INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

RTI Rotalin Gas Trading AG and Rotalin Gaz Trading S.R.L.
v.

Republic of Moldova

(ICSID Case No. ARB(AF)/22/4)

PROCEDURAL ORDER NO. 3

DECISION ON THE CLAIMANTS' REQUEST FOR PROVISIONAL MEASURES AND THE CLAIMANTS' REQUEST FOR RECONSIDERATION

Members of the Tribunal
Prof. Maxi Scherer, President of the Tribunal
Ms. Inka Hanefeld, Arbitrator
Ms. Jean E. Kalicki, Arbitrator

Secretary of the Tribunal
Mr. Oladimeji Ojo

---

11 December 2023

TABLE OF CONTENTS

I. PROCEDURAL BACKGROUND

1. This Procedural Order No. 3 addresses the Claimants' Request for Provisional Measures dated 5 October 2023 ("**Claimants' Request for Provisional Measures**" or "**Claimants' Request**") and the Claimants' Request for Reconsideration, dated 17 November 2023 ("**Claimants' Request for Reconsideration**").

2. On 6 October 2023, the Secretariat informed the Parties that the Tribunal had set out a schedule of submissions in relation to the Claimants' Request for Provisional Measures, as follows: "[t]*he Tribunal invites the Respondent to provide its observations on the Request by October 16, 2023. The Claimant may then submit its Reply by October 23, 2023, and the Respondent submit its Rejoinder by October 30, 2023*."

3. The Tribunal also invited the Parties to confer and advise the Tribunal whether they considered that a hearing on the Claimants' Request for Provisional Measures was needed.

4. On 16 October 2023, the Respondent filed its Observations to the Claimants' Request for Provisional Measures ("**Respondent's Observations**").

5. On 23 October 2023, the Claimants filed their Reply to the Respondent's Observations ("**Claimants' Reply**").

6. On 26 October 2023, the Secretariat requested the Parties to "… *confirm, at the latest by October 31, 2023, that they are content for the Tribunal to decide the Request on a documents-only basis*."

7. On 30 October 2023, the Respondent filed its Rejoinder to the Claimants' Reply ("**Respondent's Rejoinder**").

8. By separate emails on 31 October 2023, the Parties confirmed that neither of them were seeking a hearing in respect of the Claimants' Request for Provisional Measures.

9. On 16 November 2023, the Claimants requested the Tribunal to grant their request for provisional measures expeditiously, in light *inter alia* of further developments concerning a meeting that would take place the next day between Rotalin Gaz Trading S.R.L ("**Rotalin**") and Moldova's National Agency for Energy Regulation ("**ANRE**")

regarding the amount of the fine to be imposed on Rotalin for its alleged stop of supply. On the same day, the Respondent commented on the Claimants' communication.

10. On 17 November 2023, the Tribunal informed the Parties that after careful consideration of the Parties' respective submissions, the Tribunal had decided to deny the Claimants' Request for Provisional Measures. The Tribunal informed the Parties that it would in due course issue a procedural order in which it would elaborate the reasons for its decision.

11. On 17 November 2023, with their Request for Reconsideration, the Claimants requested that the Tribunal reconsider its decision in light of the ANRE meeting which took place on the same day.

12. On 22 November 2023, the Respondent submitted its objections to the Claimants' Request for Reconsideration and requested that the Tribunal instead affirm its original decision ("**Respondent's Objection**").

13. A brief overview of the relevant facts is set out in Section II of this Procedural Order. After summarizing the Parties' positions in Section III of this Procedural Order, the Tribunal provides the reasons for its decision in Section IV. The Tribunal's decision is set out in Section V.

II. RELEVANT FACTS

14. In this section, the Tribunal provides an illustrative summary of the facts upon which the Request for Provisional Measures is based. This summary does not constitute any finding by the Tribunal on any facts disputed by the Parties. A more detailed analysis of the facts relevant to the Tribunal's decision on the Claimants' Request for Provisional Measures is contained in Section IV.

15. Since 2016, Rotalin has been under an obligation to supply gas at regulated prices within its distribution area under the so-called Public Service Obligation ("**PSO**").

16. By letter dated 29 March 2023, ANRE invited Rotalin to apply for individual end-user supply tariffs by 12 April 2023.[1]

17. On 31 May 2023, the Emergency Commission of the Moldovan Government issued Decision No. 72/2023 ("**Decision No. 72**") which introduced a single payment for all final consumers terminating or changing supply contracts.[2] Following the issuance of Decision No. 72, Rotalin is said to have experienced some difficulty with acquiring new customers because potential customers "*were unable or unwilling to pay the extra fee*."[3]

18. In July 2023, Rotalin (i) submitted an application for an individual end-user supply tariff,[4] and (ii) applied for an adjustment of its distribution tariffs.[5]

19. On 15 August 2023, ANRE published a draft decision on Rotalin's application which allegedly applied end-user supply tariffs lower than those which applied to MoldovaGaz or other gas suppliers in Moldova.[6] As a consequence, Rotalin sought to withdraw its application and requested to be relieved from the PSO.

20. On 5 September 2023, ANRE issued two decisions: (i) Decision No. 522/2023 on the adjustment of regulated tariffs for the natural gas distribution service ("**Decision No. 522**"), and (ii) Decision No. 523/2023 on the approval of regulated prices for the supply of natural gas by Rotalin ("**Decision No. 523**").

21. The Claimants state that while Decision No. 522 increased Rotalin's distribution tariff, it did not do so by enough of a margin to meet Rotalin's needs. Decision No. 523 set an end-user supply tariff which was 35% lower than the tariff applicable to MoldovaGaz. According to the Claimants, this tariff was so low that it failed to cover Rotalin's costs and allow for any profit.[7]

22. On 8 September 2023, Rotalin informed ANRE that it was no longer able to meet its PSO after 1 October 2023, due to the change in the end-user supply tariffs in Decision

[1] Claimants' Request, ¶ 17.
[2] Claimants' Request, ¶ 19.
[3] Claimants' Request, ¶¶ 19 – 22.
[4] Claimants' Request, ¶ 26.
[5] Claimants' Request, ¶ 26.
[6] Claimants' Request, ¶ 27.
[7] Claimants' Request, ¶¶ 31 – 33.

No. 523.[8] Rotalin instead requested to be released from the PSO, so that it would be in a position to supply gas to end-users at a more competitive price.

23. On 13 September 2023, Rotalin filed a preliminary challenge to Decision No. 523 with ANRE on the basis that the decision was unlawful and contradicted the applicable regulatory framework. ANRE rejected Rotalin's preliminary challenge on 28 September 2023.[9]

24. On 22 September 2023, Rotalin reiterated to ANRE that it had to cease its supply operation and PSO effective 1 October 2023, and urged ANRE to take all necessary measures to ensure uninterrupted gas supply to consumers.[10] Rotalin indicated that it would commit to cooperate with the supplier of last resort designated by ANRE.

25. ANRE's administrative council met on 26 September 2023 and issued a prescription requiring Rotalin to continue with its obligation to supply gas to end-users, and to notify the public and the supplier of last resort of this development.[11]

26. On 28 September 2023, after Rotalin had failed to execute the prescription of 26 September 2023, ANRE issued a second prescription on the same terms.[12]

27. In the days following 1 October 2023, Rotalin ceased supplying gas to roughly 21,000 end-users.[13]

28. On 2 October 2023, following a meeting with Rotalin, ANRE issued a decision to suspend Rotalin's supply license ("**Suspension Decision**"), giving it three months to comply with the demand to reinstate the supply to end-users.[14] The Suspension Decision also declared MoldovaGaz as the supplier of last resort for Rotalin's customers.

29. ANRE's legal department commenced proceedings on 4 October 2023 before the Chisinau District Court ("**Court**"), requesting that the Court rule on "*(i) the legality*

[8] Claimants' Request, ¶ 34.
[9] Claimants' Request, ¶¶ 35 – 36.
[10] Claimants' Request, ¶ 40.
[11] Claimants' Request, ¶ 42; Respondent's Observations, ¶¶ 49 – 50.
[12] Respondent's Observations, ¶¶ 52 – 53.
[13] Respondent's Observations, ¶¶ 55 – 56; Claimants' Reply, ¶ 20; Rotalin's Balancing Reports (**Exhibit C- 311**).
[14] Claimants' Request, ¶ 44; Respondent's Observations, ¶¶ 57 – 58.

and validity of ANRE's three-month (3) suspension of Rotalin's License; and (ii) ANRE's demand that Rotalin recommence its natural gas supply activity to its customers from the date of the Suspension Decision."[15]

30. On 18 October 2023, Rotalin submitted a statement of defence in the proceedings before the Court.[16]

31. On 21 October 2023, the Court issued a non-reasoned ruling which upheld the Suspension Decision.[17] The reasoned decision is due to be issued within 45 days.[18]

32. On 17 November 2023, ANRE held a meeting in which it decided to postpone the decision to impose a fine on Rotalin.[19] On the same day, ANRE nonetheless published a press release on its website stating that Rotalin was fined in the amount of 5% of its annual turnover.[20] The press release was removed from ANRE's website within minutes of its posting.[21]

III. PARTIES' POSITIONS

A. Claimants' Position

33. The Claimants request the Tribunal to:

> "*(i) Order Respondent not to withdraw Rotalin's License for Supply No. 000679.*
>
> *(ii) Order Respondent to lift the suspension Rotalin's License for Supply No. 000679.*
>
> *(iii) Order Respondent to abstain from imposing any fines related to the ceasing of supply by Rotalin from 1 October 2023.*
>
> *(iv) Order Respondent to suspend ANRE Decision no. 523.*

[15] Respondent's Observations, ¶¶ 60 – 65.
[16] Respondent's Rejoinder, ¶¶ 88 – 96.
[17] Respondent's Rejoinder, ¶ 87.
[18] Second Witness Statement of Mihai Murgulet, 30 October 2023, ¶ 26.
[19] Claimants' Request for Reconsideration, p. 1; Respondent's Objection, p. 2.
[20] Claimants' Request for Reconsideration, p. 1; Respondent's Objection, pp. 2, 4; Witness Statement of Natalia Baiesu, 21 November 2023, ¶¶ 30 – 31.
[21] Respondent's Objection, pp. 2, 4.

(v) Order Respondent to compensate Claimants for their costs arising out of the provisional measure request in an amount to be specified later together with interest thereon."[22]

34. In sum, the Claimants argue that Decision No. 523 threatens the integrity of the present arbitral proceedings and the Claimants' procedural rights because the suspension of Rotalin's supply license and the impending termination of that license will likely cause financial harm to Rotalin and impact the Claimants' ability to finance these proceedings.

35. According to the Claimants, ANRE's inappropriately low supply tariffs and the Suspension Decision, which give rise to the Claimants' Request for Provisional Measures, are distinct from the main claims the Claimants brought in these proceedings.[23] The main claims instead concern the under-recovery of the Claimants' historic investment costs and damages from Moldova's failure to open the market despite repeated promises.[24] Contrary to the Respondent's suggestion that the Claimants' Request for Provisional Measures is an amendment of the Claimants' Memorial on the Merits, the requested measures do not remedy the historic under-recovery or lack of access to the Moldovan gas market.[25]

36. Instead, the rights that the Claimants seek to protect by way of their Request for Provisional Measures are the following: (i) a right to maintain the *status quo* that existed prior to ANRE's Decision No. 523; (ii) the non-aggravation of the dispute through further violations of the Claimants' rights under the ECT; (iii) the right to be treated fairly and equitably and the right not to be expropriated, which are triggered by ANRE's misapplication of the tariff methodology; (iv) the right to preserve the integrity of the proceedings and equality of arms, arising from the Respondent's abuse of its regulatory powers; and (v) the right to be heard, given that the suspension of Rotalin's license potentially threatens the Claimants' ability to finance this arbitration.[26]

37. The Claimants also do not consider it necessary to allow additional time for the Respondent to respond to the Claimants' Request for Provisional Measures as that

[22] Claimants' Request, ¶ 82.
[23] Claimants' Reply, ¶¶ 8 – 13.
[24] Claimants' Reply, ¶ 10.
[25] Claimants' Reply, ¶¶ 14 – 16.
[26] Claimants' Reply, ¶¶ 43 – 44.

would defeat the purpose of a provisional measures application. According to the Claimants, the time already allotted for these submissions is more than sufficient.[27]

38. Finally, the Claimants assert that none of the measures requested would serve to put Rotalin in a better position than the one which existed prior to Decision No. 523. Under those conditions, Rotalin operated at a loss and in difficult circumstances. This would still be the case even if the Claimants' Request for Provisional Measures were granted, and the only effect would be that Rotalin would not suffer the permanent loss of its supply business.[28]

39. In its Request for Reconsideration, the Claimants argued that ANRE's 17 November 2023 press release, announcing that Rotalin was fined in the amount of 5% of its annual turnover, clearly shows that the decision was taken by ANRE in advance, without even hearing Rotalin, and was also communicated to the PR department of ANRE in advance.[29] Not only is this a "*stark violation of due process*," but it is also "*evidence of the lack of applying the rule of law in proceedings initiated against Rotalin*."[30] According to the Claimants, this conduct demonstrates the need for provisional measures and shows the clear intent to eliminate Rotalin from the market and to take its investments.[31]

Power to Order Provisional Measures

40. The Claimants rely on Article 46 of the ICSID Additional Facility Arbitration Rules (2006) which provides as follows:

> *"(1) Unless the arbitration agreement otherwise provides, either party may at any time during the proceeding request that provisional measures for the preservation of its rights be ordered by the Tribunal. The Tribunal shall give priority to the consideration of such a request."*[32]

[27] Claimants' Reply, ¶ 12.
[28] Claimants' Reply, ¶¶ 15 – 16.
[29] Claimants' Request for Reconsideration, ¶¶ 4-5.
[30] Claimants' Request for Reconsideration, ¶ 5.
[31] Claimants' Request for Reconsideration, ¶ 5.
[32] Claimants' Request, ¶ 48.

41. The Claimants assert that there is nothing in the ECT which precludes the exercise of the Tribunal's discretion or competence to order provisional measures in these proceedings.[33]

42. As to whether the Tribunal ought to order provisional measures in this instance, the Claimants refer to *Sergei Paushok*, *CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Mongolia*[34] and *Alasdair Ross Anderson et al v. Republic of Costa Rica*.[35] Relying on these decisions, the Claimants identify the following conditions for an order of provisional measures:[36]

a. *prima facie* jurisdiction;

b. *prima facie* establishment of the case;

c. urgency, or the need to avoid irreparable harm;

d. imminent danger of serious prejudice (necessity), and

e. proportionality.

43. The Claimants submit that these conditions have been met in this case.

44. The Claimants also submit that the rights they seek to protect by way of the requested measures are procedural rights, namely "*the right to be heard, the right to a fair proceeding and the protection of the integrity of the arbitration as a whole …*"[37] The Claimants assert that there are precedents for the protection of these kind of rights by the grant of orders of specific performance. The measures which the Claimants seek are intended to preserve the *status quo* in these proceedings.

45. In response to the Respondent's argument that ANRE and the Moldovan courts are the proper forum for any dispute in relation to Decision No. 523 and the suspension of Rotalin's supply license, the Claimants submit that the Tribunal is entitled to order

[33] Claimants' Request, ¶ 48.
[34] *Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Mongolia,* UNCITRAL, Order on Interim Measures, 2 September 2008, ¶ 45 (**Exhibit CL-139**).
[35] *Alasdair Ross Anderson et al v. Republic of Costa Rica,* ICSID Case No. ARB(AF)/07/3, Decision on Provisional Measures, 5 November 2008, ¶ 20 (**Exhibit CL 140**).
[36] Claimants' Request, ¶¶ 49 – 51.
[37] Claimants' Request, ¶¶ 58 – 62.

provisional measures even where national courts are also entitled to exercise jurisdiction.[38]

46. The Claimants submit that the Tribunal is competent to decide on the Claimants' Request for Provisional Measures and that it does not require extensive expert evidence to do so. The Tribunal is always able to revoke or change any provisional measures ordered if the Respondent can show that they were not necessary or the risk for which they were ordered no longer exists.[39]

Jurisdiction and Merits

47. The Claimants submit that the standard to establish *prima facie* jurisdiction is not a high one. In this case, they argue that the threshold has been met by the registration of the proceedings by the ICSID Secretariat following a "*basic review of the jurisdictional requirements.*"[40]

48. The Claimants also refer to the Request for Arbitration, the Memorial on the Merits, and the Reply to the Respondent's Request for Bifurcation in asserting that these documents make out a *prima facie* case for jurisdiction.

49. The Claimants argue that the test to determine whether there is a *prima facie* case on the merits is for the Tribunal to consider whether facts as they have been presented by the Claimants could give rise to a violation of the relevant treaty. In this instance, the Claimants submit that the facts of this case, as they have been presented in the Memorial on the Merits and in the Claimants' Request for Provisional Measures, would give rise to breaches of the ECT if upheld.[41] On this basis, the Claimants assert that a *prima facie* case on the merits has been made in these proceedings.

50. Moreover, the Respondents' argument that the Claimants deliberately caused the suspension of its own license disregards the clear connection that exists between the inappropriate supply tariffs and the suspension of the supply license.[42]

[38] Claimants' Reply, ¶¶ 23 – 25.
[39] Claimants' Reply, ¶¶ 26 – 27.
[40] Claimants' Request, ¶¶ 52 – 53.
[41] Claimants' Request, ¶¶ 55 – 56.
[42] Claimants' Reply, ¶¶ 41 – 42.

Necessity

51. The Claimants submit that the requesting party in an application for provisional measures must demonstrate the existence of a "*sufficient risk or threat that grave or serious harm will occur if provisional measures are not granted.*"[43]

52. According to the Claimants, the risk which arises out of the suspension of Rotalin's supply license is that Rotalin will suffer the permanent loss of its entire client base to MoldovaGaz. Furthermore, even if Rotalin would later receive a new supply license, Rotalin's customers are likely to remain with MoldovaGaz due to the effective closing of the gas market and the introduction of a fee for changing suppliers. This, the Claimants argue, would aggravate the dispute and effectively create a new claim for indirect expropriation.[44]

53. Given that Decision No. 523 makes it impossible for Rotalin to carry out business profitably, the inevitable outcome is that Rotalin will suffer financial duress and risk insolvency.[45] The Claimants emphasize that they have been responsible for financing these proceedings to date and, thus, argue that if Rotalin suffers financial duress, that will likely directly impact these proceedings.[46]

54. This risk would be reduced by granting the Claimants' Request for Provisional Measures. In that scenario, Rotalin would be able to continue carrying on its business in a sustainable manner and continue these arbitration proceedings. Consequently, the Claimants argue that the measures are necessary to protect Rotalin's procedural rights and the integrity of this arbitration.[47]

55. The Claimants argue that "*monetary compensation does not suffice in the case at hand*."[48] Instead, the Claimants are seeking to reinstate the *status quo ante,* namely to be able to continue their operations.[49]

[43] Claimants' Request, ¶ 63.
[44] Claimants' Request, ¶ 64.
[45] Claimants' Request, ¶ 65.
[46] Claimants' Request, ¶ 66.
[47] Claimants' Request, ¶¶ 67 – 68.
[48] Claimants' Reply, ¶ 51.
[49] Claimants' Reply, ¶ 51.

56. While the Respondent argues that there is no risk of irreparable harm in the instant case, the Claimants submit that this is not the appropriate standard. They propose that:

> *"It is therefore not 'irreparable harm' (as all harm may be compensable) but 'sufficient risk or threat that grave or serious harm will occur if provisional measures are not granted' that the requesting party must demonstrate."*[50]

57. The standard of sufficient risk has been met by the facts of this case. The Respondent has failed to establish why the measures requested are not necessary. According to the Claimants, the assertion that Rotalin could have gone to the Moldovan courts is irrelevant.

Urgency

58. Regarding urgency, the Claimants submit that this requirement overlaps with necessity and the risk of harm discussed above. Urgency exists where the requesting party will likely suffer imminent harm, or "*at least harm that would arise before the award is rendered.*"[51]

59. The Claimants assert that unless Rotalin can renew its supply business in the short term, it will likely suffer significant financial harm, which will in turn impact these proceedings. The relevant circumstances are summarised by the Claimants as follows:

> *"(70) … The newly adjusted distribution tariff does not accord for the negative developments in Rotalin's distribution volumes in the past months. Distribution is also not a reliable business: the only customer is MoldovaGaz, which has repeatedly refused to pay fair distribution tariffs to Rotalin. It follows that every day without the supply business is a risk to Rotalin's existence, and, consequently, the existence of the arbitration. The financial damages will only be amplified by the fines ANRE announced will be imposed on Rotalin due to the supply stop. In the worst case, once Rotalin enters insolvency proceedings, the damage becomes irreparable and permanent.*
>
> *(71) Lastly, ANRE has already announced that it will withdraw Rotalin's license. This would be an effective point of no return for Rotalin, as it would lose its customer base for good."*[52]

[50] Claimants' Reply, ¶ 54.
[51] Claimants' Request, ¶ 69.
[52] Claimants' Request, ¶¶ 70 – 71.

60. The Claimants also state that Rotalin is unable to restore supply for as long as the supply tariffs continue to apply.[53] As such, the suspension is not temporary and, considering the Respondent's other conduct, is a continuation of a clear desire to squeeze Rotalin out of the market.

61. Further, none of the options proposed by the Respondent are viable. In this regard, the Claimants argue as follows:

> *"• 'appealing to the Moldovan courts': Not only does Rotalin have a choice where to request provisional measures pursuant to Article 46 ICSID AF Rules, but it is aware of the Fork in the Road Clause provided in the ECT. Respondent cannot force Claimants into domestic court proceedings which could jeopardize their right to arbitrate under the ECT.*
>
> *• 'negotiating a termination of its obligation with ANRE' has already failed, as explained in the Request for Provisional Measures. ANRE has only applied with aggression or disinterest when Rotalin attempted to negotiate alternative solutions. This is evident from the hostile letter Rotalin received from ANRE during the application process for the supply tariffs, from ANRE's silence when Rotalin was seeking alternative solutions by purchasing gas from EnergoCom, and, finally, from ANRE's threatening letters refusing all of Rotalin's requests regarding the release from the PSO.*
>
> *• 'seeking the relief of* [sic] *this Tribunal' would mean that it is too late and the dispute has been aggravated. It is exactly this outcome that the provisional measures should prevent."*[54]

Proportionality

62. Regarding the criterion of proportionality, the Claimants submit that any provisional measures granted by a tribunal must not outweigh the justification for granting them. As such, the Tribunal has a duty to consider the harm sought to be prevented and balance it against the harm likely to be caused to the counterparty by the grant of the provisional measures.[55]

[53] Claimants' Reply, ¶ 71 – 73.
[54] Claimants' Reply, ¶ 74.
[55] Claimants' Request, ¶ 74.

63. The Claimants submit that the grant of the provisional measures sought in this case will not impact the Respondent's sovereign or regulatory powers, and that there are "*no monetary, economic, or other repercussions for the Respondent*."[56]

64. Further, the Claimants argue that the grant of the provisional measures, and the continuation of Rotalin's supply business would ultimately be to the benefit of the Moldovan gas market, as well as being consistent with the Respondent's own policies.[57] According to the Claimants, the Respondent would be able to reinstate Decision No. 523 without suffering any financial harm.

65. That said, the Claimants rely on *Burlington Resources, Inc. v. Republic of Ecuador*,[58] in arguing that this Tribunal would still be entitled to grant provisional measures even if it entailed interfering with some aspects of the Respondent's sovereign powers.

66. The Claimants also argue that there is no risk of harm to the public if the measures requested are granted. To the contrary, Rotalin would be able to supply gas to its consumers at the price that all other consumers in Moldova pay. The harm to the public, if any, arises from Moldova endorsing MoldovaGaz's monopoly.[59]

67. Further, there is no risk of harm to ANRE and the Moldovan courts. In granting the measures sought, this Tribunal would not prejudge the legality of either the suspension of Rotalin's license or Decision No. 523.[60]

Good Faith

68. In responding to the Respondent's good faith argument, the Claimants observe that the relevant case law does not include a requirement of a lack of frivolous intent.[61] While the Claimants acknowledge that a certain element of good faith always plays a role when assessing the validity of a party's request, the Claimants submit that the

[56] Claimants' Request, ¶ 79.
[57] Claimants' Request, ¶¶ 74 – 78.
[58] *Burlington Resources, Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009, ¶¶ 70-71 (**Exhibit CL-149**).
[59] Claimants' Reply, ¶ 78.
[60] Claimants' Reply, ¶ 79.
[61] Claimants' Reply, ¶ 30.

Respondent's allegation of pretextual behavior is unsubstantiated and categorically flawed.[62]

69. The Claimants are not seeking a justified exit, instead they are seeking measures which would allow them to remain in the Moldovan gas market. Rotalin simply could no longer continue with its supply business following Decision No. 523, and the cessation of supply was not an act of retaliation or an attempt to trigger the suspension of its license.[63]

70. The Claimants point to another supplier, Natural Gaz D.C., who did not have its license suspended by ANRE when it was unable to supply its customers in June 2021.[64]

Preservation of the *Status Quo*

71. The Claimants reject the Respondent's arguments that the grant of the Claimants' Request for Provisional Measures would be tantamount to improving the Claimants' circumstances.

72. In particular, the Claimants argue that (i) there is no improvement of the Claimants' situation should the provisional measures be granted and (ii) this Tribunal is entitled to protect the Claimants where the State's administrative, judicial, or regulatory power is exercised in an unjustified manner.[65]

73. Here, according to the Claimants, the imposition of supply tariffs which made it impossible for Rotalin to continue its business and the ultimate suspension (with the threat of withdrawal) of the Claimants' supply license were an unjustified exercise of the Respondent's regulatory and administrative power. Consequently, the *status quo* to be protected is the state of affairs that existed prior to Decision No. 523.[66]

B. Respondent's Position

74. As a preliminary matter, the Respondent criticizes the Claimants' Request for Provisional Measures because, in the Respondent's view, it represents an attempt to

[62] Claimants' Reply, ¶ 30.
[63] Claimants' Reply, ¶¶ 30 – 34.
[64] Claimants' Reply, ¶ 35.
[65] Claimants' Reply, ¶¶ 58 – 60.
[66] Claimants' Reply, ¶ 63.

introduce an additional claim, and seek additional remedies, and so should be dismissed out of hand. The Respondent also requests that the Tribunal set a schedule to address these additional claims concerning Decisions No. 72, 522 and 523.[67]

75. The Respondent notes that it is unable to develop a comprehensive legal argument on the tariff issue in the nominal time allocated for the response to the Claimants' Request for Provisional Measures. The Respondent therefore requests additional time to put forward a more comprehensive defense to these arguments.[68]

76. The Respondent also criticizes the Claimants' Request for Provisional Measures on the basis that it is frivolous, and "*merely a pretext for Rotalin to increase the value of their initial damage claim, which is an illegal, prohibited conduct.*"[69]

77. In the Respondent's view, the true purpose of the application is to furnish the Claimants with a way to exit the Moldovan gas market. In their view, rather than terminating its services to the end-users, the Claimants could have (and should have) appealed ANRE's decision to this Tribunal or the Moldovan courts. By choosing to suspend its services, knowing that ANRE would be obliged to suspend and ultimately terminate its supply license, the Claimants deliberately sought to justify its breach of the PSO by characterising ANRE's actions as retaliatory rather than regulatory.[70]

78. The Respondent submits that the Claimants are not entitled to circumvent their obligations under Moldovan law because these proceeding are pending, or to use their Request for Provisional Measures to avoid responsibility.[71]

79. The Respondent thus requests that the Tribunal order the Claimants to compensate the Respondent for the costs incurred in responding to the Claimants' Request for Provisional Measures.[72]

80. The Respondent submits that the Claimants' Request for Provisional Measures has now been overtaken by events. Notably, the Respondent points to the fact that the Court

[67] Respondent's Observations, ¶¶ 1 – 2.
[68] Respondent's Observations, ¶¶ 27 – 32; Respondent's Rejoinder, ¶ 36.
[69] Respondent's Observations, ¶¶ 86 – 97.
[70] Respondent's Observations, ¶ 87.
[71] Respondent's Observations, ¶¶ 15, 95.
[72] Respondent's Observations, ¶¶ 280 – 282.

upheld the validity of the Suspension Decision in its decision of 21 October 2021. The Respondent submits that the "*Claimants properly availed themselves of the jurisdiction*" of the Court by filing an action in which the Claimants *inter alia* requested the reversal of the 21 October 2023 decision, to nullify all ANRE decisions leading up to ANRE's Suspension Decision, to void the Suspension Decision, and to stay all administrative proceedings which could lead to the imposition of fines against the Claimants.[73] Moreover, given that the Court's decision is subject to Rotalin's appeal, "*the Tribunal does not have jurisdiction while these very same issues are still the object of an active litigation process in Moldova*."[74]

81. Thus, the Respondent argues that the Claimants are now barred by the fork in the road clause in the ECT, and that in any event, the Moldovan courts are better equipped to determine issues relating to Decision No. 523 and ANRE's Suspension Decision.[75]

82. In the context of the Claimants' Request for Reconsideration, the Respondent submits that the Claimants have failed to provide any justification to substantiate a reversal of the Tribunal's decision.[76] The Claimants have not cited to any case law in support of their position, nor have they provided any facts to demonstrate a compelling "*change in circumstances*" that would undermine the fundamental basis of the Tribunal's decision.[77] The Claimants base their request solely on "*an inadvertent erroneous posting on ANRE's website*" that was removed within fifteen minutes of discovering the error.[78]

83. Moreover, the Claimants' Request for Reconsideration failed to mention that at the 17 November 2023 meeting, no fines were imposed on the Claimants and instead, ANRE decided to stay the administrative proceedings in line with the Claimants' request.[79] This was to the Claimants' benefit, not their prejudice.[80]

---

[73] Respondent's Objection, p. 4.
[74] Respondent's Rejoinder, ¶¶ 106 – 107, 120.
[75] Respondent's Rejoinder, ¶¶ 108 – 113.
[76] Respondent's Objection, p. 2.
[77] Respondent's Objection, p. 2 (citing to *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7 Decision on Respondent's Request for Reconsideration of, 27 March 2017, ¶ 31 (**Exhibit RL-048**).
[78] Respondent's Objection, p. 4.
[79] Respondent's Objection, p. 4; Witness Statement of Natalia Baiesu, 21 November 2023, ¶¶ 24 – 27.
[80] Respondent's Objection, p. 5.

84. The Respondent accordingly requests that the Tribunal (i) issue a ruling that the Claimants' 18 November 2023 email is an improper procedural submission, and (ii) reaffirm its original decision denying the Claimants' Request for Provisional Measures.[81]

Power to Order Provisional Measures

85. The Respondent acknowledges that Article 46 of the ICSID Additional Facility Arbitration Rules provides for the Tribunal's power to grant provisional measures. The Respondent, however, emphasizes that provisional measures ought not to be granted lightly, in particular where the measures risk infringing on State sovereignty.[82]

86. The Respondent acknowledges that the Tribunal may order provisional measures to preserve the right to procedural integrity.[83]

87. The Respondent submits that the Tribunal must first be satisfied that the Request for Provisional Measures is not brought frivolously, and subsequently must establish:

> *"(i) whether Rotalin has a right that requires preservation in the arbitration;*
>
> *(ii) there are circumstances of necessity to avoid irreparable harm being caused to Rotalin by Moldova 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."*[84]

[81] Respondent's Objection, p. 5.
[82] Respondent's Observations, ¶¶ 70 – 75.
[83] Respondent's Observations, ¶ 77.
[84] Respondent's Observations, ¶ 84.

88. Contrary to the Claimants' arguments, the Respondent submits that the Tribunal need not consider whether the Tribunal has *prima facie* jurisdiction. From the Respondent's perspective, that is a "*biased and self-sustaining*" standard.[85]

89. The Respondent submits that this Tribunal does not have jurisdiction to enjoin a State from performing its legal, judicial, or administrative activities. The Respondent also contends that the proper forum for a challenge to ANRE's decision is the Moldovan courts. The Respondent argues that the effect of any decision by this Tribunal as to the status of the supply license would be to strip ANRE of its role and functions under Moldovan law.[86] This Tribunal risks interfering with the role of the Moldovan courts and potentially creating duplicative and inconsistent decisions. On this basis, the Respondent submits that the Suspension Decision should be addressed by the Moldovan courts.[87]

Rights which Require Preservation

90. The Respondent characterizes the right which the Claimants seek to preserve as a right to the restoration of Rotalin's supply license, or more broadly, a right to the specific performance of the supply license. The Respondent argues that no such right exists.[88]

91. According to the Respondent, Rotalin has a duty to provide natural gas to the public at prices set by ANRE. The Respondent refers to Articles 11(1), 13(3), 15(c) and 80(4) of Moldova's Law on Natural Gas No. 108/2016 ("**Law on Natural Gas**") which collectively requires suppliers to fulfil their PSO by providing natural gas according to parameters set by ANRE without interruption.[89]

92. Conversely, ANRE has an obligation to protect consumers by monitoring and controlling the way in which license holders comply with the Law on Natural Gas.[90] Pursuant to this duty, ANRE is empowered to suspend licenses where the license holder has breached its obligations under the Law on Natural Gas.

[85] Respondent's Observations, ¶¶ 104 – 105.
[86] Respondent's Observations, ¶¶ 194 – 211.
[87] Respondent's Observations, ¶¶ 212 – 214.
[88] Respondent's Observations, ¶¶ 110 – 114.
[89] Respondent's Observations, ¶¶ 116 – 119.
[90] Respondent's Observations, ¶¶ 120 – 121.

93. The Respondent argues that Rotalin breached its duty under the Law on Natural Gas and ignored ANRE's prescriptions of 26 and 28 September 2023.[91]

94. The Respondent submits that Rotalin's suspension of gas supply on 1 October 2023 was a breach of Rotalin's PSO under Article 89 of the Law on Natural Gas, and that this breach "*jeopardized national security, life and public health in Moldova*."[92]

95. ANRE's Suspension Decision, which gives Rotalin three months to remedy the breach, is in line with the Law on Natural Gas. In particular, the Respondent cites Article 105(b) of the Law on Natural Gas which requires ANRE to suspend a license and designate another license holder to carry out the licensed activity "*in the event of an exceptional situation in the natural gas sector*."[93] According to the Respondent, Rotalin's decision to suspend its PSO is an exceptional situation because this cessation in supply affected more than 20,000 consumers.

96. Further, the Respondent asserts that ANRE commenced legal proceedings, and that Rotalin was entitled to challenge the Suspension Decision before the Moldovan courts.

97. The Respondent thus submits that the right which the Claimants assert in their Request for Provisional Measures is in fact a breach of its obligation under Moldovan law to which ANRE has responded to protect the public.[94]

98. The Respondent submits that Rotalin's deliberate breach of its PSO has no connection to the Claimants' ability to argue its tariff claims in these proceedings. According to the Respondent, the breach was premeditated and carried out with the knowledge that ANRE would have to suspend the license and with the ultimate aim to fabricate a basis to bring this Request for Provisional Measures.[95]

99. The Respondent asserts that Rotalin was not forced to cease its supply operations and that the Claimants already have a claim in this arbitration concerning ANRE's tariff methodology. Consequently, the Claimants may pursue that claim with or without the

[91] Respondent's Observations, ¶¶ 128 – 132.
[92] Respondent's Observations, ¶ 132.
[93] Respondent's Observations, ¶ 136.
[94] Respondent's Observations, ¶¶ 140 – 145.
[95] Respondent's Observations, ¶¶ 148 – 152; Respondent's Rejoinder, ¶¶ 56 – 86.

Suspension Decision and to decide otherwise would "*prejudice Moldova in a fair consideration of these proceedings*."[96]

100. Relying on *Emilio Agustín Maffezini v. Spain,*[97] the Respondent also argues, in the alternative, that for the Claimants to be entitled to specific performance, they would have had to seek remedies in the Moldovan judicial system. Rotalin would have to establish that the Suspension Decision is illegal, failing which there can be no right to specific performance.[98]

Necessity

101. The Respondent submits that the Claimants fail to meet the requirement that provisional measures only be granted in urgent situations where they are necessary to prevent the loss of rights.

102. In this case, the Respondent asserts that the only purpose of the Request for Provisional Measures is to seek monetary compensation. The Respondent submits that (i) the risks the Claimants asserted in their Request for Provisional Measures are purely financial risks, and (ii) the Tribunal ought to abide by the principle that losses which may be compensated in the final award do not warrant protection through provisional measures.[99] The Respondent considers this to be sufficient grounds to dismiss the Claimants' Request for Provisional Measures.

103. Separately, the Respondent urges the Tribunal to apply the standard of "irreparable harm." As to what constitutes irreparable harm, the Respondent relies on the decision in *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*,[100] where the Tribunal described irreparable harm as one which cannot be remedied by an award of damages.

104. According to the Respondent, there is no irreparable harm here. Rotalin is entitled to participate in the proceedings before the Moldovan courts regarding the legality of the

[96] Respondent's Observations, ¶ 165.
[97] *Emilio Agustín Maffezini v. The Kingdom of Spain,* ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999, ¶¶12-14 (**Exhibit RL-033**).
[98] Respondent's Observations, ¶¶ 166 – 168.
[99] Respondent's Observations, ¶¶ 170 – 172.
[100] *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 156 (**Exhibit RL-032**).

Suspension Decision. Rotalin also has an opportunity to remedy its breach within the three-month suspension period. Rotalin is not entitled to pick and choose which Moldovan laws to comply with or to have the Tribunal sanction its non-compliance.[101]

Preservation of the *Status Quo*

105. The Respondent submits that the purpose of provisional measures is to preserve the *status quo*, and to prevent the aggravation of a dispute, not to improve the situation of the requesting party or to afford them more rights than those to which they otherwise would be entitled.

106. The Respondent also submits that not every change in circumstance during an arbitration, even if it possibly increases the harm already complained of, is a fresh violation of the parties' rights.[102]

107. The Respondent argues that the measures sought by the Claimants in this case aim to improve their situation and will be equivalent to the effect of a final decision. Rotalin has an obligation to comply with Moldovan law, meet its PSO and ensure continued supply of gas, but it has failed to do so. What the Claimants are seeking is to change the *status quo* by seeking measures which would relieve them of their obligations under Moldovan law.[103]

108. The Respondent relies *inter alia* on *Phoenix Action Ltd v. Czech Republic*[104] and *Plama Consortium Limited v. Republic of Bulgaria*[105] in support of the proposition that the Claimants have failed to show any circumstances which threaten the *status quo* or the Tribunal's ability to grant relief at the end of the proceedings.[106]

[101] Respondent's Observations, ¶¶ 178 – 193.
[102] Respondent's Observations, ¶ 237.
[103] Respondent's Observations, ¶¶ 224 – 233.
[104] *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures, 15 February 2004, ¶ 37 (**Exhibit RL-037**).
[105] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005, ¶¶ 40, 45 (**Exhibit RL-026**).
[106] Respondent's Observations, ¶¶ 235 – 241.

Urgency

109. The Respondent submits that the Claimants have failed to show the existence of an urgency. The Respondent refers to *Tokios Tokelés v. Ukraine*[107] in support of the argument that an urgency exists where there is a risk of prejudice to the rights of the requesting party before a final decision is taken in the arbitral proceedings.

110. Here, the Respondent argues that there is no risk of prejudice: Rotalin itself triggered the suspension of its supply license and can remedy the breach and have its license reinstated by restoring the supply of gas within three months.[108]

Proportionality

111. The Respondent submits that the Claimants' Request for Provisional Measures ought to be dismissed because the measures sought fail to meet the proportionality test. Like the Claimants, the Respondent advocates for a balancing of interests to ensure that the harm caused by the provisional measures does not outweigh the harm sought to be prevented by them.[109]

112. The Respondent argues that the Tribunal must consider both the harm which has resulted from Rotalin's conduct, namely the suspension of the supply of gas, and the harm likely to be caused by granting the requested measures. If this Tribunal were to grant the measures sought, ANRE will be harmed by the usurpation of its regulatory and administrative functions. Similarly, the Moldovan courts will be deprived of their jurisdiction to determine the validity of ANRE's decision.[110]

113. According to the Respondent, this potential encroachment on the Respondent's sovereignty outweighs the Claimants' interest in obtaining the requested provisional measures.

[107] *Tokios Tokelés v. Ukraine,* ICSID Case No. ARB/02/18, Procedural Order No. 3, 18 January 2005, ¶ 8 (**Exhibit RL-041**).
[108] Respondent's Observations, ¶¶ 242 – 252.
[109] Respondent's Observations, ¶¶ 268 – 272.
[110] Respondent's Observations, ¶¶ 275 – 279.

IV. TRIBUNAL'S ANALYSIS

114. At the outset, the Tribunal makes a number of preliminary remarks.

115. ***First***, the Tribunal notes that both the Claimants and the Respondent have requested that the Claimants' Request for Provisional Measures be decided on the papers without the need for an oral hearing.[111] The Tribunal has carefully considered the arguments and the evidence before it on the papers and, on this basis, has decided to dismiss the Claimants' Request for Provisional Measures for the reasons set out below. However, this does not prevent either Party from seeking further relief, if and when necessary.

116. ***Second***, the Tribunal wishes to address the Respondent's argument that the Claimants are seeking to impermissibly amend their Memorial on the Merits through the Claimants' Request for Provisional Measures.[112] The Tribunal considers that the Claimants have not formulated a request to amend their Memorial on the Merits. The Tribunal will deal with such a request if and when filed.

117. ***Third***, concerning the Respondent's argument that it required additional time to respond to the Claimants' Request for Provisional Measures, the Tribunal is of the view that the briefing schedule provided to the Parties was adequate for a provisional measures application. As discussed in further detail below, the purpose of a provisional measures application is not to assess the merits of the case in detail. The Tribunal only does so on a *prima facie* basis.[113]

118. These preliminary remarks having been made, the Tribunal will now address whether it is vested with the power to grant provisional measures in Section IV(A), before setting out the relevant legal standard in Section IV(B), and subsequently applying that standard to the case at hand in Section IV(C).

[111] Email from the Claimants to the Tribunal Secretary, 31 October 2023; Email from the Respondent to the Tribunal Secretary, 31 October 2023.
[112] Respondent's Observations, ¶ 1; Respondent's Rejoinder, ¶ 27.
[113] See below at ¶¶ 137 *et seq*.

A. Power to Grant Preliminary Measures

119. Article 46 of the ICSID Additional Facility Arbitration Rules vests the Tribunal with the power to grant provisional measures. Paragraph 1 of Article 46 specifically provides that:

> "*Unless the arbitration agreement otherwise provides, either party may at any time during the proceeding request that provisional measures for the preservation of its rights be ordered by the Tribunal. The Tribunal shall give priority to the consideration of such a request."*

120. Nothing in the arbitration agreement, found in Article 26 of the ECT, prohibits the granting of provisional measures.[114]

121. The Tribunal notes that the Parties do not challenge that the Tribunal may in principle grant provisional measures.[115] Instead, the Respondent argues that either (i) the Tribunal lacks the capacity to grant the Claimants' requested relief because it would interfere with Moldova's sovereign rights,[116] or (ii) that the Moldovan courts have exclusive jurisdiction over the Suspension Decision.[117] These arguments seem to go to the *exercise* of the Tribunal's power to grant provisional measures under the relevant legal standard (discussed below) and do not, as such, challenge that this power exists.

B. Legal Standard for Granting Preliminary Measures

122. Article 46(1) of the ICSID Additional Facility Arbitration Rules does not provide any guidance as to how arbitral tribunals should exercise their discretion in granting provisional measures. Nonetheless, arbitral tribunals have over time distilled the conditions pursuant to which provisional measures may be granted. By way of example, in interpreting Article 46 of the ICSID Additional Facility Arbitration Rules and the related case law, the tribunal in *Anderson v. Costa Rica* emphasized that the two key factors that must be present to justify the granting of provisional measures are

[114] *See also* Claimants' Request, ¶ 48; Claimants' Request for Arbitration, 28 June 2022, ¶ 78.
[115] Claimants' Request, ¶ 48; Claimants' Reply, ¶ 24; Respondent's Observations, ¶ 70.
[116] Respondent's Observations, ¶ 16.
[117] Respondent's Observations, ¶¶ 141, 194 *et seq.*

that "*the measures must be necessary to preserve a party's rights*" and that "*the need for such measures must be urgent to avoid irreparable harm*."[118]

123. In this context, the Tribunal notes that the Parties have cited to arbitral case law that applies Article 47 of the ICSID Convention and/or ICSID Arbitration Rule 39(1). While these provisions do not apply to the case before the Tribunal, their wording is similar to the one in Article 46(1) of the ICSID Additional Facility Arbitration Rules. The Tribunal therefore agrees with the Parties that arbitral case law dealing with Article 47 of the ICSID Convention and/or ICSID Arbitration Rule 39(1) may be considered in interpreting Article 46(1) of the ICSID Additional Facility Arbitration Rules, unless there are established reasons requiring a distinction.

124. The Tribunal notes that the Parties are not fully aligned, but also not too far apart, as to the requirements for the granting of preliminary measures. The Claimants cite to *Sergei Paushok v. Mongolia*, where the Tribunal listed the following requirements: (i) "prima facie *jurisdiction*," (ii) "prima facie *establishment of the case*," (iii) "*urgency*," (iv) "*imminent danger of serious prejudice (necessity)*," and (v) "*proportionality*."[119] The Respondent instead listed the following five requirements and emphasized that provisional measures are extraordinary measures which should not be recommended lightly: (i) "*whether Rotalin has a right that requires preservation in the arbitration,*" (ii) "*there are circumstances of necessity to avoid irreparable harm being caused to Rotalin by Moldova 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 (v) "*any recommendation for the provisional measures must not prejudge the merits of the case*."[120]

125. Thus, the key differences in the Parties' suggested legal standards relate to (i) whether the Tribunal ought to assess jurisdiction and the merits of the case on a *prima facie* basis, (ii) whether the threshold for necessity is one of "*serious prejudice*" or

[118] *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Decision on Provisional Measures, 5 November 2008, ¶ 20 (**Exhibit CL-140**).
[119] *Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Mongolia,* UNCITRAL, Order on Interim Measures, 2 September 2008, ¶ 45 (**Exhibit CL-139**); Claimants' Request, ¶ 49.
[120] Respondent's Observations, ¶¶ 72, 84.

"*irreparable harm*," and (iii) whether there is an additional condition that the measures cannot be too broad.

126. The Tribunal will start by addressing the first point concerning the *prima facie* threshold for establishing jurisdiction and the merits of the case. While the Respondent argues that "*the requirement that the tribunal have* prima facie *jurisdiction is biased and self-sustaining,*"[121] the Respondent provides no case law support for its argument. The Tribunal notes that arbitral tribunals have regularly tested jurisdiction and merits on a *prima facie* basis only.[122] It is an inevitable and inherent consequence of the fact that provisional measures are typically requested in advance of a tribunal's decision on jurisdiction and/or merits. Therefore, tribunals are simply not in a position (and indeed it would be inappropriate for them) to make a final decision on these issues.

127. Turning now to the second point concerning the "*serious prejudice*" or "*irreparable harm*" standards, the Tribunal notes that a discussion in the abstract on these terms might seem like a question of semantics. More important, in the Tribunal's view, are the following considerations. On the one hand, it is clear that the threshold for granting preliminary measures is a high one.[123] On the other hand, the mere fact that the damage can be redressed by monetary compensation is not sufficient in all cases to rule out provisional measures. As the tribunal in *Sergei Paushok v. Mongolia* observed, "[t]*he possibility of monetary compensation does not necessarily eliminate the possible need for interim measures*."[124]

128. The Tribunal now turns to the third point concerning the alleged requirement that the provisional measures may not be too broad. The Tribunal considers that this principle

---

[121] Respondent's Observations, ¶ 104.
[122] See, e.g. *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Decision on Provisional Measures,5 November 2008, ¶ 15 ("The requirement of priority means that in order to avoid harm to rights that are at risk, the Tribunal, once having heard the arguments of the parties, should proceed to decide on the request for provisional measures before making any other decision, even those decisions relating to jurisdiction, a position taken by many ICSID tribunals.") (**Exhibit CL-140**).
[123] *Plama Consortium Limited v. Republic of Bulgaria,* ICSID Case No. ARB/03/24, Decision on Provisional Measures, 6 September 2005, ¶ 38 ("Provisional measures are extraordinary measures which should not be recommended lightly.") (**Exhibit RL-026**); *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Decision on Claimant's Request for Provisional Measures, ¶ 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.") (**Exhibit RL-029**).
[124] *Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Mongolia,* UNCITRAL, Order on Interim Measures, 2 September 2008, ¶ 68 (**Exhibit CL-139**).

is already reflected in the factors of necessity, urgency, and proportionality. As the tribunal explained in *Nova v. Romania,*

> *"*[i]*f the particular measure sought by the applicant is broader than required … to preserve the right in question, that portion of the measure will be neither necessary nor urgent, and almost by definition will impose burdens on the other party that are disproportionate to the claimed need."*[125]

129. In sum, the Tribunal considers that in exercising its discretion to recommend provisional measures under Article 46 of the ICSID Additional Facility Arbitration Rules, the Tribunal will consider the following criteria:

a. Whether the Tribunal has *prima facie* jurisdiction to hear the Claimants' claims;

b. Whether the Claimants' claims are *prima facie* well-founded;

c. Whether the requested measures are necessary to avoid irreparable harm to the Claimants' rights; and

d. Whether the requested measures are proportionate.

C. Applying the Legal Standard to the Case at Hand

1. <u>*Prima Facie* Jurisdiction</u>

130. The Tribunal assesses in this section whether it has *prima facie* jurisdiction to hear the Claimants' claims.

131. ***First***, the Tribunal notes that, contrary to the Claimants' assertion, the screening by the ICSID Secretary General when registering the case is not sufficient to demonstrate *prima facie* jurisdiction over the Claimants' claims.[126] As clarified by Article 5 of the ICSID Additional Facility Arbitration Rules, when notifying the parties of the registration of a request, the Secretary-General "*remind*[s] *the parties that the*

[125] *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Decision on Claimant's Request for Provisional Measures, ¶ 243 (**Exhibit RL-029**).
[126] *See, e.g. Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, ¶ 39 ("It is not enough for the Tribunal that the Secretary-General has found that the dispute is not manifestly outside the jurisdiction of the Centre and has therefore registered the Request for Arbitration under Article 36(3) of the ICSID Convention and Rule 6(1)(b) of the Institution Rules.") (**Exhibit RL-028**).

registration of the request is without prejudice to the powers and functions of the Arbitral Tribunal in regard to competence and merits."[127]

132. ***Second***, the Tribunal has already found in its Decision on Bifurcation that the Respondent's jurisdictional objections were not *prima facie* serious.[128] The Tribunal has not been presented with any new arguments or evidence, save an argument concerning the Suspension Decision on 21 October 2023. The Respondent argues that in submitting detailed briefs to the Moldovan courts, the Claimants have triggered the fork-in-the-road provision of the ECT and that accordingly the issue of the legality of the Suspension Decision is not for this Tribunal to decide.[129] The Respondent further argues that the proceedings before the Court dealt with the merits of the Suspension Decision and not merely with procedural aspects.[130] Finally, the Respondent emphasizes that the Court's decision has not yet become binding as the Claimants have the option to appeal it.[131] The Claimants, to the contrary, assert that the Court limited its review to fundamental procedural errors and did not concern itself with the material validity of the Suspension Decision.[132]

133. The Tribunal is not in a position to assess the scope of the Court's decision to uphold the validity of the Suspension Decision. The decision on the record is only the unreasoned dispositive version of the Court's decision.[133] The reasoned decision is yet to be published. As a result, the Tribunal cannot assess with certainty at this stage whether the underlying proceedings concerned the merits of the Suspension Decision (as the Respondent argues) or only procedural matters (as the Claimants argue).

134. However, even if the Court's decision did concern the merits of the Suspension Decision, the Tribunal is *prima facie* not convinced that this would trigger the fork-in-the road provision in the ECT. Article 26(2) of the ECT provides that:

---

[127] ICSID Additional Facility Arbitration Rules (2006), Art. 5(d) (**Exhibit CL-002**); *see also* Screening of an Application for Access and of a Request, and Registration – Additional Facility Arbitration (2006) Rules (**Exhibit CL-142**).
[128] Procedural Order No. 2, Decision on Bifurcation, 11 October 2023, ¶ 43.
[129] Respondent's Rejoinder, ¶¶ 87 *et seq.*
[130] Respondent's Rejoinder, ¶ 96; *see also* Second Witness Statement of Mihai Murgulet, 30 October 2023, ¶¶ 29-30.
[131] Respondent's Rejoinder, ¶¶ 97 *et seq.*
[132] Claimants' Reply, ¶ 20.
[133] Judgment of the Chisinau District Court, Docket No. 2c-2555/23, 21 October 2023, (**Exhibit C-313**); Second Witness Statement of Mihai Murgulet, 30 October 2023, ¶¶ 25-26.

> *"If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:*
>
> *(a) to the courts or administrative tribunals of the Contracting Party to the dispute;*
>
> *(b) in accordance with any applicable, previously agreed dispute settlement procedure; or*
>
> *(c) in accordance with the following paragraphs of this Article."*[134]

135. Notably, Article 26(3)(a) of the ECT goes on to provide that:

> *"Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article."*[135]

136. The Tribunal *prima facie* does not consider that this fork-in-the road provision could have been triggered by the Court's decision concerning the Suspension Decision, even if the Court had dealt with issues of material validity. This is because the application to the Court was filed by ANRE's legal department,[136] and the Claimants only filed a defence.[137] This is different from the Claimants actively choosing the Moldovan courts as their forum of choice under Article 26 of the ECT and thereby arguably triggering the fork-in-the road provision. In reaching this decision, the Tribunal has not made any finding as to whether the fork-in-the road provision in Article 26 of the ECT would apply to the case at hand otherwise.

137. In sum, therefore, the Tribunal finds that it has *prima facie* jurisdiction over the Claimants' claims. In doing so, the Tribunal does not in any way prejudge any issues of fact or law which may be raised by the Parties during these proceedings concerning the jurisdiction of the Tribunal to hear the Claimants' claims.

---

[134] Energy Charter Treaty, Art. 26(2) (**Exhibit CL-001**).
[135] Energy Charter Treaty, Art. 26(3)(a) (**Exhibit CL-001**).
[136] Respondent's Observations, ¶ 63; Second Witness Statement of Mihai Murgulet, 30 October 2023, ¶ 13; ANRE's Request for the Suspension of Supply License (**Exhibit MM-018**).
[137] Rotalin's Statement of Defence before Chisinau District Court (**Exhibit MM-023-1**).

2. *Prima Facie* Merits

138. The Tribunal assesses in this section whether the Claimants' claims are *prima facie* well-founded.

139. Tribunals have made clear that the standard for the *prima facie* establishment of the merits of the case is a low one. As the tribunal in *Pushok v. Mongolia* explained,

> *"*[e]*ssentially, the Tribunal needs to decide only that the claims made are not, on their face, frivolous … To do otherwise would require the Tribunal to proceed to a determination of the facts and, in practice, to a hearing on the merits of the case, a lengthy and complicated process which would defeat the very purpose of interim measures."*[138]

140. Tribunals have often relied on the test established by the International Court of Justice in the *Oil Platforms* case,[139] specifically Judge Higgins' formulation in her Separate Opinion that the court ought to "*accept* pro tem *the facts as alleged by* [the Applicant] *to be true*"[140] and assess on that basis whether there is a possibility of breach. As explained by Judge Higgins:

> *"The Court should … see if, on the facts as alleged by* [the Applicant]*, the* [Respondent's] *actions complained of might violate the Treaty articles … Nothing in this approach puts at risk the obligation of the Court to keep separate the jurisdictional and merits phases … and to protect the integrity of the proceedings on the merits … what is for the merits … is to determine what exactly the facts are, whether as finally determined they do sustain a violation of …* [the treaty] *and if so, whether there is a defense to that violation … In short it is at the merits that one sees 'whether there really has been a breach.'"*[141]

141. Having carefully considered the Parties' respective submissions presented to date, the Tribunal finds that nothing indicates, at this stage, that the Claimants' claims are on their face, frivolous. The Tribunal therefore finds that the Claimants' claims are *prima facie* well-founded. In doing so, the Tribunal does not in any way prejudge any issues

---

[138] *Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Mongolia,* UNCITRAL, Order on Interim Measures, 2 September 2008, ¶ 55 (**Exhibit CL-139**).
[139] *See, e.g., Desert Line Projects LLC v. Republic of Yemen,* ICSID Case No. ARB/05/17, Award, 6 February 2008, ¶¶ 129-131 (**Exhibit CL-143**); *David Minnotte and Robert Lewis v. Republic of Poland,* ICSID Case No. ARB(AF)/10/1, Award, 16 May 2014, ¶¶ 143-145 (**Exhibit CL-144**).
[140] *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America),* Judgment, 6 November 2023, Separate Opinion by Judge Higgins, p. 856 (**Exhibit CL-145**).
[141] *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America),* Judgment, 6 November 2023, Separate Opinion by Judge Higgins, pp. 856-857 (**Exhibit CL-145**).

of fact or law which may be raised by the Parties during these proceedings concerning the merits of the Claimants' claims.

3. Necessity

142. The Tribunal assesses in this section whether the requested measures are necessary to avoid irreparable harm to the Claimants' rights.[142]

143. As a first step, the Tribunal must establish which rights the Claimants are seeking to protect from irreparable harm through the requested measures. The Tribunal notes that the rights for which the Claimants seek protection are not the ones that form the basis of the Claimants' claims on the merits. The Claimants describe their claims on the merits as follows:

> *"Claimants' main claim in these proceedings is the claim for recovery of their holistic investment costs ('**Underrecovery Claim**'). As Rotalin invested into new gas networks in Moldova, according to basic regulatory principles it should have been allowed to recover the costs of these investments through tariffs. But this never happened. In addition, Claimants claim damages from Moldova's failure to open the market despite the repeated promises ('**TPA Claim**')."*[143]

144. The Claimants argue that "[w]*hile the request for provisional measures is connected to the arbitration in the sense that it seeks to prevent the aggravation of the dispute and interference with it, it is different from the Claimants' claims as pleaded in the Memorial on the Merits*."[144] The rights the Claimants seek to protect by way of provisional measures were listed by the Claimants as follows: (i) "*the right to maintain the* status quo ante," (ii) "*the non-aggravation of the dispute*," (iii) "*the right to be treated fairly and equitably and not to be unlawfully expropriated*," (iv) "*the right to preserve the integrity of the proceedings and equality of arms*," (v) and the "*Claimants' right to be heard*."[145]

---

[142] *See, e.g., Occidental Petroleum Corporation, Occidental Exploration and Production Company v. Republic of Ecuador,* ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶ 59 (**Exhibit RL-030**); *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005, ¶ 38 (**Exhibit RL-026**).
[143] Claimants' Reply, ¶ 10.
[144] Claimants' Reply, ¶ 46.
[145] Claimants' Reply, ¶ 43; *see also* Claimants' Request, ¶ 59.

145. The Tribunal considers that strict identity between the object of the requested provisional measures and the rights in dispute is not required. As the Tribunal in *Quiborax v. Bolivia* explained,

> *"the rights to be preserved by provisional measures are not limited to those which form the subject matter of the dispute, but may extend to procedural rights, including the general right to the preservation of the status quo and to the non-aggravation of the dispute."*[146]

146. These are self-standing rights, as recognized by the tribunal in *Burlington v. Ecuador*.[147]

147. There must, however, be a link between the requested provisional measures and the underlying dispute.[148] As the tribunal in *Plama v. Bulgaria* explained:

> *"The 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. Thus the rights to be preserved by provisional measures are circumscribed by the requesting party's claims and requests for relief. They may be general rights, such 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."*[149]

148. In the present case, some of the rights the Claimants seek to protect by the requested provisional measures are sufficiently linked to the underlying dispute, such as the general right to maintain the *status quo ante* or to avoid the non-aggravation of the dispute. However, the Claimants also argue that the provisional measures are required so as "*to be treated fairly and equitably and not to be unlawfully expropriated*." The

---

[146] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia,* ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 117 (**Exhibit RL-032**).

[147] *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (PetroEcuador)*, ICSID Case No. Arb/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009, ¶ 60 (**Exhibit RL-040**).

[148] *See, e.g. Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia,* ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 118 ("In the Tribunal's view, the applicable criterion is that "the right to be preserved bears a relation with the dispute.") (**Exhibit RL-032**); *see also Emilio Agustín Maffezini v. The Kingdom of Spain,* ICSID Case No. ARB/97/7, Procedural Order No. 2,28 October 1999, ¶ 23 ("Any preliminary measure to be ordered by an ICSID arbitral tribunal must relate to the subject matter of the case before the tribunal and not to separate, unrelated issues or extraneous matters") (**Exhibit RL-033**).

[149] *Plama Consortium Ltd v. Republic of Bulgaria,* ICSID Case No. ARB/03/24, Order, 6 September 2005, ¶ 40 (**Exhibit RL-026**).

Claimants' argument assumes that there would be a (further) breach of the FET and expropriation standards in the ECT if Rotalin were to definitively lose its supply license.[150] These, however, are claims and requests for relief that the Claimants have not yet formulated as of today.

149. In any event, as a second step, the Tribunal must also consider whether there is a risk of irreparable harm in relation to the rights that the Claimants seek to protect. The Claimants' core argument is that the requested provisional measures are necessary because otherwise (i) the Claimants will be in financial duress and thus unable to proceed with the arbitration,[151] and (ii) there is a risk of further treaty breaches (notably, breaches of the FET and expropriation standards in the ECT)[152] if Rotalin were to definitively lose its supply license. The Tribunal will address both arguments in turn.

Financial Duress and Inability to Proceed with the Arbitration

150. While the Claimants allege their financial precarity threatening an inability to continue with the arbitration, they have not provided any evidence to this effect, much less compelling evidence. In the absence of such evidence, the picture emerging from the record is mixed.

151. On the one hand, some of the submissions and documents on record seem to suggest that in recent times Rotalin has been able to operate at a profit, at least during a certain period of time.[153] The Claimants argue (without providing evidence) that this profit has been used to repay past debts to ModovaGaz.[154]

152. On the other hand, Rotalin has stressed in correspondence with the Emergency Commission of the Moldovan Government and ANRE that it was under "*current working capital constraints*."[155]

[150] Claimants' Request, ¶ 64; Claimants' Reply, ¶¶ 11, 43.
[151] Claimants' Request, ¶¶ 66, 70; Claimants' Reply, ¶¶ 43, 52, 77.
[152] Claimants' Request, ¶ 64; Claimants' Reply, ¶¶ 11, 43.
[153] Claimants' Request, ¶ 35; Letter No. 06-01/4012 from ANRE to Rotalin, 28 September 2023, (**Exhibit C-305**); *see also* Respondent's Rejoinder, ¶¶ 48-54.
[154] Claimant's Request, ¶ 38.
[155] Letter No. 1258 from Rotalin to Emergency Commission and ANRE, 8 September 2023, (**Exhibit C-301**); *see also* Claimants' Request, ¶ 38; Claimants' Reply, ¶ 15.

153. However, and in any event, even if Rotalin and/or the Claimants are in fact facing financial constraints, the Claimants have not established that this would lead to an inability to proceed with the present arbitration. The Tribunal notes that claimants, even in financially precarious situations, generally have means to proceed with legal proceedings and it is not for this Tribunal to assess the Claimants' options and strategic choices.

Loss of the Supply License

154. The Tribunal acknowledges that the loss of Rotalin's supply license could, in certain circumstances, be seen as irreparable harm, because in such a scenario (as the Claimant argues and the Respondent does not contest) Rotalin would definitively lose its client base.[156]

155. However, the potential loss of the supply license in this case is, in the first instance, a consequence of the Claimants' affirmative decision to stop supplying gas to consumer households as from 1 October 2023. The Claimants and other gas suppliers have an obligation to supply gas to consumer households at regulated prices (the so-called PSO).[157] The Claimants were aware of this obligation. By way of example, in the 8 September 2023 correspondence to the Emergency Commission of the Moldovan Government and ANRE, the Claimants "*acknowledge the imperative of maintaining an uninterrupted gas supply to the population and are prepared to comply with the new tariffs for as long as possible*."[158]

156. The Claimants argue that notwithstanding this statement, they subsequently had no choice but to stop the supply of gas, because (i) Decision No. 523 concerning the Claimants' tariffs was incorrect and resulted in supply prices that were too low, and that (ii) as a consequence, it was "*impossible*" for the Claimants to continue supplying gas.[159]

[156] *See* Claimants' Request, ¶¶ 64, 71.
[157] ANRE Decision No. 287, 17 November 2016 (**Exhibit MM-003**); ANRE Decision No. 487, 20 December 2019 (**Exhibit C-279**).
[158] Letter No. 1258 from Rotalin to Emergency Commission and ANRE, 8 September 2023 (**Exhibit C-301**).
[159] Claimants' Request, ¶¶ 28-39; Claimants' Reply, ¶¶ 6, 33, 43.

157. However, the Tribunal has not been presented with compelling evidence for either prong of the Claimants' argument.

a. With regards to the first prong, the Claimants have not sufficiently substantiated to what extent ANRE's tariff determination in Decision No. 523 was wrong, other than alleging that it should have taken into account historical losses. The Claimants merely argue that the price is too low and would not allow them to supply gas profitably.[160] In doing so, the Claimants acknowledge that ANRE applied its methodology, even if the Claimants consider that methodology to be affected by "*shortcomings*."[161]

b. With regards to the second prong, even if one were to accept the Claimants' argument that the tariffs are so low that they would not allow the Claimants to supply gas *profitably*, the Claimants have not presented any compelling evidence of why this rendered its supply of gas *impossible*. ANRE's tariff decision is, in principle, only valid for a limited period of time,[162] and suffering losses for a limited period of time does not render the supply impossible. The Claimants assert that continuing to supply gas would mean having to "*cross-subsidize its supply operations via revenues earned by its redistribution operation, thereby risking the safety of both operations*."[163] Again, the Tribunal considers that no compelling evidence has been presented on what these alleged safety risks would entail.

158. In sum, for the reasons set out above, the Tribunal decides that the Claimants have not demonstrated that the requested measures are necessary to avoid irreparable harm to the Claimants' rights.

[160] Claimants' Request, ¶¶ 28-33; Claimants' Rejoinder, ¶¶ 6, 72.
[161] Claimants' Request, ¶ 35 ("ANRE applies an isolated observation period to fabricate an alleged overrecovery: ANRE arrived at the insufficient tariff by conveniently taking advantage of the shortcomings of the tariff methodology that ANRE itself created.").
[162] The Tribunal understands that license holders submit requests regarding regulated tariffs on an annual basis, by 1 February of each year. *See* Claimants' Request, ¶ 17; ANRE Decision No. 286 Regarding the Approval of the Regulation on the Procedures for the Presentation and Examination of License Holders' Applications Regarding Regulated Prices and Tariffs, 17 October 2018, Section 1(3)(b), Section 2(5)(2)(a) (**Exhibit C-240**).
[163] Claimants' Request, ¶¶ 35, 43, 65.

159. In light of its finding, the Tribunal does not consider it necessary to address the other requirements for provisional measures.

160. Finally, the Tribunal considers that its conclusion is unaffected by the Claimants' Request for Reconsideration. The Tribunal notes that during the meeting of 17 November 2023, ANRE postponed its decision on whether to impose a fine on Rotalin because of Rotalin's decision to stop supplying gas under the PSO.[164] The mere fact that a press release that mistakenly stated otherwise was issued[165] is, in the Tribunal's view, not materially relevant to the Tribunal's assessment as outlined above. In these circumstances, the Tribunal does not deem it necessary to assess, as requested by the Respondent, whether the Claimants' Request for Reconsideration was "*an improper procedural submission*."[166]

[164] Claimants' Request for Reconsideration, p. 1; Witness Statement of Natalia Baiesu, 21 November 2023, ¶ 24.
[165] Claimants' Request for Reconsideration, p. 1; Respondent's Objection, pp. 2, 4; Witness Statement of Natalia Baiesu, 21 November 2023, ¶¶ 30 – 31.
[166] Respondent's Objection, p. 5.

V. DECISION

161. Considering the above, the Tribunal decides as follows:

a. Dismisses the Claimants' Request for Provisional Measures;

b. Dismisses the Claimants' Request for Reconsideration; and

c. Reserves its decision on costs arising out of the Claimants' Request for Provisional Measures and the Claimants' Request for Reconsideration.

For and on behalf of the Tribunal,

Signed

_____
Prof. Maxi Scherer
President of the Tribunal
Date: 11 December 2023