



School of International Arbitration

School of International Arbitration, Queen Mary,  
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# International Arbitration Case Law

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“The following is a preliminary version of the IACL summary on this decision. This summary has not yet undergone review by a member of the IACL editorial committee. The final summary along with translations to Spanish and French will be posted early this fall.”

## YURI BOGDANOV V. THE REPUBLIC OF MOLDOVA (SCC ARBITRATION NO. V(114/2009)) FINAL ARBITRATION AWARD

Case Report by Glenda Bleiberg\*\*

A Final Award rendered on 30 March 2010, under the Bilateral Investment Treaty between the Government of the Republic of Moldova and the Government of the Russian Federation, and in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

**Tribunal:** Advokat Bo G.H. Nilsson (sole arbitrator)  
**Claimants’ counsel:** Isai Chibac.  
**Defendant’s Counsel:** Ion Padurararu of the law firm Padurararu Brasoveranu & Partners.

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## *Digest*

### **1. *Facts of the Case***

On June 24, 2009 Mr. Bogdanov (the “Claimant”) filed a request for arbitration with the Arbitration Institute of the Stockholm Chamber of Commerce. Mr. Bogdanov is a Russian citizen resident in Moldova. The request for arbitration is based on Article 10 of the Bilateral Investment Treaty concluded between the Russian Federation and the Republic of Moldova (the “Treaty”). The Respondent is the Republic of Moldova (“Moldova”).<sup>1</sup>

Mr. Bogdanov is the founder and former owner of Grand TORG, LLC (“Grand Torg”), a limited liability company with foreign capital registered in Moldova on December 29, 2000 and domiciled in the Free Enterprise Zone Expo-Business-Chisinau (“FEZ”) since February 2, 2001. Mr. Bogdanov alleged that Moldova breached several treaty provisions with respect to his investment in Moldova through Grand Torg. Moldova rejected these allegations and claimed that Mr. Bogdanov had no right to bring a claim under the Treaty.

Mr. Bogdanov assigned his shares in Grand Torg, but it was agreed that all profits, losses, lost profits, amounts claimed for redemption, and any other interests resulting from the company’s activity between December 29, 2000 and December 31, 2008 should exclusively belong to Mr. Bogdanov and that his share of profit would remain in the company as working capital.<sup>2</sup>

### **2. *The Parties’ Positions and Legal Grounds***

#### *Mr. Bogdanov*

According to Mr. Bogdanov, by Article 43 of the Law 998/1992, Article 7 of the Law 625/1995 and Article 15(4) of the Law 440/2001, Moldova guaranteed a ten-year stability of legal provisions to FEZ residents.<sup>3</sup> Such stability expressly covered the customs regime, which should be understood as the import and export of goods from the FEZ. Grand Torg imports a variety of chemicals into the FEZ, removes them from the FEZ (under the customs regime) to be processed in Moldova and subsequently re-imports the finished goods into the FEZ, from where they are ultimately exported. A permit from the Customs Service is required to remove the chemicals from the FEZ in order to process them in Moldova. The customs

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<sup>1</sup> Award, ¶¶ 1, 3.

<sup>2</sup> Award, ¶ 2.

<sup>3</sup> Award ¶ 43.

regime for processing in the customs territory of Moldova is governed by the Customs Code of the Republic of Moldova<sup>4</sup>

From 2001 to 2008, excluding the year 2006, the customs authority granted Grand Torg a single annual permit for all goods taken for processing in Moldova. Law 156/2005 passed by the Moldovan Parliament amended the Law on Customs and Tariff No. 1380-XIII of November 20, 1997. Since 2005, the pertinent office has collected a \$200 fee per custom declaration from Grand Torg.<sup>5</sup> Mr. Bogdanov argued that this resulted in the unlawful imposition of a far more onerous customs regime for the company compared to the one in place at the time of its registration. Therefore, the protection contained in Article 2.2 of the Treaty was not respected.<sup>6</sup> In addition, no other company received similar treatment; hence, the measures taken are discriminatory and in violation of Article 3.1 of the Treaty.<sup>7</sup>

Furthermore, Mr. Bogdanov's argued that his right to a fair trial had been impaired. Grand Torg brought legal proceedings in Moldova against the imposition of the new regime. The Court of Appeals of Chisinau ruled in favor of the company based on: i) the Customs Office did not require a permit for each customs declaration and ii) the company was entitled to benefit from a stabilized customs regime.<sup>8</sup> However, the Supreme Court of Moldova reversed this decision due to political pressure.

Mr. Bogdanov requested that:

- Moldova be ordered to pay him 443,772.78 lei (total of customs charges collected) plus 216,930 lei (interest as of 30 November 2009).
- Moldova be ordered to pay him EUR 5,000.00 for moral damages
- Moldova be ordered to reimburse him the costs of the arbitration.<sup>9</sup>

### *The Republic of Moldova*

According to Moldova's argument, Mr. Bogdanov's personal rights are not protected under the Treaty, only his capital investment. Grand Torg was the subject of the custom fees and not Mr. Bogdanov. Further, Mr. Bogdanov ceased to have the status of investor under the Treaty, because at the time of the filing the Request for Arbitration, he was not a shareholder

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<sup>4</sup> Award ¶¶ 44, 45, 46.

<sup>5</sup> Award ¶ 49.

<sup>6</sup> Award ¶ 50.

<sup>7</sup> Award ¶ 51.

<sup>8</sup> Award ¶ 52.

<sup>9</sup> Award ¶¶ 11, 54.

of Grand Torg. This is unaltered by the alleged “2009 Protocol” where he retains certain rights with respect to the company’s profits.<sup>10</sup>

Moldova also argued that, according to paragraph 2 of Article 43 of Law 998/1992, this provision does not apply to customs issues. Further, Laws 625/1995 and Law 440 (Article 15(4)) only apply to provisions contained in these laws respectively and not to customs legislation in general.<sup>11</sup> In addition, administrative fees for the issue of permits fall outside of the scope of the customs regime. The change introduced by Annex 2 of Law 156/2005 is not discriminatory because it applies to all residents of all free economic zone areas without exception.<sup>12</sup>

The fees were paid by Grand Torg. Moldova stated that juridical persons are not entitled to claim moral damages, nor may moral damages be claimed on the grounds of the passing of legislation. In addition, the claims with respect to the year 2005 are time barred because the statute of limitations is three years.<sup>13</sup> Finally, the claims for all years should be reduced by 15% due to applicable taxes.<sup>14</sup>

Other than the issues raised, Moldova did not dispute Mr. Bogdanov’s calculation of damages and admitted to pay 475,386.41 lei in case the arbitrator rules in his favor.<sup>15</sup>

Moldova requested that:

- All claims of Mr. Bogdanov’s be denied.
- Alternatively, that the claim concerning the year 2005 be dismissed as time barred. Also, that the claims for all years be reduced by 15% due to applicable taxes. In the event Moldova is ordered to pay for Mr. Bogdanov’s legal expenses, that the amount be reduced according to the objections made.<sup>16</sup>

### 3. *Legal Issues Discussed in the Decision*

#### A. *Is Mr. Bogdanov an Investor Enjoying Protection Under the Treaty? (¶¶ 65-76)*

Mr. Bogdanov, as a Russian citizen (which was proved by a copy of his passport), is unquestionably covered by the definition of “investor” or

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<sup>10</sup> Award ¶¶ 55, 56.

<sup>11</sup> Award ¶ 57.

<sup>12</sup> Award ¶¶ 58, 59.

<sup>13</sup> Award ¶¶ 60, 61, 62.

<sup>14</sup> Award ¶ 63.

<sup>15</sup> Award ¶ 64.

<sup>16</sup> Award ¶ 40.

Article 1.1 of the Treaty. The argument that he is not protected by the Treaty because the measures undertaken by the State were taken against Grand Torg and not against him fails. A common way to invest in a foreign state is through a local company; this is implicitly supported by the broad definition of “investment” in Art. 1.2b, including “all monetary funds, as well as shares of stock, investments and other forms of participation.”<sup>17</sup> The damage caused to a company indirectly affects the investor, enabling the investor to benefit from the protection in a treaty. In the case of shareholders, the participation in the local company is to be considered the investment so that a shareholder may pursue a claim on his own behalf.<sup>18</sup>

The remaining issue is whether Mr. Bogdanov had an investment in Moldova at the time of the request for arbitration despite the fact that he no longer owned any shares in Grand Torg. Article 1.2b of the treaty also includes “a claim to money invested to perform economic values or to services of economic value, associated with an investment” under the definition of investment.<sup>19</sup> According to the 2009 Protocol signed by the former and new shareholders of Grand Torg, Mr. Bogdanov had assets placed in Grand Torg which must be considered a type of participation in the company and be deemed to be a continuation of his original investment. The economic interest owned by Mr. Bogdanov in the company qualifies as an investment under the Treaty.<sup>20</sup>

Mr. Bogdanov qualifies as an investor under the Treaty. Even if the transfer of the shares of Grand Torg is considered not valid under Moldovan law, Mr. Bogdanov still holds stock in the company and can be considered an investor under the Treaty. The objection by Moldova fails.<sup>21</sup>

*B. Have Mr. Bogdanov's Rights Under Article 2.2 of the Treaty been Violated? (¶¶ 77-85)*

Article 2.2 of the Treaty guarantees Mr. Bogdanov full and unconditional protection with respect to his capital investments in accordance with the laws of Moldova.<sup>22</sup> The parties agreed that the introduction of Law 156/2005 triggered the application of the contested fees to Grand Torg. The question of whether or not the application of this law resulted in a violation of Mr. Bogdanov's rights under the laws of Moldova depends upon determining if the above mentioned law could properly be applied to Grand Torg and indirectly to him in view of the stabilization clauses contained in Laws 625/1995 and 440/2001. Article 43 of Law 998/1992 is not

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<sup>17</sup> Award ¶¶ 65, 66.

<sup>18</sup> Award ¶¶ 67,68.

<sup>19</sup> Award ¶¶ 69, 70, 71.

<sup>20</sup> Award ¶¶ 72, 73.

<sup>21</sup> Award ¶¶ 75, 76.

<sup>22</sup> Award ¶¶ 77,78.

applicable to customs regimes.<sup>23</sup>

Moldova argued that the fees charged were not customs duties but administrative charges outside the scope of the customs regime. Although there may be some room for administrative charges that would be conceptually distinct from customs duties, the charges in this case were of such a magnitude that they were obviously designed to fulfill the usual purpose of customs duties: to provide income to the State and to serve as an instrument of the State's trade policy.<sup>24</sup> Moldova also argued that the stabilization clauses did not extend to the Law on Customs and Tariff No. 1380 and its Appendix 2. It is unreasonable to construe so narrowly the stabilization clauses in Laws 625/1995 and 440/2001, that they would allow the State to amend the customs regime as it pleases as long as it is done by legislation other than the above-mentioned laws. This would empty these clauses of any meaning.<sup>25</sup>

The application of Law 156/2005 to Grand Torg, with respect to the discussed fees, is in violation of the stabilization clauses in Laws 625/1995 and 440/2001 and consequently, in breach of Article 2.2 of the Treaty.<sup>26</sup>

C. *Has the Obligation to Give Mr. Bogdanov Fair, Equitable and Non-Discriminatory Treatment Been Violated? (¶¶ 86-91)*

Mr. Bogdanov argued that Grand Torg is the only company subject to the EUR 200 fees under the Law 156/2005. Moldova alleged that the law applies to all companies in all free zones. The argument of the State is abstract: if other companies in other zones were to conduct activities similar to those conducted by Grand Torg, then they would be subject to the same fees. Moldova has not pointed to any particular case where another company has been subject to the same fees.<sup>27</sup> In addition, Moldova has not explained why there is so much difference in terms of fees under Annex 2 between the goods originating from free economic zones and the ones that are originating in other places, which seems *prima facie* unfair.<sup>28</sup>

Consequently, lacking of any explanation about the fee structure and in the absence of other companies being subject to the EUR 200 fee per customs declaration, it is concluded that Mr. Bogdanov has not received the fair, equitable and non-discriminatory treatment provided by Articles 2.2 and 3.1 of the Treaty.

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<sup>23</sup> Award ¶ 78.

<sup>24</sup> Award ¶ 83.

<sup>25</sup> Award ¶ 84.

<sup>26</sup> Award ¶ 85.

<sup>27</sup> Award ¶¶ 86, 87, 88.

<sup>28</sup> Award ¶ 89.

*D. What is the Reimbursable Damage Sustained by Mr. Bogdanov?  
(¶¶92-98)*

Although the damages were suffered by Grand Torg, Mr. Bogdanov has indirectly suffered since the profits available for distribution from the company to him (left as working capital) under the 2009 Protocol were also reduced, as was the value of his investment.

With respect to the three-year statute of limitations claimed by Moldova regarding the fees charged in 2005, the BIT does not contain a limitation period regarding BIT claims. However, it seems that the statute of limitations of either Contracting Party should be taken into account or otherwise claims can be made indefinitely. Mr. Bogdanov has not contested the limitation period under Moldovan Law and did not invoke any Russian Law provision that would extend this period. The objection is well founded. In addition, Moldova's allegation that the Mr. Bogdanov's claims for all years be reduced by 15% due to applicable taxes is also well founded.

Finally, with respect to the objection by Moldova regarding moral damages, Mr. Bogdanov has not proved that he is entitled to them as a matter of Moldovan law.

**4. Costs (¶¶ 99-100)**

Although both parties have been successful in the arbitration, Mr. Bogdanov has been more successful. The arbitrator has decided Mr. Bogdanov should bear one-third and Moldova should bear two-thirds of the arbitration costs. Each party is jointly and severally liable to pay these costs. Each party should be responsible for their own costs in connection with the arbitration.

**5. Decision**

The arbitrator decided that:

1. Moldova is ordered to pay 475,386.41 lei to Mr. Bogdanov.
2. Mr. Bogdanov's other claims are denied.
3. The total costs of the arbitration are EUR 18,000.
4. As two-thirds of the costs of the arbitration are to be paid by Moldova (EUR 12,000) and as Mr. Bogdanov paid for the entire amount of the advance on costs, Moldova is ordered to pay Mr. Bogdanov its share of the costs of the arbitration amounting to EUR 12,000.