SCC Case 2020/074

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE (2017)

- between -

KOMAKSAVIA AIRPORT INVEST LTD

(the "Claimant")

- and -

THE REPUBLIC OF MOLDOVA

(the "Respondent", and together with the Claimant, the "Parties")

PROCEDURAL ORDER NO. 4

ON THE RESPONDENT'S APPLICATIONS FOR (A) REVOCATION OF THE EMERGENCY DECISION ON INTERIM MEASURES AND (B) SECURITY FOR COSTS AND RELATED RELIEF

Tribunal
Ms. Jean Kalicki (Chair)
Prof. Philippe Sands QC
Prof. Brigitte Stern

Administrative Secretary to the Chair
Dr. Joel Dahlquist

22 March 2021

I. PROCEDURAL HISTORY

1. On 27 November 2020, the Respondent submitted its Application For the Revocation of the Emergency Award on Interim Measures (the "**Application**"). In its Application, the Respondent requested that the Tribunal revoke a decision rendered on 2 August 2020 in an emergency arbitration between the Parties (the "**Second Emergency Arbitration**"), and also included a request that the Claimant provide security for costs in this Arbitration.

2. On 7 December 2020, the Claimant requested 7-day extension of the deadline to submit its Response to the Application (the "**Response**"), which under the Procedural Calendar annexed to Procedural Order No. 2 was scheduled for 11 December 2020

3. Upon the Tribunal's invitation, the Respondent replied to the Claimant's extension request on 8 December 2020, objecting to the requested extension. The Respondent requested in the alternative that, should the Tribunal still grant the Claimant's request, the Respondent be provided a commensurate 7-day extension to submit its **Reply**.

4. On 8 December 2020, the Tribunal granted the Claimant's extension request, and also granted the Respondent's request to extend the deadline for the Reply.

5. On 19 December 2020, the Claimant submitted its Response, together with an annex. On 22 December 2020, the Claimant submitted two further authorities.

6. On 28 December 2020, the Respondent requested a three-day extension of the deadline to submit its Reply, which the Tribunal granted on that same day.

7. On 4 January 2021, the Respondent submitted its Reply. The Reply introduced a further request, for an order prohibiting the Claimant from taking any measure that would alter the ownership and/or financial interest of the Claimant's shares in Avia Invest (the "**Alienation Request**"). On 5 January 2021, the Respondent submitted a list of "minor typographical and technical errors" contained in the Reply.

8. In an email of 8 January 2021, the Tribunal informed the Parties that it had further questions after having reviewed the Parties' written submissions, a possibility to which it had alluded in footnote 1 to the Procedural Calendar annexed to Procedural Order No. 2. The Tribunal informed the Parties that it would circulate those questions in the near future, but in the meantime asked the Parties to reserve 15 February 2021 for a short oral hearing (the "**Hearing**"), *via* video conference, on those questions.

9. On 11 January 2021, both Parties confirmed their availability for the Hearing on 15 February 2021.

10. On 26 January 2021, the Tribunal distributed its additional questions (the "**Tribunal Questions**") to the Parties. On 1 February 2021, the Tribunal informed the Parties of a minor clerical error in the Tribunal Questions, which was duly corrected and updated.

11. The Tribunal Questions are set forth below:

> QUESTION 1 – FRAMEWORK FOR REVIEW
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> The application comes to the Tribunal in the form of a request to revoke a prior decision (the Emergency Award on Interim Measures), but in essence it poses the question whether the previously ordered interim measures should be continued for the duration of this arbitration. In these circumstances, what is the appropriate framework and standard for review?
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> In other words, should the Tribunal's analysis start from the standpoint of the prior decision (for example, whether it was materially correct; whether circumstances have changed since then; etc.)? Or should the analysis instead be de novo, as if Claimant were seeking a new order of interim measures, and therefore be forward-looking (i.e., whether the relevant grounds are met for granting such an order)? If the latter, what is the standard to be applied by the Tribunal?
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> QUESTION 2 – PROTECTED RIGHTS
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> What specifically is/are the right or rights of the Claimant which the Tribunal is asked to protect, during the pendency of this arbitration, and what is the legal basis of such right or rights? Are these all rights that a Tribunal constituted under the BIT is authorized to protect?
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> QUESTION 3 – ELEMENTS FOR AN ORDER OF INTERIM RELIEF

Assuming such a right or rights exist(s), what are the Parties' core positions regarding the elements applicable to the Tribunal's determination of whether to continue (and not revoke) any interim relief? In particular, the Parties are asked to briefly summarize their positions on the following:

(a) What is required to demonstrate a prima facie case that the Tribunal has jurisdiction, in circumstances where jurisdiction evidently is contested and it is premature for the Tribunal to make any conclusive determination? Has such a prima facie case been made?

(b) What is required to demonstrate a prima facie case on the merits of the claims, in circumstances where the merits evidently are contested and it is premature for the Tribunal to make any conclusive determination? Has such a prima facie case been made?

(c) What are the Parties' positions regarding the standards to be applied in relation to alleged urgency and necessity for continuing (and not revoking) the previously granted interim relief, in the sense of alleged imminent, serious and irreparable prejudice to Claimant's protected rights?

(d) What are the Parties' positions regarding the prejudice to the Respondent if the previously granted interim relief is continued (and not revoked), and accordingly regarding the requirement of proportionality?

QUESTION 4 – THIRD PARTY FUNDING

For the Claimant: is the Claimant relying on any external funding in respect of any element of its arbitration costs and expenses? If so, disclose (i) the identity of the funder, and (ii) whether the terms of the funding arrangement would or would not cover any adverse award of costs.

For both Parties: Briefly summarize your position on whether the grounds for a security for costs order have been met, including (i) evidence regarding the Claimant's ability/inability and/or willingness/unwillingness to satisfy any adverse award of costs, and (ii) the relevance, if any, of Claimant's funding arrangement for this inquiry?

QUESTION 5 – THE "ALIENATION REQUEST"

For the Claimant: the Claimant is invited to comment on the Respondent's request in para. 249 of its 4 January 2021 Reply, which was not included in the Respondent's initial application and therefore has not been addressed by the Claimant in its response.

12. The Claimant submitted its written answer to the Tribunal Question Number 4 on 5 February 2021, as directed by the Tribunal in the cover letter accompanying the Tribunal Questions.

13. The Hearing took place *via* video conference on 15 February 2021. The following individuals were present at the Hearing:

Arbitral Tribunal
Ms. Jean Kalicki (Chair)
Prof. Philippe Sands QC
Prof. Brigitte Stern

Dr. Joel Dahlquist (Administrative Secretary to the Chair)

Claimant
Mr. James Ramsden QC
Mr Daniel Benedyk
Mr. Robert Bedford
Mr. Andrii Chornous
Mr. Sergiy Regeliuk

Respondent
Mr. Mihail Buruiana

Court Reporter
Mr. Alan Bell, European Deposition Services

Technical Host
Mr. Yuri Leite

II. BRIEF PROCEDURAL BACKGROUND

14. The present Arbitration arises out of a dispute between the Claimant, incorporated in the Republic of Cyprus, and the Respondent, the Republic of Moldova, under the Agreement between the Government of the Republic of Cyprus and the Government of the Republic of Moldova for the Reciprocal Promotion and Protection of Investments, dated 13 September 2007, which entered into force on 27 March 2008 (the "**BIT**").

15. The Claimant alleges that it invested in Moldova by virtue of its acquisition of [redacted] of the shares of Avia Invest Limited Liability Company ("**Avia Invest**"), a company registered

in the Republic of Moldova, on 6 September 2016.[1] Prior to the Claimant's share purchase, Avia Invest had won a tender bid allowing it to enter into a concession (the "**Concession Agreement**") on 30 August 2013 to "finance, design implement and operate a long-term construction and infrastructure investment project" at Chisinau International Airport (the "**Chisinau Airport**" or "**the Airport**"), Moldova's main airport.[2]

16. The Concession Agreement provides for a concession period of forty-nine years, from "no later than 01 November 2013" to "no later than 31 October 2062."[3] Avia Invest's counterparty to the Concession Agreement is described therein as the "Public Property Agency under the Ministry of Economy" (the "**PPA**"). The precise nature and character of the PPA, particularly in the context of the Concession Agreement, is disputed by the Parties.

17. Article 2.9 of the Concession Agreement gives Avia Invest "exclusive rights to the use of the Concession Territory."[4] The Concession Territory is defined in the Concession Agreement as "immovables, which peculiarities are set out in the Annex no.3, in which territory the concession and *concession facility* is to be implemented in accordance herewith," while the Concession Facility is defined as "the project described in the Annex no. 2, which the Concessionaire (Concessional Enterprise) must take over, design, arrange technically, acquire, finance, build, operate, maintain and transfer in accordance with the provisions hereof, as modified periodically in accordance herewith."[5] The Concession Facility is further described, in Article 2.1, as consisting of

> - assets of S.E. 'Chisinau International Airport' and adjacent land, except claims and debts;

[1] Request for Arbitration, ¶ 16.
[2] Request for Arbitration, ¶ 21.
[3] CA-13, Article 2.4. The Tribunal notes that the Parties have exhibited different English translations of the Concession Agreement, which appears to have been drafted in Romanian. For purposes of the present Application, the Tribunal refers to the translation exhibited by the Claimant, CA-13, with references to the translation exhibited by the Respondent, R-12, when the translations considerably deviate from each other. The Tribunal defers until later a potential determination of which translation is more accurate.
[4] CA-13, Article 2.9.
[5] CA-13, Article 1.1 (emphasis in original).

- rendering of relevant services in line with international requirements and standards, airport users, passengers and other categories of users, including based on trade relations.[6]

18. In its Request for Arbitration, the Claimant alleges that Avia Invest has performed its obligations under the Concession Agreement, [redacted]

19. The Claimant further claims that it invested in Avia Invest on 6 September 2016, in a manner that grants both the Claimant and its investment protection under the BIT. In its Application, the Respondent disputes the Claimant's characterization of the circumstances of the investment, arguing *inter alia* that neither the Claimant nor its alleged investment is protected by the BIT (as briefly summarized below in Section B.1).

20. At the center of the Claimant's claims in this Arbitration, as well as in the two emergency arbitrations discussed below, are allegations that the Respondent has taken measures "seeking to terminate and/or nullify the Concession Agreement and/or claim restitution of unjust enrichment from Avia Invest and/or diminish and/or destroy the value of Komaksavia's investment," in violation of the BIT.[8] The Claimant identifies a number of such measures in ¶ 39 of its Request for Arbitration:

    1. The public commitments made on behalf of the Respondent, including by its President Mr. Igor Dodon, to terminate/nullify the Concession Agreement;[9]

    2. The entering of Avia Invest premises by the Respondent's Security and Information Service of the National Anticorruption Centre of the Ministry of Internal Affairs on 15 August 2019;[10]

    3. The seizing of the Claimant's shareholding in Avia Invest pursuant to a prosecutorial order dated 20 August 2019;[11]

[6] CA-13, Article 2.1.
[7] Request for Arbitration, ¶¶ 31-35.
[8] Request for Arbitration, ¶ 39.
[9] Request for Arbitration, ¶ 39.1.
[10] Request for Arbitration, ¶ 39.2.
[11] Request for Arbitration, ¶ 39.3.

4. The Resolution No. HG431/2019, dated 4 September 2019, which purports to cancel the four resolutions providing the framework for the tender process leading to the Concession Agreement being awarded to Avia Invest;[12]

5. The commencement of legal proceedings on 4 September 2019 by the Respondent's Ministry of Justice in order to terminate/nullify the Concession Agreement;[13]

6. The legal proceedings initiated by the PPA directly against Avia Invest on 10 September, asking for restitution of an alleged unjust enrichment and "the imposition of various procedural remedies";[14]

7. The report by an *ad hoc* parliamentary investigative committee recommending the termination/nullification of the Concession Agreement;[15]

8. The Resolution No. 213 dated 1 April 2020, and the subsequent associated Law No. 60 dated 23 April 2020, by which the Respondent imposed an airport tax (the "**Airport Tax**") on Avia Invest, amounting to "50% of the monthly accumulated recoverable fees for airport modernization [...] to be transferred by Avia Invest to the National Social Assistance Agency [of the Respondent].[16]

21. These allegations, which are yet to be developed and addressed in further submissions by the Parties, form the background to the present Application.

III. REVOCATION APPLICATION

22. In the Application, Respondent advances two main categories of requests. The first involves the requested revocation of a decision rendered by an emergency arbitrator on 2 August 2020 (the"**Second Emergency Decision**");[17] the second relates to security for costs and related relief. This section focuses on the revocation request, beginning with a brief

[12] Request for Arbitration, ¶ 39.4.
[13] Request for Arbitration, ¶ 39.5.
[14] Request for Arbitration, ¶ 39.6.
[15] Request for Arbitration, ¶ 39.7.
[16] Request for Arbitration, ¶ 39.8.
[17] SCC Arbitration EA 2020/130, Emergency Award on Interim Measures, 2 August 2020. This Procedural Order refers to both emergency decisions as "decisions" and not "awards," which under Section 27 of the applicable Swedish Arbitration Act is the appropriate label for an emergency determination of interim measures.

summary of the factual background and the Parties' respective positions, and then setting forth the Tribunal's analysis. The Respondent's second set of requests is addressed in the following sections.

A. THE EMERGENCY ARBITRATIONS

23. After the Claimant initiated this Arbitration by its Request for Arbitration on 15 May 2020, but before the case was referred to the Tribunal on 9 September 2020, the Parties were involved in two emergency arbitrations pursuant to Appendix II of the SCC Arbitration Rules ("the **SCC Rules**").

24. The **First Emergency Arbitration** was initiated by the Claimant on 18 May 2020. The Claimant described its application as concerning the following two issues:

> 8.1. The release of unjustified and unsubstantiated precautionary measures imposed by Victoriabank, MA Bank and the Money Laundering Preventing and Combating Service of [the Respondent] on Avia Invest's bank account, which currently blocks payments into and out of that bank account with the effect that Avia Invest cannot pay sums owed by it to the [Civil Aviation Authority] (and, in a lesser amount, the PPA) despite funds having been made available to it to do so by a shareholder of Komaksavia. The effect of the blockage is that the RM claims Avia Invest cannot pay its debts, such that it can initiate insolvency proceedings against Avia Invest which results in the automatic termination of the Concession Agreement [...] It is anticipated that without such relief, [the Respondent] will initiate insolvency proceedings and seek to terminate the Concession Agreement within days [...].
>
> 8.2. The suspension of enforcement of Moldovan legislation which will have the effect, from 1 July 2020, of expropriating 50% of an airport modernisation fee to which Avia Invest is contractually entitled under the Concession Agreement and grant those sums instead to the National Social Assistance Agency of [the Respondent] [...] It is anticipated that without such relief, [the Respondent] will expropriate these amounts from 1 July 2020.[18]

25. The Claimant sought five specific measures connected to these two issues,[19] as well as a more general order that the Respondent "refrain from otherwise interfering with Avia

[18] Claimant's Application for the Appointment of an Emergency Arbitrator and an Emergency Decision on Interim Measures, 18 May 2020, ¶ 8.
[19] Claimant's Application for the Appointment of an Emergency Arbitrator and an Emergency Decision on Interim Measures, 18 May 2020, ¶¶ 99.1-99.5.

Invest's entitlements under the Concession Agreement by taking any steps having a similar or equal effect."[20]

26. The **First Emergency Arbitrator** issued his decision (the "**First Emergency Decision**") on 25 May 2020. In it, the First Emergency Arbitrator found that he had jurisdiction over the claims[21] but denied the Claimant's application on its merits, finding, in short, that the Claimant had not furnished sufficient evidence to justify any of the interim measures sought.[22]

27. On 24 July 2020, the Claimant initiated another emergency arbitration (the "**Second Emergency Arbitration**") through an application to the SCC.[23] This time, the Claimant succeeded in obtaining at least some of the relief sought.

28. Both Parties participated in the Second Emergency Arbitration. As noted above, the Claimant submitted its application, and thereafter was scheduled to also submit a response, but never did so.[24] The Respondent submitted its reply to the Claimant's application on 31 July 2020, two days after it was scheduled.[25] Despite this delay, the emergency arbitrator ("the **Second Emergency Arbitrator**") stated that the content of the Respondent's reply was "fully considered" in the making of the Second Emergency Decision.[26]

29. In the Second Emergency Decision, the Second Emergency Arbitrator rejected a jurisdictional objection raised by the Respondent. The Respondent argued that "the Claimant is not entitled to separate arbitration proceedings for the Application's claims since the Tribunal in the main arbitration proceedings has been formed."[27] The Second Emergency Arbitrator found that the already initiated arbitration did not affect his

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[20] Claimant's Application for the Appointment of an Emergency Arbitrator and an Emergency Decision on Interim Measures, 18 May 2020, ¶ 99.6.
[21] SCC Arbitration EA 2020/75, Emergency Decision, 25 May 2020 (the First Emergency Decision), ¶ 18.
[22] First Emergency Decision, ¶¶ 19-32.
[23] Claimant's Second Application for the Appointment of an Emergency Arbitrator and an Emergency Decision on Interim Measures, 24 July 2020.
[24] SCC Arbitration EA 2020/130, Emergency Award on Interim Measures, 2 August 2020 (the Second Emergency Decision), ¶ 11.
[25] Second Emergency Decision, ¶¶ 10, 15-16.
[26] Second Emergency Decision, ¶ 16.
[27] Respondent's Answer to the Claimant's Second Application for the Appointment of an Emergency Arbitrator and an Emergency Decision on Interim Measures, 31 July 2020, ¶ 6.

jurisdiction and determined that he had *prima facie* jurisdiction to hear the Claimant's requests for interim relief.[28]

30. The Claimant presented six specific requests for relief, requesting an order and/or an award that:

> 146.1. there is a stay and/or suspension of enforcement against Avia Invest of the provisions of: (a) Article XII of the RM's Resolution No. 213 dated 1 April 2020 and (b) Article VIII of the consequential Law of the Parliament of the Republic of Moldova No. 60 dated 23 April 2020;
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> 146.2 [the Respondent] (whether acting on its own behalf or by or through any other person) refrain from taking any steps concerning the enforcement and/or implementation against Avia Invest of the provisions of: (a) Article XII of the [the Respondent's] Resolution No. 213 dated 1 April 2020; and (b) Article VIII the consequential Law of the Parliament of the Republic of Moldova No. 60 dated 23 April 2020;
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> 146.3. [the Respondent] (whether acting on its own behalf or by or through any other person, and in particular through the PPA) refrain from taking any steps to terminate the Concession Agreement under Articles 19, 24, 25 and/or 26 of the Concession Agreement and/or otherwise for any failure on the part of Avia Invest to obtain and/or present a performance guarantee otherwise required by Article 19 of the Concession Agreement;
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> 146.4. there is a stay and/or suspension of any steps already taken by [the Respondent] (whether acting on its own behalf or by or through any other person, and in particular through the PPA) to terminate the Concession Agreement under Articles 19, 24, 25 and/or 26 of the Concession Agreement and/or otherwise for any failure on the part of Avia Invest to obtain and/or present a performance guarantee otherwise required by Article 19 of the Concession Agreement;
>
> 146.5. there is a stay and/or suspension and/or prohibition of the enforcement and/or effect of the Notification of Termination dated 8 July 2020, including the stay and/or suspension and/or prohibition of any steps to terminate the Concession Agreement based on the Notification of Termination or on the basis of any of the matters stated therein; and
>
> 146.6. [the Respondent] (whether acting on its own behalf or by or through any other person) refrain from otherwise interfering with Avia Invest's entitlements

[28] Second Emergency Decision, ¶ 66.

> under the Concession Agreement by taking any steps having a similar or equal effect to those described at paragraphs 146.1-146.5 above.[29]

31. Although noting that the six requests were formulated as distinct claims, the Second Emergency Arbitrator treated them in groups, after having found that some of them overlapped.[30]

32. The Second Emergency Arbitrator granted the third and fourth requests (referred to by the Second Emergency Arbitrator as claims related to the "**Performance Guarantee**"), as well as the fifth request relating to the stay/suspension/prohibition of the termination of the Concession Agreement (referred to by the Second Emergency Arbitrator as the "**Termination**" request). The first two claims, (referred to by the Second Emergency Arbitrator as claims related to the "**Special Airport Tax**"), as well as the broader measure sought in what the Second Emergency Arbitrator deemed "**Request Six**," were rejected.

33. Before turning to the merits of the Claimant's requests, however, the Second Emergency Arbitrator discussed the applicable standard for decision, noting that "the SCC Rules provide an emergency arbitrator broad discretion to grant interim measures if warranted by the issues presented in the case."[31] In its application, the Claimant argued that the test for whether to grant the measures consisted of three essential elements,[32] with which the Second Emergency Arbitrator agreed.[33] These three elements were: (i) urgency; (ii) a demonstrated *prima facie* case on the merits; and (iii) proportionality.[34]

34. In its response to the Claimant's application, the Respondent did not explicitly address the applicable standard, advancing instead what the Second Emergency Arbitrator deemed to be a number of "general positions":

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[29] Claimant's Second Application for the Appointment of an Emergency Arbitrator and an Emergency Decision on Interim Measures, 24 July 2020, ¶¶ 116-144.
[30] Second Emergency Decision, ¶ 68.
[31] Second Emergency Decision, ¶ 76.
[32] Claimant's Second Application for the Appointment of an Emergency Arbitrator and an Emergency Decision on Interim Measures, 24 July 2020, ¶¶ 146.1-146.6.
[33] Second Emergency Decision, ¶¶ 77-78.
[34] Second Emergency Decision, ¶ 77.

> • The subject matter of the Application is related to the merits of the alleged dispute in the main arbitration and cannot be decided upon without deciding on the merits of the alleged dispute;
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> • In the Application, Claimant speculates on what they would "anticipate" the Republic of Moldova will or will not do, on the steps they "anticipate" the republic of Moldova will or will not take;
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> • In case of the issuance of any of the relief sought by Claimant, Respondent will suffer serious harm and substantial loss, including damages;
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> • There is no irrevocable loss to Claimant's rights as shareholder of Avia Invest; and
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> • Claimant does not satisfy the requirements for the relief of injunctions sought.[35]

35. In rejecting the two Special Airport Tax claims, the Second Emergency Arbitrator found that the Claimant had failed to demonstrate a sufficiently urgent need to prevent the Respondent from imposing the tax before a full tribunal was constituted and could hear the case.[36]

36. The broader Request Six was rejected by the Second Emergency Arbitrator as "vague, overbroad and incapable of meaningful analysis [in an emergency arbitration]."[37]

37. As already mentioned, the Second Emergency Arbitrator granted three requests, however. The two Performance Guarantee requests, by which the Claimant requested orders prohibiting the Respondent from terminating the Concession Agreement with reference to the Claimant's failure to obtain performance guarantees under the Concession Agreement, were granted after the Second Emergency Arbitrator applied the three elements of the standard he identified.

38. In his analysis, the Second Emergency Arbitrator found that these two requests met the urgency test, stating that "the status quo with respect to the subject of this arbitration would be significantly altered were the Concession Agreement terminated with the return of the

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[35] Second Emergency Decision, ¶ 79; Respondent's Answer to the Claimant's Second Application for the Appointment of an Emergency Arbitrator and an Emergency Decision on Interim Measures, 31 July 2020, ¶¶ 7-13.
[36] Second Emergency Decision, ¶¶ 84-88.
[37] Second Emergency Decision, ¶ 122.

Airport to the Respondent. Such actions would very likely aggravate the dispute, the avoidance of which is a primary purpose of interim relief."[38] The Second Emergency Arbitrator also briefly noted that the Claimant had established a *prima facie* case with respect to the merits of the Performance Guarantee requests.[39] He then turned to their proportionality. The Second Emergency Arbitrator stated that the Claimant would suffer substantial prejudice if the Concession Agreement were to be terminated due to the performance guarantee issues, because "the entirety of its investment would appear to be nullified, as the existence of Avia Invest is solely for the purpose of maintaining the Airport under the Concession Agreement." By contrast, the burden imposed on the Respondent by an order to refrain from terminating the Concession Agreement on this ground would be less significant, the Second Emergency Arbitrator stated. In making this point, the Second Emergency Arbitrator pointed out that any such termination "may not take place until the end of the 180 [day] period from the Notification of Termination, and thus prohibiting such termination for the time being would not likely prejudice Respondent in any considerable manner." On balance, therefore, the Second Emergency Arbitrator found the two Performance Guarantee requests to be proportional and granted them.[40]

39. As for the Termination request, the Second Emergency Arbitrator found this to be directly linked to the Performance Guarantee requests, and the Claimant had sought the same relief as in these requests, *i.e.,* an order that the Respondent refrain from terminating the Concession Agreement on the ground that the Respondent refused to accept a performance guarantee obtained by the Claimant. The Second Emergency Arbitrator therefore granted the Termination request with reference to his preceding analysis of the two Performance Guarantee requests.[41]

40. Having found that he had *prima facie* jurisdiction and that three of the Claimant's requests met the applicable tests for granting interim measures, the Second Emergency Arbitrator issued the Second Emergency Decision.

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[38] Second Emergency Decision, ¶ 97.
[39] Second Emergency Decision, ¶ 100.
[40] Second Emergency Decision, ¶¶ 110-115.
[41] Second Emergency Decision, ¶¶ 116-119.

41. In the operative parts of the Second Emergency Decision, the Second Emergency Arbitrator:

> 130.1 [DENIED] Claimant's request for a stay and/or suspension of enforcement against Avia Invest of the provisions of: (a) Article XII of the Republic of Moldova's Resolution No. 213 dated 1 April 2020 and (b) Article VIII of the consequential Law of the Parliament of the Republic of Moldova No. 60 dated 23 April 2020;
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> 130.2 [DENIED] Claimant's request that the Republic of Moldova (whether acting on its own behalf or by or through any other person) be ordered to refrain from taking any steps concerning the enforcement and/or implementation against Avia Invest of the provisions of: (a) Article XII of the Republic of Moldova's Resolution No. 213 dated 1 April 2020; and (b) Article VIII the consequential Law of the Parliament of the Republic of Moldova No. 60 dated 23 April 2020;
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> 130.3 [ORDERED] the Republic of Moldova (whether acting on its own behalf or by or through any other person, and in particular the PPA) to refrain from taking any steps to terminate the Concession Agreement under Articles 19, 24, 25 and/or 26 of the Concession Agreement and/or otherwise for any failure on the part of Avia Invest to obtain and/present a performance guarantee otherwise required by Article 19 of the Concession Agreement;
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> 130.4 [ORDERED] a stay and suspension of any steps already taken by the Republic of Moldova (whether acting on its own behalf or by or through any other person, and in particular through the PPA) to terminate the Concession Agreement under Articles 19, 24, 25 and/or 26 of the Concession Agreement and/or otherwise for any failure on the part of Avia Invest to obtain and/or present a performance guarantee otherwise required by Article 19 of the Concession Agreement;
>
> 130.5 [ORDERED] a stay and suspension and otherwise prohibits the enforcement of the Notification of Termination dated 8 July 2020, including the stay, suspension and prohibition of any steps to terminate the Concession Agreement based on the Notification of Termination or on the basis of any of the matters stated therein;
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> 130.6 [DENIED] Claimant's request to order that the Republic of Moldova refrain from otherwise interfering with Avia Invest's entitlements under the Concession Agreement by taking any steps having a similar or equal effect to those described at paragraphs 146.1-146.5 of the Application;
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> 130.7 [ORDERED] the Parties to equally split the costs of these emergency arbitration proceedings; and

> 130.8 [ORDERED] the Parties to bear their own legal costs.[42]

42. The Second Emergency Decision is now subject to the Respondent's present Application.

B. THE RESPONDENT'S POSITION

43. In its Application, the Respondent seeks the following relief with respect to the Second Emergency Decision:

> 257. The Respondent respectfully requests that the Arbitral Tribunal revoke [the Second Emergency Decision].
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> 258. Alternatively, the Respondent respectfully requests that the Arbitral Tribunal revoke the decisions contained in paras. 130.3, 130.4 or 130.5 of [the Second Emergency Decision].[43]

44. The Respondent argues that the Tribunal has jurisdiction to revoke the Second Emergency Decision, citing Article 1(2) of Appendix II to the SCC Rules, which provides that:

> [T]he powers of the Emergency Arbitrator [...] terminate on referral of the case to an Arbitral Tribunal pursuant to Article 22 of the Arbitration Rules, or when an emergency decision ceases to be binding according to Article 9 (4) of this Appendix.

45. In accordance with Article 22 of the SCC Rules, the case was referred to this Tribunal on 9 September 2020. Accordingly, as of that date, the Tribunal has the power to amend or revoke the Emergency Award, the Respondent says.[44] The Respondent further claims that the Tribunal is not bound by the decisions of the Second Emergency Arbitrator.[45]

46. The Respondent requests that the Tribunal revoke the Second Emergency Decision, arguing that it was based on distorted appreciation of facts and circumstances, as well as a flawed and incorrect interpretation of the law.[46]

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[42] Second Emergency Decision, ¶¶ 130.1-130.8.
[43] Application, ¶¶ 257-258.
[44] Application, ¶ 44.
[45] Application, ¶ 45.
[46] Application, ¶ 56.

47. Furthermore, the Respondent points out that the Second Emergency Decision was based exclusively on facts as presented by the Claimant, some of which the Respondent alleges were false or incomplete, as the Respondent never provided any facts of its own during the emergency proceedings.[47] Similarly, the Second Emergency Arbitrator's legal analysis was based mostly on what was advanced by the Claimant, because the Respondent, as noted by the Second Emergency Arbitrator, did not address any of the Claimant's requested relief specifically, instead taking a number of "general positions."[48]

48. The Respondent also argues that the fact that the Claimant to date has not sought recognition or enforcement of the Second Emergency Decision shows that the interim orders were, and still are, not necessary to prevent the alleged harm to Claimant's investment.[49]

49. The Respondent raises extensive arguments about the alleged flaws, in fact and in law, in the Second Emergency Decision. In the Tribunal's view, these arguments are not immediately relevant for the Application at hand, as explained further below, and as a consequence both Parties' positions on these points are recounted only briefly.

1. The Alleged Flaws in the Second Emergency Decision

50. The Respondent argues that the Claimant is not an investor, which means that the Second Emergency Arbitrator lacked jurisdiction. In this respect, the Respondent draws the Tribunal's attention to two particular issues: (i) the Claimant allegedly failed to demonstrate that it had a seat in Cyprus, as required by Article 1(3) of the BIT, and (ii) the Claimant allegedly is an entity designed to conceal the true owners and controllers behind the investment, which should have lead the Second Emergency Arbitrator to pierce the corporate veil.[50]

51. The Respondent further claims that the Claimant had no protected investment at the time of the Second Emergency Arbitration, and that it still does not. According to the

[47] Application, ¶¶ 2, 54.
[48] Application, ¶ 55; Second Emergency Decision, ¶ 79.
[49] Application, ¶¶ 241-242.
[50] Reply, ¶¶ 9-24.

Respondent, there is no evidence that the Claimant has in fact purchased the [redacted] shares in Avia Invest which the Claimant alleges constitutes its investment.[51]

52. The Respondent instead argues that the ownership of Avia Invest, as well as the ownership of Komaksavia itself, is the result of improper transactions made within the same group of companies, which should have led to the piercing of the Claimant's corporate veil.[52]

53. The Respondent also raises various arguments based on the alleged illegal origin of the Claimant's purported investment. In this respect, the Respondent claims that there were multiple sham transactions and fake payments between various legal and physical persons leading up to and including Komaksavia's purchase of Avia Invest, which were made contrary to Moldovan law. The Respondent's two written submissions discuss these alleged transactions extensively,[53] but they will not be recounted further here, as they are of limited relevance for the Tribunal's present decision.

54. Furthermore, in the view of the Respondent, the actions of the PPA are not attributable to the Government of Moldova, as per the explicit terms of the Concession Agreement, which states (as part of its definition of "Governmental Entity") that "[f]or the purpose of this definition, the Public Property Agency, as the Grantor, a Party to this Agreement, shall not be considered a Governmental Entity."[54] The Respondent emphasizes that the Notification of Termination at issue in the Second Emergency Decision was issued by the PPA, and therefore (by the PPA's own terms) not by the Republic of Moldova. As it is the PPA which is the proper party to the Concession Agreement, it is only the PPA, and not the Respondent, which can terminate it. The Second Emergency Arbitrator did not address this issue, but instead issued the Decision against the Respondent despite there being *prima facie* evidence that the Respondent is not a party to the Concession Agreement.[55] In the Respondent's view, the Second Emergency Arbitrator should have considered the issue of attribution of the PPA's acts to the Respondent, which he failed to do, and following

[51] Reply, ¶¶ 30-32.
[52] Reply ¶¶ 25-51.
[53] Application ¶¶ 59-85, 92-124; Reply, ¶¶ 52-133, 164-178.
[54] R-12, Concession Agreement, Art. 1.1.
[55] Application, ¶¶ 125-135; Reply ¶¶ 157-159.

consideration he should have found that the actions of the PPA may not be attributable to the Respondent.[56]

2. The Framework for Review

55. As for the framework for granting interim measures, the Respondent in its Reply focuses on the framework in the context of the Second Emergency Arbitration, *i.e.*, what the appropriate framework should have been for the Second Emergency Arbitrator. In this context, the Respondent says that it is internationally recognized that "five standards have to be met before a Tribunal will issue an order in support of interim measures," which the Respondent identifies as: (i) *prima face* jurisdiction, (ii) *prima facie* establishment of the case, (iii) urgency; (iv) imminent danger of serious prejudice (necessity); and (v) proportionality.[57]

56. Following the Tribunal Questions, the Respondent at the Hearing addressed the framework relevant to the Application presently before the Tribunal. In its view, the first step of any analysis is to determine whether the Claimant has demonstrated a *prima facie* case both on jurisdiction and on the merits, both of which the Respondent says the Claimant has failed to do. There is no *prima facie* proof of the alleged investment, the Respondent says, and even assuming *arguendo* that there were such evidence, the Respondent submits that it has shown enough *prima facie* evidence that the investment was made in violation of Moldovan law.[58]

57. The Respondent also suggests the Tribunal should consider at this stage what would happen if the Claimant or the Respondent were successful in their respective arguments on the merits of the case. In this respect, the Respondent points out that in the event the Claimant is successful, damages would be an adequate remedy, whereas in the opposite scenario, *i.e.*, if the Respondent were to prevail, the Claimant will not be in a position to pay any

[56] Application, ¶¶ 170-230.
[57] Reply, ¶ 202.
[58] Respondent's Speaking Notes ¶¶ 58-63.

damages awarded against it (the amount of which may be increased if any interim measures are ordered against the Respondent at this stage).[59]

58. As for proportionality, the Respondent argues that the Tribunal should take the course which "involves the least risk of injustice."[60]

59. The Respondent also argues more generally that the Tribunal has a wide discretion in deciding on applications for interim measures. In this respect, the Respondent raises a number of alleged facts which it argues should be taken into consideration by the Tribunal in the exercise of its jurisdiction, including the alleged improprieties associated with the investment, as discussed above, as well as Claimant's alleged "bad faith" and "abuse of process."[61]

60. Finally, the Respondent argues that the Tribunal has no jurisdiction under the BIT over the merits of the present Arbitration, based on the Respondent's objections against the Claimant's purported investment as outlined above. As a consequence, there can be no jurisdiction to order interim measures either, the Respondent says.[62]

C. THE CLAIMANT'S POSITION

61. The Claimant has requested the following relief with respect to the Second Emergency Decision:

> *170. The Claimant respectfully requests that the Arbitral Tribunal refuses to revoke [the Second Emergency Decision] (or any part of it).*[63]

1. The Alleged Flaws in the Second Emergency Decision

62. The Claimant rejects the Respondent's assertions that the Second Emergency Decision was based exclusively on facts asserted by the Claimant. The Claimant points to paragraph 16 of the Second Emergency Decision, in which the Second Emergency Arbitrator noted that

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[59] Respondent's Speaking Notes ¶¶ 64-67.
[60] Hearing Transcript, p. 53.
[61] Respondent's Speaking Notes, ¶ 70.
[62] Respondent's Speaking Notes, ¶ 72.
[63] Response, ¶ 170.

the Respondent's answer had been "fully considered." Furthermore, the Claimant says, the Second Emergency Arbitrator conducted a full analysis of the facts advanced, and in no way indicated that he was "exclusively" relying on the Claimant's version of them.[64]

63. The Claimant also disputes the Respondent's characterization of some of the facts the Claimant presented in the Second Emergency Arbitration as false, incomplete or distorted, but claims that it is unable to respond to this allegation due to its vagueness.[65]

64. As for the various arguments the Respondent advanced about the alleged legal and factual flaws in the Second Emergency Decision, the Claimant considers them "unarguably irrelevant" for the present purposes.[66] The Claimant addresses these points not directly in its Response, but in an annex thereto.

65. In the Response, however, the Claimant briefly addresses the Respondent's allegations aimed at the Claimant's corporate history. According to the Claimant, this element of the Application is a "thinly-evidenced attack" seeking to challenge the procurement process which led to the awarding of the Concession Agreement. In any event, the Claimant says, none of the allegations the Respondent made in this respect is relevant for the application currently before the Tribunal.[67]

66. In the Claimant's view, the Respondent could have engaged with the Claimant's application during the Second Emergency Arbitration. In this regard, the Claimant argues that the Respondent was given an "equal and reasonable opportunity to present its case, taking into account the urgency inherent in such proceedings."[68]

67. As for the Respondent's contention that the acts of the PPA cannot be attributed to the Respondent, which the Second Emergency Arbitrator failed to consider, the Claimant says that the Second Emergency Arbitrator did not err in this respect. In any event, it is "unclear" to what extent this issue is relevant for the Respondent's Application to revoke the Second

[64] Response, ¶¶ 25-27.
[65] Response, ¶ 28.
[66] Response, ¶ 4.
[67] Response, ¶¶ 49-50.
[68] Response, ¶¶ 29-30.

Emergency Decision; the current Application is not the appropriate forum to seek a decision on the attribution point, which instead should be argued as part of any potential submissions on jurisdiction and admissibility, the Claimant submits.[69]

68. The Claimant also disputes that the compliance or non-compliance of Avia Invest with the Second Emergency Decision has any relevance for the current revocation request.[70]

69. Similarly, as to the Claimant's failure to seek recognition and enforcement of the Second Emergency Decision, the Claimant argues that this fact is not relevant to the present Application. The proper action for the Respondent, if it is of the opinion that the Claimant has not complied with the interim measures ordered by the Decision, is not to apply for a revocation of the Decision in its entirety, but rather to initiate proceedings in domestic courts. Regardless, the Claimant also says that the Respondent's position is "hopeless," as the Second Emergency Decision does not require the Claimant to do anything, and as such Claimant could not have sought any recognition or enforcement.[71]

2. The Framework for Review

70. On the standard applicable to the present request to revoke the Second Emergency Decision, the Claimant says it is accepted by both Parties that the Tribunal has the power to decide that an emergency arbitrator's decision is no longer binding, pursuant to Article 9(4)(i), Appendix II of the SCC Rules.[72]

71. The Claimant notes that "there is no clear test or framework for amending or revoking an Emergency Award under the SCC Rules, or indeed, with respect to amending or revoking any interim measures under any other international arbitration rules or the domestic legislation of Sweden." In the Claimant's submission, the appropriate approach for the Tribunal to take when deciding on the revocation request should be whether there have been any "reasonable changes in circumstances from the time when [the Second Emergency Decision] was made, which could justify amending or revoking it, or whether

[69] Response, ¶¶ 52-55.
[70] Response, ¶¶ 111-114.
[71] Response, ¶¶ 106-108.
[72] Response, ¶ 38.

[the Second Emergency Arbitrator] erred materially in his identification of the criteria upon which he granted emergency interim relief."[73]

72. The Claimant also points out that there is a provision in the SCC Rules – Article 9(2) of Appendix II – which governs the situation when an application to revoke an emergency decision is made to the emergency arbitrator who issued it. While this provision neither gives specific guidance as to the applicable standard, nor is directly applicable to the present situation, the Claimant suggests that it offers some guidance to the Tribunal. Commentary to the SCC Rules suggests a restrictive approach to requests for amendment of a substantive nature under this provision, Claimant says.[74]

73. The Claimant invokes ICSID jurisprudence and commentary to the ICSID Convention as further support for its contention that the Tribunal should take a restrictive approach to the revocation of interim measures previously ordered. The Claimant also argues that a restrictive approach would be consistent with Swedish procedural law, which the Claimant characterizes as providing that interim measures should be revoked "if there are no longer any grounds for suspicion that the respondent is taking measure [sic] to make it impossible or difficult to enforce a future judgement, or if the claimant can no longer establish probable cause for the claim."[75]

74. In the Claimant's submission, there has been no relevant change in circumstance since the Second Emergency Decision was rendered which would justify revoking the ordered interim measures. The circumstances emphasized by the Second Emergency Arbitrator in rendering his decision remain the same, and if anything, the Respondent has "increased pressure" on the Claimant since the Second Emergency Decision.[76]

75. In the alternative, even if the Tribunal instead were to apply a *de novo* standard, the Claimant argues that the Application must fail also under this standard. In this respect, the

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[73] Response, ¶ 45; Claimant's Speaking Notes, ¶ 7.
[74] Claimant's Speaking Notes, ¶ 8, relying on Ragnwaldh et al, *A Guide to the SCC Arbitration Rules*, (2019), p. 199.
[75] Claimant's Speaking Notes, ¶¶ 11-19.
[76] Claimant's Speaking Notes, ¶¶ 22-23.

Claimant refers back generally to its original application before the Second Emergency Arbitrator, as well as its Response.[77]

76. Turning to the elements forming the standard of review, the Claimant argues that there is a *prima facie* case on jurisdiction at this stage, which is a standard that does not require the Tribunal to resolve disputed jurisdictional objections to determine the present Application.[78] Referring to its Statement of Claim, the Claimant says it has satisfied this standard by showing that (i) Komaksavia is a legal person constituted and incorporated in compliance with the law of the Republic of Cyprus and having its seat in the territory of the Republic of Cyprus; (ii) the Respondent is the Republic of Moldova; (iii) there is in existence a valid BIT between the Republic of Cyprus and the Republic of Moldova; and (iv) the BIT contains a valid arbitration clause which authorises Komaksavia to submit the dispute against the Respondent to the SCC.[79]

77. Similarly, the Claimant says it has shown a *prima facie* case on the merits, which was accepted by the Second Emergency Arbitrator. The Claimant argues that the inquiry into the merits of the dispute at this stage should only be very limited; anything else would be premature and inappropriate.[80]

78. During the Hearing, the Claimant also emphasized that the Second Emergency Decision is narrow, in the sense that it is restricted to preventing the Respondent from following through on its Notification of Termination of the Concession Agreement by virtue of the Claimant's alleged failure to obtain or present performance guarantees. Thus, there is no order in place prohibiting the Respondent from lawfully terminating the Concession on other grounds should they be established, the Claimant says.[81]

79. The fact that the Second Emergency Decision is limited in this way should, in the Claimant's submission, influence the Tribunal's analysis of the urgency and necessity associated with continuing the already granted interim relief. The Respondent may still

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[77] Claimant's Speaking Notes, ¶¶ 24-26.
[78] Claimant's Speaking Notes, ¶¶ 35-41.
[79] Statement of Claim, ¶ 37.
[80] Claimant's Speaking Notes, ¶¶ 44-46.
[81] Hearing Transcript, pp. 62-64.

terminate the Concession on other lawful grounds, while the one ground on which it is currently prohibited from relying is the result of Respondent's own manipulation, "in order to contrive a breach which in truth never existed."[82]

80. Similarly, on the grounds of urgency and necessity, the Claimant argues that the Application must be viewed in the context of the long time-span for which the Concession Agreement was concluded.[83]

81. The Claimant finally argues that the Respondent has not shown that any prejudice would be caused to it if it were required to refrain from terminating the Concession Agreement during the remainder of this Arbitration. Nor, the Claimant says, has the Respondent shown any "disproportionality" associated with the interim orders staying in force, compared to the obvious prejudice caused to the Claimant if the orders were lifted, and the Respondent thereby allowed to terminate the Concession Agreement on the basis that the Claimant had allegedly breached its obligation to produce a performance guarantee.[84]

D. THE TRIBUNAL'S ANALYSIS

1. The Framework for Review

82. As the Tribunal noted in its first question to the Parties, this matter comes before it in an unusual procedural posture. Formally, the application is by the Respondent, as a request to revoke a prior decision by the Second Emergency Arbitrator. In essence, however, the request poses the question of whether the Tribunal should continue the interim measures ordered in the Second Emergency Arbitration for the duration of this proceeding. Ordinarily, requests for imposition or continuation of interim measures come to tribunals through the party seeking the benefit or protection of such measures. In opposing the Respondent's application for revocation, the Claimant is, to all intents and purposes, asking the Tribunal to continue the interim measures in force.

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[82] Hearing Transcript, pp. 63-64.
[83] Hearing Transcript, p 65.
[84] Claimant's Speaking Notes, ¶¶ 53-57, Hearing Transcript, pp. 66-69.

83. Whichever Party is viewed as seeking relief, however, one thing is agreed between them: the Tribunal is not bound by the decisions and reasons of the Second Emergency Arbitrator.[85] That fact is made explicit in the SCC Rules.[86] Accordingly, the Tribunal does not accept the Claimant's proposition that the measures ordered by the Second Emergency Arbitrator should continue, unless and until this Tribunal finds either (a) that circumstances have changed significantly since the time of the Second Emergency Arbitrator's review, or (b) that the Second Emergency Arbitrator committed material error in evaluating the submissions before him.[87] While such standards may be appropriate when a tribunal is asked to reconsider its own prior rulings, the relationship is different between an emergency arbitration decision that necessarily is rendered on a limited record and an extremely expedited basis, and a decision by a full tribunal subsequently empaneled to consider the case as a whole. In that context, the natural corollary of the tribunal's not being bound by the prior emergency decision is that such decision should create no presumption either way, nor should it shift the burden of proof that otherwise would apply to an interim measures analysis.[88] Neither a tribunal's framework for analysis, nor its ultimate exercise of discretion regarding the grant or denial of interim measures, should be constrained by the reasoning previously taken by an emergency arbitrator on an expedited basis. The SCC Rules' express statement that a tribunal "is not bound by the … reasons" of an Emergency Arbitrator supports the notion that a tribunal's assessment of prior emergency measures should be *de novo*, based on all factors and evidence in the record before it, and should not be dependent on its view of the Emergency Arbitrator's reasoning based on a different and generally narrower record.[89]

84. The question before the Tribunal is whether there is sufficient basis to order interim measures to remain in place for the remainder of the arbitration.[90] This is an entirely

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[85] Application, ¶ 45; Response ¶ 37.
[86] SCC Rules, Appendix II, Article 9(5)
[87] Response, ¶ 45; Claimant's Speaking Notes, ¶ 15. Similarly, the Tribunal does not accept the Respondent's invitation to determine that the Second Emergency Arbitrator "erred" in considerations of attribution or otherwise. *See, e.g.,* Application, ¶ 133; Respondent's Speaking Notes, ¶ 12.
[88] *Cf.* Claimant's Speaking Notes, ¶ 4.2 (contending that as "[t]his is R[espondent's] application," Respondent "bears the burden of proof").
[89] *See also* SCC Rules, Appendix II, Article 9(5).
[90] SCC Rules, Appendix II, Article 9(4)(i) ("The emergency decision ceases to be binding if: … an Arbitral Tribunal so decides").

different question than the one placed before the Second Emergency Arbitrator, who clearly understood he was being asked for relief only on an interim basis, until the full Tribunal could consider the matter anew. Indeed, the Claimant assured the Second Emergency Arbitrator that his decision "is likely to have a limited temporal effect in any event," precisely because "an arbitral tribunal is not bound by the decision(s) and reasons of the Emergency Arbitrator."[91] The Claimant emphasized this point in the context of the balance of prejudice, contending that the Respondent would not suffer "any real prejudice" from an order of interim relief, precisely because of the short window in which any such order would remain in effect.[92]

85. The Second Emergency Arbitrator in turn repeatedly alluded to this consideration, in evaluating the issues of urgency and balance of prejudice. With respect to the question of urgency, he observed as follows:

> As an initial matter, the Emergency Arbitrator notes that it is not proper to analyze the requested relief in the same manner as a constituted tribunal would approach a request for interim relief .... Here, there will eventually be a fully constituted tribunal that will have the opportunity to review any request for interim measures.
>
> Instead, the proper urgency evaluation here concerns whether there is a sufficiently urgent need to grant the relief *before a tribunal is constituted* and able to address such interim measures.
>
> ... [I]mportantly, the Emergency arbitrator need only be concerned with the harm that could occur *before a tribunal is constituted* and can address Claimant's requested interim relief.[93]

86. With respect to the issue of prejudice, the Second Emergency Arbitrator similarly referenced the limited temporal effect of any order he might render, observing that he "sees little risk of imposing a significant burden on Respondent by prohibiting Respondent to proceed with the termination *until an arbitral tribunal can be constituted*."[94] This was particularly because the Notification of Termination was not due to be implemented "until

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[91] Claimant's Second Application for the Appointment of an Emergency Arbitrator and an Emergency Decision on Interim Measures, 24 July 2020, ¶ 144.
[92] Claimant's Second Application for the Appointment of an Emergency Arbitrator and an Emergency Decision on Interim Measures, 24 July 2020, ¶ 144.
[93] Second Emergency Decision, ¶¶ 84-85, 87 (emphasis added).
[94] Second Emergency Decision, ¶ 112 (emphasis added).

the end of the 180 [day] period" from its issuance, and "thus prohibiting such termination for the time being would not likely prejudice Respondent in any considerable manner."

87. In other words, nothing in the Second Emergency Decision suggests that it was based on a consideration of a longer-term question, namely whether an injunction should be ordered for the entire life of this arbitration. That is the question now before this Tribunal.

88. The measures ordered by the Second Emergency Decision effectively enjoined the Respondent (whether acting on its own behalf or through the PPA) from taking any steps to terminate the Concession Agreement on the basis that Avia Invest allegedly had failed to present a suitable performance guarantee. That is explicit in paragraphs 130.3 and 130.4 of the Second Emergency Decision, which reference the performance guarantee issue, and is implicit also in paragraph 130.5 of the Second Emergency Decision, which enjoins the enforcement of the PPA's Notification of Termination dated 8 July 2020 – a notification that itself was predicated on the alleged performance guarantee failure.[95] The requirement of a performance guarantee in turn is set forth in the Concession Agreement.[96] Taken together, therefore, the effect of the Second Emergency Decision – for so long as it remains in force – is to bar the Respondent from taking any steps, directly or through the PPA, from trying to give force to a particular provision of the Concession Agreement to which Avia Invest and PPA are parties.

89. The question for this Tribunal, to be examined *de novo*, is whether the grounds are met for continuing such an injunction for the duration of these proceedings. The SCC Rules authorize a tribunal to "grant any interim measures it deems appropriate,"[97] but the Rules do not establish any particular test for this analysis. The Tribunal considers it appropriate to consider a number of factors that have been described in prior cases. These can be enumerated in various ways, separated into subparts or combined thematically, so it is not necessary to engage in the semantics of describing the analysis as a "three-part" test, a "five-part" test, or by any other fixed number of criteria. Either way, the considerations

[95] *See* Ex. C-7 (Notification of Termination) to the Claimant's Second Application for the Appointment of an Emergency Arbitrator and an Emergency Decision on Interim Measures, 24 July 2020.
[96] R-12, Concession Agreement, Art. 19.2.
[97] SCC Rules, Article 37(1).

should be evaluated holistically, to determine if interim relief suits the interests of justice in a particular case.

90. The relevant considerations include at least the following:

a. whether the party in whose favor the interim measures would be granted (here the Claimant) has alleged at least a *prima facie* basis for both jurisdiction and liability, as well as for the particular type of relief sought (which it seeks to protect through interim measures), should liability be established;

b. whether there is both *necessity and urgency* for the grant of interim measures, in the sense that unless such measures are granted (or maintained), a party faces a real and imminent risk of prejudice to its legal rights, which could not be remedied effectively by a grant of relief at the end of the case; and

c. whether the party against whom interim measures are sought would suffer *prejudice* from their issuance, and if so, whether the measures requested are *proportionate*, in the sense that the applicant's need for relief is not outweighed by the hardships to which the other party would be subjected if the measures are granted.

91. The Tribunal turns to these considerations below, to the extent relevant to the present Application.

2. Application to the Facts

92. The Tribunal begins by noting that the Respondent has raised a number of objections to jurisdiction and admissibility, which are presently the subject of an application for a summary procedure and/or bifurcation. The assertion of jurisdictional objections does not, however, deprive the Tribunal of the authority to consider a potential grant of interim measures. The question at this stage is not whether jurisdiction has been affirmatively established, but simply whether a *prima facie* case for jurisdiction has been alleged, in the sense that jurisdiction would exist *if* the facts alleged by the Claimant are ultimately proven – and by extension, those alleged by the Respondent in opposition to jurisdiction are not.[98]

[98] *See generally Oil Platforms (Iran v. U.S.),* 1996 I.C.J. 803 (Dec. 12), Separate Opinion by Judge Rosalyn Higgins,

Understood in that limited sense, the Tribunal finds the minimal pleading requirements to have been satisfied. The same is true with respect to a *prima facie* case on liability. The Tribunal notes, but need not definitively resolve, the Respondent's numerous counter-arguments regarding liability, including its central objection regarding any attribution of PPA conduct to the Respondent. These arguments are important, and will be examined in due course if the case proceeds to a liability stage, but they do not strip the Tribunal of authority to order interim measures if the grounds for such measures are sufficiently established.

93. The Tribunal is unable to accept, however, that the Claimant has established a *prima facie* case that it could be entitled, should a BIT violation be established, to the particular relief that it seeks to preserve through the continuation of interim measures. The Claimant's application to the Second Emergency Arbitrator was predicated on the notion that if successful in this arbitration, it would have a legal entitlement not just to monetary damages, but in particular to an order of specific performance, aimed at maintaining the Concession Agreement in effect.[99] The Claimant's Statement of Claim explicitly seeks "an order for specific performance and/or a mandatory injunction," requiring the Respondent "to comply with the terms of the Concession Agreement without interference in Avia Invest's rights under the Concession Agreement ...."[100] The Claimant's putative entitlement to "continuation of a long-term contract" is, moreover, central to its opposition now to any revocation by the Tribunal of the interim measures ordered by the Second Emergency Arbitrator.[101]

94. Despite this, the Claimant has not yet presented any case (*prima facie* or otherwise) to support its potential entitlement to specific performance of a contract to which it is not a

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(explaining that in applying a *prima facie* test, the International Court of Justice ought to "accept *pro tem* the facts as alleged by [the Applicant] to be true," and in that light, interpret the relevant treaty provisions to check if, on the basis of the applicant's factual claims, there could occur a violation of one or more of them).

[99] *See* Claimant's Second Application for the Appointment of an Emergency Arbitrator and an Emergency Decision on Interim Measures, 24 July 2020, ¶ 128 (contending that "monetary compensation in the present case would be insufficient to remedy the forced termination of the Concession Agreement," so "the Claimant will be seeking in due course through its Statement of Claim not only compensation by way of damages, but also ... a restitutionary remedy/specific performance").

[100] Statement of Claim, ¶ 151.9.

[101] Claimant's Speaking Notes, ¶ 45.1.

party. The Chisinau Airport itself is an asset belonging to the Republic of Moldova. Avia Invest may have certain tangible assets located at the Airport, but its main asset is the Concession Agreement, which conveys upon it certain contractual rights associated with the long-term operation of the Airport. But Avia Invest is not the claimant in this case, and the entity that *is* the Claimant – Komaksavia Airport Invest Ltd. – has no contractual rights of its own. Rather, the Claimant's asset, which it invokes as its qualifying investment in Moldova which it seeks to protect, are its *shares in Avia Invest*, and by extension, the rightful value of those shares should the Concession Agreement remain in effect. Stated otherwise, the Claimant's interest appears to be quintessentially monetary in nature, namely an interest to maintain share value. It is not a self-evident proposition that a shareholder in a company that enjoys a long-term contract has legal standing, on its own, to seek specific performance to preserve a contract to which it is not a party. More typically in investment cases, the remedy sought by shareholders in such situations is damages to compensate for "reflective loss," that is, for the loss in value of their shares from any improper State interference with contractual rights or other assets of the company in which they holds shares.

95. The Tribunal does not prejudge this issue, which remains to be decided in due course following further briefing from the Parties. But for present purposes, it suffices to say that the Claimant has not yet demonstrated a *prima facie* basis for its entitlement to specific performance of the Avia Invest contract, even if all of its allegations about BIT violations were assumed to be true. And absent such a showing, the Claimant cannot demonstrate an imminent threat to its rights that could not be remedied later by monetary relief, and which therefore requires interim measures to preserve.

96. Equally important, in the absence of such a showing, the Claimant's invocation of a purported right to "maintain[] the *status quo* and non-aggravation of this dispute" – the key rights the Claimant says justify continuing the interim measures in force – is equally unpersuasive.[102] While the Tribunal can certainly understand an investor's desire to avoid any further harm to its interests while an arbitral proceeding is underway, this desire alone

[102] Claimant's Speaking Notes, ¶ 4.1.

cannot serve as the basis for a legal entitlement to enjoin any acts that might possibly increase its injury. The contrary proposition would mean that by the simple act of initiating an arbitration, an investor obtains a sweeping right to freeze all circumstances as they then exist, perhaps for a period of years, even where such a standstill is not required to preserve its central rights to present its case and to obtain meaningful relief.

97. Here, the Tribunal is not yet persuaded that monetary damages would be insufficient to compensate Claimant for any attempt by the PPA (or otherwise by the Respondent) to implement the Notification of Termination, and thus to terminate the Concession Agreement on account of the performance guarantee issue. The Respondent emphasizes that no implementation is imminent in any event, since the Notification of Termination is still being litigated before the Moldovan courts. Be that as it may, even if those proceedings were to result in giving the PPA a green-light to terminate the Concession Agreement, any resulting harm to the value of the Claimant's shares in Avia Invest would seem to be fully remediable by monetary damages.[103] The Tribunal acknowledges the Claimant's argument that proving damages resulting from early termination of a long-term contract may be complex, but that is hardly a unique complication, and far from insurmountable as a matter either of investment arbitration jurisprudence or conventional damages methodology.

98. Finally, given these observations, the Tribunal is not persuaded that the balance of prejudice necessarily tilts in favor of continuing the previously ordered interim measures. By Claimant's own acknowledgment, those measures are aimed at maintaining Avia Invest in place as the operator of Moldova's only civil aviation airport for the length of these proceedings. This would be despite the PPA's allegations that Avia Invest failed to post a suitable performance guarantee, and while the Respondent is alleging more fundamental illegal conduct (of various sorts) on the part of Avia Invest and its shareholders. The Tribunal does not suggest that any of these allegations have been proven, and they may never be. But the fact remains that against this complex and uncertain backdrop, and at the very outset of an arbitral proceeding, a tribunal should be wary of inserting itself too

[103] Indeed, the Second Emergency Arbitrator himself questioned whether monetary compensation really would be inadequate (*see* Second Emergency Decision, ¶ 109), while ultimately declining to take that question further, given the very temporary nature of the relief he was requested to order.

dramatically into the state of affairs on the ground, at least where it appears that any threat of further harm to the Claimant's interests would likely be capable of remedy through eventual monetary relief. At the same time, the Respondent remains on notice that any precipitous further action against the Claimant's interests could have significant consequences for its position in the case, if such action ultimately were proven to have been in violation of the Respondent's obligations under the BIT.

99. For these reasons, the Tribunal grants the Respondent's request to revoke the interim measures ordered by the Second Emergency Arbitrator, specifically in paragraphs 130.3, 130.4 and 130.5 of the Second Emergency Decision.

IV. SECURITY FOR COSTS

100. In addition to requesting a revocation of the Second Emergency Decision, the Respondent's Application also contains a request for security for costs. More specifically, the Respondent requests that the Tribunal:

> [o]rder the Claimant to provide appropriate security for costs in the form of an irrevocable bank guarantee in the amount of EUR 1.250.000, as a reasonable estimate of the Republic of Moldova's anticipated costs and disbursements.[104]

101. In its Reply, the Respondent seemingly updated this request, insofar as the Reply specifies that the requested security be "in the form of a bank guarantee from an internationally recognised financial institution in Stockholm, Sweden and acceptable to the Arbitral Tribunal."[105]

102. The Respondent refers to Article 38 of the SCC Rules, which provides:

> (1) The Arbitral Tribunal may, in exceptional circumstances and at the request of a party, order any Claimant or Counter-claimant to provide security for costs in any manner the Arbitral Tribunal deems appropriate.

[104] Application, ¶ 243.
[105] Reply, ¶ 250.

> (2) In determining whether to order security for costs, the Arbitral Tribunal shall have regard to:(i) the prospects of success of the claims, counterclaims and defences;
>
> (ii) the Claimant's or Counterclaimant's ability to comply with an adverse costs award and the availability of assets for enforcement of an adverse costs award;
>
> (iii) whether it is appropriate in all the circumstances of the case to order one party to provide security; and
>
> (iv) any other relevant circumstances.
>
> (3) If a party fails to comply with an order to provide security, the Arbitral Tribunal may stay or dismiss the party's claims in whole or in part.
>
> (4) Any decision to stay or to dismiss a party's claims shall take the form of an order or an award.

103. Alternatively, and in the event that the Respondent's requests with respect to revocation of the Second Emergency Decision are not granted, the Respondent asks the Tribunal for an order that the Claimant provide appropriate security for costs in the same form and amount as under its primary request "in connection with the interim measures [...] which have not been revoked by the Arbitral Tribunal."[106] For this alternative request, the Respondent relies on Article 37(2) of the SCC Rules:

> The Arbitral Tribunal may order the party requesting an interim measure to provide appropriate security in connection with the measure.

104. The Respondent also requests that the Claimant is ordered to "disclose its funding for the arbitration costs and expenses, including the funding contracts, as well as the Claimant's financial records, the Claimant's balance sheet, the Claimant's financial reports filed with the fiscal (tax) authority in Cyprus for the last four years."[107]

105. Below, the Tribunal recounts both Parties' arguments on these points, before turning to its own analysis of this part of the Application.

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[106] Application, ¶ 245.
[107] Application, ¶ 250, Reply, ¶ 251.

A. THE RESPONDENT'S POSITION

106. The Respondent alleges that the Claimant is a shell company, which "does not draw its resources from operations or activities of its own" and has no assets beyond its shareholding in Asia Invest. As such, the Respondent posits, the Claimant is dependent on dividends from Avia Invest and/or third parties for its resources.[108]

107. As it appears that no Avia Invest dividends have been distributed to Claimant,[109] the Respondent argues that third party funding is the only source from which the Claimant could fund this Arbitration.[110] As a consequence, the Respondent argues, the Claimant will not be able to satisfy an adverse cost award rendered against it, nor will it be possible for the Respondent to enforce such an award against the Claimant.[111]

108. In the Respondent's characterization, the Claimant's claims are "frivolous." Furthermore, the Respondent argues that the "obscure origins" of the Claimant's investment in Avia Invest further indicate that the Claimant lacks the funds to comply with any adverse cost award.[112] In this respect, the Respondent also alleges that the shareholding structure of Avia Invest has been changed four times to date, and might be further changed by creating a vehicle in a jurisdiction safe from enforcement of a cost award.[113]

109. Finally, the Respondent also argues that the Claimant's "current conduct gives serious reason to doubt its willingness to pay the adverse costs," pointing to the Claimant's alleged non-compliance with the Airport Tax due, as well as alleged "direct influence and pressure" on Avia Invest's management.[114]

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[108] Application, ¶¶ 248, 251.
[109] In this respect, the Respondent references a statement in the Claimant's Application for the Second Emergency Arbitration, ¶ 25, in which Claimant says it "has forgone dividends from Avia Invest in order that surplus revenue is reinvested in the development of Chisinau Airport."
[110] Application, ¶ 248.
[111] Application, ¶ 251.
[112] Application, ¶¶ 252-253.
[113] Reply, ¶ 243.
[114] Application, ¶ 254.

B. THE CLAIMANT'S POSITION

110. The Claimant's submission on the security for costs request is modelled on the language in Article 38 of the SCC Rules.

111. As a preliminary point, the Claimant argues that the Tribunal does not have jurisdiction to order security for costs at this stage of the Arbitration, or at the very least is not in a good position to do so. The Claimant points out that Article 38(2)(i) provides that the Tribunal "shall have regard to: (i) the prospects of success of the claims, counterclaims and defences [...]."[115] Until the Parties have completed the filing of their respective principal submissions – not only the Claimant's Statement of Claim, but also any Counterclaim and/or Statement of Defence – the Claimant argues that "[t]he Tribunal is not in a position at this stage to make any proper determination under Article 38 as to the prospects of success of the claims, counterclaims and defences for the purposes of a security for costs assessment."[116]

112. In the alternative, should the Tribunal disagree with the Claimant's preliminary point, the Claimant argues that the standard provided by Article 38 has not been met.

1. Exceptional circumstances (Article 38(1))

113. First, the Claimant says that there are no "exceptional circumstances" making a security for costs order appropriate, as required by Article 38(2)(i). The Claimant disputes the Respondent's contention that the so-called "collection risk," *i.e.*, the possibility that the Respondent cannot collect on a potential cost award against the Claimant, is itself an exceptional circumstance. In any event, the Claimant says, the Respondent has not adduced specific evidence supporting that the collection risk is exceptional in this case.[117]

114. The Claimant also disputes that a collection risk is a "right capable of protection" by interim measures such as a security for costs order. In this regard, the Claimant relies on the provisional measures decision in the ICSID case *Eskosol v. Italy*. In that decision, the

[115] Response, ¶ 118, emphasis in Claimant's original.
[116] Response, ¶¶ 118-119.
[117] Response, ¶ 122.

tribunal stated that any measure sought must be necessary to protect an identified right. The *Eskosol* tribunal further identified that the sought measure must be urgently required to protect that identified right, as well as proportionate in the sense that it does not impose an undue burden on the party against which the measure is sought, when the interests of both parties are weighed against each other. In the present case, the Claimant submits that even if the Respondent has identified a right capable of protection (which the Claimant disputes), the request is not urgently required to protect that right, nor is it proportional. As for the latter point, the Claimant argues that, balanced against the hypothetical rights of the Respondent, the Claimant would suffer a disproportionate burden by being ordered to pay or post a guarantee for EUR 1,250,000.[118]

115. The Claimant further argues that the presence (or absence) of third party funding does not constitute exceptional circumstances. The Claimant refers for this point also to the *Eskosol* decision, in which the tribunal stated that even if the potentially recoverable costs surpassed what was covered by a third party funding agreement, the party seeking security for costs must still demonstrate that such an order would be proportionate.[119] In the Claimant's view, the issue of third party funding is *prima facie* immaterial to the issue of security for costs.

116. The Claimant also disputes the Respondent's characterization that the Claimant's sources of funding, transactions and origin of capital are "obscure." Similarly, the Respondent's contentions concerning Claimant's alleged undue influence on Avia Invest's management, as well as Avia Invest's alleged non-compliance with Moldovan law and the Concession Agreement, are also disputed by the Claimant. On all these points, the Claimant says that Respondent has failed to furnish supporting legal or factual evidence.[120]

117. In summary, the Claimant argues that the Respondent has failed to demonstrate any exceptional circumstances meeting the high threshold required.[121]

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[118] Response, ¶¶ 123-124; CA-22, *Eskosol S.p.a in liquidazione v. Italian Republic*, Procedural Order No. 3 (Decision on Respondent's Request for Provisional Measures), 12 April 2017, ¶ 35.
[119] Response, ¶¶ 125-126; CA-22, *Eskosol S.p.a in liquidazione v. Italian Republic*, Procedural Order No. 3 (Decision on Respondent's Request for Provisional Measures, 12 April 2017, ¶ 38.
[120] Response, ¶¶ 128-130.
[121] Response, ¶¶ 126, 131.

2. Ability to comply with an adverse cost order (Article 38(2)(ii))

118. The Claimant asserts that it is not a shell company and says the Respondent has misconstrued its statements; it is in fact Avia Invest which would be a "worthless shell company in the absence of the right to manage the concession project."[122] Should the Concession Agreement be terminated, the Claimant argues, Avia Invest will become a company "in name only."[123]

119. The Claimant denies the Respondent's contention that the Claimant itself is a shell company, referring to the understanding of that term under the applicable laws of Cyprus. The Claimant says that it meets the "substance" criteria which Cypriot law requires for an entity to be deemed not a shell company.[124]

120. In its written response to Tribunal Question 4 on 5 February 2021, the Claimant states that it does rely on external funding for this Arbitration, in the form of loans from companies controlled by the Claimant's ultimate beneficial owner. In the same letter, the Claimant also says that Avia Invest has paid [redacted] of the Airport Tax, with which the Respondent in its Application says the Claimant has not complied, doing so "under duress" from the Respondent.[125]

121. At the Hearing, the Claimant added two further points, in the context of Tribunal Question 4 about the relevance of its funding arrangement: (i) the Claimant has already paid the advance on costs for this Arbitration on behalf of both Parties, and (ii) the application for security for costs fails to address what would happen if the Claimant were to lose on the merits and the Respondent were to obtain a cost award against the Claimant. On the latter point, the Claimant argues that it is so physically embedded in the Chisinau Airport (through Avia Invest) that it would be a lengthy and complex process to "un-[e]mbed" itself, making it very hard for the Claimant to vanish from Moldova and, by extension, for it to evade the Respondent's efforts to enforce a cost award against it.[126]

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[122] Response, ¶ 133; Claimant's Application for the Second Emergency Arbitrator, ¶ 74.
[123] Response, ¶ 136.
[124] Response, ¶¶ 134-135, referencing CA-34, The "AML Directive".
[125] Claimant's Response to Tribunal Question 4, 5 February 2021, ¶¶ 1-8.
[126] Hearing Transcript, pp. 74-77.

C. THE TRIBUNAL'S ANALYSIS

122. As a threshold matter, the Tribunal observes that the applicable test for security for costs is set forth expressly in Article 38 of the SCC Rules. In this context, the analysis in *Eskosol* (on which the Claimant heavily relies) is entirely inapt. That case arose under the ICSID Convention and Arbitration Rules, which contain no express provision for security for costs, and therefore the *Eskosol* tribunal was required to analyze a request for security within the rubric of articles governing "provisional measures," which expressly referred to the identification of "rights" which were allegedly in need of protection. The *Eskosol* tribunal's query whether there was an established "right" under the ICSID Convention to effective collection on a cost award was specific to this context. The SCC Rules, by contrast, do not require identification of a self-standing legal right in order to qualify for security for costs.

123. Under Article 38(1) of the SCC Rules, the key question is whether the Respondent has demonstrated "exceptional circumstances" justifying an order of security for costs, at least at this stage of the proceedings. On the basis of the evidence that is before it, the Tribunal does not accept that it has done so.

124. With respect to the factor in Article 38(2)(ii) – the Claimant's "ability to comply with an adverse costs award and the availability of assets for enforcement of an adverse costs award" – it does appear that the Claimant has limited *liquid* assets of its own. This presumably is why – by its own admission – it has relied on loans facilitated by its ultimate beneficial owner to fund its pursuit of this case. On the other hand, these loans have enabled the Claimant to pay all the advances requested by the SCC, including (as the Claimant stresses) some advances that properly should have been paid by the Respondent. It is not clear that the balance of the loans has been expended, or that no further loans will be forthcoming, from which the Claimant might have the ability to satisfy an adverse costs award.

125. More importantly, even if that were not the case, this would not mean that the Claimant has *no assets at all* from which an adverse costs award could be satisfied. The Claimant owns the shares of Avia Invest, and Avia Invest apparently owns various tangible assets

located at the Chisinau Airport, presumably those employed in its task of long-term operation of that airport. These assets by definition are located within the Republic of Moldova, and are likely to remain there. In these circumstances, it is difficult to conclude that the Respondent would have no recourse available to it, in the event that the Claimant failed voluntarily to comply with an adverse costs award at the conclusion of this case.

126. The Tribunal also notes that it is quite early in these proceedings, and as the case proceeds, it is likely that more information will become available about the Claimant's organizational structure, finances and funding. That information may shed more light about the ability of the Claimant to meet (or not meet) any reasonable adverse costs award, including whether there have been any suspicious transactions seemingly designed to denude the Claimant of liquid assets to render itself judgment-proof. Nothing prevents the Tribunal from revisiting the security for costs issue based on further information if and when it becomes available.

127. In these circumstances, the Tribunal is not yet satisfied that "exceptional circumstances" have been demonstrated, which would make it "appropriate in all the circumstances of the case" to order the Claimant to provide security for costs at this juncture of the case, within the terms of Articles 38(1) and 38(2)(iii).

128. The Tribunal therefore denies the Respondent's application for an order of security for costs, without prejudice of the possibility to reapply later on the basis of further information if it deems that to be warranted. With respect to the Respondent's additional request that the Claimant be ordered to "disclose its funding for the arbitration costs and expenses," this already has been accomplished through the Tribunal's questions to the Claimant. Finally, the Tribunal denies as premature the Respondent's request that the Claimant be ordered to disclose its "financial records, … balance sheet, [and] … financial reports filed with the fiscal (tax) authority in Cyprus for the last four years."[127] The procedural orders governing these proceedings set forth an appropriate stage for document requests by both Parties to each other, and piecemeal disclosure requests in advance of that stage are not appropriate. During the disclosure stage of these proceedings, the Respondent may present any document requests for consideration, justified appropriately by reference to the

[127] Application, ¶ 250, Reply, ¶ 251.

jurisdictional or merits issues to which it contends specific categories of documents are relevant and material. The Tribunal reserves judgment until that time.

V. "ALIENATION REQUEST"

129. Finally, in its Reply the Respondent introduced a further request related to the Claimant's alleged inability to pay an adverse cost decision (the "**Alienation Request**"). The Respondent asks the Tribunal to:

> order the Claimant not to alienate in any form or manner (whether through sale, pledge and/or mortgage, guarantee, compensation, assignment of claim, or similar) and/or not to enter in any similar transaction having the same or similar effects with the shares in Avia Invest, and/or not to carry out any action which would alter in any way the ownership, and/or financial interests of the Claimant with respect to their shares in Avia Invest without the Respondent's written affirmative agreement; order Avia Invest not to provide loans, guarantees, mortgages, pledges or similar to any company, entity, economic operator or business, including its subsidiaries, branches or representative offices, shareholders, and/or not to use its funds for any other purposes than for its ordinary business operations, and/or not to use under any circumstances its funds for other purposes, and/or not to transfer funds or assets of any kind outside of the Republic of Moldova or to any person, entity, economic operator, or business whether related or unrelated to it, to shareholders, without the Respondent's written affirmative agreement.[128]

130. In Tribunal Question 5, the Tribunal gave the Claimant the opportunity to comment on the Alienation Request orally at the Hearing, which it did.

A. THE RESPONDENT'S POSITION

131. The Reply did not develop the reasons for the Alienation Request, beyond the above-quoted language.

132. At the Hearing, the Respondent elaborated briefly, arguing that the Claimant's purported investment is not now, nor has it been historically, in "clean hands." The Respondent also said that Claimant is incentivized to disinvest itself from Avia Invest, given that the latter

[128] Reply, ¶¶ 245, 249.

is "overburdened" by spending, favorable loans given to other entities, and by tax arrears.[129]

B. THE CLAIMANT'S POSITION

133. The Claimant did not address the Alienation Request in its written submissions, as the Request was introduced by the Respondent only in the last submission before the Hearing. Instead, upon an invitation from the Tribunal in the Tribunal Questions, the Claimant addressed the request at the Hearing.

134. In the Claimant's view, the Alienation Request is brought in an improper manner, having been introduced in the Reply. The Claimant therefore argues that the Respondent should bring the Request afresh, "at costs risk."[130]

135. In any event, the Claimant argues, the Respondent's Alienation Request is "hopeless." There is no evidence of Claimant's intent to transfer its shares in Avia Invest, but the Claimant in any event questions why it would need the Respondent's written affirmative agreement to do so. The Claimant also disputes the Tribunal's jurisdiction to issue an order to that effect, even assuming that Avia Invest were party to the Arbitration, which it is not.[131]

136. In short, the Respondent has not met its burden of proof to establish the Tribunal's jurisdiction to grant the Alienation Request, nor demonstrated the purpose of the Request, the Claimant says.

C. THE TRIBUNAL'S ANALYSIS

137. The Tribunal considers this request to be wholly premature, and at this point unsupported by any sustained analysis or legal reasoning. The Tribunal denies the request, without prejudice to the Respondent's potential ability to reapply for relief upon a more considered showing. That said, the Tribunal does not encourage such a re-filing at this time, and

[129] Respondent's Speaking Notes, ¶¶ 82-84; Hearing Transcript pp. 85-86.
[130] Claimant's Speaking Notes, ¶¶ 59-62.
[131] Claimant's Speaking Notes, ¶ 62.

suggests the Parties instead focus their energies on the currently scheduled next steps in the arbitration.

VI. COSTS RELATED TO THE APPLICATION

138. Both Parties have requested costs related to the Application.

A. THE RESPONDENT'S POSITION

139. The Respondent requests that:

> [...] the Arbitral Tribunal order the Claimant to pay the fees and expenses of the SCC and [the Second Emergency Arbitrator] related to [the Second Emergency Award], all costs and expenses incurred by the Republic of Moldova in connection with this Application, with interest, payable forthwith.[132]

B. THE CLAIMANT'S POSITION

140. The Claimant argues that the Application is "woefully" premature, and seeks compensation for its costs associated with having to address the arguments made in the Application at this stage.[133]

C. THE TRIBUNAL'S ANALYSIS

141. The Tribunal acknowledges but denies the Respondent's first request, that it "order the Claimant to pay the fees and expenses of the SCC and [the Second Emergency Arbitrator] related to [the Second Emergency Decision]."[134] It may be recalled that the Second Emergency Decision ordered the Parties "to equally split the costs of these emergency arbitration proceedings," and "to bear their own legal costs."[135] That was hardly an irrational ruling. In any event, the Second Emergency Arbitration is completed, and the Tribunal sees no basis – even if had the jurisdiction – to revisit and overrule the costs orders entered in that proceeding.

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[132] Application, ¶ 261.
[133] Response, ¶ 3.
[134] Application, ¶ 261.
[135] Second Emergency Decision, ¶¶ 130.7-130.8.

142. With respect to the present proceedings, the Tribunal denies both Parties' requests for an order at this juncture allocating the costs associated with the Application, the Response, and the Hearing on the Tribunal Questions. The Tribunal defers all consideration of costs for a later stage of these proceedings, to be examined holistically in light of the further circumstances and decisions that may develop in the case.

VII. ORDER

143. Having duly considered the Parties' views and all relevant factors, the Tribunal:

a) GRANTS the Respondent's request to revoke the interim measures ordered by the Second Emergency Arbitrator, specifically in paragraphs 130.3, 130.4 and 130.5 of the Second Emergency Decision;

b) DENIES the Respondent's application for security for costs and associated additional disclosure at this juncture of the proceedings;

c) DENIES the Respondent's "Alienation Request"; and

d) DENIES the Parties' respective applications for cost orders at this juncture of the proceedings.

Seat of Arbitration: Stockholm, Sweden

Jean E. Kalicki

Ms. Jean Kalicki
(Chair)

On behalf of the Tribunal