Excerpts

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
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CERTIFICATE

NOVA GROUP INVESTMENTS, B.V.

v.

ROMANIA

(ICSID CASE NO. ARB/16/19)

I hereby certify that the attached document is a true copy of the Tribunal's Award dated June 13, 2024.

[redacted]

Meg Kinnear
Secretary-General

Washington, D.C., June 13, 2024

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

NOVA GROUP INVESTMENTS, B.V.

Claimant

and

ROMANIA

Respondent

ICSID Case No. ARB/16/19

AWARD

Members of the Tribunal
Ms. Jean Kalicki, President of the Tribunal
Prof. Thomas Clay, Arbitrator
Mr. Klaus Reichert SC, Arbitrator

Secretary of the Tribunal
Ms. Anna Holloway

Assistant to the Tribunal
Ms. Lindsay Gastrell

Date of dispatch to the Parties: 13 June 2024

REPRESENTATION OF THE PARTIES

Representing Nova Group Investments, B.V.:

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Mr. Robert Purves
Ms. Kate Holderness
Mr. Scott Ralston
Mr. Georges Chalfoun
Dr. Cameron Miles
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and
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and
Lord Goldsmith KC
Mr. Patrick S. Taylor
Mr. Mark McCloskey
Ms. Diana Moise
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Representing Romania:

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Ms. Nada Sader
Ms. Sophia von Dewall
Mr. Emmanuel Foy
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021 393 Bucharest, Sector 2
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TABLE OF CONTENTS

TABLE OF ABBREVIATIONS/DEFINED TERMS

[redacted]	[redacted]
[redacted]	[redacted]
Achmea Judgment	*Slowakische Republik v. Achmea BV,* CJEU Case C-284/16
[redacted]	[redacted]
Application for Provisional Measures	Application for Provisional Measures filed with the Claimant's Request for Arbitration of 21 June 2016
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
BIT or Treaty	Agreement on Encouragement and Reciprocal Protection of Investments Between the Government of the Kingdom of the Netherlands and the Government of Romania, entered into force on 1 February 1995
[redacted]	[redacted]
C-[#]	Claimant's Exhibit
[redacted]	[redacted]
CEPRP	Chamber of Deputies of the Romanian Parliament
CJEU	Court of Justice of the European Union

CL-[#]	Claimant's Legal Authority
Claimant's Rejoinder	Claimant's Rejoinder on Jurisdiction dated 11 November 2020
[redacted]	[redacted]
Commission	European Commission
Counter-Memorial	Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction dated 10 February 2018
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
Decision on Romania's EU Law Objection	Tribunal's Decision of 21 January 2021 on Romania's Objection to the Tribunal's Jurisdiction Based on EU Law and the *Achmea* Judgment (Annex B to this Award)
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
ECHR	European Court of Human Rights
EIOPA	European Insurance and Occupational Pensions Authority
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
FET	fair and equitable treatment
FPS	Full Protection and Security
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
ICJ	International Court of Justice

ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March1965
ICSID	International Centre for Settlement of Investment Disputes
IFC	International Finance Corporation
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
Law 503/2004	Law No. 503/2004 on the financial recovery and bankruptcy of insurance undertakings
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
Memorial	Claimant's Memorial on the Merits dated 21 July 2017
MFN	Most Favored Nation
NCSC	National Council for Solving Complaints
[redacted]	[redacted]
[redacted]	[redacted]
PCC	Communist Party of China
[redacted]	[redacted]
PO7	Tribunal's Decision of 29 March 2017 on Nova's Application for Provisional Measures (Annex A to the Award)
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

R-[#]	Respondent's Exhibit
Rejoinder	Respondent's Rejoinder on the Merits and Reply on Jurisdiction dated 16 July 2020
Reply	Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction dated 11 October 2019
Request for Bifurcation	Respondent's Request to Address the Objections to Jurisdiction as a Preliminary Question, dated 19 December 2016
RL-[#]	Respondent's Legal Authority
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
Tr. Day [#] [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 17 November 2016, and composed of Jean Engelmayer Kalicki (President), Klaus Reichert, and Thomas Clay
[redacted]	[redacted]
[redacted]	[redacted]
VCLT	Vienna Convention on the Law of Treaties
[redacted]	[redacted]
[redacted]	[redacted]

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**") on the basis of the Agreement on Encouragement and Reciprocal Protection of Investments Between the Government of the Kingdom of the Netherlands and the Government of Romania, which entered into force on 1 February 1995 (the "**BIT**" or "**Treaty**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 and which became binding on Romania on 12 October 1975 and on the Netherlands on 14 October 1966 (the "**ICSID Convention**").

2. The claimant is Nova Group Investments, B.V. ("**Nova**" or the "**Claimant**"), a company established under the laws of the Netherlands.

3. The respondent is Romania (the "**Respondent**" or "**Romania**").

4. Nova and Romania are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i).

5. This dispute relates to the treatment by various Romanian governmental agencies, beginning in 2013, of Nova, which owns or has interests in a number of businesses in Romania.

II. PROCEDURAL HISTORY

6. On 21 June 2016, ICSID received Nova's Request for Arbitration of the same date. Together with the Request for Arbitration, Nova filed an Application for Provisional Measures.

7. On 5 July 2016, the Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.[1] The Secretary-General also took note of the Application for Provisional Measures and established time limits for the Parties to present their observations so that the Application could be considered promptly upon the

[1] All references to ICSID Rules and Regulations in this Award are references to the 2006 Rules and Regulations unless otherwise stipulated.

constitution of the tribunal. The briefing schedule was subsequently amended a number of times at the request of a Party.

8. On 6 September 2016, upon Nova's request, and in the absence of agreement between the Parties, ICSID confirmed that the Tribunal would be constituted pursuant to the formula provided by Article 37(2)(b) of the ICSID Convention.

9. Pursuant to Article 37(2)(b), on 6 September 2016, Nova appointed Mr. Klaus Reichert, a national of the Federal Republic of Germany and Ireland, as arbitrator. On 30 September 2016, Romania appointed Professor Thomas Clay, a national of the French Republic, as arbitrator. Each arbitrator accepted his appointment and provided a signed declaration pursuant to Rule 6(2) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**").

10. By letter of 4 October 2016, Nova requested that the Chairman of the ICSID Administrative Council appoint the President of the Tribunal in accordance with Article 38 of the ICSID Convention and ICSID Arbitration Rule 4.

11. On 14 October 2016, Romania filed its observations on Nova's Application for Provisional Measures. On 8 November 2016, Nova filed a response to Romania's observations together with the first witness statements of [redacted] and [redacted]. Nova's response included certain revisions to the relief requested.

12. After ICSID conducted a ballot procedure that yielded no agreement, the Chairman of the ICSID Administrative Council appointed Jean Engelmayer Kalicki, a national of the United States of America, as the President of the Tribunal pursuant to Article 38 of the ICSID Convention. Ms. Kalicki accepted her appointment and provided a signed declaration pursuant to ICSID Arbitration Rule 6(2).

13. On 17 November 2016, in accordance with ICSID Arbitration Rule 6(1), the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Lindsay Gastrell, then ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

14. The case file, including all prior communications between the Parties and ICSID, as well as all prior communications between the Parties that were copied to ICSID, was thereafter provided to the Tribunal.

15. On 21 November 2016, the Tribunal proposed that the first session be held by teleconference on either 20 or 21 December 2016, and that the Parties reserve 11 and 12 January 2017 for a potential hearing on the Application for Provisional Measures in Paris, France. The Tribunal noted that the proposal of Paris was for convenience only and without prejudice to the determination of venue for any future hearings. The Tribunal invited the Parties' views on these proposed dates.

16. On 28 November 2016, Nova confirmed its availability for the first session teleconference and a hearing on the Application on the proposed dates. However, Nova requested "that Romania be invited to agree that the Provisional Measures hearing should take place in London."

17. .

18. By letter of 1 December 2016, Romania objected to holding the hearing in London, arguing that this venue would be unduly burdensome, in part because of visa requirements for certain of its representatives. .

19.

20. In response, by letter of 2 December 2016, Nova made further submissions in support of its request to hold the hearing in London and argued that Romania was not entitled to the requested disclosure at this stage of the proceeding.

21. On 12 December 2016, Romania filed its rejoinder on Nova's Application for Provisional Measures.

22. [redacted].

23. Following a series of exchanges regarding the date of the hearing on provisional measures, the Tribunal confirmed that the hearing would be held on 2-3 March 2017, the first mutually available date in light of counsel's scheduling constraints.

24. On 19 December 2016, Romania filed a request that the Tribunal address its jurisdictional objections in a preliminary phase of the proceeding (the "**Request for Bifurcation**"). Romania requested the Tribunal address three preliminary jurisdictional objections in a separate phase prior to considering the merits of the case.

25. Also on 19 December 2016, Romania restated its disclosure request of 1 December 2016 and asked the Tribunal to order disclosure immediately, before the first session scheduled on 21 December 2016. In response, the Tribunal informed the Parties that they would be invited to address Romania's request during the first session, following which the Tribunal would rule promptly.

26. [redacted].

27. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties by teleconference on 21 December 2016. In addition to procedural matters and the procedural calendar, the Parties were invited to address matters relating to the Application for Provisional

Measures and Romania's disclosure request. The first session teleconference was recorded, and the audio recording was made available to the Tribunal and the Parties following the teleconference.

28. Following the first session, on 23 December 2016, the Tribunal issued Procedural Order No. 1 ("**PO1**"), embodying the agreements of the Parties and the decisions of the Tribunal on the procedure to govern the arbitration. PO1 provided, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Washington, D.C. PO1 also set out a procedural schedule for the proceeding.

29. On 26 December 2016, the Tribunal issued Procedural Order No. 2 ("**PO2**") which addressed Romania's request for disclosure. [redacted].

30. [redacted].

31. Also on 29 December 2016, Romania submitted a letter asserting that in PO2, the Tribunal failed to address one of the three grounds Romania had raised in support of its request for disclosure, namely that the requested documents were relevant and material for the purpose of assessing potential conflicts of interests. [redacted]

[redacted].

32. [redacted].

33. [redacted].

34. [redacted].

35. Also on 13 January 2017, Nova filed its Objection to the Respondent's Request for Bifurcation.

36. On 16 January 2017, the Tribunal issued Procedural Order No. 4 ("**PO4**") addressing two outstanding procedural issues: [redacted]

[redacted]

37. The Tribunal also denied Romania's request for further disclosure, noting that the additional documents Nova had disclosed on 13 January 2016 "provide sufficient supplementary factual information to address the underlying rationales of Procedural Order Nos. 2 and 3."

38. The Parties were instructed to file within ten days a supplemental submission regarding the relevance or lack of relevance to the Application for Provisional Measures of the information contained in the documents Nova had produced on 9 and 13 January 2017. Each Party filed its submission on 26 January 2017.

39. [redacted]."

40. Also on 25 January 2017, in accordance with the procedural timetable as revised by the Parties' agreement of 21 January 2017, Romania filed its Reply to the Objection to the Request for Bifurcation.

41. On 6 February 2017, Nova filed its Rejoinder on the Request for Bifurcation.

42. [redacted].

43. On 15 February 2017, the Parties submitted their comments on the draft procedural order addressing the organization of the hearing on provisional measures.

44. On 16 February 2017, the Tribunal held a pre-hearing organizational meeting by teleconference with the Parties. On the following day, the Tribunal issued Procedural Order No. 5, recording the Parties' agreements and the Tribunal's decisions on the organization of the hearing on provisional measures.

45. [redacted].

46. On 2 to 3 March 2017, the Tribunal held the hearing on provisional measures in London.

47. On 6 March 2017, Romania filed an Application for Security for Costs.

48. By letter of 13 March 2017, the Tribunal advised the Parties of its decision to deny Romania's Request for Bifurcation. The Tribunal explained that, in the interest of procedural efficiency, it had decided to convey the result of its deliberations to the Parties with a full explanation of reasons to follow. On 20 March 2017, Romania wrote to reserve its rights with respect to this procedure.

49. On 27 March 2017, in accordance with the schedule agreed between the Parties and the Tribunal, Nova filed observations on Romania's Application for Security for Costs.

50. On 29 March 2017, the Tribunal issued Procedural Order No. 6 ("**PO6**") concerning Romania's Request for Bifurcation and Procedural Order No. 7 ("**PO7**") concerning Nova's Application for Provisional Measures.

51. In PO6, the Tribunal provided its full reasoning for denying Romania's Request for Bifurcation. Among other things, the Tribunal considered, in light of certain unusual features of this case, that an "elongated schedule [would] impose [] significant burden and risks, both for the Parties and for the orderly conduct of these proceedings."

52. In PO7, the Tribunal granted the Application for Provisional Measures in part. The complete text of PO7 is set forth in **Annex A** to this Award. [redacted]

[redacted]

[redacted]

53. [redacted].[2]

54. On 10 April 2017, Romania filed a request for reconsideration of PO7. After giving Nova an opportunity to comment, on 18 April 2017 the Tribunal issued Procedural Order No. 8 denying Romania's request. The Tribunal observed that Romania had not identified any change in circumstances or material issue that the Tribunal had failed to address warranting reconsideration.

55. [redacted]"

56. On 26 April 2017, the Tribunal issued Procedural Order No. 9 denying Romania's Application for Security for Costs.

[2] The Tribunal explained, *inter alia*, that "in its view, ICSID tribunals should recommend only the *minimum steps necessary* to meet the objectives set out in the Convention," and that its focus in PO7 was "on the right of the Parties to present their respective positions to the Tribunal, and on the Tribunal's own ability to fashion meaningful relief." PO7, ¶ 365. [redacted] PO7, ¶¶ 301, 307.

57. On 21 July 2017, Nova filed its Memorial on the Merits ("**Memorial**"), [redacted]

58. On 1 September 2017, Nova submitted a corrected version of the Memorial together with updated translations and Romanian-language originals of various documents.

59. [redacted] In Procedural Order No. 10 of 15 November 2017 ("**PO10**"), [redacted]

60. On 9 February 2018, Romania filed its Counter-Memorial on the Merits and Memorial on Jurisdiction ("**Counter-Memorial**"), together with the Expert Report of [redacted].

61. On 21 March 2018, Romania submitted the judgment of the Court of Justice of the European Union ("**CJEU**") in Case C-284/16 *Slowakische Republik v. Achmea BV* (the "***Achmea* Judgment**"), which had been issued on 6 March 2018. Romania requested that the Tribunal reconsider its bifurcation decision in PO6 and "order a bifurcation of the proceedings on the specific consequences of the [*Achmea* Judgment] for purposes of jurisdiction." In its response of 10 April

2018, Nova objected to this request. The Tribunal addressed the issue in Procedural Order No. 11 of 20 April 2018, granting Romania's request in part. Specifically, the Tribunal ordered that accelerated briefing of the consequences of the *Achmea* Judgment would proceed in parallel with the main briefing schedule.

62. On 11 April 2018, the Parties submitted their contested document requests to the Tribunal for resolution. The Tribunal issued its decision on the contested requests in Procedural Order No. 12 of 30 April 2018 ("**PO12**").

63. [redacted].

64. In light of these developments, on 25 April 2018, Nova requested that the Tribunal stay the arbitration until Romania complied with the PO7 Recommendation (the "**Stay Application**").

65. On 3 May 2018, Romania submitted (a) its objections to the Stay Application and (b) a second request for reconsideration of PO7. On the same date, Nova requested reconsideration of PO12 with respect to two of Nova's document requests.

66. On 27 May 2018, the Tribunal issued Procedural Order No. 13 ("**PO13**"), which addressed Nova's Stay Application and Romania's request for reconsideration. [redacted]

67. [redacted]

[redacted].

68. Romania subsequently filed another request to resume the proceedings, which the Tribunal denied in Procedural Order No. 15 of 19 November 2018 ("**PO15**"). On 10 December 2018, Romania reserved its rights in relation to PO15 and stated that it would no longer pay its share of the costs of the arbitration.

69. In the meantime, on 14 November 2018, the European Commission (the "**Commission**") had filed an Application for Leave to Intervene as a Non-Disputing Party pursuant to ICSID Arbitration Rule 37(2) (the "**Commission's Application**"). Each Party submitted its observations on the Commission's Application on 30 November 2018. Nova opposed the Commission's Application, while Romania supported it.

70. On 9 January 2019, the Tribunal issued Procedural Order No. 16 ("**PO16**") granting the Commission's Application, with the scope of the written submission limited to the legal consequences of the *Achmea* Judgment. By letter of the same date, the Tribunal informed the Commission that its Application was granted, but noted that as the procedural calendar was temporarily adjourned, the deadline for the submission would be set after the proceedings resumed.

71. [redacted].

72. After hearing the Parties' views on the revised procedural schedule, on 27 March 2019, the Tribunal issued Procedural Order No. 17 lifting the temporary adjournment and setting a new procedural schedule. By letter of the same date, the Tribunal informed the Commission that the temporary adjournment had ended and invited the Commission to file its written submission on the legal consequences of the *Achmea* Judgment within 14 days.

73. With the adjournment lifted, the Tribunal returned to Nova's 2 May 2018 request for reconsideration of the Tribunal's decision on certain document requests in PO12. In Procedural Order No. 18 of 4 April 2019, the Tribunal granted Nova's request in part.

74. On 10 April 2019, the European Commission filed its submission, and on 31 May 2019, each Party filed its observations on the submission.

75. As the procedure moved forward, an advance payment requested by ICSID on 25 March 2019 remained outstanding. ICSID received Nova's payment of its portion of the advance on 23 April 2019 but did not receive payment from Romania. In accordance with ICSID Administrative and Financial Regulation 14(3)(d), on 2 May 2019, ICSID informed the Parties of the default and gave either Party the opportunity to make the required payment within 15 days. That period elapsed without payment from either Party. After further consultations with the Parties, on 6 June 2019, the Secretary-General moved the Tribunal to stay the proceedings for non-payment pursuant to ICSID Administrative and Financial Regulation 14(3)(d). Before acting on the Secretary-General's motion, the Tribunal gave the Parties several opportunities to commit to making the outstanding payment. However, neither Party indicated any willingness to remedy the situation. Therefore, on 21 June 2019, the Tribunal issued Procedural Order No. 19 ("**PO19**"), which stayed the proceeding for non-payment pursuant to Administrative and Financial Regulation 14(3)(d).

76. On 1 July 2019, Romania submitted an application requesting the Tribunal to direct Nova to pay the outstanding advance on costs by 15 July 2019, so that it could submit its Reply by the scheduled deadline. On 3 July 2019, Nova submitted its own application, requesting that the deadline for its Reply be extended from 7 August to 9 October 2019. After further exchanges on these matters, the Tribunal issued Procedural Order No. 20 on 19 July 2019, denying both Parties' applications. The Tribunal stated that the proceedings remained stayed pursuant to PO19, with appropriate next steps to be determined upon lifting of the stay.

77. On 4 October 2019, Nova informed the Tribunal that it had paid the outstanding advance, and on 9 October 2019, ICSID received the payment. Therefore, the Tribunal informed the Parties that the proceeding was no longer stayed pursuant to ICSID Administrative and Financial Regulation 14(3)(d) and invited the Parties to confer regarding a revised schedule for the next procedural steps.

78. On 11 October 2019, Nova filed its Reply on the Merits and Counter-Memorial on Jurisdiction ("**Reply**") [redacted].

79. After receiving the Parties' proposals on the procedural calendar, on 25 October 2019, the Tribunal issued Procedural Order No. 21 setting forth the revised procedural calendar.

80. In accordance with the revised calendar, on 4 December 2019, the Parties filed their second simultaneous submissions on the *Achmea* Judgment questions and observations on the Commission's submission.

81. On 25 January 2020, with the Parties' consent, Dr. Joel Dahlquist was appointed to serve as Assistant to the Tribunal.

82. On 16 April 2020, the Secretary-General of ICSID informed the Parties and the Tribunal that Ms. Anna Holloway, ICSID Legal Counsel, had been assigned to serve as Secretary of the Tribunal, replacing Ms. Gastrell. The Tribunal subsequently proposed that Ms. Gastrell, who had joined the chambers of the President of the Tribunal, be appointed as the principal Assistant to the Tribunal. The Parties confirmed they had no objection to this arrangement, and Ms. Gastrell was appointed on 27 April 2020.

83. On 1 June 2022, the Tribunal issued Procedural Order No. 22, setting out certain revisions to the procedural calendar.

84. On 16 July 2020, Romania filed its Rejoinder on the Merits and Reply on Jurisdiction ("**Rejoinder**"), together with the Expert Report of [redacted] and the Second Expert Report of [redacted].

85. On 29 July 2020, the Tribunal wrote to the Parties regarding the modalities and venue of the hearing in light of the COVID-19 pandemic, stating as follows:

> The Tribunal is hopeful that that it will be possible to hold a full in-person hearing, preferably in London, during the reserved period and has asked the ICSID Secretariat to make the necessary reservations and arrangements on that basis. However, the Tribunal will continue to monitor whether that is achievable consistent with the need to preserve the health and safety of the participants and to accommodate any restrictions on movement which may be imposed from time to time. The Tribunal will revisit this question with the Parties no later than in November 2020.

86. The Tribunal followed up with the Parties on 1 October 2020, inviting them to provide any further comments they may have on the modalities for the hearing, in light of current COVID-19 conditions

and associated restrictions in the various jurisdictions by 12 October 2020. Nova and Romania submitted their comments on 12 and 18 October 2020, respectively.

87. [redacted].

88. On 6 November 2020, the Tribunal issued Procedural Order No. 23, ruling that the hearing scheduled for 3-12 February 2021 would take place remotely by video conference.

89. After further revisions to the procedural calendar, on 11 November 2020, Nova filed its Rejoinder on Jurisdiction, [redacted].

90. [redacted].

91. [redacted]."

92. On 24 November 2020, the Tribunal issued Procedural Order No. 24 ("**PO24**"), [redacted]

[redacted].

93. On 25 November 2020, the Tribunal held a pre-hearing organizational meeting with the Parties by videoconference to discuss procedural, administrative, and logistical matters in preparation for the hearing. [redacted].

94. Following the pre-hearing organizational meeting, on 30 November 2020, the Tribunal issued Procedural Order No. 25 ("**PO25**") addressing the conduct of the hearing. [redacted].

95. [redacted].

96. On the same day, the Tribunal issued Procedural Order No. 26, [redacted].

[3] PO24, ¶¶ 21-22.

97. [redacted].

98. [redacted]."

99. [redacted].

100. [redacted]"

101. In view of this development, on 2 January 2021, the Tribunal issued Procedural Order No. 27 setting forth a notional hearing agenda and schedule and ruling that [redacted] examination would take place during the scheduled hearing.

102. On 21 January 2021, the Tribunal issued its Decision on Romania's Objection to the Tribunal's Jurisdiction Based on EU Law and the *Achmea* Judgment (the "**Decision on Romania's EU Law Objection**"), denying Romania's objection. The complete text of this Decision is set forth in **Annex B** to this Award.

103. [redacted]

[redacted].

104. On 31 January 2021, Romania notified the Tribunal and Nova that a member of its counsel team who was bearing significant responsibilities in preparation for the hearing was sick and had been hospitalized. Romania requested that the start of the hearing be postponed until Monday, 8 February 2021 and proceed in that week only. Nova opposed this request.

105. On 1 February 2021, the Tribunal issued Procedural Order No. 29 granting Romania's request that the start of the hearing be postponed to 8 February 2021. [redacted]

106. Following correspondence from the Parties, the Tribunal held a case management conference with the Parties by video conference on 4 February 2021 to discuss the hearing schedule and related matters.

107. On 5 February 2021, the Tribunal issued Procedural Order No. 30 addressing the revised hearing schedule. The Tribunal directed that the hearing would proceed in three parts. First, on Days 1-5 (8-12 February 2021), the Parties would deliver Opening Statements, followed by the examination of fact witnesses and non-quantum experts. Second, Days 6-7 (12-13 April 2021) would be dedicated to Opening Statements on Quantum and the examination of the quantum experts. Finally, the Parties would deliver Closing Statements on Day 8 (1 May 2021).

108. The first part of the hearing was held from 8 to 12 February 2021 by video conference, with the following persons attending:

Tribunal:	
Ms. Jean Kalicki	President of the Tribunal
Prof. Thomas Clay	Arbitrator
Mr. Klaus Reichert SC	Arbitrator
ICSID Secretariat:	
Ms. Anna Holloway	Secretary of the Tribunal
Ms. Ekaterina Minina	ICSID Paralegal

Assistant to the Tribunal:

Ms. Lindsay Gastrell	Assistant to the Tribunal

For Nova:

Mr. Christopher Harris QC	3 Verulam Buildings
Ms. Kate Holderness	3 Verulam Buildings
Mr. Georges Chalfoun	3 Verulam Buildings
Mr. Cameron Miles	3 Verulam Buildings
Mr. William Day	3 Verulam Buildings
Ms. Anca Bunda	3 Verulam Buildings
Mr. Mark Friedman	Debevoise & Plimpton LLP
Mr. Patrick Taylor	Debevoise & Plimpton LLP
Mr. Mark McCloskey	Debevoise & Plimpton LLP
Mr. Andrew Burnett	Debevoise & Plimpton LLP
Ms. Áine Fitzpatrick	Debevoise & Plimpton LLP
[redacted]	Dentons Romania
[redacted]	Dentons Romania
[redacted]	Houthoff
[redacted]	Houthoff
[redacted]	Houthoff
[redacted]	[redacted]

For Romania:

Dr. Hamid G. Gharavi	Derains & Gharavi
Ms. Nada Sader	Derains & Gharavi
Ms. Sophia von Dewall	Derains & Gharavi
Mr. Emmanuel Foy	Derains & Gharavi
Ms. Elena Mitu	Derains & Gharavi
Mr. Valentin Trofin	Trofin & Associates
Mr. Alexander Popa	Trofin & Associates
Ms. Livia Draghici	Trofin & Associates
Prof. Ziya Akinci	Akinci Law Office
Ms. Fatma Güney	Akinci Law Office
Mr. Orhan Akinci	Akinci Law Office
Ms. Lucia Scripcari	Akinci Law Office
Mr. Vladislav Rodionov	Derains & Gharavi
Mr. Mohit Mahla	Derains & Gharavi
Ms. Marjorie Berlamont	Derains & Gharavi
[redacted]	[redacted]

[redacted]	[redacted]
Court Reporter:	
Ms. Margie Dauster	B&B Reporters
Technical Support Staff:	
Mr. Matt Simmons	FTI
Mr. Scott Duval	FTI
Mr. Jamey Johnson	FTI

109. During the hearing, the following persons were examined:

On behalf of Nova:	
[redacted]	[redacted]
On behalf of Romania:	
[redacted]	[redacted]

110. Following conclusion of the first part of the hearing, on 20 February 2021, the Tribunal issued Procedural Order No. 31, setting forth a notional agenda for the second and third parts of the hearing.

111. The second part of the hearing was held from 12 to 13 April 2021, and the third part was held on 1 May 2021. The participants in the second and third parts of the hearing were as set forth in para. 108, with a few exceptions (namely, for the Claimant, Ms. Emma Habanananda from Debevoise & Plimpton LLP attended instead of Mr. Andrew Burnett, and [redacted] did not attend the third part, and for the Respondent, [redacted] attended).

112. On 11 May 2021, ICSID acknowledged its receipt of Nova's share of the advance of funds requested on 6 April 2021, notified the Parties that it had not received payment of Romania's share of the advance, and invited either party to pay this outstanding amount by 26 May 2021. In response, by letter of 21 May 2021, Nova stated that if Romania refused to advance its share, Nova would make up the shortfall, but that it "should be awarded interest on the advances reflecting its cost of funds from the time paid to the time repaid, to prevent Romania (in effect) from illegitimately extracting an interest free loan from the Claimant during the proceedings and pending

the Award." Nova asked the Tribunal to "make an appropriate sanction to mark Romania's conduct when it comes to deciding issues of costs in due course."

113. At the Tribunal's invitation, Romania responded to Nova's letter on 27 May 2021. It confirmed that it would not be making the payment requested and characterized Nova's request for interest on the advances it had paid on Romania's behalf as a "belated and time-lapsed request." Romania argued that the request must be dismissed as untimely, and that, in any event, the request was unsupported by any authority.

114. By letter of 2 June 2021, the Tribunal took note of Romania's confirmation that it did not intend to pay its share of the latest advance requested, and therefore reiterated the invitation to Nova to advance that share, in accordance with the Secretariat's letter of 11 May 2021 and ICSID Administrative and Financial Regulation 14(3)(d). The Tribunal noted that it would "take under advisement the Parties' expressed positions as regards the consequences (if any) of these developments." ICSID received Nova's payment of Romania's share on 14 June 2021.

115. The Parties filed their simultaneous submissions on costs on 23 July 2021, and their simultaneous responsive costs submissions on 30 July 2021.

116. The Tribunal sent updates to the Parties regarding the status of the Award on 13 July 2022, 9 March 2023, 13 September 2023, and 17 January 2024. The Tribunal also responded on 14 February 2024 to a 12 February 2024 letter from Nova regarding the status of the Award, and responded on 21 February, 1 March, 13 March and 14 March 2024 to correspondence by Romania of 19 February, 1 March, 12 March and 14 March 2024, requesting, *inter alia*, that the Tribunal provide certain additional disclosures. Nova submitted correspondence on 18 March 2024 with respect to Romania's repeated correspondence on this issue.

117. While the Tribunal's work was in progress, ICSID issued two additional calls for funds, on 6 April 2023 and 17 January 2024, respectively. With respect to the first of these (made on 6 April 2023), on 17 May 2024, ICSID acknowledged its receipt of Nova's share of the advance of funds, notified the Parties that it had not received payment of Romania's share of the advance, and invited either party to pay this outstanding amount. On 1 June 2023, ICSID acknowledged Nova's payment of Romania's share. With respect to the subsequent call for funds (made on 17 January 2024), on 7 March 2024, ICSID acknowledged its receipt of Nova's share of the advance, and again notified the Parties that it had not received payment of Romania's share of the advance, inviting either party

to pay this outstanding amount. On 2 April 2024, ICSID acknowledged Nova's payment of Romania's share.

118. The Tribunal closed the proceedings on 5 April 2024.

III. THE PARTIES' REQUESTS FOR RELIEF

A. NOVA'S REQUEST FOR RELIEF

119. Nova requests that the Tribunal render an award:

> (1) DECLARING that it has jurisdiction over the present dispute under the ICSID Convention and the BIT and rejecting Romania's preliminary objections in this regard;
>
> (2) DECLARING that Nova's claims are admissible;
>
> (3) DECLARING that Romania has breached its obligations under the ICSID Convention, the BIT and/or international law by:
>
> > (a) Treating Nova's investments in Romania unfairly and inequitably contrary to Romania's obligations under Article 3(1) of the BIT;
> >
> > (b) Impairing Nova's operation, management, use, enjoyment or disposal of its investments in Romania by unreasonable and/or discriminatory measures contrary to Romania's obligations under Article 3(1) of the BIT;
> >
> > (c) Failing to afford Nova's investments in Romania full protection and security, as guaranteed by Article 2(2) of the UK–Romania BIT, applicable pursuant to the Most Favoured Nation clause of Article 3(2) of the BIT;
> >
> > (d) Illegally expropriating Nova's investments in Romania contrary to Romania's obligations under Article 5 of the BIT;
> >
> > (e) Failing to arbitrate in good faith pursuant to Article 8 of the BIT;
> >
> > (f) Failing to comply with the Tribunal's binding orders for provisional measures, as set out in Procedural Order No 7 of 29 March 2017; and
> >
> > (g) Failing to comply with its obligation not to aggravate or otherwise extend the dispute.

(4) ORDERING Romania to provide reparation for its internationally wrongful acts in respect of Nova's investments and this arbitration by way of:

> (a) Compensation in respect of [redacted] calculated in accordance with the following formula: [redacted] plus pre-award interest on these principal amounts calculated at a rate of LIBOR + 4%;
>
> (b) Compensation for costs incurred by Nova due to Romania's failure to comply with the Tribunal's Procedural Order No 7; and
>
> (c) Compensation through moral damages in the amount of [redacted]

(5) ORDERING Romania to pay all the costs of this arbitration, as well as Nova's professional fees and expenses, on an indemnity basis in an amount to be determined;

(6) ORDERING Romania to pay interest at a commercial, annually compounding rate on the above amounts from the date of the award until such time as it is paid in full;

and

(7) ORDERING any such further or additional relief as the Tribunal sees fit.[4]

B. ROMANIA'S REQUEST FOR RELIEF

120. Romania requests that the Tribunal:

> 1. FIND that it does not have jurisdiction over Claimant's claims;
>
> 2. DISMISS Claimant's claims in their entirety;
>
> 3. ORDER Claimant to pay all of the costs and expenses of these arbitration proceedings, including, without limitation: (i) the fees and expenses of the members of the Tribunal; (ii) ICSID's administrative fees and expenses as determined by ICSID; (iii) the fees and expenses of Respondent's legal representation (including attorney fees and disbursements); and (iv) the fees and expenses of the experts appointed by Respondent; including interest on those costs, from the date of award until the date of payment, at a rate to be determined by the Tribunal; and

[4] Reply, ¶ 1006; Claimant's Rejoinder, ¶ 266.

4. ORDER such other and further relief as the Tribunal may deem appropriate in the circumstances.[5]

IV. FACTS

121. The Tribunal sets out below a summary of the background facts that are most relevant to the questions at issue in this arbitration, either as undisputed or as pleaded by the Parties, without prejudice to any legal conclusions by the Tribunal, which are addressed later in this Award. This summary is not an exhaustive statement of the facts considered by the Tribunal, and the absence of reference to specific facts, assertions or evidence is not an indication that the Tribunal did not consider those matters. The Tribunal has carefully considered all evidence and arguments submitted in these proceedings.

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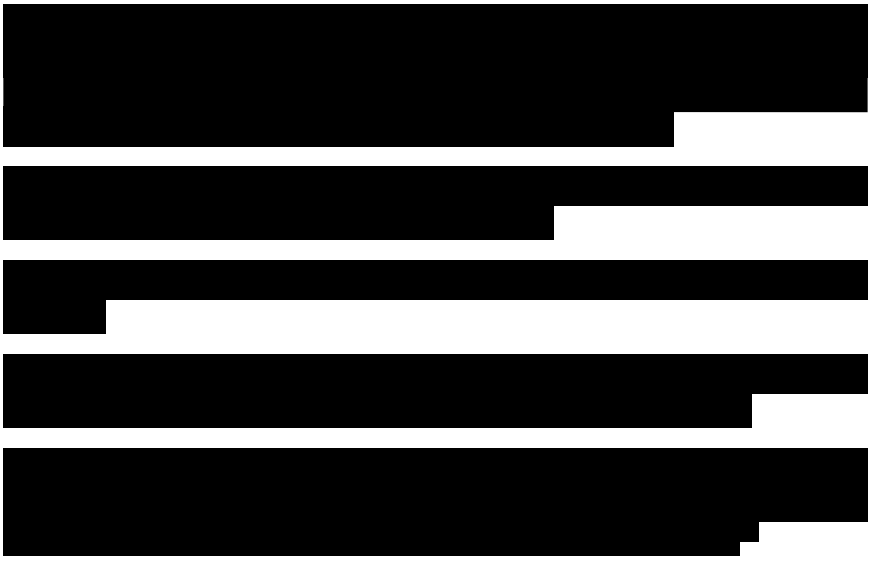

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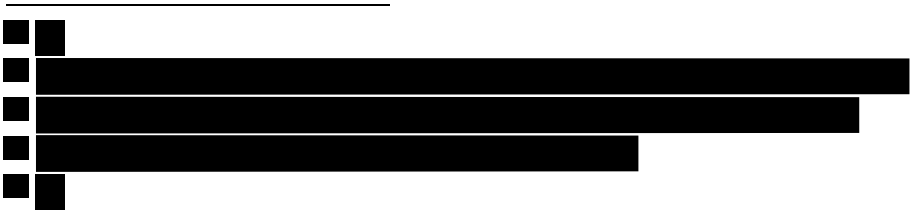

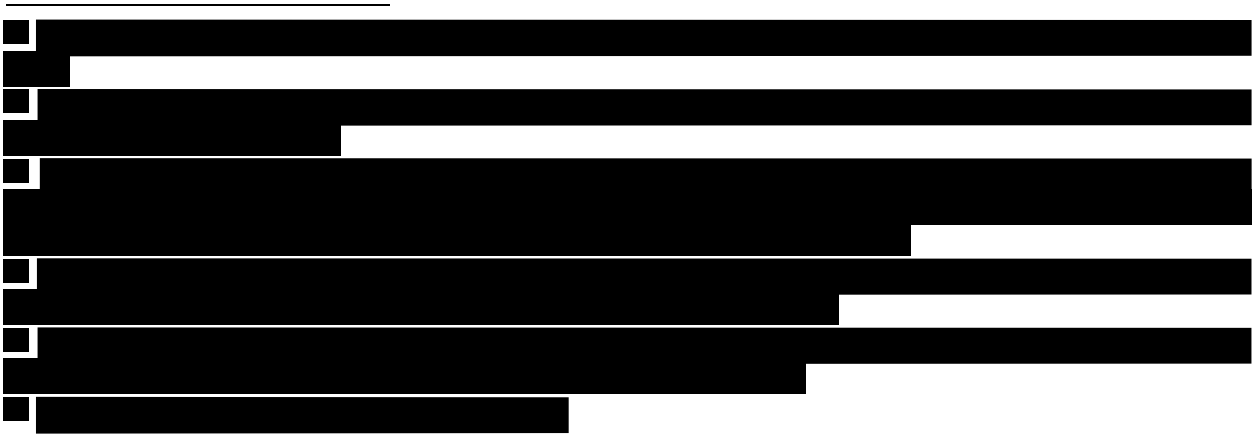

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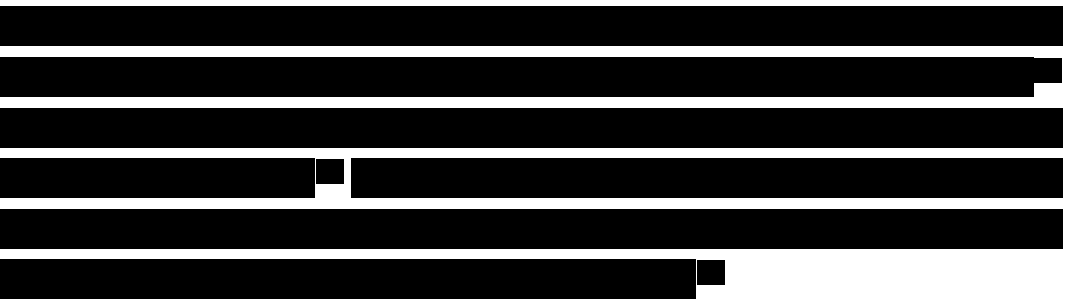

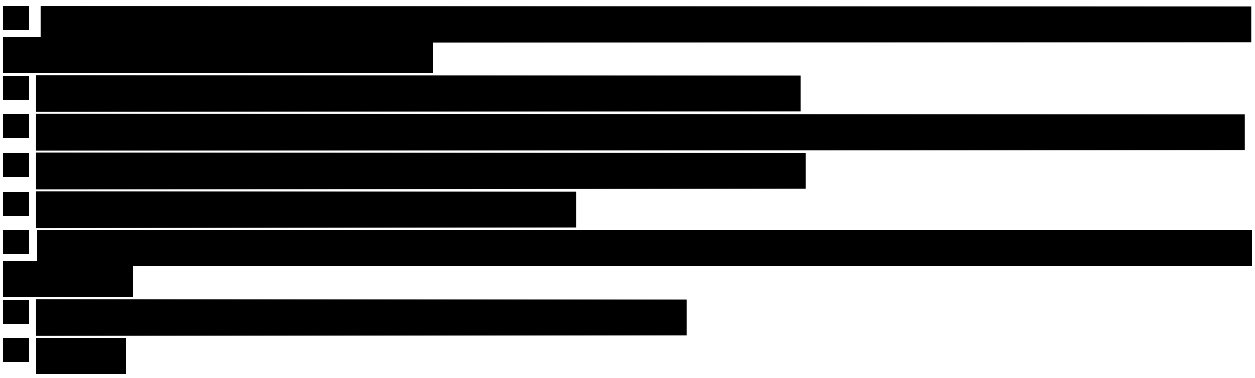

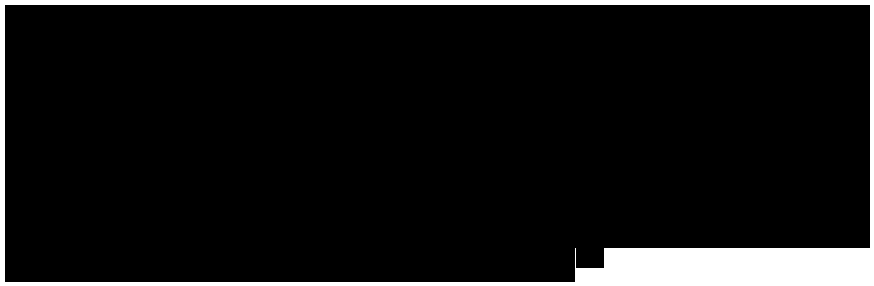

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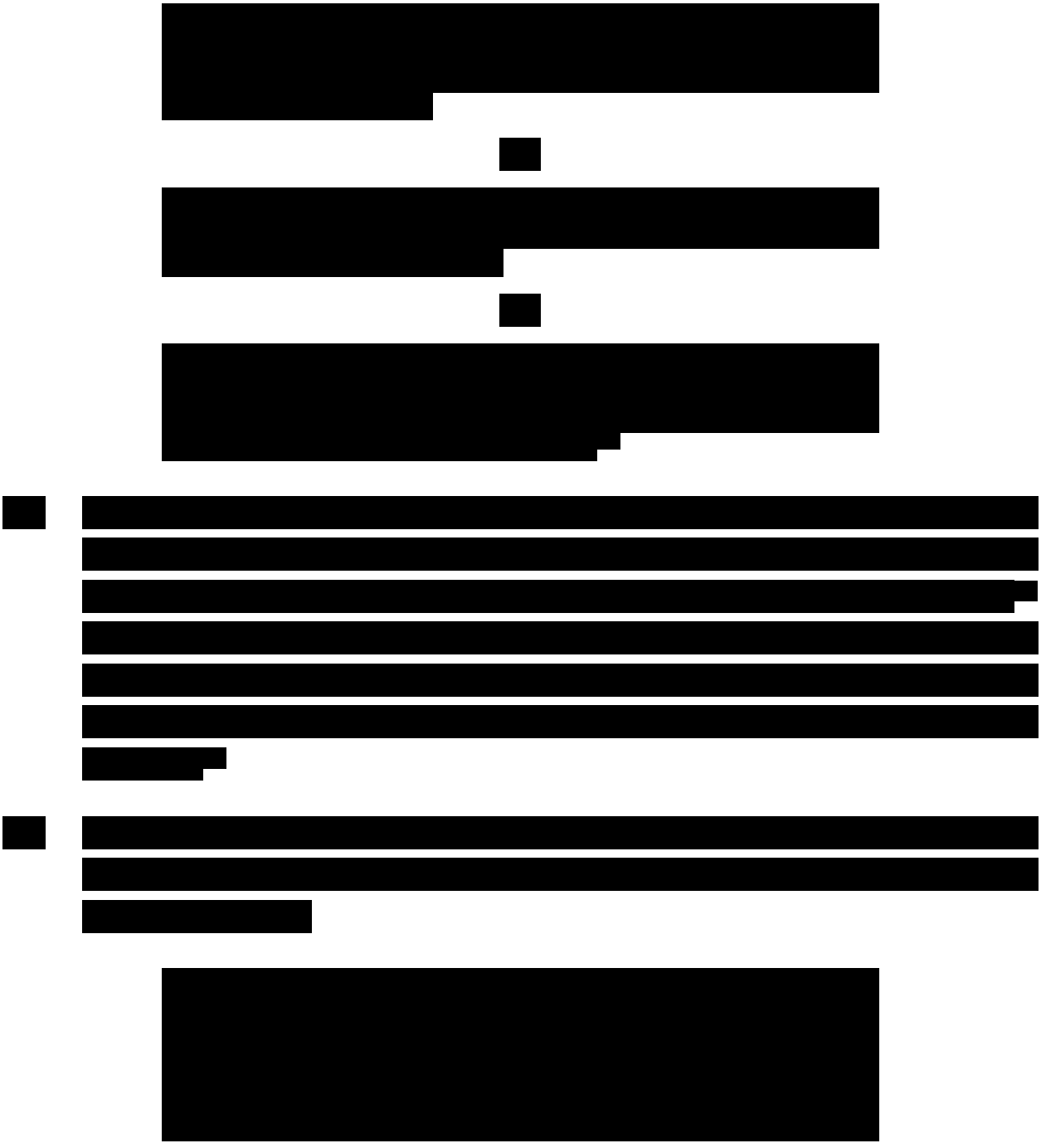

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V. JURISDICTION

413. Following the Tribunal's Decision on Romania's EU Law Objection, the following three jurisdictional objections remain to be decided in this Award:[602]

a. First, Romania submits that the Tribunal lacks jurisdiction *ratione personae* because Nova was owned and controlled at the relevant time by [redacted], a Romanian national. The present dispute is therefore a domestic dispute that falls outside the scope of the Treaty and the ICSID Convention (Section V.A).

b. Second, Romania submits that the Tribunal lacks jurisdiction *ratione materiae* because Nova's alleged investment does not qualify as an "investment" within the meaning of Article 1(a) of the Treaty or Article 25 of the ICSID Convention (Section V.B).

c. Third, Romania submits that the Tribunal lacks jurisdiction *ratione materiae* because Nova's alleged investment was not made "in conformity with the laws and regulations" as required under Article 1(a) of the Treaty (Section V.C).

414. Each of these objections involves interpretation of particular passages of treaty text, from the Treaty itself and to some extent also from the ICSID Convention. In construing the terms of both instruments, the Tribunal is guided by the interpretative principles reflected in the Vienna Convention on the Law of Treaties ("**VCLT**"). In particular, under VCLT Article 31(1), the provisions of the Convention and the BIT are to be interpreted and applied in accordance with the "ordinary meaning" of their terms, in the "context" in which they occur and in light of the relevant treaty's "object and purpose."[603] The relevant "context" for construing the provisions of a treaty can include the words and sentences found in close proximity to that passage, including definitional terms, as well as other provisions of the same treaty which help to illuminate its object and purpose. The International Court of Justice ("**ICJ**") has explained that under an Article 31(1) analysis, "[i]f the relevant words in the natural and ordinary meaning make sense in their context,"

[602] In its Request for Bifurcation, Romania indicated that it intended to raise an additional objection to jurisdiction on the basis that Nova did not complete the consultation requirement of Article 8(1) of the BIT in connection with the claims that arose out of the investments in [redacted] and [redacted] However, Romania did not raise this objection in its Counter-Memorial or thereafter.

[603] **RL-136**, VCLT, Article 31(1).

no further inquiry is required.[604] Rather, the Contracting Parties' use of unambiguous terms should be taken as reflecting their clear intent.

415. This case does not appear to involve any arguments about (a) subsequent agreements or practices of the Contracting Parties in relation to the BIT or the ICSID Convention, [605] nor about (b) an intention that terms have a "special meaning,"[606] or (c) potential recourse to supplementary means of interpretation.[607] Nonetheless, the Tribunal takes note of the content of Articles 31(2), (3) and (4) and Article 32 of the VCLT with respect to issues of interpretation.

A. JURISDICTION *RATIONE PERSONAE*

1. Relevant Treaty Provisions

416. Article 25(1) of the ICSID Convention provides that:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) *and a national of another Contracting State*, which the parties to the dispute *consent in writing* to submit to the Centre.[608]

417. Article 25(2) of the ICSID Convention provides that:

---

[604] *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, I.C.J. Reports 1991, p. 53, ¶ 48 (*citing Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports 1950, p. 8).

[605] In accordance with VCLT Articles 31(2) and 31(3), a tribunal construing the terms of a treaty should take into account any other agreements between the Contracting Parties relating to the treaty, including any "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions," as well as "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

[606] In accordance with VCLT Article 31(4), if it is established that the Contracting Parties intended a term to have a "special meaning," then that intent should be given effect.

[607] In accordance with VCLT Article 32, "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of a treaty and the circumstances of its conclusion," but only "to confirm the meaning" resulting from the textual approach required by Article 31, or in the event the textual approach leaves a meaning "ambiguous or obscure" or would lead to a result that is "manifestly absurd or unreasonable." The ICJ has explained (in a case preceding the VCLT but cited by the International Law Commission in preparing the VCLT) that "a decisive reason" (such as unmistakable evidence of the State Parties' intentions from supplementary materials) would be required "[t]o warrant an interpretation other than that which ensues from the natural meanings of the words" of a provision. *Admission of a State to Membership in the United Nations* (Charter, Article 4), Advisory Opinion: 1948 I.C.J Reports 57, p. 63, available at https://www.icj-cij.org/public/files/case-related/3/003-19480528-ADV-01-00-EN.pdf and other public websites.

[608] ICSID Convention, Article 25(1) (emphasis added).

"National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation as well as on the date on which the request was registered […], but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

418. Article 1(b) of the Treaty defines "investors" as:

i. natural persons having the citizenship or the nationality of that Contracting Party in accordance with its laws;

ii. legal persons constituted under the law of that Contracting Party;

iii. legal persons owned or controlled, directly or indirectly, by natural persons as defined in i. or by legal persons as defined in ii. above.[609]

2. Romania's Position

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[609] **C-1**, BIT, Article 1(b).

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(a) *Legal Basis of the Objection*

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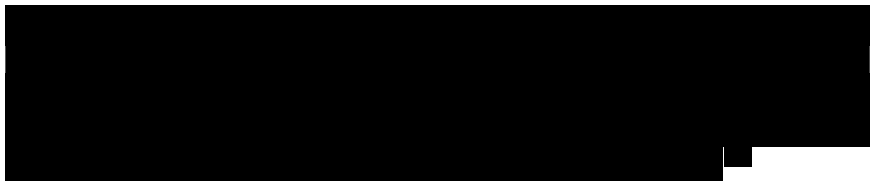

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3. Nova's Position

[redacted]

[redacted]

(a) *Legal Basis of the Objection*

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[redacted]

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(d) [redacted]

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4. The Tribunal's Analysis

488. Romania's first jurisdictional objection rests essentially on the proposition that Nova must demonstrate – but has failed to do so – that it satisfies an implicit requirement in the ICSID Convention and/or the Treaty that, regardless of how legal title formally may be structured, an investment must be beneficially owned and controlled by a foreign national, not by a national (or dual national) of the host State.

489. This objection would result in dismissal of the case only if the Tribunal were to make three cumulative findings:

a. That jurisdiction depends on findings about the ultimate beneficial ownership and control of Nova, rather than simply findings about Nova's nationality;

b. If so, that [redacted] had ultimate ownership and control of Nova at the relevant times; and

c. If so, that [redacted] was a Romanian national, [redacted]

490. Analytically, the Tribunal need reach the second and third stages of this analysis only if it agrees with Romania's proposition in the first stage. That first stage presents a legal issue rather than a factual one, involving the proper interpretation of the ICSID Convention and the Treaty. The Tribunal therefore begins with this issue.

(a) *Article 25 of the ICSID Convention*

491. Jurisdiction under the ICSID Convention is governed by Article 25. With respect to *ratione personae*,[761] Article 25(1) has two operative requirements: (a) that the dispute be "between a Contracting State … and a *national of another Contracting State*," and (b) that it involve a dispute that the parties "*consent in writing* to submit to the Centre."[762] Both elements must be satisfied: qualifying nationality will not suffice without a separate instrument stating consent, but nor will consent suffice without an objective demonstration of qualifying nationality.[763] In light of the latter

[761] Article 25(1)'s requirements with respect to *ratione materiae* are discussed separately in Section V.B.

[762] ICSID Convention, Article 25(1) (emphasis added).

[763] *See, e.g.*, **CL-86**, *Rompetrol* Preliminary Objections, ¶ 80 ("it is … widely recognized that … Article 25 reflects objective 'outer limits' beyond which party consent would be ineffective"); **RL-55**, *National Gas*, ¶ 120 ("from the

proposition, the Tribunal must examine for itself, separately from the terms of the consent reflected in the Treaty, whether Nova qualifies as a "*national of another Contracting State*" for purposes of Convention Article 25(1).

492. Importantly, this phrase in Article 25(1) is defined for both natural persons and juridical entities in the next provision of the ICSID Convention, Article 25(2).

493. The first part of this definition, in Article 25(2)(a),[764] concerns natural persons, and excludes from jurisdiction any individuals who held nationality of the respondent State, even if this was only one of multiple nationalities. This express exclusion has been understood to eliminate any need for tribunals to determine with which State an individual has the most real and tangible connection. Although such determinations are required for dual nationals in the very different context of diplomatic protection (under the rubric of "dominant" or "effective" nationality), it is widely accepted that the rules applicable in diplomatic protection "do not apply where they have been varied by the *lex specialis* of an investment treaty" or the ICSID Convention.[765]

494. The second part of the definition in, Article 25(2)(b), concerns "juridical person[s]."[766] It has two separate clauses, which are separated by the word "*and*," and which provide *two different pathways* to qualifying jurisdiction:

a. The first clause qualifies "any juridical person which had the *nationality of a Contracting State other than the State party* to the dispute" (emphasis added), with no further requirements stated.

b. The second clause independently qualifies "any juridical person which had the *nationality of the Contracting State party to the dispute*," provided that "because of foreign control,

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text of the ICSID Convention, it is clear that the parties' consent, even if otherwise established, may not suffice to establish jurisdiction before an ICSID tribunal"); **RL-128**, *KT Asia*, ¶ 121 ("the ICSID Convention sets objective outer limits to jurisdiction by requiring nationality").

[764] As recited above, Article 25(2)(a) states that "'National of another Contracting State' means: (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered …, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute."

[765] **RL-128**, *KT Asia*, ¶¶ 127-129.

[766] As recited above, Article 25(2)(b) states that "'National of another Contracting State' means: … (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

the parties have agreed [that such person] should be treated as a national of another Contracting State for the purposes of this Convention."

495. It is fundamentally important to distinguish between these two pathways in Article 25(2)(b), because the stated requirements for jurisdiction clearly differ. Conflating the two pathways would ignore both the ordinary meaning of the terms in either clause of Article 25(2)(b), and would equally ignore the context of each clause, in the sense that it is juxtaposed with the other clause which is framed in a different manner.

496. Specifically, the second clause of Article 25(2)(b), which allows certain host State entities to bring claims *against their own State*, limits that to a narrow set of circumstances where two further cumulative requirements have been met: (a) there is an *agreement* between the parties to "treat[]" such entity *as if* it were a national of another Contracting State, and (b) that this agreement be "because of *foreign control*." It is well settled that the "foreign control" requirement is objective in nature, meaning that a tribunal must confirm, on the evidence, that such control exists. A mere agreement by the parties to access ICSID jurisdiction will not suffice if the facts demonstrate that a host State entity is not truly controlled by a national of another Contracting State.

497. In other words, the second clause of Article 25(2)(b) expressly requires an inquiry into issues of control. It is therefore not surprising that ICSID tribunals conduct that inquiry in cases brought by host State entities. The debate in such cases generally is not about the need for a "control" inquiry, but rather about how extensive it should be, namely whether (a) it is sufficient simply to confirm the foreign status of the claimant's immediate controlling entity, or (b) it requires tracing control up to the level of ultimate beneficial ownership, however many intermediate legal entities may be interposed. Many of the cases that the Respondent cites address *this* question, precisely because those cases were brought by host State companies, and therefore tribunals were required by the second clause of Convention Article 25(2)(b) to confirm the objective existence of "foreign control." This was the case, for example, in *TSA Spectrum*, *National Gas*, and *Burimi*. As discussed below, however, none of these cases assists the Respondent where the *first* clause of Article 25(2)(b), rather than the second one, is at issue.

498. Beginning with *TSA Spectrum*, this involved an Argentine company bringing claims against Argentina, on the basis that it was a subsidiary of a Netherlands company and therefore qualified to be treated as Dutch under the "foreign control" provision of the second clause of Convention

Article 25(2)(b).[767] The tribunal in *TSA Spectrum* specifically distinguished the two clauses of Article 25(2)(b), and emphasized that the "*ratio legis*" of the second clause was the wording "because of foreign control": "Foreign control is thus the objective factor on which turns the applicability of this provision."[768] By contrast, the tribunal accepted that the *first clause* of Article 25(2)(b) – under which the claim was *not* brought – was very different:

> A significant difference between the two clauses of Article 25(2)(b) is that the first uses a formal legal criterion, that of nationality, whilst the second uses a material or objective criterion, that of "foreign control" in order to pierce the corporate veil and reach for the reality behind the cover of nationality.[769]

499. The *TSA Spectrum* tribunal reiterated that very real consequences flowed from the fact that the case was brought under the second clause of Article 25(2)(b) rather than the first. It stated that under the first clause, which "uses as a criterion the formal legal concept of nationality," "[t]here is no reference here to 'control,' whether foreign or other, nor any mention of 'piercing' or looking beyond this nationality."[770] By contrast, under the second clause of Article 25(2)(b), "[o]nce the Parties have agreed to the use of the ["foreign control"] criterion for juridical persons having the nationality of the host State, they are bound by this criterion as a condition for ICSID jurisdiction …."[771] The tribunal considered that in light of the operative text, it was required to "pursu[e] its objective identification of foreign control up to its real source," and could not simply "pierce the veil of the corporate entity national of the host State and to stop short at the second corporate layer it meets."[772]

500. As the *KT Asia* tribunal noted, *TSA Spectrum* is thus "of little assistance" to a respondent in a case that "falls under the first limb of Article 25(2)(b) which merely speaks of nationality, without defining it and without referring to control."[773]

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[767] Foreign control was also directly required by the applicable BIT definition of "investor," which encompassed "legal persons, wherever located, controlled, directly or indirectly, by nationals" of the Netherlands, and had a specific protocol stating that this passage "may require proof of the control invoked." **RL-73**, *TSA Spectrum*, ¶¶ 21-22 (quoting Article 1(b)(iii) of the relevant BIT and a protocol discussing that Article).

[768] **RL-73**, *TSA Spectrum*, ¶¶ 138-139.

[769] **RL-73**, *TSA Spectrum*, ¶ 140.

[770] **RL-73**, *TSA Spectrum*, ¶ 144.

[771] **RL-73**, *TSA Spectrum*, ¶ 141.

[772] **RL-73**, *TSA Spectrum*, ¶ 147.

[773] **RL-128**, *KT Asia*, ¶ 132.

501. *National Gas* is much the same. There, the claimant was an Egyptian company bringing a claim against Egypt,[774] and the tribunal similarly emphasized the distinctions between the two clauses of Article 25(2)(b), describing the second clause as "operating as an exception" to the first clause, based on circumstances of foreign control of a locally incorporated entity.[775] The fact that the claim was brought under the second clause was described as "the crucial difference" for the case.[776] The *National Gas* tribunal expressly distinguished other cases "where the named claimant is *not* a national of the respondent Contracting State (as in the present case)," and which therefore did not arise "under the second part of Article 25(2)(b)," meaning that "[t]he issue was there directed at the nationality of the named foreign claimant and not at the 'foreign control' of a local claimant." For the tribunal, its case was "materially different," because the claim was brought by an Egyptian company, and it was *that* fact which required a careful inquiry into ultimate (and not just first-level) control.[777]

502. Finally, the *Burimi* case most directly illustrates the distinction between the two clauses of Convention Article 25(2)(b), because it involved two different claimants – one a company incorporated under the laws of Albania, which was the respondent State, and the other a company incorporated under the laws of Italy.[778] As to the Albanian entity, the second clause of Article 25(2)(b) applied, which required a careful analysis of foreign control. Since the evidence demonstrated that its majority shareholder was a dual national of Italy and Albania – who could not have been a claimant in his own name under Article 25(2)(a) – the tribunal determined that his control of the Albanian entity equally could not be deemed "foreign" for purposes of the second clause of Article 25(2)(b). The Albanian entity was therefore dismissed.[779] By contrast, the tribunal *rejected* the respondent's invitation to "pierce the corporate veil" for the Italian claimant, to determine if its majority shareholder likewise was Albanian. It stated that the respondent's position was "based on a fundamental misunderstanding" of Article 25(2)(b), because the tests for jurisdiction were different under the two different clauses of Article 25(2)(b).[780] Under the first

[774] **RL-55**, *National Gas*, ¶¶ 3-4.
[775] **RL-55**, *National Gas*, ¶¶ 122, 124.
[776] **RL-55**, *National Gas*, ¶ 124.
[777] **RL-55**, *National Gas*, ¶ 141.
[778] **RL-54**, *Burimi*, ¶¶ 2, 3, 5.
[779] **RL-54**, *Burimi*, ¶¶ 118-122.
[780] **RL-54**, *Burimi*, ¶¶ 128-131.

clause of that Article, which was applicable to the Italian claimant, the tribunal concluded that "whether it is under 'foreign control' is *irrelevant* to the determination of its nationality."[781]

503. In short, these cases invoked by the Respondent actually support the Claimant's case. They examined the question of ultimate control precisely because (and in the case of *Burimi,* only where) the claimant was a juridical national of the host State, and the second clause of Article 25(2)(b) *required* a control inquiry in those circumstances. The cases however support a conclusion that for claims brought by entities that are not host State nationals, a very different analytical pathway applies under the first clause of Article 25(2)(b). The express wording of the first clause requires only that such entities have the "nationality of a Contracting State other than the State party to the dispute," *full stop*. There is no reference in this clause to "foreign control," as there is in the second clause.

504. In other words, the presence of a "foreign control" criterion in the second clause of Article 25(2)(b), and conversely the absence of such criteria in the first clause, has powerful implications. As a matter of both "ordinary meaning" and "context," it indicates that the Contracting States of the ICSID Convention wished to provide parties with flexibility to agree on circumstances that could *expand access* to ICSID jurisdiction for domestic entities that were controlled by foreign entities, but at the same time, that there was no desire to use an equivalent control inquiry to *restrict access* to ICSID jurisdiction for entities with foreign nationality themselves. The Contracting States could have designed Article 25(2)(b) differently, imposing an objective "foreign control" requirement under both pathways, but that is not what they did, as a matter of clear text.

505. This does not mean that a tribunal preceding under the first clause of Article 25(2)(b) is left with no inquiry. The clause – as well as the virtually identical clause in Convention Article 25(1) – requires a tribunal to verify that the claimant entity indeed has the "nationality" of another Contracting State. This requires a tribunal to examine, independently, the nationality principles in question. The Convention does not specify particular criteria for determining the nationality of a juridical entity, and it is well settled that this was a deliberate choice by its drafters, which "instead left the State Parties wide latitude to agree on the criteria by which nationality would be determined."[782]

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[781] **RL-54**, *Burimi*, ¶ 131 (emphasis added).

[782] **CL-86**, *Rompetrol* Preliminary Objections, ¶ 80; *see also* **RL-128**, *KT Asia*, ¶ 113 (the Convention "does not impose any particular test for the nationality of juridical persons not having the nationality of the host State," which

506. That deference in the Convention to the conclusion of a separate agreement on the criteria for qualifying nationality is also directly relevant to Article 25(1)'s requirement of separate "consent in writing" to submit the dispute to ICSID jurisdiction. In the context of consent based on investment treaties, there generally will be a single instrument (a BIT or multilateral treaty) which both defines the parameters for companies to qualify as "investors," and provides consent for those qualifying investors to invoke dispute settlement mechanisms.

507. Notably, Article 25(1) of the Convention leaves it entirely open to States concluding these separate agreements to impose requirements that go beyond mere nationality, including (*inter alia*) requirements of foreign ownership or control, or of having a "seat" or effective management in the State where the investor has formal nationality. As discussed further below, many investment treaties do impose such additional requirements, and where they do, arbitration tribunals are required to give such agreements full force and effect. But conversely, where treaties do *not* impose any such additional requirements, tribunals are required to take *that* decision equally into account. As the *Rompetrol* tribunal stated the point:

> [I]t is open to the Contracting Parties to a BIT to adopt incorporation under their own law as a necessary and also sufficient criterion of nationality for purposes of ICSID jurisdiction, without requiring in addition an examination of ownership and control, of the source of investment funds, or of the corporate body's effective seat. Incorporation in a given jurisdiction is a widely used criterion internationally in determining the nationality of corporate bodies …. This is a matter of free choice between the pair of State Parties to the BIT under consideration. Hence, the question becomes simply, *what did these two States themselves agree to of their own free will in concluding the BIT*?[783]

508. To answer this question, the Tribunal turns next to the terms of the Treaty at issue here.

(b) *Article 1(b) of the Treaty*

509. The relevant provisions of the Treaty are set forth in Article 1(b), which lists three separate categories of potential claimants that Romania and the Netherlands agreed to accept as qualifying "investors." These three categories are as follows:

"leaves broad discretion to Contracting States to define nationality, and particularly corporate nationality, under the relevant BIT").

[783] **CL-86**, *Rompetrol* Preliminary Objections, ¶ 83 (emphasis added).

> i. natural persons having the citizenship or the nationality of that Contracting Party in accordance with its laws;
>
> ii. legal persons constituted under the law of that Contracting Party;
>
> iii. legal persons owned or controlled, directly or indirectly, by natural persons as defined in i. or by legal persons as defined in ii. above.[784]

510. The structure of Article 1(b) makes clear that the three categories are independent of one another, meaning that a potential claimant under the Treaty need only show that it qualifies under one category, without any requirement to meet the terms of another. A natural person meeting the requirements of subparagraph (i) obviously could not be required also to satisfy the requirements of either of subparagraphs (ii) and (iii), which relate to "legal persons." But equally, a "legal person" meeting the requirements of subparagraph (ii) is not required also to satisfy the requirements of subparagraph (iii), or *vice versa*. These are three separate pathways to qualifying as an "investor" under Article 1(b).

511. The very fact that the three pathways to "investor" status exist independently of each other confirms that if a legal entity is "constituted under the law of [one] Contracting Party," in satisfaction of the requirements of Article 1(b)(ii), there is nothing more that need be shown for it to have standing *ratione personae* to bring a claim against the other Contracting Party. Such constitution is sufficient to satisfy the Treaty's definition of "investor."

512. Of course, while such legal constitution is *sufficient*, the Treaty does not make it *necessary* in all cases. Article 1(b)(iii) of the Treaty provides an alternative pathway for legal entities that are *not* constituted in the other Contracting Party, but can demonstrate that they are "owned or controlled, directly or indirectly," either by a natural person with the required citizenship or nationality (under Article 1(b)(i)) or by a legal entity that is constituted under the required law (under Article 1(b)(ii)). The elements of ownership and control are thus introduced in Article 1(b)(iii) to *expand* potential access to treaty protection to legal entities that cannot meet the requirement of Article 1(b)(ii) that they are constituted under the law of the other Contracting Party.

513. The fact that the criteria of ownership and control are used in this way in Article 1(b)(iii), and that such Article contains the phrase "directly or indirectly," demonstrates that the Contracting Parties turned their attention specifically to the possibility of multiple levels of corporate ownership and

[784] **C-1**, BIT, Article 1(b).

control. Yet in considering this possibility, the Contracting Parties to the Treaty made the same choice that was made by Contracting States to the ICSID Convention, namely, that ownership and control should be used to open an additional pathway to protection, but not to narrow or condition the more straightforward pathway that was provided based on legal constitution.

514. There is no indication anywhere in Article 1(b) of an intent to impose ownership and control requirements as an additional hurdle for companies with the requisite legal constitution under the law of the other Contracting Party. It would be particularly illogical to infer such an intent despite the textual silence, because doing so would render the structure of Article 1(b) without effect. If subparagraph (ii) were to be limited *sub silentio* to situations where the legal entity with qualifying nationality *also* was owned or controlled by a qualifying national person or legal entity, then subparagraph (ii) would have no utility at all as an independent path in Article 1(b). The Treaty could simply have had a form of subparagraph (iii), providing that *whatever the nationality* of a legal entity – whether of the other Contracting Party or not – it could qualify as an investor only if it was owned or controlled by a national of the other Contracting Party. But this is not how the Treaty is structured. The principle of *effet utile* requires that Article 1(b)(ii) be given independent function and effect.

515. A useful contrast is provided by the instrument of consent in another case the Respondent invoked, *Venoklim*. In that case, it was undisputed that an investment treaty did not on its own establish Venezuela's consent to participate in the proceedings, but the claimant invoked a cross-reference to treaty arbitration that was contained in Venezuela's Law on Investments.[785] The tribunal determined that in these circumstances, the claimant must prove that it met the requirements *ratione personae* that were stated in the Law on Investments.[786] The applicable provision defined a "foreign investor" as "[t]he entity that owns or effectively controls a foreign investment."[787] The tribunal emphasized that the Law on Investments contained no reference to the "criterion of incorporation," with the result that:

> As per the above text, the place of incorporation of the jurisdictional person is of little importance; what truly matters in order for a juridical person to qualify as a foreign investor is the "ownership" or "control" that the entity possesses over the investment…. [G]iven that the Law on

[785] **RL-56/CL-89**, *Venoklim*, ¶¶ 126-127, 137.
[786] **RL-56**, *Venoklim*, ¶¶ 129, 137.
[787] **RL-56**, *Venoklim*, ¶ 141.

> Investments does not contemplate a criterion of incorporation, only the criterion of control will be analyzed by the Tribunal.[788]

516. The point is that the text of the instrument of consent matters. It is within the powers of the States in question to mandate, as a clear part of that text, an inquiry into ultimate ownership and control. In the Treaty before us in this case, the Contracting Parties did that in one provision, Article 1(b)(iii), for entities that were *not* constituted under the law of the other Contracting Party. But they did not do so under Article 1(b)(ii), which on its face qualifies any entity so constituted as an "investor," without the need for it to make any further showing.

517. The Tribunal is unpersuaded by the Respondent's argument that the Treaty's stated definition of "investors" in Article 1(b) should be informed by its separate definition of "investments" in Article 1(a), as meaning "every kind of asset invested *by investors* of one Contracting Party in the territory of the other …"[789] The Respondent's argument is that the word "*by*" in this phrase implies that a Dutch national must have had an active role, in the sense of ultimate control or beneficial ownership, in the establishment of the investment.[790] However, the Tribunal does not see this phrase as addressing at all the subject of *ratione personae*, namely whether a particular claimant is a qualifying person or entity under the Treaty. Rather, the phrase is relevant to the different issue of *ratione materiae* (discussed below in Section V.B), which considers whether a claimant itself made any real "investment," in the ordinary sense of that word.[791]

518. In short, both the ordinary meaning and the context of Article 1(b)(ii) of the Treaty indicate that the provision should be interpreted at face value: a "legal person[] constituted under the law of [one] Contracting Party," such as the Netherlands, has jurisdiction *ratione personae* to bring a claim against the other Contracting Party, such as Romania, without the need for any further inquiry into upstream ownership or control.

519. This reading is hardly revolutionary. As the ICJ has explained, "international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction."[792] In these circumstances, an agreement between two States to defer to each

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[788] **RL-56**, *Venoklim*, ¶ 142.

[789] **C-1**, BIT, Article 1(b) (emphasis added).

[790] Counter-Memorial, ¶¶ 89-93.

[791] *Cf.* **RL-377**, *Alapli*, ¶¶ 357-360 (Arbitrator Park's analysis of a similar phrase, "investments *of i*nvestors," in the context of concluding that the treaty requires an entity to have made a contribution).

[792] **RL-104**, *Barcelona Traction*, ¶ 38.

other's decision whether to bestow nationality on particular juridical entities, as reflected through incorporation under domestic law, is unexceptional.[793] As the *Rompetrol* tribunal concluded, in assessing the very Treaty at issue in this case, there is no general proposition of international law which "deprives the States concluding a particular treaty … of the power to allow, or indeed to prescribe, the place and law of incorporation as the definitive element in determining corporate nationality for the purposes of their treaty."[794]

(c) *Whether "Object and Purpose" Require a Different Interpretation*

520. In short, the Tribunal concludes that the ordinary meaning of the relevant terms of the ICSID Convention and the Treaty are clear, in the context in which those words occur. Those terms demonstrate that the Contracting Parties to the Treaty agreed that the place of incorporation would establish the nationality of "legal persons," and the Contracting States to the ICSID Convention agreed that such consent, together with objective proof of such nationality, would suffice for jurisdiction in claims brought by "juridical entities" that were not incorporated within the host State.

521. Notwithstanding these conclusions, the Tribunal accepts that any interpretative analysis under VCLT Article 31(1) must also consider treaty terms in light of a treaty's "object and purpose."[795] The question therefore arises whether the object and purpose of either the ICSID Convention or the Treaty require the Tribunal to recognize an outer limit, beyond which those instruments' stated deference to "nationality"[796] and legal "constitut[ion]"[797] of an entity no longer will suffice. The Respondent posits that such an outer limit is reached in the "exceptional circumstances" where beneficial ownership and control of a claimant entity allegedly rests "in the hands of a national of the host State."[798]

522. The Tribunal of course accepts that the ICSID Convention and Treaty were both concluded as part of an effort to encourage and protect investments by *foreign* nationals, not to regulate the protections that States choose to provide for investments at home by their *own* nationals. The

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[793] *See* **CL-86**, *Rompetrol* Preliminary Objections, ¶ 89 ("If the position under general international law is that only the national State of the company itself has the capacity to bring an international claim in respect of an injury to the company, it must follow that the Contracting States to a specific bilateral treaty act well within the normal parameters of international law when they employ that same criterion to set up the nationality regime of their treaty.").

[794] **CL-86**, *Rompetrol* Preliminary Objections, ¶ 92.

[795] **RL-136,** VCLT, Article 31(1).

[796] ICSID Convention, Articles 25(1) and 25(2)(a), first clause.

[797] **C-1**, BIT, Article 1(b)(ii).

[798] Rejoinder, ¶ 175.

preamble of the Convention refers to "the need for international cooperation for economic development, and the role of private international investment therein."[799] The preamble of the Treaty recites a desire "to extend and intensify the economic relations between them particularly with respect to investments by the investors of one Contracting Party in the territory of the other Contracting Party."[800] At the same time, as the *KT Asia* tribunal observed with respect to a similar BIT preamble, "this says nothing about the *definition* of nationals," namely about who should be considered to be a State's own national as opposed to a foreign national. Rather, that determination is "precisely the subject of" a specific provision in the Treaty.[801] Nothing in the preamble of the Treaty suggests that terms specifically defined therein should not be taken at face value as reflecting the Contracting Parties' considered intentions. The same is true for the ICSID Convention, which carefully sets out in Article 25(2)(b) a regime with two separate clauses, one of which requires a demonstration of "foreign control" and the other does not.

523. The Contracting Parties were surely aware, at the time they agreed to these express provisions, that juridical entities are established in various countries for a host of legitimate business reasons, and that the locale of incorporation does not always equate to the locale of ultimate ownership or control.[802] If the Contracting Parties had wished to place limits on the practice of corporate structuring, they easily could have done so by imposing additional conditions for legal entities to qualify for access and protection. This can be done, for example, by including different language in the definition of "investors": either requiring an inquiry into ownership and control, or requiring a genuine link to the place of incorporation, such as through proof of a management seat or other significant business ties. Such requirements are hardly novel in investment treaties. Alternatively, the Contracting Parties could have authorized host States to deny treaty benefits to companies of the other Party, if nationals of the host State or of a third country own or control the company, or if the company has no substantial business activities in the territory under whose laws it is constituted. Again, such clauses are not uncommon. Had any of these provisions been included in the Treaty, this could have compelled inquiries of the sort Romania asks the Tribunal to make here.

[799] ICSID Convention, Preamble.

[800] **C-1**, BIT, Preamble.

[801] **RL-128**, *KT Asia*, ¶ 120 (emphasis added).

[802] *See generally* **RL-55**, *National Gas*, ¶ 146 (recognizing that choices of corporate structure may be "made in good faith for legitimate fiscal reasons," and "not designed as an exercise in forum shopping," and further recognizing that the use of "shell companies" for structuring investments does not necessarily imply that such companies are "sham entities").

524. But none of these avenues were pursued in the Treaty in question. Nor, for that matter, has there been any *subsequent* action by the Contracting Parties to clarify their position on these issues, even in the wake of significant jurisprudential debate over roughly two decades.[803] The Contracting Parties have neither taken steps to amend the terms of Treaty Article 1(b), or to issue a joint interpretative statement clarifying their shared understanding of the stated terms. In these circumstances, the Tribunal must assume that the Contracting Parties were content for those terms to be interpreted in accordance with their ordinary meaning and in the context of surrounding provisions, pursuant to VCLT Article 31(1).

525. Taking all this into account, the Tribunal does not consider that it has discretion to impose additional requirements *ratione personae* that are absent from the Convention and the Treaty, based upon policy arguments that are not reflected in the existing text. Doing so would not be consistent with the ICJ's own caution that, under a VCLT Article 31(1) analysis, the Contracting Parties' use of unambiguous terms should be taken as reflecting their clear intent, and "[i]f the relevant words in the natural and ordinary meaning make sense in their context," no further inquiry is required.[804] As the *Yukos* tribunal explained in a similar context,

> The Tribunal is bound to interpret the terms of the ECT … not as they might have been written but as they were actually written. ….
>
> The Tribunal knows of no general principles of international law that would require investigating how a company or another organization operates when the applicable treaty simply requires it to be organized in accordance with the laws of a Contracting Party. The principles of international law, which have an unquestionable importance in treaty interpretation, do not allow an arbitral tribunal to write new, additional requirements – which the drafters did not include – into a treaty, no matter how auspicious or appropriate they may appear.[805]

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[803] *Compare* **CL-121**, *Tokios Tokeles* Majority *with* **RL-51**, *Tokios Tokelés* Dissent.

[804] *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, I.C.J. Reports 1991, p. 53, ¶ 48 (*citing Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports 1950, p. 8).

[805] **CL-295**, *Yukos* Interim Award, ¶¶ 413, 415; *see similarly* **CL-87/RL-112**, *Saluka,* ¶ 241 ("The parties had complete freedom of choice in this matter, and they chose to [define "investors" in a particular way]. The Tribunal cannot in effect impose upon the parties a definition of 'investor' other than that which they themselves agreed."); **RL-128**, *KT Asia*, ¶ 117 (agreeing that the tribunal "could no add requirements for nationality which the Contracting States had not provided").

(d) *Conclusion and Application to the Facts*

526. The Tribunal has determined that it is required to assess Nova's jurisdiction *ratione personae* under the terms of the ICSID Convention and the Treaty as they are written. These conclusions can be summarized in a few steps:

a. The first clause of Article 25(2)(b) of the ICSID Convention qualifies "any juridical person which had the nationality of a Contracting State other than the State party to the dispute" as a national of the other Contracting State, and Article 25(1) confirms that such national is permitted to invoke the ICSID system, provided that the parties to a particular dispute have consented in writing.

b. That consent in turn was provided by Romania in Article 1(b)(ii) of the Treaty, which defines as an investor any "legal persons constituted under the law of that Contracting Party," and was accepted by Nova when it commenced these proceedings.

c. The very next provision of the Treaty, Article 1(b)(iii), confirms that the Netherlands and Romania turned their attention to issues of ownership and control, but chose not to impose that as an additional condition before an entity legally constituted in the other Contracting Party could invoke the protections of the Treaty.

d. Nothing in the ICSID Convention suggests that this choice in an instrument of consent is improper. Indeed, Article 25(2)(b) makes the same choice, by making ownership and control relevant to potentially expand access to the Convention by domestically incorporated companies, but not to restrict such access for companies with the nationality of another Contracting State.

527. The Tribunal emphasizes that in reaching this conclusion, it is focused on the language of this particular Treaty, which provides the applicable terms of consent. The Tribunal makes no determination whether different language in other treaties, reflecting different terms of consent, might lead to a different result, including in other cases brought under the ICSID Convention.

528. Given the Tribunal's analysis, there are no disputed factual issues to decide. It appears to be accepted that as of the date when Nova filed its request for arbitration, invoking the Treaty as the instrument of consent, it was a juridical entity constituted under the laws of the Netherlands. This satisfies the requirements of Article 1(b)(ii) of the Treaty, which in turn satisfies both the nationality

and consent requirements in Article 25(1) of the Convention, and establishes Nova's *ratione personae* to proceed with its claims.

529. Given this conclusion, there is no need for the Tribunal to turn to the additional factual issues that have been presented, namely [redacted] Those facts are not determinative of Nova's standing under the Treaty and Convention, which authorize it to bring claims under its own name.

B. JURISDICTION *RATIONE MATERIAE* – QUALIFYING INVESTMENT

1. Relevant Treaty Provisions

530. Article 25(1) of the ICSID Convention provides that:

> *The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment*, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.[807]

531. Article 1(a) of the Treaty defines "investments" as:

> every kind of asset invested by investors of one Contracting Party in the territory of the other Contracting Party, in conformity with the laws and regulations of the latter, and more particularly, though not exclusively:
>
> i. movable and immovable property as well as any other rights in rem in respect of every kind of asset;
>
> ii. rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
>
> iii. title to money, to other assets or to any performance having an economic value;

[redacted].

[807] ICSID Convention, Article 25(1) (emphasis added).

iv. rights in the field of intellectual property, technical processes, goodwill and know-how;

v. rights granted under public law or contract, including rights to prospect, explore, extract and win natural resources.[808]

2. Romania's Position

532. [redacted]

(a) *Legal Requirements of a Qualifying Investment*

533. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) ***Whether Nova's Shareholding in [redacted] Qualifies as an Investment***

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

3. Nova's Position

[redacted]

[redacted]

[redacted]

[redacted]

(a) ***Legal Requirements of a Qualifying Investment***

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) ***Whether Nova's Shareholding in [redacted] Qualifies as an Investment***

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] Raiffeisen Capital, 28 June 2011.

[895] Claimant's Rejoinder, ¶ 236.2.

[redacted]

[redacted]

[redacted]

4. The Tribunal's Analysis

572. Romania's second jurisdictional objection boils down, essentially, to the proposition that Nova must demonstrate – and has failed to do so – that it satisfies an objective meaning of the term "investment," as used both in Article 25(1) of the ICSID Convention and in the Treaty. The Tribunal addresses below, first, the legal requirements of a qualifying investment under these instruments, and then, second, the application of those requirements to the circumstances of this case.

(a) *Legal Requirements of a Qualifying Investment*

573. Starting with the ICSID Convention, the Tribunal agrees with Romania that Article 25(1)'s requirement that disputes "arise[] directly out of an investment" involves an *objective* rather than subjective assessment. While the ICSID Convention does not contain any express definition of "investment," this "does not deprive the term … of its significance."[898] Rather, the lack of an express definition in the ICSID Convention simply leaves the term to be interpreted like any other undefined term in a treaty, namely in accordance with VCLT interpretative principles (including ordinary meaning, context and object and purpose).[899]

574. In conducting this analysis, a tribunal should not simply assume that the term "investment" in the ICSID Convention was intended to be co-extensive with whatever meaning the parties to a given contract or treaty chose to ascribe to it. Parties to a contract or treaty do not have unlimited discretion under the ICSID Convention to define as an "investment" a transaction that objectively

[896] *See* Section V.C.3(b) below.

[897] Reply, ¶¶ 266-268.

[898] **RL-365**, *Vestey*, ¶ 186.

[899] *See* **RL-128**, *KT Asia*, ¶ 165; **CL-302**, *Quiborax*, ¶ 212.

has no such nature.[900] This is consistent with the 1965 Report of the Executive Directors on the Convention, which stated that "[w]hile consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto."[901]

575. Accordingly, ICSID tribunals may not simply defer to characterizations in the underlying instrument of consent; they must confirm that the dispute involves an "investment" within the objective definition of that term. At the same time, tribunals should not lightly conclude that a dispute which the parties subjectively intended to be placed before ICSID for resolution lacks the essential characteristics of investment to permit it to be entertained. The Tribunal accepts that a clear joint stipulation that a given asset should qualify as an investment ordinarily will give rise to a presumption that it objectively does so, although that presumption remains subject to rebuttal in appropriate circumstances.[902]

576. The Treaty at issue in this case contains a definition of investments in Article 1(a). That provision states as follows:

> For the purposes of this Agreement:
>
> (a) the term 'investments' means every kind of asset invested by investors of one Contracting Party in the territory of the other Contracting Party, in conformity with the laws and regulations of the latter, and more particularly, though not exclusively:
>
> i. movable and immovable property as well as any other rights in rem in respect of every kind of asset;
>
> ii. rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
>
> iii. title to money, to other assets or to any performance having an economic value;

[900] *See, e.g.,* **CL-307**, *RSM Production Company v. Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009, ¶ 235; **RL-119**, *Joy Mining*, ¶ 50.

[901] **CL-314A**, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and nationals of Other States, 18 March 1965, ¶ 25.

[902] *See* **CL-311**, *Gavrilovic*, ¶ 192 (concluding that the judgment of BIT parties as to which economic activities constitute investments "should be given considerable weight and deference," and that a tribunal "would need compelling reasons to disregard such a mutually agreed definition of investment"); **CL-369**, *Inmaris*, ¶ 130 (same).

> iv. rights in the field of intellectual property, technical processes, goodwill and know-how;
>
> v. rights granted under public law or contract, including rights to prospect, explore, extract and win natural resources.[903]

577. The structure of this paragraph is that it first states a general definition ("[t]he term 'investments' means *every kind of asset invested by investors* …"), and then adds that this includes, "more particularly, though *not exclusively*," an illustrative list of assets. The clear implication of the latter step is that the Contracting Parties expected that assets falling within the list, having been "invested by investors," would constitute qualifying "investments." Since one of the examples given is "rights derived from shares, bonds and other kinds of interests in companies and joint ventures," this aspect of the text gives rise to a clear statement that shareholding interests which have been "invested by" nationals "of one Contracting Party in the territory of the other Contracting Party" will be entitled to the Treaty's protections.[904]

578. In the great majority of cases, this language would be the end of the matter. Ownership of shares in a host State company usually will be sufficient for fostering international protection. But that is because, in most cases, there will be no question that such share ownership resulted from, and/or subsequently led to, an actual act of "investing" by the shareholder.

579. Where that fact is placed into doubt, however, further inquiry is necessary. That is because the use of an illustrative list of assets in a BIT, and a presumption of treaty protection flowing from inclusion of a particular asset on that list, does not entirely answer the objective question of whether an "investment" exists. Presumptions can be rebutted in unusual circumstances, based on particular facts. In this instance, the illustrative list does not trump the objective, ordinary meaning of the definition that precedes it. That is both because words in a treaty do have an ordinary meaning, which VCLT Article 31 requires be taken into account, and because of the very fact that the list of assets in Article 1(a) of the Treaty is stated not to be exclusive. As the *Romak* tribunal and others have observed, unless the term "investment" is recognized as bearing some intrinsic meaning, the non-exclusive nature of the list would provide no benchmark by which a tribunal could evaluate

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[903] **C-1**, BIT, Article 1(a).

[904] While Romania is correct that the Treaty does not stipulate that *indirect* investments fall within this scope, Rejoinder, ¶ 299, it is equally true that the Treaty does not stipulate that its scope is limited to *direct* investments. In these circumstances, the Tribunal agrees with others that have declined to exclude indirect investments from treaty protection unless a treaty expressly states that this was intended. Claimant's Rejoinder, ¶¶ 240-249 (citing cases).

the qualifications of other forms of assets outside the illustrative list.[905] But without any such benchmark, Article 1(a)'s extreme generality ("every kind of asset invested by investors") could be seen as encompassing even transactions that bear *none* of the traditional hallmarks of investment.

580. An example is useful to illustrate the point. It is widely accepted that a one-time purchase of goods does not constitute an "investment."[906] But purely formalistically, such a transaction could fall within the broad "every kind of asset" list reflected in the Treaty and many other BITs. Thus, a home State buyer who sends money to a host State seller to purchase a product may not be introducing an "asset" into the host State's territory; nor is the seller placing an "asset" into the buyer's State by shipping the product for which it already has been paid. But as the *Masdar* tribunal noted, if this scenario is tweaked slightly to make the one-time sale not for an outright payment, but instead resulting in a receivable, then ostensibly the asset list as defined in a many BITs could come into play.[907] A receivable in essence is a legal right to future payment of money or performance of an obligation, or in the words of Article 1(a)(iii) of this Treaty, it represents "title to money, to other assets or to any performance having an economic value."[908] Yet most observers would still maintain that "a one-time sale resulting in receivables would not qualify as an '*investment*,' even if the receivables may be seen as '*assets*'" that would formally fall within a broad asset list in a BIT.[909] The illustration thus demonstrates, in the words of the *Romak* tribunal, how a "mechanical application of the categories listed" in the BIT could "eliminate any practical limitation to the scope of the concept of 'investment,'" and "render meaningless the distinction between investments, on the one hand, and purely commercial transactions on the other."[910] The obvious conclusion is that an asset list – particularly one preceded by an unbounded "every kind of asset" phraseology – cannot function *on its own* as a sufficient definition of investment. Rather, it

[905] *See* **RL-125**, *Romak,* ¶¶ 178-180 (rejecting claimant's argument that it "should simply confirm that [its] assets fall within one or more of the categories listed," because this approach would "deprive[] the term 'investments' of any inherent meaning," an outcome which is inconsistent with the non-exhaustive nature of the categories enumerated; the tribunal explained that "there may well exist categories different from those mentioned in the list," and "[a]ccordingly, there must be a benchmark against which to assess those non-listed assets … in order to determine whether they constitute an 'investment' within the meaning of" the BIT).

[906] *See generally* **RL-368**, *Raymond Charles Eyre,* ¶ 293 (quoting *Postova Banka v. Hellenic Republic*: "[a]n investment, in the economic sense, is linked with a process of creation of value, which distinguishes it clearly from a sale, which is a process of exchange of values …").

[907] **RL-367**, *Masdar*, ¶ 199.

[908] **C-1**, BIT, Article 1(a).

[909] **RL-367**, *Masdar*, ¶ 199.

[910] **RL-125**, *Romak*, ¶¶ 184-185.

requires interpretation by reference to the ordinary meaning of the concepts of "investment" and "investing."

581. Accordingly, the Tribunal concludes that the word "investment" must be given an inherent, objective meaning, for purposes not only of the ICSID Convention (which contains no definition of the term at all), but also of the BIT (which contains an illustrative list of assets that may be "invested by investors," but with no stated guidance as to what shared characteristics bring such assets, and potentially other non-listed assets, within the qualifying term).

582. Beginning with the VCLT's command to look to the "ordinary meaning" of the term, the Tribunal observes that according to common dictionary definitions, the noun "investment" means variously:

- the outlay of money usually for income or profit: capital outlay";[911]
- "the act of putting money, effort, time, etc. into something to make a profit or get an advantage, or the money, effort, time, etc. used to do this";[912] or
- "the act of investing money in something," or "the money that you invest, or the thing that you invest in."[913]

583. In other words, inherent in the ordinary meaning of "investment" is some *contribution of resources* which is made in an attempt to earn a return over *a period of time*, a process that necessarily involves the possibility or *risk* of not earning a return. Many other tribunals, employing similar "ordinary meaning" analyses, have found these three basic elements to be inherent in any objective definition of "investment." Although some tribunals have reached this conclusion solely through an analysis of the ICSID Convention, others have stated – as does this Tribunal – that the same interpretation of the word "investment" applies independently to investment treaties, whether or not a case is proceeding at ICSID.[914]

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[911] Merriam-Webster, https://www.merriam-webster.com/dictionary/invest.

[912] Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/invested.

[913] Oxford Learner's Dictionaries, https://www.oxfordlearnersdictionaries.com/us/definition/american_english/invest.

[914] *See, e.g.,* **RL-128**, *KT Asia*, ¶¶ 164-166 (observing that the claimant was right not to even argue that "the mere fact of holding an asset which falls within the scope of [the BIT's illustrative list] is sufficient to conclude that a person has made an investment under the BIT," because the word "investment" has an inherent ordinary meaning, "irrespective of the application of the ICSID Convention"; that meaning "presuppose[s] … a commitment of resources," without which "the asset belonging to the claimant cannot constitute an investment within the meaning of … the BIT"); **CL-302**, *Quiborax* Jurisdiction, ¶ 215 (noting cases concluding that "the objective meaning was inherent

584. In this case, the definition of investment in Article 1(a) of the BIT contains an additional marker that confirms the Contracting Parties' intention that the term be given this objective meaning. As discussed above, after the initial reference to "every kind of asset" in the introductory clause, the Article continues immediately thereafter with the phrase "invested by investors …."[915] The same sentence clarifies *which* investors must have invested the assets in question ("investors … of one Contracting Party"). In other words, by the ordinary meaning of the sentence, the BIT extends protections to assets that were "*invested by*" qualifying nationals of the home State. This additional language is not necessary to the Tribunal's conclusion about an objective meaning of "investment,"[916] but where present, the phrase does *reinforce* the understanding that Contracting Parties expected any claimant seeking to invoke the BIT to have actually made a contribution of some sort in connection with its putative investment. This flows from the ordinary meaning of the term "*invested*," which is a past tense verb, referring to a prior act of "investing."

585. The corollary implication is that protection would *not* be extended to assets that did not come to be held by the putative investor through any act of real investing. Notably, "investing" in an asset is different from merely "owning" or "holding" an asset; the latter terms refer to legal title or possession, while the former refers to a form of conduct, the taking of an act. As the *Quiborax* tribunal explained the point, a distinction must be made between the objects (or "legal materialization") of an investment, such as shares or title to property, and the action of investing,

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to the term investment, irrespective of the application of the ICSID Convention"); **RL-125**, *Romak,* ¶¶ 180, 207 ("The term 'investment' has a meaning in itself that cannot be ignored when considering the list contained in … the BIT," because the term in the BIT "has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk …"); **RL-366**, *Orascom*, ¶ 372 ("the use of the term 'investment' in both the ICSID Convention and the BIT imports the same basic economic attributes of an investment derived from the ordinary meaning of that term, which comprises a contribution or allocation of resources, duration, and risk"); **RL-365**, *Vestey*, ¶ 192 ("the BIT notion of investment implies that the asset falling within the list be the result of an allocation of resources made by the investor").

[915] **C-1**, BIT, Article 1(a). Romania contends that the official Dutch version uses wording that translates in English to "every kind of asset that is being invested." Rejoinder ¶ 310, *quoting* **RL-380**, Dutch version of the BIT, Article 1(a).

[916] Some of the cases cited by the Parties involve BITs with equivalent terminology in their definitions of investment. *See, e.g.,* **RL-116***, Phoenix*, ¶ 56 ("any kind of assets *invested* in connection with economic activities *by an investor* …") (emphasis added); **RL-112/CL-87**, *Saluka*, ¶ 198 ("every kind of asset *invested* either directly or through an investor of a third State"); **RL-400**, *Invesmart B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 ("***Invesmart***"), ¶ 186 (same). However, other cases involve treaties without this additional language, often with the simple formulation, "every kind of asset." The Tribunal does not consider the inherent definition of "investment" to turn on the presence or absence of additional "invested by" language, but the presence of such language makes even more clear that Contracting Parties intended an "investment" to involve an act of contribution.

which requires some contribution of money or other resources.[917] The Tribunal does not accept that the terms can be conflated, so that a qualifying national who somehow comes to *own* an asset in the host State, but *without* having made any contribution, still can be considered to have "invested" in that asset. The term "invested," like the term "investment," has an objective meaning, one that is not satisfied by ownership alone. According to common dictionary definitions, the verb "invest" means variously:

- "to commit (money) in order to earn a financial return"[918];
- "to put money, effort, time, etc. into something to make a profit or get an advantage"[919]; or
- "to buy property, shares in a company, etc. in the hope of making a profit."[920]

586. In other words, inherent in the act of "investing" is the same objective element as is inherent in the resulting "investment": a requirement of a positive act that involves some sort of contribution to acquire the asset or enhance its value, coupled with an expectation or desire that the asset will produce a return over a period of time, with the possibility or risk that it may not do so (with the result that the contribution might be forfeited in part or in whole).

587. This interpretation is further reinforced by the preamble of the Treaty, which sets forth its object and purpose. The preamble first states that its purpose was "to extend and intensify the economic relations between" the Contracting Parties "with respect to investments by the investors of one Contracting Party in the territory of the other." It then states that "agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties."[921] These sentences tend to affirm that the purpose of the Treaty was to encourage and protect investments in the ordinary sense, namely those that involved some actual making of contribution contributing to "the flow of capital and technology" and "economic development." The same is true for the preamble of the ICSID Convention, which refers

[917] **CL-302**, *Quiborax* Jurisdiction, ¶ 233. *See also* **CL-308**, *Abaclat*, ¶ 347 (considering that a BIT's "list of examples of what is considered an investment" was focused on the "rights and values which may be endangered by measures of the Host State … and therefore deserve protection," but "[n]evertheless, this definition is of course based on the *premise* of the existence of [a] contribution," which "derives from the wording of other provisions" of the BIT) (emphasis added).

[918] Merriam-Webster, https://www.merriam-webster.com/dictionary/invest.

[919] Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/invested.

[920] Oxford Learner's Dictionaries, https://www.oxfordlearnersdictionaries.com/us/definition/american_english/invest.

[921] **C-1**, BIT, Preamble.

in its first sentence to "the need for international cooperation for economic development, and the role of private international investment therein." Nothing in either preamble suggests an intent on the part of the drafters to protect transactions that do not involve the making of *any* contribution by the putative investor, or any assumption by it of a concomitant risk that its contribution will not be returned.

588. Based on this analysis, the Tribunal finds that the objective definition of "investment" in both the Treaty and the ICSID Convention requires some contribution of resources of cognizable value. For avoidance of doubt, however, this notion of contribution does not depend on the *location of the payee*: an investor may acquire a qualifying investment in the host State by purchasing it from a prior owner for real consideration, or through a corporate restructuring in which some real value is exchanged, even if this does not result in the transfer of additional capital into the host State.[922] Similarly, the requirement of a contribution does not depend on whether the acquisition of the investment (or the existence of the investment more generally) ultimately aided the host State's *development*. While certain early authorities suggested that the objective definition of investment might require a contribution to host State development, this goes too far. As the *KT Asia* tribunal explained, while "such a contribution [to development] may well be the consequence of a *successful* investment … if the investment fails, and thus makes no contribution at all to the host State's economy, that cannot mean that there has been no investment" in the first place.[923]

589. The Tribunal likewise does not consider that the qualitative existence of an investment turns on whether the investor's commitment of resources was proportionate to the underlying value of the assets it obtained. The contribution cannot have been entirely *illusory*, of course: among other things, an entity that makes no real contribution – either to acquire assets or to enhance their value – undertakes no cognizable risk. While the asset it receives for free may subsequently lose value, in the absence of any real contribution in the first place, any diminution or even lack of returns is not a loss – and accordingly, the putative investor faces no real *risk* of loss on its "investment" if,

[922] *See, e.g.,* **CL-296**, *Gold Reserve*, ¶¶ 261-262 (finding an investment where the claimant obtained shares through a corporate share swap with a related entity, where this involved the payment of real consideration but not into Venezuela); *see also id.*, ¶ 271 (noting that the claimant also injected substantial additional funding into the company *after* obtaining its shares).

[923] **RL-128**, *KT Asia*, ¶ 171 (emphasis added); *see also* **RL-108**, *Saba Fakes*, ¶ 111 (noting that certain investments "might be useful to the State and to the investor itself," while others that were "expected to be fruitful may turn out to be economic disasters. They do not fall, for that reason alone, outside the ambit of the concept of investment."); **CL-302**, *Quiborax* Jurisdiction, ¶¶ 220-225 (citing other cases).

in reality, it invested nothing.[924] Tribunals have also been skeptical of *purely nominal* contributions, suggesting they may serve as a "red flag" that justifies greater scrutiny into the *bona fides* of a transaction,[925] and denying jurisdiction where the evidence indicates the putative investment "was not an economic arrangement."[926] But absent a reason to question the economic reality of a transaction, and the investor's actual commitment to develop economic resources on an ongoing basis, the fact that it may have obtained its interest for relatively low consideration does not *alone* equate to the absence of an investment.[927]

590. Finally, it is important to distinguish between an inquiry into whether the putative investor made a contribution and thus can be considered to have "invested" in the objective sense of the word, and an investigation into the *ultimate source* of the capital which the investor used for that purpose. The Tribunal does not accept Romania's suggestion that the latter is required, *i.e.,* that there is some inherent requirement that the capital have originated with the claimant (or in its home State) for an investment to be protected by the Treaty or the ICSID Convention. Such a requirement could well necessitate a forensic analysis of how each putative investor came to possess the funds it invested,

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[924] *See similarly* **RL-128**, *KT Asia*, ¶ 219 ("KT Asia has made no contribution and, having made no contribution, incurred no risk of losing such (inexistent) contribution.").

[925] *See, e.g.,* **RL-116**, *Phoenix*, ¶ 119 ("the existence of a nominal price for the acquisition of an investment raises necessarily some doubts about the existence of an 'investment' and requires an in depth inquiry into the circumstances of the transaction at stake"); **RL-131**, *Caratube*, ¶¶ 424, 433, 438 (considering that "the nominal price, if any, paid for the acquisition of the shares raises doubts about the existence of an investment …. In such situation the Tribunal is required to review closely the circumstances of the transaction …. A putative transaction [on such terms] calls for explanation and justification.").

[926] **RL-131**, *Caratube*, ¶¶ 384, 435, 455 (finding, where shares were obtained for about USD 6500, that "no plausible economic motive was given to explain the negligible purchase price … and to explain his investment in CIOC. No evidence was presented of a contribution of any kind or of any risk undertaken … There was no capital flow between him and CIOC that contributed anything to the business venture operated by CIOC."); **RL-108**, *Saba Fakes*, ¶¶ 139-140, 147 (finding a purported share transfer to be a fake "arrangement" and observing that "[h]ad the Claimant acquired any genuine legal rights in the transactions, no doubt he would have been expected to make a contribution (either financial or managerial) beyond the US$ 3,800 cash payment allegedly made").

[927] *See, e.g.,* **RL-116**, *Phoenix*, ¶¶ 119-120, 127 (considering that a low acquisition price would not be "a bar to a finding that there exists an investment," provided that "there is indeed a real intent to develop economic activities on that basis," and noting that where a claimant did contribute some funds for the purchase of shares, even a "small price," there is a risk "that the investor loses the amount he has paid"); **RL-128**, *KT Asia,* ¶ 203 (considering the amount paid for a shareholding to be "but one aspect out of a number of factors that may assist in ascertaining the existence of an investment"); **RL-379**, *Doutremepuich*, ¶¶ 126 (noting that while a contribution of just EUR 1 would "seem[] insufficient to qualify as an investment," positing any "fixed numerical threshold seems arbitrary …. [T]he reality of the contribution is to be assessed taking into account the totality of the circumstances and the elements of the economic goal pursued"); *see also* **CL-413***, Societe Generale*, ¶ 36 (noting at the preliminary objections stage that if a US$ 2 purchase price "were the only element involved in such a transaction doubts could legitimately arise," but also that "the transaction includes many other elements," that "[t]he purchase of property for a nominal price is a normal kind of transaction the world over when there are other interests and risks entailed in the business," and that the possibility that "the purchase price might include a discounted value … for the distressed state of a company" should be discussed further at the merits stage).

and whether (and on what terms) it might owe such funds back to an upstream entity or individual. This type of exercise, which may become quite complicated, should not be mandated unless it is required by the ICSID Convention or the instrument of consent.

591. As to that issue, the Tribunal agrees with many others who have found such inquiries to go beyond the exercise commanded by the Convention and other investment treaties.[928] While the term "investment" in such instruments objectively requires there to have been a commitment of capital (a contribution) *by* the claimant investor, associated with an asset in the host State's territory, nothing in such instruments further commands that the capital have *originated* with the claimant, or forbids arrangements whereby the capital has flowed from other sources or through other entities before reaching the claimant, and being then used by it to make its qualifying investment. This includes capital flows structured as loans to the claimant. As the *Kim* tribunal observed, "it is not at all unusual for investments to entail the use of credit facilities," and "there is nothing in the BIT, nor in the ICSID Convention, to provide any foundation for [an] argument that investment arrangements dependent on credit facilities for their financing are not 'investments'."[929] The exception of course would be if the loans are *mere shams*, without any intention by the lender or borrower that they be repaid.[930] If that were the case – meaning that the funds an investor ostensibly "contributes" are really free money passed through it with no attendant obligation – then the investor incurs no risk of losing those funds when it uses them, in turn, to purchase an asset in the host State.

592. Romania suggests that even if "origin of capital" is not a general requirement for jurisdiction, the Tribunal should recognize an exception in circumstances where the underlying capital to make the "investment" arguably originated from within the host State. Romania characterizes these as "circular" investments,[931] which involve capital making a kind of round-trip journey from the host State to overseas and then back again. The Tribunal appreciates the policy basis for this concern,

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[928] *See, e.g.,* **R-357**, *Cortec,* ¶ 294 (noting that "[t]he overwhelming weight of authority is against treating '**origin of capital**' as a condition for ICSID jurisdiction") (emphasis in original); **R-367**, *Masdar*, ¶ 201; **CL-311**, *Gavrilovic*, ¶ 209; **CL-202**, *Eiser*, ¶ 228; **CL-88**, *ADC*, ¶ 357.

[929] **CL-188**, *Vladislav Kim v. Republic of Uzbekistan,* ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017 ("***Kim***"), ¶¶ 13, 334-335 (citing, *inter alia*, **CL-380**, *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009 ("***Sistem***"), ¶ 35: "it is entirely normal for investment projects to be financed by borrowed funds").

[930] **CL-188**, *Kim*, ¶ 337 (considering it relevant that the evidence refuted the respondent's contention that claimants may not be required to repay loans used to finance their investment).

[931] Rejoinder, ¶ 285.

given that investment treaties are intended to promote and protect "foreign" rather than "domestic" investment.

593. Nonetheless, absent some reason to suspect *abuse of process* by a domestic investor (to create treaty jurisdiction for a foreseeable dispute),[932] or some *underlying illegality* associated with its use of domestic capital routed through overseas companies, the Tribunal finds insufficient basis in the Convention and Treaty to support a *per se* denial of jurisdiction, based only on a hypothetical domestic origin of funds that later were contributed to an investment by a legally established foreign investor. Other tribunals have been likewise reluctant to deny jurisdiction on the basis of similar corporate structuring of investments, in circumstances where the relevant instruments contain no such exclusion.[933]

594. It would have been easy for the Contracting States to exclude treaty protection in such circumstances, for example by including a provision expressly addressing the source of investment capital. But as noted in Section V.A.4 above, in connection with the separate issue of the ultimate beneficial ownership and control of investor entities, nothing in the text of the Convention or Treaty imposes such a requirement. Further, the Contracting States have ample tools (and have had ample time) to clarify their intentions, if they believe that interpretations of the Convention or the Treaty's text have misunderstood their common objectives. Among other things, they can agree to mutually amend prior treaties, or to issue joint interpretations with prospective effect, to clarify that they had

[932] *See, e.g.,* **RL-377**, *Alapli*, ¶ 311 (denying jurisdiction where "[a] Turkish national, backed by an American multinational, seeing a dispute looming with his own government, established a Dutch entity which is claiming treaty protection for a proposed combined cycle power plant."). One member of the *Alapli* majority, Prof. Stern, considered abuse of process to be the primary reason to deny jurisdiction, because the claimant "did not make an investment until after the root of the controversy was evident" and "the whole operation did not have any economic rationale" other to gain access to ICSID arbitration. *Id.*, ¶¶ 315, 390. The other member of the majority, Prof. Park, focused instead on the fact that the claimant did not itself contribute to the project: "All contributions to the Project came from someone other than Claimant," which "served as a conduit through which [another entity] funneled financial contributions …." *Id.*, ¶¶ 315, 318, 340. Prof. Park acknowledged that had this been in the form of a "loan made to Claimant …, the conclusion might be different," *id.*, ¶ 342, which suggests his concern was not the origin of capital *per se*, but rather that the claimant "had no duty to reimburse any advances," and "[t]hus, Claimant neither made any contribution nor took any risk." *Id.*, ¶¶ 346-347; *see also id.*, ¶ 380.

[933] *See* **CL-183**, *Arif*, ¶ 383 (considering the origin of capital used in investments to be "immaterial" even in such circumstances: "Whether investments are made from imported capital, from profits made locally, from payments received locally or from loans raised locally, makes no difference to the degree of protection enjoyed."); **RL-124**, *Saipem S.p.A v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ¶ 106 (finding that in the absence of a stated requirement, "investments made by foreign investors from local funds or from loans raised in the host State are treated in the same manner as investments funded with imported capital. In other words, the origin of the funds is irrelevant."); *see also* Christoph Schreuer, THE ICSID CONVENTION: A COMMENTARY (2d ed., p. 137) ("the origin of the funds is irrelevant for the purposes of jurisdiction," including whether it is from local sources or from "persons who are foreigners but do not enjoy protection" because they do not meet the relevant nationality requirements).

intended a meaning beyond what the ordinary meaning of the treaty text appears to suggest. But absent State invocation of such tools, an arbitral tribunal must proceed on the basis of a VCLT analysis of the existing text to which the Contracting States have agreed; it is not within a tribunal's remit to override such drafting choices, in order to implement policy choices that have not been made clear by the Contracting States themselves.

595. In short, since nothing in the existing Treaty (or Convention) text signals an exclusion of treaty protection predicated on the *origin of funds* used by a Dutch company to obtain shares in a Romanian company, the Tribunal declines to impose such an exclusion in this case. The key inquiry therefore remains whether the Claimant actually *made* any real contribution, as required to demonstrate the existence of a qualifying investment, not how and where it may have *sourced the funds* used for that purpose. That is because, whatever the ultimate source of funds used by an investor, "the capital *must still be linked* to the person purporting to have made an investment."[934] A claimant must prove that it actually engaged in the activity of making an investment, in order to avail itself of the protection that the Convention and Treaty afford.

596. With this understanding of the applicable legal standard, the Tribunal turns below to the facts of this case.

(b) *Whether Nova has Demonstrated a Qualifying Investment in* [redacted]

597. Before taking up the issue of Nova's several alleged contributions, the Tribunal acknowledges Nova's argument that, even if it had made no contribution, it could rely for jurisdiction on earlier contributions [redacted][935] The Tribunal does not accept this assertion. As developed above, the question is not whether *some* entity in a group of related companies at *some* time made *some* investment in the host State. Rather, it is whether the *particular* Dutch entity that is invoking the protection of a treaty between the Netherlands and Romania, on the specific basis of its own Dutch nationality, has demonstrated an "investment," which is defined in that Treaty as an "asset *invested by investors* of" the Netherlands in the territory of Romania,[936] and which bears the objective characteristics of an investment (*i.e.*, elements of contribution, risk and duration). Thus, the fact that Nova eventually came into possession of shares in a Romanian

[934] **CL-131**, *Caratube*, ¶ 456 (emphasis added).
[935] Reply, ¶¶ 243, 262.
[936] **C-1**, BIT, Article 1(a) (emphasis added).

company, to which other companies of different nationalities had previously contributed funds, does not assist in establishing Nova's own jurisdiction *ratione materiae*.

598. Be that as it may, Nova also alleges that it made several contributions itself, at various times, which satisfy the requirement of an "investment" under the Convention and Treaty. The Tribunal assesses these separately below, in chronological order. It emphasizes that in doing so, its focus in this Section is solely on *whether a cognizable contribution was made*, not on the separate question of whether any associated transaction should be disregarded on the basis of *alleged illegality*, which is a different objection taken up later in Section V.C.4.

(i) [redacted]

599. As for the contribution question, it is established that [redacted]

600. [redacted],

[937] [redacted]

[938] Rejoinder, ¶ 32 [redacted].

[939] [redacted]

[redacted].[941]

601. Romania raises three objections to this transaction qualifying as an "investment."

602. First, Romania objects to the *adequacy of the purchase price*, [redacted].[942] [redacted] As to this issue, the Tribunal sides with Nova, bearing in mind the discussion of the "low consideration" cases in Section V.B.4.a above. In the context of related company transactions, implemented to restructure ownership of shares that already are held within a broader corporate group, it is not exceptional for shares to be traded at their face value or "par," rather than at their full market value as would be more common in arms-length transactions. The Tribunal is not prepared to say that such a transaction *ipso facto* is insufficient to constitute a cognizable "contribution" by the acquiring company, particularly when the sum involved is in the millions of Euros (rather than, say, a purely symbolic few Euros), the transaction occurred long before the events giving rise to a dispute on the merits, and the acquiror retained the relevant shares for years thereafter. The consideration paid was not illusory, and the timing of the payment and the length of time the shares were held suggests a real intent that the acquired asset be deployed to develop economic activities in the host State.

603. Of course, this conclusion about consideration being adequate to be recognized as a contribution giving rise to a real investment depends on a finding that the acquiror *actually paid* the consideration in question, rather than simply recording it on paper but not actually investing anything in the transaction. As to the issue of Nova's actual payment for the shares, Romania offers two other objections: one about the *origin of funds* [redacted] and the other about the *recipient* of [redacted] payment.

604. With respect to the *origin of funds*, it appears that [redacted]

[940] [redacted]

[941] [redacted]

[942] Counter-Memorial, ¶¶ 242-243; Rejoinder, ¶¶ 319-320; Romania's Opening Presentation, slide 155.

[redacted]

[redacted][945].

605. As discussed in Section V.B.4.a above, the fact that an investor borrows money for various reasons, including to fund an asset purchase such as an acquisition of shares, does not disqualify that purchase from being a covered investment; there is no requirement that an investor making a cognizable contribution do so out of its own original funds, as opposed to funding from debt or other means. An investor who funds its overseas investment with debt does not thereby invest without risk; it still faces the risk that its contribution will be lost. The only scenario in which this might be a risk-free investment is if the underlying loan was entirely illusory, *i.e.*, a mere transfer of funds intended to be used on a pass-through basis, without any real intention that the "loan" ever would be paid back. In that event, as discussed above, the putative investor who receives free money with no attendant obligation (other than to purchase an asset with it) risks nothing itself in using those funds for the asset purchase.

606. In this case, the Tribunal has not been directed to any other documents in the record that might shed light on the purpose of the larger [redacted] loan. [redacted] Nonetheless, the fact that [redacted] tends to support a conclusion that the obligation was intended to be settled in due course. [redacted] This tends to confirm both that the [redacted] which support an inference that this was a real loan and not a sham transaction. In any event, the Tribunal has no evidence to the contrary, [redacted]

944 [redacted].

945 [redacted]

[redacted]

607. Romania's last basis for objecting to the *bona fides* of Nova's contribution relates to the *payee*: Romania objects that the payment was not sent directly [redacted]

608. In general, a payee of funds is entitled to designate the manner in which payment will be made. If it chooses to request payment to be made to a designee (whether that be its beneficial owner, representative, creditor or otherwise), that does not make the payment any less of a contribution *by the payor*. [redacted] In these circumstances, the Tribunal is unable to conclude that [redacted] payment, [redacted] was not a valid "contribution" for its purchase of the shares.

609. In short, while the Tribunal accepts that many aspects of this transaction bear the hallmarks of "related" company dealings rather than an arms-length acquisition, that fact alone is not disqualifying. [redacted] Based on those documents, and considering the applicable burden of proof (*see* Section VI.A.3 below), the Tribunal is unable to conclude that [redacted]

[redacted]

[948] Reply, ¶ 248, [redacted]

[949] [redacted]

[redacted], which ultimately resulted in Nova's [redacted], did not involve its making any contribution that is capable of recognition in support of a qualifying investment under the Convention and the Treaty.

610. As noted in Section V.B.4.a, there is nothing improper *per se* about corporate restructurings of assets, provided that they are not done in abuse of process to create jurisdiction after a dispute is reasonably foreseeable, and do not otherwise violate applicable law. Any such circumstances would be analyzed separately under the relevant doctrines,[950] not under the rubric of whether an "investment" (objectively defined) was made in the first place. As to *that* issue, [redacted] seems to meet at least the minimum requirements of demonstrating a "contribution" sufficient to establish an objective investment by Nova in Romania, [redacted]

(ii) [redacted]

611. The second transaction which resulted in Nova's obtaining a further indirect stake [redacted].

612. [redacted] y).[953]

[redacted]

[951] **C-1549**, [redacted] SPA, Section I, ¶¶ 2-3.

[952] *Id.*, Section II, ¶¶ 2-4, and Section VI, ¶ 1.

[953] *Id.*, Section III, ¶¶ 1-2, and Section IV.

613. [redacted].[960]

614. Thus, the making of [redacted] payments by [redacted] is established. The real issue that Romania raises concerns how [redacted] came to be in possession of these funds, and accordingly whether the "origin of funds" backstory is one that supports or undermines the notion that [redacted] made a contribution that is cognizable to establish an objective investment [redacted] under the ICSID Convention and the Treaty. As discussed above, most tribunals have considered tracing the investor's source of capital to be irrelevant to the *existence* of an investment as such,[961] and this Tribunal generally agrees, unless it were to be established, exceptionally, that a contribution was entirely illusory. With this approach in mind, the Tribunal turns below to the evidence regarding the source of the funds used to finance [redacted].

[redacted]

[954] [redacted]

[955] [redacted] 1.

[956] [redacted]

[957] [redacted]

[958] Rejoinder, ¶ 337.

[959] [redacted]

[960] Claimant's Rejoinder, ¶ 230.

[961] As previously stated, an investigation into sources of capital may also demonstrate other bases for concern *separate from* the existence of a contribution, such as abuse of process or illegality, but those would give rise to different grounds for challenging jurisdiction or admissibility.

[redacted]

616. While Nova's explanation of its funding practices was admittedly general rather than specific to this particular transaction, the Tribunal accepts the broader point that despite being a holding company, Nova had *bona fide* means of access to funds to perform its periodic investment activities. Given this fact, the Tribunal sees no basis for rejecting the reality of Nova's proven [redacted] contribution to [redacted] Certainly, Romania is not justified in advocating this result by way of a "negative inference that the [redacted] did not concern Claimant's own funds,"[967] because – contrary to Romania's assertion – there was no document production order on this issue with which Nova failed to comply. [redacted]

[redacted]

[967] Romania's Opening Presentation, slides 158-159.

[redacted]

617. Taking all these issues into account, the Tribunal finds that Nova has established at least a [redacted] contribution in 2011, for the purposes of acquiring (through its subsidiary) [redacted]

618. The final contribution that Nova invokes, to establish its making of an objective investment in [redacted] relates to the additional [redacted] paid [redacted]

619. [redacted]

[968] Romania's Opening Presentation, slide 158 (reproducing the Tribunal's ruling on Romania's Document Request No. 3) (emphasis added).

[969] *See* **R-120** [redacted].

[970] *See* Reply, ¶¶ 196-197 ("Romania is correct that the transaction was so structured.").

[971] [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

621. The Tribunal defers until the next Section (Section V.C) an examination of the legality of this fundraising mechanism under Romanian law, an objection by Romania which certainly raises very serious questions. The legality issues are jurisprudentially distinct from the existence of a contribution and the analyses of the two issues should not be conflated.[977] Thus, for purposes of *this* Section, the only question is whether this set of transactions reflected any additional contribution by Nova that could give rise objectively to an "investment" in Romania for purposes of the ICSID Convention and the Treaty.

[redacted]

[977] *See similarly* **CL-311**, *Gavrilovic*, ¶ 208 ("Whether the payment was contrary to Croatian law is not relevant for the present narrow question of whether Claimants were 'investors' who made an 'investment.' It is, however, relevant to the Tribunal's consideration of whether the investment was made in accordance with Croatian law ….").

622. Notably, these transactions all occurred at the Nova subsidiary level: [redacted] Nonetheless, the *end result* of the various related-company transactions [redacted] was not simply the shifting of funds [redacted] which would not constitute an objective outlay of any sort. Rather, the shifting of funds among Nova-controlled "pockets" was for the broader purpose of financing a purchase from an *unrelated third party* [redacted] of additional shares in a Romanian company. It is indisputable at the end of the day that [redacted] left Nova's subsidiaries and was paid to the [redacted]. In these circumstances, where the ultimate result (whatever the source of funds used) was an outflow of capital from Nova-owned companies to a third-party, in order to acquire Romanian assets (shares) that fall within the illustrative list in Article 1(a) of the Treaty, the Tribunal is unable to conclude that no contribution was made at all that could qualify objectively as a contribution.

(iii) Conclusion

623. The Tribunal's conclusion, summarized in the two subsections above, is that Nova contributed funds [redacted] While these funds were obtained through loans from various related companies, the various loans each appear to have been interest-bearing, and the Tribunal is unable to conclude that there was never an intention that the debts be repaid. Given the widespread jurisprudence rejecting an "origin of capital" requirement for establishing a qualifying investment, and accepting that asset purchases may be funded *inter alia* by debt (including debt raised from related companies, whether inside or out of the host State),[978] the Tribunal is unable to conclude that Nova did not make a qualifying contribution associated with the acquisition of [redacted] shares.

624. In these circumstances, there is no need for the Tribunal to examine Nova's alternate theory [redacted]. Whether or not these transactions involved additional contributions that could be attributed to Nova, the fact remains that Nova contributed sufficiently at the time of the share purchases as to establish a qualifying investment in [redacted] capable of attracting Treaty protection and satisfying the objective requirements of the Treaty and the ICSID Convention.

[978] *See* Section V.B.4.a above.

625. Romania's second jurisdictional objection, namely that the Tribunal lacks jurisdiction *ratione materiae* because Nova's alleged investment does not qualify as an "investment" within the meaning of Article 1(a) of the Treaty or Article 25 of the ICSID Convention, is therefore denied. However, this does not conclude the analysis of *ratione materiae*, because Romania presents a separate jurisdictional objection concerning alleged illegalities in connection with Nova's investments in [redacted] As already stated, that objection raises jurisprudentially distinct issues from whether an investment was established in the first place. The Tribunal therefore turns next to the illegality objection, in the Section immediately below.

C. JURISDICTION *RATIONE MATERIAE* – ILLEGALITY

1. Relevant Treaty Provision

626. As noted, Article 1(a) of the Treaty defines "investments" as "every kind of asset invested by investors of one Contracting Party in the territory of the other Contracting Party, *in conformity with the laws and regulations of the latter* …"[979]

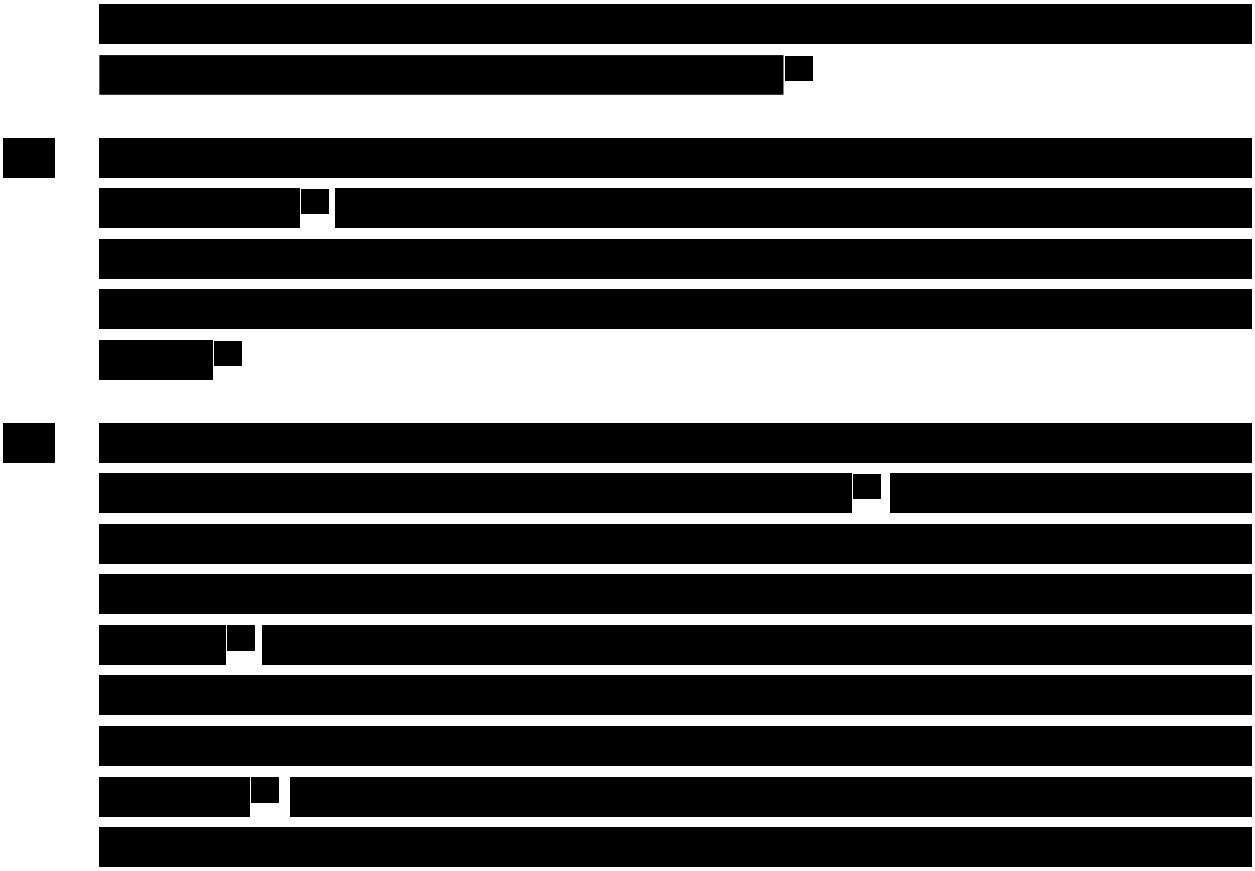
2. Romania's Position

[redacted]

(a) *Applicable Standards*

[redacted]

[redacted]



[redacted]

(b) ***Whether Nova's Alleged Investment Satisfies the Legality Requirement***

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

> [redacted]

> [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted]

3. Nova's Position

[redacted]

(a) *Applicable Standards*

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) ***Whether Nova's Alleged Investment Satisfies the Legality Requirement***

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted][redacted] [redacted]

> [redacted][redacted]

[redacted] [redacted]

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[redacted]

[redacted]

4. The Tribunal's Analysis

(a) *The Applicable Legal Requirements*

653. The Treaty defines the word "investments" to include an express requirement of legality under host State law. Specifically, Article 1(a) states that the term "investments" refers to assets that were "invested by investors of one Contracting Party in the territory of the other Contracting Party, *in conformity with the laws and regulations of the latter* …"[1086] This language removes any need to consider (as certain other cases have done) whether legality under host State law might be an implicit requirement of protection even without such a treaty provision.[1087] Under this Treaty, legality is a stated element for an investment to qualify for protection. This includes not only the substantive protections of the Treaty, but also its core consent to arbitral jurisdiction.[1088]

654. Article 1(a) of the Treaty also confirms that the legality requirement has a temporal component. The requirement of conformity with host State law to qualify as a protected "investment" concerns the manner or process by which assets were "*invested by* investors … in the territory."[1089] For jurisdictional purposes, therefore, the inquiry is into the legality of the making the investment in the first place. Violations of law after the investment was established may be very important to the merits and any entitlement to relief, but they do not affect jurisdiction *ratione materiae*, *i.e.*, the status of an "investment" as such.[1090]

[1086] **C-1**, BIT, Article 1(a) (emphasis added).

[1087] *Cf.* **RL-111**, *Inceysa*, ¶¶ 192-196 (finding a legality requirement implicit in light of certain statements in the *travaux preparatoires*); **RL-116**, *Phoenix*,¶ 101 (finding legality under national law "implicit even when not expressly stated in the relevant BIT"); **RL-114**, *Plama*, ¶¶ 138-139 (finding that ECT protections "cannot apply to investments that are made contrary to law," even though the ECT "does not contain a provision requiring the conformity of the Investment with a particular law"); **CL-303**, *Achmea*, ¶¶ 170-172, 176 (considering that eve though the definition of investment contained no express stipulation, it would be "wholly unreasonable to suppose that the Parties could have intended to protect investments that violate … a prohibition of foreign investment in a specified sector of the economy" – but rejecting "reading in a requirement that there must be no infraction of the host State's law" whatsoever "in the course of the making of the investment").

[1088] *See* **CL-302**, *Quiborax* Jurisdiction, ¶ 255 (the legality requirement in a treaty's definition of investment is "relevant to determine the scope of the Contracting Parties' … consent to arbitration"); **CL-396**, *Fraport II*, ¶ 467 ("[t]he illegality of the investment at the time it is made goes to the root of the host State's offer of arbitration under the treaty").

[1089] **C-1**, BIT, Article 1(a) (emphasis added).

[1090] *See* **CL-302**, *Quiborax* Jurisdiction, ¶ 266; **CL-385**, *ECE*, ¶¶ 3.166, 3.168; **CL-396**, *Fraport II*, ¶ 331; **CL-188**, *Kim*, ¶¶ 374-377.

655. In the Tribunal's view, the legality requirement implicitly involves some threshold of materiality.[1091] The Respondent is correct that this is not stated in the Treaty. Nonetheless, as other tribunals have found, the broader object and purpose of such treaties – stated here as "to stimulate the flow of capital and technology and the economic development of the Contracting Parties" by reaching "agreement upon the treatment to be accorded to such investments"[1092] – suggests a need to take materiality into account. It would not be consistent with the stated objectives to exclude from protection otherwise *bona fide* investments, which contribute to the stated goals and which were implemented materially in compliance with host State laws, simply because there was some minor inconsistency with rules or procedures that do not reflect substantial State objectives.[1093]

656. Accordingly, most tribunals have accepted that materiality is a part of the legality inquiry; the debate has been one of degree rather than of principle. It is accepted in virtually all cases that, at minimum, "minor or trivial acts not in compliance with legislation [are] not the type of acts intended to be captured by a legality requirement."[1094] The question is how high the bar should be set beyond this. Some cases suggest that jurisdiction might be excluded for any "non-trivial violations of the host State's legal order,"[1095] while others would set the bar only where the "illegality goes to the essence of the investment"[1096] or represents "a violation of fundamental principles of probity or public policy."[1097]

[1091] *See generally* **CL-334**, J. Kalicki *et al*., "Legality of Investment," in M. Kinnear *et al*. (eds.), *Building International Investment Law: The First 50 Years of ICSID* (ICSID/Kluwer 2016), p. 136 (explaining that in different cases "[m]ateriality has been evaluated in many different ways, including by reference to: (1) the importance of the law or equitable principle allegedly violated; (2) the nature of the violation (*e.g*., knowing misrepresentations); and (3) the likelihood that the State would have rejected the claimant's investment 'but for' the illegal or inappropriate conduct").

[1092] **C-1**, BIT, Preamble.

[1093] *See, e.g.,* **CL-188**, *Kim*, ¶¶ 19, 394 (accepting that "[t]he ordinary meaning of the phrase 'made in compliance with legislation' is inclusive and without explicit substantive limitations," but finding that "[t]he limitations on the substantive scope of the terms … become apparent when the ordinary meaning of the terms is considered in their context and in light of the object and purpose of the Treaty"; specifically, "[g]iven the aim of encouraging investment through the provision of some measure of security, it is not plausible that the drafters of the BIT intended to include minor acts of noncompliance as a basis for denying jurisdiction").

[1094] **CL-188**, *Kim*, ¶ 390.

[1095] **CL-302**, *Quiborax* Jurisdiction, ¶ 266.

[1096] **CL-396**, *Fraport II*, ¶ 332 (citing a statement by the tribunal in *EDF International S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, that "[t]he condition of not committing a grave violation of the legal order is a tacit condition of any BIT"). The *Fraport* tribunal did not declare this to be the required threshold, but stated that "international legal remedies [would be] unavailable … *at least*" in such circumstances – leaving open the question of whether the same approach would apply to illegalities that did not go to "the essence of the investment." *Id.* (emphasis added).

[1097] **CL-303**, *Achmea*, ¶ 177; *see also* **RL-115**, *Rumeli*, ¶ 319 ("investments in the host State will only be excluded from the protection of the treaty if they have been made in breach of fundamental legal principles of the host country").

657. The Tribunal sees no need to declare a standard to govern all cases. Rather, it proceeds under the proportionality approach proposed in *Kim*, which recognizes, in line with the nuanced object and purpose of investment treaties, that denying the protections of a BIT is proportionate "only when its application is triggered by noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State."[1098] This approach takes into account several factors, in recognition that "[t]he seriousness of the act is a combination of both the importance of the requirements in the law and the flagrancy of the investor's noncompliance …. Seriousness to the Host State is to be determined by the overall outcome, which will depend on the seriousness of the law viewed in concert with the seriousness of the violation."[1099] Specifically:

> [T]he legality requirement in the BIT denies the protections of the BIT to claims where the investment involved was made in noncompliance with a law of [the host State] where together the act of noncompliance and the content of the legal obligation results in a compromise of a correspondingly significant interest of [the State]. This test requires a case-by-case analysis … so as to ensure that the harshness of the sanction of placing the investment outside of the protections of the BIT is a proportionate consequence for the violation examined. …. The proportionality principle guides the Tribunal's consideration ….[1100]

658. With respect to the burden of proof, the Tribunal considers that, at least in circumstances where a treaty expressly requires legality as part of its definition of an investment, a claimant bears the initial burden of demonstrating a *prima facie* case on legality.[1101] This would include demonstrating that it invested assets in an enterprise or sector that engages in legal activity and for which foreign investment is not prohibited, and that it did so through processes that are generally permitted under applicable law. However, if a respondent considers that other facts establish a violation of law, then it bears the burden of so demonstrating. This is not because the "illegality" of an investment is an

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[1098] **CL-188**, *Kim*, ¶¶ 20, 396; *see also* **RL-357**, *Cortec*, ¶ 320 ("endors[ing] the application of the *Kim* principle of proportionality to an assessment of the impact of alleged illegalities").

[1099] **CL-188**, *Kim*, ¶ 398.

[1100] **CL-188**, *Kim*, ¶ 404. The *Kim* tribunal identified a "non-exhaustive list of relevant considerations" for each of the "three steps" in its proposed analysis, *id.*, ¶¶ 405-406, *i.e.*, to guide it in assessing (a) "the significance of the obligation with which the investor is alleged to not comply" (¶ 406), (b) "the seriousness of the investor's conduct" (¶ 407), and (c) "whether the combination of the investor's conduct and the law involved results in a compromise of a significant interest of the Host State to such an extent that the harshness of the sanction of placing the investment outside the protection of the BIT is a proportionate consequence for the violation examined" (¶ 408). The Tribunal finds this list of considerations illuminating, but agrees with *Kim* that not all factors need be considered in any particular case. *Id.*, ¶ 409.

[1101] *See generally* **CL-395**, GB Born, "On Burden and Standard of Proof," in M Kinnear *et al.* (eds), *Building International Investment Law: The First 50 Years of ICSID* (ICSID/Kluwer 2016), pp. 49-50 (the legal burden of proving required elements of jurisdiction rests on the claimant).

"affirmative defense"; as noted above, the Treaty here (like many treaties) includes conformity with host State law as a stated requirement for Treaty protection.[1102] Rather, it is because of the near impossibility of expecting a party to affirmatively prove a negative proposition, namely that an investor has not violated any possible requirement of the host State's law. The jurisprudence supports taking this factor into account in allocating evidentiary burdens of proof.[1103] Nonetheless, if a respondent is able to present *prima facie* evidence of a violation of law, then the burden shifts back to the claimant to rebut that showing,[1104] meaning that the claimant ultimately remains responsible for establishing the elements of jurisdiction.

659. Finally, separate from the question of legality under host State law, there are certain circumstances in which tribunals have found that *international law* renders investments not qualified for protection through the ICSID system. These have involved wrongdoing of a particularly serious nature, such as procurement of the investment through bribery[1105] or fraud,[1106] or abuse of process in an "attempt to misuse" the ICSID system.[1107] Tribunals have adopted various explanations for dismissing such claims for lack of jurisdiction, including "international public policy"[1108] and "the international principle of good faith."[1109] In this case, however, the Tribunal finds no need to delve into such doctrines, as explained further below.

[1102] *Cf.* **CL-396**, *Fraport II*, ¶ 299 (treating illegality as a "defense," notwithstanding that the definition of investment in the applicable treaty contained an express "in accordance with law" requirement).

[1103] *See, e.g.,* **CL-302**, *Quiborax* Jurisdiction, ¶ 259 (considering that "the party alleging a breach of the legality requirement, *i.e.*, the host State, bears the burden of proof," and explaining that "[t]he contrary proposition would be unrealistic: the investor would have to somehow prove that it has complied with the myriad laws and regulations of the host State"); **RL-273**, *Siag*, ¶ 317 (noting that "negative evidence is very often more difficult to assert than positive evidence"); *see also* **CL-395**, GB Born, "On Burden and Standard of Proof," in M Kinnear *et al.* (eds), *Building International Investment Law: The First 50 Years of ICSID* (ICSID/Kluwer 2016), pp. 49-50 (discussing the "reversal of the evidential burden of proof where the claimant would be asked to prove a negative").

[1104] *See* **CL-396**, *Fraport II*, ¶ 299; **CL-397**, *Karkey*, ¶ 497; **CL-311**, *Gavrilovic,* ¶ 231.

[1105] **CL-221,** *World Duty Free Co. Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006 ("***World Duty Free***"), ¶¶ 136, 157 (declining to entertain the breach of contract claims where the claimant had procured its investment by bribing the then-president of Kenya).

[1106] **RL-114**, *Plama,* ¶ 143 (denying ECT protection to an "investment … obtained by deceitful conduct").

[1107] **RL-116**, *Phoenix*, ¶¶ 136-144 (dismissing claims to prevent "an abuse of the system of international ICSID investment arbitration," after finding that the damages at issue "had already occurred … when the alleged investment was made," that the "'investment project' was made simply to assert a claim under the BIT," and that there were no indicia of a *bona fide* investment).

[1108] **CL-221,** *World Duty Free*, ¶¶ 139, 157; *see also* **RL-114**, *Plama,* ¶ 143.

[1109] *See* **RL-116**, *Phoenix*, ¶¶ 109, 113.

(b) *Whether Nova's Investments Complied with the Requirements*

660. As discussed in Section V.B.4.b, Nova obtained its indirect interest in [redacted] in two stages, [redacted]

661. There is no dispute that [redacted] was engaged in legal activity in Romania; it was a licensed insurance company. Nor is there any claim that Romanian law prohibited foreign investors like Nova from purchasing interests in Romanian insurance companies. [redacted] In other words, at a *prima facie* level, there appears to be nothing inherently illegal in the process by which Nova obtained its stake in [redacted] Nonetheless, Romania alleges that there were illegalities [redacted] As discussed above, Romania bears the burden of substantiating these assertions, at least to a similar *prima facie* threshold – at which point the burden would shift back to Nova to rebut any such showing.

662. The Tribunal examines the relevant arguments and evidence for each of the transactions separately below.

(i) [redacted]

663. First, with respect to the [redacted] transaction, Romania alleges two different violations of law: one relating to the sale price, the other relating to the payee to whom that price was paid.

664. With respect the sale price, Romania's argument is that the [redacted] consideration agreed [redacted] was too low to satisfy the requirement in Article 1303 of the Romanian Civil Code that "[t]he sale price must be serious and determined by the parties."[1110] Romania also contends that Article 1303 was violated because the purchase price was determined by [redacted] rather than by the parties to the transaction [redacted][1111] The Tribunal is not persuaded by these arguments.

665. The Romanian courts have explained that the concept of a "serious price" reflected in Article 1303 of the Romanian Civil Code refers to a price that "represents a sufficient cause" for a sale

[1110] **R-361**, Romanian Civil Code, Article 1303.

[1111] Romania's Opening Presentation, Slide 162; *see also* Rejoinder, ¶ 246.

transaction. "[W]ithout requiring an equivalence between the price and the good's value," the concept excludes only "the existence of a disproportion that is *not susceptible to a natural justification*," such as "when it is so disproportionate that there is *no price*, is infinitesimal and tends to zero."[1112] Moreover, the notion of disproportion is "subject to the filter of subjectivity of the contracting parties, who, by effect of their will, are free to always set the amount that is paid as a price." This is particularly the case in circumstances "where there are affinity relationship between the parties," in other words in related-party transactions.[1113]

666. In this case, [redacted] The broader restructuring has been explained by [redacted] There has been no showing that these goals were either illicit or pretextual. Nor is there any evidence that when [redacted] entered into the [redacted] as part of this broader restructuring process, they were not exercising the free will of legal entities according to their respective established approval processes.

667. As discussed in Section V.B.4.b, the evidence is that the agreed purchase price ([redacted]) reflected the par value of the shares. There is no suggestion that either party to the transaction was misled as to that fact, or believed that par value was equivalent to market value.

668. In similar circumstances, the Romanian courts have accepted that the sale or assignment of shares at par value is legal: the agreed price is neither "frivolous" nor so low as to cast doubt on the real intentions of the parties. For example, the Bucharest Tribunal (Sixth Civil Division) stated as follows in 2014:

> [A] price is frivolous when the price is so disproportionate compared to the value of the good, that it is obvious that the parties did not intend to consent to a sale. According to the provisions of the share assignment

[1112] **C-1521**, Decision 3493 of the Supreme Court, First Civil Division, 18 May 2012 (emphasis added).

[1113] *Id.*

[1114] [redacted]

[1115] [redacted] 9.

[1116] [redacted]

> agreement, the plaintiff transferred the shares in exchange for the amount of Lei 10 for each share.
>
> From the company certificate … the value of a share … is of Lei 10….
>
> Although it is possible that the par value of the share is not proportionate to their real value, *in case of transfer of such shares in exchange for their par value, it cannot be considered that the price is frivolous*. The transfer of shares for a value that is inferior to their real value represents the intention of the parties which they don't have to mention/explain in the ownership transfer document, and one cannot talk about an illegal agreement as long as the breach of consent of the assignor is not invoked and proven.
>
> Under any circumstance, *the par value of the shares cannot be considered so disproportionate* on relation to the real value of the shares, that it becomes obvious that the parties did not intend to consent to a share assignment agreement ….[1117]

669. Other Romanian courts have reached similar conclusions in the context of Article 1303 of the Romanian Civil Code. The High Court of Cassation and Justice has stated that "the assignment or sales of shares at their face value are perfectly legal."[1118] The Alba Iulia Court of Appeal, Second Civil Division has opined that "the legal provisions do not prohibit the assignment of shares at face value."[1119]

670. Romania has presented no contrary cases finding that a sale of shares at par value violates Article 1303. In these circumstances, the Tribunal finds that Romania's Article 1303 objection [redacted] has not been proven.

671. With respect to Romania's separate objection about the payee, Romania alleges that [redacted] demonstrates that the transaction had an immoral or false cause under Articles 966 and 968 of the Civil Code.[1120] [redacted]

[1117] **C-1530**, Decision No. 1041/2014 of the Bucharest Tribunal, Sixth Civil Division (emphasis added).

[1118] **C-1555**, Decision No. 1392/2017 of the High Court of Cassation and Justice.

[1119] **C-1557**, Decision No. 667/2016 of the Alba Iulia Court of Appeal, Second Civil Division.

[1120] Romania's Opening Presentation, Slide 162.

[redacted][1121]

672. Article 966 of the Romanian Civil Code provides that "[t]he obligation without cause or based on a false or illicit cause cannot have any effect." Article 968 explains that "[t]he cause is illicit when it is forbidden by law, when it is contrary to good morals and public order."[1122]

673. In this case, Romania has not demonstrated that it is either "forbidden by law" or "contrary to good morals or public order" for a seller to designate someone else to receive a payment made by a buyer. While there may be circumstances where doing so violates some independent obligation of the seller (for example, a duty to its shareholders to receive the funds and distribute them itself), there has been no showing of such facts in this case. Indeed, there has been no reference to any other stakeholder in [redacted] who allegedly was harmed by its authorization of payment to be made directly to its beneficial owner. Nor has Romania developed any other argument for why this would be illegal (for example, as allegedly facilitating some kind of tax avoidance scheme). Finally, Romania has not demonstrated that this payment designation undermined the broader rationales for the [redacted] transaction, [redacted]

674. In other words, the share purchase transaction has not been shown either to have been based on an "illicit cause," or on a "false … cause," as per the terms of Article 966 of the Romanian Civil Code.

675. In conclusion, Romania has not demonstrated, even to a *prima facie* standard, that Nova's [redacted] was made in violation of Romanian law. In these circumstances, the Tribunal has no basis to disallow that investment from coverage under Article 1(a) of the Treaty.

(ii) [redacted]

676. [redacted]

[1121] [redacted]3

[1122] **R-361**, Romanian Civil Code, Articles 966, 968.

[redacted].[1124]

677. Romania does not allege any illegality with respect to [redacted] However, it asserts numerous different illegalities in connection with the [redacted] transactions. The Tribunal sees no need to address each and every one of Romania's allegations of illegality with respect to the [redacted] transactions. That is because it concludes, as explained below, that (a) in at least one important respect, these transactions were not "in conformity with the laws and regulations" of Romania as required by Article 1(a) of the Treaty,[1125] and (b) this illegality was material using the *Kim* proportionality test discussed in Section V.C.4.a above.

678. Specifically: Article 106(1) of the Companies Act states that "[a] company may not grant advances or loans nor it may establish securities with a view to subscribing or acquiring its own shares by a third party."[1126] On a *prima facie* basis, this is effectively what [redacted] it granted a loan "with a view to" facilitating an acquisition of its own shares.

679. Nova presents two counterarguments to rebut Romania's assertion of a violation of Article 106(1). First, it notes that the borrower [redacted] was not the same company as the one which acquired [redacted].[1127] This is technically accurate but hardly exculpatory, given the back-to-back nature of the two loans, Nova's central role in coordinating them, and the undisputed purpose for which they were extended. [redacted]

[1123] [redacted].

[1124] *See* **R-120**, [redacted]

[1125] **C-1**, BIT, Article 1(a).

[1126] **R-121**, Companies Act No.31/1990, as applicable on 12 January 2007, Article 106(1).

[1127] Reply, ¶ 202 [redacted]

[1128] [redacted]

[redacted] .”[1130]

680. In other words, there was nothing coincidental in the fact that [redacted] on a single day first borrowed [redacted] and then immediately loaned the same sum [redacted]

681. Interestingly, Nova does not explain why it implemented the loan through two steps rather than one. Presumably a direct loan [redacted] would have been even simpler to implement. But this would have made the use of [redacted] funds for a share buyout much more transparent. [redacted] The Tribunal acknowledges that some “smell” emanates from the opacity of the two-step loan transaction, particularly given the absence of any other explanation for that structure. At the same time, it once again recognizes that [redacted] the Tribunal cannot rule out the possibility of some alternate explanation, such as for tax benefits or the like.

682. Ultimately, however, there is no need for the Tribunal to reach the issue of *mala fides.* That is because, whatever the reason for the pass-through structure, Nova’s admitted rationale for the broader transaction falls squarely within the terms of the prohibition in Article 106(1) of the Companies Act. Importantly, that Article forbids loans being made for a *given purpose*, namely “*with a view to* subscribing or acquiring its own shares” (emphasis added). Nothing in Article 106(1) turns on the number of steps through which this purpose is implemented. There is no suggestion that the prohibition was intended to be limited to *one-step* loan transactions, permitting without restriction any *two-step* loan transactions undertaken for the exact same purpose. Implying such a limitation into the provision would render it almost ineffectual, since it would be easy (as Nova’s conduct demonstrates) to set up a two-step loan transaction to accomplish the same

[1129] Claimant’s Rejoinder, ¶¶ 122-123.

[1130] [redacted]

[1131] Rejoinder, ¶ 229 [redacted] .

objective that a one-step transaction could have done. It is unlikely that the enactors of the Companies Act intended its provisions to be of such limited reach and effect.

683. Nova's second defense to an alleged Article 106(1) violation is that the Article's reference to a "third party" acquisition of shares implicitly covers only share purchases by unrelated acquirors, not related company acquirors.[1132] This interpretation is not obvious from the face of Article 106(1), nor does Nova point to any supporting definition of "third party" either generally in the Companies Act or specifically in its Title III ("Operation of trading companies"), where Article 106 appears.

684. Instead, Nova relies on a seemingly unrelated provision of a *different title* of the Companies Act: Article 272, which appears in Title VIII ("Contraventions and offences"). Article 272(1) imposes criminal liability on company insiders who directly or indirectly borrow funds to favor other companies they manage or control,[1133] but Articles 272(2) and (3) exempt from this prohibition *certain* related company loans, stating that those are "not considered a crime."[1134] According to Nova, Article 272 is relevant to the Article 106 inquiry, because "Article 106 of the Companies Act is … subordinate to Articles 272(2) and (3) of the Companies Act."[1135] Yet Nova's notion of "subordination" is not based on any stated connection between these two provisions in the Companies Act. It is said to be based more generally on principles of *lex specialis* and on the Romanian hierarchy of norms, specifically that "criminal law provisions are a higher norm than

[1132] Claimant's Rejoinder, ¶ 136 [redacted]

[1133] *See* **C-1314**, Companies Act No. 31/1991, Article 272(1)(2) (imposing criminal punishment on company founders, administrators, directors or legal representatives who "use[], in bad faith, goods or credit that the company enjoys, for a purpose contrary to its interests or for its own benefit or to favoring another company in which it has direct or indirect interests") and Article 272(1)(3) (imposing such punishment where "it is borrowed, in any form, directly or through an interposed person, from the company it manages, from a company controlled by it or by a company that controls the company he manages ….").

[1134] *See Id.*, Article 272(2) (stating that the offence in Article 272(1)(2) is not a crime if committed "within the framework of treasury operations between the company and other companies controlled by him or who control it, directly or indirectly") and Article 272(3) (stating that the offence in Article 272(1)(3) is not a crime if committed "by a commercial company that has the status of founder, and the loan is made from one of the controlled companies or one that controls it, directly or indirectly").

[1135] Reply, ¶ 202.

[redacted]

685. In the Tribunal's view, there is no genuine conflict between Article 106(1) and Articles 272(2) and (3) of the Companies Act. As Nova itself acknowledges, Article 272 "regulates criminal liability for directors and officers in relation to their actions," and not the legality of particular types of loans extended for particular purposes.[1139] Specifically, Articles 272(2) and (3) provide exceptions to criminal liability for director and officer conduct that otherwise would violate Article 272(1), had the same conduct not been in the context of related company loans. But the issue under examination here is not liability under Article 272(1). It is the wholly different subject regulated by Article 106(1), which concerns the legality of extending loans *for a particular purpose*, namely, to fund share acquisitions from the lender itself. That is a subject regulated only by Article 106(1), and not by Article 272.

686. [redacted]

687. In short, the Tribunal concludes that the [redacted] loan [redacted] is contrary to Article 106(1)'s

[1136] Reply, ¶¶ 201, 202; Claimant's Rejoinder, ¶ 127.4 (explaining that "while a civil law provision in the *lex specialis* will override a conflicting civil law provision in the *lex generalis*, a criminal law provision in the *lex generalis* will override a conflicting civil law provision in the *lex specialis*").

[1137] Rejoinder, ¶¶ 217-227.

[1138] Rejoinder, ¶ 215.

[1139] Claimant's Rejoinder, ¶ 129.

categorical statement that "[a] company may not grant advances or loans nor may it establish securities with a view to subscribing or acquiring its own shares by a third party."[1140]

688. In this fashion, the [redacted] loan transactions were not "in conformity with the laws and regulations" of Romania, as required by the definition of investment in Article 1(a) of the Treaty.[1141]

(c) *Consequences of Non-Compliance*

689. The question that necessarily follows is whether the violation of Article 106(1) of the Companies Act was *sufficiently material* as to carry consequences under Article 1(a) of the Treaty, or *sufficiently immaterial* that it may be overlooked. What turns on this question is whether the [redacted] shares [redacted], constitute a qualifying "investment" under the Treaty that can benefit from the protections it affords. The Tribunal considers the answer to this question to be "no," applying the proportionality approach suggested in *Kim* to determine the materiality of the violation in question.

690. The first factor to be considered in this analysis is "the significance of the obligation with which the investor is alleged to not comply."[1142] In this regard, the Tribunal cannot accept Nova's contention that the obligation in Article 106(1) is "minor in character,"[1143] such that a breach is merely "arid, technical,"[1144] of a sort that could attract "minor civil penalties only."[1145] There is no evidence in the record to suggest that breaches of this Article are dealt with by minor low-level fines or requirements of corrective paperwork. To the contrary, it seems agreed that the remedy for breach could involve negation of the offending loans in their entirety. The only debate between the Parties is whether the loans are considered void *ab initio*, or alternatively are simply voidable by act of a court.[1146] The Parties submit different translations of Article 206 of the Romanian Civil

[1140] **R-121**, Companies Act No.31/1990, as applicable on 12 January 2007, Article 106(1).
[1141] **C-1**, BIT, Article 1(a).
[1142] **CL-188**, *Kim*, ¶ 406.
[1143] Reply, ¶ 203.
[1144] Claimant's Rejoinder, ¶ 139; *see id.*, ¶ 153 (describing Article 106(1) as a "technical rule[]").
[1145] Reply, ¶ 220.1.
[1146] *Compare* Reply, ¶¶ 200, 203 with Rejoinder, ¶ 213.

Code to support their respective positions.[1147] However, Romania also presents scholarly authority supporting the absolute nullity position, to which the Claimant has not responded:

> In our opinion, the conclusion of the operations prohibited of paragraph 1 [of Article 106 of the Companies Act] shall be subject to absolute nullity. The contract is null for any situation, as it s[redacted]all always exceed the powers vested in the company's directors….[1148]

691. Be that as it may, Nova observes that to date, no Romanian court has actually declared the [redacted] loan [redacted] to be null.[1149] [redacted]

692. It is true that no charge was subsequently brought for a violation of the Companies Act. Nonetheless, Romanian prosecutors in the abuse of office proceedings have pursued criminal sanctions related to the broader episode, [redacted] It thus

[1147] *Compare* **C-1313**, [redacted]

[1149] Reply, ¶¶ 200, 203; Claimant's Rejoinder, ¶ 126.

[1150] **R-120**, [redacted]

cannot be said that Romania treated these loan transactions as an inconsequential act of noncompliance.[1152]

693. [redacted]

694. Nor is the Tribunal persuaded that Article 106(1) of the Companies Act does not reflect an important norm in the Romanian legal structure, simply because it was derived from an EU law directive that was later revised.[1154] First, the revision of the EU law directive did not have the effect of blessing the use of company loans to enable borrowers to buy company shares. It simply provided Member States more flexibility to adopt nuanced regulation of such transactions, while cautioning that "[t]his possibility should be subject to safeguards, having regard to this Directive's objective of protecting both shareholders and third parties."[1155] Moreover, as Nova admits, Romania did not implement this change in its Companies Act, with the effect that Romania *maintains the absolute prohibition* against company loans for this purpose, notwithstanding the permission granted by the EU to change its approach.[1156] This must be taken to reflect a choice by Romania to maintain a bright-line rule even when it was not required to do so. That choice reinforces the significance of the provision in the Romanian system.

695. For these reasons, the Tribunal agrees with Nova's own concession that the principles underlying Article 106(1) "may be central to Romanian company law."[1157] It disagrees with Nova's concomitant argument that this still is insufficient for purposes of Article 1(a) of the Treaty, because

[1152] *Cf* **CL-188**, *Kim*, ¶ 406 (suggesting that one relevant consideration, in "assess[ing] the significance of the obligation with which the investor is alleged to not comply," is whether there was a "specific decision of the Host State not to investigate or prosecute the particular alleged act of non-compliance").

[1153] *See* Claimant's Rejoinder, ¶ 125 [redacted]

[1154] Claimant's Rejoinder, ¶¶ [redacted]

[1155] **C-1525**, Directive 2006/68/EC, 6 September 2006.

[1156] Claimants' Rejoinder, ¶ 138.

[1157] Claimant's Rejoinder, ¶ 153.

"Romanian company law" does not rise to the level of a "fundamental … legal norm[]" equivalent to anti-fraud or anti-corruption laws.[1158] Nothing in Article 1(a) suggests that only violations of a State's highest norms can suffice to disqualify an investment for protection under the Treaty.

696. The second factor suggested by *Kim* as part of the proportionality analysis is "the seriousness of the investor's conduct," including whether the facts suggest "intentionality" in violation of the law or "mere accident" or oversight.[1159] In this case, the Tribunal has already noted the lack of any evidence to explain why the loans were structured as two back-to-back transactions, rather than a more straightforward loan [redacted] Several [redacted] have testified in the [redacted] While Nova suggests that testimony given in that context should not be accepted at face value, it has never presented any contrary evidence [redacted] The absence of contemporaneous disclosure at the very least suggests some doubt that the Board otherwise would have approved the transaction, [redacted]

697. [redacted]

[1158] Claimant's Rejoinder, ¶ 153.

[1159] **CL-188**, *Kim*, ¶ 407.

[1160] Rejoinder, ¶¶ [redacted]

[redacted]

698. There is no need for the Tribunal to determine whether [redacted] independently constituted violations of Romanian law, and if so, whether such violations constituted "serious" offenses that on their own might justify disqualifying the share purchase transaction as protected investments under the BIT.[1164] The Tribunal has found that the [redacted] loan itself was a violation of Article 106(1) of the Companies Act. The nondisclosures surrounding these transactions are simply additional circumstances which suggest an intent not to be forthcoming about its real motivations. The lack of disclosure deprived others [redacted] from an opportunity to fully consider and discuss whether the loan was in [redacted] best interest, and whether it in fact complied with applicable law.

699. With respect to what was in [redacted] best interest, Nova's final argument is that the back-to-back loans did not prejudice [redacted] shareholders or creditors."[1165] This contention is carefully worded. A loan [redacted] clearly would reduce [redacted] liquidity by that same amount, until the loan actually was repaid. While there may well have been a contemporaneous intent that the loan be repaid [redacted] this still means that in the interim [redacted] was deprived of this liquidity, and that it was exposed at the very least to additional risk. The fact that [redacted] is evidence that [redacted] absorbed a risk of non-payment that it otherwise never would have had to bear had it not extended the loan in the first place to facilitate a purchase of its own shares from the [redacted].

[redacted]

[1164] *Compare* Reply, ¶ 213 ([redacted])

[1165] Claimant's Rejoinder, ¶ 139.

700. For all of these reasons, the Tribunal concludes – applying the third step of the *Kim* proportionality test – that the combination of various factors "results in a compromise of a significant interest of the Host State to such an extent that the harshness of the sanction of placing the investment outside the protection of the BIT is a proportionate consequence for the violation examined."[1166]

701. Given this outcome, there is no need for the Tribunal to examine Romania's *other* theories of illegality [redacted] No conclusion on these issues would alter the conclusion that the Tribunal already has reached, based on the violation of the express wording of Article 106(1) of the Companies Act. Nor is there any reason to determine if Nova's conduct might qualify as an international wrong independent of its violation of national law, given that Article 1(a) of the Treaty predicates the protection of an investment on its conformity with national law.

702. The only issue that remains is for the Tribunal to determine the scope of the impediment to jurisdiction *ratione materiae* posed by Nova's violation of Romanian law [redacted] Clearly, the shares purchased with those funds are not investments qualified for protection under Article 1(a) of the Treaty. There is a question however whether the additional [redacted] shares [redacted] purchased on the same day with the [redacted] it borrowed from Nova should be disqualified from protection as well. On the one hand, the Tribunal sees no argument that these share purchases violated Romanian law. On the other hand, the Tribunal has serious doubt that [redacted] would have proceeded with a share sale transaction [redacted] leaving it still as a significant minority shareholder. The whole purpose [redacted] was to extinguish [redacted] role [redacted] In these circumstances, the Tribunal finds that the [redacted] transactions *as a whole* were tainted by the illegality [redacted] and that Nova would not have obtained its indirect interest [redacted], but for the illegality that enabled it to purchase that stake as a whole.

[1166] **CL-188**, *Kim*, ¶ 408.

703. At the same time, there is no basis for disqualifying for Treaty protection *the separate* [redacted] *stake* [redacted] that Nova had obtained four and a half years earlier [redacted] The Tribunal has found that this share purchase was in conformity with Romanian law. Notably, Article 1(a) of the Treaty imposes legality as a condition for recognizing "investments"; it does not bar "investors" from standing under the Treaty with respect to entirely separate investments that were obtained in conformity with host State law.

704. In these circumstances, the Tribunal's acceptance of Romania's *ratione materiae* objection is only a partial bar to Nova's preceding with suit, not a total bar: Nova may proceed to the merits with respect to the 73% of its stakeholding in [redacted] Otherwise stated, this finding impacts the quantum of any damages that Nova may recover, should it sustain its burden of proving both liability and causation of harm. It does not constitute an obstacle to Nova's jurisdiction to pursue such claims in the first place.

VI. MERITS

705. Nova claims that Romania, through its treatment of [redacted], has breached the following treaty provisions:

a. Article 3(1) of the Treaty, by failing to guarantee fair and equitable treatment and impairing Nova's investment by unreasonable and discriminatory measures;

b. Article 2(2) of the UK-Romania BIT (imported via Article 3(2) of the Treaty), by failing to provide full protection and security;

c. Article 5 of the Treaty, by unlawfully expropriating Nova's investment; and

d. Article 8 of the Treaty, by failing to arbitrate in good faith.

Romania denies each of these claims.

706. Below, the Tribunal first provides a brief overview of the Parties' divergent views on the burden and standard of proof, and then summarizes their positions on each of Nova's claims. The Tribunal's analysis of each Treaty claim follows the corresponding summary of positions.

A. BURDEN AND STANDARD OF PROOF

1. Nova's Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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[redacted]

[redacted]

2. Romania's Position

[redacted]

[redacted]

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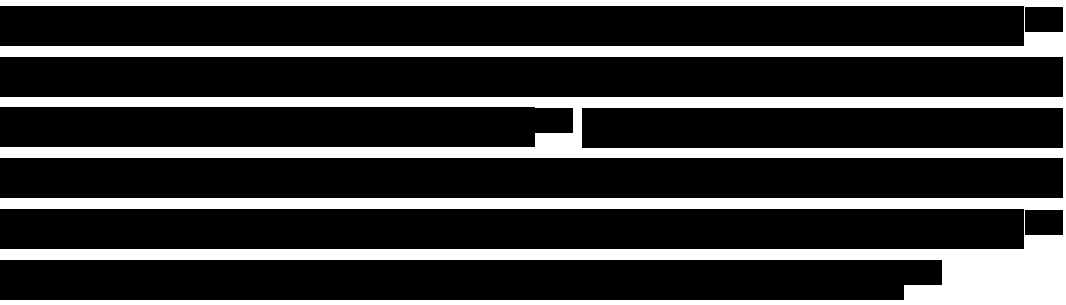

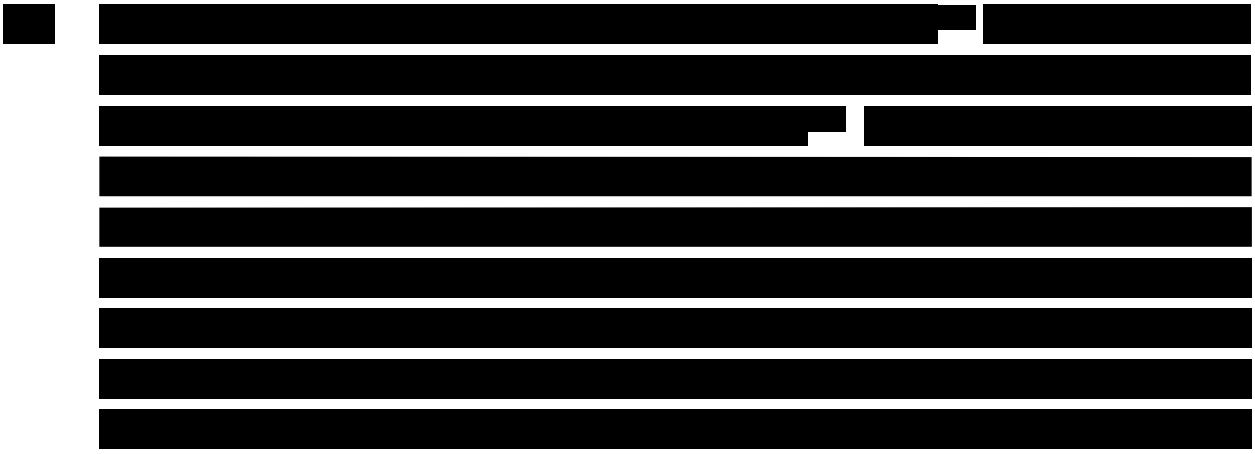

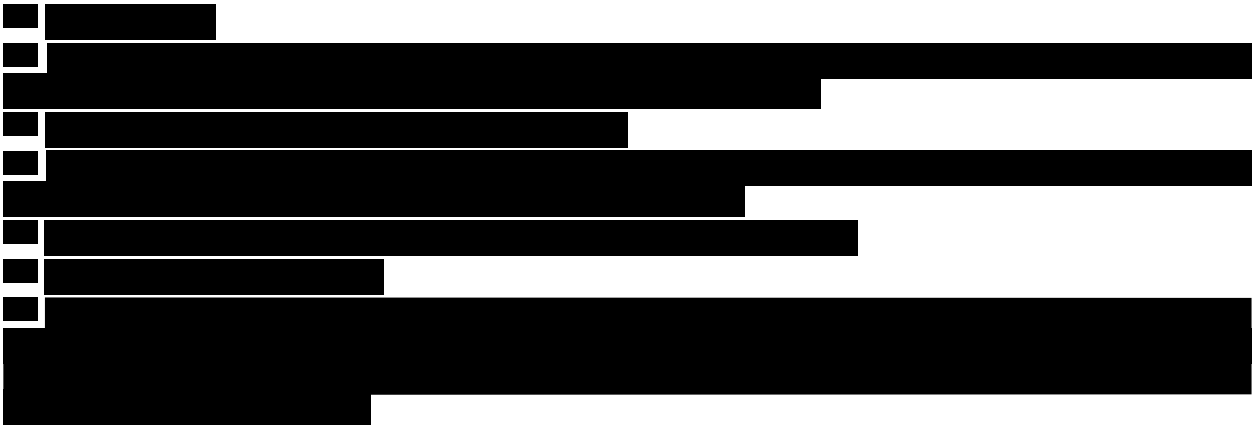

[redacted]

3. The Tribunal's Analysis

716. The Tribunal sees no need for an extensive discussion of burden of proof issues in investor-State arbitration. Certain core principles appear to be common ground between the Parties, or otherwise are uncontroversial.

717. First, as the claimant, Nova bears the burden of proving the facts on which it relies for its treaty claims. Likewise, Romania bears the burden of proving the facts on which it relies to substantiate its defenses.[1191]

[1188] Romania's Opening Presentation, slide 6; Romania's Closing Presentation, slide 10, *quoting* **CL-236**, *Marfin Investment Group v. The Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, 26 July 2018 ("***Marfin***"), ¶ 897 (Romania's emphasis).

[1189] Romania's Opening Presentation, slide 6; Romania's Closing Presentation, slide 10, *quoting* **CL-236**, *Marfin*, ¶¶ 898-900.

[1190] Romania's Opening Presentation, slide 9.

[1191] Reply, ¶ 43, *citing* **CL-20**, *Rompetrol*, ¶ 179; Rejoinder, ¶ 12.

718. More generally, whichever party alleges a fact must persuade the Tribunal that such fact more likely than not occurred.[1192] The phrase "more likely than not" reflects the common standard of a "balance of probabilities," sometimes referred to as proof by a "preponderance" of evidence. As a natural corollary of this standard, it follows that once a party bearing the burden of proof has presented credible and persuasive evidence of a particular fact, the other party (seeking to disprove that fact) would be expected to present contrary evidence that is at least as credible and persuasive.

719. As to the quality of evidence, direct evidence (where available) is more persuasive than indirect or circumstantial evidence, although in principle all are permissible forms of evidence. Likewise, particularized evidence is more persuasive than vague, general or ambiguous evidence. Where appropriate, the Tribunal also considers factors that provide context to the evaluation of evidence, including differential access to direct versus circumstantial evidence, and the appropriate inferences (if any) to be drawn from the absence of evidence in particular contexts.

720. Finally, the Tribunal takes the evaluation of evidence seriously, and for this reason has carefully examined the entire body of material presented by both Parties. This has included a systematic chronological review of exhibits in full, not simply to confirm that they contain the particular propositions for which they have been cited. Such careful review of evidence is important in all cases, but it was particularly imperative in this case, given that (a) a variety of developments occurred in close succession with respect to different issues, and (b) both Parties have alleged certain linkages among those developments, albeit to different effect. The Tribunal returns to this feature of the case in subsequent sections of this Award.

B. FAIR AND EQUITABLE TREATMENT

1. Relevant Treaty Provision

721. Article 3(1) of the Treaty provides in relevant part:

> Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party...[1193]

[1192] **CL-283**, *Saipem*, ¶ 113.

[1193] **C-1**, BIT, Article 3(1).

2. Nova's Position

[redacted]

(a) ***Applicable Standard***

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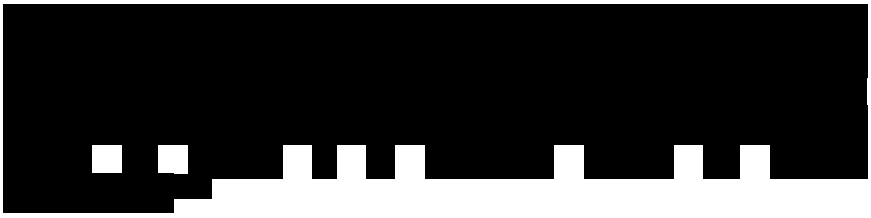

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3. Romania's Position

(a) *Applicable Standard*

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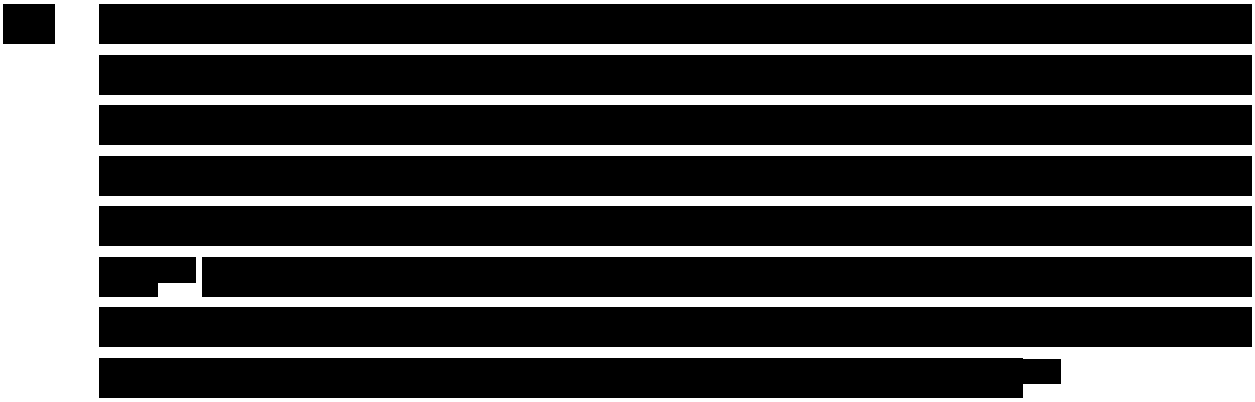

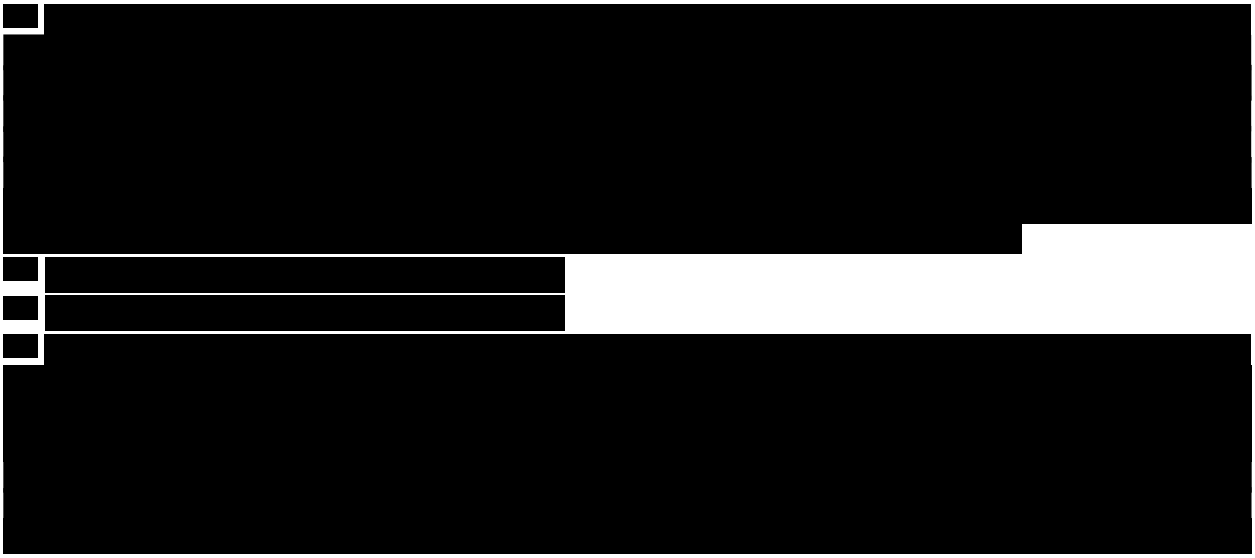

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(b) ***Whether Romania Failed to Provide Fair and Equitable Treatment***

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(i) Initiation of [redacted]

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(ii) Decision to [redacted]

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(iii) [redacted] and [redacted]

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4. The Tribunal's Analysis

(a) *Applicable Standard*

793. As other tribunals have observed, the FET standard involves several elements, which may take on varying degrees of importance in different disputes, depending on the facts and the nature of the wrongs alleged.[1360] The Tribunal does not see this particular case as turning on the element of "legitimate expectations," in the sense of expectations that derive from clear and specific State conduct entitling a reasonable investor to believe the State is offering an assurance or commitment for the future. Nova has not alleged that it received any special representations, assurances or commitments beyond the content of Romania's general laws. Nor does this case involve alleged changes to laws or regulations that are said to have violated a legitimate expectation to continuity of a prior legal regime.

794. But the presence or absence of "legitimate expectations" is by no means the end of an FET inquiry. That is because, even where the State has provided no specific representations, assurances or commitments, the FET obligation still involves important checks on State conduct through its requirements of reasonableness, proportionality and non-discrimination. These primary guardrails against improper State conduct include, as a corollary, the obligation not to act arbitrarily or in bad faith, such as based on a pretext that disguises true motivations of political or personal animus, or

[1358] Rejoinder, ¶ 804(b), [redacted]

[1359] Rejoinder, ¶ 804(b), [redacted]

[1360] *See, e.g.,* **CL-320**, *Murphy*, ¶ 206 ("[t]he precise application of the[] [FET] components may vary from case to case depending on the terms of the clause and the specific circumstances of the case").

otherwise to abuse or harass an investor or its investment. The Tribunal considers that these elements are all part of the accepted contours of the FET standard.

795. In interpreting these concepts, the Tribunal proceeds with the understandings below.

796. First, as the Parties appear to agree, review of State conduct is not for *correctness* as such in the application of national law. An error by State officials in compliance with a law or regulation does not, without more, rise to the level of a treaty breach.[1361] Moreover, State officials have a certain degree of discretion in interpreting and applying applicable legal provisions.[1362] Where the issue involves the exercise of discretion in a highly regulated and technical economic sector (in this case, consumer insurance), "a certain level of deference to the judgment of the … regulator must indeed exist."[1363]

797. Second, the FET standard's requirement that State conduct be "reasonable" is generally understood in the context of rationality, otherwise known as a *prohibition on arbitrariness*. This criteria examines whether State conduct "bears a reasonable relationship to some rational policy."[1364] The *AES* tribunal noted that this requires that "two elements … be analyzed to determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy."[1365] As for the first element, "[a] rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter."[1366] Under an FET clause, a foreign investor "can expect that the rules will not be changed without justification of an economic, social or other nature."[1367] The opposite of rationality is

[1361] *See* Counter-Memorial, ¶ 857; Reply, ¶ 770 (stating that "Nova agrees"); *see, e.g.,* **CL-236**, *Marfin Investment Group Holdings SA, Alexandros Bakatselos & Ors v. Republic of Cyprus*, ICSID Case No ARB/13/27, Award, 26 July 2018 ("***Marfin***"), ¶ 897 ("not[ing] with approval the *Invesmart v. Czech Republic* tribunal's ruling that an administrative measure 'which takes place within a detailed national legal framework that includes administrative and judicial remedies is not reviewed at the international law level for its "correctness", but rather for whether it offends the more basic requirements of international law…. Tribunals need not be satisfied that they would have made precisely the same decision as the regulator in order for them to uphold such decisions").

[1362] *See* Counter-Memorial, ¶ 858 (citing authority referring to actions that are "within the agency's regulatory discretion"), ¶ 873 (citing authority referring to a State's "margin of discretion in exercising its police powers to enforce its existing laws"); Reply, ¶ 770 (citing authority referring to the importance of administrative bodies "remain[ing] within the four corners of their duly afforded discretion").

[1363] **CL-236**, *Marfin*, ¶ 899.

[1364] **CL-87/RL-112**, *Saluka*, ¶ 460.

[1365] **CL-100/RL-194/RL-295**, *AES*, ¶ 10.3.7.

[1366] **CL-100/RL-194/RL-295**, *AES*, ¶ 10.3.8.

[1367] **CL-18/RL-188**, *El Paso*, ¶ 372.

arbitrariness, meaning something that is "not founded in reason or fact but on caprice, prejudice or personal preference."[1368] But as the *AES* tribunal noted, there is a second element to the test:

> [A] rational policy is not enough to justify all the measures taken by a state in its name. A challenged measure must also be reasonable. That is, there needs to be an *appropriate correlation* between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented.[1369]

798. Putting these elements together, the *El Paso* tribunal observed that "there are always several methods for dealing" with challenging circumstances in a country. The requirement of reasonableness and non-arbitrariness examines not "whether the measures taken were or were not the best," but simply whether they were "based on a reasoned scheme" that was itself reasonably connected to "the aim pursued."[1370]

799. Related to the evaluation of whether conduct was reasonable and not arbitrary is determination of the true rationale underlying that conduct, which may or may not equate to the stated rationale. Legally, an allegation that a State acted on a *pretext* is close to alleging that it acted in bad faith, because the concept is that the State used legal instruments for purposes other than those for which they ostensibly were created.[1371] Where this occurs – such as where "prejudice, preference or bias is substituted for the rule of law,"[1372] or where a decision "was abusive" or "a pretense of form designed to conceal improper ends"[1373] – State conduct will give rise to a breach of the FET standard.

800. For obvious reasons, a party seeking to demonstrate that a State acted for ulterior motives, and thus not on the basis of its stated public policy rationale, bears the burden to so demonstrate.[1374] This includes a burden not only to demonstrate the existence of ill will towards an investor, but also to show sufficient basis for a tribunal to infer *causation* – in other words, that the ill will was the

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[1368] **RL-114**, *Plama*, ¶ 184.

[1369] **CL-100/RL-194/RL-295**, *AES*, ¶ 10.3.9 (emphasis added).

[1370] **CL-18/RL-188**, *El Paso*, ¶¶ 320-322, 325.

[1371] *See generally* **CL-162**, *Vivendi II*, ¶¶ 7.4.24, 7.4.39. (discussing "misuse of … regulatory powers for illegitimate purposes"); **CL-317**, *Deutsche Bank*, ¶¶ 481-484 (concluding that the stated reasons for an investigation were not "the true motivation," and that "the Government acted in bad faith" in circumstances where "the result of the investigation was a foregone conclusion").

[1372] **RL-210**, *Lemire* Decision on Jurisdiction, ¶ 263.

[1373] **CL-236**, *Marfin*, ¶ 900.

[1374] *See, e.g.,* **CL-236**, *Marfin*, ¶ 898 (agreeing with the *Saluka* tribunal that, in the absence of persuasive evidence otherwise, "a tribunal must accept the reasons given by the regulator for its decision").

reason for the challenged action, and not simply a fact that existed independently from (but did not drive) State conduct. As one tribunal remarked, demonstrating an "unfriendly attitude" of the part of State actors is not enough to prove that their conduct necessarily violated international standards.[1375]

801. Third, the FET standard requires that State action be *proportionate*, in the sense that it not impose burdens on foreign investment that go far beyond what is reasonably necessary to achieve good faith public interest goals. As to this analysis, where measures are of general applicability rather than adopted with respect to a particular investment, the evaluation of proportionality must be based on their overall features and impacts, and not through the narrow lens of their impact on a particular investment. By contrast, where the State action in question is specific to a single investment, the proportionality analysis naturally focuses on whether the action was appropriately tailored to the circumstances of that investment. More generally, as the *Electrabel* tribunal explained, the notion of proportionality "requires the measure to be suitable to achieve a legitimate policy objective, necessary for that objective, and not excessive considering the relative weight of each interest involved."[1376]

802. Fourth, the FET standard also requires that State conduct not be *discriminatory*. In applying this notion, the Tribunal bears in mind the proposition that "a mere showing of differential treatment is not sufficient to establish unlawful discrimination." Instead, "[f]or discriminatory treatment, comparators must be materially similar; and there must then be no reasonable justification for differential treatment."[1377] The *Saluka* tribunal's analysis is also helpful in this regard:

> In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.[1378]

803. A final component of FET that must be addressed in this summary, given Nova's allegations in this case, is the issue of "*transparency*." Nova invokes the *Tecmed* tribunal's statement that a State must

[1375] **RL-206**, *M.C.I. Power*, ¶ 371.

[1376] **RL-410**, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015 ("***Electrabel***"), ¶ 179.

[1377] **RL-410**, *Electrabel*, ¶ 175.

[1378] **CL-87/RL-112**, *Saluka*, ¶ 307.

act "totally transparently in its relations with the foreign investor,"[1379] and contends that accordingly, "even partial opacity by the state will constitute a breach of FET."[1380] Romania by contrast contends that a breach of FET may be found on this basis only where there has been a "complete lack of transparency and candour in the administrative process," as referenced in *Waste Management*.[1381] These propositions may be seen as polar opposites, in the sense that one would require "*total*" transparency and the other would penalize only a "*complete*" absence of transparency. The Tribunal considers that neither proposition – each extreme in its own way – correctly captures the nuances of the FET standard. That standard by its terms is about "equitable" treatment, a notion which neither requires perfect conduct, nor is limited to penalizing only perfectly egregious conduct. Rather, the Tribunal considers the "transparency" question to ask is whether a State took reasonable steps, consistent with its own laws and regulations and in light of the policy objectives at issue, to provide information about its plans or conduct affecting an investment, or alternatively whether it acted secretively to conceal its plans or conduct in a context where this was not reasonably justified. An assessment of the State's conduct in this regard necessarily must take into account the surrounding circumstances, which include, *inter alia*, its obligations under domestic law, the degree of urgency involved, and whether discretion or alternatively notice and input was appropriate to the situation.[1382] The focus for purposes of the FET analysis is less on isolated communications (or slip-ups in communication) and more on patterns of conduct, in the sense of whether the evidence reveals a continuing pattern of non-transparent actions by a government over time.

(b) *General Approach to Nova's "Primary" and "Secondary" Cases*

804. With this general understanding of the FET standard, the Tribunal turns to Nova's two alternative theories of its case.

[1379] Reply, ¶ 760, *quoting* **CL-138**, *Tecmed*, ¶ 154.

[1380] Reply, ¶ 760.

[1381] Rejoinder, ¶ 778, *quoting* **RL-196**, *Waste Management,* ¶ 98.

[1382] *See similarly* **RL-47**, *Micula*, ¶ 533 ("Whether a state has been unfair and inequitable by railing to be transparent with respect to its laws and regulations, or being ambiguous and inconsistent in their application, must be assessed in light of all the factual circumstances surrounding such conduct…. The question before the Tribunal is thus not whether Romania has failed to make full disclosure of or grant full access to sensitive information; it is whether, in the event that Romania failed to do so, Romania acted unfairly and inequitably with respect to the Claimants. … This is a question that cannot be answered in a vacuum; it is highly dependent on the factual circumstances").

805. Nova describes as its "primary case … that Nova's investments in Romania were the targets of a coordinated State campaign [redacted]," [1383] which was "carried out through" several different "limbs" of the Romania government, [1384] and "motivated by a political vendetta or personal hostility" [redacted]. [1385] According to the "decision tree" Nova presented at the Hearing, if the Tribunal finds that Romania's regulatory treatment of [redacted] or the initiation or prosecution of criminal proceedings [redacted] were improperly "motivated," this alone would give rise to an FET violation. [1386]

806. As to this "primary case," Nova proposes that the Tribunal "adopt[] a systematic chronological approach" which includes analysis both of "the order in which things happened" and "the reasons given by Romania at the time for its actions." [1387] The Tribunal agrees that this is necessary, because proving the existence of a conspiracy – which is another name for what Nova describes as a "coordinated State campaign" involving multiple actors and improper motivation [1388] – presents inherent hurdles. It requires demonstration not just of specific events, but also of *linkage* among those events, in the form of some common direction or coordination. Otherwise stated, Nova's primary case requires evidence of improper animus, but animus alone will not be enough: it must be accompanied by evidence of *causation*. That is because ill will, reflected for example in intemperate statements by politicians, does not in and of itself prove that regulators or prosecutors were acting under the direction of (or in concert with) such politicians, when they take measures that otherwise might seem within the scope of their authority to act.

807. At the same time, proving such elements of linkage and causation can be difficult because of the very nature of a conspiracy: that it is often not committed to writing, and in any event that direct

[1383] Tr. Day 8, 1890:12-15 (Nova's Closing).

[1384] Tr. Day 8, 1890:19-22, 1941:3-7 (Nova's Closing)

[1385] [redacted]

[1386] [redacted]

[1387] Tr. Day 8, 1887:5-8, 17-18 (Nova's Closing).

[1388] Tr. Day 8, 1890:12-15 (Nova's Closing). *See generally* **RL-158**, *Oostergetel*, ¶ 227 (noting that a "conspiracy of state organs to inflict damage on an investment" is an example of "actions performed in bad faith" which could violate of the FET standard).

evidence is likely to be closely held and not readily accessible. For these reasons, conspiracy claims often rely in part on circumstantial evidence, including arguments that there is no other logical explanation for certain events or that the particular timing of certain events is unlikely to be coincidental. Inferences from circumstantial evidence are permissible in international arbitration, although tribunals must be wary of appeals to inference that are more in the nature of speculation than logical deduction from other concrete evidence.[1389]

808. This case presents a good example of such challenges. Given the inherent difficulty of directly proving linkage and causation in support of a conspiracy, Nova relies in part on requests for inferences from circumstantial evidence, asserting for example that the timing of various adverse acts (together with their alleged arbitrariness) could not have been coincidental with the timing of various statements [redacted].[1390] Nova also points out that Romania did not present any fact witnesses from the Romanian government to explain the various challenged measures and deny influence from [redacted].[1391] Finally, Nova relies [redacted] Reports to try to connect certain dots. Romania in turn challenges the probative value of those Reports,[1392] and denies any obligation to produce fact witnesses to explain the challenged acts.[1393] It asserts that contemporaneous documents demonstrate, on their face, that Romania's acts were motivated by legitimate public policy concerns, including those based on suspicions of wrongdoing [redacted],[1394] regardless of any public statements by [redacted].[1395] Nova in turn counters that any government suspicions of wrongful conduct at [redacted] still could not justify "regulatory

[1389] *See generally* **RL-158**, *Oostergetel*, ¶ 300 (finding that the claimants' "general allegations of a common malicious purpose behind the conduct of State organs remain speculative").

[1390] *See, e.g.,* Tr. Day 8, 1920:13-1921:5 (Nova's Closing) [redacted].

[1391] *See, e.g.,* Tr. Day 8, 1895:15-16 (Nova's Closing).

[1392] *See, e.g.,* Tr. Day 8, 2108: 10-19 (Romania's Closing) [redacted]).

[1393] *See, e.g.,* Romania's s Opening Presentation, slide 10; Tr. Day 8, 2073:10-14 (Romania's Closing).

[1394] *See, e.g.,* Romania's Opening Presentation, slide 10; Tr. Day 8, 2073:2-9 (Romania's Closing).

[1395] Tr. Day 8, 2117:2-11 (Romania's Closing) [redacted]").

overreach" in response,[1396] noting essentially that "how" a State responds to concerns can be as important as "why" it does so.[1397] In any event, Nova observes that it faced unusual constraints in rebutting Romania's accusations [redacted], because of limited access to [redacted]s files and [redacted] working documents,[1398] [redacted] death early in these proceedings,[1399] and the pending criminal charges [redacted] Nova asks the Tribunal to take these additional factors into account in assessing the evidence before it.

809. The Tribunal acknowledges each of these arguments. Nonetheless, it must decide this case based on the record that it has. It considers the best place to start as being *not* with evidence of [redacted] animus, in support of Nova's overarching theory of a coordinated State campaign, but rather with the "systematic chronological approach"[1400] that Nova itself urges. An examination of each step in the chronology is required in any event, given that Nova also presented an alternative or "secondary" case which does not rely on the existence of a coordinated State campaign.[1401] Under this case, Nova asserts that particular measures taken by Romanian state actors violated FET obligations in any event, either individually or in combination. Nova's "decision tree" suggests the Tribunal should assess in particular five issues: (a) "the initiation and undertaking of [redacted] inspection" of [redacted] (b) "the decision to place [redacted] in special administration"; (c) "the handling of the special administration"; (d) "the decision to end the special administration and put [redacted] into liquidation"; and (e) "the initiation and/or prosecution of the criminal proceedings [redacted]"[1402] After assessing these five separate issues, Nova suggests the Tribunal consider whether "the totality of Romania's treatment of Nova [was] fair and

[1396] Tr. Day 1, 229:14-16 (Nova's Opening); Reply, ¶¶ 757-758.

[1397] Tr. Day 1, 230:3-5 (Nova's Opening).

[1398] [redacted] 15. [redacted]

[1400] Tr. Day 8, 1887:5-8, 17-18 (Nova's Closing).

[redacted]

[1402] Nova's Closing Presentation, slide 40.

equitable,"[1403] noting that FET violations can be established by the "cumulative effect" of measures even if they individually do not establish a treaty breach.[1404]

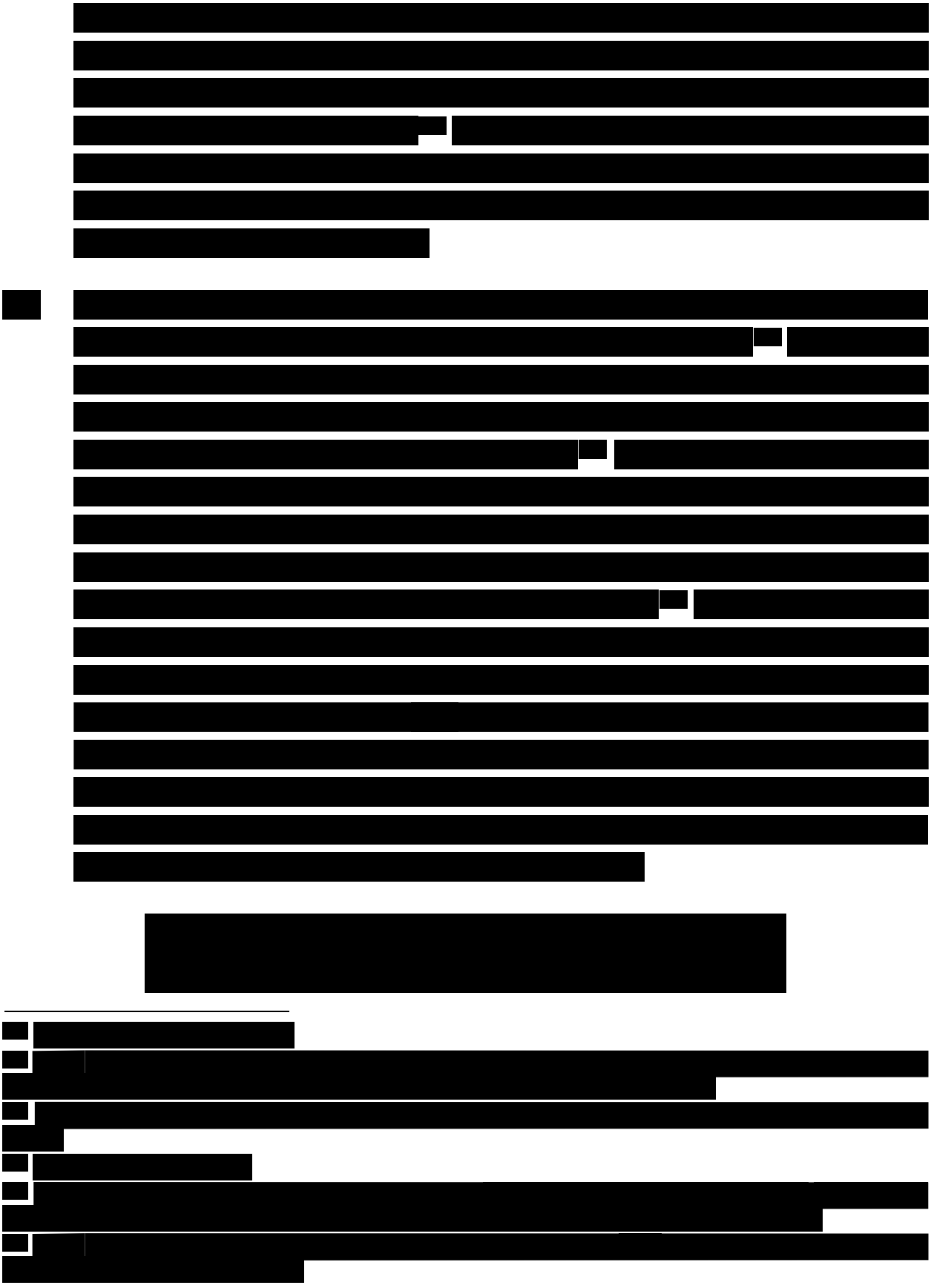
810. Accordingly, the Tribunal examines closely below each of the major steps in the chronology of challenged acts. For each step in the chronology, it examines what the record shows about the basis on which Romanian officials acted, and what evidence Nova invokes in support of an alleged alternate basis [redacted]. The Tribunal also considers whether the individual acts constituted regulatory overreach, in the established sense of arbitrary, disproportionate or discriminatory treatment in violation of Romania's FET obligations as reflected in the BIT. Finally, the Tribunal comments on Nova's contention about the cumulative effect of the individual measures.

(c) *Initiation [redacted] Inspection*

811. The Tribunal observes, first, that as the year [redacted] came to a close, there were three separate developments converging which, individually and certainly collectively, could reasonably lead the [redacted] to undertake a close review of [redacted] financial soundness and its compliance with applicable laws and regulations.

[redacted]

[redacted]



[redacted][1414]

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[redacted] [redacted]

• [redacted]" [1434]

[redacted]

[redacted]

[redacted]

[redacted]

827. With these events seen in proper context, the Tribunal is not persuaded of any FET violation in connection with the .

828.

[redacted]

829. [redacted][1449][redacted]

830. [redacted]

[redacted]

[redacted]

832. In general, the Tribunal places little to no weight on the evidence of [redacted], which is based on multiple levels of hearsay relying on unidentified sources whose credibility and authority cannot be tested in any way. Whatever the value of such evidence for intelligence purposes, it is not of the nature on which findings in a legal proceeding can be based. But in any event, [redacted]

833. The Tribunal therefore moves on from Nova's primary theory about the inspection being part of a coordinated State campaign, to its secondary theory about the inspection constituting regulatory overreach by the [redacted] in violation of the FET standard. As to this theory, however, the Tribunal does not accept that the ASF's stated rationale for the second inspection [redacted]"[1458] – was either clearly pretextual or otherwise arbitrary, irrational, or disproportionate. The [redacted] had legal authority to conduct

[1454] **R-406**, Letter from [redacted] (No. SG 2201) to NCSC on [redacted]'s complaint, 10 April 2013; **R-407**, Letter from [redacted] (no. SG 2300) to the Prime Minister [redacted], 12 April 2013.

[1455] [redacted]

[1458] **C-556**, ASF Decision No. 258, 21 January 2014.

oversight inspections, both announced and unannounced, on its own initiative or in response to notifications made by insurance creditors or insurance companies themselves.[1459] It had done both types of inspections with respect to [redacted] on prior occasions. Indeed, [redacted] indicates that ASF had carried out three unannounced inspections at [redacted] and another unannounced inspection [redacted] In this context, unannounced inspections were hardly an unprecedented practice for the ASF.[1462] It was thus well within the ASF's discretion and its prior practice to decide to proceed with another such inspection, after the deadline had passed for [redacted], and at a time when [redacted]'s [redacted] required the [redacted] to act promptly to verify [redacted]'s financial soundness – an exercise which the [redacted] logically viewed as resting in part on its compliance with [redacted]

834. These factors would have rendered the [redacted]'s inspection recommendation rational, even if [redacted] had not simultaneously announced to [redacted]."[1463] But when this statement is coupled with [redacted]'s admission to the [redacted] that it had not taken any reserves at all to protect against a possible loss [redacted] – notwithstanding the plain wording of the applicable legal norm – the [redacted] to move ahead with the inspection was clearly within its permissible scope of its regulatory purview. When Nova invested in [redacted] it chose to invest in a highly regulated market sector, and was therefore on either actual or constructive notice of the particularities (or even potential absurdities) of local regulations. As a company operating in this regulated market, [redacted] was required to comply with the applicable rules, whether or not it

[1459] *See* **RL-2**, Law No. 237/2015 on the Authorization and Supervision of the Business of Insurance and Reinsurance, Chapter II, Article 6(5) ("As part of the supervisory review process, ASF shall verify the regular reports and additional information sent by undertakings and *carry out inspections* at their premises") (emphasis added); **C-1134**, Law 503/2004 on the financial recovery and bankruptcy of insurance undertakings, Articles 4(1) and 4(2) (the ASF "shall *regularly verify the financial position* of insurance undertakings, either based on the documents and reports submitted, or following the reviews, guidance and examinations carried out by its specialized bodies. Such verification may be carried out by the [ASF] *at any time*, also as a result of *notifications made by insurance creditors* concerning the financial position of insurance undertakings, in order to prevent insolvency and/or initiate financial recovery proceedings") (emphasis added).

[1460] *See* [redacted] Presentation, slide 9 (noting unannounced inspections in November and December 2011 and June 2012); *see also* Nova's Opening Presentation, slide 56.

[1461] *See* [redacted] Presentation, slide 14.

[1462] The ASF apparently also from time to time conducted unannounced inspections of other Romanian insurance companies. *See, e.g.,* **R-222**, ASF Resolution No. 2691/2015 declaring the opening of a financial redress procedure plan at [redacted] Romania S.A., 15 October 2015, p. 1 ([redacted].

[1463] **R-216**, Letter from CNADNR to ASF, 16 January 2014.

considered those rules to make sense. [redacted] decision [redacted], apparently because it considered the risk of ultimate liability on [redacted] to be low, was inconsistent with the stated requirements of the regulatory regime in which it operated. That regime did not permit insurance companies to make such judgments, but instead conservatively required that reserves be taken upon the filing of a claim. [redacted]'s decision to ignore this requirement had serious repercussions. In particular, it cast real doubt on whether, with its reserves subsequently recalculated in compliance with the norm, [redacted] This was hardly an inconsequential question, nor one that a responsible regulator could either ignore or simply defer for another day.

835. Nor is the Tribunal persuaded of an FET violation on the basis of [redacted]'s opinion that the ASF should have simply [redacted].[1464] [redacted] opines that it would have been "in line with global standards" for the [redacted] to communicate any concerns about [redacted] "at an earlier stage of the corrective process," *i.e.*, in response to [redacted]'s monthly updates, rather than raising concerns only at a meeting following the close of [redacted]'s legally mandated compliance period under [redacted] concludes that the [redacted] "approach … is not best suited to enable a regulator to clearly understand the state of one of its supervised entities."[1466] But even accepting all of this to be true, the fact that a regulator does not proceed with optimal efficiency – or decides to have inspectors seek for answers themselves through a control inspection, in a context of apparent growing mistrust of management and some sense of urgency – does not equate to a violation of international law.

836. Finally, [redacted] takes issue with the speed of [redacted] including both that the inspectors imposed tight deadlines on their information requests to [redacted][1467] and that they brought the inspection to a conclusion within weeks, without waiting for completion of the "year-end processes" which ordinarily would result in financial statements [redacted] being finalized later in [redacted].[1468] First, with respect to the [redacted] tight deadlines, these might appear onerous in the abstract, but they were consistent with the law under which [redacted] was expected to operate. Article 6(1) of

[1464] [redacted] Report, ¶ 7.2.2.

[1465] [redacted] Report, ¶¶ 7.2.3-7.2.8.

[1466] [redacted] Report, ¶ 7.2.8.

[1467] *See, e.g.*, Tr. Day 4, 1035:10-15 (the inspection "kicks off by asking for a lot of information from [redacted] at relatively short notice") ([redacted]).

[1468] *See, e.g.*, Tr. Day 4, 1041:9-16, 1052:1-9, 1053:4-13, 1053:19-1054:3 ([redacted]).

Law 503/2004 mandated that "insurance undertakings shall make available to the [redacted] all the documents and information requested for verification in order to ensure immediate and appropriate review and examination," and Article 6(2) specified that at the [redacted] request, such "undertakings shall establish and communicate their financial position, as well as the minimum solvency margin held, within 48 hours of such request."[1469] [redacted] does not address these legal requirements in his report.

837. Second, with respect to the length of time taken for an inspection, this logically would seem to depend on the urgency of the situation, the complexity of the matters under review, and the degree to which those matters may be confirmed in short order on existing records, rather than requiring confirmation from documents to be finalized later. In this case, many of the biggest issues the ASF identified were either uncontested or were clear even without the need to complete any nuanced "year-end processes." This includes the admitted fact that [redacted]; the fact that [redacted] which had not been repaid on maturity, in a scale that was larger in value even than [redacted] the fact that [redacted], in a manner that might appear to [redacted] but that only questionably provided actual security; and the fact that even *before* any adjustments for the above, [redacted] already had been skating at the bare minimum permitted by law, meaning that it seemed clearly in reality to be operating below permitted margins. It is not clear which of these facts [redacted] believes fairly required either a lengthier control inspection or deferral to complete "year-end processes" before the inspectors could report back the basis for serious concerns.

(d) *The Decision to* [redacted]

838. The next State action which Nova challenges as abusive, pretextual or otherwise in violation of the FET standard is the [redacted] Decision [redacted], issued on [redacted] to place [redacted] into financial recovery proceedings [redacted]. [redacted]'s primary case is that this decision was part of the broader political vendetta [redacted]

[1469] **C-1134**, Law 503/2004 on the financial recovery and bankruptcy of insurance undertakings, Article 6(1), (2).

[redacted][1470] Nova's secondary case is that the [redacted] was unreasonable, disproportionate and discriminatory, [redacted].

839. Given Nova's framing of its claim, the Tribunal considers it important to focus, first, on what was known to and considered by the [redacted] as of [redacted], *i.e.*, the day *before* [redacted]. The Tribunal then considers the evidence about that meeting, as well as the subsequent events leading to [redacted] The record reveals the following.

(i) The underlying legal framework

840. First, Law 503/2004 mandated that "[i]nsurance undertakings shall be subject to financial recovery proceedings under this law whenever … the value of the available solvency margin falls below the minimum limit set out in the regulations issued by the Insurance Supervisory Commission."[1471] This is not a discretionary decision: the Law uses the phrase "*shall*." The [redacted] discretion was simply to choose who would lead the financial recovery proceedings: either (a) the company's Board of Directors, implementing a "recovery plan" which they were required to propose within 20 days, or (b) "trustee management," operating under powers of special administration.[1472] The Law does not specify the factors to be considered by the ASF in making that choice. It is logical, however, that these would include an assessment of whether management could be trusted to direct the recovery proceedings with a reasonable level of competence, prudence, honesty and transparency. It is also logical that regulators would take into account the size and strategic importance of a particular insurance company, which impacted the level of risk to the broader system should the company ultimately fail. As [redacted] notes, the "systemic importance" of a company in a national market "is relevant to the level of supervision" and "scrutiny" attracted by regulators.[1473] It is logical that this also should influence their degree of caution in choosing whether the recovery proceedings should be led by existing management or by an appointed trustee.

841. As discussed further in Section VI.B.4.e, Law 503/2004 also provided the [redacted] with discretion over the particular measures to impose on a company in financial recovery proceedings. In its decision

[redacted]

[1471] **C-1134**, Law 503/2004 on the financial recovery and bankruptcy of insurance undertakings, Article 7(b).

[1472] *Id.*, Articles 8(1), 12, 16-18.

[1473] [redacted] Presentation, slide 9.

to initiate such proceedings, the [redacted] was permitted to authorize "one or several" of eight specifically enumerated "basic prudential measures."[1474] The inclusion of these measures in the Law inherently reflected a prior determination by the legislature that in appropriate circumstances, each such measure had the potential to assist a struggling insurance company to improve its solvency margin sufficiently to enable it to meet the minimum requirements. Of course, the [redacted]s selection among these measures, like other aspects of its exercise of discretionary powers conferred on it by law, had to be exercised in good faith and in support of the broader objectives for which the list was propounded. Law 503/2004 expressly identified those objectives: "[t]he measures implemented by means of the proceedings regulated by this law shall aim at the protection of the lawful interests and rights of insurance creditors," a category which was defined to include "insured persons, policyholders, beneficiaries of insurance contracts, as well as any other injured third parties, according to the terms and conditions of insurance contracts, which are secured creditors and whose claims over insurance undertakings have not been settled."[1475] In the service of protecting these creditor interests, "financial recovery proceedings" were defined as referring to "all the administrative methods and measures decided by the [redacted] … which shall aim at maintaining or recovering the financial position of insurance undertakings."[1476]

842. With this legal framework understood, the following facts about [redacted] were known to the [redacted] on the evening before the [redacted], on which Nova places substantial weight.

[1474] **C-1134**, Law 503/2004 on the financial recovery and bankruptcy of insurance undertakings, Article 8(2). The list of authorized prudential measures included (a) setting a maximum limit on the amount of gross or net written premiums for a period 3 months and one year; (b) prohibiting the renewal of insurance contracts at maturity, or of certain types of insurance contracts; (c) prohibiting the writing of new insurance contracts for a specified period; (d) transferring part or all of the insurance portfolio; (e) convening an extraordinary shareholders meeting to increase share capital, with such increase to be implemented within 30 business days from the decision to initiate financial recovery proceedings; (f) prohibiting the making of certain investments; (g) restricting territorial networks and/or replacing the "significant persons who are held liable" for the initiation of financial recovery proceedings; and (h) the verification, review and management of claim files to manage actual losses and establish payment obligations to insurance creditor, within 30 days of the initiation of recovery proceedings. *Id.* The ASF was also authorized to (a) impose measures regarding the property or assets of insurance undertakings, (b) appoint persons to supervise preparation and observance of the financial recovery plan; and (c) take "any other prudential measures required for the financial recovery of insurance undertakings, in order to secure protection of lawful rights and interests of insurance creditors." *Id.*, Article 8(3)(b)-(c).

[1475] **C-1134**, Law 503/2004 on the financial recovery and bankruptcy of insurance undertakings, Articles 2(2) and 3(h).

[1476] *Id.*, Article 3(b).

(ii) [redacted]

843. [redacted]

[redacted]

[redacted]

[redacted]

[redacted] But the FET standard does not require regulators to ignore the very regulations they are mandated to implement.

[redacted]

[redacted]

[redacted]

848. The [redacted] concerns at this juncture about [redacted]'s approach [redacted] were neither irrational nor unpredictable. A company that chooses to operate in a heavily regulated sector like consumer insurance must expect that regulators may take a strict reading of applicable regulations and insist on companies complying with that reading, even if the company disagrees with the interpretation and meanwhile seeks legal recourse to challenge it. If the company nonetheless refuses an official request – [redacted] – it cannot later claim surprise that its refusal to honor the request was taken as a lack of cooperation and considered as a basis for mistrust. It is evident that [redacted] considered the matter in this way.

(iii) [redacted]

849. The [redacted] concern about [redacted] prior to the [redacted] meeting was based on several additional factors. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(iv) [redacted]

852. [redacted]

[redacted]

[redacted]

[redacted]

(v) [redacted]

854. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(vi) [redacted] conclusion before [redacted]

858. Each of these factors, and several others not summarized here, was mentioned by the [redacted] as a concern in its internal reports prepared [redacted], [redacted]. Collectively, they added up to a conclusion not only that [redacted]

[1501] **C-1136**, ASF note relating to the systemic risk identified at [redacted] 4 February 2014, p. 2.

[1502] **C-1137**, Note relating to the action proposals applicable to [redacted] considering the identified systemic risk, 5 February 2014, p. 3.

[1503] *Id.*, p. 3.

[1504] *Id.*, p. 4.

[redacted].

[redacted] [redacted] [redacted] [redacted] [redacted] [redacted]

[redacted] [redacted] [redacted] [redacted]

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[redacted]

[redacted]

(vii) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] No documents were produced [redacted]. On this basis, Nova requests that the Tribunal infer that the minutes "would undermine [Romania's] case, and that they would show … that this was the first stage of [redacted] *personally driving the decision* to [redacted]."[1526]

872. The Tribunal is unable to draw such a broad inference. Given the views about [redacted] that the [redacted] already had reported to the [redacted] – [redacted] – it is not surprising that the subject of [redacted] would

[redacted]

arise at a high-level meeting of institutions in charge of maintaining Romania's financial stability. [redacted],[1527] there has been no showing that it violated Romanian law for him to do so. There is no evidence, moreover, to indicate [redacted]: the very serious "systemic risk" that the ASF already had identified internally. Finally, as to the *specific* inference Nova requests – [redacted] – the Tribunal observes that the limited evidence [redacted], [redacted]. [redacted] In other words, [redacted] may have supported this suggestion at the subsequent [redacted] but the Tribunal cannot simply infer that the idea of a [redacted] originated with him in the first place.

873. Most importantly, as discussed further below, the Tribunal does not observe any dramatic change in [redacted] conduct *after* the meeting from the direction in which it already was tending before the meeting. For this reason, whatever [redacted] – [redacted] – there is insufficient basis to infer that any such statements either triggered or fundamentally altered the course of events. As discussed previously, such evidence of linkage and causation is essential to Nova's primary case that [redacted] acted pretextually, due to a coordinated State campaign [redacted].

(viii) [redacted]

[redacted]

[redacted]

[1528] Tr. Day 8, 1934:13-20 (Nova's Closing).

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

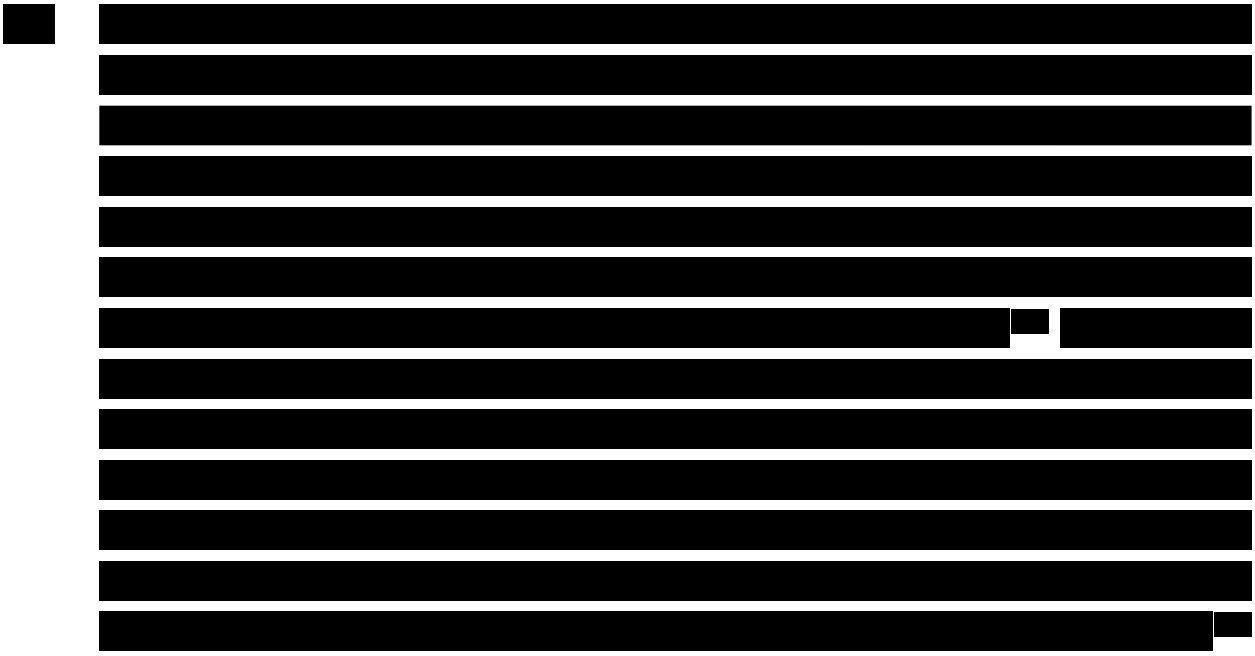
880. The Tribunal's first observation about this detailed memorandum is that it was not very different in content from the [redacted]. Rather, the [redacted] appeared to be dutifully passing along these findings. There is no sign of a dramatic change in direction [redacted]. Nor does the report suggest irrationality or concern about domestic politics. It reads as a substantial analysis by a regulator of issues that were within its remit to assess.

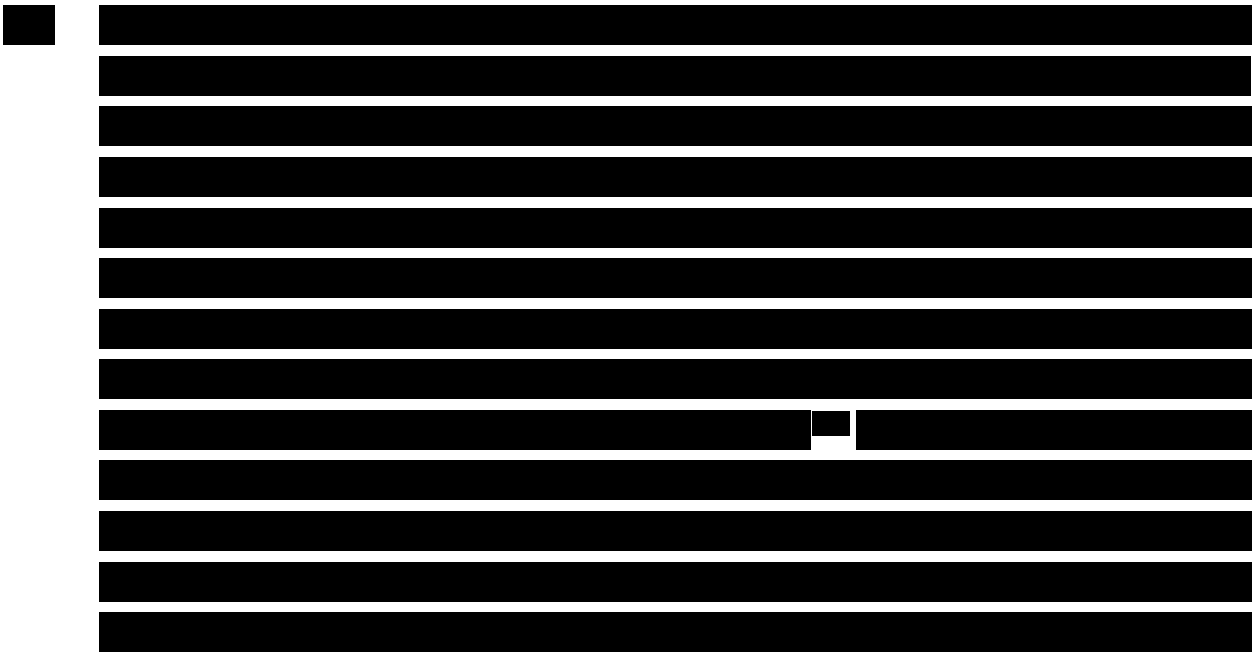
[1536] *Id.*, pp. 8-9.

[1537] *Id.*, pp. 9-10.

[1538] *Id.*, p. 10.

[1539] *Id.*, p. 11.





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[redacted]

889. The Tribunal accepts that many aspects of the [redacted] were technical, and that reasonable minds could differ regarding the extent of [redacted]'s compliance and the materiality of certain instances of alleged non-compliance. But the bigger issues troubling the [redacted] were not ones that demanded a hugely detailed assessment. There was enough evidence by this time for the regulator to reasonably conclude that [redacted] International law did not require the [redacted] in these circumstances to defer initiating a financial recovery proceeding. Nor did it require the [redacted] to defer action until a more detailed assessment of [redacted]'s records could be undertaken.

(ix) The choice [redacted]

890. The remaining question is simply whether the [redacted] decision to order one form of recovery proceedings (led by a trustee) rather than another (led by management) was an abuse of the discretion that Law 503/2004 provided the ASF to select between those options.[1559] For assessing

[1555] [redacted] a Report, ¶ 7.5.7.

[1556] **C-558**, [redacted] communication to ASF, 12 February 2014; *see also* **C-25**, Letter No. 1528 regarding the Objections Raised to Unannounced Audit Report signed on 10 February 2014, 12 February 2014 (same).

[1557] **C-1134**, Law 503/2004 on the financial recovery and bankruptcy of insurance undertakings, Article 7(b) ("[i]nsurance undertakings *shall be* subject to financial recovery proceedings under this law whenever … the value of the available solvency margin falls below the minimum limit set out in the regulations issued by the Insurance Supervisory Commission").

[1558] **C-24**, [redacted]'s Supervisory Board Decision No. 1 on Adoption of the Revised Action Plan in Decisions of [redacted]'s Boards, 31 January 2014, pp. 4-5.

[1559] **C-1134**, Law 503/2004 on the financial recovery and bankruptcy of insurance undertakings, Articles 8(1), 12, 16-18.

this question, it is useful to examine both the specific recommendations that the [redacted] had before it [redacted] and the evidence on which Nova asks the Tribunal to infer that the decision was reached for improper political reasons rather than the stated regulatory ones. Those two subjects are addressed respectively in this section and the one that follows.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

897. Nova nonetheless asserts that it was illegitimate for the [redacted] to choose [redacted] over [redacted], in circumstances where (a) the [redacted] itself had earlier recommended [redacted] and (b) the [redacted] which had carried out the inspection, was not urging [redacted][1574] The Tribunal does not see any illegitimacy in either regard. [redacted] Absent evidence of improper reasons for the final position (addressed in the subsection that follows), all this reflects is that there was ongoing consideration by [redacted] of the best approach, and some vacillation in its initial assessments, prior to its finalizing its recommendation to [redacted] Vacillation in espousing preliminary recommendations does not render a final decision inherently suspicious or illegitimate.

898. Second, as for the fact that the [redacted] did not urge [redacted] there is equally no evidence that it urged a contrary approach. [redacted] This simply results in the reality that the [redacted] was confronted with an ambiguous recommendation from one [redacted], and a clear recommendation from another, as to the type of recovery proceeding to be ordered. The [redacted] had the authority and discretion to weigh the issues presented and make its own determination.

899. That determination logically would involve a judgment call about whether management could be trusted to direct t[redacted]. It is

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[redacted] 18-19 [redacted] p. 3. [redacted]

evident from the contemporaneous records that [redacted], which were only exacerbated by [redacted] The [redacted] contemporary concerns are well documented in its internal records. Given these views – and subject only to the remaining overarching question (addressed below) of whether all of this documentation was somehow pretextual for a decision that in reality already had been made on political or personal grounds – the Tribunal concludes that it was neither arbitrary nor disproportionate for the [redacted] to exercise its legal discretion in favor [redacted]

900. Finally, the Tribunal is not persuaded by Nova's contention that Decision No. 42 was discriminatory because certain other insurance companies ([redacted] and [redacted] were placed into recovery proceedings under Article 8(1)(a) of Law 503/2004. [redacted] But this simply explains why all three companies were placed into recovery proceedings in the first place, as required under Article 8(1). It does not establish that they were similarly situated with respect to the various factors that a regulator logically would take into account in determining which *type* of recovery proceedings to elect: management-led or trustee-led.

901. As to that question, one critical factor is who could be best trusted to put the interests of policyholders and other insurance creditors first, in shepherding the company back to good health. As discussed above, Law 503/2004 *required* that recovery proceedings be pursued with this objective, not with the objective of putting shareholder interests or related company interests first.[1580] There is nothing in the record to suggest that as of the time [redacted] and [redacted] were placed into recovery proceedings, [redacted] had a comparable basis for mistrusting their management, [redacted]

[1578] *See, e.g.,* Reply, ¶¶ 434-435, 437, 444.

[1579] *See* Nova's Opening Presentation, Slide 215 (quoting **C-569**, Balance Sheet Review and Stress Test of the Romanian Insurance Sector, July 2015, ¶ 5.3); Tr. Day 8, 1921:13-19 (Nova's Closing).

[1580] **C-1134**, Law 503/2004 on the financial recovery and bankruptcy of insurance undertakings, Article 2(2).

[redacted] it is entirely rational that the ASF would evaluate their situation differently.

902. It is also rational that [redacted] would treat [redacted] with extra caution in light of its size and strategic importance. [redacted]. As [redacted] himself recognized, because [redacted] was of "systemic importance in the Romania insurance," it was expected to "receive proportionally more scrutiny" than smaller companies.[1581] It is logical that this differential importance also would influence regulators in choosing whether to entrust the recovery proceedings to existing management rather than an outside trustee, in circumstances where significant doubts had been raised about the propriety of prior management conduct at the company.

903. For these reasons, the Tribunal is not persuaded that [redacted] was "treated differently from similar cases without justification,"[1582] constituting discrimination in violation of the FET standard. [redacted].

(x) The alleged evidence [redacted]

904. For the reasons above, the Tribunal is not persuaded that the [redacted] *stated* reasons for [redacted] were outside the realm of a rational response to contemporaneous concerns, so as to constitute arbitrariness under the FET standard. Nor did they violate FET requirements of proportionality and non-discrimination. The only question which remains is whether those stated reasons were nonetheless *pretextual*, with the [redacted] really made for other improper reasons, [redacted]. [redacted] the Tribunal returns to the evidence Nova identifies to support this thesis [redacted]

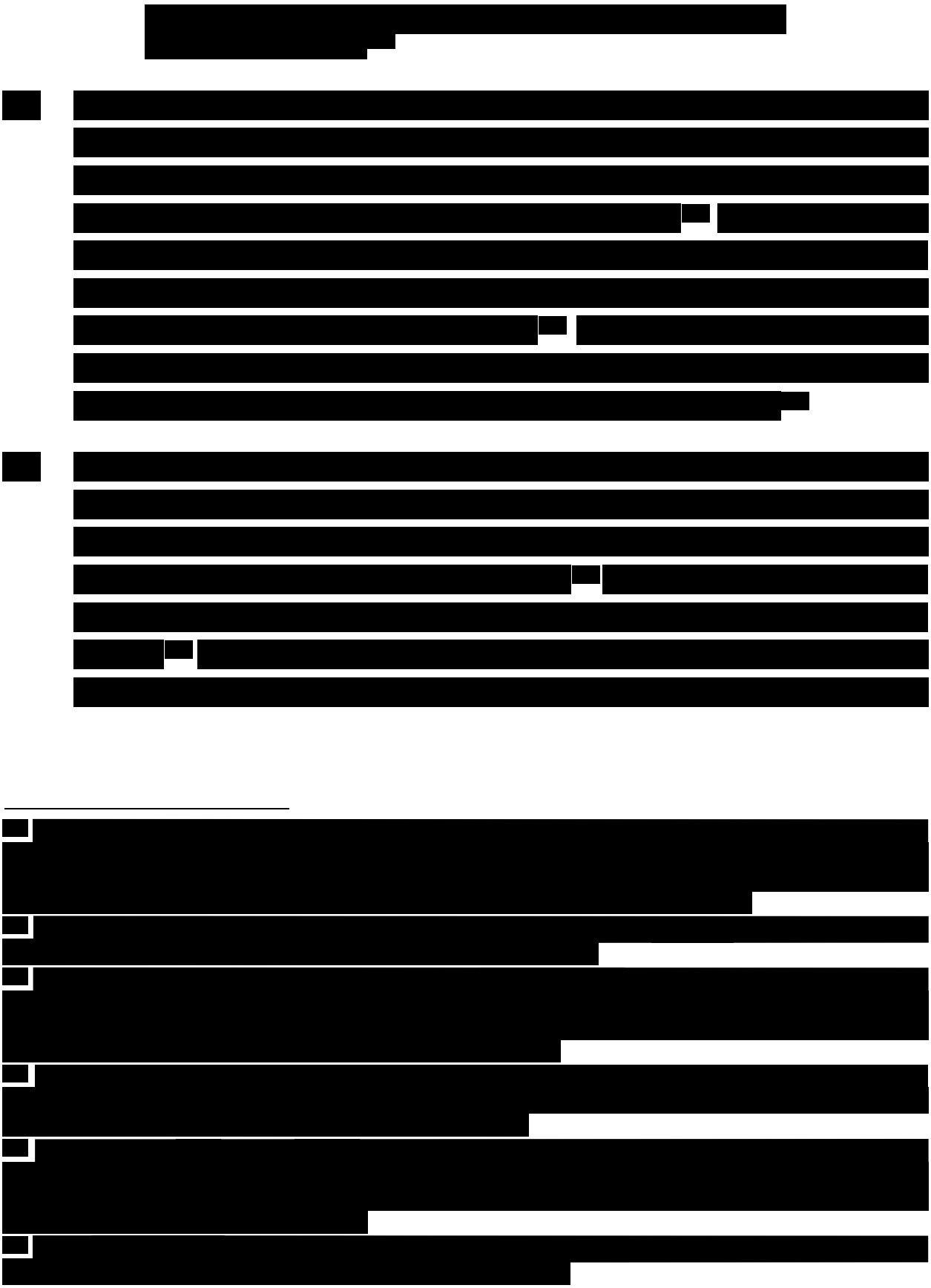
[redacted]

[1581] [redacted] Presentation, slide 8.

[1582] **RL-210**, *Lemire* Decision on Jurisdiction, ¶ 261.

[1583] Tr. Day 8, 1934:13-20 (Nova's Closing).

[redacted]



[redacted]

[redacted]

[redacted]

913. [redacted]. The Tribunal finds insufficient basis on this

[redacted]

record to accept Nova's thesis that the ASF acted pretextually in deciding to [redacted], and thereby violated Romania's obligations under the FET standard.

(e) *The Handling of* [redacted]

914. Nova's central thesis about the handling of [redacted] is that the [redacted] improperly *thwarted* [redacted] Before discussing that assertion, it is useful to examine Nova's threshold objections both to (i) the [redacted] selection of [redacted] and (ii) [redacted]). The Tribunal also summarizes (iii) the elements and sequence of steps in the [redacted] that [redacted] proposed and the [redacted] approved, albeit with limitations.

915. Following these introductory sections, the Tribunal examines Nova's assertions about the [redacted],"[1603] including in connection with (iv) the first-stage capital increase, (v) the [redacted] (vi) the proposed acquisition of [redacted], and (vii) the asserted "sabotage of [the] Second Stage Capital Increase … in the context of the ASF's secret liquidation planning."[1604] This last stage is said to have started with the [redacted] and continued with its (viii) alleged discouragement of a [redacted] and (ix) rejection of a last-minute proposal by [redacted]

916. As with the prior chapters of the [redacted] chronology, the Tribunal examines these issues both from the standpoint of Nova's primary case ([redacted] treatment [redacted] reflected a political vendetta [redacted]) and its secondary case ([redacted] conduct was unreasonable, disproportionate and discriminatory in any event).

(i) Selection of [redacted] as [redacted]

917. As a threshold issue, the Tribunal is not persuaded by Nova's allegation of impropriety in the [redacted] The evidence demonstrates that the [redacted] reached out simultaneously to the Romanian offices of [redacted], asking both to communicate their interest in participating in

[1603] Nova's Opening Presentation, slide 106 (emphasis added).

[1604] Nova's Closing Presentation, slide 96.

the role assigned by Article 8(1)(b) of Law 503/2004.[1605] Approaching large accounting firms was hardly an illogical decision, given that one of [redacted] central concerns about [redacted] involved the [redacted] While it may be true that the Romanian branches of these international firms did not have the depth or breadth of experience characteristic of their "global brand," much less specialized insurance expertise,[1606] Nova does not suggest that there were any other Romanian entities which would have been more qualified to serve in the role. Indeed the fact that the Romanian offices of [redacted] and [redacted] had affiliations with broader corporate networks would logically suggest access to greater resources and experience than a hypothetical alternate Romanian candidate.

918. Moreover, as to the selection *between* [redacted] and [redacted], the record does not show that the [redacted] steered the appointment to [redacted] over [redacted] because, as Nova contends, [redacted] allegedly (a) [redacted] and (b) [redacted][1607] [redacted]

[redacted]

[1607] Reply, ¶ 452; Memorial, ¶ 238.

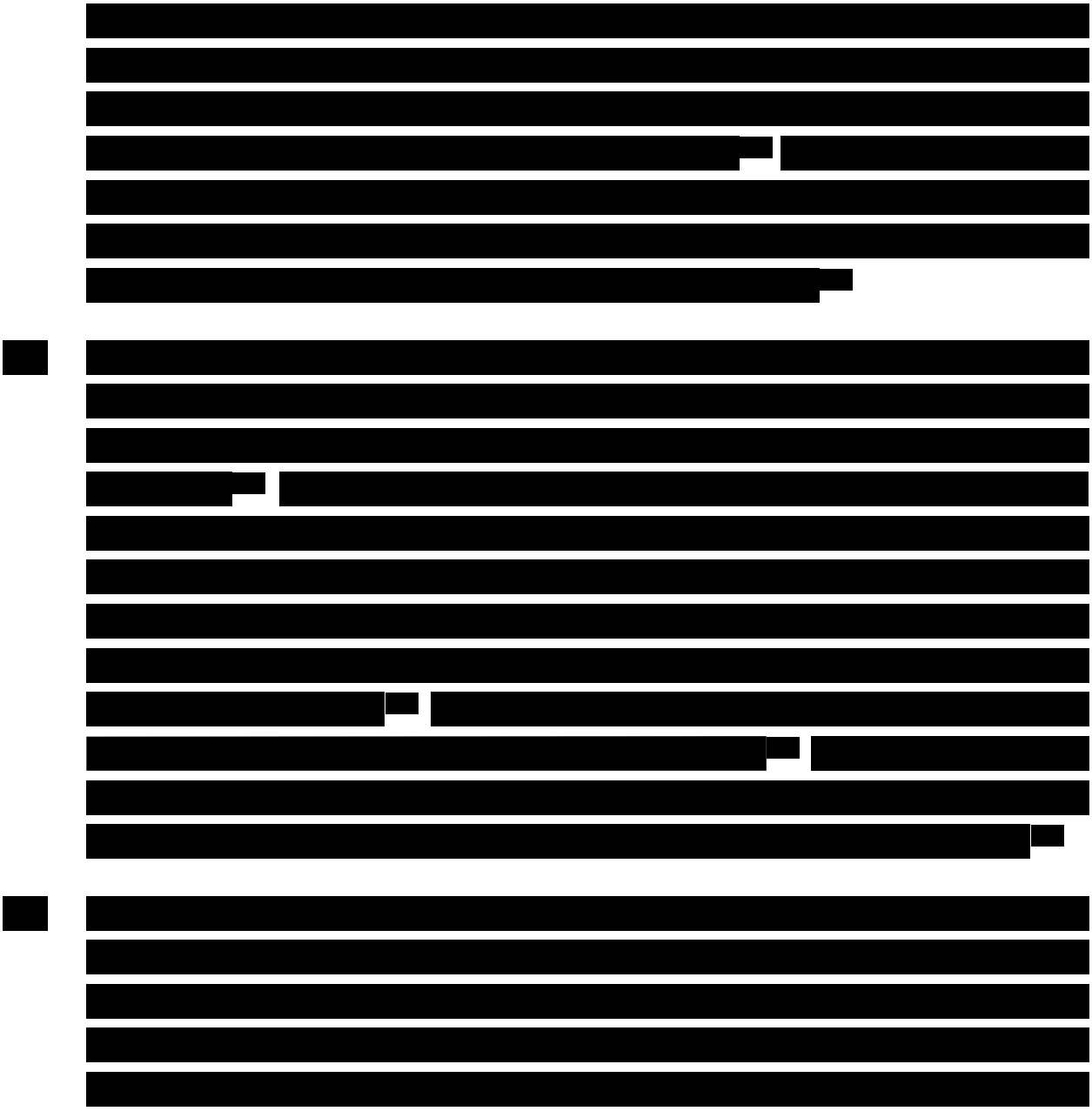
[redacted]

[redacted]

[redacted] this is sourced solely to an anonymous individual [redacted] the Tribunal places no weight whatsoever on sources of this nature. Neither the anonymous [redacted] nor his anonymous informant was made available for examination in these proceedings, and no other corroboration was provided to support the assertion. From an evidentiary perspective, this has no more substance than shifting sand.

[redacted]

[redacted]



[redacted]

923. Given these conclusions – that [redacted] was not selected for nefarious reasons, nor did it operate as a simple stooge for ASF directions – the focus of any inquiry into alleged treaty violations must squarely rest on the conduct of State officials, not on the conduct of [redacted]. Whether [redacted] acted capably or in error in the many assessments and decisions it made as [redacted] those decisions are not attributable to Romania for purposes of State responsibility. Nonetheless, because Nova's allegations about improper [redacted] conduct took place against the backdrop of [redacted]'s analyses and recommendations, the Tribunal addresses these below to the extent relevant and material.

(ii) [redacted]

[redacted]

[redacted]

[redacted] [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] [redacted]
[redacted] [redacted]
[redacted] [redacted]
[redacted] [redacted]

[redacted]

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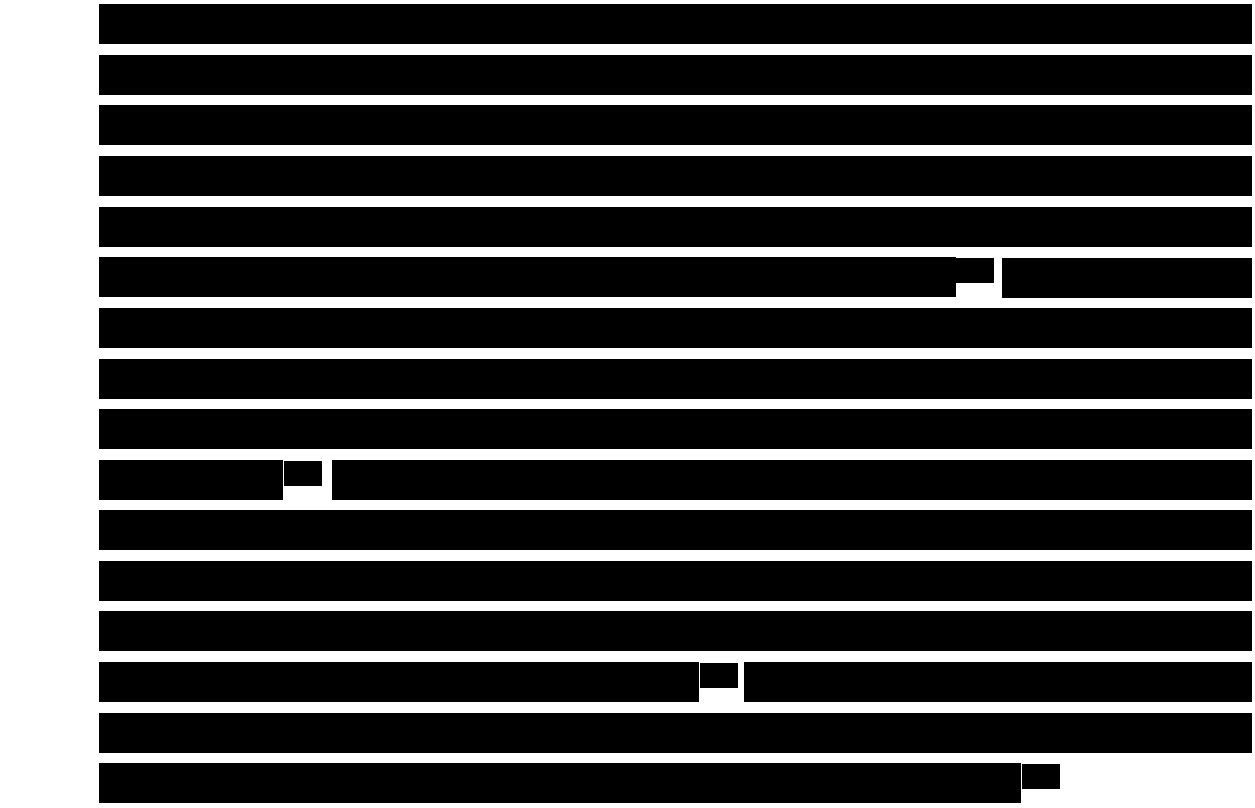

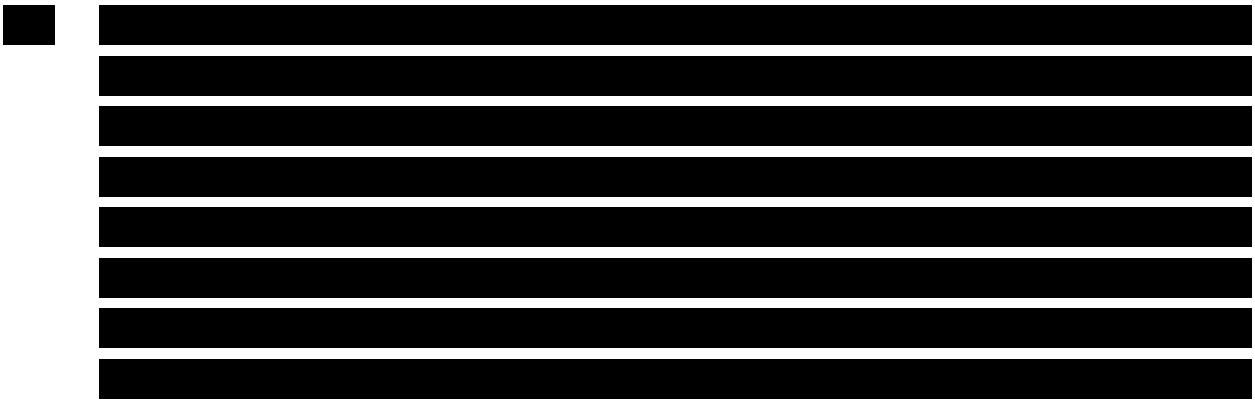

[redacted]

[redacted]

[redacted] Given [redacted]'s statutory mission, as well as the circumstances at the time, the Tribunal does not consider [redacted] to have acted improperly in its approach to the adjustments. [redacted].

(iii) The steps in [redacted]

936. In order to evaluate Nova's central thesis that the [redacted] was responsible for "obstruction of the measures plan" which [redacted][1660] it is necessary to recall the main components of the [redacted] and specifically the sequence and projected timing of the key steps.[1661] While the Plan included multiple measures, the most significant of these for present purposes were the following.

[redacted]

[redacted]

[1660] Nova's Opening Presentation, slide 106.

[redacted] 78.

[redacted]

[redacted]

(iv) The first-stage capital increase

943. With this backdrop, the Tribunal closely examines Nova's contentions that the [redacted] "sabotage[d]" [redacted]'s recovery by [redacted]."[1675]

[redacted] The record

[redacted]

reflects, however, that there were *several* reasons why the first-stage capital increase was implemented far later than [redacted] originally had anticipated, and that both sides bore responsibility for different components of the delay.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] [redacted] [redacted]

[redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]

[redacted] [redacted] [redacted] [redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted]

[redacted]

952. Based on this history, the Tribunal concludes that the [redacted] was not responsible for the first five months of delay, from the original plan of convertible loans [redacted]. [redacted]

[redacted]

Beyond this, as discussed in paragraphs 947-949, [redacted] complicated the process by insisting on preconditions about regulatory approval of [redacted].

953. It is true, however, that *after* the shareholders did transfer [redacted] funds to [redacted] there was another delay of roughly 4-1/2 months [redacted]

[redacted]

[redacted]

954. This stalemate was unfortunate, and no doubt did delay the opening of the period for completing the [redacted][1705] But in the Tribunal's view, these events are not indicative of improper State conduct. The [redacted] no doubt could have approved the capital increase earlier if it simply presumed, without demanding more evidence, [redacted]. There was an element of bureaucratic formality in continuing to demand concrete proof of that fact. The [redacted], which was in charge of reviewing the submitted documentation and moving the approval issue on to the [redacted] for decision, also could have acted more efficiently, conveying its views of the required documents to [redacted] more quickly and clearly. However, bureaucratic formality and inefficiency are hardly unique to the Romanian context, and are not indicative (without more) of improper State conduct under international standards.

955. Moreover, given the existence of the legal requirement that loans to support the issuance of insurance company shares were allowed only if coming from parent companies, it was not irrational for a regulator to insist on observing the formalities of review, particularly in light of [redacted] But even before this was known, it was not irrational for the [redacted] to ask about the source of funds being used for this [redacted] s, in circumstances where [redacted]. Indeed, one can easily imagine a concern about whether [redacted]'s [redacted] In general, the overall [redacted]

[redacted]

[redacted], was bound to increase the ASF's suspicions.

[redacted]

957. On balance, the Tribunal determines that, in light of the express legal requirement that the [redacted] confirm the source of the funds used for the capital increase, and given the [redacted] s not unreasonably heightened suspicion [redacted], it was not irrational for the [redacted] to ask more questions on this occasion, rather than simply approving without further information on the funding of the [redacted] The Tribunal thus rejects Nova's assertion that the delay was "inexplicabl[e]" and occurred "for no good reason."[1711]

[redacted]

[1711] Reply, ¶ 655; Nova's Closing Presentation, slide 96.

It also rejects as unsubstantiated Nova's further suggestion that the delay revealed nefarious intent, [redacted].”[1712]

(v) [redacted]

958. The second step in the [redacted]

[redacted]

[1712] Reply, ¶ 660.

[redacted]

960. Based on a close review of the evidence, the Tribunal is unable to find State misconduct

962. On a broader level, the very fact that [redacted] for months entertained [redacted]. Had it truly wished to stymie repayment, it could have rejected outright the [redacted]. Legally, [redacted] would have been within its rights to insist that [redacted]. [redacted] did not take this position, but engaged to some extent in [redacted] Nova's complaint that [redacted] was not *more* generous in this process – [redacted] – is not an auspicious basis on which to build an international treaty claim.

963. Equally important, during the entire time that this debate [redacted] was unfolding, [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

965. Finally, even if (*arguendo*) could be faulted in some respect for its negotiating position, Nova has not established the basis for the Tribunal to infer an improper role in this process, and therefore State misconduct. The Tribunal sees no improper

State conduct in this regard. Moreover, the action did not prevent negotiations continuing with respect to a possible repayment plan.

(vi) The proposed

966. Nova also challenges the , which it characterizes as "inconsistent" and plagued by "arbitrary decisions."[1742]

967. In considering these positions, the Tribunal starts from the premise that any analysis of regulatory action must consider the applicable norms that the regulator was obliged to apply. Here, as previously noted, those norms required the to evaluate , and in particular whether it had the funds to support 's activity from "its own resource," in the event that 's financial situation

"deteriorates."[1749] It is undisputed that [redacted]'s financial condition already was precarious: [redacted] This underscored the importance, as a matter of both law and prudence, of any acquiror having strong financial resources of its own.

[redacted]

[redacted]

[redacted]

969. In this Tribunal's view, this difference of view – which emerged even *prior* to the special administration – is the relevant backdrop for understanding the Parties' dispute over the subsequent handling of the [redacted] For example, Nova complains that the [redacted] "immediately undermine[d] [redacted][1757] by concluding internally, [redacted] But this view was based on the regulator's reading of the applicable norm; it was neither arbitrary nor irrational.

[redacted]

[redacted]

[1757] Nova's Opening Presentation, slide 145.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

974. It is logical, of course, that for any acquisition to *close* on the same date as the [redacted], the regulatory *approval* of that acquisition would need to predate the increase, even if that approval was conditioned on the successful injection of funds. The Tribunal accepts Romania's argument that this was what [redacted] attempted to convey: that the [redacted] was willing to contemplate approval before [redacted] but not unconditionally.[1770] Rather, for the approval to become effective, [redacted]. This sequence of events may be analogized to confidence building measures in diplomatic negotiations, through which each side is expected to demonstrate concrete progress towards an ultimate goal in order to reassure the other side into taking commensurate steps. Moreover, the process it envisioned ultimately would satisfy the applicable legal framework, which required [redacted] *before* it was allowed to acquire another insurance company.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

977. This proposal may have reflected business logic, but it could not solve the underlying legal problem that the regulator already had pointed out, namely that the applicable norms did not allow it to [redacted]. Essentially, the new proposal before the ASF was that it overlook the lack of progress with respect to two core recovery measures that would have improved [redacted] and instead approve the [redacted] transaction on the basis that *afterwards*, [redacted] would be stronger as a result. Yet this was just another throwback to the same chicken-and-egg debate that had emerged earlier: whether the [redacted] could, consistent with applicable law, [redacted]. This was, colloquially, a very large "ask" to make of [redacted] particularly given that the [redacted] already had taken the position that it could not do this under the applicable law.

978. It is not particularly surprising that the [redacted] pushed back. [redacted]

[redacted]

[redacted]

979. This assessment results in two findings. First, [redacted], as Nova contends. Second, however, this occurred in the context in which the core predicates of the [redacted] had not been satisfied, as Romania contends. As of this time, no appreciable progress been made in identifying a strategic investor who stood ready to inject the necessary funds into [redacted]. In these circumstances, [redacted] could not realistically have expected the regulator to approve the [redacted] in defiance of the applicable legal requirements [redacted]. [redacted] had neither a legal right nor a justified expectation of such an outcome. It therefore cannot establish a breach of FET simply on the basis that the [redacted] proposed an alternate deal structure, however unrealistic, rather than simply denying the application outright.

[redacted]

[redacted]

[redacted]

981. Finally, Nova's primary case – that the [redacted] to the [redacted] transaction was deliberate "sabotage" – is belied by the fact that the [redacted] apparently rejected on the same basis the next bid to acquire [redacted], although this was presented by a third party [redacted]. [redacted]

982. In conclusion, the Tribunal is not persuaded by Nova's claim that the [redacted] acted inconsistently, irrationally or with improper intent when it insisted that it could not approve [redacted] acquisition [redacted] This position was consistent with the [redacted] contemporaneous interpretation of the applicable norms. There is no evidence either that the [redacted] devised that interpretation specifically for [redacted] or that it enforced it only in the case of [redacted] To the contrary, the same interpretation appears to have been applied to deny approval to a subsequent would-be acquiror of [redacted]. In these circumstances, the Tribunal sees no basis for the assertion that [redacted] conduct with respect to the [redacted] violated Romania's FET obligations.

(vii) [redacted] and [redacted]

983. Nova characterizes [redacted] as a "central part" of its case.[1789] According to Nova, this [redacted],

[1785] Nova's Closing Presentation, slide 96.

[redacted]

[1789] Reply, ¶ 646.2.

through the “sabotage” of ongoing efforts to line up a strategic investor for the [redacted]

[redacted]

[redacted]

[redacted]

985. The Tribunal begins its analysis of these contentions with a reminder about the *law* that governed the [redacted] imposition of prudential measures in connection with a financial recovery process. As discussed in Section VI.B.4.d.i above, Law 503/2004 authorized the [redacted] to impose any combination of eight specifically enumerated "basic prudential measures." Among this list were certain measures that are directly relevant to [redacted] the [redacted] was authorized to "set[] a maximum limit on the amount of gross or net written premiums" for a period between 3 months and one year, and to "prohibit[] the writing" of certain types of insurance contracts or the renewal of them at maturity.[1802] By definition, such measures would *shrink the volume* and *narrow the classes* of an insurer's business, for so long as they remained in effect. Nonetheless, these measures were included among the list of options that the ASF expressly was authorized to impose as part of a financial recovery procedure. This means that the Romanian legislature did not consider them inconsistent *per se* with *bona fide* recovery efforts. Rather, the legislature evidently determined that, in appropriate circumstances, such measures could assist a struggling insurance company to improve its solvency margin enough to meet minimum statutory requirements.

986. Although the rationale for each potential measure is not spelled out in Law 503/2004, presumably the idea undergirding these particular measures was that they would focus an overextended company on strengthening certain core activities. The company would require only such further capitalization as was necessary to support that narrower sphere, rather than having to raise capital

[1798] Romania's Opening Presentation, slide 274, *citing* **C-37**, ASF Decision No. 999/2015 regarding amendments to section 4 of Decision No. 42 of 18 February 2014, 26 May 2015; *see also* Counter-Memorial, ¶ 1069.1.

[1799] Romania's Opening Presentation, slide 274.

[1800] Romania's Opening Presentation, slide 278, *citing* **C-1197**, Report of the special administrator, 15 January 2015, p. 4; Tr. Day 2, 488:12-17 (Romania's Opening).

[1801] Counter-Memorial, ¶ 686; Romania's Opening Presentation, slides 279-280.

[1802] **C-1134**, Law 503/2004 on the financial recovery and bankruptcy of insurance undertakings, Article 8(2).

to establish a minimum solvency margin for a more expansive portfolio of policies. This notion of reducing the footprint of a struggling insurer no doubt would be unwelcome to any company that previously had pursued aggressive expansion, but Law 503/2004 expressly required the [redacted], in selecting among the various authorized measures, "to aim at the protection of … insurance creditors" including policyholders.[1803] Temporarily limiting the number and classes of such policyholders, as part of a strategic contraction of an overextended business, is not inherently an irrational approach for a regulator to consider.

[redacted]

[1803] *Id.*, Article 2(2).

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

995. Based on the contemporaneous circumstances, the Tribunal does not consider this action to have been improper. The [redacted] by this point may have had low expectations of [redacted], and been losing patience with the slipping schedule for a [redacted] in the context of express warnings [redacted] This, however, is not the same thing as a determination to *thwart* recovery by forestalling some otherwise promising prospects. The [redacted] had not been informed of any such promising developments.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

1001. The Tribunal considers this extraordinary crisis environment, in which [redacted], to be a necessary context to evaluate the back-and-forth communications over the next few weeks between [redacted] But the back and forth about this issue cannot be divorced from the urgent context in which the measures were being considered. In the Tribunal's view, the correspondence reveals an exchange of *two different perspectives*, in which the [redacted] was focused primarily on the recovery objectives for [redacted], and the [redacted] was focused on [redacted], which logically supported trying to limit the number of policyholders who could be harmed by that collapse.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

1010. The Tribunal has closely examined the events leading up to [redacted] particularly given that the [redacted] took issue with the quality of its reasoning and that its issuance was controversial within the [redacted]. In evaluating the evidence, the Tribunal also bears in mind that the question for it is not whether the [redacted] ultimately was "right" under Romanian law, in deciding to proceed with the [redacted] on the basis and with the explanations that it did. Rather, the

[redacted]

question for these proceedings is whether the process was so inadequate – so tainted by abuse, improper intent, irrationality or discrimination – that it violated Nova's right under the Treaty to fair and equitable treatment of its investments.

1011. On balance, the Tribunal concludes that Nova has not so proven. Even if the [redacted] was correct that more analysis should have been conducted and more explanation provided to comply with Romanian law, it was not irrational for the [redacted] to decide to proceed quickly, without more detailed internal procedures. [redacted][8] In these circumstances, the [redacted] needed to grapple with the tension between the urgency of action on the one hand, and the procedures to properly record and justify its actions on the other.

[redacted]

[redacted]

[redacted] A regulator's decision to proceed with a controversial measure in apparently urgent circumstances, notwithstanding internal legal advice that this might risk reversal in the courts, does not *in and of itself* constitute an abusive disregard of the law, sufficient to give rise to international responsibility.

1014. The Tribunal is not persuaded that the [redacted] true motivation was to [redacted] The [redacted] no doubt understood that the new measures would impact that process; among other things, the prospectus would have to be revised to reflect the new scope of [redacted]'s permitted activity, and the reduced scope of those activities in the near-term might have an impact on the offering price for [redacted]'s shares. But the regulator's responsibility under Law 503/2004 was not to support a struggling insurance company's desire to continue at any particular size or range of activity; it was to protect policyholders and other creditors, a goal which the Law expressly authorized the [redacted] to pursue (*inter alia*) by restricting types of policy activity and total gross premiums, the latter for a period of no more than a year. [redacted]

1015. Moreover, during roughly the same time period, the [redacted] prohibited *another* Romanian insurance company ([redacted]) from issuing new class B.15 "guarantee" policies, just as it had done with [redacted] The fact that the [redacted] restricted [redacted]'s B.15 activity in the same

[redacted]

time period helps to negate Nova's suggestion that [redacted], and did so for malicious purposes or in an utterly irrational fashion.

(viii) The [redacted]

1016. According to Nova, the next step in Romania's sabotage of the [redacted] involved its interference with [redacted]

1017. The evidentiary record cannot however support this edifice, which is built from layering inference upon inference.

[redacted]

[redacted]

[redacted]

[redacted] But even if all this were true, clumsiness by government officials, lacking the dealmaking sophistication that private investment professionals might bring to such discussions, does not equate to wrongdoing. The real question is whether the content of the meetings was nefarious, deliberately *aimed* (as Nova contends) at scuttling any [redacted]

[redacted]

that would involve the payment of any reasonable sum to [redacted].

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] [redacted]

[redacted] [redacted]

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[redacted] [redacted]

[redacted]

[redacted]

1043. On this record – which the Tribunal has reviewed in exhaustive detail – the Tribunal is unable to accept Nova's proposed finding that, in the words of its witness [redacted], "[redacted]

[redacted]

[redacted] It is far more plausible that [redacted], [redacted] became increasingly skeptical of [redacted] s the more that it learned about [redacted] [redacted] it is hardly surprising that a [redacted] would have concerns about the prospects for (and potential significant costs of) completing the steps required. The Tribunal does not consider [redacted]'s doubts about the proposed deal to have been illegitimate, or that these doubts were sowed only through improper intervention [redacted]

1044. Finally, the Tribunal turns to the *third* proposition on which Nova bases the requested inference, which is related to Nova's primary FET case that [redacted]

The Tribunal discusses these further in Section VI.B.4.f, in the context of the decision to . For present purposes, it is sufficient to state that the do not support the particular inference that Nova suggests.

[redacted]

[redacted]

1045. In conclusion, the Tribunal finds no persuasive evidence that the [redacted] sought to undermine a [redacted].

(ix) The [redacted] of Nova's [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

1050. The Tribunal does not consider the ASF's response to be indicative of wrongful behavior under the FET standard. The ASF's reaction to Nova's proposal was neither arbitrary, irrational, abusive nor disproportionate. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(f) ***The*** [redacted] ***to Put*** [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] [redacted] [redacted]

[redacted] [redacted] [redacted] [redacted]

[redacted] [redacted] [redacted]

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[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

1064. From the Tribunal's perspective, although the ASF completed its procedures with surprising speed following the [redacted] its decision to close [redacted]. The content of [redacted]'s report would not have been the [redacted] first indication that the recovery procedure had failed to turn [redacted] around, such as to require a lengthy process of study

[1980] **C-38**, ASF Decision No. 2034, 27 August 2015.

[1981] *Id.*, pp. 4-5.

[1982] *Id.*, p. 5 (emphasis added).

and debate. [redacted] It was therefore not irrational for the to quickly conclude – [redacted] – that the time had come to close the recovery proceedings and [redacted].

1065. In this regard, it is worth recalling that the [redacted] was bound (*inter alia*) by Articles 20(b) and 21(b) of Law 503/2004. The first of these provisions required the [redacted] to close financial recovery proceedings when "the purpose" of the measures implemented during the proceedings "was not achieved and the underlying causes were not eliminated."[1983] The second provision required the [redacted], upon finding that an insurer in recovery proceedings was insolvent, to withdraw its license and "request immediate initiation of bankruptcy proceedings."[1984] The [redacted] to take these steps with respect to [redacted] must be evaluated against its legal obligations, [redacted].

1066. Nova nonetheless argues that [redacted] was simply "the implementation of an obviously pretextual plan, driven from [redacted]."[1985] [redacted]

[redacted]

[1983] **C-1134**, Law 503/2004 on the financial recovery and bankruptcy of insurance undertakings, Article 20(b).

[1984] *Id.*, Article 21(b).

[1985] Reply, ¶ 538; *id.*, ¶ 742.

[redacted]

[redacted]

[redacted]

1067. These posts obviously reveal [redacted]. Nonetheless, the Tribunal is unable to conclude that this was the driving force in [redacted] decisions, which flowed directly from [redacted] can, in the context, more easily be seen as a politician's public *capitalization* on developing news, rather than evidence of his having *dictated* regulatory action behind the scenes.

[redacted]

[redacted]

[redacted]

1069. In any event, [redacted] the Tribunal does not accept that [redacted] conclusions [redacted] were pretextual, [redacted]. In this regard, the Tribunal recalls its observation in Section VI.B.4.a that a party seeking to demonstrate pretextual conduct in violation of the FET standard must show not only "the existence of ill will towards an investor, but also … sufficient basis for a tribunal to infer *causation* – in other words, that the ill will was the reason for the challenged action, and not simply a fact that existed independently from (but did not drive) State conduct." Here, [redacted] considered in the context of the entire record, are insufficient to support such an inference.

1070. The Tribunal accepts that the [redacted] either in isolation or in combination with [redacted]'s earlier public pronouncements, may be read as an indication of some sort of triumph. Without more context, an occasional observer might infer that the underlying events were engineered (and not just celebrated) [redacted]. However, that superficial impression is as close to causation as Nova can get, because the Tribunal has had the benefit of the fullest possible panorama [redacted] based on the evidence placed before it. When the [redacted] are put into their proper perspective, they appear to be overblown political *schadenfreude.* Distasteful, no doubt; but the rough and tumble of political discourse – even when expressed in such lurid terms – does not, in and of itself, give rise to an evidential presumption of an illegal conspiracy to use the machinery of state to destroy an opponent.

1071. Here, the fact remains that [redacted]. This situation had persisted for more than [redacted] from the opening of [redacted]s. Given these established facts, the Tribunal does not accept Nova's contention that that the [redacted] decision was simply the result

August 2015, p. 32 (citing [redacted]'s Supervisory Board Minutes of 20 June 2011); **R-318**, Witness statement of [redacted] before the DNA (in case file no. 578/P/2015), 27 January 2016 (testifying about the risk analysis recorded in the Supervisory Board Minutes).

[redacted]. Nor was it otherwise irrational or abusive in violation of Romania's FET obligations under the BIT.

1072. Finally, the Tribunal is equally unpersuaded by Nova's allegation that [redacted] decision to [redacted] was discriminatory vis-à-vis other struggling insurance companies, in violation of Romania's FET obligations. In Section VI.B.4.d.ix above, the Tribunal rejected Nova's *different* contention about discrimination, concerning the initial decision to [redacted] into [redacted] rather than allowing it to [redacted], as were [redacted] and [redacted] The Tribunal found that there were logical reasons for those different decisions, [redacted] The Tribunal has conducted a similar analysis with respect to Nova's second discrimination allegation about the closure of the recovery proceedings, but again finds that the regulator permissibly dealt with each company based on its own discrete circumstances. Nonetheless, the outcomes for the two alleged comparator companies were tied to [redacted] just as the outcome for [redacted] was.

[redacted]

[redacted]

[redacted]

1075. In these circumstances, the Tribunal is not persuaded that [redacted] was "treated differently from similar cases without justification,"[1998] in violation of the FET standard.

[redacted]

[1998] **RL-210**, *Lemire* Decision on Jurisdiction, ¶ 261.

(g) [redacted]

(i) [redacted]

1076. With respect to the criminal proceedings [redacted], these are relevant under the FET standard only to the extent they constitute unfair or inequitable treatment of Nova's protected investments in Romania. As a general matter, investment tribunals do not have plenary standing to judge the propriety of States' use of their domestic law enforcement tools, where there is no nexus between the use of those tools and the treatment of a protected investment. However, tribunals *do* have jurisdiction, and the FET standard may be violated, where the investor's executives or employees (or those working for its investment in the host State) are targeted for prosecution as a means of harming the investment or the investor who owns it.[1999]

1077. This component of *targeting* is key to connecting an alleged improper prosecution of individuals to an alleged mistreatment of a protected investment. Absent such targeting, it is not clear that the FET standard (and a tribunal's jurisdiction) would be engaged, simply because a criminal prosecution – brought for reasons independent of an individual's connection to an investment – might in some way *affect* the operations or value of an investment. To illustrate the point with a hypothetical: imagine an individual is arrested on *bona fide* suspicion of having murdered his neighbor. The fact that the alleged murderer worked by day as the key officer of a company owned by a foreign investor, and that the company's value might drop precipitously in the aftermath of his arrest and subsequent unavailability, is unlikely to constitute a violation of State's duties *with respect to the investment*. The economic strain on the investment may derive factually from the arrest, but such harm was incidental to a *bona fide* exercise of police powers for reasons unconnected to the suspect's role in the investment. However, the hypothetical scenario would change dramatically if there was evidence that the murder charges were drummed up by officials *precisely to undermine the investment*. That alleged nexus provides the basis for an FET inquiry.

1078. In this case, Nova alleges that [redacted]

[1999] *See, e.g.,* **CL-429**, *Hydro S.r.l., and others v. Republic of Albania,* ICSID Case No. ARB/15/28, Award, 24 April 2019, ¶¶ 717-718, 724-725 (noting that even if Albania had "sufficient basis" under its law to issue an arrest warrant, "this is not the end of the matter," because the evidence showed that criminal investigations were "motivated by a political campaign" against claimants "by a government that was close to [their] commercial competitors"); **CL-181**, *Desert Line*, ¶¶ 185, 209 (finding that "[t]he Claimant … suffered threats … on the *physical* integrity of its investment" when "the Respondent besieged the construction site of Contract 6 and arrested three managers of the Claimant, including the Claimant's son," and that "the violation of the BIT by the Respondent, in particular the physical duress exerted on the executives of the Claimant, was malicious") (emphasis in original).

[redacted]

1079. [redacted]

1080. Given these charges and countercharges, there is certainly enough debate about the nexus between the criminal charges and Nova's various investments in Romania as to provide a basis for an FET inquiry. In reviewing the evidence for that inquiry, the Tribunal examines several distinct questions:

a. First, were the *investigations initiated* for improper reasons (the issue of targeting just discussed)?

[2000] Reply, ¶ 803 (emphasis added).

[redacted]

[2003] Romania's Opening Presentation, slide 282.

[2004] Romania's Opening Presentation, slide 282.

[2005] Romania's Opening Presentation, slide 315.

b. Second, was there a "serious and persistent" pattern of wrongdoing *during the course of the investigations*, for example in the collection of evidence, the decision by prosecutors to bring charges based on the evidence collected, and/or the decision [redacted] In this regard, the Tribunal agrees with the *Rompetrol* tribunal that "a State may incur international responsibility for breaching its [FET] obligation … by a pattern of wrongful conduct during the course of a criminal investigation or prosecution, even when the investigation and prosecution are not themselves wrongful. The provisos are however that the pattern must be sufficiently serious and persistent, that the interests of the investor must be affected, and that there is a failure in these circumstances to pay adequate regard to how those interests ought to be duly protected."[2006]

c. Third, did the course of the *judicial proceedings* violate FET standards, either by virtue of due process failings or with regard to the ultimate verdicts? For this question, the Tribunal bears in mind the Parties' agreement that judicial conduct is generally evaluated under a denial of justice standard.[2007] As discussed further below, that standard takes into account (*inter alia*) the availability of further judicial redress, in order to assess an alleged failing of the judicial system as a whole with regard to the investor, rather than the correctness or error of a particular ruling.

1081. The Tribunal takes up these questions below, [redacted]

(ii) [redacted]

[redacted]

[redacted]

[redacted]

[redacted] **20**, *Rompetrol*, ¶ 278.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

1091. [redacted] *initiation of* [redacted] *investigation*, the only "evidence" of improper motives that Nova presents is (a) [redacted]' opinion about political interference, based on what certain intermediaries said they had been told [redacted] (b) the anonymous statement [redacted] which is entirely vague about the provenance of his own knowledge.

1092. [redacted] Nonetheless, [redacted], legal proceedings have certain standards for the evaluation of evidence, which are different than those used in the intelligence field [redacted]

[redacted]

In an adjudicatory proceeding, statements of the sort Nova submits here cannot be given probative value, unless (*perhaps*) they were *significantly* bolstered by independent and credible corroborating evidence. For this very reason, the English courts concluded [redacted] that they could not place any weight on [redacted] The Tribunal concludes likewise.

1093. By contrast, the Tribunal *does* have before it a substantial body of contemporaneous documents regarding [redacted] investigation, which is far more probative evidence than the opinions of anonymous sources channeled through multiple steps. This evidence supports Romania's position that [redacted]

[2029] Tr. Day 3, 654:18-22 ([redacted]).

[2030] **R-343**, *Bucharest Court of Appeal, Criminal Division v.* [redacted], Westminster Magistrates' Court (Extradition Proceedings), 13 April 2018, ¶¶ 181-182, 190-191 (finding that "the information contained in the [redacted] reports … does **not** satisfy the test for admissible expert evidence," and that even were it to be admissible, "it would be appropriate for this court to give the [reports] practically no weight at all") (emphasis in original); **R-344**, [redacted] *v. Bucharest Court of Appeal Court Criminal Division,* Romania [2019] EWHC 2898 (Admin), ¶ 31. (finding that "this evidence was correctly excluded").

[redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]

[redacted]

1098. The critical question therefore is *what evidence* was developed about the knowledge and involvement of [redacted], and whether that evidence reasonably justified their *subsequent treatment* by prosecutors and the courts [redacted] In evaluating this question, the Tribunal considers it useful to set out the core evidence [redacted]

[2039] **C-971**, Telephone Discussion between [redacted], 6 December 2013.

[2040] Nova's Opening Presentation, slide 48.

[2041] Reply, ¶ 492.3.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

1113. The Tribunal addresses the judicial proceedings in the section that follows. Before that, the Tribunal closes its examination of the prosecutorial stage – the conduct of the investigations – with several observations.

1114. First, the Tribunal accepts Nova's argument that the cases [redacted] were heavily (though not entirely) dependent on the testimony of witnesses. [redacted]

1115. At the same time, there is nothing inherently improper about prosecutors basing an indictment on circumstantial evidence and the testimony of accusing witnesses, including lower-level witnesses cooperating under grants of immunity. The practice of "flipping" lower-level witnesses in this fashion is hardly unique to Romania, and in and of itself does not demonstrate impropriety, much

[redacted]

less the kind of "serious and persistent" pattern of wrongdoing during the course of an investigation which might, when aimed at foreign investors, give rise to findings of an FET violation.[2070]

1116. The Tribunal acknowledges Nova's accusation that [redacted] used more than typical prosecutorial pressure to obtain witness testimony [redacted]

1117. This is an extremely serious and troubling accusation. It is highly unfortunate that it could not be presented to the Tribunal in a form which enabled it to be examined for evidentiary weight. But as discussed above, the Tribunal was provided no access to the unnamed "Sources [redacted]," nor to the unnamed Romanian investigators who interviewed them, nor to the unnamed UK intermediaries who passed the investigators' impressions on [redacted]. All the Tribunal was provided on this topic were a few paragraphs in the [redacted], whose authors never themselves spoke either with the sources or even the investigators. This is not a sufficient basis for the Tribunal to conclude that the witness evidence which prosecutors provided to the Romanian courts, and which those courts duly considered [redacted], was so tainted as to give rise to a finding of wrongful prosecution in violation of Romania's FET obligations with respect to protected investments.

1118. The fact also remains that any alternative story of why [redacted] is intuitively illogical. [redacted]

[redacted]

[redacted] By contrast, there is logic to the prosecutor's observation that the most powerful motive existed for [redacted] It was not irrational for prosecutors to pursue charges on this theory, and the Tribunal finds that Nova has not proven a serious and persistent pattern of wrongdoing by prosecutors in doing so.

[redacted]

1119. As previously noted, the Parties agree that any FET claims against Romania with respect to judicial proceedings must be examined under the standard for denial of justice.[2076] It is axiomatic that this standard is a demanding one.

1120. Investment treaty tribunals do not sit as courts of appeal from domestic court rulings, and accordingly mere errors of law by such courts (even if demonstrated) do not, on their own, give rise to valid treaty claims.[2077] As the *Oostergetel* tribunal explained, to prove an FET violation in connection with judicial proceedings, "it will not be enough to claim that municipal law has been breached, that the decision of a national court is erroneous, [or] that a judicial procedure was incompetently conducted." Rather, the question is whether the evidence demonstrates "the failure

[redacted]

[2075] [redacted]

[2076] Counter-Memorial, ¶ 867; Reply, ¶ 776.

[2077] *See, e.g.,* **RL-219**, *Pantechniki*, ¶ 94; **CL-183**, *Arif*, ¶¶ 440-441 (in the context of an FET analysis of judicial acts, cautioning against "attributing the shape of an international wrong to what is really a local error," and cautioning that "international tribunals must refrain from playing the role of ultimate appellate courts"); **RL-158**, *Oostergetel,* ¶¶ 291, 299 ("It is indeed common ground that the role of an investment tribunal is not to serve as a court of appeal for national courts"; "The BIT does not grant protection for mere breaches of local procedural law nor does it open an extraordinary appeal from the decisions of municipal courts").

of a national system as a whole to satisfy minimum standards."[2078] This test requires a demonstration either of procedural failings that amount to "administering justice in a seriously inadequate way," or substantive ones rising to the level of "an arbitrary or malicious misapplication of the law,"[2079] with the result that the outcome is "discreditable and offensive to judicial propriety."[2080] The *Oostergetel* tribunal examined local court decisions to determine if they were "so bereft of a basis in law that the judgment was in effect arbitrary or malicious."[2081]

1121. Other tribunals have applied similar standards. The *Arif* tribunal considered that judicial acts could give rise to an FET violation through "fundamentally unfair proceedings" or "outrageously wrong, final and binding decisions."[2082] The *Rumeli* tribunal concluded that FET could be breached either when a court procedure does not comply with due process, or where the substance of its decision is "so patently arbitrary, unjust or idiosyncratic that it demonstrates bad faith."[2083] These inquiries should be seen against the backdrop of the international law notion of arbitrariness, which requires that proceedings have been conducted in a manner "opposed to the rule of law," *i.e.*, through "wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[2084]

1122. The Tribunal agrees that these high standards apply. With respect to the judicial proceedings and decisions regarding bribery, however, the Tribunal is unable to conclude that these either involved internationally inadequate procedures or were so "outrageously wrong" and "bereft of a basis in law" or reason that they could have been reached only through "arbitrary or malicious misapplication of the law."[2085]

1123. Beginning with the [redacted] However, the judges were required

[2078] **RL-158**, *Oostergetel,* ¶ 273.

[2079] **RL-158**, *Oostergetel,* ¶¶ 273-274; *see also id.*, ¶ 275 (organizing its analysis of the claimants' allegations "from a procedural and a substantive perspective").

[2080] **RL-158**, *Oostergetel,* ¶ 291.

[2081] **RL-158**R, *Oostergetel,* ¶ 292.

[2082] **CL-183**, *Arif*, ¶¶ 445.

[2083] **RL-115**, *Rumeli*, ¶ 652.

[2084] **RL-208**, ICJ, *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, 20 July 1989, ICJ Reports 1989, ¶ 128.

[2085] **CL-183**, *Arif*, ¶¶ 445; **RL-158**, *Oostergetel,* ¶ 273-275, 292.

[2086] Reply, ¶¶ 508, 806.

by law to examine the evidence to some extent at this stage of the proceedings. Under Article 202(1) of the Criminal Procedure Code, "[p]reventative measures may be ordered if there is evidence or serious indications resulting in the reasonable suspicion that a person has committed an offense and [the measures] are necessary for the purpose of ensuring the proper conduct of criminal proceedings, of preventing the suspect or defendant from avoiding prosecution or judgment or preventing the commitment of another offense."[2087] This standard applies *inter alia* to "detention on remand."[2088] More specifically, Article 223 of the Criminal Procedure Code, a judge may order detention on remand "if evidence generate[d] a reasonable suspicion that the defendant committed" the underlying offense, and there exist certain aggravating factors, including *inter alia* (a) that the offense involved "the defendant tries to influence another participant … or a witness" to try to avoid prosecution, or (b) that the offense involve serious crimes including public "corruption" and,

> based on an assessment of the seriousness of facts, of the manner and circumstances under which it was committed, or the entourage and the environment from where the defendant comes, of their criminal history and other circumstances regarding their person, it is decided that their deprivation of freedom is necessary in order to eliminate a threat to public order.[2089]

1124. [redacted]

[2087] **R-266**, Romanian New Criminal Procedural Code, Article 202(1).

[2088] *Id.*, Article 202(4)(e).

[2089] *Id.*, Articles 223(1)(b) and 223(2).

[redacted]

[redacted]

1125. The Tribunal does not consider this reasoning process, which followed the standards set out in Romanian law, to be either "bereft of a basis in law" or to have resulted in an outcome that is so bizarre that it could have been reached only through "arbitrary or malicious" misapplication of the law.[2095] Moreover, as to procedure, the Tribunal notes that [redacted]

[2092] *Id.*, pp. 16-18.

[2093] *Id.*, p. 18.

[2094] **R-271**, Decision of the Bucharest Court of Appeal, 23 July 2014, p. 2.

[2095] **CL-183**, *Arif*, ¶ 445; **RL-158**, *Oostergetel,* ¶¶ 273-275, 292.

[2096] [redacted]

[2097] [redacted]

1126. [redacted]

1127. This reasoning is not a rebuke of the original detention order. But even if it could be characterized as such, that still would not point to a denial of justice. As the *Roussalis* tribunal observed, an appellate court's lifting of a lower court order does not mean that the earlier order was arbitrary or unreasonable in violation of international law: "an 'erroneous judgment' by a court would not violate the Treaty in the absence of … a violation of due process."[2103] It is axiomatic, moreover, that denial of justice is based on the functioning of the State's judicial system *as a whole*, not the decisions of a single court. The fact that a higher court is able to perform its assigned corrective function tends to weaken rather than strengthen the case for denial of justice. [redacted]

[2099] *See* Reply, ¶ 510 (Nova arguing that the High Court decision shows the earlier custody "was unnecessary and used to exact political retribution on [redacted], and keep him from helping to extract Nova from its State-induced predicament").

[redacted]

[2103] **RL-213**, *Roussalis*, ¶ 608.

[redacted]

1128. Nor does the Tribunal see a denial of justice with respect to [redacted]'s ultimate *conviction* [redacted]

1129. Rather, Nova's complaint again relates to the sufficiency of the evidence: [redacted]

1130. It is generally for the courts of a sovereign State to weigh the sufficiency of evidence, and there is a very high threshold for an international tribunal to revisit evidentiary rulings under the standard of denial of justice. It is certainly not the role of a tribunal to weigh the evidence *de novo* for itself. In this case, Nova's arguments do not satisfy that threshold. As discussed above in the context of the prosecutorial decision to charge [redacted],[2107] the Tribunal accepts that the charges were heavily dependent on the testimony of accusing witnesses and circumstantial evidence. But that occurs from time to time in courts the world over: not every case is based on direct evidence. Moreover, different legal systems impose different degrees of rigor with regard to the appropriate balance between direct and circumstantial evidence, and between witness and documentary evidence. The denial of justice standard is not a competition imposing a requirement for the "best"

[redacted]

[2105] Reply, ¶¶ 493.2, 806.

[2106] Reply, ¶ 512.

[2107] *See* paras. 1114-1115 above.

or most rigorous evidentiary standards. Accordingly, except in rare cases where a national legal system *itself* might fall below international standards for the administration of justice, the more relevant question is whether that national system performed according to its *own* standards with respect to a particular subject, or alternatively deviated from such standards to an extent that raises serious suspicions of a miscarriage of justice.

1131. In this instance, the Tribunal has insufficient basis to find that the Romanian courts strayed beyond their considerable discretion to weigh the evidence for themselves. Nova has made no attempt to show that Romanian jurisprudence generally requires more direct evidence than that amassed [redacted], or frowns upon court reliance on witness evidence obtained through grants of immunity. Assuming, therefore, that the judicial weighing of evidence in this case took place within the range customarily expected of the Romanian courts, the only question is whether that practice itself amounted to a denial of justice. Yet on careful examination, the Tribunal is unable to find that, in reaching conclusions [redacted], both the Court of Appeal and the High Court adopted decisions that on their substance were so "patently arbitrary, unjust or idiosyncratic that [they] would demonstrate bad faith,"[2108] as is required to constitute denial of justice in violation of Romania's FET obligations under the BIT.

[redacted]

1132. Finally, the Tribunal likewise rejects Nova's assertion that Romania violated its FET obligations in connection with its separate efforts, [redacted]

1133. First, with respect to Romania's efforts to serve a summons [redacted] the Tribunal need not decide whether these were properly organized and directed under the applicable national laws. Even if *arguendo* certain errors were made in the location or methods of attempted service, such errors of procedure are not sufficient to give rise to a delict under international law.

1134. Nova's more compelling argument is about the *timing* of Romania's service efforts: [redacted]

[2108] **RL-115**, *Rumeli*, ¶ 652.

[2109] The Tribunal addresses separately, in Section VI.F below, Nova's argument that Romania's refusal to comply with the Tribunal's provisional measures recommendation constitutes an actionable abuse of its duty to arbitrate in good faith.

[redacted]

1135. The chronology reveals certain correlations in timing, although ultimately insufficient for the Tribunal to infer causation as Nova requests.

1136. [redacted].

1137. [redacted]

[redacted]

[redacted]

1138. [redacted]

1139. [redacted]

While it would clearly violate FET obligations for a State to pursue criminal prosecution *because* an investor threatened to invoke treaty arbitration, nothing requires a State that already had indicted a criminal suspect to stand down in its efforts to arrest him, simply because in the meantime it

[redacted]

2117 [redacted]

2118 [redacted]

2119 [redacted]

[redacted]

2122 [redacted]

receives a notice of dispute. A notice of dispute does not trigger automatic stand-still obligations within the host State.

1140. [redacted]

1141. [redacted]

1142. [redacted]

[2123] **C-1019**, DNA Report proposing custody on remand in absence, 25 March 2016, pp. 44-45 (summarizing evidence and asking the court to find "a reasonable suspicion that [redacted] committed the crimes he is charged with and that he absconds himself from the criminal prosecution"); **C-1027**, Decision of the Bucharest Court of Appeal, 19 May 2016, pp. 5-6 (finding that "there is evidence to create the reasonable suspicion" on both grounds); **C-1035**, Decision of the High Court of Cassation and Justice, 26 May 2016, pp. 10-11 (agreeing with the previous decision).

[2124] *See* paras. 1119-1125, 1130 above.

[2125] **R-377**, European Court of Human Rights, Fourth Section, Decision on application no. 70621/6 (*B.A.A v. Romania*), 18 April 2019, ¶¶ 21-22.

[2126] *See* Reply, ¶ 493.5 (deriding the same day retrial as "a clear breach of procedural fairness" giving rise to a "clear inference … that the outcome was predetermined").

The Tribunal has carefully examined the decisions of each of the Romanian courts regarding this warrant, and is unable to find any wrongdoing rising to the level of a denial of justice, as Nova asserts.[2130]

1143.

(iii) [redacted]

1144. By the time of the hearing, the [redacted] charges appeared to have faded in relative importance for Nova's case: it did not mention these charges in its either its opening or closing presentations, with the exception of one event box included in a broader timeline.[2133] Nonetheless, the Tribunal addresses the issues raised in Nova's earlier memorials.

1145. The Tribunal has assessed the "[redacted] story" in Sections VI.B.4.c-VI.B.4.f, in response to Nova's FET charges stemming from the actions of the ASF. Here, it focuses specifically on the *criminal* charges that eventually were brought in connection with the [redacted] events. Once again, the Tribunal divides its analysis into three parts, examining respectively (a) the reasons that [redacted] opened an investigation, (b) the conduct of the investigation, and (c) the proceedings and rulings of the Romanian courts.

[redacted]

1146. [redacted]

[redacted]

[2133] Nova's Opening Presentation, slide 8.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

1153. However, the anonymous [redacted] statement is the only evidence in the record suggesting [redacted] For the reasons previously stated, the Tribunal places no weight on anonymous contentions by individuals not available for examination, in the absence of any corroboration by more reliable evidence.[2146]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

1158. Nova offers an anonymous "witness" statement by [redacted], [redacted]

[redacted]

1159. This could have been potentially significant evidence of [redacted], if it were submitted in a form that was entitled to probative value. However, as previously discussed, the Tribunal cannot place weight on anonymous statements by individuals who are unwilling to be examined, particularly where the statements cannot be corroborated by any other evidence in the record.[2152] [redacted]

In short, the story is sensational, but its credibility rests on mere "say so" on a piece of paper. The Tribunal cannot rely on this for any factual findings.

[redacted]

[2152] *See* paras. 919 and 11533 above.

[redacted]

1160. [redacted]

1161. [redacted]

[redacted]

[redacted]

[redacted][1]

1163. [redacted]

[redacted]

[2162] **R-125**, Romanian Criminal Code [Excerpts], Article 248 (emphasis added).

[2163] Counter-Memorial, n. 266.

[2164] **R-125**, Romanian Criminal Code [Excerpts], Article 145.

1164. [redacted]

1165. The Tribunal is unable to conclude that these allegations were so arbitrary, unreasonable, pretextual or disproportionate as to constitute a violation of Romania's FET obligations under the Treaty.

1166. The Tribunal is equally unable to find an FET violation with respect to the [redacted] This explanation reflected the factors then

[redacted]

established under Romanian law, [redacted]

1167. [redacted]

1168. On the other hand, there is insufficient evidence to conclude, as Nova alleges, that Romania "has *refused*" to return the bond since [redacted] it is not illogical that a State would require some filing by a decedent's estate or his legally qualified heirs before it may return bail funds originally posted by someone who later passed away. If any such application had been made

[2167] **R-266**, Romanian New Criminal Procedural Code [Excerpts], Article 217(2).

[redacted]

[2171] Memorial, ¶ 487 (emphasis added).

[redacted]

to the appropriate authorities, it presumably would have been easy for Nova to so demonstrate.[2173] Absent any such demonstration, the Tribunal cannot find that Romania has "refused" to take action, much less that it has done so in violation of international treaty obli[redacted] The situation might well be different were there a more developed record of appropriate requests followed by an absence of rational response.

1169. [redacted]

[redacted]

[redacted]

1170. In the Tribunal's view, it is unnecessary to decide who the ultimate legal or beneficial owners of [redacted] Whatever the answer to that question, the FET standard does not penalize "incorrect" judgments on fact or law by State officials, provided such judgments were made in good faith and on a rational basis, and were subject to appropriate procedures of judicial review. In this case, it was not irrational for Romania, with the information available to it at the time, to [redacted]

1171. [redacted]

[redacted]

1172. [redacted]

1173. Nonetheless, for avoidance of doubt, the Tribunal has reviewed the findings of the three different Romanian judges who promptly heard (but rejected) the challenges [redacted]

[2178] **C-54,** Public Prosecutor [redacted] Precautionary Measures Ordinance, 25 March 2016, p. 8.

[2179] **R-124**, DNA Indictment Act for abuse of office proceedings, 19 December 2016, p. 271.

[2180] **C-163**, Bucharest Tribunal – Penal Section 1 Conclusion, 7 April 2016; **C-164**, Decision of the District Court of Bucharest – 1st Criminal Section, 14 April 2016; **C-165**, Decision of the District Court of Bucharest – Penal Section 1, 15 April 2016.

[redacted]

1174. [redacted]

[redacted]

There is certainly nothing "so patently arbitrary, unjust or idiosyncratic" about their rulings as to "demonstrate bad faith" or give rise to a denial of justice under international law.[2185]

(iv) [redacted]

1175. The Tribunal finally offers a few words about [redacted] unfortunate physical decline and eventual death in custody.

1176. The record demonstrates that [redacted] had serious illnesses predating his arrest. [redacted] On a human level, the Tribunal has no doubt that incarceration exacerbated [redacted]. Prisons are difficult places and are not generally well suited for the aged and infirm.

1177. At the same time, the Tribunal has no authority to sit as some form of human rights court, to determine either the appropriateness in general of Romania's prison facilities for elderly inmates with serious illnesses, nor whether a particular inmate at times may have received insufficient attention to his health needs. The Tribunal's authority extends to determining whether *Nova's investments in Romania* received the treatment to which they were entitled under the Treaty. This jurisdiction would extend, for example, to determining if individuals associated with the investment were *targeted for physical mistreatment* in a way that affected investment rights or value, or received *discriminatory treatment* with respect to their medical needs on account of their status as investors or their role in an investment. Beyond this, however, it is not the Tribunal's role to assess the adequacy of medical treatment received by any particular individual in a national prison system.

1178. The Tribunal has carefully scrutinized the materials it has been provided [redacted]. It has great sympathy for his suffering and appreciates the pain that

[2185] **RL-115**, *Rumeli*, ¶ 653.

[redacted]

this also must have caused his family. However, the Tribunal has no evidentiary basis for finding that he was provided worse treatment than any other inmate, [redacted] Nor does it have a basis for finding that treatment generally available within the Romanian prison system was withheld from him because of his status or notoriety as an investor. In these circumstances, the Tribunal cannot find that Romania violated its FET obligations to Nova in connection with the physical treatment [redacted].

1179. Nonetheless, the Tribunal must deplore Romania's offensive and cavalier rhetoric, when discussing [redacted] Some of that rhetoric was so outrageous that the Tribunal must call it out. This includes particularly [redacted] Demeaning someone quite ill in this manner has no place in the legitimate defense by a sovereign State of its interests. The harshness with which Romania responded set an early marker for the combative tone it would adopt throughout these proceedings, most particularly with respect to the [redacted] but also in its dealings with opposing counsel and (at times) with the Tribunal. The Tribunal returns to this issue in Section VII.D, where it addresses the issue of costs.

(h) *The "Cumulative Effect" Theory of an FET Breach*

1180. The Tribunal closes its extended analysis of Nova's FET claims by addressing the final step in the "decision tree" which Nova urged the Tribunal to follow. To recall, Nova suggested the Tribunal should assess five separate issues: (a) "the initiation [redacted] of [redacted] (b) "the decision to [redacted] (c) "the handling of the [redacted] "; (d) "the decision to end [redacted] and put [redacted] and (e) "[redacted]

[2187] Romania's Rejoinder on Claimant's Request for Provisional Measures, ¶ 80.

[2188] Nova's Reply to the Respondent's Observations on the Request for Provisional Measures, 8 November 2016, ¶ 272(c).

[redacted]."[2189] After assessing these issues individually, Nova suggested the Tribunal consider whether "the totality of Romania's treatment of Nova [was] fair and equitable."[2190]

1181. As a matter of principle, the Tribunal accepts that FET violations may be established by the "cumulative effect" of several measures, even if those "may be seen in isolation as reasonable measures."[2191] It is thus relevant to examine the challenged measures "cumulatively in context to each other," to determine if, for example, they "constituted a string of measures of coordinated harassment by various institutions of Respondent"[2192] – which is essentially what Nova alleges in this case.

1182. There is no doubt that the various challenges Nova faced on account of official actions overlapped *temporally*. There is also no doubt that developments in one arena had *repercussions* in another. [redacted]

1183. To some extent, overlaps [redacted] may have been driven by certain practices within the Nova Group that had repercussions in more than one legal sphere. [redacted]

[2189] Nova's Closing Presentation, slide 40.

[2190] Nova's Closing Presentation, slide 40.

[2191] **CL-18**, *El Paso*, ¶ 515.

[2192] **RL-272**, *Stati*, ¶ 1095.

[redacted]

[2194] First [redacted] Statement, ¶¶ 34-35, 81(3); Second [redacted] Statement, ¶ 18.

[redacted]

[redacted]

1184. Be that as it may, the Tribunal accepts that Nova and [redacted] faced a proverbial "perfect storm" of legal and financial challenges from Romanian authorities during 2014 and 2015, the effects of which were cross-cutting and far-reaching. But the Tribunal is not persuaded that this was the result of an overarching conspiracy, [redacted]. In short (though after a very long examination of the evidence), the Tribunal finds that Nova has not proven the measures in question to have been taken without objective basis or for improper reasons, much less as a result of an overarching multi-agency conspiracy of the kind that Nova posits for its primary FET case. In these circumstances, the Tribunal rejects Nova's allegation of a "cumulative" or "composite" FET breach.

C. UNREASONABLE AND DISCRIMINATORY MEASURES

1. Relevant Treaty Provision

1185. Article 3(1) of the Treaty provides in relevant part:

> Each Contracting Party shall … not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal [of investments] by those investors.[2196]

[2196] **C-1**, BIT, Article 3(1).

2. Nova's Position

(a) ***Applicable Standard***

(b) ***Whether Romania's Treatment was Unreasonable or Discriminatory***

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

3. Romania's Position

(a) *Applicable Standard*

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

4. The Tribunal's Analysis

1206. The Tribunal notes the brevity of the Parties' briefing on the Article 3(1) non-impairment standard, and their numerous cross-references to the FET standard. This is logical, because in the Tribunal's view, Article 3(1)'s reference to "unreasonable or discriminatory measures" does not involve any different analysis of *State conduct* than already is required to apply the implicit prohibitions on arbitrary, unreasonable and discriminatory treatment under Article 3(1)'s FET clause. To the extent there is a difference between the clauses, it relates to the *impact* of the conduct, not to the *nature* of the conduct itself. Thus, the FET clause requires each Contracting Party to "*ensure*" FET treatment of qualifying investments, which *inter alia* means treating investments reasonably and without discrimination, and the non-impairment clause prohibits unreasonable or discriminatory measures which "impair … the operation, management, maintenance, use, enjoyment or disposal"

[2238] Counter-Memorial, ¶ 501.

[2239] Counter-Memorial, ¶ 503; Rejoinder, ¶ 834, *citing* **R-223**, ASF press release on the closure of the financial procedure of [redacted] 9 March 2017; **R-221**, ASF Resolution No 1498/2016, 27 July 2016.

[2240] Counter-Memorial, ¶ 912; Romania's Opening Presentation, slide 229.

[2241] Counter-Memorial, ¶ 913; Romania's Opening Presentation, slide 229.

of such investments.[2242] But there is no need to examine the impact of improper conduct (*i.e.*, whether it "impairs" important rights with respect to an investment) unless and until the underlying State conduct has been found improper in the first place (*i.e.*, unreasonable or discriminatory). This is consistent with the approach taken by other tribunals, which have found that non-impairment claims should be addressed under the same rubrics of reasonableness and non-discrimination as considered for FET claims.[2243]

1207. Here, Nova does not point to any different instances of allegedly unreasonable or discriminatory conduct by Romania than the conduct it identified as part of its broader FET case. The Tribunal already has examined each of the official acts of which Nova complains, and has rejected its contentions about arbitrariness (unreasonableness) and discrimination. In particular, with regard to the allegations of [redacted] the Tribunal refers to its findings in Section VI.B.4.d.ix; and with regard to [redacted], the Tribunal refers to its findings in Section VI.B.4.f. The Tribunal maintains these findings with respect to Nova's non-impairment case under Article 3(1).

D. FULL PROTECTION AND SECURITY

1. Relevant Treaty Provision

1208. In addition to the FET standard and protection against unreasonable and discriminatory treatment Article 3(1) of the Treaty provides that "[e]ach Contracting Party shall accord to such investments full physical security and protection."[2244]

[2242] **C-1**, BIT, Article 3(1).

[2243] *See, e.g.,* **CL-394A**, *BayWa Renewable Energy GmbH et al. v. Kingdom of Spain*, ICSID Case No. ARB/15/6, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019, ¶ 532 ("If [non-impairment] were a free-standing obligation, it would overlap considerably if not completely with the obligations contained in the [FET clause of the ECT]. On this basis, it would not lead to a different result than they do. In the Tribunal's view, unreasonable or discriminatory measures in the general sense are examples of measures that may breach the FET standard …."); **CL-393A**, *Stadtwerke Munchen GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019, ¶ 364 ("The Tribunal considers that while the above reference to 'unreasonable or discriminatory measures' creates a free-standing obligation, it is merely the obverse of the requirement of reasonableness embedded in the concept of FET. This being so, the earlier analysis by this Tribunal of whether the Respondent's measures are to be considered as reasonable within the FET standard equally applies to determining whether [it] enacted unreasonable measures as prohibited by the [non-impairment clause] …. For reasons of judicial economy, there is no need to repeat the Tribunal's considerations here").

[2244] **C-1**, BIT, Article 3(1).

1209. Article 3(2) is a most favored nation ("**MFN**") clause, which provides in relevant part:

> each Contracting Party shall accord to such investments treatment, including with respect to fiscal matters, which in any case shall not be less favourable than that accorded either to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned.[2245]

1210. Article 2(2) of the UK-Romania BIT, which Nova relies on by way of the MFN clause above, provides in relevant part:

> Investments of nationals or companies of each Contracting Party shall at all times … enjoy full protection and security in the territory of the other Contracting Party…[2246]

2. Nova's Position

(a) *Applicable Standard*

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) ***Whether Romania Failed to Provide Nova Full Protection and Security***

[redacted]

[redacted]

[redacted]

[redacted]

3. Romania's Position

(a) *Applicable Standard*

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) ***Whether Romania Failed to Provide Nova Full Protection and Security***

[redacted]

[redacted]

4. The Tribunal's Analysis

1238. This case is not the occasion for a lengthy interpretation of the degree to which substantive standards (like FPS) may be imported from one treaty to another through application of an MFN clause. That is a subject of considerable debate in the investment treaty jurisprudence, particularly in situations such as this one, where the effect of importation would not be to fill a *lacuna* in the treaty at hand, but rather to substitute *different* operative language for a substantive standard that already appears in the treaty. Article 3(1) of the BIT refers to "full physical security and protection," a phrasing which – by including the word "physical" – apparently differs from all other Romanian BITs. While Article 3(2) of the BIT also contains a generally worded MFN clause, it is by no means clear that the Contracting Parties intended that clause to authorize future arbitral tribunals to override the specific drafting choices for substantive standards that they made when executing the BIT.

1239. In any event, even if the MFN clause *could* be used to import a general FPS clause into the BIT, this would not result in a standard nearly as broad as Nova suggests. While there are several strands in the investment treaty jurisprudence on FPS clauses, many tribunals and commentators consider the starting point to be that such clauses oblige States to exercise reasonable due diligence to protect an investment against foreseeable harm by third parties. This Tribunal accepts that general understanding. The Tribunal also accepts that, beyond the traditional understanding in customary international law that the FPS obligation involves protection against foreseeable physical harm, some tribunals have recognized an additional obligation to provide investors with access to a functioning judicial system, so as to protect the legal rights associated with an investment against

[2299] Counter-Memorial, ¶ 1002.

[2300] Counter-Memorial, ¶ 1003.

other forms of foreseeable harm by third parties.[2301] But it is a much further stretch to do away with the traditional FPS focus on protection against third party harm, and to encompass a more expansive interpretation that would imply a duty to protect, also, against a wide range of State conduct which is said to undermine the stability of the legal regime or the expectations under which an investment was made. The latter expansion is controversial, among other things because it would expand FPS almost to duplicate a broad reading of FET obligations. It is certainly not settled jurisprudence which this Tribunal is prepared to adopt. Nor can the Tribunal go even further in expanding FPS, to accept Nova's fairly unusual proposition that, as purportedly applied to State conduct, the standard imposes a "strict liability" obligation rather than the "reasonable due diligence" duty with which FPS always was associated in international law.

1240. Given a more traditional understanding of FPS – requiring reasonable due diligence to protect against foreseeable third party harm, and to provide access to the courts to redress such harm as cannot not be foreclosed – several of Nova's specific allegations of breach fall by the wayside. For example, Nova's allegation of a breach of FPS through abuse of the [redacted] regulatory powers towards [redacted] does not in fact implicate FPS duties. Such allegations of regulatory abuse rather fall within the scope of the BIT's FET clause. In any event, the Tribunal has found that the [redacted] conduct did not violate Romania's FET obligation (see Sections VI.B.4.c-VI.B.4.f above). Nova has not demonstrated why the result should be different even if the FPS clause were interpreted to reach regulatory conduct.

1241. The Tribunal also rejects Nova's separate FPS allegations of a *physical attack* [redacted], through [redacted]'s imprisonment [redacted] and Romania's issuance of an arrest warrant and extradition request [redacted] the [redacted] charges [redacted] were brought in violation of international standards prohibiting arbitrary, abusive or discriminatory action against investments through the criminal prosecution of their key personnel. In these circumstances, even if the FPS clause were viewed as requiring reasonable protection against foreseeable harm by State actors (rather than just third party actors), Nova has not proven that these standards of protection were violated.

[2301] For example, the *Lauder* tribunal considered that a State has an FPS duty "to keep its judicial systems available [to investors to bring claims against third parties], and for such claims to be properly examined and decided in accordance with domestic and international law." **RL-237**, *Lauder*, ¶ 314.

E. EXPROPRIATION

1. Relevant Treaty Provision

1242. Article 5 of the Treaty provides as follows:

> Neither Contracting Party shall take any measures, such as nationalization, expropriation, requisition or other measures of similar effect, depriving investors of the other Contracting Party of their investments, unless the following conditions are complied with:
>
> (a) the measures are taken in the public interest and under due process of law;
>
> (b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party which takes such measures may have given;
>
> (c) the measures are taken against just compensation. Such compensation shall represent the fair market value of the investments affected, immediately before the measures were taken or became known, shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are investors or in any freely convertible currency accepted by the claimants.[2302]

2. Nova's Position

(a) *Applicable Standard*

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) ***Whether Romania Expropriated Nova's Investment***

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

3. Romania's Position

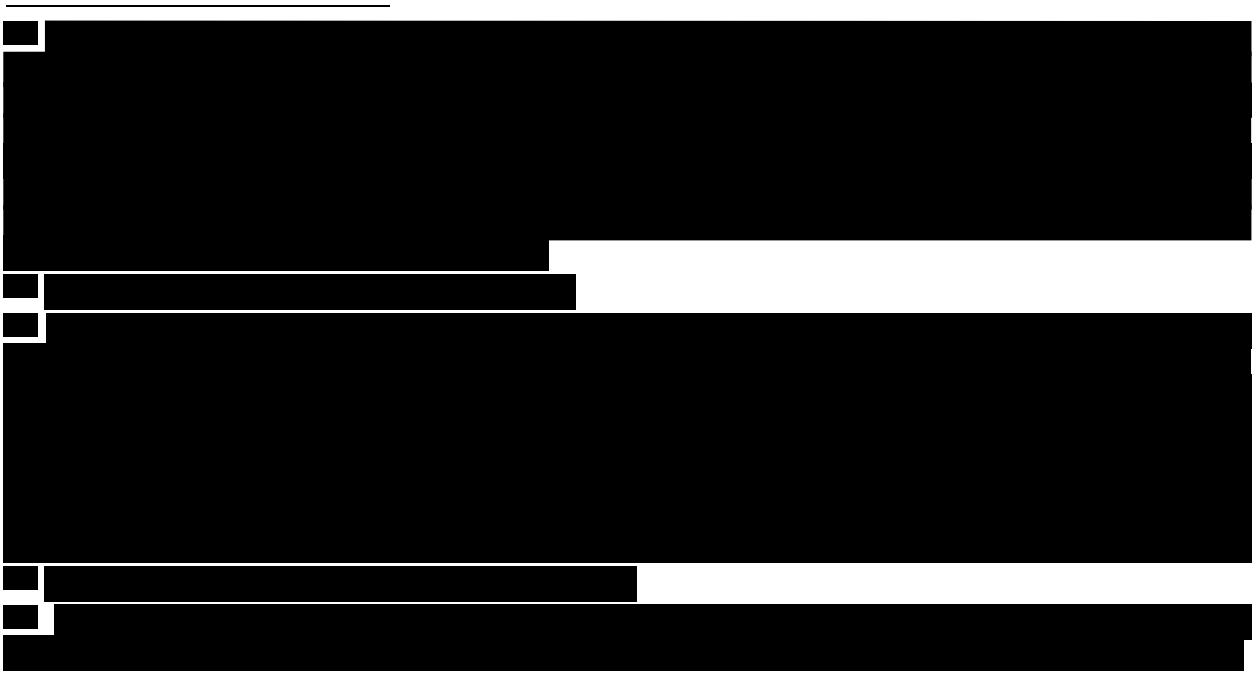
(a) *Applicable Standard*

[redacted]

[redacted]

[redacted]

[redacted]



[redacted]

[redacted]

(b) ***Whether Romania Expropriated Nova's Investment***

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

4. The Tribunal's Analysis

1268. The Tribunal begins by recalling that Nova's investment in [redacted] was, by choice, an investment in a highly regulated sector of Romania's economy. As a consumer insurance company, [redacted] was subject to numerous laws that also mandated certain actions by the insurance regulator, [redacted] As discussed in Section VI.D.4.d.ix, one of the mandatory provisions of Law 503/2004 was that

[2350] Romania's Opening Presentation, slide 9.

[2351] Counter-Memorial, ¶¶ 1028-1030.

[2352] Counter-Memorial, ¶ 1024.

[2353] Counter-Memorial, ¶ 1030.

[2354] Counter-Memorial, ¶ 1031.

[2355] Counter-Memorial, ¶ 1035.

[2356] *Id.*

"[i]nsurance undertakings shall be subject to financial recovery proceedings under this law whenever … the value of the available solvency margin falls below the minimum limit set out in the regulations issued by the Insurance Supervisory Commission."[2357] The [redacted] discretion was simply to choose who would lead the financial recovery proceedings: the [redacted], implementing a recovery plan to be approved by the [redacted], or a trustee, [redacted][2358] Further, as discussed in Section VI.D.4.f, the ASF was bound under Law 503/2004 to close financial recovery proceedings when "the purpose" of the measures implemented during the proceedings "was not achieved and the underlying causes were not eliminated,"[2359] and to withdraw an insurer's license and "request immediate initiation of bankruptcy proceedings" upon a finding that an insurer in recovery proceedings was insolvent.[2360]

1269. Neither [redacted] nor Nova as a [redacted] had a legal right to remain free of the application of these regulatory provisions. They were part of the mandatory framework of [redacted]'s charter as an insurance company, and therefore part of the legal framework that Nova accepted when investing in [redacted] This proposition is important to note because Article 5 of the Treaty, regulating events of expropriation, is concerned essentially with the taking of property rights. The provision begins with the statement that "[n]either Contracting Party shall take any measures … depriving investors of the other Contracting Party of their investments, unless the following conditions are complied with …," and then sets forth a series of conditions under which such a deprivation would be legal and permissible under the Treaty.

1270. To invoke Article 5, a claimant must first demonstrate that the respondent State took measures that deprived it of a right or asset which qualifies as an investment under the Treaty. This is a matter of first principles: the doctrine of expropriation involves protected rights in property. As the tribunal in *Emmis* observed, that proposition is inherent in the word "expropriation" itself, which is built on the Latin root for "property"; a finding of expropriation accordingly must be premised on a showing that "Claimants … held a property right of which they have been deprived."[2361]

[2357] **C-1134**, Law 503/2004 on the financial recovery and bankruptcy of insurance undertakings, Article 7(b).

[2358] *Id.*, Articles 8(1), 12, 16-18.

[2359] *Id.*, Article 20(b).

[2360] *Id.*, Article 21(b).

[2361] **RL-183**, *Emmis International Holding B.V., et al. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶ 159; *see also id.*, ¶ 161 (explaining that "[t]he need to identify a proprietary interest that has been taken is confirmed by the definition of 'investment' in the Treaties," which refers to "assets," a term whose ordinary meaning itself involves an item of property or property rights).

1271. Here, Nova's expropriation case is premised on its "effective loss of management, use or control, or a significant depreciation of value" of [redacted][2362] But the loss of management, use and control of [redacted] was pursuant to the statutory provisions above, which defined the rights at issue. Nova at no time had a property right to maintain management, use and control of an insurance company in circumstances where [redacted] reasonably concluded [redacted], and that the recovery proceedings that Law 503/2004 accordingly mandated would be best led by [redacted]. Similarly, Nova at no time had a property right to maintain management, use and control of an insurance company in circumstances where the regulator reasonably concluded that [redacted], and Law 503/2004 accordingly mandated that it [redacted] To the contrary: a "taking" of any right by Nova to continued management, use and control of [redacted] would occur only in circumstances where the ASF placed [redacted] *without reasonable basis*. Yet the Tribunal has found, after very careful analysis of the evidence, that the [redacted] did not act arbitrarily, abusively or discriminatorily in either of these decisions. In these circumstances, [redacted] did not "take" from Nova any right that it had under Romanian law, and therefore no expropriation of such a right occurred under international law.

1272. The same is true, essentially, for Nova's claim that the ASF expropriated its investment in [redacted] by depriving it of significant value. [redacted]

[2362] Tr. Day 1, 241:1-12 (Nova's Opening), *quoting* **CL-154**, *Biwater*, ¶ 452.

[redacted]

1273. [redacted].

1274. In these circumstances, the Tribunal is unable to find that the [redacted] vis-à-vis [redacted] effected a taking either of cognizable property rights or of significant realizable value. Since such a taking by State conduct (*i.e.*, expropriation) is the predicate for finding the requirements of Article 5 of the BIT to apply (*i.e.*, legal expropriation), the Article 5 claim for an illegal expropriation fails in its premises.

F. DUTY TO ARBITRATE IN GOOD FAITH

1. Relevant Treaty Provisions

1275. In relation to this claim, Nova relies on Article 8 of the Treaty, which provides in relevant part:

[redacted]

> 1) For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party, consultations will take place between the parties concerned.
>
> 2) If these consultations do not result in a solution within three months, the investor may submit the dispute, at his choice, for settlement to:
>
> […]
>
> (b) the International Centre for Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, of 18 March 1965[.]
>
> […]
>
> 4) Each Contracting Party hereby consents to the submission of an investment dispute to international conciliation or arbitration.

1276. In addition, Nova relies on Article 47 of the ICSID Convention, which provides as follows:

> Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

2. Nova's Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]
[redacted] [redacted]
[redacted] [redacted]
[redacted] [redacted]
[redacted] [redacted]
[redacted] [redacted]
[redacted] [redacted]
[redacted] [redacted]
[redacted] [redacted]

[redacted]

3. Romania's Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

4. The Tribunal's Analysis

1297. In the Tribunal's view, Nova errs in asserting a *substantive* (merits) claim for breach of the duty to arbitrate in good faith, because the Treaty does not create any standalone cause of action related to the conduct of dispute resolution procedures. Tribunals have certain inherent authority to sanction misbehavior in the arbitral process, but the main remedy for this is in the allocation of costs. The remedy does not lie in recognizing a new cause of action under the Treaty, ostensibly capable of giving rise to a distinct claim in damages.

1298. The Treaty delineates in clear text the Contracting Parties' substantive obligations, by including the word "shall" in each of its Articles 2 through 7. Thus, Article 2 imposes certain affirmative obligations, using the phrases "[e]ach Contracting Party shall … promote …" and "shall admit …." Article 3 similarly imposes affirmative obligations, stating that "[e]ach Contracting Party shall ensure …," "shall accord …" and "shall observe …." Article 4 mandates that "[t]he Contracting Parties shall guarantee …." Article 5 sets forth a prohibition, again using the word "shall": "[n]either Contracting Party shall take any measures …." Articles 6 and 7 employ the passive tense, but they still contain express mandates for State conduct: respectively, "Investors … shall be accorded by the latter Contracting Party treatment …," and "[i]f investments … are ensured …, any subrogation … shall be recognized by the other Contracting Party."[2404]

[2401] Counter-Memorial, ¶ 1046; Rejoinder, ¶ 929.

[2402] Rejoinder, ¶ 930.

[2403] Rejoinder, ¶ 931.

[2404] **C-1**, BIT, Articles 2-7.

1299. By contrast, Article 8 on investor-State dispute resolution does not contain the word "shall," or any equivalent word imposing specific obligations on the Contracting Parties. Rather, it grants an entitlement *to the investor* to elect a procedural remedy "[f]or the purpose of solving disputes with respect to investments." Specifically, "the investor may submit the dispute" to one of several dispute resolution mechanisms, including ICSID or *ad hoc* arbitration under the UNCITRAL Rules.[2405] The Treaty records that "Each Contracting Party hereby consents to the submission of an investment dispute" to arbitration,[2406] but the Treaty does not command any particular level of participation by them in the arbitral process. Indeed, the only express obligation that the Treaty imposes on the Contracting Parties with respect to the arbitral proceedings is a prohibition not to assert immunity or insurance coverage as a defense.[2407] Beyond this prohibition, there is no mandate that the respondent State do anything at all with respect to the arbitral proceedings.[2408] There is certainly no suggestion in the Treaty that a State's conduct with regard to such proceedings could give rise to an additional claim for breach of its substantive duties towards an investor or its investment.

1300. In other words, Article 8 provides recourse for the investor to pursue claims for a State's breach of one or more of the obligations mandated by the *prior* substantive Articles of the Treaty. It does not, by its terms, impose obligations on the Contracting Parties regarding the arbitral process. In these circumstances, it would be bootstrapping to imply into Article 8 certain affirmative duties by the Contracting Parties, the breach of which then would become actionable through a standalone claim for damages. Nothing in the Treaty suggests an intent to elevate potential misconduct in arbitral proceedings into a new type of substantive Treaty violation, separate from the other Treaty standards carefully delineated in its terms.

1301. This is not to say that there are no potential consequences for poor behavior by States in connection with an investor's pursuit of an arbitral remedy. If a State takes measures to thwart an investor's right to pursue such a remedy, this may well give rise to a breach of other Treaty standards, such as the obligations in Article 3(1) to ensure fair and equitable treatment of investments and not to impair unreasonably an investor's enjoyment of its investments. Indeed, any demonstrated measure

[2405] **C-1**, BIT, Articles 8(1)-8(3).

[2406] **C-1**, BIT, Article 8(4).

[2407] **C-1**, BIT, Article 8(5).

[2408] Indeed, both the ICSID Rules and the UNCITRAL Arbitration Rules, which the Treaty authorizes an investor to select, expressly contemplate the possibility that a respondent may choose not to participate at all. *See* 2006 ICSID Arbitration Rule 42 ("Default"); 1976 UNCITRAL Arbitration Rules, Article 28 (Default").

by a State to harass an investor for pursuing arbitration would seem almost impossible to justify under the standards for reasonableness, proportionality and non-abuse that are embedded in the existing Article 3 standards.

1302. In this case, [redacted] There is thus no basis for concluding that these various measures were adopted to prevent [redacted] from participating in the arbitration proceedings, contrary to Nova's suggestions.[2409] Had the Tribunal found otherwise, it would not have hesitated in finding a breach of Romania's FET obligations.

1303. As for Nova's two other main complaints about Romania's conduct in the arbitration – that it refused to pay its share of advances on costs and refused to comply with the Tribunal's provisional measures recommendation in PO7 to withdraw or suspend operation of the European Arrest Warrant for [redacted] – both complaints are true on the facts. However, neither ultimately impaired Nova's ability to present its case, which was the concern that motivated the Tribunal's issuance of PO7.[2410] Had the result been otherwise – had [redacted] in fact been extradited prior to the Hearing, and this prevented Nova from obtaining either his testimony or his

[redacted]

[2410] The Tribunal explained in PO7 that its focus was "on the right of the Parties to present their respective positions to the Tribunal, and on the Tribunal's own ability to fashion meaningful relief." PO7, ¶ 365. It considered that the extradition and detention of [redacted] prior to the hearing could fundamentally impair these rights and objectives, given his central role not only as Nova's primary fact witness but also as its key party representative following the death of [redacted] in Romania. PO7, ¶¶ 301, 307.

assistance in presenting its claims – then again, the Tribunal would have seriously considered whether Romania's actions in the face of PO7 could be classified as a breach of its FET obligations. Romania was saved from these potential consequences not by any act of its own, but rather by the independent decision of the UK authorities [redacted] In these circumstances, the Tribunal is left only to consider the cost consequences of Romania's conduct, a serious matter to which it returns in Section VI below.

VII. COSTS

1304. Each Party requests full reimbursement of the costs it incurred in this arbitration. Below, the Tribunal first sets out their respective cost schedules and arguments on costs, before identifying the costs of the arbitration and finally setting out the Tribunal's decision on costs.

A. NOVA'S COSTS AND POSITION ON COSTS

1305. Nova requests that the Tribunal order Romania to pay the total costs Nova incurred in this proceeding, plus interest at the same rate applied to any principal sum of damages awarded.[2412] In the following sections, the Tribunal: (1) sets out the costs Nova claims and its position on the reasonableness of those costs; (2) summarizes Nova's position on the reasonableness of Romania's costs; and (3) summarizes Nova's arguments as to the appropriate allocation of costs.

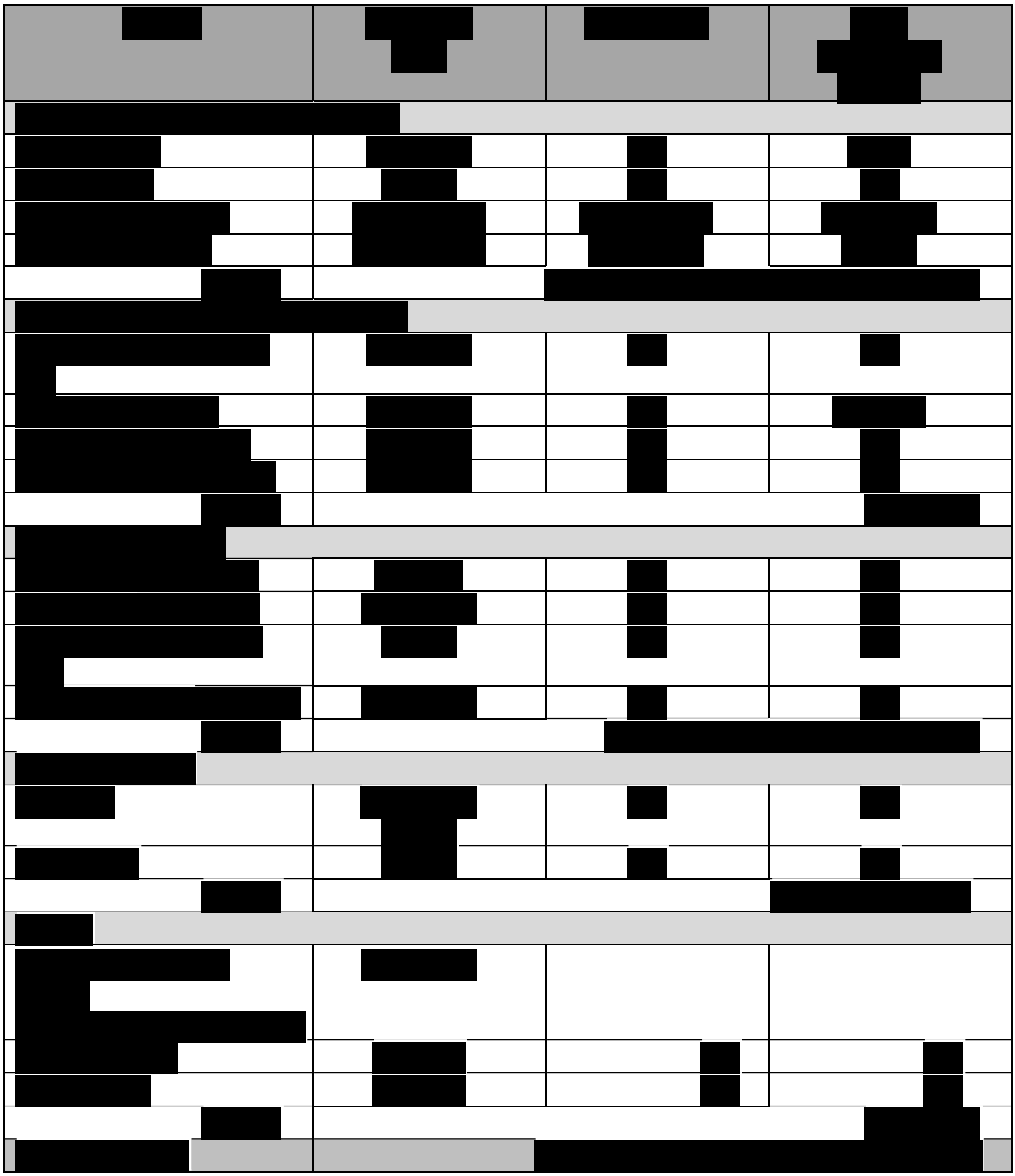
1. Nova's Costs

1306. Nova submits the following claims for legal and other costs (excluding advances made to ICSID, which are addressed in Section C below):[2413]

[redacted]

[2412] Nova's Costs Submission, ¶ 21; Nova's Reply Costs Submission, ¶ 11.

[2413] Nova's Costs Submission, pp. 9-10.



1307. Nova submits that these costs are reasonable in the circumstances of the case, which involved "protracted, complex and heavily fought proceedings, even by the standard of ICSID disputes."[2414]

1308. [redacted]

1309. [redacted]

1310. [redacted]

1311. [redacted]

[redacted]

1312. [redacted]

1313. [redacted]

1314. Nova acknowledges that its costs are higher than Romania's costs, but considers that this difference is justified because Nova, as the Claimant, took the lead in initiating the proceedings and proving its case, and adopted a "more rigorous and considered" approach to the proceedings.[2424] Nova further alleges that it incurred additional costs as a result of Romania's conduct in these proceedings, as discussed in Section VII.A.3 below.[2425]

2. Nova's Comments on Romania's Costs

1315. [redacted]

3. Nova's Position on the Allocation of Costs

1316. Nova submits that under Article 61 of ICSID Convention, the Tribunal has broad discretion as to the allocation of costs.[2427] As to the applicable standard, Nova asserts that costs should follow the event, subject to adjustments that the Tribunal considers appropriate based on the Parties' relative success on discrete issues and their conduct.[2428]

[2422] Nova's Costs Submission, ¶ 17.
[2423] Nova's Costs Submission, ¶ 18.
[2424] Nova's Reply Costs Submission, ¶ 3.
[2425] Nova's Reply Costs Submission.*Id.*
[2426] Nova's Reply Costs Submission, ¶ 4.
[2427] Nova's Costs Submission, ¶ 2.
[2428] Nova's Costs Submission, ¶ 2; Nova's Reply Costs Submission, ¶ 6.

1317. As discussed above in Section VI, Nova alleges that Romania has breached its duty to arbitrate in good faith and, on that basis, urges the Tribunal to award Nova all its costs, even if Nova were to lose the case overall. In its costs submissions, Nova raises several additional points that, in its view, weigh in favor of allocating all costs to Romania:

a. Romania unsuccessfully raised or contested several interlocutory matters, including: (i) [redacted]

b. [redacted]

c. [redacted]

[2429] Nova's Costs Submission, ¶ 3; Nova's Reply Costs Submission, ¶ 7.

[2430] Nova's Reply Costs Submission, ¶ 7.

[2431] Nova's Costs Submission, ¶ 3.5.

[2432] Nova's Costs Submission, ¶ 3.8. *See* Nova's Letter to the Tribunal of 21 May 2021.

[2433] Nova's Letter to the Tribunal of 21 May 2021.

d. [redacted]

e. [redacted]

f. [redacted]

1318. On these bases, Nova requests that the Tribunal order Romania to pay the full amount of Nova's costs, plus interest at the same rate as on any principal sum awarded by way of damages.[2441]

[2434] Nova's Costs Submission, ¶ 3.3.

[2435] Nova's Reply Costs Submission, ¶ 9.

[2436] Nova's Costs Submission, ¶ 3.2.

[2437] Nova's Reply Costs Submission, ¶ 10, *quoting* PO7, ¶ 323.

[2438] Nova's Reply Costs Submission, ¶ 10.

[2439] Nova's Reply Costs Submission, ¶ 9, *citing* Romania's Rejoinder on Nova's Request for Provisional Measures, ¶ 80.

[2440] Nova's Reply Costs Submission, ¶ 9.

[2441] Nova's Costs Submission, ¶ 21; Nova's Reply Costs Submission, ¶ 11.

B. ROMANIA'S COSTS AND POSITION ON COSTS

1319. Romania asks the Tribunal to order Nova to pay all the costs and expenses of the proceedings, plus interest on those costs running from the date of award until the date of payment, at a rate to be determined by the Tribunal.[2442] The subsections below follow the same order as in the summary of Nova's position above.

1. Romania's Costs

1320. Romania submits the following claims for legal and other costs (excluding advances made to ICSID, which are addressed in Section VII.C below):[2443]

	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
	[redacted]	[redacted]

1321. Romania considers that each category of its costs is reasonable in light of the size of Nova's damages claim and the circumstances of the case.

1322. [redacted]

[2442] Rejoinder, ¶ 1078.

[2443] Romania's Costs Schedule, p. 2.

[2444] Romania's Costs Schedule, ¶ 3.

1323. [redacted]

1324. [redacted]

2. Romania's Comments on Nova's Costs

1325. [redacted]

1326. [redacted]

1327. [redacted]

[2445] Romania's Costs Schedule, ¶ 4.
[2446] Romania's Costs Schedule, ¶ 5.
[2447] Romania's Reply Costs Submission, ¶¶ 6-7.
[2448] Romania's Reply Costs Submission, ¶¶ 7-8.
[2449] Romania's Reply Costs Submission, ¶ 10.
[2450] Romania's Reply Costs Submission, ¶ 11.
[2451] Romania's Reply Costs Submission, ¶¶ 11-12.
[2452] Romania's Reply Costs Submission, ¶ 12.

1328. [redacted]

1329. [redacted]

1330. [redacted]

1331. [redacted]

3. Romania's Position on the Allocation of Costs

1332. As a preliminary point, Romania notes that according to the Parties' agreement on the briefing of costs, the first exchange on costs was to be limited to costs schedules setting out each head of costs incurred, and the second exchange was to be limited to five pages commenting on the other Party's costs.[2458] Thus, Romania included only brief comments on the allocation of costs in its Reply Costs Submission.

1333. [redacted],

[2453] Romania's Reply Costs Submission, ¶ 15.1.
[2454] Romania's Reply Costs Submission, ¶ 15.2
[2455] Romania's Reply Costs Submission, ¶ 17.
[2456] Romania's Reply Costs Submission, ¶ 18.
[2457] Romania's Reply Costs Submission, ¶ 21.
[2458] Romania's Reply Costs Submission, ¶¶ 2-3.

[redacted]

1334. [redacted]

1335. [redacted]

1336. [redacted]

C. THE COSTS OF THE ARBITRATION

1337. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

[redacted]

[2459] Romania's Reply Costs Submission, ¶ 25.1.

[2460] Romania's Reply Costs Submission, ¶ 25.2.

[2461] *Id.*

[2462] *Id.*

1338. [redacted]

D. THE TRIBUNAL'S DECISION ON COSTS

1339. Article 61(2) of the ICSID Convention provides:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

1340. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

1341. ICSID tribunals have been far from consistent in their approach to the allocation of costs. In some cases, each party has been ordered to bear its own costs regardless of the outcome of the proceedings, based on the seriousness of the issues presented and the responsible conduct of the litigants for both sides. In other cases, tribunals have applied a "costs follow the event" approach, albeit often with some nuanced application, in circumstances where one party prevails on certain objections, applications or issues, and the other party does so with respect to others. There is certainly no "one size fits all" approach to costs which is appropriate for all cases.

1342. This case presents a textbook example of where a pure "costs follow the event" approach may not be the most suitable outcome. First, both Parties have prevailed on certain issues and lost on others. While Romania ultimately prevailed on the merits, Nova prevailed on numerous non-merits applications that Romania raised, including Romania's request for bifurcation (denied in PO6),

[2463] The remaining balance, which corresponds to the unused funds advanced in response to the latest call of funds issued on 17th January 2024, will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

[2464] Letter from Derains & Gharavi to the Tribunal, 10 December 2018.

Romania's request for security for costs (denied in PO9), and Romania's objection related to EU law and the *Achmea* Decision (denied in the Tribunal's Decision on Romania's EU Law Objection). Nova also largely prevailed on Romania's numerous other jurisdictional objections, including its *ratione personae* objections (see Section V.A above), its *ratione materiae* objections to the existence of a qualifying investment (see Section V.B above), and part of its *ratione materiae* objections on the grounds of illegality (on which Romania prevailed only in part, as related to quantum; see Section V.C above). Had the Tribunal not joined costs to the merits for all of the applications and objections above, a "costs follow the event" approach would have entailed significant responsibility on Romania's part to reimburse Nova for its apportioned costs – and a commensurate reduction in the balance of Romania's costs for which it might be entitled to reimbursement from Nova (*i.e.,* to those expended only for the merits issues). The Tribunal is not in a position to fully assess how much of each Party's claimed costs is attributable to the separate applications, objections and claims described above.

1343. Moreover, Romania adopted a litigation approach that contributed in other ways to the level of each Parties' costs, although again the Tribunal is not in a position to strictly quantify the excess costs. First, Romania repeatedly sought reconsideration of the Tribunal's decisions, including the Tribunal's PO2 decision on preliminary disclosure (which necessitated further decisions in PO3 and, following additional requests from Romania, in PO4); the Tribunal's PO6 decision on bifurcation (which required issuance of PO11); and twice with respect to the Tribunal's PO7 decision on provisional measures (which required issuance of both PO8 and PO13). Romania regularly sent protest letters regarding other developments in the case, which in turn occasioned responsive letters from Nova.

1344. Second, Romania adopted highly aggressive rhetoric towards Nova and the [redacted], some of it veering to the personally offensive (as per the caviar and belly dancer comment discussed in Section VI.B.4.g.iv above) and often unnecessary to the occasion in the case. This set a consistently difficult tone for the proceedings, which both multiplied the extended letter writing by both Parties and led to additional work by the Tribunal to try to calm tempers down.

1345. Third, Romania launched numerous gratuitous attacks on the Tribunal, from a complaint in June 2020 that the Tribunal "may no longer have the requisite independence and impartiality for decision-making"[2465] and an accusation in December 2020 that the Tribunal had made procedural

[2465] Email from Derains & Gharavi to ICSID, 30 June 2020.

decisions on "manifestly wrong and/or biased grounds,"[2466] to repeated letters in February and March 2024 that speculatively insinuated potential improper conduct by one or more Tribunal members, and demanded that each member individually deny such conduct.[2467] Romania at no point actually challenged any Tribunal member, instead leaving these serious charges simply to float poisonously in the air. As this detailed Award should make clear, the Tribunal nonetheless was committed from the outset to very carefully and objectively follow the evidence available in this case, wherever it might lead. It has led essentially to an exoneration of Romania on the merits, in light of the applicable Treaty standards. But the continued drumbeat of personal invective by Romania against both its adversaries and the Tribunal not only impacted the atmosphere in which all conducted their work, but also occasioned additional work by both Nova and the Tribunal to address. The Tribunal considers it appropriate that there be some sanction for this behavior.

1346. Fourth, Romania repeatedly refused to pay its share of the advances on arbitration costs requested by ICSID. In Section VI.F.4 above, the Tribunal concluded that the Treaty does not create any substantive cause of action related to the conduct of its own dispute resolution procedures, including with respect to compliance with institutional rules regarding the payment of advances. However, the Tribunal also observed that there may be cost consequences for a Party that flouts the applicable rules, and thereby imposes additional burdens not only on the other side but also on the smooth functioning of the arbitral process. This is a case where such consequences are appropriate.

1347. Finally, the Tribunal cannot leave unsanctioned Romania's decision not to comply with the very careful, balanced and proportionate provisional measures recommendation that the Tribunal issued in PO7. This recommendation was the result of extensive work by the Tribunal, including a separate evidentiary hearing convened in London to consider the very important issues involved. The Tribunal took its obligations extremely seriously, and in the end denied most of the relief Nova sought, granting relief only in one critical respect that the Tribunal considered essential to ensuring that Nova would have a fair opportunity to present its case. Romania's decision to flout the Tribunal's recommendation seriously threatened that objective, and occasioned significant additional work by all concerned. As discussed in Section VI.F.4 above, the only reason that the threat to the proceedings which motivated PO7 ultimately did not eventuate was an independent decision by the UK authorities. Romania's actions in this regard must have consequences, lest the

[2466] Letter from Derains & Gharavi to ICSID, 24 December 2020.

[2467] Letters from Derains & Gharavi to ICSID, 19 February 2024, 1 March 2024, 12 March 2024, and 14 March 2024.

message go down for future cases that provisional measures recommendations carefully rendered by ICSID tribunals may be flouted by parties entirely with impunity.

1348. Taking all these considerations into account, and carefully balancing also the hard work by counsel for both sides, the outcome of the proceedings and the equities involved at many levels, the Tribunal determines that both the costs of the arbitration and the costs of the Parties should remain where they lie. The result of this is that Nova, which ultimately did not prove its merits claims, will be left bearing the lion's share of the arbitration costs, including those it advanced on Romania's behalf after Romania announced its decision in December 2018 to make no further advances. Nova also will be left to bear its own party costs, which is appropriate given the outcome on the merits. On the other hand, Romania, which ultimately prevailed on the merits but occasioned so many extra costs through unsuccessful applications and objections, and which regularly chose a path of confrontation rather than cooperation throughout the proceedings and which flouted a clear provisional measures recommendation of the Tribunal, will not benefit from a recovery of its party costs. The Tribunal considers this outcome to be just in the circumstances of this case.

VIII. AWARD

1349. For the reasons set forth above, the Tribunal unanimously decides as follows:

(1) DENIES Romania's objections to jurisdiction, except with respect to [redacted], as to which the Tribunal GRANTS Romania's objection *ratione materiae*;

(2) DENIES Nova's claims that Romania violated its substantive obligations under the Treaty;

(3) DENIES accordingly Nova's claims for damages; and

(4) DENIES both Parties' requests for an award of costs.

[redacted]

Prof. Thomas Clay
Arbitrator

Date: 11 June 2024

[redacted]

Mr. Klaus Reichert SC
Arbitrator

Date: 10 June 2024

[redacted]

Ms. Jean Kalicki
President of the Tribunal

Date: 13 June 2024

ANNEX A – PROCEDURAL ORDER NO. 7

(DECISION ON CLAIMANT'S REQUEST FOR PROVISIONAL MEASURES)

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Nova Group Investments, B.V.

v.

Romania

(ICSID Case No. ARB/16/19)

PROCEDURAL ORDER NO. 7
DECISION ON CLAIMANT'S REQUEST FOR PROVISIONAL MEASURES

Members of the Tribunal
Ms. Jean Kalicki, President of the Tribunal
Prof. Thomas Clay, Arbitrator
Mr. Klaus Reichert SC, Arbitrator

Secretary of the Tribunal
Ms. Lindsay Gastrell

29 March 2017

CONTENTS

I. INTRODUCTION

A. The Underlying Dispute

1. This dispute has been submitted to arbitration on the basis of (a) the Agreement on Encouragement and Reciprocal Protection of Investments Between the Government of the Kingdom of the Netherlands and the Government of Romania, which entered into force on 1 February 1995 (the "**BIT**")[1], and (b) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

B. The Parties

2. The claimant is Nova Group Investments, B.V. ("**Nova**" or "**Claimant**"), a company established under the laws of The Netherlands. Nova is represented in this proceeding by Lord Goldsmith, QC, PC, Mr. Patrick S. Taylor, Mr. Boxun Yin, Ms. Ciara A Murphy, Mr. Jonny McQuitty, and Mr. Mark McCloskey of Debevoise & Plimpton LLP in London; and Mr. Mark Friedman of Debevoise & Plimpton LLP in New York.

3. The respondent is Romania (also referred to as "**Respondent**"). Romania is represented in this proceeding by Dr. Hamid G. Gharavi, Ms. Nada Sader, Ms. Sophia von Dewall and Mr. Emmanuel Foy of Derains & Gharavi International in Paris; Ms. Eloise Obadia of Derains & Gharavi International in Washington, D.C.; Prof. Ziya Akinci of Akinci Law Office in Istanbul; and Mr. Valentin Trofin, Mr. Alexander Popa, and Ms. Oana Cuciureanu of Trofin & Associates in Bucharest.

C. The Decision

4. This Decision addresses Nova's application for provisional measures dated 21 June 2016 (the "**Application**"), which Romania opposes. The Tribunal first sets out the Parties' respective requests for relief (Section II), the relevant procedural history (Section III), and a summary of certain relevant facts as alleged or undisputed (Section IV). In Sections V and VI, the Tribunal sets out the applicable legal framework and summarizes the Parties'

[1] **C-1**, BIT.

positions, both on the relevant standards for provisional measures and on application of these standards to the situation at hand. The Tribunal then provides its analysis of the relevant legal standards and the particular measures requested in the Application (Section VII). Finally, the Tribunal sets out its Decision (Section VIII).

5. The Tribunal emphasizes that it has reviewed and considered all of the extensive factual and legal arguments presented by the Parties in their written and oral submissions. The fact that this Decision may not expressly reference all arguments does not mean that such arguments have not been considered; the Tribunal includes only those points which it considers most relevant for its decision.

II. THE PARTIES' REQUESTS FOR RELIEF

6. The specific relief Nova seeks as provisional measures has been amended several times, based on additional events allegedly transpiring in the interim. Nova's original request for relief was contained in the Application,[2] but was subsequently amended in Nova's Reply to Respondent's Observations on the Claimant's Request for Provisional Measures, dated 8 November 2016 (the "**Reply**").[3] The Tribunal thereafter granted Nova's request for a further amendment on 21 December 2016. Finally, following [redacted], Nova informed the Tribunal of further amendments to its request for relief by letters of 9 and 28 February 2017.

7. As currently framed, Nova requests that the Tribunal order Romania to:

a) [redacted];

b) [redacted]

[2] Application, ¶ 112.

[3] Reply, ¶ 272.

[redacted];

c) [redacted]

d) [redacted]

e) [redacted]

f) [redacted]

g) take all necessary steps to:

i) [redacted]

ii) [redacted]

h) pay to Nova the full costs of this Request, together with interest on those costs.[4]

[4] Nova's letter to the Tribunal, 28 February 2017.

8. Opposing the Application in its Observations on Claimant's Request for Provisional Measures, dated 14 October 2016 (the "**Observations**") and Rejoinder on Claimant's Request for Provisional Measures, dated 12 December 2016 (the "**Rejoinder**"), Romania requests that the Tribunal:

> 241.1. deny Claimant's Request in its entirety; and
>
> 241.2. order such relief as the Tribunal may deem just and appropriate; and
>
> 241.3. Order Claimant to pay the cost Respondent has incurred in connection with Claimant's Request, including, but not limited to, legal and other associated fees or expenses.[5]

III. PROCEDURAL BACKGROUND

9. On 21 June 2016, Nova filed a Request for Arbitration of the same date ("**Request for Arbitration**"), accompanied by the Application. In the Application, Nova requested, pursuant to Rule 39(5) of the ICSID Arbitration Rules, that the Secretary-General establish time limits for the Parties to present their observations on the Application, which could then be considered by the Tribunal promptly upon its constitution.

10. In accordance with Article 36 of the ICSID Convention, on 5 July 2016, the Secretary-General registered the Request for Arbitration and so notified the Parties. At the same time, the Secretary-General provided the Parties with a schedule for their written submissions on the Application, noting that it would apply unless the Parties agreed on an alternative schedule.

11. By letter of 1 August 2016, Romania requested that the Secretary-General grant an extension of 60 days (from 8 August to 8 October 2016) for Romania to file its observations on the Application. On the same day, the Secretary-General invited Nova to respond to Romania's request. In accordance with this invitation, Nova submitted its response by letter of 2 August 2016, in which Nova opposed the requested extension on several grounds. The following day, Romania submitted a request for leave to respond to Nova's

[5] Observations, ¶ 229; Rejoinder, ¶ 241.

letter within 24 hours. The Secretary-General granted this request, noting that Nova would be given an opportunity to briefly respond to the content of Romania's additional letter. Romania submitted its letter on 4 August 2016, which was followed by Nova's further observations on 5 August 2016.

12. Also on 5 August 2016, ICSID received a letter from Dr. Hamid Gharavi, together with a corresponding power of attorney, informing ICSID that Romania had engaged attorneys of Derains & Gharavi International, Akinci Law Office, and Trofin & Associates. Dr. Gharavi also stated that it would be impossible for Romania's new counsel to file observations on the Application before the extended deadline requested by previous counsel.

13. By letter of 5 August 2016, the Acting Secretary-General informed the Parties that, in light of the status of the proceeding, Romania's request for an extension was granted.

14. On 6 September 2016, upon Nova's request, ICSID confirmed that the Tribunal would be constituted pursuant to the formula provided by Article 37(2)(b) of the ICSID Convention.

15. On 5 October 2016, Romania requested that the Secretary-General grant it a further extension of seven business days to file its observations on the Application. Upon the Secretary-General's invitation, Nova submitted its response on 7 October 2016, stating that it would agree to an extend the deadline for Romania's observations, with a corresponding one-week extension of the following deadlines on the briefing schedule. By letter of 7 October 2016, the Secretary-General informed the Parties that Romania's request for an extension was granted to the extent agreed by Nova.

16. On 14 October 2016, Romania submitted its Observations in accordance with the revised briefing schedule.

17. By letter of 20 October 2016, Nova informed ICSID that it was seeking to engage with Romania regarding possible amendments to the briefing schedule because [redacted]

[redacted].

18. On 26 October 2016, Nova requested that the Secretary-General grant Nova an extension of seven business days to file its reply to the Observations. Upon the invitation of the Secretary-General, Romania responded on 27 October 2016, opposing Nova's request. By letter of 28 October 2016, the Acting Secretary-General informed the Parties that, [redacted], Nova's request for an extension was granted. The Acting Secretary-General further noted that Romania would have a corresponding extension of time to file its rejoinder on provisional measures.

19. In accordance with the revised briefing schedule, Nova submitted its Reply on 8 November 2016, together with the first witness statements of [redacted] and [redacted] (the "[redacted]" and "[redacted]," respectively).

20. On 17 November 2016, the Tribunal was constituted in accordance with Article 37(2)(b) of the ICSID Convention, and is composed of: Ms. Jean Engelmayer Kalicki (U.S.), President, appointed by the Chairman of the Administrative Council in accordance with Article 38 of the ICSID Convention; Mr. Klaus Reichert, SC (German/Irish), appointed by Claimant; and Professor Thomas Clay (French), appointed by Respondent.

21. The case file thereafter was provided to the Tribunal, including all prior communications between the Parties and ICSID, as well as all prior communications between the Parties that were copied to ICSID. The case file provided to the Tribunal contained several communications that in some way addressed the Application, including Nova's letter of 25 September 2016; Romania's letters of 28 September 2016; Nova's letter of 30 September 2016; Nova's letter of 3 October 2016; Romania's letter of 5 October 2016; Nova's letter of 14 October 2016; Romania's letter of 25 October 2016; Nova's letter of 4 November 2016; Romania's letter of 5 November 2016; Nova's letters of 10 November 2016; Romania's letter of 11 November 2016; and Nova's letter of 16 November 2016.

22. On 21 November 2016, the Tribunal proposed that the first session be held by teleconference on either 20 or 21 December 2016, and that the Parties reserve 11 and 12 January 2017 for a potential hearing on the Application in Paris, France. The Tribunal noted that the proposal of Paris was for convenience only in light of certain travel constraints for the Tribunal in January, and was without prejudice to the determination of venue for any future hearings. The Tribunal invited the Parties' views on these proposed dates.

23. On 23 November 2016, the Tribunal circulated a draft agenda for the first session and a draft Procedural Order No. 1 to help facilitate the Parties' discussion on procedural issues in advance of the first session.

24. On 28 November 2016, Romania confirmed its availability for the first session teleconference on 21 December 2016, but stated that its counsel was unavailable for a hearing on the Application on the proposed dates. By the same letter, Romania requested an extension of seven days to file its rejoinder on the Application.

25. Also on 28 November 2016, Nova confirmed its availability for the first session teleconference and a hearing on the Application on the proposed dates. However, Nova requested "that Romania be invited to agree that the Provisional Measures hearing should take place in London." [redacted]."

26. [redacted]

27. In response to the Parties' letters of 28 November 2016, the Tribunal wrote to the Parties on 29 November 2016 to inquire (a) whether Nova would consent to Romania's request for an extension of seven days to file its rejoinder on provisional measures, and (b) whether Romania would consent to holding the hearing on provisional measures in London (on a date to be determined), without prejudice to further discussion of the appropriate venue for subsequent hearings.

28. By letter of 1 December 2016, Romania objected to holding the hearing in London, arguing that this venue would be unduly burdensome, in part because of visa requirements for certain of its representatives. [redacted]

29. [redacted]

[redacted] r of the [redacted]

30. By letter of 2 December 2016, Nova (a) made further submissions in support of its request to hold the hearing in London, (b) stated that Romania was not entitled to the requested disclosure at this stage of the proceeding, and (c) informed the Tribunal that it consented to Romania's request for an extension.

31. On 3 December 2016, the Tribunal confirmed that, in light of Nova's consent, Romania's request for an extension of one week to file its rejoinder on provisional measures was granted.

32. On the same day, the Parties were informed of the Tribunal's ruling on the venue for the hearing on provisional measures:

    a. The Tribunal accepts the Claimant's request that its counsel be permitted to attend from the same venue as [redacted]

[redacted], [redacted]. The Tribunal also accepts the Respondent's representation that a visa may be required for one or more of its representatives to attend in London.

b. The Tribunal's strong preference is an in-person hearing to be held in London, on any two consecutive dates among 6-7 February, 9-10 February or 13-17 February …. If no witness examination will be needed, the hearing could perhaps be concluded in a single day.

c. The Tribunal Secretary will be in touch with the Respondent regarding issuance of official travel certificates to support any necessary visa applications. If the Respondent's representatives nonetheless ultimately are unable to obtain visas to attend in London, the hearing instead will proceed by videoconference, with the Tribunal sitting together in person in a location to be determined (separate from either side's counsel), the Claimant's team participating from London, and the Respondent's team participating from Paris. This is not the Tribunal's preference.

The Parties were requested to inform the Tribunal of, *inter alia*, their availability for a hearing within the proposed date ranges.

33. On 8 December 2016, Nova confirmed its availability for a hearing on certain dates proposed by the Tribunal. By letter of the same date, Romania informed the Tribunal that it was not available on the proposed dates, as counsel would be attending a hearing in another ICSID case. Regarding the venue for the hearing, Romania reiterated its view that it should be Paris or Washington, D.C., but further stated that:

> Respondent however takes note that the Tribunal has expressed a strong preference for the Hearing to be held in London in person. On this basis, with all rights reserved and by courtesy to the Tribunal only, Respondent will for this sole occasion accept to hold the Hearing in London, depending on the Hearing dates, with the understanding that it takes roughly two weeks for Turkish nationals to obtain a visa to the United Kingdom.

34. By letter of 9 December 2016, the Tribunal acknowledged that the hearing dates it had proposed would not work due to the constraints of counsel, but noting its reluctance to allow a provisional measures hearing to be deferred for months. The Tribunal proposed

additional date ranges, including weekends, and urged the Parties to make the maximum effort to accommodate them.

35. In accordance with the revised briefing schedule, Romania filed its Rejoinder on 12 December 2016.

36. On 12 and 13 December 2016, the Parties responded to the Tribunal regarding their availability for the hearing on the proposed dates. Nova, in its letter, also alleged that [redacted].

37. Based on the Parties' letters, the first mutually available dates for a hearing were 2-3 March 2017. The Tribunal therefore confirmed that the hearing on the Application would be held in London on those dates.

38. On 15 December 2016, the Parties submitted their joint comments on the Tribunal's draft Procedural Order No. 1, which had been circulated by the Secretary on 23 November 2016.

39. On 19 December 2016, Romania filed a Request for Bifurcation of the Proceedings (the "**Bifurcation Request**").

40. Also on 19 December 2016, Romania restated its disclosure request of 1 December 2016. Romania argued that [redacted] Romania asked the Tribunal to order disclosure immediately, before the first session scheduled on 21 December 2016.

41. On the same day, the Tribunal informed the Parties that they would be invited to address Romania's request for disclosure during the first session, following which the Tribunal would rule promptly.

42. On 20 December 2016, Nova requested leave to submit a letter to the Tribunal in advance of the next day's first session, to respond to Romania's letter of 19 December 2016. The Tribunal granted this request with the understanding that the letter would be filed that day,

rather than on the day of the first session. In accordance with the Tribunal's instructions, Nova filed its response later on 20 December 2016.

43. Before the first session on 21 December 2016, Nova submitted two further letters to the Tribunal. In the first letter, Nova sought leave to amend one of its requests for a provisional measure (at paragraph 272(d) of the Reply), so that Romania would be ordered to:

[redacted]

44. [redacted]

45. The first session teleconference was held as scheduled on 21 December 2016. The Tribunal and the Parties discussed outstanding procedural matters, including the procedural calendar. They also addressed three matters relating to the Application:

a. First, each Party was invited to make oral submissions on Romania's disclosure request.

b. Second, Romania was given an opportunity to comment on Nova's request to amend the relief sought at paragraph 272(d) of the Reply, and Romania stated that it had no objection. The President of the Tribunal then confirmed that absent objection, Nova's requested amendment was deemed to have been made. The President also confirmed that Romania would have an opportunity to respond to the substance of Nova's letter, and Romania undertook to do so by 15 January 2017. Pursuant to this agreement, Romania filed its response on 15 January 2017.

c. Third, Nova summarized the content of its second letter regarding further criminal proceedings in Romania. Nova confirmed that it was not seeking an immediate decision from the Tribunal, but indicated that it likely would need to request specific measures in advance of the hearing on the Application, unless it received certain assurances from Romania that it would respect the *status quo* and avoid any aggravation of the dispute. Romania was given the opportunity to comment, and the matter was closed, pending any specific application by Nova.

46. The first session teleconference was recorded, and the audio recording was made available to the Tribunal and the Parties following the teleconference.

47. Following the first session, on 23 December 2016, the Tribunal issued Procedural Order No. 1, embodying the agreements of the Parties and the decisions of the Tribunal on the procedure to govern the arbitration. The Procedural Timetable was attached as Annex A of Procedural Order No. 1.

48. On 26 December 2016, the Tribunal issued Procedural Order No. 2, which addressed Romania's request for disclosure. [redacted].

49. [redacted]

[redacted]

50. On 29 December 2016, the Parties were informed of the following decision of the Tribunal:

> The Tribunal grants Claimant's request to submit the [redacted], subject to the Respondent having the opportunity to submit, within 10 days of the Claimant's submission, any observations it may have on the asserted relevance of the new document for the provisional measures application.

51. By email of the same date, Romania requested that the Tribunal withdraw or at least suspend its decision to admit the [redacted] until Romania was given an opportunity to comment on such request. Romania referenced paragraph 16.3 of Procedural Order No. 1 to support its position.[6] The Tribunal responded to Romania's message on the same day, stating that its decision had provided Romania an opportunity to comment on the substance of the new document, but that "if the Respondent wishes to be heard preliminarily on the threshold issue of admissibility, including any potential prejudice from the document's submission at this time, such opportunity is granted." The Tribunal directed Nova not to submit the [redacted] pending further instruction from the Tribunal.

52. Also on 29 December 2016, Romania submitted a letter asserting that in Procedural Order No. 2, the Tribunal had failed to address one of the three grounds Romania had raised in support of its 1 December 2016 request for disclosure, namely that the requested

[6] Paragraph 16.3 of Procedural Order No. 1 states: "Neither party shall be permitted to submit additional documents after the filing of its last written submission, unless the Tribunal determines that good cause has been shown to justify such submission based on a reasoned written request followed by observations from the other party."

documents were relevant and material for the purpose of assessing potential conflicts of interests. Romania requested that the Tribunal rule on this third ground.

53. On 30 December 2016, the Tribunal invited Nova to comment on Romania's request. In accordance with that invitation, Nova submitted a letter on 5 January 2017 opposing Romania's request.

54. On 6 January 2016, the Tribunal issued Procedural Order No. 3, addressing Romania's request of 29 December 2016. The Tribunal acknowledged, as noted in paragraph 9 of Procedural Order No. 2, that Romania's prior request for [redacted] had been stated to be relevant to "potential conflicts of interests," as well as the issues of jurisdiction and provisional measures expressly addressed in Procedural Order No. 2. The Tribunal further noted that, pursuant to Procedural Order No. 2, [redacted]. The Tribunal then stated its view that:

> this information should be sufficient for (a) the members of the Tribunal to make any disclosures that may be warranted on account of the identity of [redacted] (b) Respondent to undertake any further investigations it considers appropriate regarding any hypothetical relationships between any member of the Tribunal and [redacted] and (c) Respondent to make (promptly) any application that it considers appropriate regarding any alleged conflicts of interests of a member of the Tribunal, on account of the identities of [redacted]

On this basis, the Tribunal denied Romania's renewed application for an order that in addition to producing the subject documents, Nova [redacted]

55. Also on 6 January 2017, Romania submitted its letter objecting to Nova's 27 December 2016 request for leave to submit the [redacted] Romania argued, *inter alia*, that (a) Nova had failed to show "good cause" to justify the belated submission of the [redacted] as required by paragraph 16.3 of Procedural Order No. 1; (b) the allegation Nova was attempting to support with the [redacted] was irrelevant to provisional measures; and (c)

admitting the [redacted] would prejudice Romania, especially because its counsel had not yet been able to obtain a copy of the document, it was not clear that Romania itself had previously seen it, and the admission of the [redacted] would require further inquiry into its provenance and underlying support.

56. On 9 January 2017, in accordance with Procedural Order No. 2, Nova produced [redacted]

57. By letter of 11 January 2017, Romania requested [redacted]

58. Upon the Tribunal's invitation, Nova submitted its response on 13 January 2017. Although Nova considered Romania's further requests for disclosure to be meritless, it disclosed seven additional documents.

59. Also on 13 January 2017, Nova filed its Objection to Respondent's Request for Bifurcation (the "**Objection to Bifurcation**").

60. On 16 January 2017, the Tribunal issued Procedural Order No. 4 to address two outstanding procedural issues: (a) Nova's request to submit the [redacted] and (b) Romania's request for additional disclosure. Regarding the first issue, the Tribunal denied Nova's request, explaining that "the Tribunal initially had understood that the [redacted] already was well known to both Parties" and therefore they could "address in short order its relevance or lack of relevance" for the Application. Based on Romania's contentions otherwise, however, the Tribunal explained as follows:

> the Tribunal is concerned that introducing the [redacted] at this juncture could open the door to broader supplemental proceedings

> prior to the provisional measures hearing than the Tribunal originally had anticipated, including potential additional information requests that could expand the scope of (and threaten the orderly preparation for) such hearing. At the same time, the Tribunal notes that neither Party suggests the [redacted] is essential to the Tribunal's consideration of the pending application for provisional measures. Indeed, the Claimant's own primary submission is that the [redacted] is not necessary for its provisional measures request, as "sufficient evidence" already has been adduced "to establish that it has a prima facie claim" of improper action by the Respondent, and that the appropriate time to adduce further evidence regarding such claim is at the merits stage, "rather than now." The Respondent concurs (albeit for different reasons) that the document is not "material at this stage." … In light of these factors, the Tribunal considers it best to defer introduction of the [redacted] and related consideration of its relevance and weight, to the stage of the case for which both Parties consider it material, namely the substantive proceedings on the merits.

61. The Tribunal also denied Romania's request for further disclosure, while acknowledging Nova's 13 January 2016 disclosure of additional documents. The Tribunal explained that:

> Although it is possible that the Respondent may have further questions flowing from these documents, the Tribunal considers that they provide sufficient supplementary factual information to address the underlying rationales of Procedural Order Nos. 2 and 3. Accordingly, no further production is ordered.

62. The Parties were instructed to file within ten days a supplemental submission regarding the relevance or lack of relevance of the information contained in the documents Nova produced on 9 and 13 January 2017 to the issues before the Tribunal in connection with the Application. As scheduled, on 26 January 2017, each Party filed such a submission.

63. By letter of 25 January 2017, Nova informed the Tribunal that [redacted] Nova noted that it would "in due course, write separately on the implications of these tragic circumstances."

64. In accordance with the procedural timetable, as revised by the Parties agreement of 21 January 2017, Romania filed its Reply to Objection to Request for Bifurcation, dated 25 January 2017 (the "**Reply on Bifurcation**").

65. Also in accordance with that procedural timetable, Nova filed its Rejoinder on Objection to Request for Bifurcation, dated 6 February 2017 (the "**Rejoinder on Bifurcation**").

66. On 8 February 2017, in preparation for the pre-hearing teleconference, the Tribunal provided the Parties with a draft procedural order addressing the organization of the hearing on provisional measures. The Tribunal requested that the Parties confer and submit their comments in advance of the teleconference.

67. On 9 February 2017, Nova wrote to the Tribunal "regarding the immediate implications for the arbitration of [redacted] By this letter, Nova withdrew its request for the following provisional measure, which was originally contained in subparagraph (c) of its request for relief:

[redacted]

68. Nova also revised the provisional measures sought in subparagraphs (a) and (d) of its request for relief, to the extent related to [redacted].

69. By the same letter, Nova expressed concerns about the circumstances of [redacted]

70. On 15 February 2017, the Parties submitted their comments on the draft procedural order addressing the organization of the hearing on provisional measures.

71. On 16 February 2017, the Tribunal held a pre-hearing teleconference with the Parties to discuss procedural matters relating to the hearing on provisional measures, including the allotment of hearing time, examination and sequestration of witnesses, and hearing materials. Subsequently, on 17 February 2017, the Tribunal issued Procedural Order No. 5, recording the Parties' agreements and the Tribunal's decisions on the organization of the hearing.

72. By letter of 28 February 2017, Nova made a further amendment to subparagraph (a) of its request for relief, as follows:

[redacted]

73. By the same letter, Nova requested the Tribunal to order Romania to [redacted]

74. The hearing on provisional measures was held at the International Dispute Resolution Centre in London on 2 and 3 March 2017. The following individuals attended the hearing:

Tribunal:	
Ms. Jean Kalicki	President
Professor Thomas Clay	Arbitrator
Mr. Klaus Reichert	Arbitrator
Secretary of the Tribunal:	
Ms. Lindsay Gastrell	ICSID Secretariat
Nova:	
Counsel:	
Lord Goldsmith QC, PC	Debevoise & Plimpton LLP
Mr. Patrick S. Taylor	Debevoise & Plimpton LLP
Ms. Ciara A. Murphy	Debevoise & Plimpton LLP
Mr. Mark McCloskey	Debevoise & Plimpton LLP
Mr. Boxun Yin	Debevoise & Plimpton LLP
Ms. Doreena Hunt	Debevoise & Plimpton LLP
Ms. Diana Moise	Debevoise & Plimpton LLP

[7] The Tribunal will address this request in a separate order.

Parties/Witnesses:

[redacted]	The Nova Group Investments B.V. [redacted]

Romania:
Counsel:

Dr. Hamid G. Gharavi	Derains & Gharavi International
Ms. Nada Sader	Derains & Gharavi International
Ms. Eloise Obadia	Derains & Gharavi International
Mr. Emmanuel Foy	Derains & Gharavi International
Mr. Stefan Dudas	Derains & Gharavi International
Ms. Marine Juston	Derains & Gharavi International (Intern)
Mr. Sixto Sanchez	Derains & Gharavi International (Intern)
Professor Ziya Akinci	Akinci Law Firm
Mr. Aycan Özcan	Akinci Law Firm
Mr. Valentin Trofin	Trofin & Associates
Ms. Oana Cuciureanu	Trofin & Associates

Parties:

[redacted]	Ministry of Public Finance, Secretary of State Ministry of Public Finance, Legal Department, Chief of Office

Court Reporter:
Ms. Diana Burden

75. At the close of the hearing, each Party confirmed that it had concluded its presentation of evidence and arguments on the Application.

IV. FACTUAL BACKGROUND

[redacted]

A. Claimant's Case

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

B. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

C. The Bribery Proceedings

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

D. The Abuse of Office Proceedings and Asset Sequestration Order

[redacted]

[redacted]

[redacted]

V. APPLICABLE LEGAL FRAMEWORK

97. The Tribunal's power to grant provisional measures is embodied in Article 47 of the ICSID Convention and ICSID Arbitration Rule 39.

98. Article 47 of the ICSID Convention provides:

> Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

99. ICSID Arbitration Rule 39 states in relevant part:

> (1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
>
> (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
>
> (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.
>
> (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

VI. THE PARTIES' POSITIONS

100. In this section, the Tribunal summarizes each Party's position on the Application, primarily focusing on the Parties' arguments as set forth in their written submissions. During the hearing on provisional measures, the Parties elaborated upon these arguments, and the examination of witnesses revealed further relevant information. The Tribunal will address these additional points as necessary in its analysis contained in Section VII below.

A. Claimant's Position

(1) The Scope of the Tribunal's Power to Grant Provisional Measures

[redacted] [redacted]

[redacted] [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(2) Applicable Legal Standard

[redacted]

(3) [redacted]

[redacted]

[redacted]

[redacted]

(4) Rights to be Preserved

[redacted]

a. The Right to Procedural Integrity

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

b. The Right to Preservation of the *Status Quo* and Non-Aggravation of the Dispute

[redacted]

[redacted]

[redacted]

[redacted]

(5) Urgency, Necessity and Proportionality

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(6) Application of the Legal Standard to the Measures Requested

a. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

b. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

c. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

d. [redacted]

[redacted] [redacted]

> [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

e. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

f. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

B. Respondent's Position

(1) The Scope of the Tribunal's Power to Grant Provisional Measures

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(2) Applicable Legal Standard

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(3) Jurisdiction

[redacted]

[redacted]

[redacted]

[redacted]

(4) Application of the Legal Standard to the Measures Requested

a. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

b. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

c. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

d. [redacted]

[redacted]

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[redacted]

[redacted]

[redacted]

e. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

f. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

VII. THE TRIBUNAL'S ANALYSIS

A. Article 47 and the Applicable Legal Standards

226. The Tribunal begins with the proposition that arbitral tribunals have authority to issue recommendations to sovereign States regarding their conduct, *only* to the extent that States have granted them this power. Article 47 of the ICSID Convention constitutes an express grant of this authority, couched in discretionary terms (signified by the use of the word "may"). That means that States ratifying the ICSID Convention consent in advance to tribunals' exercise of the discretion, as and to the extent defined by its terms. This is the case even though the result may be some restriction on "the freedom of the State to act as it would wish,"[306] at least while the ICSID case remains pending.

227. However, because this grant of authority is an exception to the general principle of State sovereignty, tribunals should exercise their discretion only within the strict confines of the power thus granted, namely as an exceptional remedy, reserved for exceptional circumstances.[307] Among other things, this means that tribunals should recommend only the *minimum steps necessary* to meet the objectives set out in the Convention.

228. Article 47 confines a Tribunal's authority to a situation in which it finds that "the circumstances … require" a particular measure to be taken "to preserve the respective rights of either party." Because this process is to be conducted on a "priority" basis as specified in Arbitration Rule 39(2), by definition it will not be on the basis of the full record that eventually will unfold through completion of the ICSID case. For this reason, "the Tribunal's assessment is necessarily made on the basis of the record as it presently stands" at the time of the provisional measures decision, and "any conclusions reached" for

[306] **CL-39**, *Perenco*, ¶ 50 ("in any ICSID arbitration one of the parties will be a sovereign State, and where provisional measures are granted against it the effect is necessarily to restrict the freedom of the State to act as it would wish").

[307] The exceptional nature of the Article 47 exercise has been recognized by prior ICSID tribunals. *See, e.g.*, **CL-63**, *PNG*, ¶ 103 ("this power must be exercised in a manner consistent with the general purposes and character of the provisional measures," which "include, in particular, the exceptional nature of relief granted before the parties have had the opportunity fully to present their respective cases"); **CL-27**, *Maffezini*, ¶ 10 (provisional relief is "an extraordinary measure which should not be granted lightly by the Arbitral Tribunal").

purposes of a provisional measures analysis can be reviewed further as the case continues to progress.[308]

229. The natural implication of provisional measures being considered at an early stage of a case is that a tribunal will not have had the opportunity yet to weigh a respondent State's arguments regarding the potential infirmities of the claimant's merits case – and it may well not have had the chance to consider the State's jurisdictional objections. However, the fact that the State raises both jurisdictional and merits defenses in no way negates a tribunal's authority to consider a provisional measures request, nor to recommend such measures as it believes the circumstances urgently require to preserve the parties' rights.[309] Certainly, a tribunal should satisfy itself that the claimant has presented a non-frivolous basis for invoking jurisdiction,[310] and that its merits allegations similarly are not frivolous,[311] or "manifestly without legal merit" within the parlance of Arbitration Rule 41(5). But beyond independently assuring itself that the case satisfies these *prima facie* thresholds,[312] the focus of a tribunal at a provisional measures stage is on such minimum recommendation(s), as found to be required by the circumstances, that should be made so as to preserve the rights of the parties.

230. In particular, when a State ratifies the ICSID Convention and consents to ICSID arbitration of a dispute through an investment treaty or other instrument, this gives rise to a presumptive *right* to such arbitration on the part of persons or entities qualifying under the Convention and the relevant instrument of consent. As discussed in more detail below, concomitant with the right to arbitrate is a right to have such arbitration advance to a

[308] **CL-50**, *Churchill* PO9, ¶ 71.

[309] *See* **CL-35**, *Hydro*, ¶ 3.7; **CL-63**, *PNG*, ¶ 104; **RL-6**, *Caratube II*, ¶ 106; **CL-25**, *Quiborax*, ¶ 108; **CL-44**, *Millicom*, ¶ 42; **RL-8**, *Paushok*, ¶ 47 (citing ICJ jurisprudence); **RL-10**, *Occidental*, ¶ 55; **CL-48**, *Biwater* PO1, ¶ 70.

[310] *See* **CL-35**, *Hydro*, ¶ 3.8; **CL-63**, *PNG*, ¶¶ 104, 118; **RL-7**, *EuroGas*, ¶ 69; **CL-25**, *Quiborax*, ¶ 108; **CL-39**, *Perenco*, ¶ 39; **CL-30**, *Burlington*, ¶ 49; **RL-8**, *Paushok*, ¶ 47; **RL-10**, *Occidental*, ¶ 55; **CL-29**, *City Oriente*, ¶ 50.

[311] *See* **CL-63**, *PNG*, ¶ 120 (explaining that "[i]n practice," a requirement that the requesting party must have a *prima facie* case on the merits "will ordinarily lead to a rejection of a request for provisional measures only in rare circumstances, where the requesting party has failed to advance any credible basis for its claims"); **RL-8**, *Paushok*, ¶ 55 ("the Tribunal needs to decide only that the claims made are not, on their face, frivolous").

[312] The Tribunal rejects Nova's suggestion (Reply n. 27) that with respect to jurisdiction, it may rely simply on the ICSID Secretary General's registration of the case as demonstrating a *prima facie* basis for jurisdiction. The Tribunal has a duty to assess its jurisdiction independently, even with respect to the *prima facie* threshold applicable at this stage. *See* **CL-63**, *PNG*, ¶ 119; **CL-44**, *Millicom*, ¶ 43(a); **CL-39**, *Perenco*, ¶ 39.

conclusion in the normal way, subject to compliance with the usual procedural requirements (such as, for example, the payment of deposits and the meeting of reasonable deadlines). A tribunal considering the recommendation of provisional measures can have regard to these factors, and may recommend such steps as are necessary, at a minimum, to ensure that the case can continue to advance to a conclusion in the normal way, so that the right to arbitrate to a conclusion is not effectively thwarted. This does not require the tribunal to assess the likely outcome of the arbitration, nor should it do so at this stage. At the same time, a party that is the beneficiary of a recommendation of provisional measures to protect its right to arbitrate thereafter must pursue its case in compliance with the procedural requirements usual in any arbitration. This is only fair to the party against whom a recommendation is made, and ensures that any provisional measures exist for the shortest practical time.

231. For this reason, the Tribunal does not accept Romania's contention that the nature of the Tribunal's analysis at this stage should be impacted by the fact that it has not yet ruled on Romania's three jurisdictional objections.[313] While the Tribunal has decided not to bifurcate proceedings for the reasons set forth in the accompanying Decision on Respondent's Request for Bifurcation,[314] it takes seriously its obligation in due course to examine each of Romania's objections carefully. But the very structure of the provisional measures process established in the Convention and the Arbitration Rules envisions that such applications may have to be dealt with prior to a ruling on jurisdiction, precisely because of alleged situations of urgency requiring interim steps to preserve the parties' rights.[315] Nothing in the Convention or Arbitration Rules suggests that a tribunal should apply a different or heightened standard for assessing a provisional measures request,

[313] Observations, ¶ 136.

[314] Procedural Order No. 6, dated 29 March 2017.

[315] Of course, where bifurcation of jurisdictional objections is otherwise warranted and there is no urgent need to resolve the provisional measures request until the Tribunal concludes its assessment on jurisdiction, this factor will counsel against exercise of the Tribunal's discretion to recommend any measures for the time being, consistent with the general requirements of necessity and urgency discussed further below. *See* **RL-6**, *Caratube II*, ¶ 108; **CL-48**, *Biwater* PO1, ¶ 70.

simply because jurisdictional (as well as merits) objections remain to be resolved at a subsequent stage.

232. In any provisional measures review, the starting point (after confirming a non-frivolous basis for jurisdiction and for proceeding to the merits) is to identify the particular rights that the applicant claims are appropriate to be preserved. The nature of "rights," within the meaning of Article 47, is that these must be entitlements that exist at the time of the application.

233. In this case, Nova does not invoke the right to exclusivity of ICSID proceedings under Article 26 of the Convention, which has featured in certain past cases considering the implications of parallel proceedings in a State's domestic courts. ICSID tribunals generally have declined to accept that the right to exclusivity is impacted by domestic *criminal* proceedings, because criminal cases do not involve claims remotely of the same nature or subject matter as investment disputes arising from a State's international obligations.[316] The Tribunal ultimately does not need to reach this issue, as Nova does not rest on this basis in its application.

234. Rather, Nova invokes two other rights as deserving of preservation pursuant to Article 47: the right to procedural integrity of this case, and the right to preservation of the *status quo* and non-aggravation of the dispute.[317] There appears to be no dispute from Romania, at least at the level of principle, that these two rights are protectable in appropriate cases. Numerous prior tribunals have found that these are self-standing rights capable of protection by provisional measures.[318]

235. With respect to the integrity of proceedings, the Tribunal considers this to be both an existing right of both parties, and the central duty of any ICSID tribunal to protect. The right to procedural integrity inherently includes two different components. First, it includes

[316] **CL-35**, *Hydro*, ¶ 3.23; **CL-50**, *Churchill* PO9, ¶¶ 85-87; **CL-34**, *Lao Holdings*, ¶¶ 21, 30; **CL-25**, *Quiborax*, ¶¶ 128-131.

[317] Application, ¶ 68; Reply, ¶ 51.

[318] *See, e.g.*, **CL-31**, *Teinver*, ¶¶ 177, 198; **CL-35**, *Hydro*, ¶ 3.17; **CL-34**, *Lao Holdings*, ¶ 12; **CL-50**, *Churchill* PO9, ¶ 90; **CL-25**, *Quiborax*, ¶¶ 117, 133-136; **CL-30**, *Burlington*, ¶¶ 60, 62-64; **CL-29**, *City Oriente*, ¶ 55; **CL-48**, *Biwater* PO1, ¶ 135.

the right of the parties to present their respective positions to the Tribunal, which includes the absence of undue interference with their access to witnesses and evidence, and their ability to instruct and assist counsel to marshall these on their behalf.[319] Second, the right to procedural integrity includes the ability of a tribunal to fashion meaningful relief at the end of the case, if it finds that the applicant ultimately has proven entitlement to relief; this is sometimes referred to as the "right to the protection of the effectivity of the award."[320] As these two components were succinctly explained by the tribunal in *Plama v. Bulgaria*, "[t]he rights to be preserved must relate to the requesting party's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out."[321]

236. The second right at issue in this case is the right to preservation of the *status quo* and non-aggravation of the dispute. The Tribunal interprets this narrowly, as relevant primarily in the same context (*i.e.*, the impact on the ongoing ICSID proceeding) as the right to procedural integrity addressed above. In other words, only if continuing events in the host State threaten to interfere unduly with the parties' ability to present positions in the arbitration, or the tribunal's ability to fashion meaningful relief at the close of the case, will the events constitute an impermissible infringement on rights to preserve the *status quo* and non-aggravation of the dispute. The mere fact of lesser impacts – *i.e.*, that circumstances on the ground in the host State continue to evolve during the course of the ICSID case, possibly increasing the harm about which the investor complains – is not *ipso facto* a violation of the parties' rights. While the Tribunal understands the desire to avoid "moving target" events in the interests of an orderly proceeding, that desire alone is not sufficient to justify the recommendation of measures to prevent any and all alteration of the *status quo* or any and all increase in injury to the investor. The contrary proposition

[319] *See, e.g.*, **RL-6**, *Caratube II*, ¶ 119; **CL-25**, *Quiborax*, ¶ 141.

[320] **CL-30**, *Burlington*, ¶ 61; *see also* **CL-44**, *Millicom*, ¶ 42 (explaining that "provisional measures form an essential part of the … effectiveness of the ICSID arbitration system; while waiting for a decision to be given on the merits of a case and provided that the conditions have been met, the aim is to ensure as far as possible that no decisions can be taken that risk depriving that decision of its main effect in fact"); **CL-29**, *City Oriente*, ¶ 55 (referring to action that "frustrates the effectiveness of the award").

[321] **RL-13**, *Plama*, ¶ 40; *see also* **CL-31**, *Teinver*, ¶ 177; **CL-25**, *Quiborax*, ¶ 118.

would mean that by the simple step of initiating an ICSID claim, an investor obtains a sweeping right to freeze all circumstances as they then exist (perhaps for a period of years), even where such an overall standstill is otherwise not required to preserve its rights to present its case and obtain meaningful relief.[322] That would be an invitation to tribunals to overstep the bounds set by Article 47, through an overbroad extension of the the doctrines of *status quo* and non-aggravation. It would take the grant of provisional measures beyond the realm of exceptional circumstances noted above.

237. With this understanding of the two rights at issue in this case, the Tribunal turns next to examination of the factors relevant to a tribunal's exercise of its authority under Article 47 to preserve these rights. The Parties appear to agree that a tribunal should act only where doing so is (a) *necessary* to preserve rights, (b) *urgently* required, and (c) the particular measures requested are *proportionate*, in the sense that they do not impose such undue burdens on the other party as to outweigh, in a balance of equities, the justification for granting them.[323] Before turning to Romania's argument that there are *additional* factors to be considered as part of a provisional measures assessment, the Tribunal sets out its understanding of the parameters of these three agreed factors.

238. First, any applicant for provisional measures bears the burden of demonstrating that they are needed, or in the words of Article 47 of the Convention, that the "circumstances so *require*" (emphasis added). The Parties do not dispute the requirement of necessity, but they do differ in their precise framing of the requirement, as have past tribunals. Some tribunals have discussed necessity in terms of a need to avoid "irreparable" prejudice to the rights invoked, in the sense that it *cannot* be repaired by a monetary award.[324] Others have employed the concept of harm not "*adequately* reparable" by an award of damages,

[322] *See similarly* **RL-13**, *Plama*, ¶ 45 (declining to recommend provisional measures with respect to proceedings underway in Bulgaria, even though those "may well, in a general sense, aggravate the dispute between the parties," because "the right to non-aggravation of the dispute refers to actions which would make resolution of the dispute by the Tribunal more difficult. It is a right to maintenance of the *status quo*, when a change of circumstances threatens the ability of the Arbitral Tribunal to grant the relief which a party seeks an the capability of giving effect to the relief").

[323] Observations, ¶ 138; Reply ¶¶ 18, 51; Rejoinder, ¶ 53.

[324] *See, e.g.*, **RL-10**, *Occidental*, ¶ 59 (referencing ICJ jurisprudence); **CL-58**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 3, 18 January 2005 ("***Tokios Tokelés* PO3**"), ¶ 8.

embodied in Article 17A of the UNCITRAL Model Law (emphasis added).[325] Still other tribunals discuss the avoidance of "substantial" or "serious" harm, which may imply something less than "irreparable" harm.[326] The *PNG* tribunal suggested that "[t]he degree of 'gravity' or 'seriousness' of harm that is necessary … depends in part on … the nature of the relief requested."[327] It appears that tribunals adapting formulations looser than "irreparable" harm tend to do so where on the merits, the applicant is seeking specific performance or some other form of equitable or injunctive relief, and not simply monetary compensation.[328] By contrast, tribunals doubting the authority of investor-State tribunals to order specific performance or restitution as a remedy for loss of investment tend to decline recommendation of provisional measures, so long as monetary relief would provide adequate compensation.[329]

239. It is premature to decide in this case whether as a matter of law, Nova ever could be entitled at the end of the case to relief *other* than monetary compensation, such as the orders it seeks that Romania "cease all steps and proceedings" and "refrain from any … in the future," either to wind up Nova's investments or to pursue the [redacted] in connection with such investments, and the order that Romania "withdraw all restrictive measures taken" against Nova's assets.[330] The Parties have not yet briefed the issue of a

[325] **CL-35**, *Hydro*, ¶ 3.31; **CL-25**, *Quiborax*, ¶ 156; **CL-30**, *Burlington*, ¶ 82; **RL-8**, *Paushok*, ¶¶ 68-69 (suggesting that the notion of "'irreparable harm' in international law has a flexible meaning").

[326] **CL-63**, *PNG*, ¶ 109 (suggesting that under intentional law, "the term 'irreparable' harm is properly understood as requiring a showing of a material risk of serious or grave damage to the requesting party, and not harm that is literally 'irreparable' in what is sometimes regarded as the narrow common law sense of the term," and concluding that in its view, "substantial, serious harm, even if not irreparable, is generally sufficient to satisfy this element" of the provisional measures test).

[327] **CL-63**, *PNG*, ¶ 109.

[328] *See, e.g.*, **CL-39**, *Perenco*, ¶¶ 43, 46 (considering that Article 47 "does not lay down a test of irreparable loss" and emphasizing that the claimant was seeking restitution of contract rights and not simply monetary damages); **CL-30**, *Burlington*, ¶¶ 71, 83 (emphasizing that "at first sight at least, a right to specific performance appears to exist," and considering that "this case is not one of only 'more damages' caused by the passage of time. It is a case of avoidance of a different damage," namely a risk of destruction of an ongoing investment); *see also* **CL-29**, *City Oriente*, ¶¶ 39, 57 (emphasizing that the dispute was "strictly contractual in nature" and the claimant "is seeking to have the Contract performed," and recommending that Ecuador refrain from domestic proceedings in connection with the contract); **CL-38**, *City Oriente* Revocation, ¶¶ 70-72, 74-76, 86 (declining to revoke prior provisional measures because claimant sought contractual performance and not merely monetary damages).

[329] *See, e.g.*, **RL-10**, *Occidental*, ¶¶ 75, 85 (finding the claimants had not established, at the provisional measures stage, a "strongly arguable right to specific performance," since "[t]he adequate remedy where an internationally illegal act has been committed is compensation deemed to be equivalent with restitution in kind").

[330] Request for Arbitration, ¶ 223(g),(h) and (i).

tribunal's authority with regard to such forms of relief. For this reason, the Tribunal at this stage prefers to stick closely to first principles, namely Article 47's stipulation that provisional measures are authorized only where "required." If a Tribunal would be able to fashion meaningful relief (monetary or otherwise) in its final award, then it is difficult to conclude that a particular measure is "*required*" at the provisional measures stage. While this statement is not necessarily limited to monetary relief, it certainly means (at minimum) that provisional measures "will not be necessary where a party can be adequately compensated by an award of damages if it successfully vindicates its rights when the case is finally decided."[331]

240. By contrast, where the right at issue involves a party's ability to effectively pursue and litigate its claim – which is what Nova insists is the key issue in its Application[332] – the injury to the right is *inherently* irreparable by monetary damages.[333] Given that reality, where issues of procedural integrity are at stake, it is sufficient at the provisional measures stage to show that there is a "material risk" of harm should the measures not be granted, not that harm to procedural integrity is absolutely "certain to occur" if the measures are not granted.[334]

241. The second factor in any provisional measures analysis involves urgency. Tribunals have widely concluded – and the Parties appear to agree[335] – that provisional measures should be recommended only where it is apparent that the requested measure is needed prior to issuance of an award.[336] The nature of the urgency will depend on the rights to be protected and the nature of the threat to those rights.[337] In particular, the requirement of urgency

[331] **CL-39**, *Perenco*, ¶ 43.

[332] Reply, ¶ 57.

[333] *See* **CL-35**, *Hydro*, ¶ 3.34 (concluding that "[w]hilst the destruction of the Claimants' investments in Albania may be capable of being repaired by an award of damages …, the Claimants' ability to effectively participate in the arbitration, by definition, cannot be adequately remedied by damages"); **CL-25**, *Quiborax*, ¶ 157 ("any harm caused to the integrity of the ICSID proceedings, particularly with respect to a party's access to evidence or the integrity of the evidence produced could not be remedied by an award of damages").

[334] **CL-63**, *PNG*, ¶¶ 109, 111.

[335] Application, ¶ 95; Observations, ¶ 142; Reply, ¶ 54.

[336] **CL-31**, *Teinver*, ¶ 233; **CL-63**, *PNG*, ¶¶ 108, 115-116; **CL-25**, *Quiborax*, ¶¶ 149-150; **CL-30**, *Burlington*, ¶¶ 72-73; **CL-29**, *City Oriente*, ¶ 67; **CL-48**, *Biwater* PO1, ¶ 76; **RL-10**, *Occidental*, ¶ 59 (citing ICJ jurisprudence); **CL-58**, *Tokios Tokelés* PO3, ¶ 8.

[337] **CL-63**, *PNG*, ¶ 116; **CL-48**, *Biwater* PO1, ¶ 76.

inherently is met where relief is needed to preserve the integrity of the arbitration. As the *Quiborax* tribunal explained,

> if measures are intended to protect the procedural integrity of the arbitration, in particular with respect to access to or integrity of the evidence, they are urgent by definition. Indeed, the question of whether a Party has the opportunity to present its case or rely on the integrity of specific evidence is essential to (and therefore cannot await) the rendering of an award on the merits.[338]

242. Finally, any assessment of a request for provisional measures would need to consider if the particular measures requested are proportionate, in the sense that the applicant's need for them is not outweighed by the hardships to which the other party would be subjected if the measures are granted.[339]

243. In addition to the recognized factors of necessity, urgency and proportionality, Romania argues for the inclusion of two other factors in any provisional measures analysis. First, it contends that the provisional measure requested "must be specific as opposed to too broad."[340] The Tribunal agrees with the principle underlying Romania's concern, but considers this principle already reflected in a proper analysis of the existing factors of necessity, urgency and proportionality. If the particular measure sought by an applicant is broader than required under Article 47 to preserve the right in question, that portion of the measure will be neither necessary nor urgent,[341] and almost by definition will impose burdens on the other party that are disproportionate to the claimed need. For this reason, tribunals should be mindful to grant provisional relief that is as narrow as can be fashioned to preserve the rights in question. This is inherent in the Tribunal's initial observation

[338] **CL-25**, *Quiborax*, ¶ 153*; see also* **CL-31**, *Teinver*, ¶ 235.

[339] *See, e.g.*, **CL-63**, *PNG*, ¶ 122; **CL-25**, *Quiborax*, ¶ 158; **CL-30**, *Burlington*, ¶¶ 81-82 (recognizing that "the harm to be considered does not only concern the applicant" and therefore indicating its intent to "weigh the interests of both sides").

[340] Observations, ¶ 151.

[341] See **CL-63**, *PNG*, ¶¶ 150-151 (rejecting a request for a "general order" for the preservation of the *status quo* and non-aggravation of the dispute, "because the Claimant has not shown either urgency or the necessity for such an open-ended order," and "without requesting specific, clearly articulated measures," the request was "overly broad, and, as such, will ordinarily fail to satisfy the requirements or urgency and necessity").

above that tribunals should recommend only the *minimum steps necessary* to meet the objectives set out in the Convention.

244. Similarly, the Tribunal considers that the final factor Romania would add to the provisional measures analysis – that "any recommendation for the provisional measures must not prejudge the merits of the case"[342] – is not a separate inquiry, but rather an implicit component of the established three-factor test. It goes without saying that in considering any request for provisional measures, a tribunal must keep an open mind on the ultimate merits of the case, and "not pre-judge, either consciously or unconsciously, the resolution of any aspect of the parties' respective claims and defenses."[343] An obvious corollary of this proposition is that the tribunal should not grant any relief at the provisional measures stage that essentially is *permanent* relief, in the sense that it could not be undone, if appropriate, in a final award.[344] These propositions, however, are part and parcel of examining whether a particular measure requested truly is "necessary" prior to an award on the merits, and whether granting it would be proportionate in light of the burdens to the other party.

B. The Special Context of Domestic [redacted] Proceedings

245. In the ordinary case, this exposition of the factors relevant to an Article 47 analysis would be sufficient groundwork for the Tribunal to move directly to the specific facts, to determine if the factors are satisfied in the circumstances presented. Here, however, the Tribunal must pause first to examine Romania's contention that there are two *other* impediments to provisional measures, in the special context of domestic [redacted] proceedings. The first is an alleged absolute bar to tribunal authority; the second is an alleged threshold requirement that must be satisfied before a tribunal ever may proceed to an assessment of necessity, urgency and proportionality.

[342] Observations, ¶ 138.

[343] **CL-63**, *PNG*, ¶ 121.

[344] *See* **CL-39**, *Perenco*, ¶ 43 ("a Tribunal must be slow to grant to a party, before a full examination of the merits of the case, a remedy to which, on such examination, the party may be found to be not entitled").

246. First, Romania argues that as a general proposition, ICSID tribunals do not have the power to recommend provisional measures that would interfere with a State's sovereign right to prosecute individuals charged with crimes within its territory.[345] For this reason, Romania posits, it would be inappropriate (and there is simply no need) to reach any discussion in this case of the customary factors for applying Article 47 of the ICSID Convention. However, the cases on which Romania relies do not support this sweeping proposition. The passage it cites from *Lao Holdings*, that "[i]ssues of … criminal liability by definition fall outside the scope of the Centre's jurisdiction,"[346] arises in the section of that decision discussing the limited issue of whether domestic criminal proceedings violate Article 26's right to ICSID's exclusive jurisdiction. As noted above, Nova does not advance that theory here. By contrast, the *Lao Holdings* tribunal expressly *confirmed* its authority in "exceptional circumstances … to depart from the general rule entitling a State to enforce on the national level its criminal laws," because it was "satisfied on the evidence" that in the particular circumstances of the case, failing to do so would "undermine the integrity of the arbitral process."[347] Similarly, the general statement in *Abaclat* that the tribunal "can in principle not prohibit a Party from conducting criminal court proceedings before competent state authorities" was made in the context of an application regarding Argentina's use of confidential materials in criminal proceedings,[348] not in the context of alleged threats to the integrity of the ICSID case. The passage Romania invokes from *SGS*, regarding the sanctity of domestic criminal processes,[349] likewise was not made in the context of concerns about procedural integrity.

247. In these circumstances, it would read too much into the subject passages to suggest that these tribunals endorsed the broader proposition Romania advances here, namely that even where the procedural integrity of the ICSID proceeding is said to be in jeopardy, a

[345] Observations, ¶¶ 110, 134; Rejoinder, ¶ 36.

[346] Observation, ¶ 113, *quoting* **CL-34**, *Lao Holdings*, ¶ 21.

[347] **CL-34**, *Lao Holdings*, ¶ 26. *See also id.*, ¶ 30 (explaining that "a criminal proceeding does not *per se* violate the principle of exclusivity of ICSID arbitration, or aggravate the dispute. *Something more* has to be at stake to justify a tribunal enjoining a State to suspend or defer a criminal investigation. The Tribunal is convinced that such exceptional circumstances exist in this case.").

[348] *See* **RL-5**, *Abaclat*, ¶¶ 39, 45 (cited by Romania in Observations, ¶ 113).

[349] Observations, ¶ 112, *quoting* **RL-4**, *SGS*, p. 301, for the proposition that a tribunal "cannot enjoin" a State from the "normal processes" of justice in its own territory.

tribunal's otherwise established power to recommend measures that are necessary, urgent and proportionate somehow evaporates in the face of domestic criminal proceedings.

248. If that were so, a tribunal would have no remedy even in the most extreme hypothetical circumstances, such as where a State took action while the ICSID case was pending to incarcerate all of an investor's principals and key witnesses, and prevent them from participating any further in the proceedings. Nothing in the text of Article 47 suggests such an outcome. To the contrary, as the *Caratube I* tribunal noted, while "criminal investigations and measures taken by a state in that context … are a most obvious and undisputed part of the sovereign right of a state to implement and enforce its national law on its territory," the language of Article 47 nonetheless is "very broad and does not give any indication that any specific state action must be excluded from the scope of possible provisional measures."[350] The Tribunal likewise concludes that domestic criminal proceedings are not *per se* immune from potential recommendation of provisional measures under Article 47.

249. Perhaps recognizing the extreme nature of its primary position, Romania presents an alternative argument that recognizes tribunal authority in "exceptional circumstances," but suggests those criteria are met only where two factors are both present. First, Romania suggests, the domestic [redacted] proceedings must *post-date* the commencement of the arbitration, not be underway already when the arbitration begins. Second, the [redacted] proceedings must "relate" directly to the prior-commenced ICSID case, in the particular sense that they are impermissibly *motivated* to thwart that arbitration from progressing in any meaningful fashion.[351] According to Romania, unless an investor can demonstrate that both these criteria are met, there is no authority for a tribunal to consider provisional

[350] **RL-15**, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures, 31 July 2009 ("***Caratube I***"), ¶¶ 134-136; *see also* **CL-56**, *Libananco Holdings Co. Limited v. Republic of* Turkey, ICSID Case No. ARB/06/08, Decision on Preliminary Issues, 23 June 2008 ("***Libananco***"), ¶ 79 (while "[t]he Tribunal takes it as a given" that a State's "right and duty to pursue the commission of serious crime … cannot be affected by the existence of an ICSID arbitration against it," that "right and duty … cannot mean that the investigative power may be exercised without regard to other rights or duties, or that, by starting a criminal investigation, a State may baulk an ICSID arbitration").

[351] Observations, ¶¶ 119, 134, 183; Rejoinder, ¶¶ 15.1-15.3.

measures that could impact the unfolding of the [redacted] proceeding, and therefore no need even to consider the customary factors of necessity, urgency and proportionality.[352]

250. The Tribunal is unable to accept such a broad proposition. It certainly agrees that provisional measures are an "exceptional" remedy in any case, and that tribunals should be particularly cautious about granting such remedies where the context involves potential future State action in quintessentially sovereign areas, such as the enforcement of domestic [redacted] law.[353] This caution however comes into play in the exercise of a tribunal's discretion under the *existing* provisional measures factors, not as a threshold bar that prevents the tribunal even from reaching those factors. Among other things, the requirement of proportionality provides a mechanism to weigh the degree of intrusion of a proposed measure into sovereign processes. The requirements of necessity and urgency ensure that tribunals would consider such intrusion only in truly exceptional circumstances. In this especially delicate context, tribunals should be careful to scrutinize requests particularly closely, to make sure that all the requirements for any recommendation of provisional measures are met, and that the measures themselves do not stray beyond the minimum necessary to meet the objectives of the Convention.

251. The Tribunal also agrees with the suggestion that provisional measures are unlikely to be appropriate if the criminal proceedings are wholly unrelated to the ICSID dispute, in the sense of involving different *subject matters*. The *Hydro* tribunal illustrated this proposition with a reference to domestic murder charges; it would be difficult to envision a circumstance where an ICSID tribunal ever would find it necessary, urgent and proportionate to recommend a suspension of such charges, even if they involved an individual with a role in a pending investment arbitration. The individual's suspected violation of the most basic criminal laws of the host State, which are "unrelated to the

[352] *See* Hearing Transcript, 2 March 2017, 42:11-17 and Hearing Transcript, 3 March 2017, 398:14-17 (contending that criminal proceedings must be in retaliation for an arbitration); Hearing Transcript, 3 March 2017, 443:21-25 (suggesting that the "timing" of a good faith criminal investigation is critical); Hearing Transcript, 3 March 2017, 401:19-22 (contending that "you don't need even to analyse the impact on the integrity of the process, if the first process in terms of timing, legitimacy, was appropriate").

[353] **RL-6**, *Caratube II*, ¶ 135.

factual circumstances of the dispute being arbitrated," would take obvious precedence over his or her entirely separate status as an investor or a participant in an investment.[354]

252. But Romania's further proposition, that provisional measures never may be contemplated unless the [redacted] proceedings are related to the arbitration in the specific additional sense of both *timing* (post-dating the filing) and *motivation* (aimed at thwarting the arbitration), would take the proposition too far. While a bad faith prosecution to forestall an ICSID case is certainly an extreme circumstance that could justify provisional measures,[355] this is not the only circumstance where Article 47 may apply. Nor is it a threshold requirement that circumscribes the tribunal's authority even to *consider* the need for carefully tailored measures to preserve the procedural integrity of an ICSID case. ICSID tribunals have an independent duty to safeguard their ability to decide investment disputes that the parties have consented to place before them, and that consent includes the authority to recommend provisional measures where "the circumstances … require." The reference to "circumstances" in Article 47 is not limited by the text to circumstances of timing and motivation. In appropriate cases, these circumstances also could include considerations of *impact* – namely the *practical effect* of concurrent domestic proceedings on a party's basic ability to present its case before ICSID, or on the tribunal's fundamental duty to give both parties the opportunity to be heard. Nothing in Article 47 suggests that a tribunal is rendered without power to protect the procedural integrity of its case except in the particular circumstances Romania invokes.[356]

253. Romania's contrary position – that the exclusive focus for provisional measures must be on whether the [redacted] proceedings were motivated to thwart a prior-filed ICSID

[354] **CL-35**, *Hydro*, ¶ 3.19.

[355] **CL-25**, *Quiborax*, ¶ 121 (referencing evidence suggesting that criminal proceedings were initiated "as a result of a corporate audit that targeted claimants *because* they had initiated this arbitration"); **CL-56**, *Libananco*, ¶ 79 (referring to the "baulk[ing]" of an ICSID arbitration "by starting a criminal investigation").

[356] For this reason, the Tribunal disagrees with the suggestion of the *Caratube II* tribunal that provisional measures would not be appropriate unless the claimant established at that stage not only that criminal investigations would "prevent[] them from asserting their rights" in the arbitration, were but also that the investigations themselves were "unlawful" and constituted an "impermissible act." **RL-6**, *Caratube II*, ¶¶ 135-136. The Tribunal certainly could imagine a scenario in which the prejudice to a State from narrow provisional measures was sufficiently limited, while the potential harm to the procedural integrity of the arbitration so irreparable, as to render it appropriate to recommend such measures even prior to a full inquiry – and for the express purpose of allowing such an inquiry – into the lawfulness of the State conduct as such.

arbitration – seems to rest on an underlying proposition that the Tribunal does not consider warranted. Specifically, Romania appears to suggest that the reverse situation – in which an investor initiates an ICSID proceeding to complain about [redacted] proceedings already underway in the host State – is somehow inherently abusive or illegitimate.[357] But an investor does not lose its right to protection under a BIT or the ICSID Convention simply because the State measures it challenges as injuring its investment emanate from the State's criminal law authorities rather than from its civil or administrative law authorities. Taking another extreme hypothetical for illustration, if a State were to commence a campaign to arrest all investors of nationality X and to seize their investments to satisfy criminal penalties, it hardly would be an improper use of investment arbitration to challenge this conduct as both arbitrary and discriminatory. The fact that the arbitration necessarily *post-dated* the domestic criminal cases, and that the criminal cases therefore were not launched for the purpose of thwarting the ICSID case as such, would not protect the hypothetical State conduct from review as an alleged assault on protected investment rights. Nor should it *ipso facto* rob an ICSID tribunal of the power to consider recommendation of provisional measures that it deems necessary, urgent and proportionate to protect its ability to hear the case.

254. This does not mean that issues of timing are *irrelevant* to a provisional measures analysis. But the relevance necessarily depends on the particular right that is to be preserved. Where the right is only the preservation of the *status quo*, an inquiry into timing is inherent; the tribunal must first identify the *status quo* in order to determine whether it should be preserved, and the *status quo* may reflect the fact that criminal proceedings already are underway. So too with the right to "non-aggravation" of the dispute between the parties; this presumes an inquiry into the *current state* of that dispute, including appropriate regard

[357] *See, e.g.*, Rejoinder, ¶ 22 (expressing concern that "any dodgy investor under criminal investigation … could pop up a request for arbitration … to seek provisional measures interfering with Sovereign States' legitimate prerogatives"). With respect to this concern, tribunals of course should be sensitive to the possibility that someone properly the subject of criminal proceedings may contrive to bring about an investor-state arbitration on flimsy and spurious grounds. Such tactics would be undertaken at considerable risk, and neither such persons, nor respondent States concerned about such risks, should presume that experienced arbitrators will be naïve as to potential knavery.

for actions already taken. Issues of timing are therefore inevitable considerations in assessing rights related to the *status quo* or the non-aggravation of the dispute.

255. It is less clear, however, why the relevant timing of the [redacted] proceedings and the ICSID arbitration should be material to the separate right to procedural integrity. The fact that the arbitration may have been filed after the domestic [redacted] proceedings, rather than before, does not deprive the investor of its basic right to be heard. Nor does it provide immunity from provisional measures review for all further contemplated acts.

256. There are practical reasons, too, why findings regarding timing and motivation cannot be an absolute prerequisite for consideration of provisional measures. It bears recalling that ICSID tribunals are required by Arbitration Rule 39(2) to resolve provisional measure requests on a "priority" basis, which necessarily means in some form of expedited proceedings. Yet it is not always easy to unscramble the relationship among complex, multi-step events. This case is a good illustration, since certain events in the criminal proceedings clearly predated certain arbitration-related events, while others post-dated those events.[358] This results in both Parties presenting charges and counter-charges regarding timing and motivation, [redacted] In any case involving complex,

[redacted]

[360] Application, ¶ 43; Reply, ¶¶ 88, 104-107; Hearing Transcript, 3 March 2017, 337:3-23, 432:7-20.

multi-step fact patterns, it will be difficult for a tribunal to reach "chicken and egg" conclusions regarding the cause-and-effect of interwoven events. It will be even more difficult to reach conclusions regarding *motivation*, which frequently require close examination of contemporary documents and assessments of the testimony (and credibility) of relevant witnesses. Yet the very notion of an expedited, "priority" proceeding to determine a matter that is claimed to involve urgency *precludes* the full examination of the evidence that may be required for a tribunal to reach complex conclusions regarding issues of motivation.

257. For these reasons, while issues of timing and motivation may be important *factors* where the evidence allows for preliminary conclusions, tribunal findings regarding these subjects cannot be strict *prerequisites* for consideration of provisional measures. Given the core duty of an ICSID tribunal to protect the parties' right to present their respective cases and its own ability to hear their cases and render meaningful relief, a tribunal must consider the practical *consequences* of domestic proceedings continuing in parallel with the arbitration. In exceptional cases where the customary requirements of necessity, urgency and proportionality are shown, provisional measures may be required to preserve those fundamental rights, notwithstanding that certain aspects of the [redacted] proceedings may have predated and been independent of commencement of the arbitration.

C. *Prima Facie* Jurisdiction in This Case

258. With this analytical framework in mind, the Tribunal turns first to the issue of *prima facie* jurisdiction, without which no provisional measures application can proceed.[361]

259. First, it appears undisputed that this case involves a "legal dispute" that arises out of investments, within the meaning of Article 25 of the ICSID Convention.

[361] With respect to the merits, Romania has not suggested that Nova's case is facially frivolous in the sense of being "manifestly without legal merit" as a matter of law. The Tribunal therefore need not engage in this second aspect of a *prima facie* analysis for purposes of addressing the provisional measures application.

260. Second, it is equally undisputed that Romania and the Netherlands are both Contracting States to the ICSID Convention, and that through Article 8(2)(b) of the BIT, both States consented to ICSID arbitration by qualified investors of the other State.

261. Third, it is undisputed that Article 1(b)(ii) of the BIT defines "investors" of the Netherlands as including "legal persons constituted under the law" of that State. It appears further undisputed that Nova is a legal entity constituted under the law of the Netherlands.

262. Notwithstanding these facts, Romania presents three separate objections to jurisdiction. In brief, it argues that the Tribunal lacks jurisdiction *ratione voluntatis* because at the time of the relevant facts, the BIT had been terminated or superseded in respect of the dispute resolution clause by operation of EU law; that the Tribunal lacks jurisdiction *ratione personae* because "this arbitration is about a dispute between Romanians, over a Romanian investment in Romania, arising out of multiple violations of Romanian laws"; and that Nova failed to comply with the BIT's consultation requirement with respect to claims relating to investments other than [redacted][362]

263. As discussed further in the accompanying Decision on Respondent's Request for Bifurcation, the Tribunal in no way prejudges the outcome of any of the objections, which it intends to assess fully and independently.[363] But it is unable to conclude that any of them poses such a facially obvious defect as to render this Tribunal without even *prima facie* jurisdiction to proceed to a provisional measures analysis. In particular, given that Nova's Application is premised on alleged urgent threats to the procedural integrity of this case, the Tribunal must resolve the Application at this juncture, in order to assure itself that both Parties can continue meaningfully to present their respective arguments, including about jurisdiction itself.

D. The Relevant "*Status Quo*"

264. Before discussing each of the measures Nova requests in this case – and in particular, whether any of them is necessary, urgent and proportionate to preserve Nova's rights to

[362] Bifurcation Request, §§ 1, 2 and 3.

[363] Procedural Order No. 6, dated 29 March 2017, at ¶ 52.

procedural integrity or preservation of the *status quo* and non-aggravation of the dispute – the Tribunal considers it useful to set forth, in as neutral a way as possible, what it considers to be the *status quo* as of the date of this Decision. The right to preservation of the *status quo* necessarily "focuses on the situation at the time of the measures,"[364] rather than looking either to the past (the investor's situation as of a prior date) or to the future (the investor's goals with respect to an eventual award). For these reasons it is important to be precise regarding the situation as the Tribunal currently understands it.

265. The Tribunal is aware that in several respects, the situation today is different from that existing on earlier dates related to this arbitration, such as the dates of Nova's two notices of dispute (25 August 2015 and 15 December 2015) and the date of its Request for Arbitration and accompanying Application (21 June 2016). Within days after the Tribunal's constitution on 17 November 2016, it began offering the Parties potential dates for a hearing on the Application, including (at various venues) any two consecutive dates among 11-12, 14-15 or 24-25 January 2017; 4-7, 9-10, 13-17 or 25-28 February 2017; or 1-3 March 2017. For reasons not necessary to recapitulate here, the Parties were not available collectively on any dates prior to 2-3 March 2017, when the hearing ultimately was held in London. This reality of this passage of time necessarily shapes any assessment of the *status quo*.

266. By the time of the provisional measures hearing, the Tribunal considers the following core circumstances to exist. It draws no other conclusions at this stage regarding the facts disputed by the Parties.

267. [redacted]

[364] **CL-30**, *Burlington*, ¶ 61.

[redacted]

268. [redacted]

269. [redacted]

[365] These bail conditions significantly restrict his ability to travel. In addition to monetary security, he has been ordered to surrender his passport, to observe a nightly curfew at his London residence monitored through a leg bracelet, and not to enter into any international airport, port or railway station, or apply for any international travel documents. *See* Application, ¶ 46; Reply, ¶ 124.

[redacted]

270. [redacted]

E. The Measures Requested

271. Bearing in mind the findings above regarding applicable legal standards and the *status quo*, the Tribunal now turns to examination of the particular measures Nova requests pursuant to Article 47 of the ICSID Convention. The Tribunal addresses them in a sequence that appears most logical, which is not necessarily the order in which Nova listed the measures in its Application; in particular, the Tribunal addresses first the requests related to [redacted] For each measure requested, the Tribunal starts with an examination of the asserted grounds for necessity of a recommendation, without which there is little need to engage in discussion of the additional factors of urgency and proportionality.

(1) [redacted]

272. With respect to [redacted], Nova requests a provisional measure recommending that Romania:

[redacted]

[366] Nova's letter to the Tribunal, 9 February 2017, at pp. 5-6.

[367] Hearing Transcript, 3 March 2017, 381:7-20.

273. [redacted]

a. Necessity

274. As a threshold issue, Romania argues that it is not necessary for this Tribunal to consider provisional measures [redacted]

275. The Tribunal declines this invitation simply to defer to other authorities in connection with this issue. Under Article 47 of the ICSID Convention, the Tribunal has an independent duty to examine requests for provisional measures that are claimed to be necessary to preserve rights central to an arbitration, including the right to procedural integrity. The Tribunal would be abdicating this duty to defer to other institutions, outside of the ICSID system, who are not charged with considering whether "the circumstances so require," within the meaning of Article 47. The focus of these other institutions, necessarily, will be on different legal standards and different procedural and substantive rights within their purview, not on the procedural integrity of this ICSID arbitration. Only this Tribunal is empowered to consider the integrity of the ICSID arbitration as a central focus of its review.

276. Turning then to that review, Nova presents two separate categories of alleged necessity for a measure regarding the [redacted]. First, it argues that he is a *critical witness* without whose testimony its ICSID claims could not proceed, and that such testimony could not be obtained effectively by Nova in the first instance, or thereafter examined by Romania and the Tribunal at a merits hearing, [redacted]. Second, separate from [redacted] status as a witness, Nova argues that he is its *key party representative* for this case, and is essential for it to give meaningful instructions to counsel, coordinate the gathering of other evidence (beyond [redacted] own witness statement), obtain outside funding to support its arbitration efforts, and generally direct the formulation and presentation of its

[368] Observations, ¶¶ 38, 211-213.

case. With respect to this role, Nova likewise contends that [redacted] could not effectively perform these functions [redacted].

277. The Tribunal examines these two different roles, that of witness and party representative, separately below.

(i) Necessity in relation to witness role

278. First, with respect to [redacted] role as a witness, the threshold issue is whether he is so central to Nova's case that it could not be presented effectively without him. Nova contends that he "has played and continues to play a central role in The Nova Group and in its Romanian entities and investments," and that as a result of these roles, he has "unique knowledge" about the issues Nova intends to present in this case,[369] which concern various State acts against Nova's investments [redacted] and otherwise in violation of the BIT. Nova emphasizes various positions that [redacted] has held with [redacted].[370] Because he has both "personal knowledge and recollection of key events relevant to this dispute and an acute understanding of technical and actuarial issues involved" in the dispute over [redacted] he is a "critical witness in this case."[371]

279. Romania, by contrast, contends that Nova "has failed to identify, let alone demonstrate, how [redacted]'s testimony would be relevant and material for the resolution of the dispute, and moreover irreplaceable, as there were certainly other high ranking officers involved, probably even more closely than [redacted], in the events on which Claimant relies in its Request for Arbitration."[372] According to Romania, "[h]is testimony in this arbitration would thus bring no added value to Claimant's

[369] Reply, ¶ 142.
[370] Reply, ¶¶ 143-144.
[371] Reply, ¶ 145.
[372] Observations, ¶ 194.4.

case."[373] Romania contends that during [redacted]'s life he (and not his son) was the central figure coordinating Nova's investments in Romania, and that [redacted] was largely disengaged, spending substantial time in Monaco and elsewhere in Europe and primarily pursuing interests in literature and the arts rather than the Romanian businesses.[374]

280. [redacted]

[redacted]

[374] Hearing Transcript, 2 March 2017, 43:18-44:1; Hearing Transcript, 3 March 2017, 402:1-10.

[375] [redacted]

[376] Hearing Transcript, 2 March 2017, 221:18-222:2.

[377] Hearing Transcript, 2 March 2017, 90:4-7, 91:22-92:18.

[redacted]

281. [redacted]

282. [redacted]

[378] Hearing Transcript, 2 March 2017, 220:25-221:21, 222:8-11.

[379] Hearing Transcript, 2 March 2017, 222:12-224:8.

[380] Hearing Transcript, 2 March 2017, 112:19-113:17.

[381] Hearing Transcript, 2 March 2017, 166:12-17.

[382] Hearing Transcript, 2 March 2017, 220:5-24.

[383] *See, e.g.*, **C-36**, Application for the Urgent Temporary Suspension of the Implementation of the Increase of [redacted]'s Company Capital, 11 June 2015; **C-51,** Letter from [redacted] to [redacted] re: Settlement of [redacted]'s debts to [redacted] 5 September 2014.

[redacted]

283. [redacted]

[384] **C-137**, Written Resolution of the Management Board of Nova Group Investments, B.V., 23 June 2014.

[385] Hearing Transcript, 2 March 2017, 253:5-14, 259:4-260:13, 269:1-24.

[386] Hearing Transcript, 2 March 2017, 196:16-25, 197:20-199:8 (insisting that he "would have known" if [redacted] was owned by [redacted] and that he was certain it was not, but not volunteering that he himself had any economic interest in the company).

[387] Hearing Transcript, 3 March 2017, 299:6-300:8.

[388] Observations, Section I.1 (emphasis added).

[389] *See, e.g.*, Hearing Transcript, 2 March 2017, 61:4-17 (emphasis added).

[390] *See, e.g.*, Hearing Transcript, 2 March 2017, 61:25-62:2 (emphasis added).

"[redacted]

284. [redacted]

[391] Observations ¶¶ 25, 87 (emphasis added).

[392] Observations, ¶ 104 (emphasis added).

[393] **C-79**, The DNA's Summons on [redacted]'s attendance of the DNA questioning, 11 December 2015, p. 23.

[394] **C-133**, DNA Application for Preventative Arrest of [redacted], 25 March 2016 (emphasis added). The document also refers to the group of companies "managed and coordinated" by both [redacted] and [redacted]. *Id.*

[redacted]

285. [redacted]

286. In other words, [redacted] the Tribunal considers it evident that he is a material and necessary witness in this case. This conclusion is underscored by [redacted], who undoubtedly would have had greater knowledge of the underlying events (at least those preceding his incarceration), but whom Nova apparently did not interview in connection with a witness statement [redacted] Nova claims this is because it requested but did not receive from Romania sufficient assurances regarding the confidentiality of his discussions with Nova's arbitration counsel;[396] Romania answers that no individualized assurances were required because its legal framework already assures confidentiality for attorney-client communications.[397] The Tribunal need not resolve this issue at present. The fact remains that no testimony

[redacted]

[396] Reply, ¶¶ 199-205.

[397] Observations, ¶ 167; Rejoinder, ¶ 87.

from [redacted] was secured, so the Tribunal will not have the benefit of his knowledge of the underlying events.

287. In these circumstances, there appears to be no one other than [redacted] who could testify regarding the full range of Nova's investments in Romania and the manner in which they were impacted by the particular State action that Nova challenges in this case. Given that Nova apparently no longer has access to [redacted]'s company records,[398] the role of witnesses may be particularly important in this case. While the Tribunal does not exclude that individuals other than [redacted] may have important testimony to provide in connection with their roles in [redacted] or the other Nova companies, no specific individual has been suggested as having overarching knowledge of Nova's activities across the range of investments potentially at issue in this case. Indeed, as Nova itself argues, Romania has not attempted to pursue any other high-level director, manager or employee in connection with their involvement in the underlying events.[399]

288. To the extent Romania may have intended originally to suggest that [redacted] – [redacted], [redacted] might be an alternate material witness to [redacted],[400] this possibility was clearly excluded by the evidence at the hearing. [redacted]

[398] Reply, ¶ 150.

[399] Reply, ¶ 208.

[redacted]

[redacted]

289. For these reasons, the Tribunal concludes that [redacted]'s availability as a witness is necessary for Nova to present its case in any meaningful way. Accordingly, the analysis next turns to whether his testimony could be secured without the provisional measures Nova requests [redacted] Given the importance of this issue to all concerned – as well as the criticism of the *Hydro* tribunal for recommending provisional measures regarding [redacted], without explaining its reasoning to a greater degree[403] – the Tribunal recounts the issues here in some detail.

290. [redacted]

[redacted]

[404] Observations, ¶¶ 201.2, 202.

[405] Hearing Transcript, 3 March 2017, 415:12-417:12, 444:18-23.

[406] Hearing Transcript, 3 March 2017, 444:23-445:2.

[redacted]

[redacted]

291. [redacted]

292. [redacted]

[408] **CL-63**, *PNG*, ¶ 109 (finding it sufficient at the provisional measures stage to assess material risks and not only events that are certain to occur).

[409] Application, ¶ 82.

[410] Reply, ¶ 173.

[411] Hearing Transcript, 2 March 2017, 242:11-243:4, 246:6-25.

[412] Hearing Transcript, 2 March 2017, 247:21-249:1; *see also* [redacted] Statement, ¶ 91.

[redacted]

293. [redacted]

294. [redacted]

[413] Hearing Transcript, 2 March 2017, 248:1-5.

[414] Hearing Transcript, 2 March 2017, 249:2-10; Hearing Transcript, 3 March 2017, 407:13-21.

[415] Hearing Transcript, 3 March 2017, 407:22-24.

[416] This issue might be further informed by the medical records that Nova has sought from Romania regarding the period of [redacted]'s incarceration. *See* Nova's letter to Romania, 9 February 2017 and Nova's letter to the Tribunal, 28 February 2017. Romania has opposed that request as both premature and in any event unfounded. *See* Romania's letter to the Tribunal, 10 March 2017. Given that the request was not presented by Nova as material to the Application, and the Tribunal in any event does not rely on this episode for its findings, the Tribunal defers ruling on the request until a further procedural order.

[redacted]

295. [redacted]

[417] Reply, ¶ 154; Hearing Transcript, 3 March 2017, 421:14-24.

[418] Observations, ¶ 167; Rejoinder, ¶ 85.1.

[419] **C-114**, Romania's letter to Nova, 20 October 2016.

[420] Hearing Transcript, 3 March 2017, 406:18-24, 441:18-442:24, 448:6-450:11.

[421] Application, ¶ 82.

[422] **C-160**, Council of Europe, *Report on the Visit to Romania made by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 24 September 2015, p. 19; [redacted] Statement, ¶ 39; Reply, ¶¶ 202-203; Hearing Transcript, 3 March 2017, 365:16-22.

[redacted]

296. [redacted]

297. [redacted]

[423] Reply, ¶¶ 7, 203-205.

[424] Rejoinder, ¶¶ 85, 87, 140

[425] [redacted]

[426] Hearing Transcript, 2 March 2017, 271:18-272:10.

[427] Observations, ¶¶ 170, 194; Rejoinder, ¶ 92; Hearing Transcript, 3 March 2017, 438:1-2.

[redacted]

298. [redacted]

299. [redacted]

300. [redacted]

[428] Hearing Transcript, 3 March 2017, 438:4-6; *see also id.* 420:9-16.

[429] The Tribunal expresses no view on whether an investor's agreement would be required to sit in the territory of the respondent State. There is no need to analyze the question here, given the Tribunal's finding that such an arrangement would not be appropriate in the circumstances of this case.

[redacted]

301. [redacted]

(ii) Necessity in relation to party representative role

302. As noted at the outset, Nova's Application rests not only on [redacted] importance as a witness, but also on the assertion that he is the only one who could meaningfully instruct counsel and direct them regarding the development of its case.[431]

303. For assessing this contention, the Tribunal need not place any weight on Nova's alleged power of attorney – [redacted]

[430] Hearing Transcript, 3 March 2017, 420:16-18.

[431] *See, e.g.*, Reply, ¶ 136; Hearing Transcript, 2 March 2017, 37:13-19 (contending that "[h]e is the only person with background knowledge, ability and capacity to represent Nova. He can facilitate the collection of evidence, identify the best witnesses, provide context and information. Only he has now the requisite knowledge to manage the arbitration effectively in the best interests of Nova.").

[redacted] Rather, the Tribunal focuses on other evidence which shows that as a *practical* matter, [redacted] in reality has been the person performing these functions, and is the only person realistically positioned to continue to do so through final hearings in this case.

304. For example, the evidence shows that it was [redacted] who conducted a so-called "beauty contest" with potential law firms and negotiated terms with the ones selected,[433] and who handled negotiations for Nova with potential outside funders.[434] Whether or not [redacted] had a formal written power of attorney when he undertook these functions, the fact remains that he is the individual who *de facto* has been directing Nova in the initial steps of this arbitration.

305. Moreover, the function of party representative does not cease once outside counsel is hired and potential funding mechanisms assured. In any complicated case, counsel requires the assistance of someone on behalf of the "client" who can direct it to potential sources of evidence, reach out to potential witnesses to ask them to cooperate with counsel to prepare written testimony, make judgment calls regarding strategy and tactics, and more generally ensure that outside counsel are proceeding in accordance with the client's instructions. These functions, important in any case, are particularly critical given the realities of this one. Among other things, the fact that [redacted] and accordingly its files are now under the control of a liquidator may make it particularly challenging for Nova to assemble documentary records, which puts a particular premium on a knowledgeable client representative who can direct counsel to other sources of evidence. The same is at least as true regarding identifying potential witnesses who are both informed and willing to cooperate in Nova's case, particularly given the climate in Romania associated with the various criminal proceedings. Only a client representative who has a prior relationship

[redacted]

[433] Hearing Transcript, 2 March 2017, 145:20-24, 146:10-14; Hearing Transcript, 3 March 2017, 285:14-20.

[434] Hearing Transcript, 3 March 2017, 293:9-13.

with potential witnesses is likely to be able to assist outside counsel in making the necessary outreach.

306. The Tribunal accepts that [redacted] has been performing these additional functions since the inception of the case,[435] and has the unique capacity to continue to perform them on Nova's behalf, [redacted]. During his examination, [redacted] was able to identify easily and confidently various individuals with whom he had worked (or whom he had a role in hiring) at [redacted] and in connection with Nova's other Romanian investments.[436] There is no credible suggestion that anyone else associated with Nova has a similar set of relationships with the relevant personnel in Romania, so as to be able to assist counsel in presenting Nova's case if [redacted] could not do so.[437] While Romania previously suggested that [redacted] could instruct counsel,[438] the impossibility of his meaningfully doing so was made clear at the recent hearing, [redacted][439] [redacted].

[redacted]

[436] Hearing Transcript, 2 March 2017, 222:12-224:8.

[437] [redacted]

[438] Observations, ¶ 194; Rejoinder, ¶¶ 134-135.

[439] Hearing Transcript, 3 March 2017, 397:3-6.

[440] Hearing Transcript, 2 March 2017, 84:20-22, 85:9-12, 145:22-24; Hearing Transcript, 3 March 2017, 293:9-13.

307. Given all of the above, the question remaining is not whether [redacted] is critical to Nova's ability to prosecute its case; the Tribunal finds that he is. [redacted]

308. For these reasons, the Tribunal concludes that the first factor under a provisional measures analysis, "*necessity*," is met regarding Nova's request for a measure recommending that Romania (a) [redacted], and (b) [redacted]

309. By contrast, Nova has not demonstrated any compelling need for the additional measure it requests under this general heading, namely that Romania (a) [redacted]

[redacted] and (b) [redacted] The Tribunal recalls its threshold observation that provisional measure recommendations under Article 47 should not stray beyond the minimum necessary to meet the objectives of the Convention. [redacted]. The Tribunal sees no present need for such a recommendation, and therefore omits it from its further discussion of the remaining factors for provisional measures, namely *urgency* and *proportionality*,

b. Urgency

310. The Tribunal also finds that the requirement of urgency is met [redacted] in the sense that the recommendation is needed prior to issuance of an award. [redacted]

[441] Reply, ¶ 156.

[redacted]

311. [redacted] However, that time certainly would not extend beyond the period the Parties have requested here to get to a hearing on the merits, now scheduled for March of 2019. As discussed further below, the Tribunal has pressed the Parties more than once, including at the First Session and again at the hearing on the Application, to shorten the time requested to complete this case, but both Parties have insisted that this case requires a fairly lengthy period of preparation. Romania in particular maintained, as recently as 3 March 2017, that it required all of the time it originally had requested, and could not agree to any shortening of the arbitration schedule.[443] In these circumstances it is apparent that a recommendation regarding extradition will be needed long prior to issuance of an award in this case.

312. [redacted]

313. In short, the Tribunal concludes that a recommendation now is consistent both with the requirement of urgency, and with the principle the Tribunal enunciated at the beginning of this decision, namely that tribunals should recommend only the *minimum steps necessary* to meet the objectives set out in the Convention. Deferring the issue now, and returning to

[443] Hearing Transcript, 3 March 2017, 414:5-24.

it later when the situation potentially could be far more complicated, would not be consistent with that principle.

c. Proportionality

314. The Tribunal is mindful of the importance of weighing the prejudice to Romania from a recommendation of any provisional measure against the prejudice to Nova from not recommending that measure. To this end, it asked Romania at the hearing to address [redacted] In its response, taken together with its prior written briefing, Romania has identified four basic categories of harm, which the Tribunal addresses *seriatim* below.

315. First and foremost, Romania argues that a provisional measure of this nature would show disrespect for its sovereign right to proceed with what it considers to be fully legitimate and well-justified [redacted] proceedings.[445] Connected to this argument is the suggestion that recommending any measure would reflect doubt about the legitimacy of the domestic proceedings, and therefore would signal that the Tribunal had prejudged the merits of Nova's claim that Romania has improperly pursued [redacted] which Romania hotly contests.[446] The Tribunal does not accept these objections. First, as noted above, any recommendation of provisional measures against a State by definition (and to some extent) intrudes on sovereign discretion, but Article 47 contemplates that possibility, and Contracting States consent to that possibility in advance. The mere fact that a particular recommendation would impose on sovereign discretion thus cannot be sufficient basis for finding the measure disproportionate. As for the concern about prejudging, the Tribunal emphasizes that it has made no findings (nor even any preliminary assessment) of the legitimacy or illegitimacy [redacted] Its concern is

[444] Hearing Transcript, 2 March 2017, 273:1-9.

[445] Hearing Transcript, 3 March 2017, 409:24-410:13 (suggesting that the primary impact of a recommendation by the Tribunal is "that you would do a big pooh-pooh of the DNA, ..., of the judgment … of the sovereign state, a big, huge, pooh-pooh").

[446] Observations, ¶ 205.

solely to protect the ability of both Parties to present meaningful arguments and evidence on this issue, as explained at length above.

316. Second, Romania argues that [redacted]

317. [redacted]

[447] Hearing Transcript, 3 March 2017, 409:24-25, 410:10.

[redacted]

[450] Hearing Transcript, 3 March 2017, 450:21-452:3.

[redacted]

318. Finally, while [redacted] that would be occasioned by a provisional measure in this case certainly would be longer than that in *Lao Holdings* – where the application was heard shortly before final hearings[452] – that reality must be balanced against the Parties' shared responsibility for the length of these proceedings. The Application was filed in June 2016 along the Request for Arbitration, but the Tribunal was not constituted for five months thereafter, until November 2016. As noted in Section III, since that time the Tribunal has pressed the Parties repeatedly – including both generally during the First Session,[453] and again at the hearing on the Application in the specific context of a possible recommendation regarding extradition[454] – to work towards a tighter procedural schedule that would enable the case to move to merits hearings much earlier than March 2019. During the First Session, both Parties insisted that a longer than usual schedule was needed, both because the case was complex and because of various scheduling constraints, specifically including certain other commitments of Romania's counsel.[455] More recently, during the hearing on the Application, Nova indicated some willingness to accept shorter deadlines contingent on Romania's reciprocal agreement,[456] but Romania insisted that it required all of the time it originally had requested, and could not agree to any shortening of the schedule.[457] In these circumstances, the Tribunal is not inclined to weigh too heavily Romania's complaints about the length of disruption that would be created by a provisional measure tied to the conclusion of this ICSID arbitration.

[451] Reply, ¶ 134.

[452] **CL-34**, *Lao Holdings*, ¶¶ 72-73 (recommending that the State defer a criminal investigation until after an upcoming ICSID hearing, because the investigation "strikes directly at the people and issues involved in the arbitration" and there had been "no sufficient evidence of necessity or urgency to establish that" deferring the investigation "until the witnesses are heard at the arbitration and an award is made" would prejudice the State "in any way proportionate to the potential prejudice to the Claimant" of not doing so).

[453] First Session, Audio Recording, 38:25-1:10:09.

[454] Hearing Transcript, 2 March 2017, 273:10-274:13 (specifically posing the question in the context of a possible recommendation for withdrawal of the extradition request).

[455] First Session, Audio Recording, 39:35-45:58 (Nova); 46:39-52:44, 55:10-56:26 and 58:20-58:54 (Romania).

[456] Hearing Transcript, 3 March 2017, 379:8-380:23.

[457] Hearing Transcript, 3 March 2017, 414:5-24.

319. The third category of prejudice Romania presents is that [redacted]

320. Romania's last stated concern relates to [redacted]

[redacted]

[460] Reply, ¶¶ 127-128; Hearing Transcript, 2 March 2017, 238:20-240:15.

[461] Observations, ¶ 203.1; Rejoinder, ¶ 158; Hearing Transcript, 3 March 2017, 415:1-11.

[redacted]

321. During the hearing, the Tribunal therefore explored, both with Nova and with [redacted] personally under oath, the possibility of specific *undertakings* to the Tribunal [redacted]:

a. [redacted]

b. [redacted]

[462] Hearing Transcript, 3 March 2017, 376:1-379:1, 423:21-425:5. 453:17-455:18.

[463] [redacted]

[464] [redacted]

c. [redacted]

d. [redacted]

[redacted]

322. The Tribunal considers these to be appropriate safeguards, and will work with the Parties promptly, following this Decision, to put the relevant mechanisms in place. The Tribunal adds to this list a *sixth* requirement [redacted]

a. [redacted]

b. [redacted]

323. [redacted] The Tribunal also may consider any other request for

[redacted]

[468] Hearing Transcript, 3 March 2017, 424:6-14.

appropriate recommendations under Article 47, or appropriate other sanctions within its inherent powers (including but not limited to allocation of costs and/or the taking of adverse inferences). The Tribunal cannot underscore enough the seriousness with which it expects both Nova and [redacted] to abide by the undertakings and mechanisms discussed herein, in recognition of the Tribunal's decision to recommend this provisional measure. The strict conditions attached to this recommendation are an integral and necessary part of the Tribunal's conclusion that Nova's need for the recommendation outweighs any potential harm alleged by Romania from making it.

d. Conclusion

324. For the reasons stated above, the Tribunal grants the requested measure insofar as it seeks a recommendation that Romania (a) [redacted] and (b) [redacted]. These recommendations are conditional upon [redacted] strict compliance with the undertakings and mechanisms outlined above, [redacted]

325. By contrast, the Tribunal denies the requested measure insofar as it seeks a recommendation that Romania (a) [redacted], and (b) [redacted]

(2) [redacted]

326. Nova requests that the Tribunal order Romania to:

[redacted]

[redacted]

327. The Tribunal addresses this request on the basis both of the *status quo* [redacted] and on the assumption that Romania will comply with the Tribunal's recommendation, [redacted]

328. This is a very broad request that extends far beyond securing [redacted] personal ability to participate in this case from outside Romania. [redacted]. It also would effect a significant *change* to the *status quo*, [redacted] This is quite different from the prior request which can be seen as simply *preserving* the *status quo*, [redacted] Given the very broad scope of this requested measure, as well as the corresponding burden on Romania that would factor into any analysis of proportionality, the Tribunal would expect only the most exceptional circumstances of necessity and urgency to be able to outweigh such burdens and thereby justify a recommendation of this nature.

329. In this case, Nova alleges several distinct reasons why the measure purportedly is necessary. [redacted]

[redacted]

330. [redacted]

331. [redacted]

[469] Application, ¶ 101.

[470] Of course, the absence of due process in domestic proceedings may become relevant in ICSID proceedings in connection with substantive allegations of BIT violations. It is premature for the Tribunal to consider any such allegations in this case.

[471] Application, ¶ 101.

[redacted]

332. [redacted]

[472] Application, ¶¶ 84, 106; Reply, ¶ 246.

[473] Reply, ¶¶ 175-180; Hearing Transcript, 2 March 2017, 127:3-137:8, 225:3-227:4, 228:13-232:24, 234:23-238:18.

[474] Reply, ¶ 246.

[475] [redacted]

[476] [redacted], ¶ 37 (emphasis added).

[redacted]

333. The Tribunal does not discount the possibility that witnesses or lawyers in Romania may be reluctant to assist Nova in this case, and it certainly would take very seriously any specific allegations in future regarding witness intimidation or harassment connected to these ICSID proceedings. But based on the current record, Nova has not yet demonstrated this to be the case.[477] [redacted]

334. [redacted]

335. Nova also contends that any continuation of the [redacted] proceedings would "allow Romania to obtain documentary evidence in an abusive and unfair manner."[479] [redacted]

[477] *See generally* **RL-21**, *Churchill* PO14, ¶¶ 72, 79 (declining recommendations regarding criminal proceedings, absent demonstration of "concrete instances of intimidation or harassment" with respect to critical witnesses); **CL-63**, *PNG*, ¶¶ 139-140, 145 (same).

[478] Application, ¶ 85.

[479] Application, ¶ 106.

[redacted] Nova has not explained why the Tribunal could not sufficiently address later, through evidentiary rulings, any potential concerns about the use in this case of specific materials that allegedly were obtained through improper means. Certainly, the possibility that the issue might arise in future does not justify the sweeping recommendation Nova seeks now, for a wholesale suspension of the domestic criminal proceedings.

336. Nova's final set of arguments is that if [redacted] proceed in Romania, they "risk terminating Nova's commercial presence in Romania before the Tribunal has had a chance to consider Nova's claims," resulting in Romania's "present[ing] the Tribunal with a *fait* accompli" that "will have definitively shut down Nova's investments."[480] [redacted]

[480] Application, ¶ 92.

[481] Hearing Transcript, 3 March 2017, 373:4-15.

[482] Application, ¶ 93.

[483] Hearing Transcript, 3 March 2017, 373:15-20.

[redacted]

337. However, the Tribunal is not persuaded that [redacted] Even in the most extreme circumstances where foreign investments are expropriated entirely by States, ICSID tribunals are capable of fashioning meaningful relief in the form of monetary damages. Nova's response to this proposition at the hearing was to emphasize that the calculation of such damages can be complex, and to suggest that the Tribunal act now to forestall such additional complexities.[485] The Tribunal accepts the point about the complexity of certain quantification exercises, but does not equate complexity with an inability to fashion meaningful relief.

338. It is true that in addition to monetary compensation, Nova also seeks certain non-monetary orders as part of its final relief, [redacted] As discussed above, it is premature for the Tribunal to determine whether as a matter of law, an ICSID tribunal has authority to enter orders of this nature at the conclusion of a case, particularly where the case does not involve contractual undertakings and therefore the issue of specific performance, but simply remedies for alleged violations of a BIT. For present purposes, it is sufficient to note that Nova has not yet demonstrated as a matter of law that this is a remedy to which it could be entitled, much less that monetary compensation could not be a reasonable proxy for such entitlement. In these circumstances it has not shown that a provisional measure is necessary now, to preserve Nova's ability later to try to persuade the Tribunal to grant non-monetary relief, against the risk that its assets in Romania in the interim might be seized while this case remains pending.

[484] Application, ¶ 94.

[485] Hearing Transcript, 3 March 2017, 383:20-384:18, 456:6-457:17.

[486] Request for Arbitration, ¶ 223(g), (h) and (i).

339. For these reasons, the Tribunal finds that Nova has not sustained its burden of demonstrating that the provisional measures requested in connection with the [redacted] proceedings are either necessary or urgent (much less proportional), and therefore that the "circumstances so require" a recommendation under Article 47 of the ICSID Convention.

(3) [redacted]

340. Nova next requests that the Tribunal order Romania to:

[redacted]

341. [redacted]

342. [redacted]

[487] Hearing Transcript, 3 March 2017, 365:8-11.

[488] Nova's letter to the Tribunal, 21 December 2016.

[489] Observations, ¶ 227.

[490] Romania's Letter to the Tribunal, 15 January 2017.

343. The Tribunal has no reason to doubt that Romania has complied and will comply with its categorical assurances regarding *intentional* interception of privileged communications, and therefore makes no recommendations in that regard. The Tribunal expects the same assurances to be honoured with respect to intentional interception of non-privileged but confidential communications related to arbitration case strategy, such as discussions by Nova representatives with potential funders, witnesses and experts. The Tribunal relies on the good faith of Romania and its counsel to refrain (as they say has been the case all along) from any deliberate efforts to intercept such material.

344. [redacted] This is a risk in any ongoing criminal investigation, and the Tribunal in no way distinguishes Romania from any other State. The Tribunal has no power to regulate either the manner in which general investigations are conducted for purposes of domestic [redacted] proceedings, or the manner in which information gathered through such methods thereafter may be used in the conduct of domestic cases. However, in order to protect the integrity of *these* proceedings, the Tribunal considers it appropriate to recommend that in the event any privileged or confidential communications regarding this arbitration are intercepted even inadvertently, they not be shared either with Romania's arbitration counsel, or with those Romanian officials directly in charge of overseeing the State's participation in the ICSID case. ICSID tribunals have made similar recommendations in other cases involving parallel ICSID proceedings and domestic [redacted] investigations,[491] and the Tribunal does so here simply

[491] **CL-56**, *Libananco*, ¶ 82 (quoting a prior order that stated, at ¶ 1.2, that "[t]he Tribunal recognizes that the Respondent may in the legitimate exercise of its sovereign powers conduct investigations into suspected criminal activities in Turkey. The Respondent must, however, ensure that no information or documents coming to the knowledge or into the possession of its criminal investigation authorities shall be made available to any person having any role in the defence of this arbitration"); *see also* **RL-7**, *EuroGas*, ¶¶ 95-96 (acknowledging that certain documents were "part of the criminal proceedings, in relation to which the Tribunal has not made any order," but noting the Respondent's representation "that the Slovak Ministry of Finance has not read the seized documents" and its undertaking "that it will not read or produce the copies of the seized documents in the arbitration proceedings").

as a precautionary device, without casting any aspersions whatsoever on Romania or its officials or representatives.

(4) [redacted]

345. Nova also requests that the Tribunal order Romania to:

[redacted]

346. [redacted]

347. [redacted]

[492] Hearing Transcript, 3 March 2017, 381:7-20.

[493] Reply, ¶ 220.

[494] Hearing Transcript, 3 March 2017 381:21-25.

However, the Tribunal has concluded that the inquiry under Article 47 "focuses on the situation at the time of the measures,"[495] *i.e.*, the time at which the Tribunal is asked to act, not the time an investor first complains of earlier State conduct. While the sending of a notice of dispute is an important requirement under the BIT, the mere transmission of this notice does not *ipso facto* entitle an investor to a standstill of events in the host State.[496] The Tribunal therefore approaches its analysis on the assumption that [redacted] is itself *part* of the *status quo* that predated the Request for Arbitration and the Tribunal's constitution,[497] and that the requested provisional measure would alter the *status quo* rather than preserve it.

348. The question then becomes whether such an alteration of the *status quo* is required by the circumstances to preserve *other* important rights recognized within the framework of Article 47. [redacted] In these circumstances, the Tribunal is unable to conclude that [redacted]

[495] **CL-30**, *Burlington*, ¶ 61.

[496] The Tribunal makes no findings at this point about whether further notices of dispute are required to address events transpiring after an initial notice of dispute, an issue that is raised by one of Romania's jurisdictional objections. That issue will be resolved in the course of these proceedings.

[497] As noted above, the Request for Arbitration was filed on 21 June 2016, and the Tribunal was constituted on 17 November 2016.

[498] Application, ¶ 86.

[499] Reply, ¶ 240.

[500] Hearing Transcript, 2 March 2017, 177:1-178:17.

[redacted] poses an imminent threat to Nova's ability to move forward with the arbitration, and hence to the procedural integrity of this case.

349. [redacted]

[redacted]

350. [redacted]

351. The Tribunal acknowledges Nova's concern that [redacted] may be imposing significant harm on the value of its investments in Romania. The real question is whether such harm rises to the level necessary to justify a provisional measure, prior to any findings on the merits about whether the Order may be justified as Romania contends. For the reasons already stated, however, the Tribunal does not accept Nova's contention that the harm is irreparable because of the complexity and uncertainty of quantifying damages. The complexity of damages calculations does not render harm "unquantifiable," as Nova essentially contends.[505] [redacted]

[501] Request for Arbitration, ¶ 108; Application, ¶ 55; *see also* Reply, ¶ 235.
[502] Application, ¶ 54; Reply, ¶¶ 233-234.
[503] Reply, ¶¶ 236-238.
[504] Reply, ¶ 238.
[505] Hearing Transcript, 3 March 2017, 383:20-384:18, 456:6-457:17.

[redacted]

352. [redacted].

More fundamentally, as discussed above, Nova has not yet demonstrated that an ICSID tribunal has the authority in a BIT case to order a sovereign State essentially to permit a particular investor to continue operations, as opposed to awarding monetary compensation for the loss or impairment of such operations. The issue in the treaty context is distinct from that in a contract case where specific performance of contract obligations may be sought. The Tribunal does not exclude the possibility that Nova in due course may make such a showing, but on the present record it has not done so. As a result, Nova has not met its burden of demonstrating that the provisional measure requested is the only way to avoid irreparable injury now, from a potential impairment later in the effectiveness of a non-monetary remedy to which Nova claims it eventually may be entitled.[508]

[506] Observations, ¶ 225; *see also id.*, ¶ 39 ("the large bulk of the alleged harm that the provisional measures … seek to prevent would be perfectly capable of being adequately compensated by way of a monetary award").

[redacted]

[508] *See generally* **CL-52**, *Hydro S.r.l. & Others v. Republic of Albania*, ICSID Case No. ARB/15/28, Decision on Claimant's Request for a Partial Award and Respondent's Application for Revocation or Modification of the Order

[redacted]

353. For these reasons, the Tribunal denies Nova's request [redacted]. The Tribunal likewise denies Nova's alternative request [redacted]

354. Finally, the Tribunal denies Nova's request in the last part of the listed measure, for a [redacted] This is an extraordinarily broad request, which Nova has not justified within the parameters of the required test for provisional measures under Article 47 of the ICSID Convention.

on Provisional Measures, 1 September 2016, ¶ 4.26 (declining any recommendation regarding seized assets and frozen bank accounts, because "the Tribunal is presently of the view that any loss or damage to its Assets can be adequately compensated by an award of damages"); **RL-13**, *Plama*, ¶¶ 42, 47 (noting that "[e]ven assuming the worst case from Claimant's point of view, i.e., that [redacted] is liquidated and its assets distributed to creditors …, Claimant in this arbitration … will still be able to pursue its ECT claims for damages against Bulgaria," although noting in that regard that "Claimant has not sought restitution or any other relief … which would permit it to continue to operate the [redacted] refinery").

[509] Observations, ¶ 221.3; Rejoinder, ¶ 198.1.

[510] Rejoinder, ¶ 198.1.

355. Because the Tribunal finds that Nova has not met its burden of demonstrating necessity and urgency for the requested measures, the Tribunal need not address the additional requirement of proportionality. [redacted]

(5) [redacted]

356. Nova requests that the Tribunal order Romania to:

[redacted]

….

357. The first of these two requests would have the Tribunal recommend suspension of any pending actions in Romania, and the non-initiation of any future actions, to "establish or collect on any alleged liability to Romania disputed in this arbitration." Almost by definition, the notion of "alleged liability" refers to monetary obligations, and therefore any imposition of such liability (or collection upon) could be remedied in due course by a monetary award. Insofar as the request relates to potential future events, it is also far too broad.[513]

[511] Observations, ¶¶ 103, 203.2, 219; Rejoinder, ¶¶ 59, 197.

[512] Rejoinder, ¶¶ 191, 198.3.

[513] *See generally* **CL-35**, *Hydro*, ¶¶ 4.1(d), 4.4 (denying a request for a recommendation that the State "suspend or refrain from bringing any actions … to establish or collect on any alleged … liability," because the measure was both

358. Nova's second request, for a recommendation that [redacted], is likewise far too broad.[514] [redacted] While that no doubt could be true, it does not obviate the need to demonstrate, with some specificity, that there is a particular reason to fear particular action that is likely to have a particular result, thereby imperiling rights protected by the ICSID Convention. [redacted] In these circumstances, Nova has not shown that the "circumstances … require" such a sweeping recommendation, as it must do to merit a recommendation under Article 47 of the ICSID Convention.

359. Finally, Nova's catch-all request, [redacted] fails for lack of necessity as well as basic workability. The recommendation would provide no notice to Romania regarding what actions it is or is not permitted to undertake. For the same reason, the recommendation would provide no basis for the Tribunal later to evaluate compliance. Certainly, the Tribunal reminds *both* Parties of their general duty not to aggravate this dispute or jeopardize its procedural integrity. But a recommendation for provisional measures goes far beyond such a general reminder, and should be issued (a) only in specific circumstances, where (b) specific cause has been shown that a particular measure meets the requirements of necessity, urgency and proportionality, and (c) the measure can be worded in such a way as to provide specific direction and guidance regarding the conduct

"very broad" and "premature because it is directed at actions not yet initiated and which may or may not be initiated at some time in the future").

[514] *See generally* **CL-35**, *Hydro*, ¶¶ 4.1(e), 4.5 (denying a request for a recommendation that the State "refrain from initiating any other proceedings, criminal or otherwise, directly or indirectly related to the present arbitration," because the measure "is altogether too broad and indeed uncertain in its terms").

[515] Reply, ¶ 242.

necessary to abide by the recommendation. That is not the case with this requested measure.[516]

(6) Preservation and Restoration of Documents

360. Finally, Nova requests that the Tribunal order Romania to:

> take all necessary steps to:
>
> i) [redacted]
>
> [redacted]

361. The Tribunal first addresses the second component [redacted]) because Nova relies on the asserted loss of such data as one of the bases for its concomitant request for a general document preservation order. [redacted]

[516] *See generally* **CL-35**, *Hydro*, ¶¶ 4.1(e), 4.5 (denying a request for a recommendation that the State "refrain from … any other course of action that may aggravate the dispute, jeopardize the procedure integrity of this arbitration, and/or violate the Respondent's obligation to respect the exclusive resolution of its dispute with the Claimants in this forum," because "[t]he terminology is too broad, vague and uncertain in scope and is in any event premature"); **CL-63**, *PNG*, ¶¶ 150-152 (denying a request for a "general order for the preservation of the *status quo* and non-aggravation of the dispute," because the claimant "has not shown either urgency or the necessity for such an open-ended order," "the breadth of the Claimant's request precludes the Tribunal from assessing the risk of serious harm … or establishing whether there is necessity and urgency," and "the Claimant has not articulated the character of the *status quo* that assertedly needs protection under this request," such that the measure "would therefore be extremely difficult to implement in practice, which is "inconsistent with the purpose of the provisional measures or Article 47 of the ICSID Convention.").

[517] Reply, ¶ 254(b); *see also id.*, ¶¶ 257-263.

[redacted] In these circumstances no recommendation by the Tribunal is required to address [redacted]

362. [redacted], Nova expresses concern [redacted][520] [redacted] The Tribunal is not in a position to reach any conclusions about the reliability of the article or its underlying allegations. However, it does rely on Romania's express representation in this case that "Romania intends to undertake all reasonable measures necessary to preserve and/or recover any such data, so as to be able to comply with its obligation to produce any relevant and material documents" that it may be ordered to produce at the document production phase.[523] Romania emphasizes that it is "in Romania's interest … to ensure that it has

[518] Rejoinder, ¶ 229.

[519] Rejoinder, ¶ 237, *citing* **R-48** [redacted]

[520] Reply, ¶ 254(a).

[redacted]

[522] Rejoinder, ¶ 232.

[523] Rejoinder, ¶ 238.

undertaken all reasonable measures to recover any documents presumed by law to be in its possession, custody and control."[524]

363. [redacted][525] Based on this understanding, and in reliance on Romania to "undertake all reasonable measures necessary" as it so pledges, the Tribunal sees no need for a provisional measures recommendation specifically targeted at Romania.

364. The Tribunal does note that *both* Parties have expressed concerns about the integrity of the other's recordkeeping practices. In addition to Nova's concerns about [redacted] and [redacted] discussed above, Romania has signalled doubts about the authenticity and date of certain Nova documents thus far submitted in this case. The Tribunal reminds both Parties that it would be inconsistent with their general duty of good faith for documents that are currently in existence, or that one would expect to be in existence based on ordinary recordkeeping practices, to become unavailable unexpectedly at the time of the document production phase of this case. This suggests that both Parties may wish to take steps proactively to secure potentially relevant files for later use in this arbitration.

VIII. DECISION

365. The Tribunal stated at the outset that in its view, ICSID tribunals should recommend only the *minimum steps necessary* to meet the objectives set out in the Convention. The Tribunal also emphasized that its focus would be on the right of the Parties to present their respective positions to the Tribunal, and on the Tribunal's own ability to fashion meaningful relief.

[524] Rejoinder, ¶ 239.

[525] [redacted]

Based on these principles, and having carefully considered all of the evidence and arguments presented by the Parties, the Tribunal decides as follows:

a. The Tribunal recommends, pursuant to Article 47 of the ICSID Convention, that Romania withdraw (or otherwise suspend operation of) the transmission of European Arrest Warrant Ref. [redacted] other request for extradition for [redacted] related to the subject matter of this arbitration until the Final Award in this case is rendered.

b. This recommendation is conditional on [redacted] strict compliance with the undertakings and mechanisms outlined in Section VII.E.1 of this Decision, [redacted] the Tribunal requests the Parties to confer promptly about the potential [redacted], as well as suggestions for appropriate terms and conditions, consistent with the general framework the Tribunal has outlined herein. The Tribunal requests the Parties to report back (jointly or separately) regarding such mechanisms within two weeks of the date of this Decision.

c. The Tribunal denies Nova's request for a recommendation that Romania withdraw its domestic preventive arrest warrant [redacted], and refrain from issuing any other domestic warrant.

d. The Tribunal denies Nova's request for a recommendation that Romania suspend all criminal proceedings related to the present arbitration, [redacted].

e. The Tribunal denies Nova's request for a recommendation that Romania refrain from undertaking any surveillance or otherwise seeking to intercept any privileged or confidential communications of any nature [redacted] The Tribunal notes, and this decision is based upon, Romania's assurance that it has not and will not deliberately intercept any privileged or confidential communications regarding this arbitration. The Tribunal recommends that in the event any such communications are intercepted *inadvertently* by general surveillance operations (not targeted to this arbitration) that are authorized pursuant to Romania's laws on criminal investigations, they not be shared either with Romania's arbitration counsel, or with those Romanian officials directly in charge of overseeing the State's participation in the ICSID case.

f. The Tribunal denies Nova's request for a recommendation that Romania withdraw the Asset Sequestration Order [redacted]

g. The Tribunal denies Nova's request for a recommendation that Romania suspend or refrain from bringing any actions against Nova, its representatives, Nova's investments' representatives or Nova's investments to establish or collect on any alleged liability to Romania disputed in this arbitration, and refrain from initiating any other proceedings, criminal or otherwise, directly or indirectly related to the present arbitration or engaging in any other course of action that may aggravate the dispute or jeopardize the procedural integrity of this arbitration. However, the Tribunal reminds *both* Parties of their general duty not to aggravate this dispute or jeopardize its procedural integrity.

h. The Tribunal denies Nova's request for a recommendation that Romania take all necessary steps to preserve all documents potentially relevant in this arbitration,

[redacted] The Tribunal notes Romania's express representation that it will undertake all reasonable measures necessary to preserve and/or recover any such documentation. The Tribunal reminds both Parties that it would be inconsistent with their general duty of good faith for documents that are currently in existence, or that one would expect to be in existence based on ordinary recordkeeping practices, to become unexpectedly unavailable at the time of the document production phase of this case. This suggests that both Parties may wish to take steps proactively to secure potentially relevant files for later use in this arbitration.

i. The Tribunal defers both Parties' requests for costs in connection with this Application, to be addressed at a later stage of this case.

On behalf of the Tribunal,

[redacted]

Ms. Jean Kalicki
President of the Tribunal
Date: 29 March 2017

ANNEX B – DECISION ON ROMANIA'S OBJECTION TO THE TRIBUNAL'S JURISDICTION BASED ON EU LAW AND THE *ACHMEA* JUDGMENT

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

NOVA GROUP INVESTMENTS, B.V.

Claimant

and

ROMANIA

Respondent

ICSID Case No. ARB/16/19

DECISION ON ROMANIA'S OBJECTION TO THE TRIBUNAL'S JURISDICTION BASED ON EU LAW AND THE *ACHMEA* JUDGMENT

Members of the Tribunal
Ms. Jean Kalicki, President of the Tribunal
Prof. Thomas Clay, Arbitrator
Mr. Klaus Reichert SC, Arbitrator

Secretary of the Tribunal
Ms. Anna Holloway

Assistant to the Tribunal
Ms. Lindsay Gastrell

21 January 2021

CONTENTS

I. INTRODUCTION

A. The Underlying Dispute

1. This dispute has been submitted to arbitration on the basis of (a) the Agreement on Encouragement and Reciprocal Protection of Investments Between the Government of the Kingdom of the Netherlands and the Government of Romania, which entered into force on 1 February 1995 (the "**BIT**")[1], and (b) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

B. The Parties

2. The claimant is Nova Group Investments, B.V. ("**Nova**" or "**Claimant**"), a company established under the laws of the Kingdom of the Netherlands. Nova is represented in this proceeding by Mr. Christopher Harris, Ms. Kate Holderness, Mr. Georges Chalfoun, Mr. Cameron Miles and Mr. William Day of 3 Verulam Buildings in London; and Mr. Patrick S. Taylor, Mr. Mark W. Friedman and Mr. Mark McCloskey of Debevoise & Plimpton LLP.[2]

3. The respondent is Romania (also referred to as "**Respondent**"). Romania is represented in this proceeding by Dr. Hamid G. Gharavi, Ms. Nada Sader, Ms. Sophia von Dewall, Mr. Emmanuel Foy, Ms. Julie Spinelli and Ms. Elena Mitu of Derains & Gharavi International in Paris; Prof. Ziya Akinci of Akinci Law Office in Istanbul; and Mr. Valentin Trofin, Ms. Mihaela Atanasiu and Ms. Oana Cuciureanu of Trofin & Associates in Bucharest.

C. This Decision

4. This Decision addresses Romania's objection that the Tribunal lacks jurisdiction *ratione voluntatis* because the BIT, or at least the dispute resolution clause contained in Article 8 of the BIT, was terminated, replaced or superseded when Romania acceded to the European Union ("**EU**"). As discussed further in the procedural summary in Section II below,

[1] **C-1**, BIT.

[2] Until 21 May 2019, Nova was represented by Lord Goldsmith, Mr. Patrick S. Taylor, Mr. Boxun Yin, Ms. Ciara A Murphy, Mr. Jonny McQuitty, and Mr. Mark McCloskey of Debevoise & Plimpton LLP in London; and Mr. Mark Friedman of Debevoise & Plimpton LLP in New York.

Romania raised this jurisdictional objection before the Court of Justice of the European Union ("**CJEU**") issued its judgment in Case C-284/16 *Slowakische Republik v Achmea BV* (the "***Achmea* Judgment**"). Subsequently, the European Commission (the "**Commission**") sought and was granted the opportunity to file a written submission on the implications of the *Achmea* Judgment in this proceeding, pursuant to ICSID Arbitration Rule 37(2) (the "**Commission's Submission**"). Both Parties then addressed the specific consequences of the *Achmea* Judgment in two rounds of written submissions, which also contained the Parties' respective observations on the Commission's Submission. The Parties did not address this jurisdictional objection further in their subsequent memorials, although these did discuss other unrelated objections to the Tribunal's jurisdiction which Romania had raised.

5. In addressing Romania's objection, the Tribunal first sets out the relevant procedural history (Section II) and the Parties' respective requests for relief (Section III). In Sections IV and V, the Tribunal summarizes the Parties' positions and the Commission's Submission. The Tribunal then provides its analysis (Section VI) and, finally, its Decision (Section VII).

6. The Tribunal emphasizes that it has reviewed and considered all aspects of the Parties' submissions. The fact that this Decision may not expressly reference all arguments does not mean that such arguments have not been considered; the Tribunal includes only those points which it considers most relevant.

II. RELEVANT PROCEDURAL BACKGROUND

7. On 21 June 2016, ICSID received Nova's Request for Arbitration of the same date. The Secretary-General registered the Request for Arbitration in accordance with Article 36 of the ICSID Convention on 5 July 2016.

8. On 17 November 2016, the Tribunal was constituted in accordance with Article 37(2)(b) of the ICSID Convention and is composed of: Ms. Jean Engelmayer Kalicki (U.S.), President, appointed by the Chairman of the Administrative Council in accordance with

Article 38 of the ICSID Convention; Mr. Klaus Reichert, SC (German/Irish), appointed by Claimant; and Professor Thomas Clay (French), appointed by Respondent.

9. On 19 December 2016, Romania filed a Request for Bifurcation of the Proceeding (the "**Request for Bifurcation**"). Romania asked the Tribunal to address three jurisdictional objections in a preliminary phase of the proceeding prior to addressing the merits. One of those objections was that the Tribunal lacks jurisdiction *ratione voluntatis* because the arbitration clause of the BIT was terminated, replaced or superseded as a result of Romania's accession to the EU.

10. The first session was held by teleconference on 21 December 2016.

11. Following the first session, on 23 December 2016, the Tribunal issued Procedural Order No. 1 ("**PO1**"), embodying the agreements of the Parties and the decisions of the Tribunal on the procedure to govern the arbitration. The Procedural Timetable was attached as Annex A of Procedural Order No. 1.

12. The Parties then filed the following submissions on the Request for Bifurcation: Nova's Objection to Respondent's Request for Bifurcation, dated 13 January 2017; Romania's Reply to the Objection to Request for Bifurcation, dated 25 January 2017; and Nova's Rejoinder on the Objection to Request for Bifurcation, dated 6 February 2017.

13. On 29 March 2017, the Tribunal issued Procedural Order No. 6 ("**PO6**"), containing its decision on the Request for Bifurcation. For the reasons set forth in PO6, the Tribunal denied Romania's Request for Bifurcation.

14. On 21 July 2017, Nova filed its Memorial on the Merits.

15. On 9 February 2018, Romania filed its Counter-Memorial on the Merits and Objections to Jurisdiction (the "**Counter-Memorial**"). Romania lodged the three objections to jurisdiction mentioned in its Request for Bifurcation, including the following:

> The tribunal lacks jurisdiction in this case because, on January 1, 2007, when Romania became an EU Member State, or at the very least, on December 1, 2009, when the Lisbon treaty came into force, and the EU Charter of Fundamental Rights became binding on all

> EU Member States, the Netherlands-Romania BIT was terminated, or at the very least, superseded insofar as the dispute resolution clause therein is concerned.[3]

16. On 6 March 2018, the CJEU issued the *Achmea* Judgment, which considered whether the dispute resolution clause in an investment agreement between the Netherlands and the Slovak Republic was compatible with EU law.

17. By letter of 21 March 2018, Romania requested that the Tribunal reconsider its decision on bifurcation in PO6 and "order a bifurcation of the proceedings on the specific consequences of the [*Achmea* Judgment] for purposes of jurisdiction."

18. Upon the invitation of the Tribunal, on 10 April 2018, Nova submitted its response to Romania's letter of 21 March 2018. Nova asked the Tribunal to decline to reconsider its decision on bifurcation.

19. On 20 April 2018, the Tribunal issued Procedural Order No. 11 ("**PO11**") addressing Romania's 21 March 2018 request. The Tribunal decided to "accept accelerated briefing of the specific consequences of the Achmea Judgment for purposes of jurisdiction, in parallel with other briefing in this case."[4] The Tribunal also provided the following instructions:

> In order to ensure that the Parties join issue on the questions the Tribunal believes it important for it to consider, while at the same time keeping their submissions as narrowly focused on such questions as possible, they are requested to organize their submissions to address the following questions:
>
> i. Whether or not on the date of the Request for Arbitration there was a valid offer on the part of Romania to arbitrate;
>
> ii. If so, with the consequence that an arbitration agreement came into existence as between the Parties, was that arbitration agreement vitiated at a later point in time, and if so, when and how; and

[3] Counter-Memorial, ¶ 260.

[4] PO11, ¶ 30(a).

iii. Are there other questions the Parties consider essential for the Tribunal to decide, in order to assess its jurisdiction in the wake of the Achmea Judgment?[5]

20. The Tribunal did not accept Romania's proposed timetable for the briefing, and instead instructed the Parties to "confer promptly regarding a precise schedule for two rounds of simultaneous written submissions … taking into consideration the Tribunal's notional suggestion of roughly two months for the first round and six weeks for the second round."[6]

21. On 27 May 2018, the Tribunal issued Procedural Order No. 13 ("**PO13**"), by which it ordered a temporary adjournment of all procedural deadlines, including document production, the accelerated briefing of the specific consequences of the *Achmea* Judgment, and Nova's Reply on the Merits and Defence on Jurisdiction.[7]

22. On 14 November 2018, the Commission filed with the ICSID Secretariat an "Application for Leave to Intervene as a Non-Disputing Party," pursuant to ICSID Arbitration Rule 37(2) (the "**Commission's Application**"). The Secretary of the Tribunal transmitted a copy of the Application to the Parties and to the Members of the Tribunal.

23. Upon the invitation of the Tribunal, each Party submitted its observations on the Commission's Application on 30 November 2018. Nova opposed the Commission's Application, while Romania supported it. Nova further referenced the Commission's Application in a letter dated 12 December 2018, as did Romania in a letter dated 17 December 2018.

24. On 9 January 2019, the Tribunal issued Procedural Order No. 16 ("**PO16**") addressing the Commission's Application. The Tribunal noted that PO16 was "made solely for the purpose of deciding upon the [Commission's] Application as a matter of procedure in this arbitration," and that it was "without prejudice to its eventual decision on any of

[5] PO11, ¶ 30(b).

[6] PO11, ¶ 30(c).

[7] PO13 sets out in detail the relevant procedural history and reasons for the Tribunal's decision to temporarily adjourn these deadlines.

Respondent's preliminary objections."[8] The Tribunal decided on the Commission's Application as follows:

> a. The Commission's request to submit a written submission in this proceeding, limited to the legal consequences of the *Achmea* Judgment, is granted.
>
> b. The Commission's submission shall be no more than 15 pages in length and shall be filed 14 days after the Tribunal communicates the lifting of the temporary adjournment of substantive submissions that is currently in effect for this case. The Tribunal will communicate the relevant deadline to the Commission in due course.
>
> c. The Commission's request for leave to participate in oral hearings in this proceeding is denied.[9]

25. The Tribunal informed the Parties that its decision would be communicated to the Commission by a letter attached as Annex A to PO16. Immediately after PO16 was issued, ICSID sent that letter to the Commission.

26. On 15 January 2019, 22 Members States of the EU issued a declaration entitled "Declaration of the Governments of the Member States on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union" (the "**January 2019 Declaration**").[10]

27. On 27 March 2019, the Tribunal issued Procedural Order No. 17 ("**PO17**"), by which it lifted the temporary adjournment of procedural deadlines and set a new procedural timetable.[11]

28. By letter of the same date, the Tribunal informed the Commission that the temporary adjournment had been lifted and invited the Commission to file its written submission on the legal consequences of the *Achmea* Judgment within 14 days.

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[8] PO16, ¶ 3.

[9] PO16, ¶ 31.

[10] **Annex EC-16**, January 2019 Declaration.

[11] The events leading up to PO17, which permitted a full resumption of substantive submissions, are summarized in that Order.

29. On 10 April 2019, the Commission's Submission was filed together with Annexes EC-01 to EC-17.

30. On 31 May 2019, the Parties filed their first simultaneous submissions on the *Achmea* Judgment questions and observations on the Commission's Submission ("**Romania's First *Achmea* Submission**" and "**Nova's First *Achmea* Submission**"). With its First *Achmea* Submission, Romania submitted a communication from the Embassy of the Netherlands in Bucharest dated 28 May 2019 enclosing a declaration of the Netherlands entitled "Declaration by the Kingdom of the Netherlands concerning the jurisdiction of the arbitral tribunal in the pending arbitration procedure Nova Group Investments BV v. Romania (ICSID Case No. ARB/16/19)" ("**Netherlands Declaration**").[12]

31. As the procedure moved forward, an advance payment requested by ICSID on 25 March 2019 remained outstanding. ICSID received Nova's payment of its portion of the advance on 23 April 2019 but did not receive payment from Romania. In accordance with ICSID Administrative and Financial Regulation 14(3)(d), on 2 May 2019, ICSID informed the Parties of the default and gave either Party the opportunity to make the required payment within 15 days. That period elapsed without payment from either Party. After further consultations with the Parties, on 6 June 2019, the Secretary-General moved the Tribunal to stay the proceeding for non-payment pursuant to Administrative and Financial Regulation 14(3)(d). Before acting on the Secretary-General's motion, the Tribunal gave the Parties several opportunities to commit to making the outstanding payment. However, neither Party indicated any willingness to remedy the situation. Therefore, on 21 June 2019, the Tribunal issued Procedural Order No. 19, which stayed the proceeding for non-payment pursuant to ICSID Administrative and Financial Regulation 14(3)(d).

32. Despite the stay, Nova filed its second submission on the *Achmea* Judgment with the ICSID Secretariat on 7 August 2019 (the deadline set forth in the timetable in PO17). On 8 August 2019, the Secretary of the Tribunal confirmed receipt of the submission and noted that ICSID would not transmit it to Romania or the Tribunal, unless instructed otherwise by the Tribunal. Later that day, Romania objected to Nova's "unilateral and unannounced"

[12] **R-327**, Netherlands Declaration.

Achmea submission. Romania requested that the submission "be withheld and not communicated to the Tribunal until a new procedural calendar has been established and Romania afforded an opportunity to simultaneously submit its submission on the matter."[13]

33. On 9 August 2019, the Tribunal confirmed that Nova's submission would not be shared by the Secretariat with the Tribunal until such time as the procedural calendar could be clarified following the lifting of the stay.

34. On 4 October 2019, Nova informed the Tribunal that it had paid the outstanding advance, and on 9 October 2019, ICSID received the payment. Therefore, the Tribunal informed the Parties that the proceeding was no longer stayed pursuant to ICSID Administrative and Financial Regulation 14(3)(d) and invited the Parties to confer regarding a revised schedule for the next procedural steps.

35. On 11 October 2019, Nova filed its Reply on the Merits and Defence on Jurisdiction (the "**Reply**"). In the Reply, Nova addressed Romania's objection to the Tribunal's jurisdiction *ratione voluntatis* as follows:

> So far as Nova is concerned, this question has been thoroughly canvassed by the parties in the course of their submissions on the decision of the Court of Justice of the European Union in *Slovak Republic v Achmea BV*. A determination by the Tribunal on that point will also determine Romania's objection.
>
> In the event that Romania considers any aspect of this objection to be left open after the Tribunal's decision on the effect of *Achmea*, it should set these out in its Reply on Jurisdiction. Nova will then address any such points in its Rejoinder on Jurisdiction.[14]

36. After receiving the Parties' views on the schedule for the next procedural steps, on 25 October 2019, the Tribunal issued Procedural Order No. 21 ("**PO21**") setting forth the revised procedural timetable.

[13] Email from Romania's counsel to Nova's counsel of 8 August 2019 (Romania requested that this communication be transmitted to the Tribunal).

[14] Reply, ¶¶ 279-280.

37. In accordance with the revised timetable, on 4 December 2019, the Parties filed their second simultaneous submissions on the *Achmea* Judgment questions and observations on the Commission's Submission ("**Romania's Second *Achmea* Submission**" and "**Nova's Second *Achmea* Submission**").[15]

38. On 16 July 2020, Romania filed its Rejoinder, which addressed *inter alia* its other unrelated objections to the Tribunal's jurisdiction, but did not revert to its objection *ratione voluntatis*. On 11 November 2020, Nova filed its Rejoinder on Jurisdiction, which likewise did not provide further briefing on this particular objection.

III. THE PARTIES' REQUESTS FOR RELIEF

A. Romania's Request for Relief

39. As summarized below, Romania's position is that the Tribunal lacks jurisdiction over Nova's claims because, on the date of the Request for Arbitration, there was no valid consent of Romania to submit this dispute to ICSID arbitration.

40. In its First and Second *Achmea* Submissions, Romania requests that the Tribunal issue an Award:

> DISMISSING Claimant's claims in their entirety;
>
> ORDERING Claimant to pay all of the costs and expenses of these arbitration proceedings, including, without limitation: (i) the fees and expenses of the members of the Tribunal; (ii) ICSID's administrative fees and expenses as determined by ICSID; (iii) the fees and expenses of Respondent's legal representation (including attorney fees and disbursements); and (iv) the fees and expenses of the experts appointed by Respondent; including interest on those costs, from the date of award until the date of payment, at a rate to be determined by the Tribunal; and

[15] Before filing its Second *Achmea* Submission, Nova contacted the Secretariat regarding the submission that it had filed on 7 August 2019. Nova informed the Secretariat that it would be filing an updated version of the submission and that "the earlier version of the brief should be deleted by ICSID and not sent to the Tribunal." ICSID confirmed that the 7 August 2019 submission had been deleted.

ORDERING such other and further relief as the Tribunal may deem appropriate in the circumstances.[16]

B. Nova's Request for Relief

41. As summarized below, Nova's position is that Romania's consent to submit this dispute to ICSID arbitration is found in Article 8(2)(b) of the BIT, which remained valid on the date of the Request for Arbitration.

42. Thus, Nova requests that the Tribunal dismiss Romania's jurisdictional objection.[17]

IV. THE PARTIES' POSITIONS

43. In this Section, the Tribunal summarizes each Party's position on the following issues: (a) the legal framework applicable to the Tribunal's jurisdiction and the relevance, if any, of the *Achmea* Judgment; (b) whether there was a valid offer on the part of Romania to arbitrate on the date of the Request for Arbitration; (c) if so, whether that arbitration agreement was vitiated subsequently; and (d) other matters that are potentially relevant to the Tribunal's decision on jurisdiction.

44. This summary includes, where relevant, the Parties' observations on the Commission's Submission.

A. Romania's Position

[redacted]

[redacted]

[redacted]

(1) Applicable Legal Framework and Relevance of the Achmea Judgment

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(2) Whether There Was a Valid Offer on the Part of Romania to Arbitrate on the Date of the Request for Arbitration

[redacted]

[redacted]

[redacted]

[redacted]

a. <u>EU Treaties and Primacy of EU Law</u>

[redacted] [redacted][redacted] [redacted][redacted]

[redacted] [redacted]

[redacted][redacted]

[redacted] [redacted][redacted] [redacted][redacted] [redacted]

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[redacted]

[redacted]

[redacted]

[redacted]

b. Application of the VCLT

[redacted]

[redacted]

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[redacted]

c. Post-*Achmea* Judgment Declarations

[redacted]

[redacted]

[redacted]

[redacted]

(3) Whether the Arbitration Agreement was Vitiated Subsequently

[redacted]

(4) Other Matters

a. Enforceability

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

b. Denial of Justice

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

B. Nova's Position

[redacted]

(1) Legal Framework Applicable to the Tribunal's Jurisdiction

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(2) Whether There Was a Valid Offer on the Part of Romania to Arbitrate on the Date of the Request for Arbitration

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

a. EU Treaties and Primacy of EU Law

[redacted]

[redacted]

[redacted]

[redacted]

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[redacted]

[redacted]

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b. Application of the VCLT

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it expressly leaves intra-EU commercial policy (including questions

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c. Post-*Achmea* Judgment Declarations

[redacted]

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[redacted]

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[redacted]

(3) Whether the Arbitration Agreement was Vitiated Subsequently

[redacted]

(4) Other Matters

a. Enforceability

[redacted]

[redacted]

[redacted]

b. Denial of Justice

[redacted]

[redacted]

[redacted]

[redacted]

V. THE COMMISSION'S WRITTEN SUBMISSION

[redacted]

A. Applicable Legal Framework and Relevance of the *Achmea* Judgment

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

B. Whether There Was a Valid Offer on the Part of Romania to Arbitrate on the Date of the Request for Arbitration

[redacted]

[redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted]

[redacted]

[redacted] [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

C. Enforceability

[redacted]

VI. THE TRIBUNAL'S ANALYSIS

170. The Tribunal begins its analysis with Romania's suggestion that the outcome of its objection *ratione voluntatis* is somehow dictated by Article 42(1) of the ICSID Convention, because application of that Article allegedly results in EU law being part of the governing law of these proceedings (Section VI.A below). The Tribunal next addresses Romania's arguments stemming from EU law, which contend that its offer to arbitrate in Article 8(2)(b) of the BIT was no longer valid after EU accession, because – as the *Achmea* Judgment allegedly confirmed – any intra-EU BIT arbitration is fundamentally incompatible with the primacy of EU law (Section VI.B). In the following Section VI.C, the Tribunal addresses Romania's arguments from the VCLT, which contend that the same result arises through application of public international law principles about incompatible

[275] Commission's Submission, § 6.

[276] Commission's Submission, § 5.

[277] Commission's Submission, ¶ 35.

provisions in successive treaties. Finally, in Section VI.D, the Tribunal addresses the Parties' remaining arguments, not otherwise covered within the framework above.

A. Applicable Law and Article 42(1) of the ICSID Convention

171. Romania argues, as a foundational principle, that the applicable law of these proceedings includes EU law, pursuant to the second sentence of Article 42(1) of the ICSID Convention, and as a result the Tribunal is required to interpret its jurisdiction consistent with the manner in which that question would be assessed under EU law. The conclusion Romania says flows from this proposition – that jurisdiction is lacking because, as a matter of EU law, Romania's offer of arbitration in the BIT was terminated upon EU accession – is addressed in Section VI.B below. First, however, the Tribunal is compelled to correct Romania's assertion about the law which governs this international dispute.

172. Article 42(1) of the ICSID Convention provides as follows:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

173. According to Romania, since the BIT does not contain an express applicable law clause, this means that the second sentence of Article 42(1) applies, and extends to issues of both jurisdiction and merits. In consequence, Romania says, the ICSID Convention requires that jurisdictional issues be decided with reference both "the law of the Contracting State party to the dispute" (Romanian law, which incorporates EU law principles), and "such rules of international law as may be applicable" (which in its view likewise includes EU law).[278]

174. This proposition misstates the law applicable to determining the existence of jurisdiction in this case.

175. First, the Tribunal's jurisdiction is regulated by the terms of Article 25(1) of the ICSID Convention, which provides that jurisdiction "shall extend to any legal dispute arising

[278] Romania's First *Achmea* Submission, ¶ 31; Romania's Second *Achmea* Submission, ¶¶ 42, 50.

directly out of an investment, between a Contracting State … and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre." The reference to "consent in writing" refers back to the BIT, which contains provisions defining the scope of arbitral jurisdiction, including Article 8(2)(b)'s provision that "disputes with respect to investments" may be submitted to ICSID for resolution. The existence of jurisdiction will depend on construction of the terms of the BIT and Article 25(1) of the ICSID Convention, pursuant to traditional interpretative tools provided by the VCLT. This inquiry is not, however, shaped by Article 42(1) of the ICSID Convention. As the *Vattenfall* tribunal persuasively reasoned, the phrase with which Article 42(1) opens – "The Tribunal shall decide a dispute" – "points to the application of those rules of law in order to decide the dispute between the parties, and the ordinary meaning of that phrase … is that it refers to the substantive dispute between the parties."[279] This is consistent with Professor Schreuer's observation that Article 42(1) "does not govern questions of the tribunal's jurisdiction under Art. 25," nor questions of procedure, but only the substantive law to be applied to the merits of the dispute.[280]

176. Second, even if (*arguendo*) Article 42(1) were to have some applicability to issues of jurisdiction – which the Tribunal does not accept – its operation still would not result in application of the second sentence of that provision, as Romania mistakenly contends. The first sentence of Article 42(1) provides that "[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties"; the second sentence becomes operative only "[i]n the absence of such agreement." Romania's error, however, is in equating the BIT's silence on applicable law with a supposition that the Contracting States to the BIT had no joint understanding about the BIT's applicable law, which Nova in turn accepted in invoking the BIT's arbitration clause. That leap of logic is not justified as a matter of public international law.

[279] **CL-237**, *Vattenfall*, ¶ 118.

[280] **CL-257**, Christoph Schreuer et. al., *The ICSID Convention: A Commentary* (2nd ed. Cambridge University Press), p. 550-551.

177. It is certainly true that the BIT contains no express provision addressing the issue of applicable law;[281] many treaties do not. But this does not mean that the BIT's Contracting States had no shared understanding with respect to the law governing the BIT. A treaty is not an empty vessel with no governing law whatsoever, until some is assigned to it through resort to the default rules of a particular court or arbitral institution. Rather, under the very definition of a treaty provided by Article 2(1)(a) of the VCLT, a treaty is "an international agreement concluded between States in written form and *governed by international law* …."[282] In other words, the starting proposition for any treaty is that its Contracting States have agreed it shall be interpreted by reference both to its terms (on which the States expressly agreed), and to general principles of international law (on which the States implicitly agreed). If the Contracting Parties wish to add *other elements* to the applicable law, they may do so by adding an express provision to that effect. But if they do not wish to add to the implicit applicable law arising from the VCLT, they need not include an express applicable law provision, although of course they may choose to do so for avoidance of doubt. The fact that particular States do not include any express clause simply means they had nothing to add to the default principles provided by the VCLT. It does not connote that they had no shared understanding regarding the issue.[283] It certainly does not connote that they had a shared intention to depart from the basic VCLT proposition on applicable law, which is that treaties are governed by their express terms and by reference to general principles of international law, and instead have applicable law determined by the default rules of whichever court or arbitral institution an investor might choose to resolve an eventual investment dispute.

178. The latter proposition – that the State Parties somehow intended the applicable law of an investment treaty dispute to depend on the default rules of the administering institution –

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[281] The Tribunal notes, but is not persuaded by, the Commission's argument that Article 11(5) of the BIT functions as an applicable law clause for the BIT as a whole, including for investor-State disputes under Article 8. Article 11(5) applies specifically to State-to-State disputes, and no comparable provision exists within Article 8, nor in any other provision of the BIT whose terms are applicable to investor-State disputes.

[282] VCLT Article 2(1)(a) (*emphasis added*).

[283] Indeed, Romania's proposition that silence necessarily equates to lack of agreement would suggest (by analogy) that State Parties who do not include a particular substantive protection in a treaty – such as an umbrella clause – have not agreed on whether such protection should apply. The logical conclusion is actually the obverse: that the State Parties agreed not to include the protection in the treaty.

would be particularly odd in light of the fact that those default rules often vary. For example, the UNCITRAL Arbitration Rules – which Article 8(2)(c) of the BIT offers as an alternative to ICSID arbitration – provide that in the absence of agreement on applicable law, "the arbitral tribunal shall apply the law which it determines to be appropriate."[284] This conveys a broad discretion that may or may not lead to the same outcome as the default rule in the second sentence of ICSID Convention Article 42(1). Yet nothing in the BIT suggests that the Contracting States intended the applicable law of a dispute to be subject to the happenstance of whether an investor invoked ICSID arbitration or UNCITRAL arbitration – much less that they intended the BIT's own substantive terms to be interpreted and applied differently, depending which dispute resolution route is chosen.[285] That would be illogical, since the dispute resolution provisions in a treaty do not operate, in and of themselves, to change the substance of what is agreed. Either way, the BIT says what it says, and a tribunal constituted under any set of procedural rules should apply those terms in accordance with VCLT principles and general principles of international law.

179. This recognition – that treaties have an implicit applicable law even if they do not have an express applicable law provision – is entirely consistent with the structure and purpose of Article 42(1) of the ICSID Convention. Article 42(1), along with the rest of the Convention, was developed at a time when contractual agreements between States and investors were expected to be the main source of consent to arbitrate disputes, and well before the proliferation of investment treaties became an alternate path to arbitration for investors without direct contractual agreements with States (so-called "arbitration without privity").[286] In that context, it is hardly surprising that Article 42(1) was constructed to begin with a reaffirmation about the primacy of consent between the two *disputing* parties:

[284] 2013 UNCITRAL Arbitration Rules, Article 35(1).

[285] Obviously, the choice among different procedural rules still may impact an arbitration in other ways, including as a result of the independent requirements of those rules. But this does not mean that the applicable law of the BIT *itself* should vary based on the procedural rules of different arbitrations.

[286] *See, e.g.*, Memorandum of the meeting of the Committee of the Whole, 18 December 1962, ¶ 36, in *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Vol. II, Part 1 (1968) (Aron Broches, the ICSID Convention's principal architect, stating during the Convention's negotiations that a circumstance in which a State would "ma[k]e a general statement that it would submit to arbitration a defined class of disputes with all comers" was "hardly ever likely to obtain," and that the far "more likely … situation was that an arbitration clause would be incorporated in an investment agreement").

"The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties."[287] But in the newer "arbitration without privity" world of investment treaties, it is far less likely that there will be any direct agreement on applicable law between the disputing parties (the investor and the State). Therefore, any such agreement generally must be found through the same two-step process by which mutual consent to arbitrate is formed in the first place – namely with (first) a standing offer of arbitration agreed between Contracting States, and (second) an acceptance of that standing offer by a particular qualified investor. This means, of course, that one looks to the investment treaty itself for the "offer" of applicable law, and that the investor's consent to that applicable law is implicit in its invocation of the treaty as the basis for commencing arbitration.

180. In these circumstances, when an investor accepts an offer to arbitrate contained in an investment treaty, the investor accepts the applicable law that implicitly governs all such treaties in the absence of express provisions otherwise – namely, that the dispute will be governed by the BIT's terms and by international law, pursuant to VCLT Article 2(1)(a). Stated otherwise, the terms of the BIT form a *lex specialis* that the Contracting States agree to govern their respective relationships with each other's investors, together with general principles of international law which help to inform the concepts embedded in the treaty terms. By invoking the BIT, the investors in turn accept that this applicable law framework will govern any disputes alleging a State's non-compliance with those standards. This process results in an effective agreement on the law applicable to the treaty's interpretation and application. Accordingly, the second sentence of Article 42(1) of the ICSID Convention does not come into play. This approach to ICSID Convention Article 42(1) in the context of investment treaties is consistent with the decisions of a number of prior tribunals.[288]

[287] ICSID Convention Article 42(1) (first sentence).

[288] *See generally Addiko Bank AG and Addiko Bank D.D. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU *Acquis*, 12 June 2020, ¶¶ 261-265 ("***Addiko***") (discussing prior decisions in **CL-88**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 290; **RL-164**, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12 (Annulment Proceeding), Decision on the Application for Annulment, 1 September 2009, ¶¶ 132, 141; and **CL-167**, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶ 228).

181. This analysis disposes of Romania's argument that the second sentence of Article 42(1) makes *Romanian law* part of the applicable law of the arbitration, and thus that the Tribunal is bound to apply EU law (as interpreted by the CJEU) as part of Romanian law. Romania's further argument – that the CJEU's rulings are binding on this Tribunal because EU law is part of the general *international law* which governs this case[289] – is equally flawed, for the reasons articulated at some length by the *Eskosol* tribunal (among others).

182. Summarized briefly, although EU law undoubtedly qualifies as one type of international law, it is not part of the general principles of international law by which treaties must be interpreted.[290] In the words of the *Vattenfall* tribunal, EU law "is not general law applicable as such to the interpretation and application of the arbitration clause in another treaty."[291] Moreover, the decisions of EU courts and authorities with respect to EU law are not binding on international investment tribunals empaneled under a different legal order, such as the ICSID Convention.[292] The EU Treaties are one sub-system of international law, vesting authority in various organs including the CJEU, but this sub-system exists side-by-side with other sub-systems created by other treaties such as the BIT, which vests authority in arbitral tribunals such as this one. Each authority is empowered in its sub-system to render decisions within its sphere, such as the CJEU's *Achmea* Judgment under the EU Treaties, and the awards of various arbitral tribunals under bilateral and multilateral investment treaties. Just as the former is not bound by the decisions of the latter, the latter are not bound by the decisions of the former.[293]

183. Rather, as the *Electrabel* tribunal explained, a tribunal that "has been seized as an international tribunal by a Request for Arbitration … under [an investment treaty] and the ICSID Convention" is required accordingly to apply that treaty and "applicable rules and principles of international law," because it "is placed in a public international law context

[289] *See* Romania's First *Achmea* Submission, ¶ 34 ("the ECJ's interpretation of the relationship between pre-accession BITs … and the EU Treaties, is binding on EU Member States … *as well as on this Tribunal*") (*emphasis added*).
[290] *See* **CL-233**, *Eskosol*, ¶¶ 115-121.
[291] **CL-237**, *Vattenfall,* ¶ 133.
[292] *See* **CL-233**, *Eskosol*, ¶¶ 178, 181-186.
[293] *See* **CL-233**, *Eskosol*, ¶¶ 181-184.

and not a national or regional context."[294] The *Eskosol* tribunal stated the point similarly, when it "accept[ed] that the judgments of the CJEU constitute settled and decisive interpretations of the particular issues of EU law that they actually reach," but confirmed nonetheless that "the *implications* of such EU law decisions for proceedings in the broader international order, governed not by EU law" but by other international agreements (such as the ICSID Convention and investment treaties), "remain open to assessment."[295]

184. For these reasons, the Tribunal cannot accept Romania's starting proposition that (a) EU law is part of the mandatory legal framework that the Tribunal must apply under the ICSID Convention for purposes of determining its jurisdiction, and therefore that (b) the Tribunal would be bound by decisions of EU law authorities regarding that issue. Instead, the Tribunal must independently assess whether, under the BIT and general principles of international law, a valid offer of consent to arbitrate still existed following Romania's EU accession, and up through the date on which Nova sought to accept that offer by commencing these proceedings; and if so, whether that consent could be vitiated by later developments. The Tribunal begins that analysis below.

B. The *Achmea* Judgment and the Primacy of EU Law

185. Romania contends that its prior offer to arbitrate investor-State disputes with Dutch investors, reflected in Article 8(2)(b) of the BIT, was implicitly "terminated, replaced, or superseded by the EU Treaties" upon its accession to the EU.[296] According to Romania, this outcome was made clear in the *Achmea* Judgment, where the CJEU "unequivocally confirm[ed] that all intra-EU BIT dispute resolution clauses … are incompatible with the EU Treaties, and therefore were automatically terminated upon Romania's accession to the EU."[297] Even apart from the *Achmea* Judgment, Romania argues that the same conclusion flows from Article 351 of the TFEU and from the primacy of EU law for all Member States, since arbitration under the BIT would be fundamentally incompatible with these norms.

[294] **CL-99**, *Electrabel,* ¶¶ 4.111, 4.112.

[295] **CL-233**, *Eskosol*, ¶ 153 (emphasis in original).

[296] Romania's Second *Achmea* Submission, ¶ 4; *see* Romania's First *Achmea* Submission, ¶¶ 16, 24.

[297] Romania's First *Achmea* Submission, ¶ 20.

186. The Tribunal begins below with Romania's contention that the *Achmea* Judgment established the incompatibility of all intra-EU BIT arbitration clauses with EU law (Section VI.B.1). Romania's more general contentions about the primacy of EU law, linked to its interpretation of Article 351 TFEU, are addressed in the following Section VI.B.2.

(1) The Achmea *Judgment*

187. As noted above, Romania contends that the CJEU "unequivocally confirm[ed]" the incompatibility of all intra-EU BIT arbitration clauses with EU law.[298] That contention requires, in the words of the *CEF* tribunal, a threshold analysis of "what it is *Achmea* decides, and, importantly, what it does not decide."[299] Such an analysis makes clear, as set forth below, that the CJEU's ruling was far narrower than Romania contends, and was concerned with a particular subset of BIT arbitrations from which this case can readily be distinguished.

a. Summary of the *Achmea* Judgment

188. The Tribunal prefaces this summary with an acknowledgment that it largely tracks the detailed summary set forth in the *Eskosol* decision, by a tribunal with the same presiding arbitrator as this one.[300] Since the Tribunal agrees with that summary, it sees no need to reformulate it in different language.

189. The *Achmea* matter came before the CJEU on a request by the German Bundesgerichtshof for a preliminary ruling. In December 2012, an UNCITRAL tribunal had issued an arbitration award in favor of Achmea B.V., a Dutch company, finding that the Slovak Republic had violated certain obligations owed to the company under the Netherlands-Slovakia BIT. As the seat of the arbitration was in Frankfurt, the Slovak Republic brought a set-aside action before the Oberlandesgericht Frankfurt am Main, and when that court

[298] Romania's First *Achmea* Submission, ¶ 20.

[299] **CL-241**, *CEF*, ¶ 78.

[300] **CL-233**, *Eskosol* ¶¶ 155-166. A similar description was also included in *Addiko*, a decision rendered after *Eskosol* by a tribunal likewise with the same presiding arbitrator. Similar descriptions appear in two decisions rendered by tribunals chaired by another member of this Tribunal: **CL-241**, *CEF,* ¶¶ 79-95, and **CL-388A**, *Rockhopper Italia S.p.A. et al. v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on the Intra-EU Jurisdictional Objection, 26 June 2019, ¶¶ 154-170 ("***Rockhopper***").

dismissed its action, the Slovak Republic appealed to the Bundesgerichtshof on a point of law.

190. The Bundesgerichtshof stayed the appeal and sought a preliminary ruling from the CJEU on the following questions, referring to the text of Articles 18, 267 and 344 of the TFEU:

> (1) Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT) under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date?
>
> If Question 1 is to be answered in the negative:
>
> (2) Does Article 267 TFEU preclude the application of such a provision?
>
> If Questions 1 and 2 are to be answered in the negative:
>
> (3) Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?[301]

191. Advocate General Wathelet proposed that the CJEU should answer these questions as follows:

> Articles 18, 267 and 344 TFEU must be interpreted as not precluding the application of an investor/State dispute settlement mechanism established by means of a bilateral investment agreement concluded before the accession of one of the Contracting States to the European Union and providing that an investor from one Contracting State may, in the case of a dispute relating to investments in the other Contracting State, bring proceedings against the latter State before an arbitral tribunal.[302]

[301] **RL-284**, *Achmea* Judgment, ¶ 23.

[302] **CL-231**, Case No. C-284/16, *Slovak Republic v. Achmea BV*, Opinion of Advocate General Wathelet, 19 September 2017, ¶ 273.

192. The CJEU did not, however, accept Advocate General Wathelet's proposed resolution. Instead, it began by reformulating the questions posted by the Bundesgerichtshof, into a combined first and second questions framed as follows:

> By its first and second questions, which should be taken together, the referring court essentially asks whether Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[303]

193. The CJEU's reformulation included a specific reference to Article 8 of the Netherlands-Slovakia BIT. That clause provided first, in Article 8(1), that "[a]ll disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall, if possible, be settled amicably." Failing such a settlement, Article 8(2) of the Netherlands-Slovakia BIT provided that "[e]ach Contracting Party hereby consents to submit a dispute referred to in paragraph 1 of this Article to an arbitral tribunal." The Netherlands-Slovakia BIT then provided as follows in Article 8(6), regarding the law applicable to such a dispute:

> The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:
>
> - the law in force of the Contracting Party concerned;
> - the provisions of this Agreement, and other relevant agreements between the Contracting Parties;
> - the provisions of special agreements relating to the investment;
> - the general principles of international law.[304]

194. Beginning its analysis, the CJEU set out various EU law considerations which it considered relevant:

[303] **RL-284**, *Achmea* Judgment, ¶ 31.

[304] **RL-284**, *Achmea* Judgment, ¶ 6 (quoting Article 8 of the Netherlands-Slovakia BIT).

32. In order to answer those questions, it should be recalled that, according to settled case-law of the Court, an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is enshrined in particular in Article 344 TFEU, under which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties ….

33. Also according to settled case-law of the Court, the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other ….

34. EU law is thus based on the fundamental premiss [sic] that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss [sic] implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected. It is precisely in that context that the Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU ….

35. In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law ….

36. In that context, in accordance with Article 19 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law ….

> 37. In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties ….
>
> 38. The first and second questions referred for a preliminary ruling must be answered in the light of those considerations.[305]

195. The CJEU then organized its analysis into three intermediary questions. The first was "whether the disputes which the arbitral tribunal mentioned in Article 8 of the BIT is called on to resolve are liable to relate to the interpretation or application of EU law."[306] The CJEU answered this question in the affirmative, reasoning as follows:

> 40. Even if, as Achmea in particular contends, that tribunal, despite the very broad wording of Article 8(1) of the BIT, is called on to rule only on possible infringements of the BIT, the fact remains that in order to do so it must, in accordance with Article 8(6) of the BIT, take account in particular of the law in force of the contracting party concerned and other relevant agreements between the contracting parties.
>
> 41. Given the nature and characteristics of EU law mentioned in paragraph 33 above, that law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States.
>
> 42. It follows that on that twofold basis the arbitral tribunal referred to in Article 8 of the BIT may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital.[307]

196. The second intermediate question was "whether an arbitral tribunal such as that referred to in Article 8 of the BIT is situated within the judicial system of the EU, and in particular whether it can be regarded as a court or tribunal of a Member State within the meaning of Article 267

[305] **RL-284**, *Achmea* Judgment, ¶¶ 32-38 (citations omitted).

[306] **RL-284**, *Achmea* Judgment, ¶ 39.

[307] **RL-284**, *Achmea* Judgment, ¶¶ 40-42.

TFEU."[308] The CJEU answered this question in the negative, on the basis that an international arbitral tribunal is neither part of the judicial system of a single EU Member State nor a court common to a number of such States.[309]

197. The CJEU's third intermediate question was "whether an arbitral award made by such a tribunal is, in accordance with Article 19 TEU in particular, subject to review by a court of a Member State, ensuring that the questions of EU law which the tribunal may have to address can be submitted to the Court by means of a reference for a preliminary ruling."[310] It noted that under the UNCITRAL Arbitration Rules, a tribunal may choose its own seat, and it was only by virtue of the chosen seat in this instance being Frankfurt that a set-aside proceeding was brought in the German courts.[311] Even in these circumstances, moreover, judicial review was limited by German law to the validity of the arbitration agreement and the consistency of the award with public policy.[312] While the CJEU had accepted the notion of limited review of commercial awards, "provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference to the Court for a preliminary ruling,"[313] it considered that "arbitration proceedings such as those referred to in Article 8 of the BIT are different from commercial arbitration proceedings." The CJEU explained as follows:

> While the latter originate in the freely expressed wishes of the parties, the former derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law …, disputes which may concern the application or interpretation of EU law. In those circumstances, the considerations set out in the preceding paragraph relating to commercial arbitration cannot be applied to arbitration proceedings such as those referred to in Article 8 of the BIT.[314]

[308] **RL-284**, *Achmea* Judgment, ¶ 43.
[309] **RL-284**, *Achmea* Judgment, ¶¶ 45-46.
[310] **RL-284**, *Achmea* Judgment, ¶ 50.
[311] **RL-284**, *Achmea* Judgment, ¶¶ 51-52.
[312] **RL-284**, *Achmea* Judgment, ¶ 53.
[313] **RL-284**, *Achmea* Judgment, ¶ 54.
[314] **RL-284**, *Achmea* Judgment, ¶ 55 (citations omitted).

198. Based on this analysis, the CJEU considered as follows:

> 56. Consequently, having regard to all the characteristics of the arbitral tribunal mentioned in Article 8 of the BIT …, it must be considered that, by concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law.
>
> 57. It is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected ….
>
> 58. In the present case, however, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States. Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation referred to in paragraph 34 above.
>
> 59. In those circumstances, Article 8 of the BIT has an adverse effect on the autonomy of EU law.[315]

199. The CJEU accordingly concluded as follows:

> 60. Consequently, the answer to Questions 1 and 2 is that Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member

[315] **RL-284**, *Achmea* Judgment, ¶¶ 56-59.

> States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.
>
> …
>
> 62. … On those grounds, the Court (Grand Chamber) hereby rules:
>
> Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[316]

b. Scope of the *Achmea* Judgment

200. As noted above, Romania contends that the *Achmea* Judgment "unequivocally confirm[ed] that all intra-EU BIT dispute resolution clauses … are incompatible with the EU Treaties, and therefore were automatically terminated upon Romania's accession to the EU."[317] In its view, the CJEU's use of the phrase "such as Article 8 of the [Netherlands-Slovakia BIT]" in the *dispositif* of the *Achmea* Judgment was not intended to limit the scope of its findings, which "were not case specific, but rather general in nature, and intended to find incompatible with the EU Treaties all Intra-EU bilateral treaties" providing for arbitration.[318]

201. The Tribunal does not agree. Like many tribunals before it – including those chaired by members of this Tribunal[319] – the Tribunal considers that the phrase "such as Article 8" was inserted to refer to particular characteristics of Article 8, and makes clear that the

[316] **RL-284**, *Achmea* Judgment, ¶¶ 60, 62.

[317] Romania's First *Achmea* Submission, ¶ 20.

[318] Romania's Second *Achmea* Submission, ¶ 95.

[319] *See, e.g.,* **CL-233**, *Eskosol*, ¶ 169; **CL-241**, *CEF*, ¶ 96; *Addiko*, ¶ 242; **CL-388A**, *Rockhopper*, ¶ 171.

CJEU's holding would be extended to comparable provisions in other BITs. As to which features of a BIT might supply the requisite similarities, the Tribunal agrees with *Eskosol* that the most important feature for the CJEU's analysis was Article 8's choice of law clause, because "the CJEU was at pains throughout its analysis … to emphasize a concern about submission to arbitration of *disputes requiring application of EU law*."[320]

202. Several aspects of the CJEU's reasoning illustrate the centrality of choice of law to its analysis and conclusions.

203. First, the questions submitted to the CJEU by the Bundesgerichtshof were broadly framed, as general questions which addressed all intra-EU BITs submitting claims to arbitration, regardless of choice of law.[321] As noted above, the CJEU not only reformulated the question to include the phrase "such as Article 8,"[322] but it went on in its analysis to emphasize the choice of law issue. This is evident in the CJEU's description of both the "principle … enshrined in" Article 344 TFEU (as a Member State undertaking "not to submit a dispute *concerning the interpretation or application of the [EU] Treaties*" outside the EU court system) and the "object" of Article 267 TFEU ("of securing *uniform interpretation of EU law*").[323]

204. Second, the CJEU's central focus on choice of law issues is evident in the care it took to distinguish international treaties which establish dispute resolution mechanisms responsible only for "the interpretation and application of *their provisions*," *i.e.*, of the standards and obligations set out in the treaties themselves.[324] The CJEU emphasized that it had no objection to the submission of such pure international law issues to the decision-making of courts or tribunals outside the EU structure.

205. Third, that distinction was further emphasized by the CJEU's focus, for purposes of its concern, on only *two of the four* parts of the choice of law provision in Article 8(6) of the

[320] **CL-233**, *Eskosol*, ¶¶ 169, 171 (*emphasis in original*).
[321] *See* **RL-284**, *Achmea* Judgment, ¶ 23.
[322] **RL-284**, *Achmea* Judgment, ¶ 31.
[323] **RL-284**, *Achmea* Judgment, ¶¶ 32, 37 (*emphasis added*).
[324] **RL-284**, *Achmea* Judgment, ¶ 57 (*emphasis added*).

Netherlands-Slovakia BIT. In particular, the CJEU referred to Article 8(6)'s mandate that disputes under the Netherlands-Slovakia BIT be decided *not only* based on "the provisions of this Agreement" and "the general principles of international law" – elements which (as above) it confirmed would *not* run afoul of Articles 344 and 267 TFEU – but also based on "the law in force of the Contracting Party concerned" and "other relevant agreements between the Contracting Parties."[325] The CJEU specifically stated that "[e]ven if" the claims in the *Achmea* arbitration only involved alleged infringements of the BIT, "the fact remains that in order to" rule on such claims, the arbitral tribunal "must, *in accordance with Article 8(6) of the BIT*, take account in particular of the law in force of the contracting party concerned and other relevant agreements between the contracting parties," both of which "must be regarded" as including EU law.[326] Tellingly, the CJEU concluded that "on that *twofold* basis" – namely, *those two elements* of Article 8(6)'s choice of two clause, as distinguished from the *other two unobjectionable elements* – a tribunal under the Netherlands-Slovakia BIT would have to "interpret or indeed to apply EU law."[327] It was this conclusion, about the "twofold" elements of the particular choice of law clause in that particular BIT, which led to the CJEU to state that "*[c]onsequently*, having regard to all the *characteristics* of the arbitral tribunal mentioned in Article 8 of the BIT," that the provision in question was precluded by Articles 267 and 344 TFEU.[328] The CJEU repeated the phrase "*[c]onsequently*" in the paragraph immediately transitioning to its *dispositif*,[329] making clear that the *dispositif* was based on the particular findings that preceded it, namely those about the scope and implications of the choice of law clause in the applicable BIT.

206. The Tribunal thus agrees with the *Eskosol* tribunal that "nothing in the CJEU's Judgment suggested that EU Member States were barred from offering to arbitrate disputes under

[325] **RL-284**, *Achmea* Judgment, ¶ 4.

[326] **RL-284**, *Achmea* Judgment, ¶¶ 40-41 (*emphasis added*).

[327] **RL-284**, *Achmea* Judgment, ¶ 42 (*emphasis added*); *see* **CL-233**, *Eskosol*, ¶¶ 172-173 (noting the CJEU's emphasis in its reasoning on "that twofold basis" arising from the applicable law clause of the Netherlands-Slovakia BIT, as distinct from that clause's other unobjectionable elements).

[328] **RL-284**, *Achmea* Judgment, ¶ 56 (*emphasis added*).

[329] **RL-284**, *Achmea* Judgment, ¶ 60 *(emphasis added*).

treaties *not* governed even in part by EU law, but only by express treaty provisions and by general principles of international law."[330] As the *Eskosol* tribunal further explained:

> The *Achmea* Judgment was not predicated on the exclusive competence of the EU to enter into such treaties on its Member States' behalf. Rather, the Tribunal understands the Achmea Judgment more narrowly, as objecting only to treaty provisions that by their terms give tribunals the authority (or indeed the mandate) to decide a dispute among other things by reference to EU law, in either or both of the "twofold" aspects the CJEU identified.[331]

207. The *Eskosol* and *CEF* tribunals both concluded, based on a close reading of *Achmea*, that the CJEU did *not* bar EU Member States from authorizing arbitral tribunals to decide treaty disputes under general principles of international law, so long as they do not authorize such tribunals to apply EU law in addition.[332] This Tribunal agrees with that interpretation of the *Achmea* Judgment.

208. This reading of *Achmea* is also supported by the distinction about applicable law which the Commission itself had urged the CJEU to adopt, in its 2016 submission in the *Achmea* case. The Commission took pains to distinguish between investment treaties under which EU law was part of the governing law, and those (such as with non-EU Member States) under which arbitrations "concern only the application and interpretation of the Agreement and not the rest of Union law." Importantly, the Commission acknowledged that EU law still might play a role in disputes under these third-country treaties, depending on the facts alleged, and that tribunals empowered under those treaties therefore might have to interpret EU law, but it explained that in such cases the "*interpretation [of EU law] plays a role only as a factual element* in the context of the finding of a possible breach of the agreement and in no way binds the courts of the Union."[333] The Commission argued to the CJEU that

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[330] **CL-233**, *Eskosol*, ¶ 175 (*emphasis in original*).

[331] **CL-233**, *Eskosol*, ¶ 175.

[332] **CL-233**, *Eskosol*, ¶ 175; **CL-241**, *CEF*, ¶ 96(d).

[333] European Commission, Written Observations regarding a Prejudicial Decision, submitted pursuant to Article 23, second paragraph, of the protocol of the Court of Justice's statute (Ref. sj.c(2016) 5385926 - 30/08/2016), ¶ 162, unofficial translation from French original available at http://ec.europa.eu/dgs/legal_service/submissions/c2016_284_obs_fr.pdf (*emphasis added*) ("**Commission Observations in *Achmea***"); **CL-233**, *Eskosol*, ¶ 171 (quoting same).

no incompatibility with the *acquis* therefore arose, because notwithstanding these possible interpretations of EU law as issues of fact, "arbitral tribunals operating on the basis of these agreements must therefore *only apply* the investment protection rules enshrined in international law between the Union and the third country, and not those provided by Union law."[334]

209. Interestingly, the CJEU later reinforced this distinction in its Opinion 1/17, rendered after *Achmea*, upholding the legality under the EU *acquis* of the investment dispute settlement provisions of the CETA.[335] In this decision, the CJEU began by reiterating its statement in *Achmea* that an international treaty establishing a mechanism for interpretation of its own provisions "is, in principle, compatible with EU law."[336] It further stated that the fact the CETA established a dispute resolution mechanism that was "indeed separate from" the EU court system did not render it incompatible *per se* with the EU *acquis*.[337] The key point, the CJEU emphasized, was that "EU law does not preclude" a treaty conferring on a tribunal "the jurisdiction to interpret and apply the provisions of the [treaty] having regard to the rules and principles of international law applicable between the Parties," so long as the tribunal was not granted the power "to interpret and apply provisions of [EU law]."[338] The CJEU then emphasized that under the CETA's applicable law provision, alleged breaches of CETA were to be determined by applying the terms of CETA itself and "other rules and principles of international law," but the CETA tribunal could not "determine the legality of a measure … under the domestic law of a Party."[339] The CJEU distinguished "the investment agreement at issue in" *Achmea* on several grounds, the very first of which was that under *its* applicable law, a tribunal "would be called upon to give rulings on disputes that might concern the interpretation or application of EU law."[340]

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[334] Commission Observations in *Achmea*, ¶ 163; **CL-233**, *Eskosol*, ¶ 171 (quoting same).
[335] CJEU Opinion 1/17, EU:C:2019:341, FJ-41, 30 April 2019 ("***CETA* Opinion**").
[336] *CETA* Opinion, ¶ 106.
[337] *CETA* Opinion, ¶¶ 114-115, 117.
[338] *CETA* Opinion, ¶ 118.
[339] *CETA* Opinion, ¶ 121.
[340] *CETA* Opinion, ¶ 126.

210. Importantly, the CJEU went on to discuss what it meant by "interpretation and application of EU law," in the context of a treaty-based dispute. It indicated that it was not troubled by the CETA's express provision that "in determining the consistency of a measure with this Agreement, the [CETA] Tribunal *may consider, as appropriate, the domestic law of a Party as a matter of fact*," because it would be guided by the "prevailing interpretation" of domestic law provided by domestic courts, and in any event "any meaning given to domestic law by the [CETA] Tribunal shall not be binding upon" those courts.[341] The CJEU further explained this distinction between considering EU law "as a matter of fact" (acceptable under the *acquis*) and purporting to offer binding interpretations of EU law (not acceptable under the *acquis*), as follows:

> Those provisions serve no other purpose than to reflect the fact that the CETA Tribunal, when it is called upon to examine the compliance with the CETA of the measure that is challenged by an investor and that has been adopted by the investment host State or by the Union, will inevitably have to undertake, on the basis of the information and arguments presented to it by that investor and by that State or by the Union, an examination of the effect of that measure. That examination may, on occasion, require that the domestic law of the respondent Party be taken into account. However, … that examination cannot be classified as equivalent to an interpretation, by the CETA Tribunal of that domestic law, but consists, on the contrary, of that domestic law being taken into account as a matter of fact ….[342]

211. Based on this understanding – that taking EU law "into account as a matter of fact" "cannot be classified as equivalent to an interpretation" of EU law – the CJEU concluded that the CETA's dispute resolution provisions were compatible with the EU *acquis*. It emphasized again that the governing law of CETA, and hence the "powers of interpretation" of CETA tribunals, were "confined to the provisions of the CETA in the light of the rules and principles of international law …."[343] These of course were the same two categories of applicable law that the CJEU had not objected to in *Achmea*, when it framed its concern

[341] *CETA* Opinion, ¶ 130 (*emphasis added*).
[342] *CETA* Opinion, ¶ 131.
[343] *CETA* Opinion, ¶ 134.

there as only about the other "twofold" elements of the four-part applicable law clause in the Netherlands-Slovakia BIT.[344]

212. As a result, the Tribunal considers that the CJEU's view – as reflected in *Achmea* and later confirmed in the *CETA* Opinion – is that (a) treaties whose applicable law raises the same functional concerns as the CJEU found objectionable under the Netherlands-Slovakia BIT would in that respect be incompatible with Articles 344 and 267 of the TFEU, but (b) treaties whose applicable law is limited to the terms of the treaties themselves and general principles of international law, which the CJEU found not to be problematic in either *Achmea* or the *CETA* Opinion, would not be incompatible with Articles 344 and 267 of the TFEU. The latter conclusion remains the case under the *acquis* even if EU law might have to be "taken into account as a matter of fact" in a particular case for purposes of applying the governing international law standards (in the language of the *CETA* Opinion).

213. In this case, the Tribunal already has found (as discussed in Section VI.A above) that the BIT's applicable law does *not* extend beyond the terms of the BIT itself and general principles of international law, contrary to Romania's mistaken arguments about a broader applicable law derived from Article 42(1) of the ICSID Convention. In these circumstances, Romania's arguments based on the *Achmea* Judgment, and on what that Judgment ostensibly "confirmed" was the correct reading of the EU Treaties, do not support its proffered conclusion that the BIT in this case is fundamentally incompatible with the EU Treaties.[345] On that basis, Romania cannot rely on the *Achmea* Judgment to support its contention that the offer of arbitration reflected in Article 8 of the BIT was

[344] **RL-284**, *Achmea*, ¶ 42.

[345] Because the Tribunal so finds with regard to the BIT, it need not reach the additional distinction with *Achmea* that Nova proffered, to the effect that *Achmea* concerned an UNCITRAL rather than an ICSID arbitration. In Nova's view, the CJEU's ruling did not reach the issue of offers to arbitrate under the ICSID Convention. *See* Nova's First *Achmea* Submission, ¶¶ 32-34. By contrast, Romania argues that *Achmea* cannot be limited to non-ICSID cases. *See* Romania's Second *Achmea* Submission, ¶¶ 44-46. While both Parties present interesting arguments on these points, the Tribunal's determination that the BIT is not governed by EU law (the way the Netherlands-Slovakia BIT was) renders the CJEU's ruling in *Achmea* inapposite to this BIT, and thereby makes it unnecessary for the Tribunal to assess any operative differences between the two paths to arbitration offered under the BIT.

implicitly "terminated, replaced, or superseded by the EU Treaties" upon its accession to the EU.[346]

(2) Article 351 TFEU and the Primacy of EU Law

214. Romania argues that even apart from the *Achmea* Judgment, Romania's offer to arbitrate in the BIT was rendered invalid immediately upon its accession to the EU, as a direct consequence of both Article 351 of the TFEU and the primacy of EU law.

215. Article 351 TFEU provides that the international law obligations acceding States assumed towards non-EU Member States prior to joining the EU "shall not be affected" by the EU Treaties.[347] Romania's argument is that, "[*a*] *contrario*," this statement must mean that treaty obligations acceding States previously undertook towards EU Member States "*would* be affected, and thus give way in case of inconsistency to the EU treaties."[348] Romania adds that "the ECJ has consistently held that EU Treaties take precedence over agreements that were concluded between EU Member States before the EU Treaties entered into force."[349] From this proposition Romania reaches the conclusion that the "Dutch – Romanian BIT, or at the very least the dispute resolution clause therein, was effectively terminated or at the very least superseded" upon Romania's accession, because the arbitration clause was "incompatible" with the EU Treaties, in particular regarding the primacy of EU law.[350]

216. As a threshold point, the Tribunal observes that if this construction of Article 351 was as obvious as Romania suggests, with the effect that the Article effectively terminated all intra-EU BITs (or invalidated their arbitration clauses) immediately upon accession, it would have been easy for the CJEU to say so in *Achmea*. The CJEU did not, however, reference Article 351 TFEU at all. More generally, reasoning *a contrario* is an exceedingly indirect way for the EU Treaties ostensibly to accomplish the termination of other treaty

[346] Romania's Second *Achmea* Submission, ¶ 4; *see* Romania's First *Achmea* Submission, ¶¶ 16, 24.
[347] **RL-65**, TFEU, Article 351.
[348] Romania's First *Achmea* Submission, ¶¶ 36-37 (*emphasis in original*).
[349] Romania's First *Achmea* Submission, ¶ 37.
[350] Romania's First *Achmea* Submission, ¶ 49; Romania's Second Achmea Submission, ¶¶ 47-48.

commitments. If Article 351 had been intended to address treaties between acceding States and EU Member States, one would expect it to mention such treaties directly; instead it is entirely silent on such treaties, addressing only those between acceding States and non-EU Member States.

217. Putting aside Romania's contention that Article 351 implied the automatic *termination* of prior BITs between acceding States and existing Member States as a matter of EU law, the Tribunal acknowledges the general principle of the *primacy* of EU law within the EU legal system. The Tribunal does not doubt that this principle acts as a rule of priority through which the EU Treaties prevail over the national laws of EU Member States. The EU courts may also regard the principle as requiring the EU Treaties to prevail over any incompatible provisions of pre-accession treaties. That observation, however, begs the important question of *which* provisions of pre-accession BITs in fact are incompatible with the EU Treaties. As discussed above, the CJEU in *Achmea* did not find that intra-EU BIT arbitration was *per se* incompatible with EU law, but rather that it would be only *to the extent* such tribunals were required to apply EU law as part of their rules of decision. Given that this BIT does not so provide, invoking the primacy of EU law does not advance Romania's case. Moreover, even if the EU courts were to disagree with this analysis, this Tribunal is a body established under international law rather than EU law, and accordingly must apply international law principles (rather than EU law principles) to the question of purported inconsistency and priority among treaties. The Tribunal turns to that exercise below.

C. VCLT Principles Regarding Successive Treaties

218. As discussed above, the Tribunal must independently assess whether, under the BIT and general principles of international law, a valid offer of consent to arbitrate still existed following Romania's EU accession, and up through the date on which Nova sought to accept that offer by commencing these proceedings.

219. Romania invokes two provisions of the VCLT in support of its contention that no valid offer of consent existed as a matter of international law: the principle of implied

termination of treaties, under VCLT Article 59(1), and the regulation of successive treaties related to the same subject matter, under VCLT Article 30(3).

a. VCLT Article 59(1)

220. Beginning with Article 59(1), the provision states as follows:

> A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:
>
> (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
>
> (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

221. Working through its provisions, the first requirement is that all parties have "conclude[d] a later treaty relating to the same subject matter." As to which treaty in this case is "later," the Tribunal notes Nova's argument that the relevant provisions of EU Treaties which Romania invokes (principally Articles 267 and 344 TFEU) have existed in the same form since before the BIT.[351] Nonetheless, the question under Article 59(1) is not when the provisions originated in the abstract; it is when the relevant Contracting States "*conclude[d]*" the treaty in question. Romania and the Netherlands did not become bound to each other under the EU Treaties until Romania's accession in 2007, which post-dated their mutual entry into the BIT. The Tribunal therefore accepts that as between Romania and the Netherlands, their mutual obligations to one another under the EU Treaties were "conclude[d]" (*i.e.*, entered into force) "later" than their obligations to one another under the BIT.

222. The second threshold requirement for Article 59(1) to apply is that the earlier and later treaties "relat[e] to the same subject-matter." Romania and the Commission suggest that this is not actually an independent requirement, based on the VCLT's drafting history and academic commentary.[352] The Tribunal is unable to accept this contention, which would collapse the inquiry under Article 59(1)(b) into the inquiry under Article 59(1)'s

[351] Nova's First *Achmea* Submission, ¶¶ 36, 39.

[352] *See* Romania's Second *Achmea* Submission, ¶¶ 65-69; Commission Submission, ¶ 15.

introductory provision. The *Eskosol* tribunal's reasoning on the same issue under VCLT Article 30 is persuasive in this regard. First, "adopting the Commission's interpretation would effectively require rewriting the text, to ignore a threshold provision … which is expressly stated to be the foundational requirement for any of the following provisions of [the Article] even to apply."[353] Article 59(1) is structured grammatically with both an "if" and an "and": "A treaty shall be considered as terminated *if* all the parties to it conclude a later treaty relating to the same subject-matter *and* …," which clearly denotes that the qualifying conditions following the "if" must be satisfied, before one can move to the second stage of the inquiry, namely whether the additional qualifying conditions following the "and" are also satisfied. Adapting the words of the *Eskosol* decision to Article 59(1), "[a]dherence to the natural and ordinary meaning of the terms does not permit the requirements of [Article 59(1)] to be skipped over, allowing direct recourse to [Article 59(1)(b)]."[354] Certainly, none of the materials Romania cites suggest that the "same subject matter" proviso which was added to the final VCLT text was intended to be treated as "merely superfluous and given no meaning whatsoever,"[355] in contravention of normal treaty interpretation principles of *effet utile.*

223. In addition, as is the case also under VCLT Article 30(3), the *comparators* in Articles 59(1) and 59(1)(b) are different: the former "examines the relationship between *treaties as a whole* (whether they 'relat[e] to the same subject matter'), while [the latter] examines the relationship between *particular provisions* within such related treaties (whether they are '[in]compatible')."[356] The *Eskosol* decision had this to say about such different comparators:

> While in principle it could be possible to reason from the whole to a part (i.e., that if two treaties at their macro-level do relate to the same subject matter, their particular provisions may well contain overlaps which require scrutiny for compatibility), it is not equally possible to reason in reverse, from a part to a whole (i.e., that treaties necessarily do relate to the same subject matter because specific provisions in different treaties might have different effects). The

[353] **CL-233**, *Eskosol*, ¶ 136.
[354] **CL-233**, *Eskosol*, ¶ 136.
[355] **CL-233**, *Eskosol*, ¶ 139.
[356] **CL-233**, *Eskosol*, ¶ 137.

> Commission's argument thus fails at the level of logic, in light of the different comparators set out in [the Article's] plain text.[357]

The Tribunal agrees with this analysis. The difference in comparators reinforces that the "same subject matter" language in the introductory sentence in Article 59(1), which relates to the two treaties *as such*, cannot be treated as adding nothing whatsoever to the analysis already mandated by Article 59(1)(b), which analyzes the compatibility of *particular provisions* of those treaties.

224. The Tribunal also agrees with the numerous other tribunals that have found the EU Treaties do not have the "same subject matter" as BITs, such that the Contracting Parties may be presumed to have intended accession to the former naturally to supplant the latter, even without discussion or further action. Among other things, the EU Treaties were envisaged as a method of creating a common market between EU Member States by reference to EU law, while the objective of BITs is, *inter alia*, to encourage reciprocal investment between Contracting States, by providing investors certain assurances of treatment defined in terms of international law. Although both bodies of law create dispute resolution mechanisms, this does not mean that the treaties have the same subject matter, even if both mechanisms in theory could be employed to address a given set of facts. The *Eskosol* tribunal explained that "[t]wo different treaties may apply simultaneously the same set of facts, or even share very broadly stated goals (such as 'integration' or 'cooperation' with other States) but approach the achievement of those goals from different perspectives."[358] The *EURAM* tribunal reached the same conclusion,[359] based on its view that the subject matter of a treaty "refers to the issues with which its provisions deal, *i.e.*, its topic or substance."[360] Using those standards, the Tribunal agrees with the consistent case law finding that the EU Treaties deal with a different subject matter than investment treaties.[361]

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[357] **CL-233**, *Eskosol*, ¶ 137.

[358] **CL-233**, *Eskosol*, ¶ 146.

[359] **CL-101**, *EURAM*, ¶¶ 168-169 (discussing VCLT Article 59).

[360] **CL-101**, *EURAM*, ¶ 172.

[361] *See, e.g.,* **CL-101**, *EURAM*, ¶¶ 178, 184 ("To accede to an economic community is simply not the same as to set up a special investment protection regime providing for investor-State arbitration"); **CL-99**, *Electrabel*, ¶ 4.176; **RL-48**, *Eastern Sugar*, ¶¶ 74-79.

225. For these reasons, the notion that the EU Treaties implicitly terminated the BIT pursuant to VCLT Article 59(1), automatically and *sub silentio*, cannot be accepted. But this conclusion would be the same even if (*arguendo*) a different approach to the threshold "same subject matter" requirement were to apply. That is because neither of the subsidiary tests of Article 59(1)(a) or Article 59(1)(b) are met in this case.

226. Beginning with Article 59(1)(a), there is no evidence that Romania and the Netherlands each contemporaneously intended, at the time of Romania's accession to the EU on 1 January 2007, that the reciprocal assurances they previously had provided to each other's investors by means of the BIT – including the assurance of access to international arbitration – would cease to apply. Romania asserts that it first adopted this position on 6 April 2009, when it submitted its counter-memorial in the *Micula* case,[362] but it does not cite any evidence suggesting this was its intent several years earlier when it joined the EU. Romania certainly does not cite evidence suggesting this was also the Netherlands' contemporaneous understanding, on 1 January 2007, of the automatic effect of Romania's EU accession.

227. Indeed, the notion of implicit termination of the BIT by mutual intent is belied by the text of the January 2019 Declaration, discussed in Section VI.D(1) below, by which the signatories (including both Romania and the Netherlands), state that they "will terminate" (future tense) all BITs concluded between them, and that they "will make best efforts" to complete this process by 6 December 2019.[363] The use of the future tense clearly indicates that the signatories did not believe their intra-EU BITs already had been terminated many years before.[364] The Netherlands Declaration on which Romania also relies is similar in

[362] Romania's First *Achmea* Submission, ¶ 17.

[363] **Annex EC-16**, January 2019 Declaration, pp. 3-4.

[364] Indeed, even the recent EU agreement on termination of intra-EU BITs, which certain Member States (including Romania and the Netherlands) signed on 5 May 2020, provides for termination *by virtue of* (and effective upon) that new treaty's entry into force. *See* Agreement for the termination of bilateral investment treaties between the EU Member States, *available at* https://ec.europa.eu/info/files/200505-bilateral-investment-treaties-agreement_en, Article 4(2). ("The termination in accordance with Article 2 of Bilateral Investment Treaties listed in Annex A … shall take effect, for each such Treaty, as soon as this Agreement enters into force for the relevant Contracting Parties"). The whole *raison d'etre* of the new treaty is to effect a change in the status of the covered intra-EU BITs, which would not be necessary if such BITs already had been implicitly terminated under VCLT Article 59(1).

this respect, stating that it "will undertake best efforts to deposit any treat terminating bilateral investment treaties between Member States no later than 6 December 2019."[365]

228. As for Article 59(1)(b), the Tribunal does not accept that the provisions of the EU Treaties are "so far incompatible with those of the [BIT] that the two treaties are not capable of being applied at the same time." As a matter of international law, obligations in two treaties are understood to be incompatible if compliance with one obligation places a State into non-compliance with the other.[366] But this necessarily requires a finding that the obligations of two separate treaties cannot *both* be applied, perhaps imposing parallel or additional obligations but not flatly inconsistent ones. The Tribunal does not consider this to be the case as between the BIT and Articles 267 and 344 TFEU, as Romania contends,[367] for the reasons canvassed extensively above in the analysis of the *Achmea* Judgment. Stated most simply, the CJEU considered a conflict to arise only where a BIT (like the one before it) mandated a tribunal's application of EU law as part of the governing law of the proceedings. That is not the situation here.

229. Nor is the BIT incompatible in this sense with Article 18 TFEU, as Romania also argues, because the provisions of the BIT and of that Article – which prohibits discrimination on grounds of nationality as among EU Member States – can be cumulatively applied.[368] Nothing in the BIT requires Romania or the Netherlands to provide *more* favorable treatment to the other's investors than they would to any other EU national; the BIT simply prohibits its Contracting Parties from providing *less* favorable treatment than it provides other investors, but that norm itself establishes a proposition of non-discrimination. So long as Romania and the Netherlands provide other EU nationals with the same treatment as they provide each other's investors, the anti-discrimination principles of both the BIT and Article 18 TFEU can be honored. In that sense, the two sets of legal obligations can

[365] **R-327**, Netherlands Declaration, p. 3.

[366] *See, e.g.,* **RL-327**, ILC, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law," Report of the Study Group of the International Law Commission, U.N. Doc. A/CN/4/L/682, 13 April 2006, ¶ 24 ("conflict exists if it is possible for a party to two treaties to comply with one rule only by thereby failing to comply with another rule. This is the basic situation of incompatibility. An obligation may be fulfilled only by thereby failing to fulfill another obligation.").

[367] *See* Romania's First *Achmea* Submission, ¶¶ 75, 80-82.

[368] Romania's First *Achmea* Submission, ¶ 76; Romania's Second *Achmea* Submission, ¶¶ 97-101.

be said to work towards a common end, not disparate ones, and may be cumulatively applied without any inherent inconsistency. This is true not only of the BIT's substantive provisions, but also of its provision for access to international arbitration, since (as explained in Section VI.B.1 above), EU law – as interpreted by the CJEU in *Achmea* – does not actually prevent Member States from agreeing to treaty arbitration, so long as the proceedings are governed only by the terms of the treaty and general international law.

b. VCLT Article 30(3)

230. The Tribunal is equally unpersuaded by Romania's argument that its offer of arbitration in the BIT was rendered invalid as of EU accession, by virtue of the conflicts rule represented by Article 30(3) of the VCLT.[369] This argument requires little additional attention in light of the discussion above of VCLT Article 59(1).

231. VCLT Article 30 is entitled "Application of successive treaties relating to the same subject-matter," and its first subparagraph states that "the rights and obligations of States Parties to successive treaties *relating to the same subject-matter* shall be determined in accordance with the following paragraphs."[370] Subparagraph (3) then provides that "[w]hen all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its previsions are *compatible* with those of the later treaty."[371] As the Tribunal already has concluded, however, neither the "same subject matter" test nor the "incompatibility" test is satisfied here. These conclusions apply as much to VCLT Article 30 as they did to VCLT Article 59.

D. Other Arguments Raised by the Parties

(1) The Declarations

232. Romania invokes two Declarations, first the January 2019 Declaration of EU Member States (including Romania and the Netherlands), and second the Netherlands Declaration

[369] Romania's First *Achmea* Submission, ¶ 74.

[370] **RL-136**, VCLT, Article 30(1) (*emphasis added*).

[371] **RL-136**, VCLT Article 30(3) (**emphasis added**).

dated 28 May 2019. Romania argues that these Declarations "expressly referred to the ECJ's Achmea Decision," and "expressly confirmed" on that basis that the Tribunal lacks jurisdiction to proceed because there was no valid offer to arbitrate.[372] Romania also argues that "[a]t the very least, [the Netherlands Declaration], coupled with Romania's repeated position as of 2009 that intra-EU BITs had been terminated upon Romania's accession to the EU, should be construed as a binding interpretative note confirming … that the BIT or the dispute resolution clause therein, had been effectively terminated upon Romania's accession to the EU."[373]

233. In order to understand the limitations of these arguments, it is useful to examine the two Declarations in some detail. Beginning with the January 2019 Declaration, this document is entitled "Declaration of the Governments of the Member States on the legal consequences of the judgment of the Court of Justice in *Achmea* and on investment protection in the European Union." Citing the *Achmea* Judgment, the January 2019 Declaration first states that "Member States are bound to draw all necessary consequences from that judgment pursuant to their obligations under Union law."[374] The rest of the Declaration may be divided into two parts, the first expressing views on certain legal issues in the wake of the *Achmea* Judgment,[375] and the second declaring that in accordance with those views, the 22 EU Member States "will undertake the following actions without undue delay."[376]

234. Regarding the legal issues, the signatories state *inter alia* as follows:

> Union law takes precedence over bilateral investment treaties concluded between Member States. As a consequence, all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable. They do not produce effects including as regards provisions that provide for extended protection of investments made prior to termination for a further period of time (so-called sunset or grandfathering clauses). An arbitral tribunal established on the basis

[372] Romania's First *Achmea* Submission, ¶ 8; Romania's Second *Achmea* Submission, ¶ 103(ii).

[373] Romania's First *Achmea* Submission, ¶ 9; Romania's Second *Achmea* Submission, ¶ 106.

[374] **Annex EC-16**, January 2019 Declaration, p. 1.

[375] **Annex EC-16**, January 2019 Declaration, pp. 1-2.

[376] **Annex EC-16**, January 2019 Declaration, pp. 3-4.

> of investor-State arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment Treaty.[377]

The statement that "Union law takes precedence over bilateral investment treaties concluded between Member States" contains a footnote which cites certain CJEU judgments and then asserts, without any analysis or citations, that "[t]he same result follows also under general public international law, in particular from the relevant provisions of the Vienna Convention on the Law of the Treaties and customary international law (*lex posterior*)."[378]

235. Regarding the actions to be taken by the 22 signatories, the January 2019 Declaration pledges that they will "undertake the following," *inter alia*:

> 1. By the present declaration, Member States inform arbitration tribunals about the legal consequences of the *Achmea* judgment, as set out in this declaration, in all pending intra-EU investment arbitration proceedings brought either under bilateral investment treaties concluded between Member States or under the Energy Charter Treaty.
>
> 2. In cooperation with a defending Member State, the Member State, in which an investor that has brought such an action is established, will take the necessary measures to inform the investment arbitration tribunals concerned of those consequences. Similarly, defending Member States will request the courts, including in any third country, which are to decide in proceedings relating to an intra-EU investment arbitration award, to set these awards aside or not to enforce them due to a lack of valid consent.
>
> 3. By the present declaration, Member States inform the investor community that no new intra-EU investment arbitration should be initiated.
>
> ...
>
> 5. In light of the *Achmea* judgment, Member States will terminate all bilateral investment treaties concluded between them by means of a plurilateral treaty or, where that is mutually recognised as more expedient, bilaterally.

[377] **Annex EC-16**, January 2019 Declaration, pp. 1-2.

[378] **Annex EC-16**, January 2019 Declaration, p. 1, n. 1.

...

> 8. Member States will make best efforts to deposit their instruments of ratification, approval or acceptance of that plurilateral treaty or of any bilateral treaty terminating bilateral investment treaties between Member States no later than 6 December 2019.[379]

236. The Tribunal's first observation is that the January 2019 Declaration does not actually purport to interpret the TFEU, but rather to address the perceived "legal consequences of the judgment of the Court of Justice in *Achmea*."[380] This is an important distinction, because EU Member States do not have the power to interpret the TFEU; only the CJEU has the power to do so within the EU legal order. As for *Achmea*, of course, its judgment says what it says, and while the CJEU in due course may provide further guidance on how to read that judgment, the EU Member States do not themselves have that authority.

237. This latter point is important because, as the *Eskosol* tribunal noted, "in their statements regarding legal issues on the first pages of the January 2019 Declaration, the signatories have gone far beyond the actual holding in [*Achmea*]."[381] Specifically, the January 2019 Declaration declares that *Achmea* stands for the proposition that "*all* investor-state arbitration clauses contained in bilateral investment treaties … are contrary to Union law,"[382] but *Achmea* does not actually so state. Rather, as explained in Section VI.B.1 above, the CJEU's finding in *Achmea* was limited to intra-EU BITs with a "provision … *such as* Article 8" of the *Achmea* BIT,[383] and its reasoning in *Achmea* makes clear that the concern was about clauses that make EU law part of the applicable law of the treaty. In these circumstances, while *Achmea* itself now forms part of EU law, EU Member States cannot by simple declaration extend *Achmea* beyond its own terms, or declare a more sweeping proposition about the *acquis* than the CJEU itself was willing to embrace.

238. Nor does the January 2019 Declaration rightly qualify as a "subsequent agreement" between the BIT's Contracting States on interpretation of the BIT, for purposes of VCLT Article

[379] **Annex EC-16**, January 2019 Declaration, pp. 3-4.

[380] **Annex EC-16**, January 2019 Declaration, p. 1.

[381] **CL-233**, *Eskosol*, ¶ 213.

[382] **Annex EC-16**, January 2019 Declaration, p. 1 (*emphasis added*).

[383] **RL-284**, *Achmea* Judgment, ¶ 62 (*emphasis added*).

31(3)(a), which provides that "[t]here shall be taken into account, together with the context … [a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."[384] The ILC's 1966 Commentaries on the Draft VCLT Articles suggest that the purpose of Article 31(3)(a) was to allow Contracting States to clarify later "[a] question of fact … as to whether an understanding reached during the negotiations [of a particular treaty] concerning the meaning of a provision was or was not intended to constitute an agreed basis for its interpretation."[385] But the January 2019 Declaration does not suggest that Romania and the Netherlands had contemporaneously shared *any* "understanding" at the time of their BIT negotiations that arbitration provisions would become inoperative if and when Romania acceded to the EU. Indeed, as Nova notes, many (if not most) EU Member States believed prior to *Achmea* that intra-EU BITs were consistent with EU law, a view that Advocate-General Wathelet himself reflected in his Opinion in *Achmea*.[386] In these circumstances, the Declaration at best can be seen as offering the Member States' *new* intention with respect to the BIT, rather than confirming a shared understanding at the time the BIT was agreed and ratified.[387] Moreover, this new shared intention is said to be based on the CJEU's decision in *Achmea*, which came into being well after the critical date for jurisdiction in this case , *i.e.*, the date of the Request for Arbitration, 21 June 2016.

239. This distinguishes the situation from the joint interpretative note issued by the NAFTA State Parties through the NAFTA Free Trade Commission (the "**FTC Interpretation**"), which Romania observes was given effect by tribunals even in cases that already were pending when it was issued.[388] The FTC Interpretation clearly affirmed that the State Parties had *intended from the outset* that certain terms of the NAFTA be given a particular meaning, by stating that the Note was issued "in order to clarify and reaffirm the meaning" of certain provisions.[389] Moreover, the NAFTA itself expressly provided that an interpretation by the Free Trade Commission "shall be binding on a Tribunal established under this Section," a point that was

[384] **RL-136**, VCLT, Article 31(3)(a).

[385] *See* ILC Draft Articles on the Law of Treaties with Commentaries, 1966, p. 221 (Article 27, Commentary, item 14).

[386] Nova's First *Achmea* Submission, ¶ 119.

[387] *See* **CL-233**, *Eskosol*, ¶ 223 (concluding the same with regard to the ECT).

[388] *See* Romania's First *Achmea* Submission, ¶ 100.

[389] NAFTA Free Trade Commission, "Notes of Interpretation of Certain Chapter 11 Provisions," 31 July 2001.

emphasized by the tribunals giving the FTC Interpretation immediate effect. In these circumstances, most of those tribunals *never even addressed* VCLT Article 31(3)(a). That considerably limits the persuasiveness of Romania's citing their decisions in support of its VCLT Article 31(3)(a) contention.[390]

240. As noted above, nothing in either the *Achmea* Judgment, or in the January 2019 Declaration purporting to draw "legal consequences" from that Judgment, contends that the interpretation of intra-EU BIT arbitration clauses there stated was one that the relevant EU Member States intended from the outset. In these circumstances, the Tribunal agrees with the *Eskosol* tribunal that the January 2019 Declaration "is quite different from the types of 'subsequent agreements' that VCLT Article 31(3)(a) was intended to address."[391]

241. By contrast, as a matter of international law, any *new* understanding or agreement between Romania and the Netherlands about the BIT, based not on their original intention at the time of the BIT but rather on their impression of the "legal consequences" of the CJEU's *Achmea* Judgment, would have to be prospective in effect, rather than applied after-the-fact to pending cases already initiated under the BIT. This is the case regardless of what EU courts eventually may decide, for purposes of EU court proceedings, about the *ex tunc* or *ex nunc* effect of the *Achmea* Judgment. The opposite result – giving a new understanding (such as the January 2019 Declaration declares) effect in a pending case, with the result of defeating jurisdiction that was not demonstrably already lacking as of the date the case commenced – would have

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[390] *See, e.g.,* **RL-315**, *Pope & Talbot*, ¶ 51 (concluding that "the phrase 'shall be binding' in Article 1131(2) is better regarded as mandatory than prospective"); **RL-170**, *Mondev*, ¶ 120 (stating that "[i]n light of the FTC's interpretation, and in any event, it is clear that Article 1105 was intended to put to rest for NAFTA purposes a long-standing and divisive debate" about the minimum standard of treatment in international law); **RL-197**, *ADF*, ¶¶ 176-177 (stating that Article 1132(2) makes the FTC Interpretation "binding on this and any other Chapter 11 Tribunal," and observing in addition that the FTC Interpretation "expressly purports to be an interpretation of several NAFTA provisions … and not an 'amendment,' or anything else"); **RL-171**, *Loewen*, ¶ 126 (concluding that "[a]n interpretation issued by the Commission is binding on the Tribunal by virtue of Article 1131(2)"). The only case Romania cited that even mentioned VCLT Article 31(3)(a) was *Methanex*, where the tribunal first stated that "[w]hatever the motive or the timing of the FTC's interpretation, the historical fact remains that the FTC has made what it characterizes as an 'interpretation' of Article 1105(1) NAFTA"; then observed that "the FTC interpretation would be entirely legal and binding on a tribunal seised with a Chapter 11 case," because "[t]he purport of Article 1131(2) is clear beyond peradventure"; additionally referenced VCLT Article 31(3)(a), for the proposition that "rules of international interpretation" provide for recognition of such mutual agreements regarding interpretation; and then concluded that Article 1131(2) was entirely proper under international law, analogizing it to a "legislative clarification" of the original intention of a statute to address a concern that "the courts implementing it have misconstrued the legislature's intention …. " **RL-245**, *Methanex*, ¶¶ 14, 20-22.

[391] **CL-233**, *Eskosol*, ¶ 222.

the same flaw that the *Eskosol* tribunal noted: "it would be inconsistent with general notions of acquired rights under international law to permit States effectively to non-suit an investor part-way through a pending case, simply by issuing a joint document purporting to interpret long-standing treaty text so as to undermine the tribunal's jurisdiction to proceed."[392] The fact that the signatories to the Declaration did not even evince a belief that their respective intra-EU BITs had been implicitly terminated from the date of accession, but rather announced their intent to explore *future* steps leading to eventual termination,[393] further confirms that the Declaration cannot be given legal force to invalidate BIT arbitration clauses in cases already then underway.[394]

242. A similar observation pertains to the subsequent Netherlands Declaration dated 28 May 2019. By the time the Netherlands Declaration was issued, this arbitration already had been pending for almost three years. Moreover, the Ministry of Foreign Affairs of the Netherlands explains in its transmittal of the Netherlands Declaration that the latter is simply an implementation of its commitment, in the January 2019 Declaration, "to inform the investment tribunal concerned of the consequences of the *Achmea* judgment" as per the views stated in the January 2019 Declaration.[395] The Netherlands Declaration itself adds nothing of substance, but simply (a) quotes the January 2019 Declaration's description of the *Achmea* Judgment, (b) notes that this arbitration is established on the basis of a BIT between Romania and the Netherlands, and (c) concludes that "[h]ence, the Kingdom of the Netherlands stresses that the arbitral tribunal … lacks jurisdiction due to a lack of a valid offer to arbitrate …."[396] Nothing in the Netherlands Declaration suggests that the Netherlands had believed *at the time of the BIT* that

[392] **CL-233**, *Eskosol*, ¶ 226.

[393] **Annex EC-16**, January 2019 Declaration, pp. 3-4 ("In light of the *Achmea* judgment, Member States will terminate all bilateral investment treaties concluded between them by means of a plurilateral treaty or, where that is mutually recognised as more expedient, bilaterally."). As Romania observes, the Member States agreed on the terms of such a treaty in October 2019, by which time this arbitration already had been pending for more than three years; the new treaty is still subject to ratification. *See* Romania's Second *Achmea* Submission, ¶ 103(iii), *citing* **R-335**, European Commission Statement, "EU Member States Agree on a Plurilateral Treaty to Terminate Bilateral Investment Treaties," 24 October 2019.

[394] *See similarly* **CL-388A**, *Rockhopper*, ¶¶ 185, 188 ("Importantly, the … text evinces an intention to intensify certain discussions and take certain specified actions," including eventual termination of intra-EU BITs; "an intention to terminate a treaty suggests, strongly, that the treaty itself remains in force ….").

[395] **R-327**, Netherlands Declaration, p. 1 (letter from the Ministry of Foreign Affairs of the Netherlands to the Ministry of Foreign Affairs of Romania, dated 28 May 2019).

[396] **R-327**, Netherlands Declaration.

its offer to arbitrate contained in that agreement would become invalid if Romania later joined the EU. In other words, this does not constitute a clarification of the Netherlands' understanding of the BIT's terms at the time it agreed and ratified the BIT. It is simply stating its *present* understanding of the effect of the *Achmea* judgment. That does not meet the requirements of VCLT Article 31(3)(a), for the reasons stated above, nor may it be applied to an already pending arbitration.

(2) Implied Reservations on Consent

243. Romania argues that even if its offer to arbitrate were still "potentially valid" at the time Nova filed its Request for Arbitration, that offer was subject to "implied reservations regarding the continuing validity of this offer under other future international obligations" undertaken towards the Netherlands. Specifically, Romania says it should not be "deemed to have accepted, back in 1993, to be bound by its open offer to arbitrate regardless of any future incompatibility with, or indeed illegality under later undertaken international obligations towards the very same counterparty."[397] Romania insists that its "consent could not possibly have been unconditional" and given "without reservations regarding the continuing legality of the same."[398] In its view, the result of such an implied reservation is that its offer to arbitrate "would still have been nullified upon the ECJ's Achmea Decision," even if Nova already had accepted that offer, because any acceptance would still be subject to the conditions embedded in the offer itself.[399]

244. This argument fails on several levels. The most basic is that, even if Romania's proposition about implied reservations were taken at face value, the CJEU in *Achmea* did *not* find all intra-EU BIT arbitration to be "illegal" as such, but only arbitrations governed in part by EU law, which this proceeding is not. But even beyond this point, the Tribunal has serious difficulty with Romania's proposition that treaties may have embedded conditions that are neither acknowledged in the treaty text, nor even reflected in the *travaux preparatoires*, but which

[397] Romania's First *Achmea* Submission, ¶¶ 104-105; *see also* Romania's Second *Achmea* Submission, ¶ 115.

[398] Romania's First *Achmea* Submission, ¶¶ 107-108.

[399] Romania's First *Achmea* Submission, ¶ 109; *see also* Romania's Second *Achmea* Submission, ¶ 114 (contending that "Romania's implied reservations would have been validly triggered by the Achmea Decision, thereby vitiating its consent as of the date of the decision, namely March 16, 2018").

States may invoke years later as a basis to escape commitments that otherwise are expressly stated. There are recognized procedures in the VCLT by which States may terminate or withdraw from treaties, and a State which finds continued treaty compliance to be undesirable – whether because of a later court judgment condemning a treaty provision, or for any other reason – may take appropriate actions. If a State does not take timely steps to withdraw from its international law commitments, however, it must understand that it runs the risk that those commitments will be considered still to be in force.

245. This is particularly the case where the beneficiaries of those commitments have taken active steps in reliance on the State's treaty commitments, such as (in the case of a BIT) investors formally accepting an open offer to arbitrate by commencing international arbitration. Any opposite finding would run counter, in ICSID cases, to the provision in Article 25(1) of the ICSID Convention that consent may not be unilaterally withdrawn. More generally, it also would be inconsistent with the accepted principles of the VCLT regarding good faith reliance on treaty validity prior to the invocation of invalidity, so long as the grounds for invalidity were not already manifest at the time of such reliance. These principles are reflected both in (a) VCLT Article 46, which prevents States from invoking provisions of their own law to invalidate their consent to be bound by a treaty, unless the violation of internal law "was manifest" in the sense that it "would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith,"[400] and (b) VCLT Article 69, which provides that while treaty invalidity is grounds to render the provisions of such treaty without legal force, "if acts have nevertheless been performed in reliance on such a treaty" and "in good faith before the invalidity was invoked," those acts "are not rendered unlawful by reason only of the invalidity of the treaty."[401] The Tribunal is not persuaded by Romania's suggestion that only State Parties to the BIT (and not investor beneficiaries of a BIT) may invoke these principles, nor its contention that there is a difference between continuing *lawfulness* and continuing *effectiveness* of acts taken in reliance on a treaty in these circumstances.[402] Rather, the Tribunal finds that, absent evidence in the treaty text or *travaux*

[400] **RL-136**, VCLT, Article 46; *see also* **CL-233**, *Eskosol*, ¶¶ 190-193.

[401] **RL-136**, VCLT Articles 69(1) and 69(2)(b).

[402] Romania's First *Achmea* Submission, ¶ 99.2.

preparatoires of some intent by States to embed reservations or conditions in their extension of an open offer to arbitrate, that offer cannot be revoked after it already has been accepted in good faith, because of the occurrence of such a putative condition.

246. Finally, the Tribunal does not accept Romania's argument that the implicit conditionality of the BIT should have been manifest to Nova prior to its filing of the Request for Arbitration in June 2016.[403] While it is true that the Commission already had made its position about intra-EU BITs clear before then, its position was controversial within the EU, and certainly had not yet been accepted by any authority whose pronouncements were capable of authoritatively resolving EU law debates. Indeed, even 15 months later in September 2017, the issue remained sufficiently unsettled that Advocate General Wathelet rendered an Opinion recommending that the Commission's position be rejected. It was not until March 2018, when the CJEU actually issued the *Achmea* Judgment (rejecting the Opinion of Advocate General Wathelet, at least as to certain intra-EU BITs), that it could be said that investors were placed on a notice by a competent authority in the EU legal system about the risks under that system of relying on the apparent consent to arbitration reflected in such BITs.[404] That was roughly 21 months after Nova had filed its Request for Arbitration in June 2016.

(3) Issues with Enforceability

247. The Tribunal is equally unpersuaded by Romania's suggestion that the Tribunal's duty to render an enforceable award should lead in this case to a finding that it lacks jurisdiction.[405]

248. The Tribunal of course acknowledges, as did the *Eskosol* tribunal which also considered this argument,[406] that the *Achmea* Judgment is binding in the judicial systems of EU Member States. The CJEU has not yet clarified whether it intended its *Achmea* Judgment to apply to all intra-EU BITs (as Romania argues), or only to a subset of BITs which make EU law part of the applicable law of decision (as the reasoning of that judgment suggests, and numerous tribunals have now found). However, the Tribunal accepts that if the CJEU ultimately

[403] Romania's First *Achmea* Submission, ¶ 99.3.

[404] *See* **CL-233**, *Eskosol*, ¶¶ 191, 193, 204-206 (concluding the same with respect to the ECT).

[405] Romania's First *Achmea* Submission, ¶¶ 84-85; Romania's Second *Achmea* Submission, ¶¶ 116-119.

[406] *See* **CL-233**, *Eskosol*, ¶ 230.

interprets its *Achmea* Judgment in line with Romania's interpretation, then a court that is subject to the EU legal order might well decline to enforce an award rendered in an intra-EU BIT case.

249. As for courts outside the EU system, they would face a decision about how to handle any enforcement application. On the one hand, any courts in the territory of ICSID Contracting States have obligations under Article 54 of the ICSID Convention to "recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." On the other hand, many EU States have undertaken, in the January 2019 Declaration, that "defending Member States will request the courts, including in any third country, which are to decide in proceedings relating to an intra-EU investment arbitration award, to set these awards aside or not to enforce them due to a lack of valid consent."[407]

250. Nova presumably may need to weigh the risks of potential non-enforcement of any award that it might obtain in these proceedings.[408] However, this is not a basis for *the Tribunal* to decline to resolve a dispute over which it may have jurisdiction (subject to Romania's other objections, which have been joined to the merits). Indeed, tribunals have a duty to exercise jurisdiction unless they have found it to be lacking. Importantly, the Tribunal's jurisdiction is not determined by any national rules governing the enforceability of arbitral awards, but rather by the ICSID Convention and the BIT, neither of which subordinates jurisdiction to issues of enforcement. As the *Eskosol* tribunal explained, an ICSID tribunal in these circumstances should not decline to exercise its jurisdiction, "simply because there are certain scenarios under which one or the other Party might face challenges in enforcement in certain jurisdictions, based on their national laws and/or their other treaty obligations."[409]

[407] **Annex EC-16**, January 2019 Declaration, p. 3, ¶ 2.

[408] The Tribunal emphasizes that this section does not imply any conclusion that there necessarily will be any Award that requires enforcement; the Tribunal has not prejudged the merits of the dispute in any way. The discussion about enforceability of a potentially adverse award is entirely responsive to arguments that Romania itself offered in its submissions.

[409] **CL-233**, *Eskosol*, ¶ 235. *See also* **CL-241**, *CEF*, ¶¶ 71-72 (rejecting a similar argument).

(4) Nova's Denial of Justice Argument

251. Finally, because the Tribunal has rejected Romania's proposition that its offer of arbitration in the BIT became invalid as a result of EU accession, there is no need to address Nova's argument that not allowing it to pursue relief under the BIT would leave it without any effective remedy at all for wrongs Romania allegedly committed, thereby enabling Romania to succeed in a denial of justice.[410] The Tribunal emphasizes that it has not considered in any way, in the course of its decision here, the Parties' contentions regarding the fairness or adequacy of the Romanian judicial system, either generally or with respect to the specific allegations of this case.

VII. DECISION

252. For the reasons stated above, the Tribunal decides as follows:

a. Romania's objection to the Tribunal's jurisdiction based on EU law and the *Achmea* Judgment is hereby denied.

b. Decisions regarding costs in connection with this objection are deferred for resolution at a later stage of these proceedings.

[redacted]

Thomas Clay
Arbitrator

[redacted]

Klaus Reichert SC
Arbitrator

[redacted]

Jean Kalicki
President of the Tribunal

Date: 21 January 2021

[410] Nova's First *Achmea* Submission, ¶¶ 18-21.