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. 6

DECISION ON THE CLAIMANTS' SECOND REQUEST FOR PROVISIONAL MEASURES

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

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15 July 2024

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I. PROCEDURAL BACKGROUND

1. This Procedural Order No. 6 addresses the Claimants' Second Request for Provisional Measures dated 11 June 2024 ("**Claimants' Second Request**").[1]

2. On 5 October 2023, followed by subsequent comments on 23 October 2023, the Claimants made a first request for provisional measures ("**Claimants' First Request**") seeking various directions against the Respondent in relation to ANRE's suspension of the gas supply license belonging to Rotalin Gaz Trading S.R.L ("**Rotalin**"). On 16 and 30 October 2023, the Respondent submitted its comments to the Claimants' First Request.

3. On 17 November 2023, after carefully considering the Parties' respective submissions, the Tribunal informed the Parties that it had decided to dismiss the Claimants' First Request. Later, on 11 December 2023, the Tribunal issued Procedural Order No. 3, setting out the reasons for its decision to dismiss the Claimants' First Request.

4. On 11 June 2024, the Claimants filed the Claimants' Second Request along with exhibits C-318 to C-347 and legal authorities CL-157 to CL-160. As further detailed below, the Claimants' Second Request relates to a fine levied by ANRE Decision No. 342 dated 4 June 2024 ("**Decision No. 342**").

5. Following receipt of the Claimants' Second Request on 12 June 2024, the Tribunal invited the Respondent to provide observations on the Claimants' Second Request.

6. Also on 12 June 2024, the Claimants informed the Tribunal that their request to the Respondent to extend the deadline for payment of the fine levied by Decision No. 342 had been denied and that the full payment of the fine was due on the next day, 13 June 2024. For that reason, the Claimants requested the urgent grant of the Second Request and sought that the Tribunal order the Respondent not to take any steps to enforce the fine levied on Rotalin by Decision No. 342.

7. On 14 June 2024, the Respondent submitted its observations on the Claimants' Second Request, along with a third witness statement of Mr. Mihai Murgulet, exhibits MM-026 to MM-037, and legal authorities RL-187 to RL-190. Among other things, the Respondent took issue with the Claimants' assertion about urgency, stating that "*Rotalin has 30 days to pay the fine*."[2]

8. On 17 June 2024, the Tribunal directed the Respondent to "*refrain from taking any steps in relation to matters which are the subject of the Second Request*" while it considered the Parties' submissions on the Claimants' Second Request. The Tribunal noted that, in making this direction, it had taken into account the Respondent's statement (as above) about Rotalin still having some time to pay the fine.

9. 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

[1] Capitalized terms, unless defined otherwise herein, shall have the meaning as defined in prior procedural orders.
[2] Respondent's Observations to Claimants' Second Request, ¶ 167.

set out in Section V.

II. RELEVANT FACTS

10. In this section, the Tribunal provides an illustrative summary of facts upon which the Second Request for Provisional Measures is based. The 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.

A. Public Service Obligations under the Law on Natural Gas

11. 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**"). It was obliged under various provisions of Moldova's Law on Natural Gas No. 108/2016 ("**Law on Natural Gas**") to supply continuous and uninterrupted natural gas to its customers.[3]

12. On 20 December 2019, via ANRE Decision No. 487/2019, the Respondent amended the previously existing PSO upon all suppliers who operate in a regulated tariff market ("**Decision No. 487**") and imposed "*for a term of 7 years, the [PSO] to supply natural gas to final consumers at established quality parameters, at regulated, transparent, non-discriminatory and easily comparable prices, on license holders for the supply of natural gas, within the limits of the territories authorized by licenses of the distribution system operators…*"[4] ANRE consulted with Rotalin prior to Decision No. 487's approval, and Rotalin did not contest its adoption.[5]

B. Moldova's Adoption of Third-Party Access

13. In late 2022, ANRE implemented third-party access to the Moldovan gas market. This allowed Rotalin to import cheaper gas from outside Moldova and had, according to the Claimants, resulted in "*(temporary) positive effects*" on Rotalin's supply operations.[6]

C. Rotalin's End-User Tariff Application

14. In July 2023, Rotalin applied for an individual end-user tariff.[7] In assessing this application, ANRE took note of Rotalin's declared profits and calculated that Rotalin obtained a tariff surplus of MDL 38,453,860.[8]

D. ANRE Decision Nos. 522 and 523

15. 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**

[3] Respondent's Observations to Claimants' Second Request, ¶ 32.
[4] Decision No. 487, 20 December 2019 (**Exhibit C-279**); Respondent's Observations to Claimants' Second Request, ¶ 33.
[5] Respondent's Observations to Claimants' Second Request, ¶ 34.
[6] Claimants' Second Request, ¶¶ 13,15.
[7] Respondent's Observations to Claimants' Second Request, ¶ 35.
[8] Respondent's Observations to Claimants' Second Request, ¶¶ 36 – 37.

No. 522"),[9] and (ii) Decision No. 523/2023 on the approval of regulated prices for the supply of natural gas by Rotalin ("**Decision No. 523**").[10]

16. According to the Claimants, in issuing Decision No. 523, ANRE misused the applicable tariff methodology to "*isolate the first few months of profitable operations*" following the introduction of the third-party access in the Moldovan gas market by ANRE.[11] This, the Claimants allege, resulted in "*an unrealistically low tariff*" which eventually "*led to Rotalin's inability to continue its supply operations beyond 1 October 2023 and suspension of its supply license*."[12]

E. Requests to be Released from PSO and Supply Disruption

17. Between 8 September 2023 and 3 October 2023, Rotalin made several requests to ANRE to release it from the PSO.[13] However, ANRE did not accept any of its requests.

18. On 22 September 2023, Rotalin wrote to ANRE indicating its intention to terminate its supply of natural gas to its end-users.[14] In response, on 26 September 2023, ANRE issued Prescription No. 000451, requiring Rotalin to supply natural gas to its end-users.[15] Two days later, on 28 September 2023, ANRE issued Prescription No. 000452, reiterating its previous direction.[16]

19. Subsequently, from around 2 October 2023, Rotalin stopped supplying natural gas to its end-users.[17]

F. ANRE's Suspension Decision and Subsequent Court Proceedings

20. As a consequence of Rotalin's failure to supply gas under the PSO, on 2 October 2023, ANRE suspended Rotalin's supply license ("**Suspension Decision**"). ANRE directed Rotalin to resume supply of natural gas within three months. If Rotalin failed to recommence supply within three months, it could face a permanent revocation of its supply license.[18]

21. On 4 October 2023, ANRE commenced proceedings before the Chisinau District Court ("**Court**") seeking a ruling on the validity of the Suspension Decision.[19] Rotalin participated in the proceedings. It sought and secured a stay of the Suspension

[9] Respondent's Observations to Claimants' Second Request, ¶ 38.
[10] Claimants' Second Request, ¶ 13.
[11] Claimants' Second Request, ¶¶ 13,15.
[12] Claimants' Second Request, ¶ 15.
[13] Claimants' Second Request, ¶ 16; Letter No. 1258 from Rotalin to Emergency Commission and ANRE, 8 September 2023 (**Exhibit C-301**); Letter No. 1270 from Rotalin to ANRE, 13 September 2023 (**Exhibit C-302**); Letter No. 06-01/4012 from ANRE to Rotalin, 28 September 2023 (**Exhibit C-305**); Letter No. 04-01/4087 of 3 October 2023 from ANRE to Rotalin (**Exhibit C-300**).
[14] Respondent's Observations to Claimants' Second Request, ¶ 40.
[15] Respondent's Observations to Claimants' Second Request, ¶ 41.
[16] Respondent's Observations to Claimants' Second Request, ¶ 42.
[17] Respondent's Observations to Claimants' Second Request, ¶ 43; Third Witness Statement of Mihai Murgulet, ¶ 25.
[18] Respondent's Observations to Claimants' Second Request, ¶ 45.
[19] Respondent's Observations to Claimants' Second Request, ¶ 46.

Decision.[20]

22. On 20 October 2023, the Court found that the Suspension Decision was valid.[21] Rotalin filed an appeal, which remains pending, as far as the Tribunal is aware.[22]

G. ANRE's Decision to Postpone Imposing a Fine on Rotalin

23. As noted in Procedural Order No. 3, on 17 November 2023, ANRE held a meeting and decided to postpone imposing a fine on Rotalin for failing to supply gas under the PSO.[23] Nonetheless, on the same day, ANRE published a press release on its website stating that Rotalin was fined MDL 12,057,134.40, i.e., roughly an amount corresponding to 5% of Rotalin's annual turnover ("**Announced Fine**").[24] The press release was removed from ANRE's website within minutes of its posting.[25]

H. Rotalin's Request to Revoke the PSO

24. On 20 November 2023, Rotalin submitted a formal request to ANRE seeking to revoke its PSO.[26]

25. On 20 December 2023, ANRE denied Rotalin's request.[27]

I. Entry Into Force of Law No. 429

26. On 28 December 2023, the Respondent adopted Law No. 429, which came into force on 29 December 2023 ("**Law No. 429**"). Under this law, it became mandatory for ANRE to impose a fine on "*license holders, but not less than 500 000 lei, or at least 5% of the turnover of authorization holders for breach of obligations*" in case of "*non-execution by the license holders of the public service obligations imposed in accordance with provisions of art. 11, art. 89 and art. 90 or refusal to honor their public service obligations.*"[28]

J. ANRE's Revocation Decision

27. Despite its previous 20 December 2023 denial, on 30 January 2024, ANRE indicated its intention to revoke Rotalin's PSO from 1 February 2024 ("**Decision No. 44**"). Moreover, ANRE decided that (i) an amount of MDL 38,453,860 was the accumulated surplus of the PSO obligation between 1 January and 2 October 2023 "*to be recovered to system users from the territory served by*" Rotalin; and (ii) ANRE's legal department

[20] Respondent's Observations to Claimants' Second Request, ¶ 47- 48.
[21] Respondent's Observations to Claimants' Second Request, ¶ 50; Decision of Chisinau Court of Justice dated 20 October 2023 (**Exhibit MM-24**).
[22] Respondent's Observations to Claimants' Second Request, ¶ 51; Third Witness Statement of Mihai Murgulet, ¶ 37.
[23] Procedural Order No. 3, ¶ 32.
[24] Claimants' Request for Reconsideration, p. 1; Respondent's Objection, pp. 2, 4; Witness Statement of Natalia Baiesu, 21 November 2023, ¶¶ 30 – 31.
[25] Respondent's Objection, pp. 2, 4.
[26] Claimants' Second Request, ¶ 16.
[27] Claimants' Second Request, ¶ 16.
[28] Law No. 429, Article 427 amending Article 113(2)(g) of the 2016 Gas Law, p. 28 (**Exhibit C-335**).

would initiate a procedure to fine Rotalin under the Law on Natural Gas.[29]

28. Shortly thereafter, on 2 February 2024, ANRE issued two decisions.

a. ANRE decided to revoke Rotalin's PSO ("**Decision No. 45**" or "**Revocation Decision**"). According to the Respondent, the Revocation Decision prohibited Rotalin from supplying natural gas in the regulated market but did not affect Rotalin's ability to supply natural gas to the unregulated market.[30]

b. ANRE also directed Rotalin to pay MDL 12.8 million in each of 2024, 2025, and 2026 to cover the tariff surplus ("**Decision No. 46**").[31]

K. ANRE's Calculation of Rotalin's Tariff Surplus and Computation of Fine

29. Subsequently, on 27 March 2024, ANRE repealed Decision No. 46 ("**Decision No. 211**")[32] and instead calculated Rotalin's tariff surplus to be MDL 38,353,860.[33] ANRE also amended Decision No. 44, by deleting the portion of that decision which had directed that the tariff surplus be recovered from the territory served by Rotalin in its capacity as a distribution system operator.[34]

30. On 10 April 2024, ANRE informed Rotalin that it had initiated procedures to apply a fine on Rotalin based on its declared revenue, as recorded in an information note dated 14 May 2024 issued by the Department of Natural Gas and Heat Energy.[35] The information note recorded Rotalin's turnover for the period 1 January to 2 October 2023 to be MDL 225,021,000. Accordingly, ANRE assessed the fine to be MDL 38,453,86[36] which was 17.8% of Rotalin's turnover.[37]

L. ANRE's Imposition of the Fine

31. On 28 May 2024, ANRE held a meeting and announced its intention to impose a fine of MDL 38,453,860 on Rotalin for breach of the PSO.[38] Rotalin's administrator, Mr. Ihor Mankovskyi, participated in the meeting and submitted documents contesting the fine announced by ANRE.

32. The Claimants submit that, at the time, Rotalin had a cash balance of MDL 13.2 million, which would enable Rotalin to pay the [A]*nnounced* [F]*ine of ca MDL 12 million which ANRE intended to impose in November 2023.*"[39] As noted above, the Announced Fine had referred to calculations at 5% of Rotalin's annual turnover.

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[29] ANRE Decision No. 44, 30 January 2024, p. 2 (**Exhibit C-322**).
[30] Respondent's Observations to Claimants' Second Request, ¶¶ 56 - 57.
[31] Decision No. 46, 2 February 2024 (**Exhibit C-332**).
[32] ANRE Decision No. 211, 27 March 2024 (**Exhibit C-334**).
[33] Respondent's Observations to Claimants' Second Request, ¶ 61.
[34] Claimants' Second Request, ¶ 21, Decision No. 211, 27 March 2024 (**Exhibit C-334**).
[35] Respondent's Observations to Claimants' Second Request, ¶ 62.
[36] Respondent's Observations to Claimants' Second Request, ¶ 63.
[37] Claimants' Second Request, fn 3. The Claimants submit that based on Rotalin's total turnover of approximately MDL 205 million in 2023, the actual percentage of the fine amount is higher than 17.8% as stated by ANRE.
[38] Claimants' Second Request, ¶ 19.
[39] Claimants' Second Request, ¶ 26.

M. ANRE Decision No. 342

33. On 4 June 2024, ANRE issued Decision No. 342, imposing a fine of MDL 38,453,860 on Rotalin on the ground that it had breached the PSO.[40]

34. Rotalin was served this decision on 10 June 2024.[41]

35. The Claimants submit that under Article 20(1) of Moldova's Law No. 174/2021 regarding energy ("**Law on Energy**"), Rotalin was required to pay the fine levied under Decision No. 342 within 72 hours of service, i.e., by 3:30 pm local time on 13 June 2024.[42] The Respondent submits that "*there is no 72 hour period obliging Rotalin to pay*," and instead it was a "*benefit*" available to Rotalin who could avoid paying 50% of the fine if it paid the remaining 50% within a 72-hour period.[43]

N. Rotalin's Requests for Extension of Time to Pay the Fine

36. On 11 June 2024, Rotalin sought an extension of the 72-hour time period set out in Article 20 of the Law on Energy[44].

37. On 12 June 2024, ANRE denied Rotalin's request for extension dated 11 June 2024, noting that the "*amendment of the 72-hour term from* [the Law on Energy] *can only be carried out by the Parliament by adopting an amending law*."[45]

III. PARTIES' POSITIONS

A. Claimants' Position

38. The Claimants request the Tribunal to:

> *"(i) Order Respondent to prevent the seizure of Rotalin's assets, bank accounts and other property in Moldova as a result of enforcement of (i) the Decision No. 342 of 4 June 2024, imposing a fine of MDL 38.5 million against Rotalin, and (ii) Decision No. 44 of 30 January 2024, as amended by Decision No. 211 of 27 March 2024, finding the alleged surplus of MDL 38.5 million.*
>
> *(ii) 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.*
>
> *(iii) Order any other alternative provisional measures that the Arbitral Tribunal may deem more appropriate*."[46]

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[40] Claimants' Second Request, ¶ 24; Respondent's Observations to Claimants' Second Request, ¶ 66; ANRE Decision No. 342, 4 June 2024 (**Exhibit C-318).**
[41] Claimants' Second Request, ¶ 1.
[42] Claimants' Second Request, ¶ 2.
[43] Respondent's Observations to Claimants' Second Request, ¶¶ 26 – 27.
[44] Claimants' Second Request, fn 5.
[45] ANRE's letter no. 06-01/2838 to Rotalin, 12 June 2024 (**Exhibit C-348**).
[46] Claimants' Second Request, ¶ 64.

39. The Claimants submit that Rotalin does not have the capacity to even pay 50% of the MDL 38.5 million fine to ANRE within the 72-hour period set out in the Law on Energy. The Claimants argue that given the distribution tariff of MDL 53.3 million, and planned operating expenses of MDL 51.6 million, there would be a deficit of MDL 36.7 million.[47] The Claimants estimate that it will take Rotalin more than six years of operating at zero profit to pay the fine.[48]

40. On this basis, the Claimants submit that the Respondents' demand for the payment of MDL 38.5 million as a fine (pursuant to Decision Nos. 342 and 44) creates an imminent risk of seizure of all of Rotalin's assets and property. The Claimants argue that such a seizure would threaten the integrity of the present arbitral proceedings and the Claimants' procedural rights.[49]

41. The Claimants assert that while Rotalin intends to challenge the fine before Moldovan courts, that challenge will have no suspensive effect and will not prevent "*an immediate seizure of its assets and ultimately the transfer to Moldovagaz*."[50]

42. In addition, the Claimants characterise the fine levied by ANRE as being "*disproportionate and excessive*."[51]

    a. The Claimants submit that – to their knowledge – this is the "*largest regulatory fine ever imposed in Moldova*" and that the "*abusive*" fine is intended to eliminate Rotalin from the market.[52] The Claimants argue that "*hardly any company active in the international gas business*" would be able to survive a fine of the magnitude levied by ANRE.[53]

    b. They argue, referring to competition law as an example, that "*[u]sually in case of fines based on turnover, the upper end of fines is capped at 10% of the turnover*," and even the 10% fine is reserved for "the most serious and continuous breaches."[54] In contrast, the Claimants argue, Rotalin has been penalized for nearly double the upper limit of 10% for a "single instance of an alleged breach of the PSO."[55]

    c. Asserting that "[r]*egulatory fines shall never force a regulatory undertaking into an insolvency*," the Claimants argue that ANRE is causing harm by reducing the number of regulated entities in the market and that the fine "*squarely contradicts basic regulatory principles*."[56]

    d. The Claimants further argue that it is uncertain whether ANRE still intends to recover the alleged surplus of around MDL 38.5 million in addition to the fine it has already imposed. Characterising any such demand as "*double punishment*," the Claimants argue that "*the lack of transparency and obvious*

[47] Claimants' Second Request, ¶ 24.
[48] Claimants' Second Request, ¶ 24.
[49] Claimants' Second Request, ¶ 29.
[50] Claimants' Second Request, ¶¶ 45, 2.
[51] Claimants' Second Request, ¶ 3.
[52] Claimants' Second Request, ¶ 3.
[53] Claimants' Second Request, ¶ 6.
[54] Claimants' Second Request, ¶ 3.
[55] Claimants' Second Request, ¶ 3.
[56] Claimants' Second Request, ¶ 3.

correlation of the amounts are telling of the true intentions behind the fine." [57]

1. Power to Order Provisional Measures

43. 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*."[58]

44. 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.[59]

45. The Claimants identify the following conditions for an order of provisional measures:[60]

a. whether the Tribunal has *prima facie* jurisdiction to hear the Claimants;

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.

46. The Claimants submit that these conditions have been met in this case.[61] The Claimants also submit that the rights they seek to protect by 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 by preventing Respondent from expropriating Claimants, pushing Rotalin into insolvency and seizing all its assets and property*,"[62] and the requested measure would "*maintain the status quo of the arbitration*."[63]

2. Jurisdiction and Merits

47. Arguing that the threshold to demonstrate *prima facie* jurisdiction is low, the Claimants contend that such *prima facie* jurisdiction exists. They argue that the existence of a relevant treaty or arbitration agreement is enough to establish *prima facie* jurisdiction. They further assert that the low threshold to establish *prima facie* jurisdiction has been met because in registering the proceedings, the ICSID Secretariat carried out a "*basic*

[57] Claimants' Second Request, ¶ 5.
[58] Claimants' Second Request, ¶ 31.
[59] Claimants' Second Request, ¶ 31.
[60] Claimants' Second Request, ¶ 33, citing Régis Bismuth, 'Anatomy of the Law and Practice of Interim Protective Measures in International Investment Arbitration', Journal of International Arbitration, (Kluwer Law International; Kluwer Law International 2009, Volume 26 Issue 6), p. 814 (wfr) (**Exhibit CL-141**).
[61] Claimants' Second Request, ¶ 34.
[62] Claimants' Second Request, ¶ 40.
[63] Claimants' Second Request, ¶ 41.

review of the jurisdictional requirements."[64] The Claimants note further that the Tribunal has already found, in Procedural Order No. 3, that it has *prima facie* jurisdiction.[65]

48. Further, the Claimants submit that they have a *prima facie* case on the merits, as the Tribunal confirmed in Procedural Order No. 3, where it stated that "*the Claimants' claims are* prima facie *well-founded*."[66]

3. Necessity

49. The Claimants submit that "the requested provisional measures are necessary to preserve this arbitration" to "prevent further aggravating of the dispute and protect Claimants' right to be heard."[67] Relying on *Gabriel Resources v. Romania*, the Claimants argue that "the rights to be protected may include a party's right to the procedural integrity of the arbitration."[68]

50. In particular, the Claimants argue that the provisional measures requested are necessary to maintain the status quo of this arbitration and prevent the aggravation of the dispute.[69] The Claimants rely on the observations of the Tribunal in Procedural Order No. 3 that "*the rights 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*."[70]

51. The Claimants submit that any action against Rotalin to collect the alleged tariff surplus "*would prevent* [Rotalin's] *continuation of operation on the distribution market.*"[71] The Claimants argue that the pertinent case law allows "*specific performance requests for the preservation of the status quo*."[72] According to the Claimants, "[d]*ue to ANRE's actions Rotalin has already lost its whole supply business to Moldovagaz for good*" and that "*the enforcement of the fine* (*in isolation or together with the obligation to return the alleged 'surplus') effectively results in seizure of all Rotalin's assets and property and amounts to a hostile take-over of its distribution business*."[73]

52. The Claimants submit that while Rotalin will challenge the fine, the challenge will not have a suspensive effect and will result "*in an immediate seizure of its assets and ultimately the transfer to Moldovagaz*."[74]

53. Relatedly, the Claimants argue that Decision No. 342 threatens the integrity of the proceedings and the Claimants' right to be heard, since it will impede access to their

[64] Claimants' Second Request, ¶ 36.
[65] Claimants' Second Request, ¶ 36 referring to Procedural Order No. 3, ¶ 138.
[66] Claimants' Second Request, ¶ 35.
[67] Claimants' Second Request, ¶ 38.
[68] Claimants' Second Request, ¶ 39; *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31, Decision on Claimants Second Request for Provisional Measures, 22 November 2016, ¶¶ 69 – 70 (**Exhibit CL-146**).
[69] Claimants' Second Request, ¶ 41.
[70] Procedural Order No. 3, ¶¶ 144, 148. Claimants' Second Request, ¶ 42.
[71] Claimants' Second Request, ¶ 43.
[72] Claimants' Second Request, ¶ 43.
[73] Claimants' Second Request, ¶ 45.
[74] Claimants' Second Request, ¶ 45.

revenue stream and will constrain their ability to successfully pursue this arbitration.[75]

54. The Claimants dispute that the Respondent's actions were a consequence of the Claimants' decision to stop supplying gas to consumer households at regulated prices from 1 October 2023.[76] Instead, the Claimants point out that (1) as on the date of the stoppage of supply, the amendments to the Law on Natural Gas, including the "*fining provisions* had not come into existence; (2) Rotalin was prepared to pay (half of) the previously Announced Fine of approximately MDL 12 million; and (3) the alleged tariff "*surplus*" was imposed by the Respondent without any legal basis under the Respondent's 2020 Tariff Methodology.[77]

4. Urgency

55. Regarding urgency, the Claimants submit that this requirement overlaps with necessity and the risk of harm discussed above, and that the Tribunal had also "*not considered the requirement of urgency separately from necessity of the provisional measures*" in Procedural Order No. 3.[78]

56. The Claimants nonetheless set out their case on the urgency of their request, and argue that urgency exists where the requesting party will likely "*suffer imminent harm or at least harm that would arise before the award is rendered*."[79] The Claimants argue that both risks exist in this case because (i) if the fines are imposed, Rotalin will be "*pushed into insolvency*" and "*its assets and other property will inevitably be seized*", and (ii) Rotalin does not have reserves, and since the distribution tariff – Rotalin's only revenue stream – is set at a low level, paying half of the fine is also unsustainable. For the Claimants, the "*damage becomes irreparable*" once Rotalin's bank accounts and assets are seized.[80]

5. Proportionality

57. The Claimants argue that when considering an application for provisional measures, 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.[81] Relying on case law,[82] the Claimants argue that provisional measures may be granted even in cases where this entails some interference with some aspects of the State's sovereign powers.

58. According to the Claimants, the requested measures are proportionate to the harm in the case at hand. On the one hand, the Claimants rely on the imminent threat of Rotalin's bankruptcy that would follow the enforcement of the fine or asset seizure. On the other hand, the Claimants argue that any restriction on Moldova's rights to enforce Decisions Nos. 342 and 44 would not put undue burden on the Respondent.[83] According to the

[75] Claimants' Second Request, ¶ 47.
[76] Claimants' Second Request, ¶ 46.
[77] Claimants' Second Request, ¶ 46.
[78] Claimants' Second Request, ¶ 51.
[79] Claimants' Second Request, ¶ 52.
[80] Claimants' Second Request, ¶¶ 53 – 55.
[81] Claimants' Second Request, ¶ 56.
[82] *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, ¶ 66 (**Exhibit CL-149**).
[83] Claimants' Second Request, ¶ 59.

Claimants, Rotalin's gas distribution pipelines "*cannot be used for any other purpose or transferred out of Moldova*."[84] The Claimants argue that the measures requested "*can be easily revoked and has no monetary, economic or other repercussions*" and must therefore be proportional.[85]

B. Respondent's Position

59. The Respondent objects to the Claimants' Second Request.

1. Provisional Measure Standards

60. The Respondent argues that provisional measures are exceptions to the general principle of State sovereignty and thus should be granted only extraordinarily.[86] According to the Respondent, tribunals should exercise their discretion within strict confines and should recommend only the minimum steps necessary.[87]

61. The Respondent identifies the following five-prong test for the grant of interim measures:

a. *Prima facie* jurisdiction of the tribunal;

b. *Prima facie* existence of a right susceptible of protection;

c. Necessity of the measure requested;

d. Urgency of the measure requested; and

e. Proportionality of the measure requested.[88]

2. *Prima facie* Jurisdiction

62. The Respondent submits that the Tribunal should issue interim orders only if a plausible source for asserting jurisdiction exists.[89] The Respondent denies that that is the case here, and submits that although the Tribunal ruled in its Procedural Order No. 3 that it had *prima facie* jurisdiction, that ruling was before the Tribunal had the benefit of the Respondent's arguments on jurisdiction because it was before the Respondent filed its Counter-Memorial.[90]

63. Relying on case law, the Respondent argues that even though the mere fact that "*a party contests the jurisdiction of an arbitral tribunal to which the case is referred is insufficient to deprive that tribunal of the jurisdiction to order provisional measures*"[91]

[84] Claimants' Second Request, ¶ 60.
[85] Claimants' Second Request, ¶ 61.
[86] Respondent's Observations to Second Request, ¶¶ 67 – 70.
[87] Respondent's Observations to Second Request, ¶ 70.
[88] Respondent's Observations to Second Request, ¶ 72.
[89] Respondent's Observations to Second Request, ¶ 76.
[90] Respondent's Observations to Second Request, ¶¶ 77 – 78.
[91] Respondent's Observations to Second Request, ¶ 79; *Victor Pey Casado and Fondation President Allende v. Republic of Chili*, ICSID Case no. ARB/98/2, Decision on provisional measures, 25 September 2001 ¶ 7 (**Exhibit RL-188**).

a tribunal cannot discard "*elements which call into question the competence of the Tribunal*."[92] The Respondent highlights that this is especially true as Rotalin is breaching Moldovan law, violating the ECT and asking the Tribunal for protection.[93]

64. The Respondent highlights that, given that Rotalin sought to invoke the jurisdiction of Moldovan courts, this matter falls outside the scope of Article 26 of the ICSID Convention.[94] The Tribunal cannot interfere or enjoin a State from its legal, judicial or administrative activities.[95] For the Respondent, the exclusivity of ICSID proceedings does not extend to proceedings over which Moldovan courts have jurisdiction.[96] The Respondent argues that since the Suspension Decision is an administrative one, instead of an investment dispute, it falls outside of the Tribunal's jurisdiction.[97]

3. Rotalin Failed to Comply with Moldovan Law and Cannot Seek ECT Protection

65. The Respondent argues that, under Article 1(6)(f) of the ECT, an operation only qualifies as an investment if it is "*pursuant to law,*" that is, in accordance with the host State's law.[98] Relying on *Plama v. Bulgaria,* the Respondent argues that substantive protections of the ECT cannot apply to investments made contrary to law.[99]

66. The Respondent notes that, as a supply license holder, Rotalin was obliged under Articles 11, 13(3), 89, 15(1)(c), 80(4), 114(4) and 1585 of the Law on Natural Gas to supply continuously and uninterruptedly gas to its customers.[100] However, Rotalin abruptly ceased supplying gas to its approximate 20,000 customers amidst Moldova's state of emergency[101] and refused to provide gas service to its customers even in an unregulated market where it had no PSO,[102] only because of its discord with ANRE vis-a-vis the tariff surplus of MDL 38,453,860.[103] Noting that the recovery of the tariff surplus would become impossible both in fact and in law if Rotalin no longer participated in the regulated market,[104] the Respondent asserts that Rotalin's request to be removed from that market and to terminate its PSO was an attempt to avoid the recoupment of the excess sums Rotalin owed to its customers.[105]

67. The Respondent argues that ANRE's actions are not, as the Claimants assert, arbitrary

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[92] Respondent's Observations to Second Request, ¶ 80.
[93] Respondent's Observations to Second Request, ¶¶ 82 – 83.
[94] Respondent's Observations to Second Request, ¶ 85.
[95] Respondent's Observations to Second Request, ¶ 86.
[96] Respondent's Observations to Second Request, ¶¶ 87 – 88.
[97] Respondent's Observations to Second Request, ¶ 88.
[98] Respondent's Observations to Second Request, ¶¶ 96 – 99.
[99] Respondent's Observations to Second Request, ¶ 84; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, at ¶ 138 (**Exhibit RL-64**). *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Provisional Measures, September 6, 2005, ¶ 38 (**Exhibit RL-26**).
[100] Respondent's Observations to Claimants' Second Request, ¶¶ 86 – 87.
[101] Respondent's Observations to Claimants' Second Request, ¶ 88.
[102] Respondent's Observations to Claimants' Second Request, ¶ 89.
[103] Respondent's Observations to Claimants' Second Request, ¶ 90.
[104] Respondent's Observations to Claimants' Second Request, ¶ 91.
[105] Respondent's Observations to Claimants' Second Request, ¶ 92.

or directed at Rotalin[106] in the sense expressed by *Saluka v. Czech Republic*.[107] In fact, according to the Respondent, ANRE is *obliged* under Article 113(2) of the Law on Natural Gas to apply the financial penalty in the case of revocation of the PSO.[108] Moreover, ANRE did not single out Rotalin for financial penalties: it also applied a fine to Moldovatransgaz S.R.L, by way of a financial sanction of 10% of the latter's annual turnover for the year 2022.[109] The Respondent argues that Rotalin is effectively requesting that the Tribunal grant it preferential treatment and a recourse to avoid the consequences of its breach of the law.[110]

4. *Prima Facie* Existence of the Right Sought to Be Preserved

68. The Respondent disputes the Claimants' position that they are *prima facie* entitled to the rights that they seek to protect through the Claimants' Second Request. [111]

69. Noting that provisional measures are intended to preserve the parties' rights and not to protect their mere expectations,[112] the Respondent argues that the Claimants were required to prove that a link exists between the "*rights to be preserved*" and the fair consideration of their requests for relief. For the Respondent, the Claimants have failed to establish any such link.[113]

70. Further, the Respondent argues that Claimants have failed to identify (i) "*ANY right that must be preserved*;"[114] (ii) "*any law that identifies the evasion of law as a protectable right*;"[115] (iii) "*any law that defines as a protectable right, the alleged 'injury' which is a direct result of the movants' breach of the host state laws*;"[116] (iv) "*any law that names Rotalin's discarding its obligation to the public because it disagrees with ANRE's financial calculations as a protected right*;"[117] (v) "*any law that identifies Rotalin' excess charges made to its public customers, as protected right*;"[118] (vi)"*any law that recognizes Rotalin's refusal to reimburse its public the overcharges it made, as a protected right*;"[119] (vii) "*any law that recognizes as a protected right the argument that Rotalin spent money it knew was owed to the public and now claim it has no funds to do [sic] pay the financial sanctions*"[120]; (viii) "*any law that Rotalin has a right to force ANRE to breach its obligations to impose the financial sanction to protect the public*;"[121] and (viii) "*any law that labels Rotalin has a protected right to prevent ANRE to impose a sum for Rotalin's breaches in an amount similar to that owned by Rotalin to its customers.*"[122] To the contrary – the Respondent asserts (i) "*all of the law*

[106] Respondent's Observations to Claimants' Second Request, ¶ 96.
[107] Respondent's Observations to Claimants' Second Request, ¶ 95; *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006 at ¶ 304 (**Exhibit RL-134**).
[108] Respondent's Observations to Claimants' Second Request, ¶ 97.
[109] Respondent's Observations to Claimants' Second Request, ¶ 98.
[110] Respondent's Observations to Claimants' Second Request, ¶ 99.
[111] Respondent's Observations to Claimants' Second Request, ¶ 122.
[112] Respondent's Observations to Claimants' Second Request, ¶ 101.
[113] Respondent's Observations to Claimants' Second Request, ¶¶ 104 - 105.
[114] Respondent's Observations to Claimants' Second Request, ¶107.
[115] Respondent's Observations to Claimants' Second Request, ¶108.
[116] Respondent's Observations to Claimants' Second Request, ¶109.
[117] Respondent's Observations to Claimants' Second Request, ¶110.
[118] Respondent's Observations to Claimants' Second Request, ¶111.
[119] Respondent's Observations to Claimants' Second Request, ¶112.
[120] Respondent's Observations to Claimants' Second Request, ¶113.
[121] Respondent's Observations to Claimants' Second Request, ¶114.
[122] Respondent's Observations to Claimants' Second Request, ¶115.

denies ECT protection to a claimant who has breached the law";[123] (ii) "*given that Rotalin failed to submit a valid tariff request for almost 20 years, it cannot now link its managerial incompetence to its inability to pay*;"[124] (iii) Rotalin could have avoided the fine; and (iv) "*Rotalin could have supplied gas without its PSO in an unregulated market."*[125]

5. Necessity

71. Relying on case law, the Respondent argues that provisional measures should only be ordered where, absent such measures, protected rights would be definitely lost.[126] In contrast, measures will not be necessary where a party can be adequately compensated by an award of money.[127] The Respondent argues that Rotalin admitted that the rights at issue are purely economical, and on that basis the granting of Claimants' Second Request is not warranted.[128]

72. The Respondent argues that, should the Tribunal reject this proposition, there must be a high likelihood of harm,[129] or irreparable harm if provisional measures are not granted. For the Respondent, irreparable harm is such harm that cannot be repaired by an award of damages.[130] In light of Rotalin's decision to cease natural gas supply to all its customers in both regulated and unregulated markets,[131] its requests to have the PSO revoked, and its choice not to challenge the revocation of the PSO before the Court,[132] Rotalin knowingly and voluntarily assumed the fine.[133]

73. The Respondent argues that, considering all the opportunities Rotalin had to avoid the fine but failed to take, Rotalin's requests are unwarranted because there is no risk or threat that any grave or serious harm will come to Rotalin.[134] The Respondent asserts that Rotalin is using this arbitration to avert its obligations under Moldovan laws.[135]

6. Non-Aggravation of Dispute

74. The Respondent disputes the applicability of the principle of non-aggravation in this case because, in its view, Rotalin is seeking to improve its position, rather than to maintain the status quo. Relying on case law,[136] including *Phoenix Action v. Czech*

[123] Respondent's Observations to Claimants' Second Request, ¶ 116.
[124] Respondent's Observations to Claimants' Second Request, ¶ 119.
[125] Respondent's Observations to Claimants' Second Request, ¶ 120.
[126] Respondent's Observations to Claimants' Second Request, ¶ 123.
[127] Respondent's Observations to Claimants' Second Request, ¶ 124.
[128] Respondent's Observations to Claimants' Second Request, ¶ 125.
[129] Respondent's Observations to Second Request, ¶¶ 127 - 128; *Gerald International Limited v. Republic of Sierra Leone*, ICSID Case No. ARB/19/31, Procedural Order No. 2 (Decision on Rotalin's Request for Provisional Measures), 28 July 2020, ¶ 177 (**Exhibit RL-34**).
[130] Respondent's Observations to Second Request, ¶¶ 129 - 130; *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-32**).
[131] Respondent's Observations to Claimants' Second Request, ¶¶ 132 – 133.
[132] Respondent's Observations to Claimants' Second Request, ¶¶ 134 – 135.
[133] Respondent's Observations to Claimants' Second Request, ¶¶ 136.
[134] Respondent's Observations to Claimants' Second Request, ¶¶ 137 – 138.
[135] Respondent's Observations to Claimants' Second Request, ¶¶ 141.
[136] Respondent's Observations to Claimants' Second Request, ¶¶ 142 – 143; *Amco Asia v. Indonesia*, Decision on request for provisional measures of 9 December 1983, ICSID Reports, 1993, p. 412 (**Exhibit RL-38**).

Republic,[137] the Respondent submits that provisional measures are not intended to improve a claimant's position, but rather to preserve the status quo. In the Respondents' view, the fact that circumstances continue to evolve during the course of the case is not in itself sufficient to justify provisional measures.[138]

75. Separately, the Respondent argues that the Claimants' Second Request cannot be granted because it would amount to granting the final relief being sought in the case.[139]

76. The Respondent argues that "*Rotalin has not claimed, nor can it, that the fine has changed the status quo Rotalin created*." In this respect, relying on *Quiborax v. Bolivia*, the Respondent argues that Rotalin knowingly and voluntarily assumed the fine and therefore must bear the consequences of its conduct.[140]

77. Further, the Respondent argues that the right to non-aggravation of the dispute is a right to prevent changes of circumstances which threaten the ability of the Tribunal to grant the relief which a party seeks and the capability of giving effect to the relief.[141] Rotalin has not shown any evidence that the Tribunal has the capability of giving effect to the relief that Rotalin sought as Rotalin caused the fine to be imposed due to its non-compliance with the law.[142]

7. Urgency

78. Referring to *Tokios Tokelés v. Ukraine*[143] and *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*,[144] the Respondent argues that a provisional measure is urgent if action prejudicial to the rights of either party is likely to be taken before the final decision is made,[145] or if there is a need to obtain the requested measure at a certain point in the procedure before the issuance of an award.[146] The Respondent contends that ANRE's imposition of the fine is not prejudicial to Rotalin's rights.[147]

8. Proportionality

79. The Respondent argues that the harm to be avoided must substantially outweigh the harm that is likely to result to the party against whom the measure is directed if the measure is granted.[148] The Respondent argues that this is not the case here.

80. The Respondent contends that any harm to Rotalin is self-imposed as it itself sought to be relieved of the PSO, and therefore to pull out of the regulated gas supply market. In fact, the Respondent alleges that Rotalin sought to revoke the PSO to "*retain profit that*

[137] *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures, February 15, 2004, ¶ 37 (**Exhibit RL-37**).
[138] Respondent's Observations to Claimants' Second Request, ¶ 147.
[139] Respondent's Observations to Claimants' Second Request, ¶ 150.
[140] Respondent's Observations to Claimants' Second Request, ¶¶ 155 – 156.
[141] Respondent's Observations to Claimants' Second Request, ¶ 157.
[142] Respondent's Observations to Claimants' Second Request, ¶ 158.
[143] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 3, 18 January 2005, ¶ 8 (**Exhibit RL-41**).
[144] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, 31 March 2006, ¶ 76 (**Exhibit RL-42**).
[145] Respondent's Observations to Claimants' Second Request, ¶ 159.
[146] Respondent's Observations to Claimants' Second Request, ¶ 160.
[147] Respondent's Observations to Claimants' Second Request, ¶ 161.
[148] Respondent's Observations to Claimants' Second Request, ¶¶ 170 – 173.

it gained illegally by charging its 20,000 gas customers."[149] Further, the Respondent argues that Rotalin did not have to request the revocation of the PSO, or cease operating as a natural gas supplier via the unregulated market. Additionally, it could also have initiated proceedings in the Moldovan court.[150]

81. On this basis, the Respondent argues that the fine imposed by ANRE was proportionate as it (i) reflects the least amounts which Rotalin should have reimbursed to the customers to whom it had overcharged;[151] and (ii) corresponds to the gravity of Rotalin's actions and inactions, especially since it was aware that it was unlawful to "*obtain, and spend unjustified revenues*" in the amount of MDL 38,453,860.[152]

82. In this context, the Respondent argues that applying only the minimum penalty of 5% of turnover required by Law No. 429 "*would be unfair to the public who will not recoup its excess billing,*"[153] in particular where the imposition of the fine would also set standards for other suppliers to comply with.[154] The fine is also not excessive or in violation of any law, as Article 113(2)(g) of the Law on Natural Gas does not set any maximum limit.[155] Further, the fine was also not a double sanction, as Rotalin has not been sanctioned previously for the same acts.[156] Lastly, Article 20(10) of the Law on Energy allowed a reduction of the fine if Rotalin paid it within 72 hours from the date it received the decision.[157]

83. In addition, the Respondent contends that Rotalin's purpose of bringing the Second Request is to have a mechanism to exit the Moldovan market without complying with its financial obligation.[158] On this basis, the Respondent argues that allowing the Claimants' Second Request would violate the integrity of the arbitration.[159]

9. Costs

84. The Respondent disputes the Claimants' claim for costs against it, [160] and instead makes its own claim for costs incurred in preparing its responses to the Claimants' Second Request.[161]

IV. TRIBUNAL'S ANALYSIS

85. The Tribunal sets out below its considerations relating to the Claimants' Second Request. At the outset, the Tribunal notes that neither Party has requested an oral hearing in relation to the Claimants' Second Request. Accordingly, similar to the Claimants' First Request, the Tribunal has decided the Claimants' Second Request on

[149] Respondent's Observations to Claimants' Second Request, ¶¶ 174 – 178.
[150] Respondent's Observations to Claimants' Second Request, ¶¶ 179 – 181.
[151] Respondent's Observations to Claimants' Second Request, ¶¶ 183 – 184.
[152] Respondent's Observations to Claimants' Second Request, ¶¶ 185 – 186.
[153] Respondent's Observations to Claimants' Second Request, ¶ 187.
[154] Respondent's Observations to Claimants' Second Request, ¶ 188.
[155] Respondent's Observations to Claimants' Second Request, ¶ 189.
[156] Respondent's Observations to Claimants' Second Request, ¶¶ 192 – 195.
[157] Respondent's Observations to Claimants' Second Request, ¶ 200.
[158] Respondent's Observations to Claimants' Second Request, ¶¶ 201 – 203.
[159] Respondent's Observations to Claimants' Second Request, ¶¶ 204 – 206.
[160] Respondent's Observations to Claimants' Second Request, ¶ 207.
[161] Respondent's Observations to Claimants' Second Request, ¶¶ 209-210.

the papers.

86. The Tribunal will now recall its power to grant provisional measures in Section IV(A), and the relevant legal standard in Section IV(B), before applying that standard to the case at hand in Section IV(C).

A. Power to Grant Preliminary Measures

87. In Procedural Order No. 3, the Tribunal has already set out the principles governing, and considerations relevant to, its power to order provisional measures. The Tribunal recalls them below.

88. 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*."

89. The Respondent does not dispute the Tribunal's power to grant provisional measures.[162] Instead, it argues that provisional measures are an exceptional remedy and the Tribunal must exercise "*its discretion only with the strict confines of the power granted*"[163] and *"recommend only the minimum steps necessary*" when granting provisional measures.

B. Legal Standard for Granting Preliminary Measures

90. As the Tribunal has previously noted, 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.[164] The Tribunal recalls its discussion of the legal standard from Procedural Order No. 3 summarized below:

a. 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 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*."[165]

b. It is generally appropriate to refer to case law relating to Article 47 of the ICSID Convention and/or ICSID Arbitration Rule 39(1) when interpreting Article 46(1) of the ICSID Additional Facility Arbitration Rules.[166]

91. In exercising its discretion to recommend or order provisional measures under Article

[162] Respondent's Observations to Claimants' Second Request, ¶ 69.
[163] Respondent's Observations to Claimants' Second Request, ¶ 70.
[164] Procedural Order No. 3, ¶122. *See also* Respondent's Observations to Claimants' Second Request, ¶ 67.
[165] *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**).
[166] Procedural Order No. 3, ¶ 123.

46 of the ICSID Additional Facility Arbitration Rules, the Tribunal sees no reason to deviate from the criteria it laid out in Procedural Order No. 3. These are:

a. Whether the Tribunal has *prima facie* jurisdiction to hear the s' 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.[167]

92. In the sections that follow, the Tribunal applies the relevant legal standard to the facts.

C. Applying the Legal Standard to the Case

1. *Prima Facie* Jurisdiction

93. In Procedural Order No. 3, the Tribunal set out its assessment of the *prima facie jurisdiction* in this case. In summary, the Tribunal noted the following:

a. The screening performed by the ICSID Secretary-General when registering the case is insufficient to demonstrate *prima facie* jurisdiction over the Claimants' claims.[168] As Article 5 of the ICSID Additional Facility Arbitration Rules clarifies, when notifying the parties of the registration of a request, the Secretary-General "*remind[s] the parties that the registration of the request is without prejudice to the powers and functions of the Arbitral Tribunal in regard to competence and merits*."[169]

b. The Tribunal has already found in its Decision on Bifurcation that the Respondent's jurisdictional objections were not *prima facie* serious.[170]

94. Since the time the Decision on Bifurcation was issued, the Respondent has:

a. made an argument that in applying to the Moldovan courts to relieve itself of the PSO, Rotalin has submitted to the jurisdiction of the Moldovan courts and accordingly now falls outside of the scope of Article 26 of the ICSID Convention;[171] and

b. submitted its Counter-Memorial which contains a detailed articulation of its jurisdictional objections. This Counter-Memorial was filed after Procedural Order No. 3 was issued.

95. Having reviewed these further submissions from the Respondent, the Tribunal does not consider that there is any reason to deviate from its previous finding that it has *prima*

[167] Procedural Order No. 3, ¶ 129.
[168] Procedural Order No. 3, ¶ 131.
[169] 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**).
[170] Procedural Order No. 2, Decision on Bifurcation, 11 October 2023, ¶ 43.
[171] Respondent's Observations to Claimants' Second Request, ¶ 85.

facie jurisdiction in this case. The Tribunal clarifies again that in reaching a conclusion as to *prima facie* jurisdiction, it does not indicate its prospective decision on jurisdiction over this case. The Tribunal is not required at this stage to finally decide the questions relating to its jurisdiction.

2. *Prima Facie* Merits

96. The Tribunal assesses in this section whether the Claimants' claims are *prima facie* well-founded. In Procedural Order No. 3, the Tribunal has already found that the Claimants have established a *prima facie* case in relation to their claims. In particular:

a. Noting the decision in *Paushok v. Mongolia*, the Tribunal found that the standard for the *prima facie* establishment of the merits of the case was not particularly high.[172]

b. Noting the decision in the *Oil Platforms* case, [173] the Tribunal found that it was required to accept *pro tem* the facts as alleged by the Claimants for the purpose of assessing whether the Claimants had a *prima facie* case on the merits.[174]

97. As already decided in Procedural Order No. 3, the Tribunal finds that there is no indication that, at this stage, 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 of fact or law which may be raised by the Parties during these proceedings concerning the merits of the Claimants' claims.

3. Necessity

98. In this section, the Tribunal assesses whether the requested measures are necessary to prevent irreparable harm to the Claimants' rights.

99. As a first step, the Tribunal must identify the rights whose protection the Claimants seek in the Claimants' Second Request. As the Tribunal noted with reference to the decision in *Plama v. Bulgaria* in Procedural Order No. 3, the provisional measures requested must bear a sufficient link with the subject matter of the underlying dispute.[175] However, as the Tribunal has also clarified in Procedural Order No. 3, the rights to which the Claimants are entitled to seek protection may be substantive rights but may also include procedural rights, including the right to non-aggravation of the dispute.[176] As the tribunal in *Burlington v. Ecuador* has recognised, these are self-standing rights that can be protected by an order of provisional measures.[177]

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[172] Procedural Order No. 3, ¶ 139.
[173] *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**).
[174] Procedural Order No. 3, ¶ 140.
[175] Procedural Order No. 3, ¶ 147 referring to *Plama Consortium Ltd v. Republic of Bulgaria,* ICSID Case No. ARB/03/24, Order, 6 September 2005, ¶ 40 (**Exhibit RL-026**).
[176] Procedural Order No. 3, ¶¶ 145 – 146.
[177] *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**); Procedural Order No. 3, ¶ 146.

a) Rights the Claimants Seek to Protect

100. Having recalled these observations, the Tribunal begins by identifying the rights whose protection the Claimants seek through their application for provisional measures.

101. As discussed above, through the Claimants' Second Request, they seek the protection of "*the right to be heard, the right to a fair proceedings and the protection of the integrity of the arbitration as a whole by preventing Respondent from expropriating Claimants, pushing Rotalin into insolvency and seizing all its assets and property*," and "**the Claimants are seeking to maintain the status quo of the arbitration**" which they allege are required to "*prevent unnecessary exacerbation of the relevant disputes*."[178]

102. The Tribunal understands from this articulation that the rights the Claimants seek to protect are (i) the right to be heard, (ii) the right to fair proceedings, (iii) the right to protection of the integrity of the proceedings, and (iv) the right to seek the maintenance of *status quo* as part of a general right to non-aggravation of disputes.[179] The Tribunal notes that the procedural rights sought to be protected (i.e., the right to be heard, the right to fair proceedings, and the right to protection of the integrity of the proceedings) may in this case be considered to be inextricably related and encompassed in the overall right to a fair trial.

103. The Tribunal also notes that, unlike the Claimants' First Request, in the Claimants' Second Request they have not sought the protection of any alleged right to be protected against unfair or inequitable conduct or expropriatory conduct as an independent right which should be protected by an order of provisional measures.

b) Link Between the Measures Requested and Rights at Issue

104. In Procedural Order No. 3, the Tribunal noted that "*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*."[180] These rights included "*the general right to maintain the status quo ante or to avoid the non-aggravation of the dispute*."[181] The Tribunal sees no reason to deviate from that finding, or to find any differently for the Claimants' right to a fair trial: these rights are sufficiently linked to the dispute.

4. Risk of Irreparable Harm

105. As noted above, the Claimants argue that the enforcement of the fine (Decision No. 342) would endanger their right to continue with this arbitration. The Claimants argue that this risk arises because (i) the fine constitutes 19% of Rotalin's turnover,[182] (ii) Rotalin does not have the funds to make such a payment (or even half of it),[183] and (iii) Rotalin's inability to pay the fine is likely to invite enforcement action from the

[178] Claimants' Second Request, ¶¶ 40 – 41.
[179] Claimants' Second Request, at ¶¶ 40 – 41.
[180] Procedural Order No. 3, ¶ 148.
[181] Procedural Order No. 3, ¶ 148.
[182] Claimants' Second Request, ¶ 1.
[183] Claimants' Second Request, ¶ 45.

Moldovan authorities.[184] The Respondent does not, in particular, deny either that Rotalin has insufficient financial resources to make the payment, or that failure to make payment will invite enforcement action from the Moldovan authorities.

106. Indeed, the cash flow projections for 2024 – although not audited – provide support for the Claimants' assertion that Rotalin does not have sufficient funds to pay the fine, or even half of it. The document indicates that the cash balance at the end of May 2024 was MDL 13.27 million.[185] This amount – even as at the end of May 2024 – was lower than the fine of MDL 38.5 million imposed on Rotalin. Even though the document is titled "*cash flow projections,*" it appears to indicate *actual* numbers in relation to May 2024, and projected numbers from June 2024 onwards.[186] The Tribunal therefore finds it reasonable to rely on this document as sufficient proof, at this stage, that Rotalin does not have the liquid assets to pay the full amount of the fine imposed on it. While it is not possible for the Tribunal to find that ANRE necessarily will initiate enforcement action, the Tribunal must consider that a risk of enforcement exists. The Respondent has not denied that the enforcement of the fine and possible other steps including seizure of Rotalin's assets could follow the imposition of the fine. Accordingly, the Tribunal finds that there is a risk of harm with regard to the fine imposed by Decision No. 342 of 4 June 2024.

107. To the contrary, the Tribunal is currently unconvinced that a similar risk exists with regard to Decision No. 44 of 30 January 2024, as amended by Decision No. 211 of 27 March 2024, finding the alleged surplus of MDL 38.5 million.[187] Indeed, the Claimants have not provided sufficient evidence showing a risk that the Respondent – at this stage – would enforce Decision No. 44, *in addition* to the fine imposed by Decision No. 342. Accordingly, the Tribunal finds that there is no risk of harm with regard to Decision No. 44.

108. Having established the risk of a harm (in relation to Decision No. 342), the Tribunal now considers whether said harm is irreparable. As noted above, the Respondent argues that monetary compensation is an adequate remedy for the breaches the Claimants allege against the Respondent and that any harm would therefore not be irreparable. The Tribunal does not agree. First, as the Tribunal noted in Procedural Order No. 3, in *Paushok v. Mongolia* the "*possibility of monetary compensation does not necessarily eliminate the need for interim measures*."[188] Second, even though it is true that monetary compensation *could* in certain circumstances mean that harm caused to a claimant's investment is reparable because damages can be awarded equivalent to the harm caused to the investment, it is not clear that an award of damages will adequately repair *procedural* rights that are at risk of being endangered. This is particularly true because where procedural rights are violated, that also affects a party's ability to secure the monetary compensation.

109. The Tribunal now addresses the Respondent's further argument in this regard: that Rotalin was aware of the fine, voluntarily assumed the fine, and therefore could have avoided the fine by continuing to supply gas. While the Tribunal does not need to make

[184] Claimants' Second Request, ¶ 45.
[185] Rotalin's P&L Cash Flow Projection for 2024, (**Exhibit C-320**).
[186] Rotalin's P&L Cash Flow Projection for 2024, (**Exhibit C-320**).
[187] ANRE Decision No. 44, 30 January 2024, p. 2 (**Exhibit C-322**).
[188] *Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Mongolia,* UNCITRAL, Order on Interim Measures, 2 September 2008, ¶ 68 (**Exhibit CL-139**).

definitive findings on the facts alleged by the Respondent, the Tribunal is satisfied that, at best, Rotalin accepted that *a* fine would be levied, but not that a fine *of MDL 38.5 million* would be levied. It is thus important in this regard to distinguish between the acceptance in principle that a fine would be levied, and the quantum or amount of the fine.

110. The Tribunal notes that there is no dispute between the Parties that Rotalin stopped providing gas to its customers in October 2023. The circumstances relating to the decision to stop supply and the reasons for it appear to be in dispute between the Parties. However, it is not in dispute that Rotalin could have avoided the fine if it continued to supply gas.

111. Without making a finding on whether Rotalin was in a position to continue supplying gas or whether it was economically feasible for Rotalin to do so, the Tribunal notes that it is possible to take a view that Rotalin knew that continued non-compliance with its PSO would likely lead to a fine. Even though its position is that under the law as it stood when it stopped supplying gas, no fine could be levied for such non-supply, there is no dispute that at least from 28 December 2023, there was a law in place which allowed the imposition of a fine for such non-supply.[189] Therefore, the possibility of the imposition of a fine was – or at least ought to have been – a consideration of Rotalin's decision to continue refusing to supply gas even after December 2023.

112. However, there is no evidence that Rotalin accepted the possibility of a fine that would be comparable in amount to the MDL 38.5 million eventually imposed on it.

    a. The Claimants submit, and the Respondent does not dispute, that the fine of MDL 38.5 million is the largest fine ever imposed in Moldova.[190] It therefore cannot be presumed that Rotalin could have expected this quantum of fine, irrespective of whether the fine imposed by ANRE reflected the amounts which Rotalin should have allegedly reimbursed to overcharged customers and whether the fine is proportionate to the gravity of Rotalin's alleged actions and inactions.

    b. ANRE provided that under the amended 2016 Gas Law, it is mandatory that Rotalin would be fined at least 5% of its turnover.[191]

    c. The Tribunal accepts that 5% is the *minimum* as opposed to a *maximum* fine. However, it indicates that the calculation of fines could be expected to be based (in terms of methodology) on a percentage of turnover, rather than on calculations of a prior tariff surplus. It also indicates that Rotalin's acceptance of the principle of a fine must be seen as being inherently linked to the notion that it accepted a fine of a minimum of 5% of its turnover. While Rotalin perhaps could have expected a fine exceeding 5% of its turnover, this is not sufficient basis to infer that it could have expected a fine of 19% of its turnover.

    d. The Announced Fine in November 2023 was also in line with the expectation

[189] Claimants' Second Request, ¶ 46.
[190] Claimants' Second Request, ¶ 3.
[191] The text of the amended provision of the 2016 Gas Law is set out at ¶ 26.

that the fine would likely be around 5% of the turnover.[192] Contemporaneous evidence, including Rotalin's letter dated 9 February 2024, indicates that Rotalin expected the risk to be the following: "*the risk to be fined an amount of 5% of its turnover (8 million lei)*" for the stoppage of its supply.[193] The Tribunal further understands that the Claimants may have been prepared to pay the Announced Fine – or possibly at least half of it, in light of Article 20(20) of Law No. 174 of 21 September 2017 on Energy, which entitles energy companies to pay only half of the amount of a financial penalty if they pay it no later than 72 hours after receiving the decision imposing the penalty.[194]

e. Rotalin's expectation of a fine in the range of 5% – but not about three times that amount – also appears to be justified when considering that ANRE imposed a fine of 10% of the turnover on Moldovatransgaz.[195]

f. The year of turnover and amount of turnover appear to be in dispute between the Parties. While Decision No. 342 of 4 June 2024 is based on Rotalin's 2023 turnover, the amount of which is also in dispute between the Parties,[196] the Announced Fine based on the 2022 turnover. The Tribunal has not been presented with evidence as to what year of turnover should be considered for the calculation of any fine and the Tribunal also has not been presented with concrete evidence of either the 2022 or 2023 turnover.

113. On this basis the Tribunal finds that Rotalin did not accept the possibility of a fine of MDL 38.5 million. Accordingly, having found that Rotalin is at risk of bankruptcy following enforcement actions of the Moldovan authorities, the Tribunal is satisfied that there is a risk of irreparable harm if the collection of the fine is not, at least partially, suspended.

5. Proportionality

114. The Tribunal then turns to the final criterion for the grant of provisional measures in this case: whether the requested measure is proportionate. The Tribunal notes that while there is no universally accepted articulation of this criterion, it is rather uncontroversial that provisional measures require an assessment of the relative burdens of the parties.

115. The Respondent refers to a slightly stricter test and relies on the decisions of the Tribunal in *Quiborax v. Bolivia*, which found that the principle of proportionality requires that "*harm substantially outweighs the harm that is likely to result for the party against whom the measure is directed if the measure is granted.*"[197]

116. The Tribunal holds that it must consider the consequences on the Respondent if the

[192] Claimants' Email to Tribunal of 17 November 2024 and ANRE Press Release, 17 November 2024 (**Exhibit C-317**).
[193] Letter from Rotalin to Energy Community Secretariat, 9 February 2024 (**Exhibit C-319**).
[194] Article 20(20) of Law No. 174 of 21 September 2017 on Energy (Exhibit **MM-008**).
[195] The Tribunal notes that documentary support for this assertion of the Claimants only indicates that a fine of MDL 33.9 was imposed but does not indicate the turnover of Moldovatransgaz. However, the Respondent appears to confirm the Claimants' assertion that the fine amounted to "10% of the annual turnover for the entity's 2022 year," Respondent's Observation on the Claimant's Second Request, ¶199.
[196] Claimants' Second Request, fn 3; Respondent's Observation on the Claimant's Second Request, ¶ 63.
[197] *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, ¶ 71 (**Exhibit RL-032**).

provisional measures requested are *granted* and compare those to the consequences on the Claimants if the provisional measures requested are *not* granted.

117. Here, if the Tribunal *refrains* from granting any provisional measure sought by the Claimants, as discussed above, there is a risk of irreparable harm to the procedural rights of Rotalin. The full fine is of such amount that its enforcement would likely lead to the bankruptcy of Rotalin and affect its right to participate in the arbitration. The Respondent does not disagree with these probable consequences of the enforcement of the fine of MDL 38.5 million.

118. On the other hand, if the Tribunal *grants* some of the provisional measures requested, it would be open to Moldova in the future to recover the fine against such assets as Rotalin then has available. While the amount of Rotalin's cash reserves may fluctuate over time, the Tribunal understands that Rotalin's main physical assets are in Moldova,[198] and it will be open for the Respondent ultimately to enforce against those assets if it prevails in this case yet the Claimants prove unable to pay any fines lawfully imposed. The Tribunal is therefore convinced that not granting *any* provisional measures would impose severe consequences on the procedural rights of the Claimants, while the impact on the Respondent of granting *some* form of provisional measure may be capable of remedy in future.

119. However, it does not automatically follow that the entirety of the Claimants' request (i.e., preventing the Respondent from taking steps to enforce *any* of the MDL 38.5 million fine against Rotalin) would be proportionate. In this context, the Tribunal recalls – as it did in Procedural Order No. 3 – that the Tribunal is obliged to ensure that it does not grant provisional measures that are broader than necessary to protect the rights alleged to be at risk.

120. As the tribunal in *Nova v. Romania* explained:

> *"[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."*[199]

121. In this case, the Tribunal's granting of provisional measures is aimed at preventing the risk to the procedural rights of the Claimants that would arise as a result of the bankruptcy of Rotalin following the enforcement of the fine. However, as the Claimants admit, Rotalin was "*preparing to pay*" an amount calculated at "*(half of) the* [A]*nnounced* [F]*ine of ca MDL 12 million*" in November 2023.[200] The Announced Fine was roughly in the region of 5% of Rotalin's 2022 turnover, with the 5% threshold corresponding to the minimum level of fines that ANRE now may assess under Law No. 429. While Rotalin's intent is not entirely clear from the Claimants' submissions, it may be that it was prepared to pay "*half of*" the Announced Fine,[201] in light of Article 20(1) of the 2017 Energy Law, in order to prevent enforcement of the remainder

[198] Claimants' Second Request, ¶ 60.
[199] *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**).
[200] Claimants' Second Request, ¶ 26.
[201] Claimants' Second Request, ¶ 26.

of the Announced Fine during the duration of any legal challenges.[202]

122. In the Claimants' Second Request, the Claimants do not allege that paying the approximately MDL 12 million Announced Fine (or half of it) would have resulted in Rotalin's bankruptcy, in the way that Claimants allege the eventual fine of MDL 38.5 million would. Moreover, the Tribunal has not been informed of any change in the Claimants' ability to pay such sums in the period following the making of the Claimants' Second Request.

123. From the perspective of proportionality, there is value in securing for the Respondent the possibility of payment of at least such portion of the currently challenged fine as the Claimants admit that Rotalin were preparing to pay based on the earlier Announced Fine, even while challenging the appropriateness of any such fine. Not securing these funds would leave the Respondent worse off than if it had never revised the fine levels upward in the first place, particularly given Claimants' repeated protestations of financial instability. At the same time, so long as such payment is secured during the pendency of these proceedings – for example, through some sort of escrow account – it is not essential that that the funds actually change hands. The Respondent's interests would be protected by the establishment of an escrow, at least to the level of the minimum fines required by Law No. 429 read in conjunction with Article 20(1) of the 2017 Energy Law. Indeed, the securing of liquid funds in this amount would ensure that the Respondent's only remedy *if it prevails* on this point is not the extreme one of attaching Rotalin's physical assets. And while the Claimants would still lose the use of the escrowed funds while the case is ongoing, the return of these funds to Rotalin *if Claimants prevail* on this point would be easier than if the funds were transferred to the Respondent outright.

124. The Tribunal considers this type of arrangement to be a middle-ground which is more proportionate to both Parties than the extremes of either (i) granting all the relief the Claimants seek, or (ii) denying any relief to the Claimants, as the Respondent seeks. The Tribunal's goal is to impose no more burden on the Parties than is strictly necessary for the protection of the Claimants' procedural rights. The Tribunal finds that the placement of sums into an escrow account allows the Tribunal to balance the interests of both Parties pending the outcome of the case. The Tribunal determines this amount to be MDL 6,028,567.20 (i.e., half of the Announced Fine) which the Claimants said, at a minimum, they were prepared to pay.[203]

[202] Claimants' Second Request, ¶ 2 & n. 4 (explaining the operation of Article 20(1) of the Energy Law)
[203] See above at ¶ 112(d), 121.

V. DECISION

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

a. Orders the Respondent to prevent the seizure of Rotalin's assets, bank accounts and other property in Moldova as a result of the enforcement of Decision No. 342 of 4 June 2024, imposing a fine of MDL 38.5 million against Rotalin;

b. Orders the Claimants to establish an escrow account with an independent financial institution, to remain in place for the duration of this case or until otherwise ordered by the Tribunal, into which they shall place MDL 6,028,567.20;

c. Notes that the measure at paragraph (a) will only be maintained if the Claimants comply with the order at paragraph (b) within a reasonable timeframe;

d. Dismisses the remainder of the Claimants' Second Request; and

e. Reserves its decision on costs arising out of the Claimants' Second Request.

On behalf of the Tribunal:

Signed

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Prof. Maxi Scherer
President of the Tribunal
Date: 15 July 2024