

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Nasib Hasanov

v.

Georgia

(ICSID Case No. ARB/20/44)

PROCEDURAL ORDER NO. 3

Members of the Tribunal

Mr. Laurence Shore, President of the Tribunal
Professor Stanimir Alexandrov, Arbitrator
Mr. J. William Rowley QC, Arbitrator

Secretary of the Tribunal

Ms. Celeste Mowatt

April 15, 2021

I. Background

1. The Request for Arbitration dated October 19, 2020, includes an application for urgent provisional measures at paragraphs 110-124 (**'Application'**).
2. In accordance with ICSID Arbitration Rule 39(5), the Secretary-General fixed a schedule for further submissions on the Application following the registration of the Request for Arbitration.
3. Further to the calendar fixed by the Secretary-General, the Respondent filed observations on the Application on December 21, 2020.
4. On January 12, 2021, the Claimant filed its response, which modified the provisional measures requested in the Application. At paragraph 143 of the response, the Claimant seeks an order:

"143.1 Staying the making or execution of any administrative decisions by the [Georgian National Communications Commission ("GNCC")] in respect of [Caucasus Online LLC ("CO")], including (specifically but non-exclusively) decisions that: (i) would have the effect of suspending or would lead to the suspension of CO's authorisation to operate; (ii) impose further sanctions against CO for its alleged breaches (in dispute in these proceedings) of the Communications Law, the 2016 GNCC Decision and/or the 2019 GNCC Decision; and/or (iii) are designed to procure and/or may directly or indirectly lead to the forced reversal of the Transaction;

143.2 Proscribing the Special Manager from exercising any of the powers conferred on her in respect of CO by the 1 October 2020 Decision, including (specifically but non-exclusively) by taking any measures (by action or inaction) that: (i) are adverse to CO; (ii) interfere in or obstruct the day-to-day management and business activities of CO; and/or (iii) are designed to procure and/or may directly or indirectly lead to the forced reversal of the Transaction; and

143.3 Ordering that the Special Manager approve the request made by Mr Teymur Taghiyev, a director of Nelgado Limited, in his letter dated 11 January 2021,150 that CO's governing bodies (its director, supervisory board and shareholders) be empowered to carry out the managerial activities listed in that letter."

5. The Respondent submitted its reply on February 5, 2021, which requests that the Tribunal deny the Application.
6. Following the constitution of the Tribunal on February 18, 2021, the first session of the Tribunal was scheduled for March 19, 2021. Following consultations with the parties concerning the matters to be addressed during the first session, the Application was

included in the agenda for the first session and each party was allocated time for oral submissions and rebuttals concerning the Application.

7. Shortly before the first session, correspondence from the parties dated March 17 and 18, 2021, addressed developments connected to the Application.
8. By letter dated March 17, 2021, the Respondent informed the Tribunal that the Tbilisi Court of Appeals had, further to an application from International Online Networks (“ION”), a shareholder of CO, granted interim measures that suspended the powers of the Special Manager. Based on this development, the Respondent requested that the Tribunal “(i) order Claimant to clarify its case on provisional measures; and (ii) postpone the hearing on provisional measures, currently scheduled for this Friday, March 19, 2021, to allow Respondent to properly prepare its defense to the latest iteration of Claimant’s case.”
9. In his letter of March 18, 2021, the Claimant agreed that the Application be postponed *sine die* given the developments, but “reserve[d] his right to request that the Tribunal convene an emergency hearing on relatively short notice for the two or three hours required to hear the Parties on the provisional measures request.”
10. During the first session held on March 19, 2021, each party had the opportunity to make introductory comments, including addressing the circumstances relating to the Application. The developments related to the Application were noted in the Tribunal’s Procedural Order Nos. 1 and 2, both dated March 26, 2021.
11. By letter of April 8, 2021, the Claimant informed the Tribunal that the Tbilisi Court of Appeals had reversed its interim measures decision based on the evidence that had been presented by GNCC. The Claimant therefore renewed his Application and asks that the Tribunal “urgently reconvene to hear Claimant’s Request for Provisional Measures.” The Claimant requested, in particular, “that the Tribunal convene a hearing on the Request for Provisional Measures, at its earliest convenience, on or after 12 April 2021.”
12. Following the Tribunal’s invitation, the Respondent responded by letter of April 9, 2021. The Respondent states that “[i]t would not be practically feasible or procedurally appropriate to hold a hearing on Claimant’s requests for provisional measures on such short notice” and requested that the Tribunal “convene the hearing on provisional measures no earlier than May 12, 2021”. The Respondent argues, *inter alia*, that (a) “the hearing should not be scheduled until the Court of Appeal’s reasoned decision reinstating the powers of the Special Manager, which forms the basis of Claimant’s request for a hearing, becomes available and can be introduced into the record”; and (b) “procedural economy dictates that the Tribunal should decide the Inter-State Negotiation Objection before Claimant’s request for provisional measures.”
13. On April 12, 2021, following the Tribunal’s invitation, the Claimant maintained its request that the Tribunal “convene a hearing on the Request for Provisional Measures at its earliest convenience this week.” The Claimant notes that the parties were previously

prepared to address the Application during the first session, and “save for the reinstatement of the Special Manager following” the Court of Appeal’s decision, there have been no developments that would alter the grounds for the Application and would therefore justify further preparation time. The Claimant states that, if the Tribunal were minded to wait for the reasoned decision of the Tbilisi Court of Appeals before deciding on the Provisional Measures Request, the Claimant requests “that the hearing take place on Monday 26 or Tuesday 27 April 2021, on the basis that the reasoned decision of the Tbilisi Court of Appeal should as a matter of Georgian procedural law be handed down by 21 April 2021[...].” However, the Claimant emphasizes that the reasoning of the Court of Appeal’s decision “has no impact whatsoever on the Tribunal’s ability to grant Provisional Measures.” Moreover, the Respondent’s challenge to jurisdiction should not delay the hearing of the Application (citing *Caratube International Oil Company v. Kazakhstan*, ICSID Case No. ARB/08/12, Decision dated December 4, 2014, para 106).

14. On April 14, 2021, the Respondent replied to the Claimant’s letter of April 12, 2021, reiterating its request that the Tribunal convene the hearing on provisional measures no earlier than May 12, 2021. Regarding the need for additional time for preparation, the Respondent notes *inter alia* that “circumstances have evolved” since the first session and that it has not had an opportunity to “fully review the record of the Court of Appeals proceedings.” With regard to the objection on jurisdiction, the Respondent states that there is “no urgency that would require a decision on provisional measures in the short period of time needed to resolve the Inter-State Negotiation Objection” and in this regard argues that in *Caratube*, cited by the Claimant, the Tribunal “expressly confirmed that, in exercising its discretion whether or not to recommend provisional measures, it is necessary to ‘[d]ecide whether or not the urgency of the matter requires [the Tribunal] to defer the provisional measures until after the issue of the tribunal’s jurisdiction has been argued and decided.’” (citing *Caratube v. Kazakhstan*, Decision dated December 4, 2014, para 108). Finally, the Respondent asserts that there is no basis for the provisional measures requested in paragraphs 143.2 and 143.3 of the Claimant’s January 12, 2021 submission (i.e. an undertaking that the GNCC will not suspend CO’s authorization to operate and approval of the request made by Mr. Teymur Taghiyev).

II. The Tribunal’s Directions

15. ICSID Convention Article 47 states:

“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.”

16. Further, ICSID Arbitration Rule 39 provides that:

“(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. [...]"

17. The Tribunal considers that the Application is ripe for review. The record may be further supplemented with the reasoning of the of the Tbilisi Court of Appeal's April 7, 2021 decision, if the reasoning appears sufficiently in advance of the hearing on provisional measures (see below). However, the absence of the Court's reasoning would not preclude the Tribunal's consideration of the Application. Further, the Tribunal's determination of the Application is not predicated on its prior determination of the Republic of Georgia's pending Inter-State Negotiation Objection, for which a hearing is scheduled on May 12, 2021.
18. As a practical matter, it is unfeasible for the Tribunal to hold a hearing on the Application before May 12, 2021. Taking into account the timing of the renewed Application, the parties' submissions and the Tribunal's availability, the Tribunal will hear the parties' oral arguments on the Application during the hearing scheduled for May 12, 2021, together with oral submissions on the Inter-State Negotiation Objection. As previously arranged, the May 12 hearing shall be held remotely. The Tribunal shall issue a hearing schedule in due course. The Parties will please liaise with Ms. Mowatt to make the necessary logistical arrangements for the remote hearing on May 12.
19. In the period from this date until the Tribunal issues its final decision on the Application, the Tribunal issues the directions in paragraph 20, below, to the parties on the basis of the parties' submissions to date, with a view to preventing the aggravation of the parties' dispute, and ***without forming any judgment whatsoever on the merits of the Application and the jurisdiction of this Tribunal.***
20. The Tribunal directs that the Respondent refrain from taking any of the steps listed in para. 143.1-3 of the Claimant's submissions of January 12, 2021, including, in particular:
 - a) an undertaking that the GNCC will not suspend CO's authorization to operate; and

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- b) an undertaking to allow that the governing bodies of CO exercise, without the Special Manager's further approval, the list of activities requested by Mr. Teymur Taghiyev in his letter of January 11, 2021.

Each party is at liberty to apply for modification of these directions upon a showing of good cause.

For and on behalf of the Tribunal

[signed]

Laurence Shore
President of the Tribunal
Date: April 15, 2021