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

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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 the death in Romania of Mr. Dan Adamescu, 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) suspend all criminal proceedings related to the present arbitration, including Cases No. 577/P/2015, 578/P/2015 and 929/P/2016 and refrain from recommencing or initiating criminal proceedings against Nova's investments in Romania or the officers of the investment companies, including Alexander Adamescu;
>
> b) withdraw (i) the transmission of European Arrest Warrant Ref. 3576/2/2016 by the Romanian Ministry of Justice and associated request for extradition submitted to the Home Office of the United Kingdom on 6 June 2016 and (ii) the preventive arrest

[2] Application, ¶ 112.

[3] Reply, ¶ 272.

warrant No. 13/UP issued on 19 May for Alexander Adamescu and refrain from reissuing or transmitting this or any other European Arrest Warrant or other request for extradition or arrest warrant for Alexander Adamescu;

c) refrain from undertaking any surveillance or otherwise seeking to intercept any privileged or confidential communications of any nature between Alexander Adamescu and/or any other of Nova's representatives and Nova's international and Romanian counsel or any other third parties;

d) withdraw the Asset Sequestration Order or, alternatively, amend the Asset Sequestration Order to permit Nova to complete the sale of an interest in [redacted] SPV and in [redacted] Center SA, and refrain from issuing any further orders adversely affecting assets which are the subject of the Asset Sequestration Order or any other of Nova's investments in Romania;

e) 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;

f) 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; and

g) take all necessary steps to:

   i) preserve all documents potentially relevant in this arbitration, including all documents in the ASF's possession, custody or control relating in any way to Astra, any of Nova's assets in Romania, Dan Adamescu, or Alexander Adamescu, and that it will continue to take such steps for the duration of the arbitration; and

   ii) reconstruct any lost ASF data potentially relevant in this arbitration, relating in any way to Astra, any of Nova's assets in Romania, Dan Adamescu, or Alexander Adamescu, using hard copy records; and

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 Alexander Adamescu's extradition hearing (originally scheduled for 22 November 2016) had been

postponed until the week of 24 April 2017, and Dan Adamescu's medical treatment in Romania was continuing.

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, in light of the status of the proceeding and the previous extensions granted to Romania, 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 Mr. Alexander Adamescu and Mr. [redacted] W[redacted] (the "**Adamescu Statement**" and [redacted] **Statement**," 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." Nova argued that Alexander Adamescu was unable to travel to Paris because of bail conditions of the Westminster Magistrates' Court and an Interpol Red Notice, both of which resulted from Romania's actions. According to Nova, Alexander Adamescu's presence in person at the hearing and ability to provide instructions to counsel "would be necessary to respect equality of arms and the integrity of the arbitral process."

26. Nova further requested that, if Romania would not agree to London as the hearing venue, the Tribunal order Romania to take all necessary steps to ensure that Alexander Adamescu could travel outside of the United Kingdom for the hearing; or that the Tribunal order a procedure in which he could be cross-examined in person in London one day in advance of the hearing and then be provided a means of following the hearing the next day and instructing counsel.

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. Romania also asserted that Nova's request for London, based on Alexander Adamescu's inability to travel, was meritless because (a) Romania would be willing to cross-examine him by video-conference if necessary, and (b) Mr. Adamescu is not a representative of Nova.

29. In the same letter, Romania asked the Tribunal to order Nova to

> disclose the identity of its real owners, beneficial or otherwise, with supporting documents, including but not limited to a copy of the Terms of Administration ('Administratievoorwaarden') of and a copy of the depository receipt holder's register of the [Stichting [redacted] (the "**Stichting**")].

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 Mr. Alexander

> Adamescu, which would be London given Mr. Adamescu's present constraints. 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 Romania was taking steps to advance certain criminal proceedings against Dan Adamescu, which were part of the subject matter of the Application.

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 the identity of Nova's ultimate owners and beneficiaries was material and relevant to Nova's request for provisional measures, the Tribunal's jurisdiction, and potential conflicts of interests. 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:

> refrain from undertaking any surveillance or otherwise seeking to intercept any privileged or confidential communications of any nature between Dan Adamescu and/or Alexander Adamescu and/or any other of the Claimant's representatives and the Claimant's international and Romanian counsel or any other third parties. (amendment underlined)

44. With its second letter, Nova submitted a press release regarding the initiation of criminal court proceedings against Dan Adamescu in Romania on charges related to alleged abuse of office when he served as President of the Supervisory Board of *Societatea de Asigurare-Reasigurare Astra S.A.* ("**Astra**"). Nova stated that these proceedings were one of the subjects of the Application, and that it would raise the issue during the first session later that day.

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. The Tribunal denied Romania's general request for an order that Nova disclose "the identity of its real owners, beneficial or otherwise," with supporting documents, on the grounds that Nova contended it already had done so by reference to the Stichting (which Nova contended could have no beneficial owner as a matter of Dutch law), and the Tribunal "sees no reason at this juncture to examine the validity" of this assertion by making determinations of what "real ownership" and "beneficial ownership" mean in the context of a Dutch Stichting. However, the Tribunal granted Romania's more specific request for an order that Nova disclose a copy of the Stichting's Terms of Administration and its register of depository receipt holders, as these potentially could be relevant to the pending provisional measures Application. Nova was ordered to produce these documents within 14 days. The Tribunal also invited the Parties to suggest a date for simultaneous supplemental submissions on the relevance or lack of relevance to the Application of the information contained in the new documents.

49. By letter of 27 December 2016, Nova requested leave to submit into the record a report prepared by [redacted] Ltd, dated 19 September 2016 (the [redacted] **Report**") in support of

its request for provisional measures. Nova asserted that, although it had already provided sufficient evidence to establish that it was entitled to apply for provisional measures, it was seeking to introduce the [redacted] Report "in case the Tribunal is moved in any way by Romania's complaint of a lack of sufficient evidence at this stage." According to Nova, the [redacted] Report would support its position that Romania's actions toward Nova were part of a politically motivated campaign against the Adamescus. Nova also argued that its request was reasonable because it was made more than two months in advance of the hearing on provisional measures, and because the [redacted] Report already was known to Romania.

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] Report, 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] Report 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] Report 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 disclosure of Nova's "real owners, beneficial or otherwise," 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, Romania would receive the depository receipt holder's register of the Stichting and a copy of the Terms of Administration of the Stichting. 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 the certificate holders, (b) Respondent to undertake any further investigations it considers appropriate regarding any hypothetical relationships between any member of the Tribunal and any certificate holder, 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 the certificate holders.

On this basis, the Tribunal denied Romania's renewed application for an order that in addition to producing the subject documents, Nova identify its "real owners, beneficial or otherwise."

55. Also on 6 January 2017, Romania submitted its letter objecting to Nova's 27 December 2016 request for leave to submit the [redacted] Report. Romania argued, *inter alia*, that (a) Nova had failed to show "good cause" to justify the belated submission of the [redacted] Report, as required by paragraph 16.3 of Procedural Order No. 1; (b) the allegation Nova was attempting to support with the [redacted] Report was irrelevant to provisional measures; and (c)

admitting the [redacted] Report 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] Report would require further inquiry into its provenance and underlying support.

56. On 9 January 2017, in accordance with Procedural Order No. 2, Nova produced copies of (a) the Terms of Administration of the Stichting and (b) the depository receipt holder's register of the Stichting, the latter referencing [redacted] Limited ("[redacted]") as the sole depository receipt holder.

57. By letter of 11 January 2017, Romania requested "confirmation and identification, with supporting evidence" of (a) "the identity of the Adamescu family members for which the shares in [redacted] are held in trust, as well as the proportion of each family members' beneficial interest in the shares of [redacted] since 2006"; and/or (b) "any beneficiary holders of the shares in [redacted] other than the Adamescu family since 2006, and the proportion of their beneficiary interest in the shares of [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] Report 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] Report 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] Report 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] Report is essential to the Tribunal's consideration of the pending application for provisional measures. Indeed, the Claimant's own primary submission is that the Report 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] Report, 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 Dan Adamescu had passed away in Romania. 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 Dan Adamescu's death while in Romania's custody." By this letter, Nova withdrew its request for the following provisional measure, which was originally contained in subparagraph (c) of its request for relief:

> [that Romania] give assurances that for the duration of Dan Adamescu's detention he shall:
>
> i) receive all necessary medical attention, including all necessary medication and medical treatment;
>
> ii) be permitted to meet with Nova's counsel whenever a meeting is requested, up to daily if necessary, in order to give instructions to counsel in respect of this arbitration and to discuss his evidence with counsel, and that such meetings shall not be monitored, recorded, or listened to in any way by any instrumentality, representative, employee, or agent of the Romanian State; and
>
> iii) be permitted to give evidence in this arbitration at any hearing in person at the place of the hearing if required.

68. Nova also revised the provisional measures sought in subparagraphs (a) and (d) of its request for relief, to the extent related to Dan Adamescu.

69. By the same letter, Nova expressed concerns about the circumstances of Dan Adamescu's death and, in this context, requested that Romania disclose his medical records from the period of his incarceration and any documents related to examinations conducted after his death.

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:

> [that Romania] suspend all criminal proceedings related to the present arbitration, including Cases No. 577/P/2015, ~~4153/2/2014 and~~ 578/P/2015 and 929/P/2016 […]

73. By the same letter, Nova requested the Tribunal to order Romania to produce Dan Adamescu's medical records and any documents related to examinations conducted after his death. Romania responded to this request by letter of 10 March 2017.[7]

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:	
Mr. Alexander Adamescu	The Nova Group Investments B.V.
Mr. [redacted] W[redacted]	Director, [redacted] B.V.
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:	
Mr. Attila György	Ministry of Public Finance, Secretary of State
Mr. Victor Strâmbeanu	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

76. The following summary is based on the Parties' submissions filed to date and is not an exhaustive presentation. The Tribunal takes no position with respect to disputed facts, and no part of this Order constitutes a finding by the Tribunal with respect to the factual record. The purpose of this summary is to contextualize the Parties' arguments on the Application.

A. Claimant's Case

77. This dispute arises out of Nova's alleged investments in Romania, including:

a. *Societatea de Asigurare-Reasigurare Astra S.A.* ("**Astra**"), which, according to both Parties, has been considered one of Romania's largest insurers with a strategic position in the consumer insurance market and, more generally, in the Romanian economy.[8]

b. *Medien Holding*, owner of the newspaper *România Liberă*.

c. [redacted] *S.A.* ("**TNG Romania**"), a Romanian holding company with various investments.

d. [redacted] *Center SA* ("[redacted]"), a company listed on the Bucharest Stock Exchange, [redacted]

e. [redacted] *Romania SA* ("[redacted]"), a company listed on the Bucharest Stock Exchange, which holds the [redacted] in Bucharest.

f. [redacted] *SPV* ("[redacted]"), which holds interests in [redacted] in Romania.

g. [redacted] *Center* [redacted] *SRL* ("[redacted]"), which holds a [redacted] in Bucharest.[9]

78. Nova's case is that in 2013, State actors began to target its investments and its founder and Chairman, Dan Adamescu. Nova alleges, *inter alia*, that (a) the Romanian financial services regulator (the "**ASF**") undertook actions to wrest control of Astra from Nova, leading to the bankruptcy of Astra and *România Liberă*,[10] and (b) the Romanian National Anti-Corruption Directorate (the "**DNA**") acted on baseless allegations to initiate criminal proceedings against Dan Adamescu and his son, Alexander Adamescu, for bribery (the

[8] Request for Arbitration, ¶¶ 45-46; Observations, ¶ 43.

[9] Request for Arbitration, ¶ 103.

[10] Request for Arbitration, § III.C(2) and (3).

"**Bribery Proceedings**") and for abuse of office and money laundering arising out of Astra's bankruptcy (the "**Abuse of Office Proceedings**").[11]

79. According to Nova, this was a politically motivated campaign arising from the fact that Dan Adamescu and *România Liberă* were highly critical of Romania's Social Democratic Party and its leader, Mr. Victor Ponta, who became Prime Minister in May 2012.[12]

80. Romania denies that any of its actions toward Nova, Astra or the Adamescus were illegitimate or politically motivated.

81. Despite the Parties' disagreement on other matters of fact, they largely agree on the occurrence and timing of the events described in the following sections.

B. Astra and România Liberă

82. In 2013, the Romanian motorway agency, Compania Nationala De Autostrazi Si Drumuri Nationale din Romania SA, commenced civil proceedings against Astra seeking payment of an insurance claim for partial non-completion of a highway project.[13] This led ASF to inspect Astra's financial recording practices.[14]

83. Subsequently, from 22 January to 4 February 2014, the ASF carried out a second inspection of Astra's financial situation.[15] As part of this inspection, ASF alleged that Astra's reported solvency margin was significantly overstated at RON 188 million, when in fact it was negative RON 810 million.[16]

84. On 18 February 2014, the ASF issued Decision No. 42/2015, placing Astra under special administration, and appointed the international accounting firm KPMG as special

[11] Request for Arbitration, § III.C(5) and (6). The Tribunal uses Nova's defined terms for convenience only.

[12] Request for Arbitration, ¶¶ 5-9.

[13] Request for Arbitration, ¶ 4; Observations, ¶ 87.4.

[14] Request for Arbitration, ¶ 56; Observations, ¶ 45; **R-13**, Report of Special Administrator, KPMG Advisory SRL, 25 March 2014, Section 3.1; **C-33**, Executive Summary of Special Administrator's Report, 25 March 2014.

[15] Request for Arbitration, ¶ 56; Observations, ¶ 48.

[16] Observations, ¶ 48.

administrator.[17] KPMG issued a Special Administrator's Report (the "**KPMG Report**") on 25 March 2014, setting out a series of recovery measures to be taken by Astra, including:

- Cash contribution to the share capital in the amount of **490 million lei**, consisting of:
  - Short-term capital increase of **192 million lei** (starting with April 2014)
  - Additional capital increase of **298 million lei** (January 2015)
- Operational measures without impact on cash (non-cash), with a net effect on Company's equity of 316 million lei, consisting of:
  - The extension of the catastrophe reinsurance risk programme (40 million lei) – until 30 April 2014
  - Guarantee / payment of intra-group loans (125 million lei) – until 30 April 2014
  - Amicable settlement of disputes relating to the insurance contracts with Romstrade (151 million lei) – until 30 May 2014
- The merger with Axa Romania SA, with a net effect on the Company's liquidity and own equity amounting to 118 million lei (simultaneously with the latest share capital increase)[18]

85. On 7 April 2014, the ASF approved the recovery plan provided in the KPMG Report.[19]

86. Later that month, the ASF issued Decision No. 159 opposing Astra's purchase of AXA's Romanian interests, and in September, AXA terminated the purchase agreement.[20] Thus, one of the main recovery measures contained in the KPMG plan failed, for reasons disputed between the Parties.

[17] Request for Arbitration, ¶ 60; Observations, ¶ 52; **C-26**, ASF Decision No. 42/2015, 18 February 2014.

[18] **C-33**, Executive Summary of Special Administrator's Report, 25 March 2014. *See* Romania's translation at **R-13**, Report of Special Administrator, KPMG Advisory SRL, 25 March 2014, Section 9.1. Nova's translation is reproduced here for convenience only.

[19] Request for Arbitration, ¶ 71; Observations, ¶ 54; **C-34**, ASF Decision No.117 on the Report of the Special Administrator of Astra, 7 April 2014.

[20] Request for Arbitration, ¶ 74; Observations, ¶¶ 59-61; **C-35**, ASF's Decision No.159, 30 April 2014; **R-20**, AXA Press Release, "Termination of the sale and purchase agreement between AXA and Astra," 19 September 2014. According to Romania, the ASF could not approve the transaction because Astra's shareholders failed to make a required RON 70 million cash contribution. Observations, ¶ 57.

87. Following the failure of other measures suggested by KPMG, on 25 August 2015 KMPG recommended initiation of bankruptcy proceedings for Astra.[21] The same day, Nova sent a letter to the ASF notifying it of a dispute under the BIT.[22]

88. Two days later, the ASF issued Decision No. 2034, which closed Astra's financial recovery process and commenced bankruptcy proceedings.[23] Astra's shareholders challenged this decision in the Bucharest Court of Appeal, requesting a stay of the bankruptcy proceedings.[24] However, in December 2015, the court declared Astra insolvent and appointed KPMG as Astra's liquidator.[25] On 15 December 2015, Nova sent a letter to the President and Prime Minister of Romania, notifying them of a dispute under the BIT.[26]

89. *România Liberă* was also affected by Astra's difficulties. While managing Astra, KPMG called for immediate payment of loans Astra had made to Medien Holding, the owner of *România Liberă*.[27] As Medien Holding could not repay these loans outright, and a repayment plan was rejected, on 9 February 2015 Astra filed a petition with the Bucharest Tribunal Court to declare Medien Holding liquidated.[28]

[21] **R-24**, Report Regarding the Effects of the Result of the Capital Increase Measure on Astra's Redress Chances, KPMG Advisory SRL, 25 August 2015.

[22] **C-78**, Letter from WilmerHale to the ASF, 25 August 2015. Romania disputes that this was a valid notice. *See* Observations, ¶ 12.

[23] Request for Arbitration, ¶ 79; Observations, ¶ 70; **C-38**, ASF Decision No. 2034, 27 August 2015.

[24] Request for Arbitration, ¶ 82; **C-40**, Challenge to the ASF Decision no. 2034 of 27 August 2015 filed by Nova and [redacted] SRL at the Bucharest Court of Appeal, 7 September 2015, **C-41**; Request for stay of proceedings in relation to the ASF's Decision No. 2034 of 27 August 2015 filed by Nova and [redacted] SRL at the Bucharest Court of Appeal, 7 September 2015.

[25] Request for Arbitration, ¶ 82; Observations, ¶ 71.

[26] **C-80**, Letter from Hogan Lovells to the President of Romania and the Prime Minister of Romania, 15 December 2015. Romania disputes that this was a valid notice. *See* Observations, ¶ 12.

[27] Request for Arbitration, ¶ 89.

[28] Request for Arbitration, ¶ 90. According to Nova, the petition was put on hold pending the outcome of a challenge against the validity of the repayment agreement, dated 8 September 2015, between Astra and Medien Holding. Request for Arbitration, ¶ 95.

C. The Bribery Proceedings

90. The Bribery Proceedings against Dan Adamescu began on 22 May 2014, when the DNA identified him as a suspect based on allegations of bribery.[29] He was arrested on 5 June 2014 and subsequently indicted for bribing two bankruptcy judges.[30]

91. On 2 February 2015, Dan Adamescu was convicted of those charges and sentenced to four years and four months of imprisonment.[31] Nova has criticized the conditions of his detention, alleging that he was not provided adequate medical care. This originally was the subject of one of Nova's requested provisional measures. As noted above, on 25 January 2017, Nova informed the Tribunal that Dan Adamescu had died in Romania.

92. Alexander Adamescu also was implicated in the Bribery Proceedings. The DNA first summoned him as a suspect in May 2014, and he was indicted on 20 June 2014.[32] However, the DNA took no further action against Alexander Adamescu until 11 December 2015, when the DNA summoned him for questioning.[33] He was then residing in London and did not appear before the DNA in Romania.

93. The DNA understood this failure to appear as an attempt to escape the investigation.[34] In March 2016, the DNA sought an arrest warrant for Alexander Adamescu, which a Romanian court granted on 4 May 2016.[35] Although he successfully appealed the arrest

[29] Application, ¶ 15.

[30] Application, ¶ 16; Observations, ¶ 79; **C-55**, DNA Indictment relating to bribery acts, 20 June 2014,

[31] Request for Arbitration, ¶ 138; Observations, ¶ 80; **C-73**, Decision of the Bucharest Court of Appeal, 2 February 2015.

[32] Application, ¶ 42; Observations, ¶ 83.

[33] Request for Arbitration, ¶ 144; Observations, ¶ 91; **C-79**, DNA Summons on Alexander Adamescu's attendance of the DNA questioning, 11 December 2015. The Parties disagree on the validity of this summons.

[34] **C-82**, DNA Press release No. 358/VIII/3, 25 March 2016.

[35] Request for Arbitration, ¶¶ 146, 149; Observations, ¶ 96; **C-54**, Public Prosecutor George Matei's Precautionary Measures Ordinance, 25 March 2016; **C-83**, Conclusion of the Bucharest Tribunal, the Criminal Division I, 4 May 2016.

warrant on 19 May 2016, the DNA obtained a new warrant that same day.[36] The court rejected his appeal against this new warrant.[37]

94. On 6 June 2016, the DNA obtained a European Arrest Warrant for Alexander Adamescu, and one week later, he was arrested in London.[38] He was released on bail a few days later, with an extradition hearing initially scheduled for 22 November 2016.[39] This hearing has now been rescheduled for the week of April 2017.[40]

D. The Abuse of Office Proceedings and Asset Sequestration Order

95. In connection with its investigation into Astra's financial reporting, the DNA initiated the Abuse of Office Proceedings against Messrs. Dan and Alexander Adamescu in March 2016.[41] They are accused of abusing their office while serving in Astra's management and of money laundering.

96. Based on the claim against Dan Adamescu, the DNA issued an asset sequestration order over Nova's equity interests in several Romanian entities, including [redacted] and [redacted] (the "**Asset Sequestration Order**").[42] The Asset Sequestration Order freezes these assets as security for claims against Astra.[43] Appeals against the Asset Sequestration Order in Romanian courts thus far have failed.[44]

[36] Request for Arbitration, ¶ 151; Observations, ¶ 97.

[37] Request for Arbitration, ¶ 153; Observations, ¶ 97; **C-85**, RomaniaTV [online], The Supreme Court Decided the Preventive Arrest in absentia for Alexander Adamescu', 26 May 2016.

[38] Request for Arbitration, ¶ 154; Observations, ¶ 98; **C-86**, European Arrest Warrant, Bucharest Court of Appeal, 6 June 2016.

[39] Request for Arbitration, ¶ 155; Observations, ¶ 99.

[40] Adamescu Statement, ¶ 75.

[41] Application, ¶ 48; Observations, ¶ 102.

[42] Request for Arbitration, ¶ 103; Application, ¶ 53; Observations, ¶ 102; **C-54**, Public Prosecutor George Matei's Precautionary Measures Ordinance, 25 March 2016.

[43] Reply, ¶ 85.

[44] *See*, *e.g.*, Request for Arbitration, ¶ 105.

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

101. Nova submits that ICSID tribunals have broad power to recommend provisional measures under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules.[45] According to Nova, it is well recognized that such interim relief is binding on parties.[46]

102. Nova argues that this broad power extends to provisional measures that touch upon criminal proceedings and detention.[47] In this regard, Nova opposes Romania's argument that the Tribunal cannot interfere with Romania's sovereign right to enforce its criminal law.[48] Nova proposes several reasons that this argument should fail, including:

a. ICSID tribunals have power to grant "any" provisional measure required to preserve a party's right, and have used that power to grant measures concerning judicial proceedings and decisions.[49]

b. All provisional measures will have some impact on State sovereignty, which is permissible because States, including Romania, have accepted certain limitations on their sovereignty by ratifying the ICSID Convention.

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[45] Application, ¶ 62, *citing* **CL-24**, Schreuer, *The ICSID Convention*, *A Commentary* (2nd ed., Cambridge University Press, 2009) (excerpts) ("**Schreuer**"), p. 779.

[46] Application, ¶ 63, *citing* **CL-26**, Schreuer, pp. 764-765; **CL-27**, *Emilio Augustin Maffezini v. Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999, (2001), 5 ICSID Reports 393, 394 ("***Maffezini***"); **CL-28**, *Victor Pey Casado & President Allende Foundation v. Chile,* ICSID Case No. ARB/98/2, Decision on Provisional Measures, 25 September 2001, (2001) 6 ICSID Reports 373, 394 ("***Pey Casado***"); **CL-29**, *City Oriente Limited v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007 ("***City Oriente***"), ¶¶ 52, 92; **CL-30**, *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009 ("***Burlington***"), ¶ 66; **CL-25**, *Quiborax S.A. and others. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010 ("***Quiborax***"), ¶ 108; **CL-31**, *Teinver S.A., et al. v. Argentine Republic,* ICSID Case No. ARB/09/1, Decision on Provisional Measures, 8 April 2016 ("***Teinver***"), ¶ 186.

[47] Reply, § II.B.

[48] Observations, ¶ 110.

[49] Reply, ¶ 34, *citing* **CL-48**, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, 31 March 2006 ("***Biwater* PO1**"), ¶¶ 71, 105; **CL-29**, *City Oriente*, ¶ 91.

c. Numerous ICSID tribunals have ordered provisional measures relating to criminal proceedings, as Romania acknowledges.[50] Nova cites, for example, *Tokios Tokelés v. Ukraine*,[51] *Quiborax v. Bolivia*,[52] *Menzies v. Senegal*,[53] and *Hydro v. Albania*.[54]

d. Because measures such as those requested are only temporary, they neither prevent a State from enforcing its criminal law nor challenge any final decision of its domestic courts.[55]

(2) Applicable Legal Standard

103. Nova submits that ICSID tribunals may order provisional measures when:

> a) the tribunal has prima facie jurisdiction to hear the claim;
>
> b) the requesting party has rights susceptible of protection by way of provisional measures, including procedural rights such as the right to the non-aggravation of the dispute and protection of the procedural integrity of the arbitration;
>
> c) the measures requested are urgent, necessary and proportionate.[56]

(3) Jurisdiction

104. In Nova's view, the first requirement—that the tribunal have *prima facie* jurisdiction—is a low threshold; a tribunal need only decide whether the claims are frivolous on their face

[50] Reply, ¶¶ 36-46.

[51] **RL-11**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 1 Claimant's Request for Provisional Measures, 1 July 2003 ("***Tokios Tokelés* PO1**"), ¶ 7(a) (ordering the respondent to "abstain from, suspend and discontinue, any domestic proceedings, judicial or other, concerning [the claimant] or its investment in Ukraine … which might prejudice the rendering or implementation of an eventual decision or award of this Tribunal or aggravate the existing dispute").

[52] **CL-25**, *Quiborax*, ¶¶ 123, 133 (ordering the respondent to take appropriate measures to suspend certain criminal proceedings and to "refrain from initiating any other criminal proceedings directly related to the present arbitration, or engaging in any other course of action which may jeopardize the procedural integrity of this arbitration").

[53] **CL-41**, *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*, ICSID Case No. ARB/15/21, Procedural Order No. 2, 2 December 2015 ("***Menzies***"), ¶ 132.

[54] **CL-35**, *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, 3 March 2016 ("***Hydro***"), ¶¶ 2.1, 4.3, 5.1 (ordering the respondent to suspend certain criminal proceedings and extradition proceedings pending against two of the claimants until issuance of the award).

[55] Reply, ¶¶ 47, 50.

[56] Reply, ¶ 18.

or obviously outside its competence.[57] Regarding the level of scrutiny involved in this analysis, Nova relies on the following statement of the tribunal in *Millicom v. Senegal*:

> the Arbitral Tribunal cannot and must not examine in depth the claims and arguments submitted on the merits of the case; it must confine itself to an initial analysis, i.e. "at first sight". For this, it is necessary and sufficient that the facts alleged by the applicant establish this jurisdiction without it being necessary or possible at this stage to verify them and analyse them in depth.[58]

105. Contrary to Romania's position,[59] Nova asserts that a tribunal's power to grant provisional measures is unaffected by the fact that the tribunal has not yet ruled on jurisdiction.[60]

106. Nova submits that it demonstrated the Tribunal's *prima facie* jurisdiction in the Request for Arbitration.[61] In particular, Nova's position is that (a) it is established under the laws of the Netherlands and owns qualifying investments in Romania as required by Article I of the BIT; (b) it has observed the cooling off period contemplated in Article 8(2) of the BIT; and (c) the jurisdictional requirements contained in Article 25 of the ICSID Convention have been met, as Nova is a National of a Contracting State under Article 25(2)(b) of the ICSID Convention, and its claims involve a legal dispute arising out of a qualifying investment. Nova also asserts that there is no basis on which its claims could be classified as frivolous.[62]

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[57] Reply, ¶¶ 22-23, *citing* **RL-8**, *Sergei Paushok et al., CJSC Golden East Company and CJSC Vostkneftegaz Company v. The Government of Mongolia,* UNCITRAL, Order on Provisional Measures, 2 September 2008 ("***Paushok***"), ¶ 55; **CL-28**, *Pey Casado*, ¶ 8. Nova asserts that Romania's counsel has advocated for a low standard in another ICSID case. Reply, ¶ 23, *citing* **CL-41**, *Menzies*, ¶ 111.

[58] Reply, ¶ 21, *citing* **CL-44**, *Millicom International Operations B.V. and Sentel GSM S.A. v. Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on the Application of Provisional Measures, 9 December 2009 ("***Millicom***"), ¶ 42.

[59] Observations, ¶ 136 ("The extraordinary and limited nature of provisional measures is particularly recognised and emphasised in cases, such as the present one, where the tribunal has not yet decided on its jurisdiction").

[60] Reply, ¶ 24.

[61] Application, ¶ 67; Reply, ¶ 25, *citing* Request for Arbitration, ¶¶ 177-197. Nova further argues that the Secretary-General's registration of the dispute is "an acknowledgment of the prima facie jurisdiction of the Tribunal." Reply, fn. 27, *citing* **CL-43**, Schreuer, ¶¶ 47-48.

[62] Reply, ¶ 26. Nova's position on jurisdiction is further detailed in its submissions on the Bifurcation Request.

(4) Rights to be Preserved

107. Nova submits that provisional measures may be ordered to preserve both substantive and procedural rights that relate to the arbitration.[63] Nova relies on the following procedural rights:

> a) the right to the procedural integrity of the arbitration proceedings; and
>
> b) the right to the preservation of the status quo and non-aggravation of the dispute.[64]

a. The Right to Procedural Integrity

108. Nova argues that the right to procedural integrity, including access to evidence and to integrity of evidence, is subject to protection under Article 47 of the ICSID Convention.[65]

109. In this regard, Nova cites *Quiborax v. Bolivia*, in which the tribunal ordered the suspension of criminal proceedings to protect the claimants' right to present their case.[66] In particular, the tribunal found that the criminal proceeding had impeded the claimants' access to relevant documents and would deter witnesses from testifying against the State.[67] While recognizing the power of sovereign States to enforce criminal law, the tribunal stated that "such powers must be exercised in good faith and respecting Claimants' rights, including their prima facie right to pursue this arbitration."[68] Nova also cites the statement of the

[63] Reply, ¶ 51.

[64] Application, ¶ 68; *see* Reply, ¶ 51. Nova cites **CL-33**, *Biwater Gauff (Tanzania) Ltd v Tanzania,* ICSID Case No ARB/05/22, Procedural Order No 3, 29 September 2006 ("***Biwater* PO3**"), ¶ 135 ("It is now settled in both treaty and international commercial arbitration that an arbitral tribunal is entitled to direct the parties not to take any step that might (1) harm or prejudice the integrity of the proceedings, or (2) aggravate and exacerbate the dispute. Both may be seen as a particular type of provisional measure … or simply as a facet of the tribunal's overall procedural powers and its responsibility for its own process.").

[65] Application, ¶¶ 71 *et seq.*

[66] Application, ¶¶ 72-75, *citing* **CL-25**, *Quiborax*, ¶¶ 11, 23-30, 123, 142-146.

[67] **CL-25**, *Quiborax*, ¶¶ 142-146.

[68] **CL-25**, *Quiborax*, ¶ 123.

tribunal in *Lao Holdings v. Laos* that domestic criminal proceedings could disrupt the arbitration by diverting the claimant's resources.[69]

110. According to Nova, the recent decision on provisional measures in *Hydro v. Albania* has many parallels with the Application. In that case, the tribunal reasoned that if claimants were detained, they could not effectively conduct business and fully participate in the arbitration, which would be a "grave concern to the procedural integrity of the proceeding."[70]

111. Nova's position is that its rights are at greater risk than the claimants' rights in these past cases.[71] In particular, it submits that Romania's actions prevent Nova's representatives and witnesses from instructing counsel, giving evidence, obtaining testimony from other witnesses, and accessing resources needed to fund the arbitration (as explained further below).

b. The Right to Preservation of the *Status Quo* and Non-Aggravation of the Dispute

112. According to Nova, Article 47 of the ICSID Convention allows tribunals to grant provisional relief that prohibits "any action that affects the disputed rights, aggravates the dispute, frustrates the effectiveness of the award or entails having either party take justice into their own hands."[72] For Nova, this is an extension of the international law principle that parties must "not allow any step of any kind to be taken which might aggravate and extend the dispute."[73]

113. To support its position, Nova cites, *inter alia*, *City Oriente v. Ecuador*, in which the tribunal ordered the respondent to suspend criminal proceedings, based on its finding that the

[69] Application, ¶ 77, *citing*, **CL-34**, *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Order, 30 May 2014 ("***Lao Holdings***"), ¶¶ 40-41.

[70] Application, ¶¶ 78-79, *citing* **CL-35**, *Hydro*, ¶¶ 3.18-3.19, 3.41.

[71] Application, ¶ 80.

[72] Application, ¶ 87.

[73] Application, ¶ 87, *quoting* **CL-36**, *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria),* PCIJ series A/B No. 79, Judgment, 5 December 1939.

respondent was using those proceedings to secure a payment that was contested in the arbitration.[74]

114. According to Nova, without the requested provisional relief, Romania's actions "risk terminating Nova's commercial presence in Romania before this Tribunal has had a chance to consider Nova's claims," and would frustrate the effectiveness of the Tribunal's award.[75]

(5) Urgency, Necessity and Proportionality

115. Nova refers to the requirement in Article 47 of the ICSID Convention that a tribunal must be satisfied that the "circumstances require such measures," and submits that ICSID tribunals will grant provisional measures if they are urgent, necessary and proportionate.[76]

116. Nova argues that "a measure is considered urgent when it cannot await the outcome of the award,"[77] and points out that Romania has acknowledged this standard.[78] Nova cites the tribunal in *Quiborax v. Bolivia* for the view that measures protecting the procedural integrity of arbitration are "urgent by definition."[79]

117. Regarding the "necessity" requirement, Nova states that "measures are necessary where they are required to avoid harm or prejudice being inflicted upon the applicant that would be '*significant*'."[80] Contrary to Romania's position,[81] Nova argues that it is not required to demonstrate a risk of irreparable harm that cannot be compensated by monetary damages. In Nova's view, the irreparable harm standard is unsuitable for investor-State

[74] **CL-29**, *City Oriente*, ¶ 57.

[75] Application, ¶¶ 92-94.

[76] Reply, ¶ 51.

[77] Application, ¶ 95, *citing* **CL-37**, Schreuer, p. 775.

[78] Reply, ¶ 54, *citing* Observations, ¶ 142.

[79] Application, ¶ 96, *citing* **CL-25**, *Quiborax*, ¶ 153 ("The Tribunal agrees with Claimants that 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."). *See* Application, ¶¶ 96-98; Reply, ¶ 51.

[80] Application, ¶ 102, *citing* **CL-38**, *City Oriente Limited v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Revocation of Provisional Measures, 13 May 2008 ("***City Oriente* Revocation**"), ¶¶ 70-72.

[81] Observations, ¶ 142.

disputes, where the State can use its sovereign power to impair the investor's ability to pursue its claim.[82]

118. Nova asserts that this view is supported by commentators and jurisprudence, citing *inter alia*, the statement of the tribunal in *PNG v. Papua New Guinea* that "substantial, serious harm, even if not irreparable, is generally sufficient to satisfy this element of the standard for granting provisional measures."[83]

119. In any event, Nova argues that even if it were necessary to show irreparable harm, this requirement would be met in the present case because "a serious disregard of the requirements of procedural fairness could not be compensated by monetary damages."[84]

120. With respect to the "proportionality" requirement, Nova considers the relevant question to be whether the measures would result in disproportionate prejudice to the respondent when compared to the potential prejudice to the claimant without the measures.[85]

121. Relying on a statement by the tribunal in *Churchill Mining v. Indonesia*, Nova asserts that its burden of proof is to establish these three requirements "with sufficient likelihood, without however having to actually prove the facts underlying them."[86] Specifically in respect of the "necessity" requirement, Nova argues that it is sufficient to show that the harm is likely; establishing actual harm is not required.[87]

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[82] Reply, ¶¶ 57-61.

[83] Reply, ¶¶ 57-61, *citing inter alia*, **CL-63**, *PNG Sustainable Development Program Ltd v. Independent State of Papua New Guinea*, ICSID Case No ARB/13/33, Decision on the Claimant's Request for Provisional Measures, 21 January 2015 ("***PNG***"), ¶ 109; **CL-40**, Sarooshi, *Provisional Measures and Investment Treaty Arbitration* (2013) 29 *Arbitration International* 361, p. 370; **CL-38**, *City Oriente* Revocation, ¶ 72 ("'irreparable prejudice' standard is too high and inappropriate in the context of ICSID arbitrations… sufficient for grant of provisional measures in the ICSID context if there is a risk of significant harm"); **CL-39**, *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009 ("***Perenco***"), ¶ 43.

[84] Reply, ¶¶ 63-64.

[85] Application, ¶ 108; Reply, ¶ 51.

[86] Reply, ¶ 52, *quoting* **RL-21**, *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 14, 22 December 2014 ("***Churchill* PO14**"), ¶ 64.

[87] Reply, ¶ 53, *citing* **CL-33**, *Biwater* PO3, ¶ 145.

122. In response to Romania's submissions on the appropriate legal standard, Nova contends that Romania, without support, overstates the applicable threshold.[88] According to Nova, the tribunal in *Quiborax v. Bolivia* expressly held that it is *not* necessary for the requesting party to show "identity between the object of the coercive measures from which protection is sought and the rights in dispute."[89] Similarly, the tribunal in *Hydro v. Albania* stated that tribunals should avoid intervening in domestic proceedings when such proceedings are "divorced from the investments made by the Claimants," for instance "where a person is charged with a serious offence totally unrelated to the factual circumstances of the dispute being arbitrated, such as murder."[90]

123. Nova further contends that provisional measures may be granted in relation to domestic proceedings even if they were not initiated for the sole purpose of interfering with the arbitration. In Nova's view, the "only enquiry is whether the State authorities acted in good faith and with due regard to the claimants' procedural rights in the arbitration."[91]

(6) Application of the Legal Standard to the Measures Requested

a. The Criminal Proceedings

124. Nova seeks an order suspending the Bribery Proceedings and the Abuse of Office Proceedings against Alexander Adamescu.[92] Nova submits that allowing these proceedings to go forward in Romania would cause significant harm to the integrity of this arbitration by impeding Nova's ability to present its case.[93]

125. In particular, Nova argues that its representatives could not give evidence or otherwise participate in the proceeding, potential witnesses would be deterred, and Romania could obtain evidence unfairly.[94] In addition, the "criminal proceedings are extremely disruptive

[88] Reply, ¶¶ 65-67, *citing* Observations, ¶¶ 119, 134.

[89] Reply, ¶ 68, *quoting* **CL-25**, *Quiborax*, ¶¶ 116-117. Nova further argues that, in any event, there is in fact a direct relationship between the measures requested and its claims. Reply, ¶ 69.

[90] Reply, ¶ 70, *quoting* **CL-35**, *Hydro*, ¶ 3.19.

[91] Reply, ¶ 71.

[92] Subparagraph (a) of Nova's request for relief. *See* Section II above.

[93] Reply, § III.A.

[94] Application, ¶ 106.

and divert resources from Nova's defence of its substantive rights in this arbitration."[95] According to Nova, the proceedings would also frustrate its request for relief in the arbitration by terminating its remaining investments in Romania.[96]

126. Contrary to Romania's position, Nova contends that the connection between the criminal proceedings and the arbitration "is undeniable."[97] First, measures aimed at preserving Nova's ability to present its case obviously relate to the arbitration.[98] Further, according to Nova, the requested measure would protect the very same rights at issue in the arbitration.[99] In this regard, Nova points to its underlying claim that Romania has violated the BIT by pursuing criminal proceedings against Nova's officers as part of a politically motivated campaign.

127. Specifically regarding the Abuse of Office Proceedings, in which Dan and Alexander Adamescu each are alleged to have abused his office and laundered money while serving on Astra's Supervisory Board, Nova alleges that Romania's actions are aimed at shifting the blame for Astra's bankruptcy on the Adamescus to justify seizure of their other assets with the Asset Sequestration Order.[100] Therefore, in Nova's view, there is obviously an overlap of evidence, experts and witnesses in the Abuse of Office Proceedings and this case.[101] Moreover, any attempt by Romania to "determine" such issues would aggravate the dispute and disrupt the *status quo*.[102]

128. With respect to the Bribery Proceedings, Nova submits that the conviction and detention of Dan Adamescu allowed Romania to inhibit his influence over Astra, and to commit many of the breaches alleged in the Request for Arbitration.[103] Nova further alleges that Romania's decision to "revive" bribery charges against Alexander Adamescu in September

[95] Application, ¶ 85.
[96] Application, ¶ 107.
[97] Reply, ¶ 75.
[98] Reply, ¶ 78.
[99] Reply, ¶ 77.
[100] Reply, ¶¶ 84, 88.
[101] Reply, ¶¶ 90-91.
[102] Reply, ¶ 132.
[103] Reply, ¶¶ 93-97.

2015 "provided Romania with a pretext to extradite him to Romania, preventing Nova from effectively pursuing its case in the arbitration."[104]

129. For Nova, the abusive nature of the Bribery Proceedings is clear from (a) the absence of reliable evidence against Alexander Adamescu, (b) the escalation of the investigation following notification of Nova's claims, and (c) Romania's acknowledgment that the Bribery Proceedings against Alexander Adamescu were recommenced to advance the Abuse of Office Proceedings.[105]

130. According to Nova, the chronology of the criminal proceedings confirms their connection with this arbitration.[106] Nova highlights the following three points:

> a) the Adamescus were not implicated in the Bribery Proceedings until after Ponta revealed his vendetta against Dan Adamescu;
>
> b) Romania did not re-open the bribery proceedings against for [sic] Alexander Adamescu until Nova notified Romania of its intention to refer disputes to arbitration in the absence of a settlement; and
>
> c) the Abuse of Office Proceedings followed the second notification of dispute, issued on 15 December 2015.[107]

131. Nova also cites a 23 June 2014 resolution of Nova's Management Board which, in its view, shows that Nova considered commencing arbitration long before the Adamescus were implicated in the criminal proceedings.[108]

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[104] Reply, ¶ 96.

[105] Reply, ¶ 133. In this context, Nova cites Romania's reference to "the serious and substantiated nature of suspicions regarding Mr. Alexander Adamescu's involvement in the bribery of Romanian insolvency judges as well as acts of large scale fraud on the strategic consumer insurance market in Romania." Observations, ¶ 213 (Nova's emphasis).

[106] Reply, ¶¶ 103-121.

[107] Reply, ¶ 106. In its submissions on the chronology of events, Nova also argues that Romania has misrepresented the summons process for Alexander Adamescu. According to Nova, Alexander Adamescu did not evade justice, as Romania alleges; rather, Romania failed to validly serve him with the first summons issued in May 2014, then took no further action until December 2015, when Romania issued a second summons and again failed to validly serve it on Alexander Adamescu. Reply, ¶¶ 108-121.

[108] Reply, ¶ 107; **C-137**, Written Resolution of the Sole Director of Nova Group Investments, B.V., 23 June 2014.

132. Nova rejects Romania's assertion that Nova has failed to show that the criminal proceedings "are fabricated, based on objectively frivolous evidence, or 'improper'."[109] For Nova, Romania's submissions in this regard are misleading and in any event irrelevant to the Application.

133. Therefore, Nova submits that, to prevent aggravation of the present dispute, it is necessary to suspend the criminal proceedings against Alexander Adamescu pending this arbitration. According to Nova, the provisional relief it requests would not prejudice Romania, as Romania could pursue the criminal proceedings after the arbitration, whereas Nova would suffer "substantial and/or irreparable harm" without such relief.[110]

b. The European Arrest Warrant and Extradition Request for Alexander Adamescu

134. Nova requests that the Tribunal order Romania to withdraw the European arrest warrant and request for extradition for Alexander Adamescu, which Nova considers a proportionate response to the serious harm it faces.[111] Nova alleges that the European arrest warrant and extradition request represent an escalation of Romania's pursuit of Mr. Adamescu since Nova initiated this arbitration.[112] In Nova's view, one of the real purposes of Romania's actions is to stall the arbitration.

135. Nova asserts that Alexander Adamescu is both a key representative and key witness, and that his extradition to Romania would prevent Nova effectively from advancing its claims in this proceeding.[113] For Nova, the death of Dan Adamescu highlights Alexander Adamescu's critical importance to this arbitration, as he is now the only person alive with the requisite knowledge to instruct counsel on Nova's behalf.[114]

[109] Reply, ¶¶ 98-102, *quoting* Observations, ¶ 185.
[110] Reply, ¶ 134.
[111] Subparagraph (b) of Nova's request for relief. *See* Section II above.
[112] Reply, ¶ 122.
[113] Reply, ¶¶ 135 *et seq.*
[114] Nova's letter to the Tribunal, 9 February 2017.

136. According to Nova, the urgency of the requested measures is clear, given that Mr. Adamescu's extradition hearing in London is scheduled to take place during the week of 24 April 2017.[115] If Romania's request is granted, Alexander Adamescu will be extradited to Romania between seven and 17 days after the decision, subject to any application for permission to appeal.[116]

137. Nova considers the requested measures to be proportionate because they are temporary and therefore would not prejudice Romania. Indeed, Nova asserts that Romania made no effort to pursue the Bribery Proceedings against Alexander Adamescu from June 2014 to December 2015, which indicates that waiting slightly longer would cause no harm.[117] In contrast, his extradition would irreparably harm Nova's procedural rights.[118] In this regard, Nova's view is that Alexander Adamescu would be imprisoned in Romania, leaving no secure means for him to communicate and meet with counsel, experts, witnesses, and others as needed to conduct this arbitration on behalf of Nova.[119]

138. To support its position that Alexander Adamescu is a necessary witness, Nova argues that he has unique personal knowledge of relevant events, gained from the central roles he played in Nova, and that he understands the technical insurance and actuarial matters involved.[120] Nova relies on the fact that Alexander Adamescu served (a) as President of Astra's Management Board from March to October 2012, (b) on Astra's Supervisory Board from June 2013 until the company was placed under special administration and then again from August to December 2015, and (c) on the boards of directors of related companies within the Nova group.[121]

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[115] Reply, ¶ 140.

[116] Reply, ¶ 156, *citing* **CL-66**, Extradition Act 2003, ss.26(4) and 35(4).

[117] Reply, ¶ 138.

[118] Reply, ¶¶ 156-157.

[119] Reply, ¶¶ 153-154. Nova states that the "provisions on additional access for lawyers [in Romanian prison] are limited to the inmate's personal lawyers, and do not extend to other lawyers such as Nova's arbitration counsel. …Moreover, there is a real risk that the security of Alexander Adamescu's communications and meetings with counsel would be compromised, in light of Romania's failure to provide even the most basic of assurances of respect for confidentiality and Nova's privilege in communications with its witnesses and instructing individuals." *Id.*

[120] Reply, ¶¶ 142-145.

[121] Reply, ¶ 143; Adamescu Statement, ¶¶ 20-21.

139. Nova further submits that Alexander Adamescu "has unique experience that makes him the only person presently able effectively to instruct counsel and manage the arbitration on Nova's behalf."[122] For Nova, this is especially true because it has no access to Astra's employees.[123]

140. In this context, Nova points to a 23 June 2014 resolution of [redacted] B.V., in its capacity as the Management Board of Nova, granting power of attorney to Alexander Adamescu and stating:

> Bogdan Alexander Adamescu is the only person within [Nova] who could instruct lawyers and provide them with the necessary information to file a claim against the Government of Romania under the BIT;
>
> The Management Board has no knowledge of the circumstances leading to the ASF decision nr. 42 and its current effects and consequence nor is it able to procure this knowledge to be able to bring a claim against the Government of Romania under the BIT and therefore finds itself in the impossibility to engage counsel for a claim against the Government of Romania.[124]

141. According to Nova, the other two members of the board of [redacted] B.V. (Mr. [redacted] W[redacted] and Ms. G[redacted]) have insufficient knowledge of the underlying facts and do not speak Romanian.[125] Thus, Nova denies Romania's assertion that Mr. W[redacted] would be able to instruct counsel with respect to all of Nova's claims.[126]

142. Nova rejects Romania's argument that the Tribunal should not grant measures relating to the extradition request because the English court provides safeguards against any abuse.[127] Contrary to Romania's position, Nova argues that the case for intervention is even greater in this case than in *Hydro v. Albania* because, under the English Extradition Act, English courts have less discretion to deny an extradition request from an EU Member (like

[122] Reply, ¶ 146.
[123] Reply, ¶¶ 150-151.
[124] **C-137**, Written Resolution of the Management Board of Nova Group Investments, B.V., 23 June 2014.
[125] Reply, ¶ 147; [redacted] Statement, ¶ 20; Adamescu Statement, ¶ 29.
[126] Reply, ¶ 149; [redacted] Statement, ¶ 20.
[127] Reply, ¶¶ 158 *et seq.*, *citing* Observations ¶¶ 210-212.

Romania) than to deny one from a non-EU Member (like Albania).[128] Further, the English court is not required to consider Nova's procedural rights in this arbitration, nor does it have the power to grant the relief required to preserve such rights. In Nova's view, "[t]hat is the role of this Tribunal."[129]

143. Nova also denies Romania's argument that the requested measures are based on the presumption that Alexander Adamescu will be imprisoned and are thus premature. According to Nova, Romania's submissions on the Application imply that he will be detained before trial and that his guilt will be presumed.[130] For Nova, there is no question that Alexander Adamescu would be placed initially into custody, at least until he appears before a judge, which could take weeks.

144. Moreover, Nova argues that Alexander Adamescu's fundamental rights would likely be violated. To support this position, Nova alleges, *inter alia*, the following:

a. Although the European arrest warrant for Mr. Adamescu concerns only the Bribery Proceedings, Romania has made clear that it also intends to prosecute him for the Abuse of Office Proceedings, in breach of the principle of "speciality."[131]

b. The conditions in Romanian prisons are cruel and inhumane.[132]

[redacted]

[128] Reply, ¶¶ 159-163.
[129] Reply, ¶ 164.
[130] Reply, ¶ 183.
[131] Reply, ¶¶ 167-169, *citing* **CL-68**, Council Framework Decision No. 2002/584/JHA, 13 June 2002, Article 27(2).
[132] Reply, ¶¶ 170-172.
[133] Reply, ¶ 173.

[redacted]

146. Nova also alleges that Romanian authorities have harassed and intimidated Alexander Adamescu's wife and children, demonstrating Romania's attempt "to place maximum pressure upon the Adamescus so as to deprive Nova of its ability to conduct and pursue this claim."[135]

c. Surveillance and Interception of Privileged or Confidential Communications

147. Nova seeks a provisional measure from the Tribunal ordering Romania to refrain from undertaking any surveillance or seeking to intercept certain privileged or confidential communications.[136]

148. According to Nova, this request is based on "well-founded concerns" that Romania is in fact trying to access Nova's communications.[137] In particular, Nova cites Romania's acknowledgement that it used wire taps in the course of the criminal proceedings against Dan Adamescu.[138] In addition, Nova points to Romania's letter of 11 November 2016, in which it alleged that Nova was seeking third-party funding. In Nova's view, Romania's refusal to identify the source of that information suggests that it has solicited or otherwise sought to obtain such confidential and privileged communications.[139]

149. Nova submits that this measure is necessary, urgent, and proportionate.[140] It also states that "Romania is required to 'arbitrate fairly and in good faith', and it cannot claim to suffer

[134] Nova's letter to the Tribunal, 9 February 2017.

[135] Reply, ¶¶ 175-183. Nova specifically alleges that (a) KPMG and Romanian authorities investigated his wife concerning baseless allegations, (b) border authorities prevented his three-year-old son from boarding a plane in Bucharest, and (c) his wife was attacked in London by masked men.

[136] Subparagraph (d) of Nova's request for relief, as amended. *See* Section II above.

[137] Nova's letter to the Tribunal, 21 December 2016.

[138] Nova's letter to the Tribunal, 21 December 2016, *citing* Observations, ¶ 17.

[139] Nova's letter to the Tribunal, 21 December 2016.

[140] Nova's letter to the Tribunal, 21 December 2016.

prejudice as a result of being prevented from monitoring confidential or privileged communications."[141]

d. The Asset Sequestration Order

150. Nova asks the Tribunal to order Romania to withdraw the Asset Sequestration Order or, alternatively, to amend it so that Nova can complete the sale of its interests in [redacted] and in [redacted] Nova states that

> the requested relief is both necessary and urgent to prevent the aggravation of the dispute and to ensure the procedural integrity of the arbitration. In addition, the measures requested are proportionate to the harm that Nova faces.[143]

151. The DNA issued the Asset Sequestration Order on 25 March 2016 to freeze RON 857,301,363.37 worth of shares in Nova's subsidiaries.[144] Nova alleges that the Asset Sequestration Order is part of Romania's plan ultimately to seize Nova's assets, and thus seriously aggravates the present dispute.[145] Moreover, Nova asserts that the Tribunal's award would be prejudiced if Romania were allowed to seize its assets before that award is rendered.[146]

152. In connection with the Asset Sequestration Order, Nova alleges, *inter alia*, the following facts:

a. The Asset Sequestration Order was imposed by the prosecutor (not a court) based on Dan Adamescu's designation as a *suspect* in the Abuse of Office Proceedings, reflecting a presumption of guilt.

[141] Nova's letter to the Tribunal, 21 December 2016.
[142] *See* Section II above.
[143] Reply, ¶ 239.
[144] Reply, ¶ 222; **C-54**, Public Prosecutor George Matei's Precautionary Measures Ordinance, 25 March 2016.
[145] Reply, ¶¶ 218-221.
[146] Reply, ¶ 221.

b. There has been no independent review of factors such as the value of the frozen assets, the risk of dissipation, or potential damage to third parties in the event of dissipation.

c. The Asset Sequestration Order was applied immediately and indefinitely, without any prospect of a hearing.

d. The amount of Astra's liabilities, which the Asset Sequestration Order secures, is overstated, based on insurance claims made but not yet assessed.

e. The DNA ignored the fact that Nova is owned by the Stichting, not Dan Adamescu.

f. All appeals against the Asset Sequestration Order have failed.[147]

g. Romania failed to withdraw the Assert Sequestration Order following the death of Dan Adamescu despite the fact that its stated justification for the Asset Sequestration Order was to prevent the dissipation of assets pending the criminal proceedings against him.[148]

153. Nova further alleges that the Asset Sequestration Order has seriously hindered Nova's ability to conduct business. According to Nova, the main effects of the Asset Sequestration Order are the following:

a. The Asset Sequestration Order has prevented Nova from selling a 12.87% interest in [redacted] to [redacted] Holding SA for EUR 3.5 million.[149]

b. The Asset Sequestration Order has halted the tender process for TNG Romania's shares in [redacted][150]

[147] Reply ¶ 231; **C-163**, Bucharest Tribunal – Penal Section 1 Conclusion, 07 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.

[148] Nova's Letter to the Tribunal, 9 February 2017, *citing* Reply on Bifurcation, ¶ 104.

[149] Reply, ¶ 233(a); **C-166**, Board Resolution of The Nova Group Investments, B.V., 18 March 2016.

[150] Reply, ¶ 233(b); Adamescu Statement, ¶ 80(b).

c. In addition to freezing the shares of Nova's subsidiaries, it prohibits dealings involving their underlying *assets*; for example, the DNA has prevented [redacted] Center from selling certain real estate.[151]

d. Nova subsidiaries such as [redacted] SA and [redacted] SRL have been refused financing based on "reputational risk."[152]

e. Romanian banks have notified several of Nova's subsidiaries that, due to "reputational risk," their accounts will be closed.[153]

f. A Romanian bank has refused Nova subsidiaries' request to open bank accounts.[154]

154. On the basis of these allegations, Nova asserts that the Asset Sequestration Order has already caused it losses and restricted its access to funds, which might at some point require Nova to seek third-party funding.[155]

e. Additional Proceedings in Romania

155. Nova asks the Tribunal to order Romania to suspend or refrain from initiating any action against Nova, its representatives or investments "to establish or collect on any alleged liability to Romania disputed in this arbitration," or any other action that would "aggravate the dispute or jeopardize the procedural integrity of this arbitration."[156] Nova submits that this relief is necessary, urgent and proportionate.[157]

[151] Reply, ¶ 234; **C-168**, DNA Ordinance rejecting request to sell the [redacted] SRL real estate, 19 October 2016, (tab C). [redacted] Center's appeal of this decision is pending. **C-169**, Complaint filed on behalf of [redacted] Center [redacted] SRL, 28 October 2016.

[152] Reply, ¶ 236; Adamescu Statement, ¶ 82.

[153] Reply, ¶ 237. The notices concern [redacted] SRL, [redacted] SRL, [redacted] SRL, [redacted] SRL, [redacted] SRL, [redacted] SPV, TNG [redacted], and TNG Romania. **C-170**, Letters from OTP Bank, 13 May 2016; **C-171**, Letter from Raiffeisen to [redacted] SPV SRL, 6 July 2014; **C-172**, Letter from Raiffeisen to [redacted], 6 July 2014; **C-173**, Letter from Raiffeisen to The Nova Group [redacted], 6 July 2014.

[154] Reply, ¶ 237; Adamescu Statement, ¶ 84.

[155] Reply, ¶ 240. Nova reserves the right to include the cost of such funding in its claims for costs.

[156] Subparagraphs (f) and (g) of Nova's request for relief. *See* Section II above.

[157] Reply, ¶ 249.

156. In this context, Nova cites decisions in which tribunals have found that the threat of criminal proceedings could deter potential witnesses.[158] For example, the tribunal in *Quiborax v. Bolivia* stated that "even if no undue pressure is exercised on potential witnesses, the very nature of these criminal proceedings is bound to reduce their willingness to cooperate in the ICSID proceeding."[159] In *Lao Holdings v. Laos*, the tribunal declined to allow the respondent to pursue a criminal investigation into the claimant's employees, stating that "the 'chilling effect' of a concurrent criminal investigation [would] be a powerful deterrent to Laotian witnesses to give evidence contrary to the Respondent's position."[160]

157. Nova alleges that in this case, Romania's "unrelenting pursuit of the Adamescus" has had, and will continue to have, a chilling effect on potential witnesses. According to Nova, it has "identified a number of witnesses with relevant and material information to the dispute but who are concerned about publicly testifying against Romania."[161] Thus, in Nova's view, the requested provisional relief is required to preserve procedural integrity and for Nova to bring its claims effectively.

f. Preservation and Restoration of Documents

158. Nova requests provisional measures concerning the preservation and reconstruction of documents and data that are potentially relevant to this arbitration.[162]

159. Nova states that it "has reason to believe" that two categories of "documents held by the ASF and potentially relevant to this arbitration have recently been destroyed": (a) documents related to Astra that have been shredded or lost, and (b) documents in the ASF electronic document depository that were destroyed after its IT system crashed.[163] In this

[158] Reply, ¶¶ 242-245, *citing inter alia* **CL-25**, *Quiborax*, ¶¶ 143-148; **CL-34**, *Lao Holdings*, ¶ 41; **CL-50**, *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 9, 8 July 2014 ("***Churchill* PO9**") ¶ 92.

[159] **CL-25**, *Quiborax*, ¶ 143.

[160] **CL-34**, *Lao Holdings*, ¶ 41.

[161] Reply, ¶ 246.

[162] Subparagraph (h) of Nova's request for relief. *See* Section II above.

[163] Reply, ¶¶ 253-254.

context, Nova relies on articles published in the Romanian media (*România Liberă* and *Profit.ro*) on 3 April and 4 November 2016.[164]

160. Although Nova has not been able independently to assess the allegations stated in these articles, Nova contends that the events described, and the response of the head of the ASF, Mr. Misu Negritoiu, raise legitimate concerns about the ASF's document preservation systems. Whether the IT crash at ASF was innocent or deliberate, Nova's main concern is that "relevant documents have already been destroyed, and that there is a serious risk that relevant documents may continue to be destroyed."[165] Thus, by letter of 4 November 2016 to Romania's counsel, Nova sought details of the events described in the articles, as well as assurances that relevant documents were being preserved.[166] However, Romania refused to provide any explanation or assurances.[167] In these circumstances, Nova asserts that the requested relief is necessary.

161. Nova also argues that the measures are urgent because (a) relevant documents may be permanently lost without steps to retrieve them, and (b) Mr. Negritoiu is subject to parliamentary investigations and thus has "every incentive to cover up any documents which might implicate or incriminate him personally, or more generally, the ASF."[168]

162. Finally, Nova contends that the requested relief is proportionate, as it would impose on Romania "little, if any, inconvenience beyond what it is already obliged to do in order to

[164] **C-175**, "A suspicious crash affected the main servers of the ASF, but also the three backup systems. The IT incident has erased on time the ASF documents," *România Liberă*, 4 November 2016 (quoting sources in the ASF, stating that "when the bankruptcy of [Astra] was decided, the decision was taken to destroy several compromising documents that were showing the abuses made by the ASF Board. The documents were shredded. Those were documents showing the abuses committed by directors subordinated to Misu Negritoiu"); **C-176**, "Investigation of the ASF: the IT system crashed. A deliberate action is not excluded. Negritoiu's reaction: we were transferring the data from the 'messed up' systems of the former Agency," *Profit.ro*, 4 November 2016; **C-177**, "ASF has found the documents requested by the DNA about Astra insurance that it initially lost," *Profit.ro*, 3 April 2016 (stating that the ASF found some documents that had been lost but that others "might have been removed or destroyed").

[165] Reply, ¶ 263.

[166] Reply, ¶¶ 265-266; **C-113**, Letter from Nova to Romania, 4 November 2016.

[167] Reply, ¶¶ 265-266; **C-117**, Letter from Romania to Nova, 5 November 2016.

[168] Reply, ¶ 270(b).

preserve the integrity of this arbitration"; on the other hand, Nova would suffer serious or irreparable harm without the measures.[169]

B. Respondent's Position

(1) The Scope of the Tribunal's Power to Grant Provisional Measures

163. Romania submits that the Tribunal lacks the power to grant Nova's requested provisional relief because it

> would interfere with Romania's sovereign right, and in fact duty, to prosecute, in a legitimate exercise of its police powers, the individuals that have engaged in criminal activities on its territory, and moreover endangered the interests of the public at large.[170]

164. Romania cites a number of past provisional measures decisions to support its position.[171] For example, Romania points to *SGS v. Pakistan*, in which the tribunal denied the request for provisional measures relating to domestic criminal proceedings, stating that it "[could] not enjoin a State from conducting the normal processes of criminal, administrative and civil justice within its own territory."[172] Romania also cites the statement of the tribunal in *Lao Holdings v. Laos* that, in the context of ordinary proceedings to enforce criminal laws

> [i]ssues of such criminal liability by definition fall outside the scope of [ICSID] jurisdiction and the competence of this Tribunal. Neither the ICSID Convention nor the BIT imposes a prohibition on a State that enjoins it from exercising criminal jurisdiction over such matters.[173]

[169] Reply, ¶ 270(c).

[170] Observations, ¶ 110; Rejoinder, ¶ 36.

[171] Observations, ¶ 119, *citing inter alia* **RL-4**, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2, 16 February 2002 ("***SGS***"), p. 301; **RL-5**, *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 13, 27 September 2012 ("***Abaclat***"), ¶¶ 39, 45; **CL-34**, *Lao Holdings*, ¶ 21.

[172] **RL-4**, *SGS*, p. 301.

[173] **CL-34**, *Lao Holdings*, ¶ 21.

165. According to Romania, in the very few cases in which tribunals have granted measures that interfered with criminal proceedings, tribunals applied a "particularly high threshold," requiring "proof of exceptional circumstances."[174] In particular, Romania argues that in all such cases, "there were clear indications that the State had used said criminal investigations coercively to jeopardize the arbitration proceedings."[175]

166. Indeed, according to Romania, the cases relied upon by Nova all involved exceptional circumstances.[176] For example:

a. In *Quiborax v. Bolivia*, the tribunal accepted evidence that the criminal proceedings at issue had been initiated in retaliation to the arbitration and aimed at intimidating witnesses.[177]

b. In *Lao Holdings v. Laos*, the exceptional facts included: (i) the respondent admitted that the purpose of the criminal investigation at issue was to gather evidence for the arbitration, (ii) the respondent was seeking to conduct the investigation on the eve of the hearing in the arbitration, and (iii) the investigation was aimed at the same individuals and facts the formed the subject of the arbitration.

c. In *Hydro v. Albania*, the respondent had sought the extradition of the claimants after they filed the request for arbitration.

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[174] Observations, ¶¶ 114-115, *quoting* **RL-6**, *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Claimants' Request for Provisional Measures, dated December 4, 2014 ("***Caratube II***"), ¶ 135 ("a 'particularly high threshold must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a state'… it would take proof of exceptional circumstances to recommend that a State refrain from conducting criminal investigations."). *See* **RL-7**, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 - Decision on Requests for Provisional Measures, 23 June 2015 ("***EuroGas***"), ¶¶ 77, 82 ("only exceptional circumstances may … justify that an arbitral tribunal order provisional measures which interfere with criminal proceedings"); **CL-41**, *Menzies*, ¶ 126 (stating that the requested measure "implies a substantial infringement on the sovereignty of the State of Senegal and its legitimate power to fight against corruption, money laundering and organized crime. Such a measure could only be granted in exceptional circumstances that would seriously jeopardize the proper conduct of the arbitral proceedings").

[175] Rejoinder, ¶ 95.

[176] Rejoinder, ¶ 39.

[177] Observations, ¶¶ 125-130, *citing* **CL-25**, *Quiborax*, ¶¶ 8, 122-124, 145-146, 163-164.

167. Thus, even assuming that the Tribunal had the power to grant the requested relief, Romania's alternative position is that Nova would have to meet a particularly high threshold, beyond the general requirements under Article 47 ICSID Convention.[178] In particular, Romania argues that Nova would need to demonstrate that the criminal proceedings (a) prevent Nova from asserting its rights in this arbitration, (b) constitute an "impermissible act," and (c) relate directly to the arbitration.[179] As explained further below, Romania's position is that Nova has manifestly failed to meet this burden.

(2) Applicable Legal Standard

168. Romania sets out the applicable legal standard for provisional measures as follows:

> in order for provisional measures to be granted, (i) the claimant must have a right that exists at the time of the request and that requires preservation in the arbitration, (ii) there must be circumstances of necessity to avoid irreparable harm being caused to the claimant by the party against whom provisional measures are sought, (iii) there must be circumstances of urgency, (iv) the provisional measures requested must be proportional; (v) the provisional measures requested must not be too broad, and (vi) any recommendation for the provisional measures must not prejudge the merits of the case.[180]

169. With respect to the first requirement, Romania argues that under ICSID Arbitration Rule 39, the rights to be protected must exist at the time of the request for provisional measures; they cannot be future or hypothetical rights.[181] Further, such rights must be related to the claims at issue and relief sought in the ICSID arbitration.[182]

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[178] Observations, ¶ 134.

[179] Observations, ¶ 120; Rejoinder, ¶ 38.

[180] Rejoinder ¶ 53, *citing* **CL-27**, *Maffezini*, ¶¶ 10-13; **RL-10**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007 ("***Occidental***"), ¶¶ 59, 61; **RL-6**, *Caratube II*, ¶ 116; **CL-34**, *Lao Holdings*, ¶ 73; **RL-4**, *SGS*, p. 301; **CL-28**, *Pey Casado*, ¶¶ 45-46; **RL-12**, *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited*, ICSID Case No. ARB/98/8, Appendix A to Final Award, 22 June 2001, Decision on the Respondent's Request for Provisional Measures, 20 December 1999, ¶ 13.

[181] Observations, ¶ 139, *citing* **CL-27**, *Maffezini*, ¶¶ 12-13 ("Rule 39(1) specifies that a party may request … provisional measures for the preservation of its rights. … The use of the present tense implies that such rights must exist at the time of the request, must not be hypothetical, nor are ones to be created in the future.").

[182] Observations, ¶ 139, *citing* **RL-13**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order of 6 September 2005 ("***Plama***"), ¶ 40 ("The rights to be preserved … may be general rights, such

170. In addressing the element of necessity, Romania asserts that the measure must be necessary to avoid irreparable harm, and in this regard, rejects Nova's argument that "significant" harm would satisfy the test.[183] According to Romania, ICSID tribunals have consistently denied requests for provisional measures when the alleged harm could be redressed by damages, especially in cases in which the ultimate relief sought is an award of damages.[184]

171. Romania challenges Nova's reliance on past decisions to support its proposed "significant" harm test. In particular, Romania argues that these cases are inapposite and in any case underscore the importance of the irreparable harm test, as follows:

a. *City Oriente v. Ecuador* and *Perenco v. Ecuador*: The claimants were seeking specific performance as relief in the underlying arbitration.[185] Further, the tribunals found that without the requested measures, the claimants' business in Ecuador would cease to exist.[186]

b. *Paushok v. Mongolia*: The tribunal relied on the UNCITRAL Model Law, which does not require irreparable harm, and expressly distinguished cases governed by the ICSID Convention.[187]

c. *PNG v. New Guinea*: The tribunal granted measures to prevent actions that would (i) "significantly affect the Tribunal's ability to render an award of restitution" or (ii) endanger the claimant's existence and ability to participate in the arbitration.[188]

as the rights to due process or the right not to have the dispute aggravated, but those general rights must be related to the specific disputes in arbitration, which, in turn, are defined by the Claimant's claims and requests for relief to date.").

[183] Observations, ¶¶ 143-149.

[184] Observations, ¶ 143, *citing* **RL-13**, *Plama*, ¶ 46 ("harm is not irreparable if it can be compensated for by damages which is the case in the present arbitration and which, moreover, is the only remedy Claimant seeks.").

[185] Observations, ¶¶ 144-148, *citing* **CL-38**, *City Oriente* Revocation, ¶¶ 64-65; **CL-39**, *Perenco*, ¶¶ 46, 53.

[186] **CL-38**, *City Oriente* Revocation, ¶ 85; **CL-39**, *Perenco*, ¶ 46.

[187] Rejoinder, ¶ 58, *citing* **RL-8**, *Paushok*, ¶ 70.

[188] Rejoinder, ¶ 59, *quoting* **CL-63**, *PNG*, ¶ 160.

172. Regarding the third requirement, Romania states that a measure is urgent when it cannot await the award.[189]

173. As to the element of proportionality, Romania states that a grant of provisional measures must "not prejudice the respondent in a manner disproportionate to the potential prejudice to the claimant if the measures were not to be ordered."[190]

174. With respect to the fifth element, Romania asserts that the requested measures must be specific in object and scope.[191]

175. Finally, Romania submits that provisional measures, which are by nature aimed at protection rather than enforcement, must not prejudge the merits of the case. According to Romania, the tribunals in *Maffezini v. Spain* and *Pey Casado v. Chile*, for example, have recognized this principle.[192]

176. Romania argues that, although Nova ignores these fifth and sixth requirements, ICSID tribunals have refused to grant provisional measures when these two factors are not satisfied.[193]

177. Romania states that Nova has the burden of proving that the requested measures satisfy each of these six requirements but, as explained below, has failed to do so.[194]

(3) Jurisdiction

178. In addition to the requirements set out above, Romania submits that ICSID tribunals "should be particularly cautious in granting provisional measures when they have not yet

[189] Observations, ¶ 142.

[190] Observations, ¶ 150.

[191] Observations, ¶ 151, *citing* **RL-4**, *SGS*, ¶ 301 (denying the claimant's request that the tribunal order the respondent not to commence or participate in any "proceedings in the courts of Pakistan relating in any way to this arbitration," finding that this measure was "too broad").

[192] Observations, ¶¶ 152-153, *citing* **CL-27**, *Maffezini*, ¶ 21 ("It would be improper for the Tribunal to pre-judge the Claimant's case by recommending provisional measures of this nature"); **CL-28**, *Pey Casado*, ¶¶ 45-46 ("the Arbitral Tribunal cannot and does not want to pre-judge anything, or even, strictly speaking, 'to presume anything in an anticipatory manner.'").

[193] Rejoinder, ¶ 57, *citing* **RL-4**, *SGS*, p. 301; **CL-63**, *PNG*, ¶ 152.

[194] Observations, ¶ 155; Rejoinder, ¶ 60.

ruled on the merits and even more so on jurisdiction."[195] Romania considers this a minimum safeguard for States.[196] Romania cites the statement of the tribunal in *Perenco v. Ecuador* that

> 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. The Tribunal must be even slower where, as here, the jurisdiction of the tribunal to entertain the dispute has not been established.[197]

179. Thus, Romania rejects Nova's position that the Tribunal's powers are unaffected by the fact that it has not yet ruled on jurisdiction.[198] According to Romania, Nova has tried to avoid Romania's submissions on jurisdiction by arguing irrelevantly that a tribunal has the power to grant provisional measures once it is satisfied that there is a *prima facie* basis for jurisdiction.[199]

180. As further detailed in the Bifurcation Request and Reply on Bifurcation, Romania's position on jurisdiction is that

a. 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;

b. 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

[195] Rejoinder, ¶ 23.

[196] Rejoinder, ¶ 22.

[197] Observations, ¶ 136, *quoting* **CL-39**, *Perenco*, ¶ 43.

[198] Rejoinder, ¶¶ 24-32, *citing* **CL-41**, *Menzies*, ¶ 113.

[199] Rejoinder, ¶ 19, *citing* Reply, ¶ 20. Romania contends that Nova's case is so "fundamentally pathological and unsubstantiated on material points … that Romania did not have the minimum level of factual clarity required to submit jurisdictional objections." Rejoinder, ¶ 21.

c. Nova failed to comply with the BIT's consultation requirement with respect to all claims relating to investments other than Astra.[200]

(4) Application of the Legal Standard to the Measures Requested

a. The Criminal Proceedings

181. Romania advances several reasons for which, in its view, Nova has failed to satisfy the applicable legal requirements with respect to its request for a provisional measure suspending the Bribery Proceedings and Abuse of Office Proceedings.[201]

182. Romania's primary argument is that, because Nova has failed to demonstrate that the criminal proceedings were initiated in direct connection with this arbitration, its requested measure must be denied.[202] For Romania, the chronology of events establishes that there is no link between the criminal proceedings and this arbitration, filed on 21 June 2016.

183. Regarding the Bribery Proceedings, Romania points out that they were launched at the latest in May 2014, more than one year before Nova allegedly first notified Romania of a dispute under the BIT on 25 August 2015.[203] Romania dismisses Nova's reliance on a 23 June 2014 resolution of its management board, which purportedly shows that Nova considered initiating arbitration before commencement of the Bribery Proceedings.[204] In Romania's view, such internal discussions are irrelevant and cannot implicate Romania in any way.

184. Further, according to Romania, it is undisputed that the extradition proceedings for Alexander Adamescu relate back to the Bribery Proceedings; therefore, they could not have been pursued in connection with this proceeding. Romania rejects Nova's allegation that the reopening of the Bribery Proceedings against Alexander Adamescu in September 2015

[200] Bifurcation Request, §§ 1, 2 and 3.

[201] Observations, §III.2; Rejoinder, §III.2. *See* subparagraph (a) of Nova's request for relief at Section II above.

[202] Rejoinder, ¶¶ 98-111.

[203] Rejoinder, ¶ 101, *citing* Reply, ¶ 105(b) and **C-78**, Letter from WilmerHale to the ASF, 25 August 2015.

[204] Rejoinder, fn. 133; *see* **C-137**, Written Resolution of the Sole Director of Nova Group Investments, B.V., 23 June 2014.

(after Nova's first alleged notice of dispute) indicates any link with this arbitration.[205] Romania states that the authorities' renewed focus on the bribery allegations against Mr. Adamescu stems from the investigation into his liability for the failure of Astra.[206]

185. As to the Abuse of Office Proceedings, Romania asserts that they were initiated in February 2014, based on a finding by ASF that Astra's executive bodies had misrepresented the company's insolvency margin.[207] Romania cites a 7 March 2016 DNA Ordinance which, according to Romania, shows that (a) the Adamescus were explicitly linked to the proceedings on 31 March 2014, when the ASF filed a complaint against Astra and the Adamescus for gross mismanagement of the company, and (b) the Adamescus were formally identified as suspects in 2016.[208] Thus, according to Romania, there is no evidence that the Abuse of Office Proceedings, which began even before Nova's first alleged notification of the dispute, are related to this dispute.

186. Romania further argues that the present arbitration and the criminal proceedings "have a completely different subject matter and purpose," are conducted before different jurisdictions, and are governed by different laws.[209] Therefore, any finding by Romanian courts would not affect Nova's case.[210] Even accepting Nova's allegation that there is some factual overlap between Nova's claims in this arbitration and the criminal proceedings, Romania argues that any similarities "are presumably due to the fact that Nova has precisely initiated the arbitration in order to obstruct the criminal proceedings."[211]

187. Romania's second main argument is that Nova's request must be denied because Nova has failed to show that the criminal proceedings are in any way illegitimate. In particular, Romania denies Nova's allegation that the Adamescus were targeted for politically

[205] Rejoinder, ¶ 106.

[206] Rejoinder, ¶ 106.

[207] Rejoinder, ¶ 102.

[208] Rejoinder, fn. 135; **C-130**, DNA Ordinance against Dan Adamescu, 7 March 2016.

[209] Rejoinder, ¶¶ 143-145.

[210] Rejoinder, ¶ 144. Romania also states that the "present Tribunal simply has no jurisdiction to determine criminal guilt or innocence under Romanian law." *Id.*, ¶ 143.

[211] Rejoinder, ¶ 98.

motivated reasons by the former Prime Minister, Mr. Victor Ponta. Among the facts alleged by Romania to support this position are the following:

a. The Bribery Proceedings against the Adamescus were part of a wider investigation into the potential corrupt practices of several insolvency judges that began before Mr. Ponta entered office.[212]

b. The DNA has strong evidence of the Adamescus' involvement in the bribery of these judges, including "the testimonies of numerous witnesses, as well as multiple wire taps, bank statements, and other financial documentation."[213]

c. Dan Adamescu was tried in accordance with the rules of due process, and his conviction was upheld by the High Court of Cassation and Justice.[214]

d. Four insolvency judges and a Member of Parliament in Mr. Ponta's political party also were convicted on bribery charges.[215]

e. The DNA is independent, as shown by the fact that it initiated several criminal investigations against Mr. Ponta between June and September 2015, ultimately indicting him.[216]

f. Romania's scrutiny into Astra's financial situation began in early 2013, before Mr. Ponta was elected.[217]

g. In January 2014, the ASF discovered that Astra's reported insolvency margin had been inflated by nearly RON 1 billion, which was confirmed by KPMG.[218]

[212] Observations, ¶¶ 76-81.

[213] Observations, ¶ 78; **C-55**, DNA Indictment relating to bribery acts, 20 June 2014.

[214] Observations, ¶ 82, *citing* Request for Arbitration, ¶ 140.

[215] Observations, ¶¶ 80-81; **C-73**, Decision of the Bucharest Court of Appeal, 2 February 2015; **R-15**, "Who is the businessman Iosif Armas, one accused of destruction of Baile Herculane," *Cotidianul*, 4 June 2016.

[216] Observations, ¶ 36.5; Rejoinder, ¶ 119; **R-16**, DNA Press Releases regarding investigations against Mr. Victor Ponta.

[217] Observations, ¶ 36.1; **R-13**, Report of Special Administrator, KPMG Advisory SRL, 25 March 2014, Section 3.1.

[218] Observations, ¶ 85.

h. The Abuse of Office Proceedings are supported by the 25 August 2015 report of KMPG, which is "overwhelming and damning as regards the nature, degree and extent of ASTRA's management's wrongdoings."[219] These offenses include tampering with the insolvency margin, granting illegal loans to other companies in the Nova group leading to losses of nearly RON 100 million, and bearing the premiums for policies granted to Nova subsidiaries.[220]

i. Nova has presented no evidence that the criminal proceedings have involved any undue threats or intimidation of any potential witnesses.[221]

188. Romania asserts that Nova has intentionally avoided addressing the damning evidence against the Adamescus.[222] In response to Nova's assertion that such "arguments on the merits are not relevant at this stage," Romania contends that the evidence underlying the criminal investigations is important because the Tribunal does not have the power to interfere with Romania's legitimate enforcement of its criminal laws, especially when the criminal allegations are serious and supported by strong evidence, as in this case.[223]

189. Third, Romania submits that Nova's request must be denied because it has failed to demonstrate that, without the requested measure, the criminal proceedings would jeopardize the arbitration.[224]

190. In particular, Romania's position is that Nova has not shown that Alexander Adamescus is a material, irreplaceable witness, or that he is the only individual capable of instructing counsel.[225] According to Romania, his testimony would "bring no added value to Nova's

[219] Observations, ¶¶ 86-87, *citing* **R-9**, Report of the Special Administrator regarding the causes and main situations that resulted in the deterioration of the liquidity and solvability of the Company until the start of the financial recovery procedure, KPMG Advisory SRL, 25 August 2015.

[220] Observations, ¶ 87, *citing* **R-9**, Report of the Special Administrator regarding the causes and main situations that resulted in the deterioration of the liquidity and solvability of the Company until the start of the financial recovery procedure, KPMG Advisory SRL, 25 August 2015.

[221] Rejoinder, ¶¶ 196-198.

[222] Rejoinder, ¶¶ 114-115.

[223] Rejoinder, ¶ 113.

[224] Observations, ¶¶ 189-199; Rejoinder, ¶¶ 121-127.

[225] Rejoinder, ¶ 122.

case," as it has not been shown that he has material, irreplaceable knowledge of the relevant facts.[226] In Romania's view, other members of senior management of Astra or Nova likely would have better, more relevant knowledge.

191. Romania is not persuaded by Alexander Adamescu's witness statement, which it considers "empty words" aimed at establishing his importance to the case but lacking any supporting evidence, such as correspondence, minutes, or memoranda.[227] For Romania, the relevance of Alexander Adamescu's position on Astra's Supervisory Board is questionable because, as he acknowledges, this does not involve the day-to-day work of the company.[228] With regard to his alleged role as President of Astra's Management Board, Romania highlights that he held this position for only six months.[229] Romania also dismisses Nova's view that Alexander Adamescu's educational background makes him an important witness, as Nova has failed to provide any corresponding evidentiary support.[230]

192. Similarly, Romania argues that Nova has failed to show that Alexander Adamescu is the only person who effectively can instruct counsel on Nova's behalf. According to Romania, Nova's burden is to prove that no one else could act as *authorized party representative*, which is an individual empowered to instruct counsel in a binding manner.[231] For Romania, it is irrelevant whether that person has the requisite skillset and knowledge to give correct instructions.[232]

193. In Romania's view, Nova has not met this burden. In particular, Romania asserts that [redacted] W[redacted] has full legal authority to instruct counsel, acting on behalf of Nova's sole director, [redacted] B.V. Indeed, given that Alexander Adamescu holds no position within

[226] Rejoinder, ¶ 124. As an alternative, Romania states: "At the very best, Claimant's application in this regard only, irrespective of the other requirements that are required but fail to be met, is premature and would need to await the filing of the Memorial and Counter-Memorial to see what factual points are claimed, challenged, and what Mr. Alexander Adamescu could possibly meaningfully add thereto." Rejoinder, ¶ 137.

[227] Rejoinder, ¶ 125.

[228] Rejoinder, ¶ 127, *citing* Adamescu Statement, ¶ 24 and **R-8**, "Astra Asigurari, suspected of having underestimated massive damages," *Ziare*, 8 February 2014, p. 4.

[229] Rejoinder, ¶ 128, *citing* Adamescu Statement, ¶ 23.

[230] Rejoinder, ¶ 129.

[231] Rejoinder, ¶ 133.

[232] Rejoinder, ¶ 133.

Nova and has no material knowledge of the underlying facts, Nova likely would be better served by Mr. W[redacted] acting with a senior member of Astra.[233] In this regard, Romania rejects as unsubstantiated Nova's allegation that it has no access to Astra employees.

194. Romania challenges Nova's reliance on board resolutions that purport to give Alexander Adamescu power of attorney to instruct counsel on Nova's behalf.[234] For Romania, these documents confirm that [redacted] B.V. is also authorized to instruct counsel. Moreover, Romania considers these documents "suspicious and at odds with common practice."[235] In this regard, Romania makes, *inter alia*, the following arguments:

a. Common practice is for companies to grant the power of attorney to counsel directly.

b. The timing of the 9 June 2016 power of attorney shows that it was "aimed at fabricating evidence."[236]

c. The 23 June 2014 board resolution inexplicably was not submitted until Nova's Reply.

d. The date of the 23 June 2014 board resolution is "troubling" because (i) the metadata of the file shows that it was produced on 6 June 2016;[237] (ii) there is no evidence that the document was registered or even part of Nova's records in 2014; and (iii) if the date were authentic, there would have been no reason to issue the 9 June 2016 power of attorney.[238]

195. Romania further argues that Nova's request in relation to Alexander Adamescu is untenable because it rests on several hypotheticals. For instance, Nova has not demonstrated that if extradited, he will be convicted and imprisoned.[239] Nor has Nova shown that Alexander Adamescu will submit a witness statement in the underlying

[233] Rejoinder, ¶¶ 134-135.

[234] Observations, ¶ 194; Rejoinder, ¶¶ 136, 138. *See* **C-6**, Resolution of the Sole Director of Nova Group Investments, B.V., 9 June 2016.

[235] Observations, ¶ 194; Rejoinder, ¶ 136.

[236] Observations, ¶ 194.1.

[237] **R-39**, Metadata re. written Resolution of the Sole Director of Nova Group Investments B.V., 23 June 2014.

[238] Rejoinder, ¶ 138.

[239] Rejoinder, ¶ 141.

arbitration or that he will be called for cross-examination by Romania. Even if these events occur, there is no evidence that such imprisonment will prevent him from participating in this arbitration. According to Romania, all inmates in the national penitentiary system have unrestricted and privileged access to the attorneys of their choice.[240] Accordingly, Mr. Adamescu could prepare any evidence allegedly required from him, instruct counsel, and, if necessary, provide oral testimony by videoconference.[241]

196. Romania's fourth main argument in connection with the criminal proceedings is that Nova's requested measures fail the proportionality test.[242] As summarized above, Romania's position is that "the harm that Claimant would – potentially – suffer if the Tribunal were to reject its provisional measures would, at best, be hypothetical."[243] In contrast, Romania argues that measures would cause irreparable harm to Romania and the Romanian public. In particular, the measures would allow Alexander Adamescu to "flee to a country where his extradition might not even be possible, without the Tribunal being able to exercise any direct or indirect control over the same."[244] In addition, the Sequestration Order likely would be lifted, resulting in a serious risk that Nova would dissipate assets that could serve to compensate Astra for losses incurred through the Adamescus' suspected wrongdoings.[245]

197. Romania's final main argument is that by granting the requested measures, the Tribunal necessarily would prejudge the merits of Nova's claim, including its allegation that Romania has breached Article 3(2) of the BIT by improperly preventing the Adamescus from freely entering and exiting Romania.[246]

[240] Observations, ¶¶ 167 *et seq.*; Rejoinder, ¶¶ 87 *et seq.*
[241] Observations, ¶ 194; Rejoinder, ¶ 140.
[242] Observations, ¶¶ 200-204; Rejoinder, ¶ 146.
[243] Observations, ¶ 202.
[244] Observations, ¶ 203.
[245] Observations, ¶ 203.
[246] Observations, ¶ 205.

b. The European Arrest Warrant and Extradition Request for Alexander Adamescu

198. Romania submits that the Tribunal must not grant Nova's request for an order to withdraw the European arrest warrant and extradition request for Alexander Adamescu.[247] According to Romania, there are several reasons to dismiss Nova's request, in addition to the all of the reasons summarized above in relation to the criminal proceedings.

199. Romania argues that there is no evidence that its actions in relation to Alexander Adamescu are illegitimate or intended to jeopardize the arbitration.[248] In Romania's view, there is no basis for Nova's allegation that Romania intensified efforts to extradite him following the Request for Arbitration.[249] Rather, the Interpol Red Notice was issued days after the European arrest warrant in accordance with standard practice.[250] Similarly, Romania states that its requests for mutual assistance from UK authorities in July and September 2016 were in accordance with standard procedure and aimed at ensuring that all relevant procedural rules were observed in connection with the extradition hearing.[251] In response to Nova's allegation that Romania has continued to "harass and intimidate" Alexander Adamescu's family, Romania asserts that all three of Nova's allegations are entirely unsubstantiated.[252]

200. Indeed, Romania points out that Alexander Adamescu's procedural rights will be safeguarded throughout the extradition process, especially because Romania is an EU Member State and a signatory of the European Convention on Human Rights. In particular, Mr. Adamescu will have access to the UK appeal mechanism, as well as avenues of appeal at the European Court of Justice ("**ECJ**") and the European Court of Human Rights ("**ECHR**").[253]

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[247] Observations, § III.3; Rejoinder, § III.3. *See* subparagraph (b) of Nova's request for relief at Section II above.

[248] Rejoinder, ¶¶ 107-109.

[249] Rejoinder, ¶ 108.

[250] Rejoinder, ¶ 108, *citing* **RL-28**, Interpol Official Website - Red Notice Explanation.

[251] Rejoinder, ¶ 109; **C-141**, Request for Mutual Assistance from Romania – Bribery Proceedings (No. 1372/2016), 28 July 2016, p. 7.

[252] Rejoinder, ¶ 110.

[253] Rejoinder, ¶ 154.

201. Romania challenges Nova's allegation that Mr. Adamescu's rights would likely be breached if he were extradited.[254] Romania offers, *inter alia*, the following arguments:

a. There is a presumption among EU Members that EU Members are complying with the fundamental rights guaranteed under EU law.[255]

b. Nova overstates the limits of English courts' discretion under the principle of mutual recognition. Under the 2003 Extradition Act, extradition can be refused on several grounds, including the principle of proportionality and human rights concerns.[256] The English courts will hear arguments on and investigate any risk to Alexander Adamescu's fundamental rights, and will not grant extradition until such risk is "ruled out."[257] Any assurances provided by Romania in this regard will be subject to rigorous scrutiny.[258]

c. There is no basis for Nova's complaints about the conditions of Alexander Adamescu's potential detention, in light of the protections afforded under Romanian law.[259] Indeed, there are special protections for inmates with disabilities.[260]

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[254] Rejoinder, ¶¶ 164 *et seq.*

[255] Rejoinder, ¶ 165, *citing* **CL-69**, Joined Cases C-404/15 & C-659/15 PPU *Re: Criminal proceedings against Aranyosi and Căldăraru*, [2016] 3 CMLR 13, 5 April 2016, ¶ 78.

[256] **RL-31**, Report on the UK law and practice on extradition of the Select Committee on Extradition Law of the House of Lords, 10 March 2015, p. 13.

[257] Rejoinder, ¶ 177, *quoting* **CL-72**, *Vasilev v. Bulgaria* [2016] EWHC 1401 (Admin), 14 April 2016, p. 2 ("If the existence of a risk could not be ruled out in a reasonable time, the court had to decide whether it should refuse to extradite.").

[258] Rejoinder, ¶¶ 170-176, *citing* **RL-31**, Report on the UK law and practice on extradition of the Select Committee on Extradition Law of the House of Lords, 10 March 2015, p. 32 ("assurances should always be handled carefully and subjected to rigorous scrutiny"). **CL-73**, *Mureset al v. Zagrean et al, Romania* [2016] EWHC 2786 (Admin), 4 November 2016, ¶ 52 (setting out four conditions for assurances regarding human rights risks:"(i) the terms of assurances must be such that, if they are fulfilled, the person returned will not be subjected to treatment contrary to Article 3; (ii) the assurances must be given in good faith; (iii) there must be a sound objective basis for believing that the assurances will be fulfilled; (iv) fulfilment of the assurances must be capable of being verified").

[259] Rejoinder, ¶¶ 180-181, *citing* **RL-23**, Law No. 254 of 2013 regarding the Execution of Punishments and Imprisonment Measures Adopted by the Judiciary during Criminal Trial – updated, Article 94(2).

[260] Rejoinder, ¶ 181, *citing* **RL-23**, Law No. 254 of 2013 regarding the Execution of Punishments and Imprisonment Measures Adopted by the Judiciary during Criminal Trial – updated, Article 94(2) ("inmates with disabilities will be provided with the necessary conditions to take part in educational, cultural and therapeutic activities and psychological counseling as well as religious activities adapted to their needs and personalities and based on their choices and abilities."); **RL-26**, Rules of Application of Law no. 254/2013 regarding the Execution of Punishments and Imprisonment Measures Adopted by the Judiciary during Criminal Trail Article 134(1).

d. In any event, even if Nova were to prove a potential breach, it would not be the Tribunal's role to protect Alexander Adamescu's fundamental rights, especially because more appropriate bodies, such as the ECJ and ECHR, are established for this purpose.[261]

202. Regarding the element of urgency, Romania submits that the extradition hearing has already been postponed by five weeks, until the week of 24 April 2017, and it will be followed by the English court decision and various appeals, resulting in significant further delay before Alexander Adamescu actually would face extradition.[262] Therefore, in Romania's view, the measure cannot be urgent.

203. As to the element of proportionality, Romania submits that "the potential harm to Romania and the Romanian public at large, if the extradition proceedings are withdrawn and Mr. Alexander Adamescu [is] able to disappear once again, far outweighs the harm suffered by Claimant, if any" without the requested measure.[263] In this regard, Romania alleges that Mr. Adamescu has evaded several valid attempts by the DNA to summon him.[264]

c. Surveillance and Interception of Privileged or Confidential Communications

204. With respect to the measure sought in subparagraph (d) of Nova's request for relief, Romania makes the following observation:

> Respondent did not, is not and will not be intercepting any privileged communications of Claimant with its attorneys or executives. Claimant has not even made a proper allegation to this effect, let alone proved it. The required measure is therefore unwarranted.[265]

[261] Rejoinder, ¶ 165.

[262] Rejoinder, ¶ 157.

[263] Rejoinder, ¶ 158.

[264] Rejoinder, ¶¶ 161-163; **C-79**, The DNA's Summons on Alexander Adamescu's attendance of the DNA questioning, 11 December 2015, p. 24. Romania rejects Nova's argument that Alexander Adamescu was not properly served. According to Romania, Nova's argument is wrong as a matter of Romanian law and, in any event, should be dismissed as purely formalistic. Rejoinder, ¶¶ 161-163; **RL-30**, Romanian Criminal Procedural Code. Article 257(1).

[265] Observations, ¶ 227; *see also* Rejoinder, ¶ 204.

205. Romania specifically denies Nova's allegation that Romania improperly intercepted privileged and/or confidential communications about Nova's attempts to secure third-party funding. Romania states that its counsel obtained such information "based on Claimant's own conduct and the 'word on the market'."[266]

d. The Asset Sequestration Order

206. Romania submits that the Tribunal must deny Nova's request for an order suspending or varying the Asset Sequestration Order.[267] In this context, Romania refers again to its arguments summarized above regarding the criminal proceedings and the extradition request, and also raises "additional and independent" reasons for which it considers this specific request unwarranted.[268]

207. Romania argues that Nova has failed to demonstrate the necessity or urgency of the requested measure.[269] According to Romania, the purpose of the Asset Sequestration Order is merely to ensure that there are sufficient assets to compensate Astra for losses incurred by the suspected wrongdoings of the Adamescus, provisionally calculated at RON 788,978,853.37.[270] Thus, while the Asset Sequestration Order prevents the Adamescus from dissipating assets, it has no effect on their ability to manage and profit from their businesses. For Romania, it follows that there can be no risk of irreparable harm.

208. Further, in Romania's view, even if Nova suffered some harm from the depreciation in the value of the sequestered shares, such harm is not irreparable because it could be adequately compensated by a monetary award.[271]

209. In any event, Romania contends that Nova has failed to substantiate its allegation that the Asset Sequestration Order has prevented the closing of three certain transactions, involving

[266] Romania's letter to the Tribunal, 15 January 2017.

[267] Observations, § III.4; Rejoinder, § III.4. *See* subparagraph (d) of Nova's request for relief at Section II above.

[268] Observations, ¶ 216.

[269] Observations, ¶¶ 218-222.

[270] Observations, ¶ 219. Romania states that Astra's failure is solely attributable to Nova and the Adamescus, while the Romanian government and the independent firm KPMG tried to help the company recover. Observations, § I.1.

[271] Observations, ¶ 225.

[redacted], [redacted] Center, and [redacted].[272] Romania also dismisses Nova's allegation that the Asset Sequestration Order has resulted in Nova companies having difficulty securing financing and opening and maintaining bank accounts.[273] According to Romania, Nova has offered no evidence of these events, much less shown that they were caused solely by the Asset Sequestration Order.[274]

210. Indeed, Romania alleges that Nova has managed to circumvent the Asset Sequestration Order; in October 2016, Nova caused [redacted] to sell its subsidiary, [redacted] SRL, for a suspiciously low purchase price to [redacted] B.V., a wholly owned subsidiary of [redacted] B.V. with the same registered corporate address as Nova.[275] According to Romania, Nova was able to dissipate EUR 7 million in assets through this transaction, despite the fact that the shares of [redacted] were subject to the Asset Sequestration Order.[276]

211. Romania also rejects Nova's allegations concerning the Asset Sequestration Order itself.[277] According to Romania, while Nova states that the Asset Sequestration Order was "imposed not by a court but by the prosecutor, without any independent assessment," it then defeats its own argument by stating that "Dan Adamescu, Nova, and TNG Romania each separately, but unsuccessfully, appealed against the Asset Sequestration Order."[278] Moreover, Nova has neither alleged nor demonstrated that the Asset Sequestration Order was contrary to Romanian or EU law.[279]

212. Romania further argues that Nova has failed to show that the requested measure meets the proportionality test; while allowing the Asset Sequestration Order to remain in place

[272] Observations, ¶ 223.

[273] Rejoinder, ¶ 198.5.

[274] Observations, ¶ 223.

[275] Rejoinder, ¶ 198.3, *citing* **R-43**, Resolution of the General Assembly for [redacted] România SA, 6 October 2016; **R-44**, Share Purchase Agreement between [redacted] and [redacted] BV, [redacted]; **R-40**, "Latest Adamescu brand shenanigan: sales of [redacted] to [redacted] 'specialised' in … EUR 1 purchases," *Jurnalul.ro*, 12 September 2016.

[276] Rejoinder, ¶ 198.3.

[277] Rejoinder, ¶ 200, *citing* Reply, ¶¶ 224-227.

[278] Rejoinder, ¶ 200, *quoting* Reply, ¶¶ 224, 231.

[279] Rejoinder, ¶ 200.

"would have minimal consequences for Claimant," granting the requested measure would have "irreparable consequences for Romania and the Romanian public at large, if Claimant does indeed dissipate all of its assets in the country."[280]

213. In response to Nova's position that the Asset Sequestration Order aggravates the dispute, Romania argues that, in fact, the Asset Sequestration Order preserves the *status quo*.[281] Therefore, "if the Tribunal were to order Respondent to withdraw or amend the same, it would effectively pre-judge the merits of the dispute."[282]

214. Finally, with respect to Nova's alternative request for an amendment of the Asset Sequestration Order, Romania argues that this request should denied for lack of substantiation, and that "the very fact that Claimant puts forward this alternative request is telling of the lack of urgency, necessity, and substantiation of its argument."[283]

e. Additional Proceedings in Romania

215. Romania asks the Tribunal to deny Nova's request for an order that Romania suspend or refrain from initiating certain other actions or proceedings in Romania.[284] Romania argues that these "incomprehensible, and extraordinarily broad" requests should be dismissed for overbreadth, and because Nova has failed to establish their necessity or urgency.[285]

216. Romania rejects Nova's argument that the requested measures are needed to prevent a "chilling effect on witnesses called to testify."[286] In this regard, Romania asserts that there is no evidence indicating that any of Romania's actions relating to Nova to date have been illegitimate or politically motivated.[287] This is true with respect to the criminal proceedings discussed above, as well as the tax audits of [redacted] and [redacted] and the tax

[280] Rejoinder, ¶ 197.
[281] Rejoinder, ¶¶ 193, 197, 198.
[282] Rejoinder, ¶ 197.
[283] Observations, ¶ 224; Rejoinder, ¶ 201.
[284] Observations, § III.6; Rejoinder, § III.6. *See* subparagraphs (f) and (g) of Nova's request for relief at Section II above.
[285] Observations, ¶ 228.
[286] Rejoinder, ¶ 207, *citing* Reply, ¶ 242.
[287] Rejoinder, ¶¶ 208-209.

inspection of [redacted] Indeed, according to Romania, Nova has conceded that it has not suffered negative consequences as a result of these routine tax procedures.[289]

217. According to Romania, the past decisions cited by Nova in this respect only highlight how far it has failed to meet the legal standard. For example:

a. In *Quiborax v. Bolivia*, the tribunal "was troubled by the effect that the criminal proceedings may have on potential witnesses" because, *inter alia*, the relevant criminal proceedings were found to be aimed at intimidating witnesses.[290]

b. In *Lao Holdings v. Laos*, the tribunal noted the potential "chilling effect" of criminal investigations on witness testimony on the basis of evidence demonstrating exceptional circumstances, including the fact that the respondent was seeking to investigate potential witnesses during hearing preparations.[291]

c. In *Churchill Mining v. Indonesia*, the tribunal rejected the provisional measures request, noting that there was no "showing of intimidation, harassment or malfeasance."[292]

218. Romania argues that in the current case, Nova has failed to bring any evidence suggesting that Romania's actions could deter potential witnesses.

f. Preservation and Restoration of Documents

219. Finally, Romania submits that the Tribunal must deny Nova's request that the Tribunal order the Romania to preserve certain documents in the ASF's possession, custody and control, and to reconstruct certain ASF data.[293] According to Romania, "Claimant has failed to prove that the requested measure is warranted, not least because the facts

[288] Rejoinder, ¶ 209.
[289] Rejoinder, ¶ 209, *citing* Reply, ¶ 248.
[290] Rejoinder, ¶¶ 213-214, *citing* **CL-25**, *Quiborax*, ¶¶ 145-146.
[291] Rejoinder, ¶ 216, *citing* **CL-34**, *Lao Holdings*, ¶¶ 27-28, 32, 39.
[292] Rejoinder, ¶ 217, *citing* **RL-21**, *Churchill* PO14, ¶¶ 10, 76-79.
[293] Rejoinder, § III.7. *See* subparagraph (h) of Nova's request for relief at Section II above.

underlying its request were only alleged by Claimant's own newspaper, are not proved, and in any event are wrong."[294]

220. Specifically, Romania denies Nova's allegations that (a) in August 2015, documents held by ASF were intentionally destroyed; and (b) in October 2016, "documents incriminating the ASF board" were lost during an IT system crash, the cause of which is questionable.[295]

221. Romania points out that the main source upon which Nova relies for its position is an article from *România Liberă*, a newspaper controlled by Nova.[296] Romania contends that the allegations in this article must be disregarded because (a) the allegations are based on hearsay from unnamed sources; (b) Dan Adamescu exerted editorial control over *România Liberă*, as demonstrated by the fact that he pushed out a former editor-in-chief for failing to defend Dan Adamescu in the Astra scandal;[297] (c) the new editor-in-chief was expected to support the Adamescus; and (d) the allegations were not relayed or confirmed by any other media source.[298]

222. Romania further argues that the two other sources upon which Nova relies—articles from *Profit.ro*—in fact contradict the *România Liberă* article. For example, the 4 November 2016 article concerning the IT crash reported that no documents were lost and that the "main theory adopted by the investigation committee is that the cause was human error."[299] The 6 April 2016 article reported that certain documents requested by the DNA in

[294] Rejoinder, ¶ 227.

[295] Rejoinder, ¶ 228.

[296] Rejoinder, ¶ 228, *citing* **C-175**, Second enclosure to Nova's letter to Romania, 4 November 2016.

[297] Rejoinder, ¶¶ 232-236, *citing* **R-45**, "Editor-in-chief Dan Turturica and deputies Laurentiu Mihu and Gabriel Bejan have left Romania Libera," *Hotnews.ro*, 26 November 2015; **R-46**, "Dan Turturică, editor-in-chief of România Liberă, leaves the newspaper," *Mediafax.ro*, 26 November 2015; **R-47**, "Editor-in-chief Dan Turturică and deputies Laurenţiu Mihu and Gabriel Bejan have left România Liberă," *Ziarulevenimentul.ro*, 26 November 2015.

[298] Rejoinder, ¶¶ 232-236.

[299] Rejoinder, ¶ 229, *citing* **C-176**, Serban Buscu, "Investigation of the ASF: the IT system crashed. A deliberate action is not excluded. Negritoiu's reaction: we were transferring the data from the 'messed up' systems of the former Agency," *Profit.ro*, 4 November 2016.

connection with Astra had been misplaced, but that all material documents were found in just a few days.[300]

223. In any event, Romania highlights that, as acknowledged by Nova, an investigation committee is working to identify the cause of the crash and reconstruct any lost data.[301] Romania states that:

> Claimant can rest assured 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 in its possession, custody and control, should it be ordered to do so by the Tribunal at the document production stage.[302]

224. According to Romania, the two cases Nova cites in which the tribunals ordered the respondent to preserve documents can be distinguished because the evidence at issue originally had been in the possession of the claimant, until actions of the respondent caused the claimant to lose access.[303] In the present case, the documents and data that form the subject of the requested measure belong to the ASF. Thus, Romania states that it is in its own interest to recover any relevant "documents presumed by law to be in its possession, custody and control" because they may be the subject of document requests in this proceeding.[304]

225. Romania concludes that, in the present circumstances, the requested measures cannot be necessary or urgent.[305]

[300] Rejoinder, ¶ 230, *citing* **C-177**, Serban Buscu, "ASF has found the documents requested by the DNA about Astra insurance that it initially lost," *Profit.ro*, 3 April 2016.

[301] Rejoinder, ¶ 237, *citing* Reply, ¶ 259(c).

[302] Rejoinder, ¶ 238.

[303] Rejoinder, ¶ 239, *citing* **CL-48**, *Biwater* PO1 and **CL-80**, *AGIP SpA v. People's Republic of the* Congo, ICSID Case No. ARB/77/1, Award, 30 November 1979 ("***AGIP***").

[304] Rejoinder, ¶ 239.

[305] Rejoinder, ¶ 240.

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 Adamescus civilly or criminally 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 Criminal 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 criminal 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 criminal proceedings must *post-date* the commencement of the arbitration, not be underway already when the arbitration begins. Second, the criminal 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 criminal 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 criminal 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 criminal 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 criminal 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 criminal 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 criminal 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 criminal 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, with Romania arguing (for example) that the arbitration was "launched in retaliation for [its] legitimate exercise of sovereign police powers,"[359] and Nova suggesting that Romania's "renewed" efforts to arrest Alexander Adamescu, its commencement of the Abuse of Office proceedings, and its issuance of the Asset Sequestration Order were in retaliation for Nova's transmission of notices of dispute signalling its intention to commence this arbitration.[360] In any case involving complex,

[358] For example, it appears undisputed simply as a matter of chronology that Messrs. Dan and Alexander Adamescu were identified as suspects in the bribery investigation in 2014, which was well *before* Nova's 2015 notices of dispute regarding a potential ICSID arbitration. It is similarly undisputed that a preventative arrest warrant was first sought for Alexander Adamescu beginning in 2016, which was *after* the notices of dispute. Similarly, Romania's Abuse of Office proceedings were commenced and the Asset Sequestration Order was issued in 2016, which was *after* the notices of dispute but also *after* various investigations of Astra's finances by KPMG and others. Finally, it is undisputed that Nova's Request for Arbitration was filed in June 2016, *after* Alexander Adamescu's arrest in London. The Tribunal draws no inferences regarding cause-and-effect of any of these events, but recites them simply to demonstrate that the chronology of the criminal proceedings and the arbitration involves concurrent and overlapping events, making the task of determining whether any given event was precipitated by another, or entirely independent, inherently complex.

[359] Observations, ¶ 26; *see also id.*, ¶ 30 ("it is not the criminal proceedings … that are in retaliation for … the present proceedings, but this ICSID arbitration that was launched in a[n] … attempt to foil Romania's legitimate exercise of its sovereign right" to pursue criminal wrongdoing); Rejoinder, ¶¶ 49, 98-99.

[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 criminal 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 Astra.[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. First, Nova's founder and Chairman, Dan Adamescu, passed away in Romania in January 2017. He did so part way through serving a four-year, four-month prison sentence imposed following his conviction in February 2015 on bribery charges, which were based on payments made in December 2013 to two Romanian bankruptcy judges by individuals said to have been acting on his instructions. His conviction was upheld on appeal in May 2016. Part of Dan Adamescu's incarceration was spent in prison facilities and part in hospital

[364] **CL-30**, *Burlington*, ¶ 61.

facilities under guard. At the time of his death, he had been accused of (but had not yet stood trial for) additional crimes connected to the management of Astra, in what is known in this case as the Abuse of Office Proceedings.

268. Alexander Adamescu was indicted along with his father in June 2014 in connection with the bribery charges. However, he has not returned to Romania to stand trial, and his prosecution was separated from that of the other defendants. Romania made certain efforts to locate him outside of Romania during mid-2014, and made further efforts in this regard towards the end of 2015. A German passport holder, Alexander Adamescu is presently living in London under strict bail conditions set by the UK courts,[365] in connection with his arrest by UK authorities in June 2016 pursuant to a European Arrest Warrant that Romania issued in June 2016. The European Arrest Warrant was preceded by, and based upon, a Romanian preventative arrest warrant connected to the bribery charges. Romania has sought his extradition from the UK, and the extradition request is now scheduled to be heard in London beginning on 24 April 2017. Alexander Adamescu is also a suspect in the Abuse of Office Proceedings.

269. With respect to Nova's various Romanian investments, the *status quo* is that Astra was declared insolvent in December 2015 and placed into bankruptcy proceedings with KPMG as liquidator, following a prior period in which it was operating under special administration with KPMG as special administrator. The reasons for Astra's failure are contested, and the Tribunal makes no findings in this regard. However, KPMG as liquidator sought to intervene as a civil party in the Abuse of Office Proceedings, lodging a claim for substantial damages against Dan Adamescu in the event he was found guilty of criminal malfeasance in connection with Astra's bankruptcy. In consequence of this claim, Romania's authorities in March 2016 issued an Asset Sequestration Order freezing Nova's shares in a variety of other Romanian investments that were alleged to be beneficially owned by Dan Adamescu, as security to meet any civil liability to Astra that might arise

[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.

thereafter. The Asset Sequestration Order is said to reach Nova's shares in, *inter alia*, TNG Romania, [redacted], [redacted], [redacted], and [redacted] Center.

270. The status of the Asset Sequestration Order is unclear following the death of Dan Adamescu. Nova argues that as the Order was premised on his personal involvement in (and potential future conviction for) Astra's failure, it must now be lifted,[366] and states that an application to that effect is now being prepared in Romania.[367]

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 the personal liberty of Alexander Adamescu, before turning more generally to the issue of pending proceedings in Romania. 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) The European Arrest Warrant, Extradition Request, and Preventative Arrest Warrant for Alexander Adamescu

272. With respect to Alexander Adamescu, Nova requests a provisional measure recommending that Romania:

> withdraw (i) the transmission of European Arrest Warrant Ref. 3576/2/2016 by the Romanian Ministry of Justice and associated request for extradition submitted to the Home Office of the United Kingdom on 6 June 2016 and (ii) the preventive arrest warrant No. 13/UP issued on 19 May for Alexander Adamescu and refrain from reissuing or transmitting this or any other European Arrest Warrant or other request for extradition or arrest warrant for Alexander Adamescu;

[366] Nova's letter to the Tribunal, 9 February 2017, at pp. 5-6.

[367] Hearing Transcript, 3 March 2017, 381:7-20.

273. As noted above, the current state of affairs is that Alexander Adamescu is residing in London under strict bail conditions set by the UK courts, with a hearing on Romania's extradition request scheduled to begin on 24 April 2017.

a. Necessity

274. As a threshold issue, Romania argues that it is not necessary for this Tribunal to consider provisional measures related to the extradition, because Alexander Adamescu has other avenues for challenging the extradition request under both UK and EU law.[368]

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 extradition of Alexander Adamescu. 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, if Mr. Adamescu were extradited and thereafter incarcerated in Romania. Second, separate from Mr. Adamescu's 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 Mr. Adamescu's 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 Mr. Adamescu could not effectively perform these functions if he were extradited and thereafter incarcerated in Romania.

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 Mr. Adamescu's 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 that are said to have been politically motivated and otherwise in violation of the BIT. Nova emphasizes various positions that Mr. Alexander Adamescu has held with Astra's Supervisory Board and Management Board, as well as his Board of Directors positions with [redacted], Medien Holding, [redacted], [redacted] Center, and other related companies.[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 Astra, he is a "critical witness in this case."[371]

279. Romania, by contrast, contends that Nova "has failed to identify, let alone demonstrate, how Mr. Alexander Adamescu'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 Mr. Alexander Adamescu, 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 Dan Adamescu's life he (and not his son) was the central figure coordinating Nova's investments in Romania, and that Alexander Adamescu 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. The Tribunal notes that Mr. Adamescu was examined for more than three hours on 2 March 2017, including regarding the realities of his time spent in Romania, his activities in connection with Astra, and his knowledge of individuals and events related to Nova's Romanian investments.[375] Among other things, he testified that beginning in 2006 when he started working in Romania, he "had taken on more and more responsibility" with the Nova companies there, including "hiring staff for the Nova Group that knew me as their go to person," becoming "more and more knowledgeable about TNG's business," and through "a gradual process … taking over from my father" with respect to these businesses.[376] As of 2011 when he was spending almost every week in Romania despite being formally domiciled in Monaco, he assisted his father in "the running of the various businesses," being "either on the board or a director or I took care of every aspect of the management of these companies. I took the important decisions, either alone or together with my father, regarding financing, budgeting, all the most important operational aspects of these companies," with the assistance of company management.[377] After moving to London in 2012, he continued to travel to Romania and "had regular phone calls with the persons involved," "almost on a daily basis," because "[t]here was always some decision

[373] Rejoinder, ¶ 124; *see also* Hearing Transcript, 2 March 2017, 45:19-22 (contending that Mr. Adamescu "was never relevant, let alone material"); Hearing Transcript, 3 March 2017, 403:15-17 (stating that "for the purposes of this arbitration," he is "not material, nor event relevant, … let alone indispensable"), 404:13-14 ("We don't think that [he] is relevant"), 418:7-8 ("he was never important for the case").

[374] Hearing Transcript, 2 March 2017, 43:18-44:1; Hearing Transcript, 3 March 2017, 402:1-10.

[375] Alexander Adamescu also testified that he holds the ultimate economic interests in Nova, although he is not Nova's formal legal owner; he traces his economic interest back to 2009, when Dan Adamescu allegedly transferred his own 50% interest to his son, who previously likewise held a 50% interest. Hearing Transcript, 2 March 2017, 181:6-19. Romania challenges the authenticity of the document allegedly showing this 2009 transfer. Nova and Romania appear to agree, however, that the issue of who holds legal or economic interests in Nova is not material to the issue of provisional measures. *See* Nova's letter to the Tribunal, 26 January 2017, at ¶ 1; Romania's letter to the Tribunal, 26 January 2017, at pp. 1, 4.

[376] Hearing Transcript, 2 March 2017, 221:18-222:2.

[377] Hearing Transcript, 2 March 2017, 90:4-7, 91:22-92:18.

to be taken, always some input to be given," and he "knew the people and I knew the issues, I knew the history, and I knew what had to be done … to continue managing the companies."[378] Mr. Adamescu provided a detailed listing of the management and boards of the various Romanian companies, many of whom he had personally hired and with whom he was in "regular" and "continuous" contact during this period.[379]

281. Among other things, according to Mr. Adamescu, he was involved (as a member of Astra's Supervisory Board) in the appointment of members of the Board of Directors, and also in approval of major investments and loans, including the intra-company loan to Medien Holding that later formed a critical part of KPMG's criticism and Romania's case for Abuse of Office.[380] He also testified that he was personally involved both in shareholder meetings and communications with KPMG regarding its investigations and proposed restructuring plans for Astra.[381] This included, for example, personal involvement in discussions about the possibility of Medien Holding's repaying certain intra-company loans to Astra.[382] In corroboration of this testimony, the Tribunal observes that there is documentary evidence already in the record indicating that Mr. Adamescu wrote, or at least signed, various correspondence from Nova and Medien Holding related to Astra, including letters to KMPG as Astra's Special Administrator and to Romania's Financial Supervisory Authority.[383]

282. During the hearing, Romania argued that Alexander Adamescu's testimony regarding his importance as a witness should not be credited, both because it was fairly general (and inherently self-serving), and because of certain other circumstances that it says undermine Mr. Adamescu's trustworthiness as a witness. In particular, Romania accuses Mr. Adamescu of providing highly evasive testimony about a Nova Power of Attorney

[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 Astra's Company Capital, 11 June 2015; **C-51,** Letter from Medien Holding to Astra re: Settlement of Medien Holding's debts to Astra, 5 September 2014.

ostensibly dated June 2014,[384] but ultimately admitted by Mr. W[redacted] at the hearing to have been written (with Mr. Adamescu's knowledge) in June 2016, ostensibly to record the oral grant of the relevant powers two years earlier.[385] Romania also emphasizes Mr. Adamescu's allegedly evasive testimony at the hearing regarding the ownership of a company ([redacted] B.V.) that purchased certain assets,[386] despite Mr. W[redacted] later confirmation that Mr. Adamescu *himself* held the ultimate economic interest in both buyer and seller.[387]

283. The Tribunal takes note of Romania's significant concerns about Mr. Adamescu's credibility, and agrees that in due course, as this case proceeds to the merits, issues of credibility will need to be tested and carefully considered by the Tribunal. But the fact that a party raises issues about the reliability of a given witness does not, in the Tribunal's view, preclude a finding that that witness has relevant knowledge and that his examination could be material (one way or the other) to the Tribunal's ultimate understanding of events. The simple fact that Romania has *chosen to pursue* Alexander Adamescu (along with his father) in connection with the alleged misconduct in relation to Astra – and *not to pursue* any other individuals associated with Astra's management – is inconsistent with its current contention that he played no relevant or material role in the underlying events that will be tested in this case. For example, Romania's asserts that "[t]he Failure of Astra is solely attributable to Claimant and *the Adamescus*," plural,[388] and emphasizes that the KPMG Report attributed Astra's financial distress to "a number of deals … which had been approved or signed by either Mr. Dan *or Alexander* Adamescu,"[389] thereby raising "suspicions … about the responsibility and involvement of *both*" gentlemen in Astra's failure.[390] Romania's Observations directly allege (based on the KPMG Report) that *both*

[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 Mr. W[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).

"Messrs. Dan and Alexander Adamescu had engaged in … wrongdoings" regarding Astra, and that KPMG concluded "that Astra's management, which was *led at the time* by Messrs. Dan and Alexander Adamescu," had committed various wrongdoings under their leadership.[391] Romania likewise refers to Alexander Adamescu as "*heading* Astra's management" along with Dan Adamescu, and in that capacity as having "caused or allowed" certain actions and "moreover approved" other actions which Romania evidently considers significant to the Astra story.[392] Romania continued at the provisional measures hearing to allege direct involvement by Alexander Adamescu in Astra's financial distress.

284. Moreover, Romania's own documents, on which it relies in both this arbitration and its domestic proceedings, repeatedly refer to Alexander Adamescu as an active figure with respect to both Astra and other Nova companies in Romania. For example, the DNA's December 2015 summons for Alexander Adamescu in connection with the bribery charges recites the testimony of an Astra receptionist that during the period in which Alexander Adamescu held the position of President of Astra's Board of Directors, he "was usually on the territory of the country, being present at the office, but in the periods when he was abroad" he remained "in contact" with Astra's office, "as necessary, by phone or by work email."[393] The DNA's arrest warrant on 25 March 2016 refers to "the group of companies *managed by*" both Dan and Alexander Adamescu, and goes on to describe both of them as "*act[ing] as coordinators*, de jure and de facto, on the Romanian territory, of a group of companies in interdependence from the point of view of the shareholders or partners and of the economic and financial relationships."[394] The DNA's March 2016 request for the Asset Sequestration Order in connection with the Abuse of Office Proceedings against Dan Adamescu likewise alleges that *both* Dan *and* Alexander Adamescu, "as representatives, in fact and in law, of [Astra]," "ordered the granting of loans" to various affiliated companies," and further that "they" (*plural*) also "ordered the signing of [an] assignment

[391] Observations ¶¶ 25, 87 (emphasis added).

[392] Observations, ¶ 104 (emphasis added).

[393] **C-79**, The DNA's Summons on Alexander Adamescu's attendance of the DNA questioning, 11 December 2015, p. 23.

[394] **C-133**, DNA Application for Preventative Arrest of Alexander Adamescu, 25 March 2016 (emphasis added). The document also refers to the group of companies "managed and coordinated" by both Dan and Alexander Adamescu. *Id.*

contract," and "proceeded to the fictional transferring the reinsurance risks … and, therefore, to the distorted reporting of the financial position and performance," which had the effect of "depriving the company of the liquidities necessary for the insurance activity, … which meets the constitutive elements of the offense of abuse of office …." The same document accuses Alexander Adamescu, and not just Dan Adamescu, of various acts said to "meet[] the constitutive elements" of several other crimes, including money laundering and aiding and abetting abuse of office.[395]

285. Romania's own documents thus undermine its suggestion that Alexander Adamescu is neither relevant nor material to this case. Indeed, it is difficult to understand as a matter of logic how he could be both *central* to Romania's criminal proceedings regarding Astra, and at the same time *immaterial* to Nova's ICSID case alleging that those same proceedings (among various other steps taken by Romania allegedly impacting Nova's investments) reflect a political vendetta against the Adamescu family in violation of its rights under the BIT.

286. In other words, based on Romania's own assertions regarding Alexander Adamescu's alleged responsibility for the underlying events related to Astra, the Tribunal considers it evident that he is a material and necessary witness in this case. This conclusion is underscored by the death of Dan Adamescu, 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 prior to his death. 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

[395] **C-54**, Public Prosecutor George Matei's Precautionary Measures Ordinance, 25 March 2016, at pp. 1-3. The document goes on to identify Dan and Alexander Adamescu's connections to various Nova Group companies, leading to the conclusion that the two of them "are the final beneficiaries … of the intra-group holdings" and that the companies are "economically controlled" by them. *Id.* at p. 8.

[396] Reply, ¶¶ 199-205.

[397] Observations, ¶ 167; Rejoinder, ¶ 87.

from Dan Adamescu 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 Alexander Adamescu 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 Astra'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 Mr. Adamescu may have important testimony to provide in connection with their roles in Astra 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] W[redacted] – a director of [redacted] BV, a Dutch company that performs company secretarial and administrative functions for Nova – might be an alternate material witness to Alexander Adamescu,[400] this possibility was clearly excluded by the evidence at the hearing. That evidence made clear that Mr. W[redacted]'s role with the Nova companies began in 2014, and was limited to providing a few hours per month of corporate administrative service across dozens of different companies, while playing no meaningful role in the operational oversight, direction or management of any of them.[401] Mr. W[redacted] does not speak Romanian. By the end of the hearing, Romania itself had accused him of serving simply

[398] Reply, ¶ 150.

[399] Reply, ¶ 208.

[400] As discussed below, Romania argued that Mr. W[redacted] could function as Nova's party representative and instruct counsel as well or better than Mr. Adamescu. Observations, ¶ 194.3; Rejoinder, ¶ 134. It is not clear whether Romania intended to suggest that Mr. W[redacted] also could serve as a central witness on the merits.

[401] *See, e.g.,* Hearing Transcript, 2 March 2017, 267:12-268:4; *see also* Hearing Transcript, 3 March 2017, 286:16-17, 287:1-6 and 308:24 (explaining that his "time to take care of TNG BV is extremely limited," that his work for the Adamescu family constituted "maybe 5 per cent of my activity, from the very beginning," and that this work was spread among "dozens of companies" for TNG BV alone); Reply, ¶ 147 (denying that Mr. W[redacted] "has knowledge of the underlying events and their context").

as a "puppet" for the Adamescu family and taking no meaningful decisions except upon their instruction.[402]

289. For these reasons, the Tribunal concludes that Alexander Adamescu'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 regarding his extradition to Romania. Given the importance of this issue to all concerned – as well as the criticism of the *Hydro* tribunal for recommending provisional measures regarding extradition, without explaining its reasoning to a greater degree[403] – the Tribunal recounts the issues here in some detail.

290. As a threshold point, Romania contends that it is speculative that Alexander Adamescu would be incarcerated following extradition, either pending his trial or following completion of his trial (*i.e.*, that he would be convicted).[404] The Tribunal nonetheless concludes that pretrial detention is likely, given (a) Romania's own contentions about his alleged efforts in the past to evade its summons,[405] (b) Romania's expressed concern regarding the ease of obtaining new passports from certain jurisdictions,[406] and (c) the fact that his father was placed in pre-trial detention for some time, without having been accused previously of trying to evade summons or arrest.[407] The Tribunal is not in a position to comment on the potential length of pretrial detention for Alexander Adamescu, except to note that in his father's case there was an eight-month gap between his June 2014 arrest

[402] Hearing Transcript, 3 March 2017, 397:3-7 (Romania's counsel asking "Why can I not call a puppet a puppet? He has no role, Mr. W[redacted]. He gets an instruction to do something and he obeys. His master is the Adamescus. He carries out no due diligence. He does not even know what he buys.").

[403] **CL-35**, *Hydro*, ¶ 3.18 (identifying Mr. Becchetti as "one of the Claimants and who is perhaps the central person involved in the arbitration from the Claimants' side," and concluding without further detail that "[i]n the case of Mr Becchetti (and Mr De Renzis), who face extradition from the United Kingdom as a result of the arrest warrants, their possible incarceration in Albania would prevent them from effectively managing their businesses, and fully participating in this arbitration"); *see generally* Luke Eric Peterson, "Arbitrators Order Albania to Halt Extradition Bid, But Don't Offer Much Proof for Conclusion That 'Procedural Integrity' of Arbitration Was in Peril," Investment Arbitration Reporter, 9 March 2016, https://www.iareporter.com/articles/analysis-arbitrators-order-albania-to-halt-extradition-bid-but-dont-offer-much-proof-for-conclusion-that-procedural-integrity-of-arbitration-was-in-peril/.

[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.

[407] Request for Arbitration, ¶¶ 124, 133. Following a period in prison, Dan Adamescu was released on bail and served the remainder of his pre-trial detention under house arrest, until his conviction.

and his February 2015 conviction on the bribery charges. If this history is any guide, Alexander Adamescu could well face a significant period of incarceration even prior to any trial or possible conviction. If he is convicted, of course, his incarceration presumably would be much longer, based on the sentence of four years and four months handed down for Dan Adamescu. This certainly constitutes a "material risk" of incarceration, even if the Tribunal is unable to conclude that it is "certain to occur" if provisional measures are not granted.[408]

291. The central question then thus becomes whether Alexander Adamescu could participate meaningfully as a witness in this case, from a Romanian prison. Nova contends that "[s]hould [he] be sent to prison in Romania, [his] preparation of witness statements and [his] appearance at a hearing before this Tribunal would be impossible."[409] The Tribunal addresses below the four issues that have been raised, namely about (a) [redacted] safety, (b) access to him by Nova's counsel, (c) the confidentiality of such discussions, and (d) the mechanics by which he could be examined regarding any witness statements proffered in this case.

[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* Adamescu Statement, ¶ 91.

[redacted]

294. Separately, Nova expresses significant concern that if Alexander Adamescu were incarcerated, he would not have regular or frequent access to Nova's counsel to develop witness statements for purposes of this case. According to Nova, while prisoners in Romania are entitled to meet upon request with their personal lawyers (*i.e.*, those retained to advise and counsel them in connection with the criminal charges), there are no similar

[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 Dan Adamescu'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.

guarantees regarding access to lawyers with whom they do not have a direct attorney-client relationship, which is the case for Nova's arbitration counsel. Nova suggests that such meetings would have to be fit within a general allotment to prisoners of five visitors per month, which would mean any visit from Nova's lawyers would be at the expense of a visit from Mr. Adamescu's family.[417] Romania counters that its law allows for prison visits from attorneys, and that Nova has not alleged any specific instance in which its counsel sought and were denied a meeting with Dan Adamescu.[418] Although Romania's stated position in relation to Dan Adamescu was that he would be provided access on terms that were "neither more favorable, nor less favorable, than any other inmate in a similar situation,"[419] at the hearing Romania stated that it would make reasonable efforts to accommodate additional visits to Alexander Adamescu if reasonably requested by Nova's counsel, and if Nova nonetheless believed access was being unduly withheld, it could make additional applications to this Tribunal.[420]

295. Nova also expresses concern about the confidentiality of any prison meetings that its counsel might be permitted with Alexander Adamescu. It argues that "even in the unlikely event that the Romanian authorities do allow … Alexander Adamescu to access and communicate with Nova's counsel in this arbitration, there is a very serious risk of those privileged and confidential communications being intercepted by Romania."[421] According to Nova, while Romanian law provides on paper for attorney-client privilege, there have been reliable third-party reports that confidentiality is not respected in the prison setting, with one Council of Europe report describing such confidentiality as "the exception rather than the rule."[422] Nova also argues that when it repeatedly sought assurances of confidentiality for any meetings it might seek with Dan Adamescu, Romania declined to

[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; Adamescu Statement, ¶ 39; Reply, ¶¶ 202-203; Hearing Transcript, 3 March 2017, 365:16-22.

provide any specific assurances.[423] Romania counters that no special assurances were required because of the strength of its law in this regard, and because Nova had failed to show evidence that privilege would *not* be respected.[424] In any event, during the course of these proceedings, Romania stated categorically that "it did not, is not and will not be intercepting any privileged communications of Claimant with its attorneys or executives."[425]

296. Given the representations made by Romania at the hearing, the Tribunal accepts that it likely would be possible for Nova's counsel to arrange (independently or upon further applications to the Tribunal) sufficient visits with Mr. Adamescu to develop one or more witness statements based on his personal recollection of events. Whether mechanics exist that would allow him securely to review extensive *documentation* from prison, in order to refresh his recollection and comment on the evidence, is less clear. But even if such arrangements could be made, there remains the issue of his subsequent examination before the Tribunal. The Tribunal specifically asked Romania how this would be accomplished, if the Tribunal were to find that Mr. Adamescu was a necessary witness from whom it would wish to hear regarding the merits case.[426]

297. Romania insisted that it would be adequate for Mr. Adamescu to testify by videoconference, assuming this could be arranged from prison or through Mr. Adamescu's supervised transport from prison to a videoconference facility elsewhere in Romania.[427] For relatively minor witnesses, the Tribunal accepts that videoconference examination may suffice, where for particular reasons in-person appearances are not possible. But given the scope, length and importance of Mr. Adamescu's likely witness statements, his

[423] Reply, ¶¶ 7, 203-205.

[424] Rejoinder, ¶¶ 85, 87, 140

[425] Observations, ¶ 227; *see also* Hearing Transcript, 3 March 2017, 405:13-20 ("Mr Alexander Adamescu, if extradited, and if he were to end up in jail, would have access to his counsel in arbitration without the conversations being under surveillance. There may be visual surveillance – maybe – but there is, based on the legal safeguards already in place, no surveillance of the conversations that counsel for Claimant would have with Mr Alexander Adamescu"), 441:23-442:2 ("represent[ing] … that under the existing laws, Debevoise & Plimpton could meet Mr Adamescu without surveillance in his capacity as a potential client or as a witness with respect to this arbitration").

[426] Hearing Transcript, 2 March 2017, 271:18-272:10.

[427] Observations, ¶¶ 170, 194; Rejoinder, ¶ 92; Hearing Transcript, 3 March 2017, 438:1-2.

examination during the hearing is likely to be fairly lengthy. Since Romania itself has insisted that merits hearings take place only in Washington, D.C., the time differences may well complicate videoconference arrangements, either requiring Mr. Adamescu to testify into the wee hours of the morning (if this can even be arranged consistent with his prison regimen) or requiring the Tribunal and all other hearing participants to sit at such hours to accommodate the limitations of prison videoconferencing or the realities of prisoner transport within Romania.

298. More fundamental than these logistical issues is the reality of Romania's own forceful aspersions on Mr. Adamescu's veracity. It seems obvious in that light that issues of credibility will play a significant role in his cross-examination and in the Parties' arguments regarding the evidence in this case. The Tribunal firmly believes that such issues can best be assessed through in-person examination, including additional questions by the Tribunal should it so wish.

299. In response to such concerns, Romania suggested that it would "undertake its best efforts to allow even examination in person in Bucharest," if the Tribunal and all other hearing participants could come there for the purpose.[428] The Tribunal does not believe this is an appropriate solution. Investment arbitration hearings generally are not held in the territory of the host State, both because of general principles of neutrality and due to the inevitable reluctance that witnesses or party representatives may have about testifying or appearing there in the context of a suit against the State itself. Given the particular nature of Nova's allegations against Romania here, it seems highly unlikely that it would consent to any part of the merits hearings being held in Bucharest.[429]

300. Given this reality, the only possible way for Mr. Adamescu to be examined in person before the Tribunal and outside of Romania, if he is otherwise incarcerated at the time of the hearing, would be for Romania to arrange to escort him out of the country, not only for the period of time necessary for him to be examined but also for confidential meetings with

[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.

Nova's counsel for final preparation (in the ordinary course) for such examination. The need for such confidentiality inevitably would mean that Mr. Adamescu would have to be away from the immediate watchful eye of Romanian prison officials for, potentially, considerable periods of time. As to such a possibility, Romania stated that "to have … an examination abroad in person is much more complicated," but not out of the question.[430] This was far from a guarantee that Romania would make Mr. Adamescu available for examination in Washington D.C., or would consent to the hearing being held in another neutral venue in which it would meaningfully guarantee his participation.

301. For these reasons, the Tribunal has significant concern that if Mr. Adamescu were extradited to and incarcerated in Romania, his participation in this case as a material witness could prove challenging, even by virtue of mechanics alone. The additional factor of his [redacted] health could complicate the uncertainties. Ultimately, however, the Tribunal need not rest on such concerns, because (as discussed further below), it finds that even if extradition were not flatly incompatible with Mr. Adamescu's role as a *material witness*, it is incompatible with his *additional role* as the individual instructing and directing Nova's counsel on the preparation and conduct of its case.

(ii) Necessity in relation to party representative role

302. As noted at the outset, Nova's Application rests not only on Mr. Adamescu's 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 – ostensibly dated June 2014 but (as noted above) really written in 2016 – that characterizes Mr. Adamescu as "the only person within [Nova] who could instruct lawyers and provide them with the necessary information to file a claim against the

[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.").

Government of Romania under the BIT."[432] Rather, the Tribunal focuses on other evidence which shows that as a *practical* matter, Mr. Adamescu 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 Mr. Adamescu 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 Mr. Adamescu 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 Astra 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

[432] **C-137**, Written Resolution of the Management Board of Nova Group Investments, B.V., 23 June 2014 (also stating that "[t]he Management Board has no knowledge of the circumstances leading to the ASF decision nr. 42 and its current effects and consequence nor is it able to procure this knowledge to be able to bring a claim against the Government of Romania under the BIT and therefore finds itself in the impossibility to engage counsel for a claim against the Government of Romania.").

[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 Alexander Adamescu 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, particularly following Dan Adamescu's death. During his examination, Mr. Adamescu was able to identify easily and confidently various individuals with whom he had worked (or whom he had a role in hiring) at Astra 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 Alexander Adamescu could not do so.[437] While Romania previously suggested that Mr. W[redacted] could instruct counsel,[438] the impossibility of his meaningfully doing so was made clear at the recent hearing, which (as noted) resulted in Romania's own counsel accusing Mr. W[redacted] of being a mere "puppet" for Mr. Adamescu.[439] While the Tribunal does not accept, at this stage, such a characterization of Mr. W[redacted]'s role, it does accept that Mr. W[redacted] has neither the background knowledge, relationships, Romanian language or available time to perform the necessary party representative functions on Nova's behalf. Indeed, to date he apparently has not been involved either in the selection of Nova's counsel, negotiations with potential funders, or the management of the arbitration process.[440]

[435] Reply, ¶ 153 (contending, supported by Mr. Adamescu's witness statement, that "he attends meetings with Nova's counsel, with local and specialist counsel, and with potential experts; he provides, explains and comments on documents; and provides instructions and actively reviews ands comments on draft pleadings, witness statements and correspondence. He does this on a daily basis: often multiple times a day and indeed throughout the day. It is an all-consuming and effectively full-time role.").

[436] Hearing Transcript, 2 March 2017, 222:12-224:8.

[437] This reality may explain why outside funders apparently have conditioned any financing of Nova's case on Alexander Adamescu's freedom to coordinate the arbitration, in the view that the case otherwise would collapse. Hearing Transcript, 2 March 2017, 177:17-178:1. In the absence of any showing that outside funding is the only effective means for Nova to present its case, however, the Tribunal places no great weight on this factor.

[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 Alexander Adamescu is critical to Nova's ability to prosecute its case; the Tribunal finds that he is. The question is whether he could continue to perform the key functions of Nova's party representative from incarceration in Romania. On that issue, the Tribunal has little difficulty concluding that he could not. Even if conditions of access and confidentiality could be assured sufficient to enable Nova's counsel to complete the more limited task of assisting Mr. Adamescu with the preparation of written witness statements, far greater fluidity of access would be required for him to provide meaningful direction and feedback to counsel regarding the ongoing shaping of the case. Without reliable, confidential access to the inevitable and ongoing stream of email or telephone communications arising from a complex, investor-state arbitration, or the ability to meet frequently in person on relatively short notice and for extended periods of time, it is difficult to see how such functions effectively could be performed. And even if these obstacles could be overcome regarding communications with Nova's counsel, they still would not allow Mr. Adamescu to perform the other important function of reaching out to potential witnesses on Nova's behalf, to request their cooperation with Nova's counsel by providing their own testimony or arranging access to written documentation. It is not credible that he could perform this outreach to potential witnesses from behind bars. Finally, there have been no assurances from Romania that it would release Mr. Adamescu from incarceration (even with appropriate supervision) not only for the full two weeks presently reserved for the merits hearing in this case, but also for the additional time needed for a party representative to assist counsel with final preparations for such hearings.

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) withdraw the European Arrest Warrant and associated extradition request issued for Alexander Adamescu, and (b) refrain from issuing any other European Arrest Warrant or extradition request related to the subject matter of this arbitration, while the arbitration remains pending.

309. By contrast, Nova has not demonstrated any compelling need for the additional measure it requests under this general heading, namely that Romania (a) withdraw its own

preventative arrest warrant for Mr. Adamescu, and (b) refrain from issuing any other domestic warrant. 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. In the absence of any outstanding European Arrest Warrant or associated extradition request, it does not appear that Mr. Adamescu's ability to serve as either witness or party representative on Nova's behalf would be endangered by maintaining the Romanian preventative arrest warrant in effect, provided he does not voluntarily return to Romania. That scenario appears highly unlikely given the current circumstances, at least absent a broader recommendation by the Tribunal (which for reasons below, it declines to issue) that Romania suspend all domestic criminal proceedings underway involving Nova's investments in Romania or Mr. Adamescu personally. Moreover, a recommendation that a State withdraw a domestic arrest warrant applicable within its own borders would be a far greater intrusion into its sovereignty than one that it refrain, for a time, from pursuing requests to another country to alter the *status quo* by extraditing someone not presently within its borders. 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 with regard to the issue of extradition, in the sense that the recommendation is needed prior to issuance of an award. The evidence is that Alexander Adamescu's extradition hearing is scheduled for 24 April 2017. Nova argues that if the English court upholds the request, he could be extradited to Romania between seven and 17 days after the decision.[441] While a possibility of appeal exists, this appears to be a matter of discretion (requiring the court to grant an application for permission to appeal, which must be filed within seven days after the decision).[442]

[441] Reply, ¶ 156.

[442] Reply, ¶ 156; Hearing Transcript, 3 March 2017, 367:17-23. Nova specifically referenced the high hurdle facing any applicant for leave to appeal: "It is looked at pretty strictly so as to prevent people just being able to string out being removed from the country for a period of time." Hearing Transcript, 3 March 2017, 368:3-5.

311. It is certainly possible that the combination of a slow decision from the first instance court, combined with permission to appeal, could postpone any final extradition order for some time. 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. Nor does the Tribunal consider it a workable solution first to wait to see the decision of the English courts, and then issue its recommendation only in the event that they order Mr. Adamescu's extradition. At this point, the *status quo* is simply that a request has been made by Romania for extradition, which itself (if granted) would constitute a significant alteration of the *status quo*. The Tribunal has authority pursuant to Article 47 to recommend that Romania withdraw its pending request if the "circumstances so require," which the Tribunal has found to be the case. But it is far less clear how such a recommendation could be implemented *after* the English courts have ordered Mr. Adamescu's extradition, at which time that outcome becomes an edict of the English courts, and not simply a pending request from Romania. The Tribunal does not have authority to recommend that the English courts rescind such an order.

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 the nature of the harm it might suffer from a possible suspension of extradition pending completion of this arbitration.[444] 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 criminal 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 Mr. Adamescu, 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 of Romania's charges against Mr. Adamescu. 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 any suspension of its efforts to extradite Mr. Adamescu would delay the completion of the criminal proceedings against him, with the result that "justice is delayed."[447] The Tribunal accepts this general proposition. However, concerns about delay must be considered in the context of specific circumstances, in order to assess the extent and nature of the burdens thereby imposed. Here, those circumstances include the fact that for roughly 18 months (between mid-2014 and late 2015) Romania apparently took no further steps to try to locate and pursue Mr. Adamescu on the bribery charges for which he was indicted.[448] The Tribunal acknowledges Romania's complaints about the difficulties of perfecting personal service of a summons on Mr. Adamescu, but those complaints (which Nova disputes)[449] relate to the efforts it made *before and after* this 18-month gap, not to why it apparently suspended efforts for so long in between. In particular, Romania has not explained why – if delay was a significant concern – it waited until June 2016 to issue a European Arrest Warrant for Mr. Adamescu.

317. The Tribunal also notes Romania's insistence that it already has gathered substantial evidence against Mr. Adamescu related to the pending criminal proceedings.[450] Romania has not suggested that deferring his extradition until the conclusion of this arbitration would jeopardize the availability or use of any such evidence later. Nor has Romania suggested that there is any concern about a statute of limitations, such that a delay in extradition could

[447] Hearing Transcript, 3 March 2017, 409:24-25, 410:10.

[448] The Tribunal does not address the timeliness of the Abuse of Office proceedings, as to its understanding the extradition request for Mr. Adamescu is not premised on any charges related to those proceedings. It does observe that these proceedings were initiated much more recently than the bribery case, with Mr. Adamescu named as a suspect only in March of 2016. This suggests that the consequence on the proceedings of waiting for the conclusion of this arbitration would not be as great as they would have been had that case already been pending for a considerable time.

[449] For its part, Nova asserts that Mr. Adamescu was not hiding from authorities, but simply insisting on proper service at his place of legal residence, which in mid-2014 was Monaco but by late 2015 was London. Reply, ¶¶ 112, 115-119. Nova also points to two letters Mr. Adamescu's attorneys wrote to UK authorities, in September 2014 and May 2016, informing them of his willingness to appear voluntarily for arrest if a request were made by Romanian authorities for UK assistance in his request. **C-76**, Letter from Kingsley Napley to the Extradition Squad at New Scotland Yard, 1 September 2014; **C-77**, Letter from Kingsley Napley to the Extradition Squad at New Scotland Yard, 27 May 2016.

[450] Hearing Transcript, 3 March 2017, 450:21-452:3.

prevent it from resuming its prosecution later. Nova specifically argued that Romania could resume the proceedings later,[451] and Romania has not responded to the point.

318. Finally, while the delay in extradition 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.

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[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 a delay in Mr. Adamescu's extradition would prevent it from questioning him about the pending investigations as well as possible additional instances of wrongdoing by him or others.[458] However, the Tribunal notes that Romania has asked the UK Home Office to question Mr. Adamescu on its behalf in connection with both the bribery charges and the Abuse of Office proceedings, through available procedures for mutual legal assistance.[459] Mr. Adamescu's lawyers apparently have opposed that request on the basis that it is inconsistent with Romania's concomitant request to extradite him.[460] With the pending extradition request withdrawn pursuant to a Tribunal recommendation, this ground for resisting compliance would be moot. The Tribunal therefore would expect Mr. Adamescu to work cooperatively with the Home Office or other relevant UK authorities to provide answers to questions posed by them (as intermediaries) at the request of Romanian authorities.

320. Romania's last stated concern relates to Mr. Adamescu's potential flight from the UK to another jurisdiction that does not permit extradition to Romania.[461] The Tribunal accepts that the UK bail conditions currently protecting against flight were imposed in consequence of Mr. Adamescu's arrest pursuant to the European Arrest Warrant, and if that warrant (and its associated extradition request) were withdrawn or otherwise suspended, the bail conditions presumably would be lifted. This would leave Mr. Adamescu free to depart from the UK unless other protective measures are put in place. The Tribunal makes no findings regarding the likelihood of flight, but it does accept that preventing any such possibility is an important element of preserving the *status quo*, and mitigating the prejudice to Romania of a provisional measure. Such mitigation is part and parcel of

[458] Hearing Transcript, 3 March 2017, 410:14-411:20 ("more specifically, you would prevent a sovereign state to know what else is in there. Is there another judge that has been bribed? Is there another member of the executive or legislative that has been bribed? What was the underlying purpose of this? Did it go beyond this issue? Did it implicate other companies? …. All these questions relate to the bribery and will remain unanswered with these people maybe on the ground already bribed, manoeuvring in favour of the Adamescus.").

[459] Reply, ¶¶ 125-126, 128; **C-141**, Request for Mutual Assistance from Romania to the Home Office (No. 1372/2016), 28 July 2016; **C-142**, Request for Mutual Assistance from Romania to the Home Office (No. 1374/2016), 29 July 2016.

[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.

ensuring that any provisional measure has no broader consequence than the minimum necessary to achieve the purposes of the ICSID Convention.

321. During the hearing, the Tribunal therefore explored, both with Nova and with Mr. Adamescu personally under oath, the possibility of specific *undertakings* to the Tribunal regarding flight, coupled with specific *mechanisms to enforce* those undertakings. Mr. Adamescu confirmed under oath both the undertakings requested and his willingness to abide by certain practical restrictions on his movement during the course of these proceedings.[462] In particular, Mr. Adamescu indicated his agreement that unless and until the Tribunal modified these conditions, he would:

a. not travel outside of England, Scotland or Wales by any means whatsoever,[463] except to Washington, D.C. for the merits hearing in this case;[464]

b. immediately surrender his German passport if and when returned by the UK authorities who presently hold it, for sequestration by an independent institution or law firm performing this function on behalf of the Tribunal;[465]

[462] Hearing Transcript, 3 March 2017, 376:1-379:1, 423:21-425:5. 453:17-455:18.

[463] Hearing Transcript, 3 March 2017, 376:1-13. Travel to Northern Island was expressly excluded, in recognition of the Common Travel Area that allows individuals to travel from there to the Republic of Ireland without a passport or equivalent travel document. *Id.* at 453:24-455:9.

[464] Nova has indicated its willingness to hold the merits hearing in London, to eliminate any need for Mr. Adamescu to travel at all. Romania has insisted that the hearing be held at the seat of the Centre. This is Romania's right under Article 62 of the Convention, although Romania's also agreed during the First Session (as reflected in Procedural Order No. 1, ¶ 10.2) "not to unreasonably withhold its consent" to hearings in other locations, if the Tribunal "considers that circumstances justify such a request." The Tribunal at this point makes no such request. However, Romania's preference that the hearing be held in Washington, D.C. will entail a need for Mr. Adamescu to travel there, given the Tribunal's findings regarding the importance of his in-person participation as both witness and party representative.

[465] Hearing Transcript, 3 March 2017, 376:17-377:378:11. The Tribunal acknowledges Nova's suggestion that the passport be held by its counsel (Debevoise & Plimpton). *Id.* at 377:3-378:11. While the Tribunal has no doubt that counsel would safeguard it diligently, it also recognizes a possible concern that counsel has professional duties to its client as well as to the Tribunal. In order to avoid any potential for conflict between these obligations, the Tribunal considers it best that the passport be held by an independent third party. This could be either a London-based institution or an independent law firm approved by the Tribunal following consultation with the Parties. The Tribunal intends to promptly seek the Parties' comments on the potential custodian, as well as suggestions for appropriate terms and conditions. It emphasizes however that any costs of the custodial services must be borne by Nova and not by Romania.

c. accept that the custodian of the passport would permit access to it only for such purposes and under such conditions of supervision as the Tribunal approves;[466]

d. not apply for any substitute passport or other identification card that could be used for international travel;[467] and

e. notify the German Embassy in London and the German Consulate in Scotland in writing of the undertaking not to apply for any replacement passport or identification card.[468]

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 that the UK authorities presently holding Mr. Adamescu's passport be notified promptly of his agreement that:

a. they not release it until such time as the Tribunal certifies that the substitute custodial arrangements have been put into place, and

b. then release it directly to the custodian, so as to protect against the possibility of any inadvertent release directly to Mr. Adamescu.

323. The Tribunal's decision to recommend a provisional measure regarding extradition is strictly conditional on Mr. Adamescu's compliance with these undertakings and mechanisms. Should any violation occur, the Tribunal may rescind immediately its provisional measures recommendation, resulting in Romania's freedom to issue a new European Arrest Warrant and to take any other measures appropriate for Mr. Adamescu's apprehension and extradition. The Tribunal also may consider any other request for

[466] Nova indicated that aside from travel to Washington, D.C. for hearings in this case, Mr. Adamescu could require use of the passport for limited purposes, such as to renew it prior to its expiration and as proof of identity for banking transactions. Hearing Transcript, 3 March 2017, 377:3-378:1. The Tribunal considers that mechanisms could be devised to enable its use for these limited purposes, without the passport being returned to Mr. Adamescu's personal control.

[467] Hearing Transcript, 3 March 2017, 423:22-424:1. The Tribunal has been assured that Mr. Adamescu does not presently have any other passport or any identification card that could permit international travel. Hearing Transcript, 3 March 2017, 423:21-22.

[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 Mr. Adamescu 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) withdraw (or otherwise suspend operation of) the transmission of European Arrest Warrant Ref. 3576/2/2016 by the Romanian Ministry of Justice and associated request for extradition submitted to the Home Office of the United Kingdom on 6 June 2016, and (b) refrain from reissuing or transmitting this or any other European Arrest Warrant or other request for extradition for Alexander Adamescu related to the subject matter of this arbitration while this case remains pending. These recommendations are conditional upon Mr. Adamescu's strict compliance with the undertakings and mechanisms outlined above, to preserve the *status quo* and prevent any departure from England, Scotland or Wales during the pendency of this case, except as necessary to attend an arbitration hearing in Washington, D.C.

325. By contrast, the Tribunal denies the requested measure insofar as it seeks a recommendation that Romania (a) withdraw its domestic preventive arrest warrant No. 13/UP issued on 19 May for Alexander Adamescu, and (b) refrain from issuing any other domestic warrant.

(2) The Criminal Proceedings

326. Nova requests that the Tribunal order Romania to:

> suspend all criminal proceedings related to the present arbitration, including Cases No. 577/P/2015, 578/P/2015 and

> 929/P/2016 and refrain from recommencing or initiating criminal proceedings against Nova's investments in Romania or the officers of the investment companies, including Alexander Adamescu….

327. The Tribunal addresses this request on the basis both of the *status quo* (that Alexander Adamescu is currently in London and not Romania) and on the assumption that Romania will comply with the Tribunal's recommendation, explained above, with regard to his extradition to Romania. On this basis, the Tribunal interprets the requested measures to seek a recommendation of suspension of the pending criminal proceedings *even in his absence* from Romania, as well as a recommendation that Romania not pursue any other criminal proceedings against any Nova investment in Romania or any officer of the investment companies, including but not limited to Mr. Adamescu.

328. This is a very broad request that extends far beyond securing Mr. Adamescu's personal ability to participate in this case from outside Romania. If granted, it would effect a significant intrusion into Romania's sovereign right to pursue criminal proceedings within its borders, against entities and individuals also presently within its borders. It also would effect a significant *change* to the *status quo*, which includes the fact of pending proceedings within Romania's borders. This is quite different from the prior request which can be seen as simply *preserving* the *status quo*, *i.e.*, that Mr. Adamescu is in the UK under strict restrictions preventing foreign travel, but would face criminal proceedings in Romania if he were to return. 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. The first concerns Mr. Adamescu's own ability to travel to Romania: Nova argues that "[e]ven without incarceration, Romania's measures are continuing to worsen the dispute and destroy Nova's investments because Alexander Adamescu is effectively

prevented from travelling to Romania to coordinate his and Nova's defence in legal proceedings in Romania, and to manage Nova's business and investments."[469]

330. As to the first argument – that Mr. Adamescu's absence from Romania hampers coordination of "his and Nova's defence" in Romanian proceedings – the Tribunal observes that its central focus is the integrity of *these ICSID proceedings*. The Tribunal does not have a broad remit to protect the ability of parties (or individuals connected to parties) to participate in one manner or another in domestic proceedings.[470] With regard to the ICSID proceedings, moreover, Nova has not demonstrated that Mr. Adamescu's return to Romania is either necessary or urgent in order for it to prepare and present its ICSID case. While the Tribunal has no doubt that Nova's case preparation would be easier if Mr. Adamescu could meet in person with potential witnesses and physically assist with collection of documents in Romania, there has been no showing that these functions could not be accomplished with his providing direction and guidance from London by telephone, email or other means.

331. The other suggested reason for Mr. Adamescu's required return to Romania, *i.e.,* that it is required to manage Nova's investments, equally falls far short of the high threshold for demonstrating necessity under Article 47 of the Convention. Nova argues that "[u]nlike other cases where the investor is a passive investor, here Alexander Adamescu, through his directorships, runs and operates many of Nova's investments on a day-to-day basis."[471] Be that as it may, the record suggests that Mr. Adamescu has not been traveling to Romania now for several years, presumably because of concerns about potential arrest. Whatever alleged damage to Nova's investments results from his need to remain in London, instead of assisting Nova from within Romania, already likely has been sustained. Nova has not demonstrated any specific additional need (much less an urgent one) for his in-person management help in Romania now. Even if it could identify some business reason why his presence in Romania purportedly was important and pressing, it would be difficult for

[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.

Nova to demonstrate that the harm suffered by his continued absence would be irreparable, since any incremental harm to Nova's investments could be addressed by an incremental award of damages, should Nova meet all the other requirements necessary to establish liability and prove such damages.

332. Nova's next set of arguments suggest that the continuation of proceedings in Romania, even in Mr. Adamescu's absence, will have a range of other impacts on this arbitration. The first is that it would discourage other witnesses from giving evidence in this case.[472] But Nova has provided no information regarding who such witnesses are, why they are material to the integrity of this case, and why the Tribunal should accept that they are presently unwilling to testify because of the pending criminal proceedings, but would be so willing if those proceedings were suspended. With the exception of specific incidents involving Mr. Adamescu's wife[473] – who presently resides in London and therefore could testify on Nova's behalf with or without suspension of the Romanian proceedings – Nova has alleged only in the most general terms that it "has identified a number of witnesses with relevant and material information to the dispute but who are concerned about publicly testifying against Romania."[474] Mr. Adamescu's witness statement did aver that "Romania's continuing persecution has already caused tremendous difficulties in *hiring and retaining* top-flight employees," as current employees "have been pressured on numerous occasions to explain why they continue to work for the Nova Group and the Adamescus given the smear campaign against us in Romania,"[475] but this is different than averring that critical witnesses are unwilling to testify. He also stated that "[s]ome lawyers in Romania … sought to *charge a premium* for their services to offset the pressure that they knew they would come under in Romania as a result of taking on the case,"[476] but this

[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] Adamescu Statement, ¶ 37 (emphasis added). When pressed by the Tribunal to explain the allegation regarding "pressure," Mr. Adamescu testified that there were "a few incidences of our employees being specifically asked by well-meaning people, and some of them are known to have connections with the Romanian State about why they would work for us…. They are packaged as a nice conversation but the undertone, the undercurrent of this is very clear, that there might be personal consequences against you if you continue to work for" Nova companies. Hearing Transcript, 2 March 2017, 243:11-244:25.

[476] Adamescu Statement, ¶ 37 (emphasis added).

is far short of a claim that Nova has been unable to obtain local counsel, and that without such assistance its ability to proceed at ICSID is in jeopardy.

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] Nor has it demonstrated that any discouragement such witnesses or counsel already have experienced since 2014 in connection with the criminal charges against Dan and Alexander Adamescu is likely to be materially *heightened* between now and the merits hearing in this case, or materially *relieved* by a temporary suspension of the criminal proceedings, such that a recommendation of such a suspension is necessary to secure their participation in this case.

334. Nova also contends that continuation of the Romanian proceedings will "divert resources from Nova's defence of its substantive rights in this arbitration."[478] This complaint is almost completely unsubstantiated, however. The Tribunal has no doubt that it always is costlier to defend proceedings in two arenas rather than in one, but that alone does not justify a recommendation that one proceeding be suspended to allow use of resources exclusively for the other. Nova has not attempted any evidentiary showing regarding the extent of its resources to fund this arbitration (either directly or with the assistance of third-party funding), much less to show that the need to devote attention concomitantly to Romanian proceedings would cause those resources to become insufficient. The argument is stated in conclusory fashion with no accompanying support.

335. Nova also contends that any continuation of the criminal proceedings would "allow Romania to obtain documentary evidence in an abusive and unfair manner."[479] Nova does not spell out precisely what it means. If the concern is that Romania might seek to intercept

[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.

and then use in this proceeding confidential communications between Nova and its counsel, this is addressed both by Romania's direct undertaking in this regard (*see* Section VII.E.3 below), and also by the Tribunal's inherent power to exclude any privileged material from introduction into evidence. If the concern is a broader one – that Romania might seek to use criminal investigatory powers to obtain documents that it could not obtain either through document requests in this case or through permissible requests to Astra's liquidator and the bankruptcy courts – Nova certainly has not stated this in any direct fashion, and the issue in any event appears premature. 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 the cases against Mr. Adamescu 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] Specifically, Nova suggests that the Abuse of Office Proceedings could provide a basis for continuing the Asset Sequestration Order notwithstanding Dan Alexander's death, in order to secure assets in which Alexander Adamescu is believed to have an economic interest, against the possibility of his conviction and related civil liability to Astra or others.[481] According to Nova, the sequestration of its assets is "just the first step of a process by which Romania intends to expropriate those assets."[482] Nova argues that if Mr. Adamescu subsequently is convicted of the charges, even in *absentia*, Romania then could seize the previously sequestered assets.[483] This "will have frustrated the

[480] Application, ¶ 92.
[481] Hearing Transcript, 3 March 2017, 373:4-15.
[482] Application, ¶ 93.
[483] Hearing Transcript, 3 March 2017, 373:15-20.

effectiveness of any award," because the final relief Nova seeks through its Request for Arbitration includes, *inter alia*, an order that Romania cease violations of the BIT.[484]

337. However, the Tribunal is not persuaded that the risk of further sequestration of Nova's assets because of the pendency of criminal proceedings against Alexander Adamescu, or even the risk of seizure of such assets following a conviction in *absentia*, meets the required standard of irreparable harm. 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, including an order that Romania "cease all steps and proceedings" and "refrain from any … in the future" to wind up Nova's investments, and an order that Romania "withdraw all restrictive measures taken" against Nova's assets.[486] 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 criminal 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) Surveillance and Interception of Privileged or Confidential Communications

340. Nova next requests that the Tribunal order Romania to:

> refrain from undertaking any surveillance or otherwise seeking to intercept any privileged or confidential communications of any nature between Alexander Adamescu and/or any other of Nova's representatives and Nova's international and Romanian counsel or any other third parties ….

341. In light of the Tribunal's recommendation regarding extradition, there is no need to address further the confidentiality of any attorney-client communications from a Romanian prison. The Tribunal therefore considers this request in the context of alleged surveillance of such communications – as well as "confidential communications" involving "third parties" rather than counsel – *outside* of the prison context.

342. In that context, it appears that Nova's sole basis for suggesting any threat of surveillance or interception of privileged or confidential communications is the argument that Romania's investigatory authorities are known to use wiretaps,[487] and a suspicion that Romania somehow obtained knowledge about Nova's attempts to secure third-party funding.[488] For its part, Romania has stated categorically that it "did not, is not and will not be intercepting any privileged communications of Claimant with its attorneys or executives,"[489] and claims that it learned of the funding attempts through general market rumors, not through any improper surveillance.[490]

[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. However, given that criminal investigations may be ongoing in Romania, it is always possible that privileged or confidential communications could be captured *inadvertently* by general surveillance operations (not targeted to this arbitration) that are authorized pursuant to Romania's laws on criminal investigations. 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 criminal 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 criminal 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) The Asset Sequestration Order

345. Nova also requests that the Tribunal order Romania to:

> withdraw the Asset Sequestration Order or, alternatively, amend the Asset Sequestration Order to permit Nova to complete the sale of an interest in [redacted] SPV and in [redacted] Center SA, and refrain from issuing any further orders adversely affecting assets which are the subject of the Asset Sequestration Order or any other of Nova's investments in Romania ….

346. As noted above, the *status quo* with respect to the Asset Sequestration Order is that this has been in place since March 2016, for the stated purpose of freezing Nova's shares in a variety of Romanian investments that were said to be beneficially owned by Dan Adamescu, as security to meet any civil liability to Astra that might arise in the event he was convicted in the Abuse of Office Proceedings. The Asset Sequestration Order is based at least in part on KPMG's findings (as Astra's liquidator and former special administrator) regarding potential mismanagement and/or malfeasance. However, the reasons for Astra's failure are contested. In the meantime, the status of the Asset Sequestration Order is unclear following Dan Adamescu's death, with Nova stating that an application to lift the Order is now being prepared.[492]

347. Nova presents several arguments in favor of its request for a provisional measure recommending withdrawal of the Asset Sequestration Order. The first is that any "preventative sequestration" of Nova's assets "with the ultimate objective of seizing those assets to satisfy alleged liabilities that are at the heart of the dispute before this Tribunal amounts to a patent aggravation of the dispute."[493] Nova emphasizes that the Asset Sequestration Order was imposed following Nova's two 2015 notices of dispute.[494]

[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 the Asset Sequestration Order 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. In this case, Nova asserts that the Asset Sequestration Order, together with efforts to wind up Astra and Medien Holding through bankruptcy proceedings, is "starving [it] of funds it would use to pay for the arbitration,"[498] and that "if it is not suspended or modified," it may "at [some] point dry up Nova's funds such as to cause Nova to have to obtain third party funding for the conduct of the arbitration."[499] However, Nova presents no documentation regarding its finances to support the contention that it is in any immediate risk of having insufficient un-sequestered assets to fund this case, nor does it contend in any event that it would be unable to obtain outside funding to supplement its own available assets. Indeed, Mr. Adamescu testified that he had negotiated with several funders and reached the stage of a term sheet, albeit with terms he considered demanding.[500] In these circumstances, the Tribunal is unable to conclude that the Asset

[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.

Sequestration Order poses an imminent threat to Nova's ability to move forward with the arbitration, and hence to the procedural integrity of this case.

349. Nova also argues that the Asset Sequestration Order renders it

> presently unable to obtain financing for its group's operations, and its contractual counterparties all have additional leverage to bring to bear against Nova, given their awareness of the difficulties Nova is facing in Romania. It is also being seized upon by fellow shareholders (some of which are state-controlled) in certain investments … as an opportunity to seek to wrest control of those investments from the Nova Group.[501]

350. Already, it contends, it has lost the ability to pursue or close on several important transactions, including a sale of an interest in [redacted] a sale of a plot of land owned by [redacted] Center, and a tender to sell its majority stake in [redacted] Nova also contends that "banks in Romania have started taking steps to close the accounts of Nova's Romanian subsidiaries," and that subsidiaries "have had difficulty in opening a bank account," suggesting that Nova "might be on a 'blacklist.'"[503] Nova emphasizes that "the effects have been felt by companies across the wider Nova Group, in addition to those specifically targeted by the Asset Sequestration Order."[504]

351. The Tribunal acknowledges Nova's concern that the Asset Sequestration Order 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] Indeed, Romania itself concedes that "any loss incurred

[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.

as a result of a depreciation in value of the shares sequestered, provided it is demonstrated to be solely attributable to the Sequestration Order, would be capable of being adequately compensated by way of a monetary award."[506]

352. Finally, Nova argues that if the sequestered assets ultimately are *seized* (rather than merely being sequestered), this would be a further aggravation of the dispute and would prejudice the execution of any award, since the final relief Nova seeks in this case includes orders to prevent impairment of its assets and to allow it to continue operating businesses in Romania.[507] At this point, however, there appears to be no imminent threat of such seizure, which the Tribunal understands would require a conviction in the Abuse of Office Proceedings. It is unclear how quickly those proceedings will move forward, in light of Dan Adamescu's death and the Tribunal's recommendation of withdrawal or suspension of Romania's efforts to extradite Alexander Adamescu while this case remains pending. 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]

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[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").

[507] Application, ¶ 107; Reply, ¶¶ 220-221. As noted above, Nova seeks not only various declarations and an award of compensatory and moral damages, but also (a) an order that Romania "cease all steps and proceedings to wind up Medien Holdings and to refrain from any such steps and proceedings in future," (b) an order that Romania "withdraw all restrictive measures taken against assets held by Nova in Romania in respect of any liabilities said to arise from the management of Astra or any of Nova's other investments," and (c) an order Romania "to cease all civil and criminal proceedings … in respect of any alleged wrongdoing said to arise from the management of Astra or any of Nova's other investments, and to refrain from any such actions in the future." Request for Arbitration, ¶ 223(g), (h) and (i).

[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

353. For these reasons, the Tribunal denies Nova's request for a recommendation under Article 47 that Romania withdraw the Asset Sequestration Order. The Tribunal likewise denies Nova's alternative request for a recommendation that such Order be amended "to permit Nova to complete the sale of an interest in [redacted] SPV and in [redacted] Center." Romania contends that a process exists through which Nova may apply to the Romanian courts for the approval of transactions, albeit with the proceeds of such transactions offered for sequestration in kind, to prevent any overall dissipation of assets.[509] Romania suggests that Nova "has not even attempted to do the same."[510] If Nova seeks such approvals and is denied, it is certainly free to suggest such denials were unreasonable and/or caused additional harm to the value of the sequestered shares, just as it is free to argue that the very imposition of a regime in which it cannot freely transact as it wishes was itself a violation of its rights under the BIT. But these are issues for the merits, not for provisional measures. Nova has not demonstrated that any of the subject transactions is required to preserve the core rights that Article 47 is designed to protect, thereby justifying a recommendation that the Asset Sequestration Order be amended to permit these transactions even while the ICSID case remains pending.

354. Finally, the Tribunal denies Nova's request in the last part of the listed measure, for a recommendation that Romania "refrain from issuing any further orders adversely affecting assets which are the subject of the Asset Sequestration Order or any other of Nova's investments in Romania." 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.

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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 Nova Plama 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 Nova Plama 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. This includes Romania's contention that any lifting of the Asset Sequestration Order could lead to dissipation of Nova's assets and thereby substantial prejudice to its interest in protecting the alleged victims of the Adamescus' alleged wrongdoing.[511] Nor does the Tribunal have to address Romania's suggestion that certain past transactions allegedly substantiate its concerns about the risk of asset dissipation.[512] Such issues may be addressed at the merits stage, if the Parties continue to view them as relevant to these proceedings.

(5) Additional Proceedings in Romania

356. Nova requests that the Tribunal order Romania to:

> 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 ….

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 Romania "refrain from initiating any other proceedings" of any nature whatsoever ("criminal or otherwise"), with any relationship whatsoever ("directly or indirectly") to this arbitration, is likewise far too broad.[514] Nova's only asserted basis is a concern that "the *threat* of criminal proceedings can have a chilling effect on witnesses called to testify against a sovereign State."[515] 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. In this case, Nova has made no demonstration that there are material witnesses who are being "chill[ed]" or are likely to be "chill[ed]" from participating in this case, because of the prospect of some potential *future* proceeding that is not yet on the horizon. 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, for a recommendation that Romania "refrain from … engaging in any other course of action that may aggravate the dispute or jeopardize the procedural integrity of this arbitration," 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) preserve all documents potentially relevant in this arbitration, including all documents in the ASF's possession, custody or control relating in any way to Astra, any of Nova's assets in Romania, Dan Adamescu, or Alexander Adamescu, and that it will continue to take such steps for the duration of the arbitration; and
>
> ii) reconstruct any lost ASF data potentially relevant in this arbitration, relating in any way to Astra, any of Nova's assets in Romania, Dan Adamescu, or Alexander Adamescu, using hard copy records ….

361. The Tribunal first addresses the second component (the alleged need to "reconstruct any lost ASF data") 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. Specifically, Nova cites certain press articles for the proposition that "[d]ocuments in the ASF's electronic document depository … have been destroyed following a crash in the ASF's IT system" between 26 and 28 October 2016.[517] Romania cites other press articles for the proposition that "documents [were] not lost" and "the ASF archive is stored on both electronic and

[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.

hardcopy form."[518] The Tribunal considers that press reports are not the best evidence of what may or may not have occurred during the IT crash, and that Romania (unlike Nova) has access to more direct evidence, *i.e.*, through the ASF itself. In that regard, Romania presents an internal ASF memo, enclosing a report from the ASF's internet services provider, for the proposition that "the IT crash only affected the registration numbers of certain documents, petitions and information mainly related to ASF's approval process … but that *no actual electronic or physical documents were affected*."[519] The Tribunal takes this statement as a representation by Romania to that effect. In these circumstances no recommendation by the Tribunal is required to address the IT crash.

362. Beyond the issue of the IT crash, Nova expresses concern that "[d]ocuments specifically in relation to Astra … have been deliberately shredded or otherwise lost."[520] This is based on a November 2016 *România Liberă* article reporting that when Astra was being put into bankruptcy, certain "compromising documents that were showing the abuses made by the ASF Board" were destroyed, including "several documents regarding Astra Insurance."[521] Romania contends that the article should be disregarded because the Adamescu family purportedly influences the newspaper's editorial direction.[522] 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**, ASF Internal Memo, dated 28 November 28, 2016, enclosing Report from IBM dated 7 November 2016 (emphasis added).

[520] Reply, ¶ 254(a).

[521] Reply, ¶¶ 255-256. An earlier April 2016 article from a different paper is said to have reported that "the ASF was able to locate some of these documents" but not others, speculating the latter "might have been removed or destroyed." Reply, ¶ 256. With respect to the April 2016 article, Romania quotes other passages suggesting that the large majority of documents originally misplaced had been "found and forwarded to the prosecutors … in only a few days," and the missing materials did not relate to Astra but rather were "employment records of certain CSA employees." Rejoinder, ¶ 230.

[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. The Tribunal understands this undertaking regarding preservation and recovery of information to extend not simply to the data possibly affected by the IT crash, but more generally to documents related to Astra and to the ASF's investigation of Astra.[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 Astra and ASF files 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] The Tribunal does not accept Romania's argument that Nova already should have gathered whatever Astra documents it may need for the case, between August and December 2015 when the Adamescus regained possession of Astra's management and therefore presumably of its files. Hearing Transcript, 3 March 2017, 394:2-14. The fact remains that whatever Nova should or should not have done at that time, it today no longer has access to Astra's files. At the appropriate time, the Tribunal will consider any justified requests for document production from those files or otherwise.

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. 3576/2/2016 by the Romanian Ministry of Justice and associated request for extradition submitted to the Home Office of the United Kingdom on 6 June 2016, and refrain from reissuing or transmitting this or any other European Arrest Warrant or other request for extradition for Alexander Adamescu related to the subject matter of this arbitration until the Final Award in this case is rendered.

b. This recommendation is conditional on Mr. Adamescu's strict compliance with the undertakings and mechanisms outlined in Section VII.E.1 of this Decision, in order to maintain the *status quo* which prevents his departure from England, Scotland or Wales during the pendency of this arbitration, except as necessary to attend an arbitration hearing in Washington, D.C. As one of these conditions involves the continued sequestration of Mr. Adamescu's passport in the event it is relinquished by the UK authorities, the Tribunal requests the Parties to confer promptly about the potential custodian for the passport, 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 No. 13/UP issued on 19 May for Alexander Adamescu, 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, including Cases No. 577/P/2015, 578/P/2015 and 929/P/2016 and refrain from recommencing or initiating criminal proceedings against Nova's investments in Romania or the officers of the investment companies, including Alexander Adamescu.

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 between Alexander Adamescu and/or any other of Nova's representatives and Nova's international and Romanian counsel or any other third parties. 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 or, alternatively, amend the Asset Sequestration Order to permit Nova to complete the sale of an interest in [redacted] SPV and in [redacted] Center SA, and refrain from issuing any further orders adversely affecting assets which are the subject of the Asset Sequestration Order or any other of Nova's investments in Romania.

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,

including all documents in the ASF's possession, custody or control relating in any way to Astra, any of Nova's assets in Romania, Dan Adamescu, or Alexander Adamescu, and that it will continue to take such steps for the duration of the arbitration, and reconstruct any lost ASF data potentially relevant in this arbitration, relating in any way to Astra, any of Nova's assets in Romania, Dan Adamescu, or Alexander Adamescu, using hard copy records. 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,

Jean E. Kalicki

Ms. Jean Kalicki
President of the Tribunal
Date: 29 March 2017