

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Nova Group Investments, B.V.

v.

Romania

(ICSID Case No. ARB/16/19)

PROCEDURAL ORDER NO. 8

**DECISION ON RESPONDENT'S REQUEST FOR
RECONSIDERATION OF PROCEDURAL ORDER NO. 7**

Members of the Tribunal

Ms. Jean Kalicki, President of the Tribunal

Prof. Thomas Clay, Arbitrator

Mr. Klaus Reichert SC, Arbitrator

Secretary of the Tribunal

Ms. Lindsay Gastrell

18 April 2017

CONTENTS

I.	PROCEDURAL BACKGROUND.....	1
II.	THE PARTIES' POSITIONS.....	2
	A. Romania's Request for Reconsideration	2
	(1) Measures to Preserve the Status Quo.....	3
	(2) Necessity	4
	B. Claimant's Observations	6
	(1) Implementation of the Recommendation.....	6
	(2) Measures to Preserve the Status Quo.....	7
	(3) Necessity.....	8
III.	THE TRIBUNAL'S ANALYSIS	9
IV.	DECISION.....	19

I. PROCEDURAL BACKGROUND

1. On 21 June 2016, the claimant, Nova Group Investments, B.V. (“**Nova**” or “**Claimant**”) filed a Request for Provisional Measures (the “**Request for Provisional Measures**”), together with its Request for Arbitration against the respondent, Romania (also referred to as “**Respondent**”).
2. Following two rounds of written submissions and a hearing in London on 2 and 3 March 2017 (the “**Hearing**”), on 29 March 2017, the Tribunal issued Procedural Order No. 7 (“**PO7**”), containing its Decision on Claimant’s Request for Provisional Measures (the “**Decision**”).¹ That Decision included, *inter alia*, the following recommendation (the “**Recommendation**”):
 - a. The Tribunal recommends, pursuant to Article 47 of the ICSID Convention, that Romania withdraw (or otherwise suspend operation of) the transmission of European Arrest Warrant Ref. 3576/2/2016 by the Romanian Ministry of Justice and associated request for extradition submitted to the Home Office of the United Kingdom on 6 June 2016, and refrain from reissuing or transmitting this or any other European Arrest Warrant or other request for extradition for Alexander Adamescu related to the subject matter of this arbitration until the Final Award in this case is rendered.
 - b. This recommendation is conditional on Mr. Adamescu’s strict compliance with the undertakings and mechanisms outlined in Section VII.E.1 of this Decision, in order to maintain the *status quo* which prevents his departure from England, Scotland or Wales during the pendency of this arbitration, except as necessary to attend an arbitration hearing in Washington, D.C. As one of these conditions involves the continued sequestration of Mr. Adamescu’s passport in the event it is relinquished by the UK authorities, the Tribunal requests the Parties to confer promptly about the potential custodian for the passport, as well as suggestions for appropriate terms and conditions, consistent with the general framework the Tribunal has outlined herein. The Tribunal requests the Parties to report back (jointly or

¹ The factual background and extensive procedural history relating to the Request for Provisional Measures are set forth in PO7.

separately) regarding such mechanisms within two weeks of the date of this Decision.²

3. The Tribunal denied the Request for Provisional Measures in all other respects.
4. Also on 29 March 2017, the Tribunal issued Procedural Order No. 6 (“**PO6**”), in which it denied Romania’s Request for Bifurcation of the Proceedings, dated 19 December 2016 (the “**Request for Bifurcation**”).
5. On 10 April 2017, Romania filed a letter requesting that the Tribunal reconsider the Recommendation contained in PO7 (the “**Request for Reconsideration**”).
6. Upon the invitation of the Tribunal, on 12 April 2017, Nova submitted its observations on the Request for Reconsideration (the “**Observations**”). Nova asks the Tribunal “to reject [the Request for Reconsideration], and order Romania to comply with the Tribunal’s binding recommendations set out in PO7 without further delay, and in any event by 20 April 2017.”³
7. Nova also submitted a second letter on 12 April 2017, in which it set forth the steps it had taken to implement the Recommendation (the “**Second Letter**”).

II. THE PARTIES’ POSITIONS

A. Romania’s Request for Reconsideration

8. Romania reports that, after meetings involving the Prime Minister, “the highest levels of Government,” and various State organs, it has taken “no firm decision” in relation to the Tribunal’s decision in PO7.⁴ According to Romania, the “unprecedented nature” of the Recommendation, and the resulting interference with Romania’s sovereign right to pursue criminal suspects, makes compliance difficult.⁵

² PO7, ¶ 365.

³ Observations, p. 1.

⁴ Request for Reconsideration, ¶¶ 2-3.

⁵ Request for Reconsideration, ¶ 4.

9. Romania identifies three reasons for this alleged difficulty: (a) internal institutional issues, (b) public perception, and (c) the content of PO7.
10. First, regarding the “institutional” impediments to compliance, Romania argues that implementation of the Recommendation “would require interfering with the independence of both the Romanian judiciary and the Prosecutor’s Office.”⁶ In Romania’s view, such action would be inconsistent with the Romanian Constitution and its obligations under other international agreements.⁷
11. Second, Romania states that compliance with the Recommendation “will be perceived by the Romanian public as unacceptable preferential treatment being afforded to a private individual.”⁸ Therefore, in light of recent popular demonstrations over the Government’s approach to corruption, Romania considers that the Recommendation could “further fuel public unrest.”⁹
12. Third, Romania challenges the content of the Tribunal’s decision in PO7. In particular, Romania submits that (a) the measures adopted by the Tribunal to preserve the *status quo* are insufficient, and (b) the Recommendation is premature and thus unnecessary.

(1) Measures to Preserve the Status Quo

13. Romania recalls that the Tribunal made the Recommendation “strictly conditional” on Alexander Adamescu remaining in “England, Scotland or Wales during the pendency of this arbitration, except as necessary to attend an arbitration in Washington D.C.,” which the Tribunal considered “an important element of preserving the *status quo*.”¹⁰ Yet, according to Romania, the measures that the Tribunal adopted to preserve the *status quo* will not be effective, for the following reasons:

⁶ Request for Reconsideration, ¶ 5.

⁷ Request for Reconsideration, ¶ 5, *citing* Romanian Constitution, Articles 124 and 133(1) (available at http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=3#t3c6s1sba124) and European Convention on Human Rights, Article 6 (available at http://www.echr.coe.int/Documents/Convention_ENG.pdf).

⁸ Request for Reconsideration, ¶ 6.

⁹ Request for Reconsideration, ¶ 6.

¹⁰ Request for Reconsideration, ¶ 10, *citing* PO7, ¶¶ 320, 324.

- a. The strict bail conditions currently imposed on Alexander Adamescu by the UK authorities are the only measures that could possibly prevent him from fleeing the UK.¹¹
 - b. The sequestration of Mr. Adamescu’s German passport “will not prevent him from travelling to other countries on other forms of ID, or from obtaining another passport, either by declaring his own lost, or by obtaining the nationality of an entirely new state.”¹²
 - c. Mr. Adamescu’s “undertakings” are unreliable, as demonstrated by his conduct in this arbitration, which includes lying to the Tribunal and forging documents.¹³
 - d. Even if Mr. Adamescu complied with the Tribunal’s instructions during this arbitration, the Tribunal would have no means of preventing him from leaving the UK upon issuance of the final award, leaving him a window within which to flee before Romania could resume the extradition proceedings.¹⁴
 - e. By the time of the final award, the UK likely will have exited the EU, creating a risk that Romania would be unable to seek Mr. Adamescu’s extradition from the UK.¹⁵
14. Given these alleged shortcomings of the precautions specified in PO7, Romania argues that the Recommendation is not proportionate.¹⁶

(2) Necessity

15. According to Romania, the Parties did not have the information required to properly brief the relevant issues before the Tribunal issued PO7. Specifically, the Parties were not aware

¹¹ Request for Reconsideration, ¶ 9.

¹² Request for Reconsideration, ¶ 10.1.

¹³ Request for Reconsideration, ¶ 10.2.

¹⁴ Request for Reconsideration, ¶ 10.3.

¹⁵ Request for Reconsideration, ¶ 10.4.

¹⁶ Request for Reconsideration, ¶ 10.

of the final procedural timetable or the Tribunal’s “concerns and rationale” in relation to the Request for Provisional Measures.¹⁷

16. Considering the current procedural calendar, Romania submits that the Recommendation is premature. Romania reasons that even if Mr. Adamescu’s extradition hearing is held on 24 April 2017, he is very likely to remain in the UK until the filing date for Nova’s memorial, 14 July 2017, and could freely assist counsel during that period.¹⁸
17. In fact, according to Romania, even if Mr. Adamescu were extradited to Romania, he could arguably be prevented from assisting Nova’s counsel only if he were “placed in pre-trial detention (rather than, for instance, house arrest), or ultimately, convicted to hard prison time.”¹⁹ Those are hypothetical scenarios, and in any event, it is far from clear that Mr. Adamescu would be convicted and sentenced before the hearing on the merits in March 2019.²⁰
18. Thus, Romania proposes that if Mr. Adamescu were extradited,

Romania would then exchange on what measures or assurances, within the framework of Romanian law, it could offer, if necessary, and to the extent necessary at that point in time, for Mr. Alexander Adamescu to have the required ability and privacy, in his capacity as witness and/or purported party representative, to undertake what is needed, as per industry practice in similar cases ... for Claimant to be able to proceed until the conclusion of the proceedings.²¹

¹⁷ Request for Reconsideration, ¶ 12. Romania disagrees with the Tribunal’s approach to addressing the Request for Provisional Measures and the Request for Bifurcation. In Romania’s view, the Tribunal should have taken the following steps in order: (a) decided on the Request for Bifurcation, (b) “set out its concerns and rationale for considering the Request for Provisional Measures,” (c) invited further submissions on the timing and nature of the assistance Nova would need from Alexander Adamescu, and (d) then, if it considered measures necessary, invited further submissions on the safeguards required.

¹⁸ Request for Reconsideration, ¶¶ 14-15, 22.

¹⁹ Request for Reconsideration, ¶ 16. Romania asserts that it cannot give assurances at this time that Mr. Adamescu would be placed under house arrest because he has not allowed Romania to notify him of the charges against him, even through the EU mutual assistance procedures. Request for Reconsideration, ¶ 19.

²⁰ Request for Reconsideration, ¶ 17.

²¹ Request for Reconsideration, ¶ 23.

B. Claimant’s Observations

19. Nova’s position is that the Tribunal should deny the Request for Reconsideration because Romania has identified no new facts or circumstances that would warrant reconsideration of PO7. Rather, Romania’s arguments “were either already advanced ... and considered by the Tribunal or could have been advanced prior to or at the hearing on 2 and 3 March 2017.”²² Thus, in Nova’s view, the Request for Reconsideration is merely a delay tactic adopted by Romania “in the hope that the extradition of Alexander Adamescu might become a *fait accompli* before Romania is constrained to comply with the Tribunal’s order.”²³
20. Nova submits that (a) Romania faces no legally cognizable difficulty in implementing the Recommendation; (b) the measures adopted by the Tribunal to prevent Mr. Adamescu’s departure from the UK are adequate; and (c) the Recommendation is necessary.

(1) Implementation of the Recommendation

21. According to Nova, Romania has failed to comply with the Recommendation in violation of its international law obligations.²⁴ In this context, Nova produces a 31 March 2017 letter from the Romanian Ministry of Justice to the Crown Prosecution Service stating that

the issuing authority will not withdraw the [European Arrest Warrant for Mr. Adamescu], taking into account that [a European Arrest Warrant] can be withdrawn only under the legal provisions set out in the Romanian Criminal Proceedings Code and article 94 of Law n. 302/2004 and these legal provisions are not applicable in this case.²⁵

22. Nova argues that Romania’s submissions regarding alleged difficulty in implementing the Recommendation must be rejected for the following reasons:

²² Observations, p. 3.

²³ Observations, p. 1.

²⁴ Observations, pp. 1-2.

²⁵ Letter from the Romanian Ministry of Justice to the Extradition Squad at the Crown Prosecution Service, 31 March 2017.

- a. Under international law, “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”²⁶
- b. There is a mechanism under Romanian law to compel State organs, including the judiciary, to comply with Romania’s international treaty obligations.²⁷
- c. Romania has provided no support for its claim that compliance with the Recommendation would pose a threat to public order, or that it would cause Romania to breach other international obligations.²⁸

(2) Measures to Preserve the Status Quo

23. Nova contends that the Tribunal has considered all of Romania’s concerns regarding the precautions adopted to prevent Mr. Adamescu from fleeing the UK. Thus, such arguments cannot constitute grounds for reconsideration of PO7.²⁹
24. In any event, Nova states that “[t]here are very real circumstantial, practical and legal impediments to Mr Adamescu leaving England, Wales or Scotland except for the purpose of attending the hearing in Washington DC in due course.”³⁰ Mr. Adamescu has lived with his family in London since 2012 and has no incentive to abscond to another country while this arbitration is pending. Nor is it clear how he would manage to do so without his passport. In this context, Nova denies Romania’s allegation that Mr. Adamescu cannot be trusted to comply with his undertakings to the Tribunal.³¹

²⁶ Observations, p. 3, *quoting* the Vienna Convention on the Law of Treaties, Article 27.

²⁷ Observations, p. 3, *citing* Romanian Law No. 590, 2003, Article 31(1)-(3) (“The enforcement of and the compliance with the provisions of the treaties in force represents an obligation for all the authorities of Romanian State, **including the juridical authority**, as well as for the Romanian natural and legal persons or those located on the Romanian territory. ... The Government, Ministry of Foreign Affairs, as well as other ministries and authorities of the State have the obligation of taking all the measures required for the enforcement of the treaties in force, as well as for controlling their execution.”) (Nova’s emphasis).

²⁸ Observations, p. 4.

²⁹ Observations, p. 4.

³⁰ Observations, p. 4.

³¹ Observations, p. 4.

25. Nova also rejects Romania’s assertion that Mr. Adamescu will have a window within which to freely leave the UK after issuance of the final award. For Nova, this argument is “unsubstantiated and unfounded” and, in any event, “premature.”³²

(3) Necessity

26. According to Nova, the Tribunal has also considered and addressed Romania’s remaining arguments relating to the necessity of the Recommendation.
27. In particular, Nova submits that Romania had every opportunity to brief the Tribunal on the impact of the procedural timetable on the Request for Provisional Measures.³³ The Tribunal set two timetables in Procedural Order No. 1, one of which would apply in the absence of bifurcation, and Romania could have made submissions in relation to these timetables.³⁴ In fact, at the Hearing, the Tribunal invited Romania to consider amendments to the timetables.³⁵
28. Similarly, Nova points out that during the Hearing, the Tribunal expressly invited the Parties’ views on what measures could be adopted to prevent Mr. Adamescu’s departure from the UK. In response, Romania made the same arguments it now advances in support of the Request for Reconsideration.³⁶
29. Nova rejects Romania’s position that the Recommendation is premature because Mr. Adamescu is unlikely to be extradited before the filing of Nova’s memorial. According to Nova, the Tribunal addressed this in PO7 when it decided that (a) Mr. Adamescu’s participation would be essential throughout the proceeding, and (b) the decision on the Request for Provisional Measures could not await the English court’s ruling on Mr. Adamescu’s extradition.³⁷

³² Observations, p. 5.

³³ Observations, p. 5.

³⁴ Observations, p. 5, *citing* Procedural Order No. 1, Annex A.

³⁵ Observations, p. 5.

³⁶ Observations, p. 5.

³⁷ Observations, p. 5, *citing* PO7, ¶¶ 307, 311-312.

30. Finally, Nova asserts that the Tribunal already considered Romania's arguments concerning the probability that Mr. Adamescu will be placed into custody, finding that "detention is likely" and that there is "a 'material risk' of incarceration."³⁸

III. THE TRIBUNAL'S ANALYSIS

31. The Tribunal begins by acknowledging that the subject of reconsideration of ICSID decisions has been the focus of debate, with some tribunals disclaiming authority to revisit their prior determinations,³⁹ and others considering the authority to be inherent, albeit to be exercised sparingly.⁴⁰ The Tribunal considers it unnecessary to enter into this debate in the particular context of provisional measures, which by definition are "provisional" and not permanent.⁴¹ In that context, it is appropriate that parties may apply for the modification or termination of prior recommendations, or for the grant of new or additional recommendations, *based on changed circumstances*.⁴² The very nature of the provisional

³⁸ Observations, p. 5, citing PO7, ¶ 290.

³⁹ See, e.g., *ConocoPhillips Petrozuata B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration (Majority Decision), 10 March 2014, ¶¶ 19-23; *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Ecuador's Reconsideration Motion, 10 April 2015, ¶¶ 22-97; *ConocoPhillips Petrozuata B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration of the Tribunal's Decision of 10 March 2014 (Majority Decision), 9 February 2016, ¶¶ 20-37.

⁴⁰ See, e.g., *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration (Dissenting Opinion), 10 March 2014, ¶¶ 33-62; *Churchill Mining PLC and Planet Mining Pty Ltd. v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 15 (Claimants' Request for Reconsideration of Procedural Order No. 13), 12 January 2015, ¶ 23; *ConocoPhillips Petrozuata B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration of the Tribunal's Decision of 10 March 2014 (Dissenting Opinion), 9 February 2016, ¶¶ 24-80; *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited (TANESCO)*, ICSID Case No. ARB/10/20, Award, 12 September 2016, ¶¶ 307-324.

⁴¹ **CL-28**, *Victor Pey Casado & President Allende Foundation v. Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, 25 September 2001, ¶ 14, (2001) 6 ICSID Reports 373, 380 ("the provisional measures, which are provisional by nature and by definition . . . , can be modified or cancelled at any time by the Tribunal, do not benefit from the force of *res judicata*, will only last for the duration of the proceedings and automatically fall if the Tribunal decides that it lacks jurisdiction to decide the case").

⁴² **CL-34**, *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Order, 30 May 2014, ¶¶ 8-9 ("[t]here is no doubt that the Tribunal has the authority to modify a decision on provisional measures," but "[s]uch a modification has to be based on changed circumstances, which make it urgent and necessary to adopt a new decision on provisional measures, which can suspend, terminate or modify the scope of the provisional measures initially granted"); **RL-21**, *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 14, 22 December 2014, ¶ 66 (noting that prior denial of provisional measures was accompanied by the observation that "its finding could be revised if the circumstances were to change," and proceeding to consider a new provisional

measures analysis involves assessments of the necessity, urgency and proportionality of particular measures at particular points in time,⁴³ and *if the underlying facts have changed* that alter the prior calculus, parties should be free to bring these changes to a tribunal's attention. This is different, however, from simply asking a tribunal to "reconsider" its prior decision *based on the exact same evidentiary and legal record as previously presented*. Even if an ICSID tribunal had such inherent authority – which this Tribunal considers unnecessary to decide – it would only be appropriate to exercise it in the exceptional case where a Tribunal is persuaded that it somehow had overlooked something truly material in the prior record, which otherwise would have led it to a different conclusion.⁴⁴

32. In this case, Romania does not suggest that any circumstances have changed in the short time since the Tribunal's issuance of the Decision, much less to such a degree as to demonstrate compelling new circumstances that would undermine the fundamental basis of that Decision. Nor does Romania contend that the Tribunal failed to address any material issue that was before it. Rather, Romania's application is largely directed at persuading the Tribunal it was wrong in its prior assessment, while articulating with more emphasis a few points that Romania presented before, but could have developed further in its extensive written and oral pleadings. Neither presents a compelling basis for a reconsideration request.
33. The Parties were given ample opportunity to present whatever arguments and evidence they wished, both in writing and orally. The Tribunal evaluated these arguments and evidence carefully, and set forth its analysis in a 139-page Decision that represents, to its

measures request based on allegedly changed circumstances); **CL-52**, *Hydro S.r.l. & Others v. Republic of Albania*, ICSID Case No. ARB/15/28, Decision on Claimant's Request for a Partial Award and Respondent's Application for Revocation or Modification of the Order on Provisional Measures, 1 September 2016, ¶¶ 4.1-4.2 (considering it appropriate to revoke prior provisional measures and replace them with "differently-worded recommendations," in light of changed circumstances).

⁴³ PO7, ¶¶ 237, 264.

⁴⁴ See *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited (TANESCO)*, ICSID Case No. ARB/10/20, Award, 12 September 2016, ¶ 322 ("Whatever the power the tribunal has to reconsider a decision ... such a power should not be seen as unlimited.... [T]he decisions made by ICSID tribunals in the course of a case are binding, and it would lead to considerable uncertainty if tribunals were to assert an unconstrained power to reopen any decisions made. A decision of an ICSID tribunal cannot be considered to be merely a draft that can be reopened at will.").

understanding, the most detailed exposition to date of provisional measures issues arising in the context of domestic proceedings.⁴⁵

34. Specifically, in its Decision, the Tribunal recommended the “minimum steps”⁴⁶ that it considered necessary and urgent to preserve the right to procedural integrity,⁴⁷ with regard to Nova’s ability to present its case with the direction and assistance of Alexander Adamescu, and the Tribunal’s ability to properly hear that case (including through eventual questioning of Mr. Adamescu and assessment of his credibility). This recommendation was based on a very detailed evaluation of the arguments and evidence presented by both Parties, not only about Mr. Adamescu’s role as witness and party representative,⁴⁸ but also about the obstacles to his continued participation in the case if the recommendation was not made.⁴⁹ The Tribunal expressly considered the timetable of the current extradition proceedings and of the subsequent proceedings in Romania;⁵⁰ the complications that would arise from deferring decision until after the UK courts had entered a binding extradition order;⁵¹ the likelihood that Mr. Adamescu would be placed in pre-trial detention rather than under home arrest;⁵² and the conditions of access by counsel to Mr. Adamescu and of Mr. Adamescu’s participation in these proceedings from a prison facility, either during pre-trial detention or after conviction.⁵³ The Tribunal also considered at length each of the arguments Romania had identified regarding prejudice to it of a recommendation regarding

⁴⁵ The Tribunal notes the request from ICSID, in its 29 March 2017 transmittal letter accompanying PO6 and PO7, for the Parties to indicate whether they consented to publication of these decisions on the ICSID website. The Parties have not yet responded to this request. The Tribunal would prefer, in the interests of both Parties, that any eventual discussion of the Recommendation in the public arena occur in an accurate context, and not based on mistaken assumptions about what the Tribunal may or may not have decided. The Parties therefore are requested to provide their responses to ICSID’s prior inquiry regarding consent to official publication of PO7, as well as this ruling on Romania’s reconsideration request. Of course, such inquiries regarding mutual consent to publication on the ICSID website do not govern the separate conduct of the Parties regarding any unilateral release, which the Tribunal can only hope will be handled in a responsible and accurate fashion.

⁴⁶ PO7, ¶¶ 227, 243, 313, 365.

⁴⁷ PO7, ¶ 235.

⁴⁸ PO7, ¶¶ 278-289, 302-307.

⁴⁹ PO7, ¶¶ 289-301, 307.

⁵⁰ PO7, ¶¶ 290, 310-311.

⁵¹ PO7, ¶¶ 312-313.

⁵² PO7, ¶ 290.

⁵³ PO7, ¶¶ 291-301, 307.

extradition.⁵⁴ Finally, the Tribunal considered at length the legal framework applicable to requests for provisional measures, both in general⁵⁵ and in the specific context of domestic criminal proceedings.⁵⁶

35. By contrast with its recommendation regarding extradition, the Tribunal denied Nova's request for many other provisional measures regarding Romania's domestic proceedings, finding that these did not meet the exacting standards of necessity, urgency and proportionality.⁵⁷ The Tribunal distinguished between the measures it recommended (which sought to preserve the *status quo* to the greatest extent feasible regarding Mr. Adamescu's present situation) and those it did not (which would have altered the *status quo* significantly).⁵⁸ The Tribunal took exquisite care to assess each requested measure separately and in all of its components, with careful attention to each principal argument presented, and to distinguish for each measure the specific legal and factual matrix that differentiated it from the other measures.
36. Romania now asks the Tribunal essentially to reverse its comprehensive ruling, based on arguments that Romania raised before or that it could have raised before, in more detail or with different emphasis than it actually did. For example, *with respect to the issue of necessity*, Romania presents arguments in its reconsideration request about the potential conditions under which Mr. Adamescu might be held in Romania after extradition, and the related conditions by which Nova might have access to him. Specifically, Romania argues that there are various scenarios under which access to Mr. Adamescu might be facilitated, for example if he is held under house arrest pending his trial, or placed in more open prison facilities rather than under "hard prison time" following any conviction.⁵⁹ But the issue of potential custodial arrangements in Romania was addressed by the Parties in their written submissions and opening statements, and the Tribunal specifically asked Romania to consider further overnight, and then address in its closing arguments, whether it could offer

⁵⁴ PO7, ¶¶ 314-320.

⁵⁵ PO7, ¶¶ 226-244.

⁵⁶ PO7, ¶¶ 245-257.

⁵⁷ PO7, ¶¶ 309, 339, 353-354, 357-358.

⁵⁸ PO7, ¶¶ 264-270, 309, 320, 328, 347.

⁵⁹ Request for Reconsideration, ¶ 16.

any assurances or undertakings about the conditions of detention that might apply, so as to ensure Mr. Adamescu’s ability to participate appropriately in these proceedings.⁶⁰ It became clear nonetheless that Romania either could not or would not commit in advance to any particular custodial arrangements, and even now, in its Request for Reconsideration, it does not offer any such commitments.⁶¹

37. Rather, Romania’s argument continues to be that it is premature for the Tribunal to conclude that access and participation could be endangered by extradition, because any such conclusion is speculative until the actual conditions of Mr. Adamescu’s confinement are determined at some time in the future. But this argument confuses the applicable legal standard in the context of procedural integrity, which – as the Tribunal expressly found – is whether there is a “material risk” to the integrity of proceedings, not whether impairment is an absolute certainty at the time a tribunal is asked to act.⁶² In the absence of any meaningful assurances, Romania cannot expect the Tribunal to simply hope for the best until the extradition and detention are both *fait accompli*, and then (only after the proverbial “horse has left the barn”) to consider whether it is possible to recommend any easement of detention conditions to facilitate greater access and participation. This approach would not preserve the Tribunal’s ability to recommend effective measures after the *status quo* already would be fundamentally changed.
38. Similarly, *with respect to the issue of urgency*, Romania presents arguments based on the procedural timetable of this case, suggesting that (a) Nova likely could complete its work on Mr. Adamescu’s first witness statement prior to any extradition order being

⁶⁰ Hearing Transcript, 2 March 2017, 271:15-272:10.

⁶¹ Request for Reconsideration, ¶ 19 (noting that it remains premature for Romania “to potentially provide assurances that it would request, or at least ... refrain from opposing the placement of Mr. Alexander Adamescu under house arrest, rather than pre-trial detention, until a final and definitive conviction”) and ¶ 23 (suggesting that only after Mr. Adamescu was “ultimately extradited to Romania” would Romania “*then* exchange on what measures or assurances, within the framework of Romanian law, it could offer, if necessary, and to the extent necessary at that point in time, for Mr. Alexander Adamescu to have the required ability and privacy, in his capacity as witness and/or purported party representative, to undertake what is needed, as per industry practice in similar cases, *which could only be determined then*, based on the location and situation of Mr. Alexander Adamescu; the advancement of both the Romanian criminal proceedings and the present arbitration; as well as the specific requirements of Claimant, once it has set them out, in terms of the exact nature, extent and regularity of assistance needed from Mr. Alexander Adamescu, at that point in time and at each later different stage of proceedings, in order for Claimant to be able to proceed until the conclusion of the proceedings”) (emphasis added).

⁶² PO7, ¶ 240.

implemented,⁶³ and (b) possibly could take this case through final hearings prior to any final judgment of conviction in Romania, if criminal proceedings against Mr. Adamescu move forward on the same pace as those against his father in the past.⁶⁴ But these are not new arguments or arguments that could not have been expanded upon before. The issue of how quickly the UK courts might implement an extradition order was specifically addressed by both Parties both in their written and oral presentations, and then addressed by the Tribunal in its analysis.⁶⁵ As for the schedule of this case, while the Tribunal had not yet decided Romania's pending bifurcation request at the time of its hearing on provisional measures, it had laid out clearly, in Procedural Order No. 1 issued on 23 December 2016, the two potential schedules that would apply under bifurcated and non-bifurcated scenarios. Romania therefore was fully on notice about what the schedule would be if bifurcation was denied, and could have made any arguments it wished, during the Hearing, regarding the consequences of this schedule in relation to the timetable of projected extradition from the UK or potential conviction in Romania. Indeed, the Tribunal specifically invited such discussions, by drawing the Parties' attention to the fairly elongated schedule of the case and asking whether, in light of the serious nature of the provisional measures requested by Nova, the Parties might be able to further expedite these proceedings.⁶⁶

39. Finally, *with respect to the issue of proportionality*, Romania presents several different arguments. First, it emphasizes the difficulty of complying with the Tribunal's recommendation, in light of the independence of its judiciary and Prosecutor's Office, and the possible impact of compliance on volatile public opinion in Romania.⁶⁷ The Tribunal appreciates the complexities involved, notwithstanding the general principles of international law regarding constraints imposed by domestic law.⁶⁸ It also notes Romania's explanation that it already has begun high-level consultations to explore these various

⁶³ Request for Reconsideration, ¶¶ 15, 22.

⁶⁴ Request for Reconsideration, ¶¶ 17-18.

⁶⁵ PO7, ¶¶ 310-311.

⁶⁶ PO7, ¶ 318.

⁶⁷ Request for Reconsideration, ¶¶ 4-6.

⁶⁸ Observations, p. 3, *citing, inter alia*, the Vienna Convention on the Law of Treaties, Article 27, which provides that a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

issues.⁶⁹ But these are not new circumstances, and Romania makes no showing why arguments about these burdens could not have been presented before, as part of its two rounds of written pleadings and its opening and closing arguments at the Hearing with respect to the issue of proportionality.

40. Second, Romania suggests that “the Tribunal has failed to weigh to the fullest extent ... the fact that Romania will have also been deprived of the ability to investigate, including through available procedures for mutual legal assistance, the evidence” of potential other wrongdoing by the Adamescus.⁷⁰ But the Tribunal specifically discussed this concern in its Decision,⁷¹ addressing the arguments that Romania had presented on the issue. The Tribunal denied all recommendations Nova sought regarding investigations and proceedings that are ongoing or contemplated within Romania,⁷² so such investigations and proceedings may continue as Romania wishes. As to Mr. Adamescu’s personal assistance with such investigations, the Tribunal noted that “[w]ith the pending extradition request withdrawn,” Mr. Adamescu’s prior “ground for resisting compliance” with Romania’s request to question him through mutual legal assistance procedures “would be moot,” and “[t]he Tribunal therefore would expect Mr. Adamescu to work cooperatively ... to provide answers to questions posed ... at the request of Romanian authorities.”⁷³ Romania’s apparent dissatisfaction with having to proceed through such channels is not a basis for reconsideration of the Tribunal’s ruling.
41. Third, Romania renews its concerns about the risk that Mr. Adamescu might seek to flee the UK while this case is pending, if his present bail conditions are lifted.⁷⁴ The general

⁶⁹ Request for Reconsideration, ¶¶ 2-3, 24.

⁷⁰ Request for Reconsideration, ¶ 10.3; *see also id.*, ¶ 12.

⁷¹ PO7, ¶ 319.

⁷² PO7, ¶¶ 309, 339, 353-354, 357-358.

⁷³ PO7, ¶ 319. Romania expresses concern that Mr. Adamescu nonetheless might not “cooperate with the relevant authorities.” Request for Reconsideration, ¶ 12. Nova responds that “no evidence is presented that would suggest that Mr Adamescu would not cooperate with a properly formulated request for assistance submitted through the UK authorities in accordance with the required procedures.” Observations, p. 5. With regard to this issue, the Tribunal has made clear the expectations of good faith cooperation upon which its Decision was based. It is premature to discuss the consequences of any possible future demonstration that either Party is not complying with such expectations.

⁷⁴ Request for Reconsideration, ¶ 10.

issue of flight risk was discussed in both Parties' written and oral presentations, and this issue, as well as the issue of potential safeguards, was explored at some length by the Tribunal during the hearings. In its Decision, the Tribunal *accepted* as a matter of principle the importance of protecting against such a risk,⁷⁵ and it endorsed a series of undertakings and mechanisms in this regard that were specifically discussed with both Parties during the Hearing.⁷⁶ These did not simply take Mr. Adamescu *at his word* regarding remaining in the UK – although the Tribunal notes Nova's contention that he has no reason to try to leave.⁷⁷ Rather, the Tribunal made clear during the Hearing that it preferred mechanisms that would extend “beyond words” and into actual deeds,⁷⁸ and its Decision proceeded accordingly.⁷⁹ The Decision also included a clear warning regarding the substantial consequences of non-compliance, including consequences relating not only to future extradition requests by Romania, but also to the future development of these proceedings.⁸⁰

42. Given the stakes of this case for Nova's investments and by extension for Mr. Adamescu personally, the Tribunal expects these warnings will not be taken lightly.⁸¹ Indeed, it appears that Nova already has taken prompt steps to address the issue of flight risk, including (a) by requesting the Home Office and the Westminster Magistrates Court to retain Mr. Adamescu's passport until it can be transferred directly to an independent custodian,⁸² and (b) by identifying a law firm that potentially could serve as that custodian, subject to Romania's comment and the Tribunal's determination.⁸³ Mr. Adamescu

⁷⁵ PO7, ¶ 320.

⁷⁶ PO7, ¶¶ 321-322.

⁷⁷ Observations, p. 4 (citing Mr. Adamescu's residence in London with his family since 2012).

⁷⁸ Hearing Transcript, 3 March 2017, 376:17-377:2.

⁷⁹ PO7, ¶¶ 321-322.

⁸⁰ PO7, ¶ 323; *see also* Observations, p. 4 (acknowledging that “[t]he Tribunal has clearly spelled out the serious consequences for Mr Adamescu should he breach the undertakings that he has given”).

⁸¹ *See* Observations, p. 4 (emphasizing that “Mr Adamescu has no incentive to leave the UK while the arbitration is underway and his assistance required,” and that “he is deeply committed to assisting Nova in pursuing these claims to completion”).

⁸² Observations, p. 4; Second Letter, p. 1.

⁸³ Second Letter, p. 2 (proposing that the firm of Osborne Clarke be appointed to perform the role of independent custodian). The Tribunal requests Romania to present promptly any reasoned objections to Osborne Clarke's selection, together with any alternative proposal of a custodian. The Tribunal encourages Romania to participate constructively in this process, while assuring it that any comments on the identity of the custodian will not be considered to be a waiver of its general objection to the custodian mechanism, which is duly noted. In the meantime,

apparently also (c) has notified the German Embassy in London and the German Consulate in Scotland of his undertaking not to apply for a replacement passport or identity card,⁸⁴ which addresses the concern Romania now repeats regarding the possibility that he could seek such documents from German authorities “by declaring his own lost.”⁸⁵

43. At the same time, the Tribunal understood that its description of these various mechanisms to address the issue of flight was simply a general framework for the relevant arrangements, and that certain details might require further specification. For that reason, the Tribunal specifically indicated its intention to “work with the Parties promptly, following this Decision, to put the relevant mechanisms in place.”⁸⁶ The Tribunal also noted that it would solicit the Parties’ “suggestions for appropriate terms and conditions”⁸⁷ within the general framework — and to accomplish the specific objectives — that the Tribunal had laid out. It is true that this notation was in regard particularly to the custodial arrangements for Mr. Adamescu’s passport, but the Tribunal did not preclude discussion of reasonable additional safeguards to accomplish the stated objectives. In light of Romania’s view that the “purported safeguards implemented by the Tribunal” are incapable of achieving the goal of preventing Mr. Adamescu from fleeing the UK,⁸⁸ Romania remains free to propose specific additional safeguards for Nova’s consideration, and failing agreement to make any applications to the Tribunal that it may wish.⁸⁹ But the possibility of additional safeguards is not a basis to justify reconsideration of the basic findings the Tribunal already has made, regarding the necessity, urgency and proportionality of preserving the *status quo* (i.e., Mr. Adamescu’s presence in but restriction to the UK) while this case is pending, in order to enable Nova to obtain his meaningful direction and support to present its case.

the Tribunal is exploring with ICSID various feasible mechanisms for the engagement of the independent custodian, and will revert separately on this subject.

⁸⁴ Observations, p. 4; Second Letter, p. 2.

⁸⁵ Request for Reconsideration, ¶ 10.1.

⁸⁶ PO7, ¶ 322.

⁸⁷ PO7, n.465.

⁸⁸ Request for Reconsideration, ¶ 6; *see also id.*, ¶ 10 (contending that the “‘*undertakings and mechanisms...*’ of the Decision are incapable of achieving the goal pursued”).

⁸⁹ This could include, for example, any further safeguards Romania might suggest regarding the risk of Mr. Adamescu obtaining travel documents “by obtaining the nationality of an entirely new state” and using such documents to leave the UK. Request for Reconsideration, ¶ 10.1.

44. Finally, the Tribunal acknowledges Romania’s argument that there could be a gap in time *after* this case concludes, and before the reinstatement by UK authorities of any safeguards against flight that they consider appropriate in light of potentially renewed extradition requests by Romania.⁹⁰ The Tribunal accepts that neither Party raised this issue previously, in written or oral pleadings. While the issue does not rise to the level to justify reconsideration of the Decision, Romania is not precluded by the prior briefing from making any future application regarding this “gap” period that it might consider warranted. At the same time, there appears to be no urgency to address this issue now, given that any putative gap would not commence until mid-2019 at the earliest.⁹¹ There is ample time remaining in this case to consider any modification of the present provisional measures recommendation, or any recommendation of additional measures that Romania might consider necessary, urgent and proportionate to preserve its rights pursuant to Article 47 of the framework set forth in the ICSID Convention.⁹²

⁹⁰ Request for Reconsideration, ¶ 10.3 (arguing that upon issuance of the Final Award, Mr. Adamescu “will *de facto* have a window – due to the necessary delays incumbent to the resumption of the extradition proceedings – to escape the UK, and seek safe haven in a State that has no extradition agreements with Romania”); *see also id.*, ¶ 10.4.

⁹¹ Observations, p. 5 (contending that “[e]ven if such a concern were genuine and legitimate (which is not accepted) it would be premature”).

⁹² For the same reasons, there is no urgency to address – and in any event it is premature to assess – any risks imposed by the possibility that the UK’s eventual exit from the European Union might leave Romania without any valid extradition treaty in force under which it could request Mr. Adamescu’s extradition following the completion of this case. Request for Reconsideration, ¶ 10.4.

IV. DECISION

45. For the reasons above, the Tribunal holds as follows:

- a. Romania's request for reconsideration of the Recommendations set forth in PO7 is hereby denied.
- b. The Tribunal defers any consideration of costs in connection with this Application.

On behalf of the Tribunal,

Jean E. Kalicki

Ms. Jean Kalicki
President of the Tribunal
Date: 18 April 2017