CASES

Jurisdiction – *Locus standi* – United States–Moldova Bilateral Investment Protection Treaty, 1993 – Article VI(8) – Consent to arbitration – Articles I(2) and VI(3) of the BIT – Six-month waiting period – Constitution of tribunal – UNCITRAL Rules – Article 5

Expropriation – Customs and tax regime stability – Whether change in customs and tax regime tantamount to expropriation – United States–Moldova BIT

Compensation – Whether Respondent liable to pay Claimant compensation – Whether Respondent in breach of BIT – Damages – Whether Respondent liable for damages including loss of profits – Costs – Article 40 of UNCITRAL Rules

LINK-TRADING JOINT STOCK COMPANY *v*. DEPARTMENT FOR CUSTOMS CONTROL OF THE REPUBLIC OF MOLDOVA

Award on Jurisdiction. 16 *February* 2001

Final Award. 18 *April* 2002

(*Arbitration Tribunal*: Hertzfeld, *Chairman*; Buruiana and Zykin, *Members*)[1]

SUMMARY: *The facts*: — The Claimant, Link-Trading Joint Stock Company, was a US–Moldovan joint venture company established in 1996 under the laws of the Republic of Moldova, the Respondent. Its business was the sale, to retail customers, of products imported into the Free Economic Zone of Chişinău ("the FEZ").

In November 1996, the Claimant registered as a resident of the FEZ and, under Moldovan legislation at that time, was initially exempt from import duties and value-added taxes on goods it brought into the FEZ. Customers of the Claimant were exempt up to US $600 from duties and taxes on goods imported from the Claimant in the FEZ into the customs territory of Moldova. Law No. 625 adopted on 3 November 1995 granted this exemption to the Claimant, while the partial exemption of US $600 to the retail customers was granted by Annex 11 to the State Budget Law for 1996.

The US $600 limit was reduced in March 1997 to US $400 and then again in December 1997 to US $250. In July 1998, the exemption was abrogated by an amendment to the Budget Law. In August 1998, the Respondent sent a letter to the administration of Chişinău FEZ and subsequently issued an order stating that the residents of the Chişinău FEZ had to act as collecting agent for the Republic of Moldova by adding duties and value added tax to the price of goods.

[1] The arbitration was constituted pursuant to the UNCITRAL Arbitration Rules and to Article VI of the Bilateral Investment Protection Treaty between the USA and the Republic of Moldova of 21 April 1993, which entered into force on 25 November 1994 ("the BIT") (www.unctad.org/sections/dite/iia/docs/bits/us_moldova.pdf). The place of arbitration was Chişinău, Moldova.

The Claimant protested and argued that the amendment to the Budget Law was in breach of a governmental guarantee of a ten-year period of stability in the tax and custom regime. The Claimant asserted that the amendment constituted an indirect expropriation in breach of the Bilateral Investment Protection Treaty between the USA and the Republic of Moldova, signed on 21 April 1993 and entering into force on 25 November 1994 ("the BIT"). The Respondent replied that the amendment to the tax and duties regime was carried out as a normal and proper exercise of the State's regulatory powers.

In November 1999, the Claimant served a Notice of Arbitration in accordance with the UNCITRAL Rules and the BIT seeking a declaration of its right to sell goods exempt from customs and fiscal duties, and seeking compensation for damages and loss of profits.

The Respondent contested the Tribunal's jurisdiction on a number of grounds, including: (i) lack of an agreement to arbitrate; (ii) the fact that the Republic of Moldova and Ministry of Finance had not been invited to join the arbitration; (iii) the Republic of Moldova had the right to deny to any company the advantages of the BIT; (iv) the Claimant could have applied to the Moldovan Parliament to seek an amendment of the relevant law; (v) the Claimant should have invoked its rights before any competent authority in the Republic of Moldova but not before an international tribunal; (vi) the Claimant had not waited six months before issuing arbitral proceedings as per Article VI(3) of the BIT; (vii) the Notice of Arbitration failed to specify the contract on which the dispute was based and the number of arbitrators required; and (viii) the Claimant's claim did not constitute an expropriation under the BIT.

The Claimant replied that at the time of its investment, Moldovan law provided that no changes would occur in the tax and customs regulations. The amendment to the Budget Law which entered into force in 1998 constituted an expropriation of the Claimant's investment in breach of Articles III and X of the BIT. The Claimant referred, as a source of the Republic of Moldova's guarantee, to Law 998 on Foreign Investment dated 1 April 1992, Law No. 625 of 3 November 1995, Law 1451–XII of 25 May 1993 and the Minister of Finance Regulation No. 05/1–07/507 of 11 April 1998. In July 2001, the Claimant sought to amend its claim to request a higher amount of compensation and a declaration of the rights of its parent company as an investor.

The Respondent argued that: (i) the Claimant lacked *locus standi* since it was a Moldovan company and its parent company had ceased to exist in March 2000; (ii) the claim was time-barred under Moldovan law; (iii) there was no State undertaking not to change the customs and tax regime as far as the partial exemption of US $600 was concerned; (iv) Law No. 625 restricted its application to the custom and tax regime contemplated in that law, which did not provide for the partial exemption of US $600 contained in the Budget Law; (v) the Minister of Finance Regulation No. 05/1–07/507 of 11 April 1998 was not a law and did not create rights; (vi) Law No. 998 on Foreign Investment dated 1 April 1992 expressly excluded from the stability provision any changes in the customs and tax regime; (vii) amendments to the Budget Law were regulatory measures and they were not discriminatory or unfair or arbitrary; and (viii) there was no evidence of the link between the

alleged damages and the alleged confiscatory measures. In particular, the economic downturn in Moldova was caused by the Russian financial crisis of August 1998, which triggered a devaluation of the Moldovan currency.

Award on Jurisdiction (16 February 2001)

Held: — The Tribunal was properly constituted and had jurisdiction over the dispute.

(1) The basis for the arbitration was the consent to arbitrate contained in the BIT and not any agreement between the Claimant and the Respondent (p. 7).

(2) The Claimant, as a US–Moldovan joint venture, had *locus standi* pursuant to Article VI(8) of the BIT despite the fact that it was established in the Republic of Moldova (p. 8).

(3) The Government of Moldova and the Ministry of Finance were not separate parties from the Respondent since they too were emanations of the Republic of Moldova and could have joined the arbitration (p. 8).

(4) There was no basis for denying the benefits of the BIT to the Claimant pursuant to Article I(2) (p. 8).

(5) The BIT did not impose on the Claimant an obligation to seek a change in the national legislation as a condition for seeking recourse under the BIT (p. 9).

(6) The BIT did not require that the Claimant seek domestic remedies as opposed to international arbitration (p. 9).

(7) The Claimant had fulfilled the requirement of Article VI(3) of the BIT since the dispute arose in 1998, culminating in its formal complaint of 5 November 1999. The purpose of the six-month waiting period was to encourage parties to exercise reasonable efforts to resolve disputes before resorting to international arbitration. Where there was an evident refusal of the Claimant's position by the Respondent, as in this case, Article VI(3) was to be interpreted restrictively (pp. 9–10).

(8) The Notice of Arbitration was adequate, even though it did not refer to the contract which was the basis of the dispute, since it invoked the BIT in accordance with Article 3(3) of the UNCITRAL Rules. The Tribunal had been properly constituted. Since the parties had not agreed upon a sole arbitrator, the proper number of arbitrators was three in accordance with Article 5 of the UNCITRAL Rules (pp. 10–11).

(9) The Claimant had made a colourable claim of indirect expropriation that was arbitrable under the BIT (p. 13).

Final Award (18 April 2002)

Held: — The Respondent had not breached the BIT and was not liable to pay compensation to the Claimant for damages and loss of profits. The Claimant was to pay to the Respondent US $22,500 as compensation for the Respondent's reasonable arbitration costs.

(1) As a company controlled by a US investor, the Claimant had *locus standi* because it existed at the time of the alleged expropriation (para. 55).

(2) The Tribunal had no jurisdiction over the Claimant's parent company since it was not a party to the arbitration (para. 58).

(3) The Statute of Limitations prescribed by Moldovan law was inapplicable to the dispute since it was an action with respect to violation of the State's treaty obligations and not for breach of contract under Moldovan civil law (para. 62).

(4) The tax measures, while unfavourable to the Claimant, were not inherently abusive, arbitrary or discriminatory. They did not place the Claimant in a worse competitive position than any other category or nationality of retailer in Moldova (para. 72).

(5) The Republic of Moldova had not undertaken to maintain unchanged the customs and tax regime applicable to the Claimant's customers and their partial exemption (para. 86).

(6) The Claimant had not sufficiently proved the link between the downturn suffered by its business and the abrogation of its customers' partial exemption. The new tax measures did not therefore constitute expropriation (para. 91).

The texts of the decisions of the Tribunal are set out as follows:

AWARD ON JURISDICTION (16 FEBRUARY 2001)

In the matter before this Tribunal, Claimant, a US–Moldovan joint venture company established in November 1996 in the Free Economic Zone of Chişinău (hereinafter "the FEZ") in the Republic of Moldova, alleges to have suffered an indirect expropriation for which it seeks compensation pursuant [to] the Bilateral Investment Protection Treaty between the USA and the Republic of Moldova, signed on April 21, 1993 and effective November 25, 1994 (hereinafter "the BIT"). Claimant has named the Department of Customs Control of the Republic of Moldova as Respondent. The Tribunal has been set up under UNCITRAL Arbitration Rules, one of the optional arbitration systems referred to in the BIT.

Claimant's allegation of indirect expropriation is based upon a change in the rates of duties and VAT exemptions introduced in the 1998 Moldovan Law on the Budget the alleged effect of which was to destroy the economic viability of Claimant's business. According to the Claimant, its business consisted essentially of the duty-free import of consumer products into the FEZ for sale to Moldovan citizens. At the time of Claimant's investment in the FEZ, it appears to be uncontested that Moldovan citizens were permitted to purchase such products in the FEZ and import them into the customs territory of Moldova free of VAT and duties, within the maximum limit of $600.

This limit was subsequently reduced under the 1997 Budget Law to $400 and under the 1998 Budget Law to $250. The 1998 Budget Law was then amended in August 1998 eliminating the exemption altogether. Claimant maintains that the reduction and final elimination of this exemption disregarded governmental guarantees of 10-year stability of the tax and customs regime, which

guarantees were contained in the Law on the FEZ and the Moldovan Law on Foreign Investment in effect at the time of Claimant's creation, and constituted an indirect expropriation of its investment. Under such circumstances, it claims entitlement to compensation under the BIT.

Claimant confirmed to the Tribunal by letter of August 9, 2000 that it considers its Notice of Arbitration served on November 27, 1999 as constituting its Statement of Claim under UNCITRAL Rules. Respondent filed a Response to the Statement of Claim on August 30, 2000, setting forth, *inter alia*, certain jurisdictional objections, some of which had been previously raised by Respondent in its letter of April 4, 2000 addressed to the Arbitration Institute of the Stockholm Chamber of Commerce (the appointing authority designated by the Permanent Court of Arbitration in the Hague – see below).

Both parties have requested the Tribunal to consider Respondent's jurisdictional objections as a preliminary matter before proceeding further with the merits of the case. Neither Party requested an oral hearing on the jurisdictional objections.

By letter of October 16, 2000, the Tribunal posed a series of specific questions to both of the Parties bearing upon the issue of jurisdiction and requested their responses thereto by November 15. Claimant submitted its response on November 14. Respondent has not responded, despite a reminder letter sent by the Tribunal affording Respondent an additional time period to do so.

Respondent's jurisdictional objections may be summarized as follows:

1. That no agreement to arbitrate has been signed by and between Claimant and Respondent.
2. That the Republic of Moldova and the Ministry of Finance should have been or should be invited to join the arbitration.
3. That, pursuant to Article I(2) of the BIT, the Republic of Moldova has the right to deny to any company the advantages of the BIT.
4. That, pursuant to the Article 7 of the Law on Expo-Business-Chişinău FEZ No. 625, Claimant's only recourse in the case of an adverse change of law is to the Moldovan Parliament.
5. That, under the terms of the BIT, Claimant has the right of examination of his claim by a competent judicial or administrative authority of the Republic of Moldova or the USA, but not by an international tribunal.
6. That Claimant did not wait the required six-month period under Article VI(3) of the BIT before commencing this arbitration.
7. That the Notice of Arbitration was defective since it fails to make reference to the contract that is the basis of the dispute or to propose the number of arbitrators as required by UNCITRAL rules.
8. That the Claimant's claim does not constitute an expropriation under the BIT.

The Tribunal will address each of these points in sequence.

1. *That no agreement to arbitrate has been signed by and between Claimant and Respondent*

The asserted basis for arbitration is not a contract or agreement signed between the Claimant and Respondent, but rather a consent to arbitrate set forth in the BIT.

Claimant as a US–Moldovan joint venture entity is a proper party claimant thereunder in accordance with Article VI(8) of the BIT which provides:

> For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of companies of the other Party, shall be treated as a . . . company of such other Party . . .

Evidence has been submitted that at the time of its creation and at all times since then Claimant has been owned and controlled by a company established in the United States.

The Department of Customs Control of the Republic of Moldova is likewise a proper party respondent in this arbitration. The Republic of Moldova has given its consent to arbitrate under the terms of the BIT in the circumstances defined in the BIT. In bringing its action against the Department of Customs Control of the Republic of Moldova, the Claimant is, in the opinion of the Tribunal, suing the Republic in the name of its Customs Department. Indeed, Respondent has not contested its standing as a proper party in this arbitration.

2. *That the Republic of Moldova and the Ministry of Finance should have been or should be invited to join the arbitration*

As indicated above, Respondent has not contested its standing as a proper party. Rather, it has requested that the Tribunal invite the Government of Moldova or the Ministry of Finance to join the arbitration as well. Claimant has expressed no objection to such participation in the arbitration.

It is not the role of the Tribunal to request any particular representatives of the Government or the Ministry of Finance to participate in these proceedings. However, in light of the wishes of both parties, the Tribunal has no objection to such participation on the side of the Respondent, if Respondent considers that its position will be better represented in this way. This being said, in so doing, it should be clear that neither the Government nor the Ministry of Finance would be viewed as a new or separate party from the Respondent, but rather as additional emanations of the same party in interest, the Republic of Moldova.

3. *That, pursuant to Article I(2) of the Treaty, the Republic of Moldova has the right to deny to any company the advantages of the BIT*

While Article I(2) of the BIT sets forth certain circumstances in which a company (as defined under Article I(1)(b) of the BIT) may be denied the advantages of the BIT, no evidence has been submitted establishing the existence of any of these circumstances in the present case. Consequently, the Tribunal sees no basis for denying the benefits of the BIT to Claimant.

4. *That, pursuant to the Article 7 of the Law on Expo-Business-Chişinău FEZ No. 625, Claimant's only recourse in the case of an adverse change of law is to the Moldovan Parliament*

The Tribunal finds that this argument which goes to the issue of State authority to deal with disputes arising as a result of adverse changes in legislation is irrelevant in light of the issue before us, which concerns not the fulfilment of national obligations but international obligations.

The BIT does not impose on Claimant an obligation to seek a change in national legislation as a condition to seeking recourse under the BIT.

5. *That, under the terms of the BIT, Claimant has the right of examination of his claim by a competent judicial or administrative authority of the Republic of Moldova or the USA, but not by an international tribunal*

The BIT does not require Claimant to pursue examination of its claim by national judicial or administrative authorities, as opposed to international arbitration.

Article VI(2) of the BIT provides an aggrieved party *the right*, but not *the obligation*, to apply to a national court or administrative authority for examination of his claim. In no way is this intended to deprive such party of the right to arbitrate in appropriate circumstances under the terms of the treaty. In the present case, Claimant chose not to avail itself of the right of examination by a court or administrative authority, and to proceed instead to arbitration under the BIT.

6. *That Claimant did not wait the required six-month period under Article VI(3) of the BIT before commencing this arbitration*

Article VI(3) requires a waiting period of six months "from the date on which the dispute arose" before an aggrieved company may submit an arbitrable dispute under the BIT to binding arbitration.

Respondent argues that the dispute arose only when Claimant submitted its formal complaint on November 5, 1999. Respondent formally responded to the complaint on November 22, 1999 rejecting Claimant's position, and Claimant thereupon served its Notice of Arbitration on November 25, 1999.

In our opinion the formal complaint sent on November 5, 1999 represented the culmination, not the inception, of the dispute. The dispute in question arose at latest upon notification of the elimination of the customs exemption for purchases by Claimant's customers in the FEZ in August 1998. Evidence has been submitted showing that, on August 19, 1998, the Respondent sent its letter no. 583–005 to the FEZ Administration with respect to the implementation of the new legislation relative to the changes in the customs/VAT exemption. Thereafter, according to allegations made by Claimant in its Notice of Arbitration and not rebutted by Respondent, the Customs authorities repeatedly during the period September through November 1998 brought pressures to bear upon Claimant and others in the FEZ to comply with the changed customs rules.

The purpose of the six-month waiting period in the BIT is to encourage parties to exercise reasonable efforts to resolve disputes before resorting to the costly and time-consuming remedy of international arbitration. The Tribunal believes that where, as here, there is an evident refusal of Claimant's position by Respondent, such a waiting period should be interpreted restrictively. Indeed, we are comforted in this view by the fact that a year has passed since the commencement of this arbitration and no peaceful settlement of the dispute has proven possible during this period. The only consequence of adopting a liberal interpretation of the six-month waiting period, as Respondent proposes, would therefore have been to aggravate the possible claim of damages.

7. *That Notice of Arbitration was defective since it fails to make reference to the contract that is the basis of the dispute or to propose the number of arbitrators as required by UNCITRAL Arbitration Rules*

The Notice of Arbitration invoked the BIT at its page 3: "Another factor ensuring the right of [Claimant] . . . is the Treaty between the Republic of Moldova and the United States of America concerning the encouragement and reciprocal protection of investments. Art. X(2)(c) of the Treaty foresees that the Party must respect terms (conditions) of a certain investment in his tax policy (the Treaty is annexed – source: Ministry of the Economy and Reforms)." Under the circumstances it was not necessary to make reference to any other contract. The UNCITRAL Arbitration Rules are applicable in a given case to the extent consistent with the Treaty. The Treaty itself may serve and actually serves here as a ground out of or in relation to which the dispute arises (Article 3(3) of the UNCITRAL Rules).

The Notice also proposed the choice of a single arbitrator (with Claimant's suggested names set forth) and the designation of an appointing authority in the event that this should prove necessary.

Under Article 5 of the UNCITRAL Rules, where the parties have not agreed on the number of arbitrators, the number should be three.

When the Respondent failed to respond to Claimant's above-mentioned proposals, Claimant relying upon UNCITRAL Rules – one of the sets of rules stipulated in the BIT – appointed its party-designated arbitrator – Professor Ion Buruiana – by notice served on Respondent on December 13, 1999.

When Respondent failed to appoint a second arbitrator within the 30-day period stipulated in the UNCITRAL rules, Claimant applied to the International Bureau of the Permanent Court of Arbitration in the Hague by communication dated January 18, 2000 for the designation of an appointing authority to select such arbitrator.

Respondent mistakenly refers to Article VII(1) as the basis for asserting that it should have had two months from the date of notice of arbitration to nominate an arbitrator. Article VII concerns only disputes between Parties to the BIT, i.e. inter-governmental disputes. The present case has been brought under Article VI to the BIT for disputes involving a company and a State Party, and the two-month period does not apply.

The Secretary General of the Permanent Court of Arbitration, after establishing its competence and seeking the views of the parties and having received no reply

from Respondent, designated the Arbitration Institute of the Stockholm Chamber of Commerce as appointing authority, which then appointed Professor Ivan Zykin as the second arbitrator on April 13, 2000 and ultimately Jeffrey Hertzfeld Esq. as the presiding arbitrator on July 19, 2000.

Respondent has not asserted that the procedures followed by the Hague Court and the Arbitration Institute were in any way improper.

The Tribunal therefore finds that the Notice of Arbitration was proper and adequate. Since the parties had not agreed upon a sole arbitrator, the proper number of arbitrators is three. The Tribunal has been properly constituted.

8. *That the Claimant's claim does not constitute an expropriation under the BIT*

This is the most difficult aspect of the jurisdictional issue – firstly, because it touches particularly complex issues of international law and secondly, because, being presented as a preliminary question, it poses the challenge of separating the jurisdictional element from the substantive element.

The Tribunal must therefore determine whether Claimant presents the elements of a cause of action for expropriation under the BIT, without deciding whether it has sufficient evidence to carry its burden of proof of the actual existence of these factual elements.

The BIT permits claims of expropriation under its Article III(1) to be brought to UNCITRAL arbitration (among other optional dispute resolution systems) if they constitute "investment disputes" under Article VI of the BIT.

An "investment dispute" is defined in Article VI of the BIT as

> a dispute between a Party and a . . . company of the other Party arising out of or relating to (a) an investment agreement between that Party and such . . . company; (b) an investment authorization granted by that Party's foreign investment authority to such . . . company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

As indicated earlier, under Article VI(8), Claimant as a US-controlled Moldovan company is treated as a US company for purposes [of] the BIT.

An "investment" is defined in the BIT very broadly, in Article I(1)(a), to include

> every kind of investment in the territory of one Party owned or controlled directly or indirectly by . . . companies of the other Party, such as equity, debt, and service and investment contracts; and includes: (i) tangible and intangible property . . . (v) any right conferred by law or contract, and any licenses and permits pursuant to law.

Claimant has submitted evidence of the existence of such investments, both equity and debt. The fact that an investment consists of debt financing does not appear to affect its characterization as an investment under the BIT.

The Tribunal does not need to determine whether the agreement allegedly concluded by Claimant with the administration of the FEZ and/or the authorization allegedly obtained by Claimant to operate in the FEZ meet(s) the requirements of Article VI, since the Tribunal considers that Claimant would in any event have a sufficient basis for an action under subparagraph (c) of Article VI by alleging