INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

PLAMA CONSORTIUM LIMITED
(CLAIMANT)

and

REPUBLIC of BULGARIA
(RESPONDENT)

(ICSID Case No. ARB/03/24)

ORDER

Members of the Tribunal
Mr. Carl F. Salans, President
Mr. Albert Jan van den Berg, Arbitrator
Mr. V.V. Veeder, Arbitrator

Secretary of the Tribunal
Ms. Aurélia Antonietti

Representing the Claimant
Mr. Emmanuel Gaillard
and Mr. John Savage
Shearman & Sterling LLP

Representing the Respondent
Mr. Ivan Kondov
Head of the Judicial Protection of the Ministry of Finance of the Republic of Bulgaria
Mr. Paul D. Friedland
Ms. Carolyn B. Lamm
Ms. Abby Cohen Smutny
White & Case LLP
Mr. Lazar Tomov
Tomov & Tomov

Date of dispatch to the Parties: September 6, 2005

ORDER

ICSID Case No. ARB/03/24

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Claimant's Request

1. On July 29, 2005, Claimant filed a Request for Urgent Provisional Measures in accordance with ICSID Arbitration Rule 39 seeking urgent recommendations of provisional measures pursuant to Article 47 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention").

2. Claimant seeks an order recommending urgent provisional measures in the following terms:

> *(1) that the Respondent immediately discontinue and/or cause to be discontinued all pending proceedings, and refrain from bringing or participating in any future proceedings before the Bulgarian Courts and Bulgarian authorities relating in any way to this arbitration including (i) the reopened insolvency proceedings against Plama; (ii) the execution actions commenced by the ASR and (iii) the execution of the CPC's decision dated February 10, 2005*
>
> *(2) that the Respondent takes no action of any kind that might aggravate or further extend the dispute submitted to the Tribunal*
>
> *(3) that the Tribunal grant any further relief that it deems appropriate to preserve PCL's rights*
>
> *(4) that Respondent pays the full costs of this application, including the fees and expenses of PCL's legal counsel.*

3. Claimant explained in its Request that various proceedings had been commenced against Nova Plama in the Bulgarian Courts which form the subject matter of the Request. The Bulgarian Court proceedings are summarized as follows:

(a) The Bulgarian Courts have reopened insolvency proceedings against Nova Plama on the application of two alleged creditors, Yorset Holdings (Bulgaria), EAD ("Yorset") and DZI Bank AD ("DZI Bank"). In this regard, Claimant draws the Tribunal's attention

to the fact that the debts claimed by Yorset and DZI Bank, as the alleged legal successors of First Private Bank, Mineralbank and Balkanbank, are disputed by Claimant and part of the subject matter of the dispute before this Arbitral Tribunal.

(b) Claimant refers the Tribunal to a Decree of the Pleven District Court of July 19, 2005 regarding the insolvency proceedings, declaring Nova Plama bankrupt, ordering its business activity to be suspended, ordering that an attachment of Nova Plama's property be decreed, terminating the power of the management bodies of Nova Plama, decreeing that the assets of Nova Plama be sold and distributed to its creditors and appointing temporary trustees in bankruptcy to oversee the bankruptcy procedure.

(c) While the Pleven Court's Decree may be appealed to the High Court of Cassation in Bulgaria, the Decree is subject to immediate execution which, according to Claimant, will not be stayed by such an appeal.

(d) Bulgaria's Agency for State Receivables ("ASR")[1] has commenced execution actions against Nova Plama for the collection of Nova Plama's public (tax and assurance) debts and, according to Claimant, has seized twelve properties owned by it and sold four pieces of Nova Plama's real estate.

(e) Allowing the ASR to recover Nova Plama's tax debts at this stage, argues Claimant, when the survival of Nova Plama is at stake would serve only to aggravate the existing dispute between Claimant and Respondent. Claimant says its right to non-aggravation of the dispute deserves protection by the Tribunal in the form of an order for provisional measures.

(f) Bulgaria's Commission on Protection of Competition ("CPC") is seized of an application by various entities against Nova Plama for breaches of Bulgarian competition law by reason of alleged illegal state subsidies. Claimant states that the CPC has decided

[1] ASR is described by Claimant as the public executive for the securing and execution of public receivables.

on February 10, 2005 that Nova Plama is the beneficiary of an illegal state subsidy and has ordered its reimbursement by Nova Plama. Claimant alleges that while it has appealed the CPC's decision to the Bulgarian Supreme Administrative Court, such appeal is not suspensive of the execution of that decision; and if the CPC's decision is executed, a large part of Nova Plama's core inventory will be sold off and Nova Plama will not be able to start up the Refinery in such an event.

(g) Accordingly, Claimant requests the Arbitral Tribunal to recommend that Respondent discontinues or causes to be discontinued all pending proceedings and refrains from bringing or participating in any execution actions pertaining to the CPC's decision in the future.

4. The relief sought by Claimant is based on Article 47 of the ICSID Convention which provides as follows:

> *Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.*

5. Rule 39 of the ICSID Arbitration Rules states that:

> *(1) At any time during the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.*
>
> *(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).*
>
> *(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in*

> *a request. It may at any time modify or revoke its recommendations.*
>
> *(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.*
>
> …

6. Claimant contends that it has a right to non-aggravation of the dispute pending before the Arbitral Tribunal and that the reopening of the insolvency proceedings in Bulgaria will, in fact, lead to aggravation of its dispute with Bulgaria.

7. It also contends that Respondent's conduct threatens its right to the exclusive nature of ICSID arbitration under Article 26 of the ICSID Convention:

> *Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy …*

8. Claimant furthermore argues that its rights which are the object of the present arbitration include the right to fair and equitable treatment of its investment, the right to constant protection and security, non-impairment by unreasonable or discriminatory measures, the right for its investment not to be subject to measures of expropriation or measures having equivalent effect and the right to have an effective means for the assertion of claims and the enforcement of rights under domestic law. In order to preserve these rights, says Claimant, its investment must not suffer irreparable harm pending the outcome of the arbitration. Claimant seeks the preservation of its right to continue with the operation of the Refinery and to maintain the remaining value of its investment in Nova Plama. It asserts that it will not be able to do this if Nova Plama is liquidated and its inventory is converted to cash pursuant to the Pleven District Court's Decree of July 19, 2005.

Respondent's Opposition

9. On August 19, 2005, Respondent filed its Opposition to Claimant's Request for Urgent Provisional Measures.

10. Respondent argues that the relief sought by Claimant is unnecessary to preserve any of its rights in this arbitration because Claimant has failed to demonstrate that its rights in this arbitration would be irreparably harmed without the measures it seeks. According to Respondent:

- None of the proceedings in Bulgaria interfere with Claimant's right under Article 26 of the ICSID Convention to the resolution of its Energy Charter Treaty claims in ICSID arbitration to the exclusion of any other remedy. None of the proceedings at issue threaten to rule on any of the Claimant's rights or Bulgaria's obligations under the Energy Charter Treaty. Those determinations remain exclusively for this Tribunal to make.

- None of the actions in Bulgaria threaten Claimant's right to obtain an effective award on the basis of the claims it has presented. Claimant seeks an award of monetary compensation for what it alleges are breaches by Bulgaria of Part III of the Energy Charter Treaty. None of the Bulgarian proceedings threaten to undermine Claimant's ability to obtain an award fully compensating it should it demonstrate that any of its claims have merit. (In fact, Claimant asserted as of its Request for Arbitration that its investment already had in effect been expropriated entitling it to an award of "the discounted cash flow of the company … in lieu of the market value if this gives a higher value.") Claimant does not indicate that it is seeking an award on any other basis, nor has it demonstrated that it would be entitled to do so in this case.

11. Respondent points out that Claimant's request, if granted, would affect proceedings in Bulgaria involving the rights of third parties entirely unrelated to this arbitration and would impact public interest rights generally (such as enforcement of competition law) as well as private commercial rights of individual parties not parties to the arbitration, where doing so would conflict with other international obligations of Bulgaria.

12. Respondent outlines the legal standards which it says are applicable to Claimant's request:

(a) an ICSID tribunal's authority to recommend provisional measures is limited to that which is necessary to preserve the right of a party.

(b) The Tribunal can order a provisional measure to safeguard only those rights over which it is seized.

(c) A requesting party must demonstrate *prima facie* that it has the specified right.

(d) Article 26 of the ICSID Convention extends to the legal dispute to which the parties agreed to submit to ICSID arbitration, in this case to claims of breaches of the ECT.

(e) The right to no aggravation of the dispute refers to preserving the efficacy of a final award on the basis of the claims presented.

(f) Provisional measures are indicated to protect the substantive rights in dispute, not to enforce them.

(g) A provisional measure must be necessary for the protection of the right in dispute.

(h) Where any potential harm to a right is compensable, provisional measures are not indicated.

13. Respondent elaborates its argument that as regards the bankruptcy proceedings pending in Bulgaria, these have been commenced by private, third-party creditors who have no relation to Bulgaria or to the dispute before this Tribunal. It goes on to rebut other allegations of Claimant regarding the bankruptcy proceedings.

14. With respect to the Agency for State Receivables' actions to secure payment from Nova Plama for overdue taxes and other debts to the State, Respondent argues that these actions do not amount to harassment, do not affect Nova Plama's core assets and have been conducted in accordance with due process. It cites *SGS Société Générale de*

Surveillance SA v. Pakistan (ICSID Case No. ARB/01/13, Procedural Order No. 2 of October 16, 2002:

> *We cannot enjoin a State from conducting the normal processes of criminal, administrative and civil justice within its own territory. We cannot, therefore, purport to restrain the ordinary exercise of these processes.*

The Arbitral Tribunal notes that the respondent to the application in that case was both the plaintiff in the Pakistani legal proceedings and SGS' co-contractor; there was no third party involved in the dispute before the ICSID tribunal, directly or indirectly.

15. Regarding the proceedings commenced before the Bulgarian Commission for the Protection of Competition, Respondent points out that these proceedings were brought by third-parties, competitors of Nova Plama, against the State of Bulgaria for alleged, unlawful state aid to Nova Plama. The issues in that proceeding have nothing to do with the issues in the present arbitration.

16. Respondent contends that none of the Bulgarian proceedings at issue affect any of Claimant's rights in the arbitration. It is not enough, says Respondent, for Claimant to observe that facts relevant to its claim are being addressed in the other proceedings.

17. Respondent argues that none of the Bulgarian proceedings threaten irreparable harm to Claimant's substantive right to obtain an award on the basis of the ECT. It points out that what Claimant seeks in this arbitration is monetary compensation for losses it claims it suffered due to actions and omissions it claims are attributable to Bulgaria and breaches of Articles 10, 12 and 13 of the ECT.

Claimant's Response

18. On August 25, 2005, Claimant submitted its Response to Respondent's Opposition to Claimant's Request for Urgent Provisional Measures.

19. Claimant argues that Respondent's opposition on the grounds that suspending the Bulgarian bankruptcy proceedings is unprecedented is wrong, citing *CSOB v. Slovak*

Republic (ICSID Case No. ARB/97/4). Claimant also argues that Bulgaria's contention that third party rights will be affected is irrelevant since Claimant's request is only for provisional measures to maintain the *status quo* of Nova Plama pending the final outcome of this arbitration, which would not prejudice such third party rights.

20. Claimant says that Respondent's argument that the Arbitral Tribunal can only order provisional measures to safeguard rights over which it is seized is unsupported by Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules.

21. Claimant rejects Respondent's contention that the Request seeks the enforcement, as opposed to the protection, of its rights under the ECT.

22. Claimant says that if the reopened bankruptcy proceedings in Bulgaria are allowed to continue, its rights in this arbitration would be irreparably harmed, and damages would not be an adequate remedy. No monetary award, it argues, could compensate for the destruction of the Nova Plama refinery and its core inventory. Claimant adds that if insolvency proceedings continue, its right to the non-aggravation of the dispute, its right to the exclusive remedy under Article 26 of the ICSID Convention and its rights in dispute in this arbitration will be irreparably prejudiced.

23. Claimant, further, seeks to refute various factual allegations made by Respondent in its Opposition regarding the Bulgarian proceedings.

24. Finally, Claimant reiterates its request for relief in terms identical to those in its initial Request.

Respondent's Rejoinder

25. On August 31, 2005, Respondent submitted its Rejoinder to Claimant's Reply.

26. In that Rejoinder, Respondent argues that Claimant's right under Article 26 of the ECT to ICSID arbitration as the exclusive remedy for the dispute is not infringed by the proceedings in Bulgaria. Respondent furthermore says that continuation of the Bulgarian proceedings will not aggravate the parties' dispute, i.e., will not undermine the resolution of the dispute by arbitration. Moreover, Claimant's rights in dispute which may be

preserved by provisional measures pending a decision by the Tribunal do not include, says Respondent, the right to avoid commercial loss, particularly loss resulting from the payment of debts to third party creditors having no relation to the Parties in this arbitration or to the arbitration itself.

27. Respondent contends that while, on the merits, Claimant seeks monetary compensation for what it claims are breaches by Bulgaria of various ECT obligations, it seeks as an interim measure an order directing Bulgaria to suspend ordinary judicial and administrative mechanisms affecting many third parties and the public interest.

28. Respondent says that to be entitled to urgent provisional measures, Claimant must demonstrate that its rights at issue in the arbitration face irreparable harm due to acts of Respondent. There can be no irreparable harm, it asserts, when a threatened injury can be made whole by monetary compensation.

29. Respondent says there is no precedent for an ICSID tribunal recommending the suspension of domestic legal proceedings where the proceedings involved and affected the rights of third parties unrelated both *de jure* and *de facto* to the parties and the arbitration. The right to maintain the *status quo*, invoked by Claimant, applies only as between the parties to a dispute.

30. Respondent's Rejoinder then goes on to examine the various proceedings underway in Bulgaria involving Nova Plama and to rebut Claimant's arguments about their effect on that company and on this arbitration.

Telephone Conference

31. The Arbitral Tribunal held a telephone conference with the Parties' counsel on September 1, 2005 in which the Tribunal indicated that it did not consider an oral hearing other than that telephone conference to be necessary since the Parties' written submissions were very detailed and comprehensive. The Parties declared that they wished to make no further submissions beyond their respective written submissions prior to the telephone conference (which are summarised above). Various questions were put to counsel by the Tribunal and a discussion ensued of the procedure and timetable for rendering the

Tribunal's decision on Claimant's Request for Urgent Provisional Measures. The conference was recorded by ICSID.

Examination of the Parties' Contentions

32. Claimant's Request for Arbitration contains both principal claims based on the ECT and subsidiary claims based on relevant BITs. With respect to the latter claims, the Arbitral Tribunal, in its Decision on Jurisdiction dated February 8, 2005, held that:

> *The most favored nation provision of the Bulgaria-Cyprus BIT, read with other BITs to which Bulgaria is a Contracting Party (in particular the Bulgaria-Finland BIT), cannot be interpreted as providing the Respondent's consent to submit the dispute with the Claimant under the Bulgaria-Cyprus BIT to ICSID arbitration or entitling the Claimant to rely in the present case on dispute settlement provisions contained in these other BITs.*

33. The first principal cause of action stated in Claimant's Request for Arbitration is that Respondent has breached Article 10 of the ECT. Claimant asserts that Respondent has violated its obligations vis-à-vis Claimant's investment in Nova Plama under ECT Articles 10(1) and 10(12) which read as follows:

> *(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each*

> *Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.*
>
> …
>
> *(12) Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorizations.*

34. The second principal cause of action is based on the alleged breach by Respondent vis-à-vis Claimant's investment in Nova Plama of ECT Article 13 which provides that:

> *(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subject to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is*
>
> *(a) for a purpose which is in the public interest;*
>
> *(b) not discriminatory*
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> *(c) carried out under due process of law; and*
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> *(d) accompanied by the payment of prompt, adequate and effective compensation.*

35. Claimant's third principal cause of action relies on Article 12(1) of the ECT. That article stipulates:

> *(1) Except where Article 13 applies, an Investor of any Contracting Party which suffers a loss with respect to any Investment in the Area of another Contracting Party owing to war or other armed conflict, state of national emergency, civil disturbance, or other*

> *similar event in that Area, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, treatment which is the most favourable of that which that Contracting Party accords to any other Investor, whether its own Investor, the Investor of any other Contracting Party, or the Investor of any third state.*

36. In Section 5 of its Request for Arbitration, Claimant sets forth its claims and request for relief. Its principal claims include damages for breaches of ECT Articles 10 and 12 as well as compensation in respect of expropriation as provided in ECT Article 13, plus compounded interest as well as indemnification of all costs incurred in relation to this arbitration. As confirmed by Claimant in the telephone conference on September 1, 2005, Claimant seeks only damages in the present arbitration.

37. The Arbitral Tribunal will now examine Claimant's Request for Urgent Provisional Measures in the light of the issues in this case.

38. The Arbitral Tribunal's authority to recommend provisional measures under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules is not questioned. Nor, with one exception to which we will come, do the parties seriously differ over the legal considerations applicable to a decision whether or not to recommend such measures. The parties cite the same ICSID tribunal and ICJ court decisions and the same commentaries as evidence of the rules which have developed. Provisional measures are extraordinary measures which should not be recommended lightly. The need for provisional measures must be urgent and necessary to preserve the status quo or avoid the occurrence of irreparable harm or damage. Provisional measures are appropriate to preserve the exclusivity of ICSID arbitration to the exclusion of local administrative or judicial remedies as prescribed in Article 26 of the ICSID Convention. They are also appropriate to prevent parties from taking measures capable of having a prejudicial effect on the rendering or implementation of an eventual award or which might aggravate or extend the dispute or render its resolution more difficult. Provisional measures must relate to the preservation of the requesting party's rights, as specified in Article 47 of the ICSID Convention and Rule 39(1) of the ICSID Arbitration Rules.

39. It is this latter element on which there is a difference between the parties. In the *Amco Asia v. Indonesia case* (ICSID Case No. ARB/81/1 (Decision of December 9, 1983, reprinted in ICSID REP 410 at 411 (1993))), the arbitral tribunal said the rights to which Rule 39(1) of the ICSID Arbitration Rules relate are the "*rights in dispute*". Claimant, in its Reply, takes issue with this statement and cites learned authors to the effect that the rights to be preserved should not be limited in this way.

40. It seems to the Arbitral Tribunal that the rights referred to in Article 47 of the ICSID Convention and Article 39(1) of the ICSID Arbitration Rules must be limited in some way. In the context of the present arbitration, the terms cannot mean any and all rights a party may have unconnected with the ECT or vis-à-vis third parties. If the words used in *Amco Asia*, "rights in dispute", may be too narrow, at least a limitation such as "rights relating to the dispute" is reasonable and necessary. The rights to be preserved must relate to the requesting party's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out. Thus the rights to be preserved by provisional measures are circumscribed by the requesting party's claims and requests for relief. They may be general rights, such as the rights to due process or the right not to have the dispute aggravated, but those general rights must be related to the specific disputes in arbitration, which, in turn, are defined by the Claimant's claims and requests for relief to date.

41. The rights relating to the dispute in the present arbitration are the rights deriving from the Energy Charter Treaty: Claimant's rights to fair, equitable and non-discriminatory treatment for its investment. Claimant considers that Respondent has not accorded such treatment to its investment in Nova Plama, in violation of Respondent's obligations under the Energy Charter Treaty. Claimant invokes many grounds to support its claims - - some of which may be involved in the Bulgarian proceedings complained of - - but Claimant does not in this arbitration seek a Tribunal decision to remedy the alleged wrongs which make up these grounds other than by way of damages. Thus, the Tribunal is asked to decide whether Claimant is entitled to damages for the breach of the ECT which it alleges these wrongs constitute. Because the claims and relief which the Claimant seeks are limited to damages, the scope of the "rights relating to this dispute"

which deserve protection by provisional measures is necessarily limited to the damage claims.

42. Nor are the causes of action and claims and requests for relief which are the subject matter of the present arbitration causes of action or claims and requests for relief in any of the proceedings in Bulgaria. The Arbitral Tribunal is unable to see how any of the proceedings underway in Bulgaria could affect the issues involved in this arbitration or the outcome of this arbitration. Even assuming the worst case from Claimant's point of view, i.e., that Nova Plama is liquidated and its assets distributed to creditors and that ASR and CPC are successful in their actions, Claimant in this arbitration - - which is not Nova Plama - - will still be able to pursue its ECT claims for damages against Bulgaria. And the outcome of the proceedings in Bulgaria will have no foreseeable effect on the Arbitral Tribunal's ability to make a determination of the issues in the arbitration.

43. Moreover, at least with respect to the bankruptcy proceedings, it is significant that the parties to those proceedings and the parties to this arbitration are different. The bankruptcy proceedings are brought by private parties who are not involved in the present arbitration. The Tribunal is reluctant to recommend to a State that it order its courts to deny third parties the right to pursue their judicial remedies and is not satisfied that if it did so in this case, Respondent would have the power to impose its will on an independent judiciary. While under general principles of public international law, a state is responsible for actions of its courts, Claimant's Request for Urgent Provisional Measures is not based on a claim of denial of justice by those courts for which relief is sought. In addition, in the *CSOB v. Slovak* case (ICSID Case No. ARB/97/4) where the arbitral tribunal did recommend the suspension of bankruptcy proceedings (see Procedural Order No. 4 of January 11, 1999 and Procedural Order No. 5 of March 1, 2000)[2], it did so because and to the extent that the court in those proceedings might determine claims of a right to receive funds which were at issue in the arbitration. Moreover there was a direct link between the Slovak Republic as the respondent to CSOB's application for interim measures and the Slovak Collection Agency (Slovenska inkasni spol or 'SI') as the

[2] It is to be noted that during the telephone conference on September 1, 2005, counsel for Respondent explained that, in the *CSOB v. Slovak* case, the Slovak Republic did nothing to bring the tribunal's recommendation to the local court's attention. However, claimant did do so, but those courts did not accept the tribunal's recommendation.

subject of the Slovak bankruptcy proceedings where CSOB was the only named creditor. Indeed, the absence of any other interested parties to the bankruptcy proceedings led the Slovak Court eventually to dismiss SI's bankruptcy for lack of plurality of creditors, as was explained by Counsel during the oral hearing by telephone on September 1, 2005: see also paragraphs 43 to 46 of the CSOB award of December 14, 2004. There is no similar situation in the present arbitration.

44. The ASR and CPC proceedings may be different because ASR is an agency of the Bulgarian Government and CPC is an administrative tribunal. The Government could, undoubtedly, order ASR to discontinue the proceedings against Nova Plama if the Tribunal recommended it to do so. Quaere regarding CPC, which appears to be an administrative tribunal. However, the tax claims of the ASR and the state aid claims of CPC relating to Nova Plama, which are the subject of the proceedings in Bulgaria, are not presently claims before this Tribunal and will not affect Claimant's pursuit of its claims here or of the Tribunal's ability to dispose of them.

45. The proceedings underway in Bulgaria may well, in a general sense, aggravate the dispute between the parties. However, the Tribunal considers that the right to non-aggravation of the dispute refers to actions which would make resolution of the dispute by the Tribunal more difficult. It is a right to maintenance of the *status quo*, when a change of circumstances threatens the ability of the Arbitral Tribunal to grant the relief which a party seeks and the capability of giving effect to the relief.

46. Even the urgency of the need for provisional measures and the "irreparable" nature of the harm invoked to justify such measures appear to the Tribunal unfounded. What Claimant is seeking in this arbitration are monetary damages for breaches of Respondent's obligations under the Energy Charter Treaty. Whatever the outcome of the bankruptcy proceedings or the ASR or CPC proceedings in Bulgaria is, Claimant's right to pursue its claims for damages in this arbitration and the Arbitral Tribunal's ability to decide these claims will not be affected. The Tribunal accepts Respondent's argument that harm is not irreparable if it can be compensated for by damages, which is the case in the present arbitration and which, moreover, is the only remedy Claimant seeks.

47. It is undoubtedly true, as Claimant says, that if Nova Plama is placed in bankruptcy and sold to another investor or liquidated and its assets distributed to its creditors, Claimant will no longer have a going concern to operate. The same may be true if the ASR or CPC proceedings against Nova Plama are successful. But that is not an issue in the ICSID arbitration. Claimant has not sought restitution or any other relief from this Tribunal which would permit it to continue to operate the Nova Plama refinery. What is at issue here is Claimant's right to monetary damages because of Respondent's alleged breach of Treaty obligations.

Costs

48. Lastly, the Arbitral Tribunal makes no order here regarding the costs of and arising from the Claimant's application, save to reserve its power to do so in a later order, decision or award.

49. The Tribunal requests the Parties, in their eventual submissions on costs, to specify the costs incurred relating to this phase of the arbitration insofar as possible.

The Decision of the Arbitral Tribunal

50. The Arbitral Tribunal rejects Claimant's Request for Urgent Provisional Measures in its entirety.

51. The Tribunal reserves its decision on the costs of the procedure relating to the Request for Urgent Provisional Measures to a later stage of this arbitration.

Place of Arbitration: Washington D.C. Date: _____

On behalf of the Arbitral Tribunal

_____

Carl F. Salans

President