be divested of

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62 Ibid.

63 Claimant's Observations, para 6, citing to *CSOB v Slovak Republic*, Procedural Order No 4.

64 Cited at note 38 above.

their shares]". On this basis the Emergency Arbitrator concluded that it was "established, *prima facie*, that there is a reasonable possibility that [c]laimant will succeed on the merits of its claim".[65] It appears, therefore, that the earlier decision concerned a decision by the NBM which was unmotivated.

61. The record in the present proceedings is different. It is true, and indeed concerning to some extent given the gravity of the charges, that the reasoning of Decision 43 is in rather stilted and curt terms, at least as translated in English. That may or may not be the accepted style in similar instruments in Moldova. Be that as it may, Decision 43 is not bare: it refers to facts and, as noted by the Claimant itself, makes inferential findings. The Emergency Arbitrator does not have the factual record (if any) and analysis (again, if any) underlying Decision 43. More concerning, if true, would be the possibility (as suggested by the Claimant) that by virtue of a recent law Decision 43 may not be subject to any review within the Moldovan legal system, other than by the NBM itself. But a recent decision of a Moldovan court concerning Decision 43, announced in the course of these proceedings but not available to be placed on record, suggests that judicial review is after all available.

62. To be clear, the Emergency Arbitrator makes no finding in respect of the compliance or otherwise of Decision 43 and Decree 15/2 with the Respondent's Treaty obligations. Nor does the Emergency Arbitrator wish to suggest that the Claimant failed in any evidential duty in connection with the present status of the evidential record. It is simply the case that the present record appears to be different from that which was before the Emergency Arbitrator in the earlier case.

D. ADDITIONAL REQUIREMENTS

63. Given the findings above, it is unnecessary to enter into the requirements of urgency or proportionality of the injunctions sought. Accordingly no finding is made in respect of these requirements.

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64. Although in the circumstances the measures sought by the Claimant do not appear warranted, the Parties must bear in mind their general duty as litigants to refrain from conduct that could aggravate or extend the dispute.[66]

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65 Ibid, para 62.

66 See eg *Electricity Company of Sofia and Bulgaria* (Order), PCIJ, Series A/B No 79, 194, p 199; and *Amco Asia Corp v Indonesia* (ICSID Case ARB/81/1), Decision on Provisional Measures, 9 December 1983, para 5.

V. COSTS

65. Article 10(a) of Appendix II to the 2010 SCC Rules provides that "[t]he party applying for the appointment of an Emergency Arbitrator shall pay the costs of the emergency proceedings upon filing the application". Article 10(5) of Appendix II provides that "[a]t the request of a party, the costs of the emergency proceedings may be apportioned between the parties by an Arbitral Tribunal in a final award". The Emergency Arbitrator therefore has no power to allocate costs between the parties. The Claimant has reserved its right to seek costs from the Arbitral Tribunal in a final award, in accordance with Article 10(5) of Appendix II to the 2010 SCC Rules.[67]

VI. OPERATIVE PART

66. For the foregoing reasons, the Claimant's Application is dismissed.

Seat of the Emergency Arbitration: Stockholm

Date: 30 May 2016

Georgios Petrochilos
Emergency Arbitrator

[67] Claimant's Observations, para 16.D.i.