In the matter of an arbitration
under the Rules of Arbitration of
the International Centre for
Settlement of Investment Disputes

Case No. ARB/20/44

Video conference
via Zoom

Tuesday, 23rd November 2021

Hearing on the Bifurcated Issue
and Provisional Measures

Before:
MR LAURENCE SHORE
DR STANIMIR ALEXANDROV
MR J WILLIAM ROWLEY QC

NASIB HASANOV

Claimant

-v-

GEORGIA

Respondent

Secretary to the Tribunal: CELESTE MOWATT

Party-amended transcript produced by Trevor McGowan
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15:00 1 Tuesday, 23rd November 2021
2 (Transcript time is CET)
3 (3.06 pm)
4 THE PRESIDENT: Good morning/good afternoon, everyone. It's
5 nice to see quite a few faces. However, I would ask
6 that apart from main speakers on each side, or main
7 members of counsel team, if everyone else could be on
8 mute and, in order to save bandwidth, also stop video.
9 Thank you.
10 You have the Tribunal and Administrative Secretary.
11 We're grateful for the parties' cooperation in getting
12 to this hearing on provisional measures and the
13 bifurcated jurisdictional issue in Case No. ARB/20/44.
14 The Tribunal has just one housekeeping matter that
15 I'll ask Mr Rowley to address everyone on in a moment.
16 But first, if I can ask Claimant if there's any point
17 that Claimant needs to raise before we get started on
18 the provisional measures application?
19 MR OSTROVE: Nothing, thank you very much, Mr President.
20 THE PRESIDENT: Thank you, Mr Ostrove.
21 Am I right, because I see Mr Ostrove,
22 Ms Cervantes-Knox and Mr Sinclair, that you will be the
23 principal speakers for Claimant on provisional measures?
24 MR OSTROVE: Yes, that's correct, although we will also have
25 Ms Bizikova who will also be addressing you briefly.

15:07 THE PRESIDENT: Thank you.

For Respondent, I see Ms Annacker, Ms Stein, Mr Silva Romero. You are the principal speakers; is that right, Ms Annacker?

DR ANNACKER: That's correct.

THE PRESIDENT: And is there any point that Respondent had that it wished to raise at the outset?

DR ANNACKER: No, we don't.

THE PRESIDENT: Alright. Thank you very much.

Mr Rowley, on the Tribunal's housekeeping matter.

MR ROWLEY: Yes, good morning, everybody, or good afternoon, everybody, as the case may be.

The Tribunal has had a discussion prior to the meeting about the use of Box, and we have all struggled with it mightily. It just does not provide the kind of platform and support that is optimal for a tribunal or for the parties. What we would like to propose is that, as we move forward, the record be moved on to the Opus 2 platform, that that platform be available from here forward to the Tribunal and to the parties, to the extent that -- in numbers the parties wish.

I emphasise that because sometimes when we discuss this, parties say, "Oh, it's expensive if we have a lot of people on it because they charge for it by the person". And in the last couple of cases I've been

15:09 doing with them, we've encouraged the parties to have as many as they want on, but it can be as few as one person per party, until you really need it at the hearing.

So that's what we're proposing. We'd like to ask Ms Mowatt to get a quote for us. I am working with another tribunal where we moved from the Box to Opus 2 last week in ICSID, and it just makes a world of difference in terms of saved time. I won't take you through the troubles that the members of the Tribunal have had with Box over the last two or three days, but we're ready to hear you. But in future hearings, we'd like to think we will be more ready once we get a good platform in place.

THE PRESIDENT: Thank you very much, Mr Rowley.

So I would ask counsel, after today's hearing, to consider what Mr Rowley, on behalf of the Tribunal, has just explained, and to let us know as soon as you can. It would be very helpful.

Thank you very much. We're ready to go. You've got 40 minutes on your primary submissions on your provisional measures application, Mr Ostrove.

(3.10 pm)

Submissions on behalf of Claimant
on the provisional measures application

MR OSTROVE: Thank you very much, Mr President, members of

15:10 the Tribunal.

Claimant is seeking provisional measures to avoid imminent harm, to avoid aggravation of the dispute and to preserve the status quo of the situation on the ground pending resolution of this dispute, and granting these measures would cause no prejudice to Georgia.

Despite Georgia's efforts to prejudge the outcome on the ground and act as if Claimant never purchased the share of Caucasus Online indirectly, the legal status on the ground is that Mr Hasanov is the ultimate owner of the investment.

Respondent is trying every way it can to force him to reverse the transaction by which he acquired Caucasus Online and to deprive him of his ownership rights. And that started with administrative decisions and fines against Caucasus Online. Then came the imposition of the special manager, an action that was made possible by a targeted piece of legislation that was pushed through on the fast track through the legislature.

And as you will see during our presentation shortly, the leading rule-of-law bodies of the Council of Europe have already expressed their strong opinion condemning the imposition of the special manager as violating the rights to property under the European Convention on Human Rights. We will turn to that opinion a little bit

later; it's Exhibit C-44.

Since this case has started, the special manager has blocked attempts by Caucasus Online to carry on its business as it sees fit; and in doing so, she has blocked its ability to show the market that Caucasus Online will grow and will develop into a critical part of regional development. And the special manager continued to do that after Procedural Order No. 3 was issued, flaunting your clear directions.

Notwithstanding the urgency of the situation that we've been facing, the parties have agreed twice to postpone this hearing, and we thank all of the members of the Tribunal and everyone involved for their flexibility in that regard.

(Slide 2) The first time we requested a suspension, it was because just before the scheduled hearing, the Tbilisi Court of Appeals granted the interim measures essentially that we sought, and suspended the imposition of the special manager. The judgment is at C-45, and we explained that in our letter of 18th March. The Tbilisi Court of Appeals made that decision on the grounds that the future actions by the special manager were likely to cause irreparable harm to Caucasus Online.

But Georgia did not accept the rule of law, even when that rule of law was issued by its own Court of

15:13 Appeals. That decision was a non-appealable decision, but Georgia looked for a way around it and brought a revision procedure. A revision procedure there, like in most places, requires newly discovered evidence.

(Slide 3) There was no newly discovered evidence. What they raised was these famous MoUs that you've heard about already, which would have helped Caucasus Online participate in the Digital Silk Way; and they claimed that they had also discovered new evidence that, surprise, Mr Hasanov had exercised a call option over the remaining 51% of shares in Nelgado, ultimately controlling Caucasus Online.

But there was no newly discovered evidence. The GNCC admits that it knew of the MoUs since December 15th 2020. The exercise of the call option was explained in paragraph 11 of our Request for Arbitration in October 2020. It reflects poorly on the rule of law in Georgia that the state and the GNCC would resort to such abusive manipulation of their judiciary.

Sadly, we learnt on 7th April that on 1st April the Court of Appeals had reversed its judgment granting the provisional measures, agreeing that there was newly discovered evidence and therefore putting a little figleaf over this reversal of a non-appealable judgment. It's an embarrassing decision for Georgia, and that's

15:15 where we are.

So we came back to you in our letter of April 8th to explain that we needed now to get provisional measures from you. As you'll recall, it was taking a little while to get a hearing date, and we greatly appreciate the Tribunal's issuance of Procedural Order No. 3 temporarily granting the relief that we sought, as it says in paragraph 19 for the period from the date of that procedural order until the date "the Tribunal issues its final decision on the Application."

Then a second time, on the eve of the next hearing of May 12th, we agreed to postpone again to seek an opportunity to settle the case. We agreed because we did have that interim measure of protection in place, although we were well aware that Georgia had expressed certain scepticism about that procedural order and whether it really was provisional measures.

(Slide 4) But we received assurances via email of May 11th -- which is referenced in Claimant's letter C-64, which is on the screen -- that Georgia assured us that no further adverse actions would be taken, including specifically the revocation of the licence to operate.

So we would have preferred to continue negotiating without having to come back to you to interrupt that,

15:16 but the deterioration of the situation on the ground has continued. There have been repeated breaches of Procedural Order No. 3, forcing us to come to you to seek a clear and robust provisional measures order, one that will not allow Georgia to quibble about procedural issues with the way the order came down to give them an excuse for non-compliance.

Although Respondent and the GNCC have been holding off on the ultimate threat of withdrawal of the authorisation to operate, that still hangs over us as a sword of Damocles and has a tremendous impact on the business.

Our Update to you on November 11th filled you in on what's happened over the last few months. In a nutshell, the GNCC has taken steps to preserve its ability to withdraw the authorisation to operate as soon as December. In parallel, the special manager has prevented the local management from freely operating the company and has prevented the shareholders from exercising ownership rights at all. It's been denying access to information. The confidentiality application that you received last Friday was a striking example.

The GNCC and the special manager -- and now Georgia itself -- have been taking the position that the shareholders of record are not entitled to any rights.

15:18 They want to deny those rights now, rather than leaving in place the status quo and waiting for you to make your decision. In doing so, they are slowly strangling the company.

(Slide 5) So we are back here with a stronger case than ever for provisional measures, and my colleagues and I will run through why you've got every reason to grant provisional measures. Ms Bizikova will cover prima facie jurisdiction. Then I'll come back to you for why the measures are necessary to avoid irreparable harm. Then Kate Cervantes-Knox will address why the measures maintain the status quo. And Anthony Sinclair will end on why the measures meet any requirement for narrow and specific.

So with that, I turn the floor over. And I will ask for a tiny bit of understanding: we have to do some adjustment of microphones to avoid feedback, so we might run over by a minute because of manipulations. Thank you.

MR ROWLEY: Just one point. You are going to provide us, I assume, with this opening demonstrative by email, will you?

MR OSTROVE: The slides have been distributed. (Pause)

MS BIZIKOVA: (Slide 6) I will address the first requirement for provisional measures to be granted, which is the

15:19 existence of prima facie jurisdiction.

(Slide 7) As explained by the Tribunal in Pey Casado v Chile (CLA-10, paragraph 11), to obtain provisional measures, claimants must show:

"... the prima facie existence of [jurisdiction], or, to couch this in negative terms, the absence of a clear lack of jurisdiction."

The threshold for a showing of prima facie jurisdiction is extremely low and has been demonstrated in this case, as shown by the Claimant in his Request for Arbitration and in his Response on Provisional Measures.

Respondent has argued that there is a lack of prima facie jurisdiction on the basis of its inter-state negotiation objection. The lack of merit of that jurisdictional objection will be addressed later in detail in this hearing and therefore, in the interest of time, I will not address it here.

(Slide 8) As for the Respondent's argument that there is no prima facie jurisdiction by virtue of the alleged fork-in-the-road provision in Article 9(2) of the BIT, the objection has no merit because there is no fork-in-the-road provision in the treaty. Article 9(2) of the BIT, which is set out on the left-hand side of the slide, permits an investor to refer the matter to

15:21 the judicial body of the contracting party in whose territory the investment is made, under paragraph (a); or to ICSID arbitration, under paragraph (b); or to UNCITRAL arbitration, under paragraph (c).

Such provisions which adopt the either/or formulation have been found to give an investor a choice of remedies; but they do not, by their terms, forbid the investor to resort to both, as has been confirmed by the tribunal in Mabco Constructions v Kosovo (CLA-95, paragraph 433), and I refer the Tribunal to the excerpt of that award on the right-hand side of the slide. This reasoning has also been confirmed in other cases, such as Lundin v Tunisia.

(Slide 9) The text of Article 9(2) can be contrasted with the language of an actual fork-in-the-road provision, which makes clear that the claimant must elect one form of dispute resolution or another.
I refer the Tribunal to the quote on the slide from the same award from Mabco Constructions, in which the tribunal gave several examples of the standard formulation of fork-in-the-road provisions in other treaties and distinguished them from the either/or formulation. This finding alone is sufficient to dismiss Respondent's objections against the prima facie jurisdiction of the Tribunal.

15:22 Beyond this, of course, the BIT dispute has not been submitted anywhere else and Mr Hasanov has not submitted his [case] anywhere else. So even if there were a fork-in-the-road provision in the BIT, it would not apply here. This is yet a further reason why that prima facie jurisdiction is established.

(Slide 10) My colleague Michael Ostrove will now explain why the requested measures are urgently required to avoid irreparable harm.

MR OSTROVE: I will also add that of course the dispute itself was never submitted locally anyway, or any place else. So even if there were a fork in the road, it would not apply.

(Slide 11) With respect to the requested measures being urgently required to avoid irreparable harm, the first disputed issue before you is: what kind of harm justifies provisional measures?

Measures are deemed to be necessary if the harm is substantial or serious, and that's really a widely embraced standard. It was set out relatively clearly in the PNG v Papua New Guinea case (RL-9, paragraph 109) and is described in paragraph 93 of our Response on Provisional Measures. The critical point is that "irreparable" means substantial and serious; it doesn't mean literally something that cannot be repaired by

15:24 money.

In reply, of course Respondent tries to set the highest bar possible. They would. They go for the literal approach that: yes, it means that literally it can't be repaired otherwise. And they rely mostly on the Metalclad decision from 1997; a decision that, by the way, doesn't even mention the term "irreparable harm". We submit to you that the more recent cases that we cite present the prevailing view.

Respondent then has tried to make an attempt to distinguish our cases, but its attempt fails. Focusing on their core argument, they try to argue that most of the cases we relied on involved claims for specific performance and therefore are inapposite. They say that in their Reply, paragraphs 129 to 131.

But that's incorrect. Specific performance is of course exceptionally rare in investment arbitration and provisional measures are not. In none of our cases did a tribunal determine that the standard that we suggest, as laid out in the PNG case, applied only because there was specific performance being sought. And in fact, tribunals have often granted provisional measures when specific performance was not either any of the relief or the main relief, and where damages were sought as an equivalent.

15:25 (Slide 12) Cases that we have cited are on the screen. You have our submissions on them. But as you will see, many of them included damages-only relief claims.

(Slide 13) In any event, here Claimant has sought the functional equivalent of specific performance. In our Notice of Dispute on June 22nd 2020, C-26, we indicated that we would be seeking restitutio in integrum. In the end, when we formulated the claim, Claimant asked for a declaration of rights. If the Tribunal declares that Respondent's actions denying the validity of the transaction violate the treaty, then Respondent will be bound to abide by that award, according to Article 53(1) of the ICSID Convention, and we expect that Respondent will abide by that. And that will allow Claimant to operate Caucasus Online in the interests of, frankly, all parties.

If Georgia's position is that they won't comply with their international obligations after you have declared them, and that they will only comply if you specifically direct them to take certain actions and cause the GNCC to take certain actions, then of course we can amend our prayer for relief. But that, we submit, would be putting form over substance to the extreme.

(Slide 14) The second issue that is really debated

15:27 a little bit between the parties is what level of likelihood of this irreparable harm happening is necessary. There is no requirement that there be an absolute certainty that all of these bad things will happen; the test is satisfied if the harm is probable. We have cited a number of cases for that, put them up on the screen. You have our submissions on it. The jurisprudence we submit is clear, and Respondent has not cited anything that contradicts that.

(Slide 15) Finally, the measures have to be "urgently needed". And regarding urgency and what urgency means, the test is satisfied when a question cannot await the outcome of the award on the merits because the harm would arise before you, as a Tribunal, have had an opportunity to issue your final award.

We've got CLA-24, the Biwater Gauff case, on the screen for that provision. It itself refers to Professor Schreuer.

Respondent quibbles with this a little bit, saying, "No, no, no, it has to be imminent, the harm", and they cite the Rizzani case at CLA-31 for that. But even the Rizzani case just says that "imminent" means that something is not purely hypothetical and speculative; it means it could be happening soon. So if it's happening before you issue your award, that's imminent enough to

15:28 make it necessary to issue provisional measures to protect the situation.

Now, in light of the --

THE PRESIDENT: Let me ask you -- sorry, Mr Ostrove.

(Pause)

I wonder, leaving aside the possibility of authorisation being pulled, what I'd like you to speak to is how CO is being damaged right now, and to what degree, by the special manager. Is profitability plummeting? I have seen none of that in the evidence you have presented.

I understand the point about the authorisation, and that that's looming, potentially. But what I don't see -- apart from any business obviously doesn't want a third party coming in and telling them things about running their business, but I don't see actual data about how the business is being damaged. Where is that data? Is Mr Kopaladze telling us that this company is suffering serious harm because the special manager is there? They seem to, despite certain conflicts, get along quite well. What's the issue with the special manager?

MR OSTROVE: Thank you, Mr President. I'm going to be coming to that in the next section of my presentation. But briefly, and at the highest level, first of all,

15:31 Mr Kopaladze is not going to be able to give evidence because he is currently under instructions not even to be having discussions with the shareholder --

THE PRESIDENT: Leave aside Kopaladze giving evidence; someone from CO hasn't given any evidence. Leave aside Kopaladze; I shouldn't have mentioned him. But someone from the company, at a high level, needs to tell us how it's being damaged. I don't see it.

MR OSTROVE: Okay. And we'll come to Stuart Evers's email that's on the record shortly --

THE PRESIDENT: I've seen that. I've seen that.

MR OSTROVE: -- showing that the company is unable to carry out its business plan. And it paid a lot of money for this company not to keep it going at a status quo where it won't be able to long-term manage its finances, but in order to be able to grow it, so that it actually can get a return on investment and survive and long-term finance itself.

So what we'll see shortly is the evidence that it's been unable to negotiate properly with Amazon in order to get servers in -- we'll jump right to that right now. (Slide 23) There it is.

The shareholders had asked for information about the technical structure of the network because they wanted to be able to put in place a negotiation with Amazon to

15:32 locate virtual servers in Georgia. That would be a major source of profit in order to bring additional funds into the business and to tie it into the Digital Silk Road, which is the entire business plan on which basis Claimant invested the kind of money it invested into this company.

But then you have a special manager coming up and saying, "No, I need more information, I need to understand the justification for this". And Respondent has said, "Oh, well, you just have to provide the justifications to the special manager". But you see on the email that Respondent itself cited on the screen (C-54) the frustration of the shareholder, saying, "We cannot continue to be commercially active with Caucasus Online as part of the Digital Silk Way if this is the way we're operated".

So they are actually unable to carry out the business plan that they intended to do because the special manager has completely cut off the shareholders and the shareholder bodies, and has specifically said -- they asked in their letter to you, when they said, "We don't accept that you really issued provisional measures, but we'll agree to abide by them if Claimant agrees not to do anything to integrate the company with the Digital Silk Way". So what they've been doing is,

15:33 not having received that undertaking from us, they are not following your procedural order and they are stopping us from doing anything to integrate the company into the Digital Silk Way.

So the company is floating along. They are allowing it to do minor investments to maintain its cable. There is a major contract that has already been lost with MagtiCom. And the only way that the company long term can have the revenue flow that it needs is by plugging into international revenues.

THE PRESIDENT: Thank you. Go ahead, Mr Ostrove. I may come back to that, but go ahead for right now.

MR OSTROVE: More than happy to.

(Slide 18) You already have our submissions, so I won't go through them again here, about the types of thing that the special manager has already done, from our Response, paragraphs 40 to 49 -- that's on the screen, so we can go right past that -- where she basically is blocking the day-to-day activities of the company.

(Slide 19) She did issue a limited power of attorney for minor payments, but not allowing new commercial contracts without her authorisation and not allowing the governing bodies to act. So that again was just putting in a blocker to anything that was going to allow the

15:35 company to go forward with the direction that the current management wanted.

(Slide 20) That's just the fact that she actually won't even communicate with the shareholders.

(Slide 22) We can skip over that; you've got that in our Update. That's about the netting agreement. Again, it's daily operations about setting off claims, but everything is slowed down and blocked because the special manager doesn't understand the business and everything has to be explained. And that's just no way to run a company.

Then the next slide (24), please, which goes on to the legal rights. Even more importantly, what she's doing is she's been blocking the ability of the company even to act and take actions in justice. We've set that out in our Update. But essentially, she refused to grant a power of attorney to allow the company timely to challenge the May 20th 2021 decision ordering again the company to reverse the 51% transaction. So there's actually been a blockage of legal rights by the company by the special manager's roles.

(Slide 25) In Procedural Order No. 3, you had also said, in order to allow the company to go forward, the GNCC should stop taking adverse decisions. But it did, on May 20th 2021: that's the one I just mentioned that

15:37 we can't appeal locally. And on October 15th 2021: that's the decision where they said, "Hey, we're now giving you until December to comply, else, as already mentioned, the potential for the withdrawal of authorisation".

THE PRESIDENT: So there's no appeal of the October decision; is that right?

MR OSTROVE: Please?

THE PRESIDENT: Sorry, Mr Ostrove. There is no appeal of the October 15th decision: is that because it's simply an updating of the May decision? Or is there an opportunity to appeal the October decision?

MR OSTROVE: So, first, the October 15th decision is separate from the May decision and it extends the time period for compliance --

THE PRESIDENT: No, I understand that. Is there an opportunity to appeal it? No.

MR OSTROVE: No, the special manager refused the power of attorney that would have allowed the company to challenge it.

I understand it is possible that just on the eve of this hearing, last Friday, the special manager may have issued an additional power of attorney that would allow an action. But we haven't seen the documentation yet, and it would certainly seem to be an awfully convenient

15:38 time for something to be coming in right before this hearing. But we don't know yet what the scope of the rights are available under that.

THE PRESIDENT: But you know, nonetheless, Respondent says that there are a number of challenges, not only from CO, but that other shareholders have been able to take in relation to decisions that would arguably adversely affect CO. Is that not the case?

MR OSTROVE: It's right that one of the shareholders, ION, has issued a challenge. But in an exactly parallel circumstance, with Railway Telecom, which is an affiliate, the shareholder had brought an action to challenge the GNCC's decision, and the Tbilisi court said, "The shareholder doesn't have standing to bring that action; only the authorised entity can challenge the GNCC's decision". So there's basically no way that the ION shareholder action can survive; it would have to be the entity itself, Caucasus Online, that brings the challenge.

THE PRESIDENT: Alright, thank you. I'm sorry, go ahead. Sorry for interrupting. Go ahead, Mr Ostrove.

MR OSTROVE: Please don't apologise for interrupting: your questions are more important than anything else.

(Slide 26) So just with respect to the refusal to abide by your Procedural Order No. 3, which could have

15:40 provided perhaps enough protection that we could go on and negotiate in peace, we requested on April 16th an undertaking, as required by your procedural order. And then we got this famous letter back from Georgia on April 19th quibbling that, "No, you couldn't possibly have really directed interim provisional measures. If you really meant to do that, you would have done all these other things, so you couldn't possibly mean that". And they will only abide by that -- and then you have the text at the bottom there -- if we "refrain from any action [other than] ordinary day-to-day operations" and if we don't integrate Caucasus Online into the Digital Silk Way.

So Georgia has been clear on this: they will not allow this company to be operated in a way that it can survive and grow: they will only allow it to be operated in a way that it will fizzle along and eventually go out of business.

(Slide 27) So what's happening? It's very interesting: the Venice Commission and the Director General on Rule of Law, both from the Council of Europe, highlighted exactly the kind of insidious harm that the special manager can wreak. The harm isn't just imminent: it's already started. And what the Venice Commission said, back on March 22nd 2021 (C-44,

15:41 paragraph 37), is that after reviewing the special manager's powers in light of what the special manager was supposed to do -- reverse the transaction -- it was neither legitimate, nor was it proportional to put in place a special manager, and [it] violated the right to property under Article 1, protocol 1 of the ECHR.

So given the situation where the special manager has completely cut off the shareholders, is refusing to allow them to exercise any of their prerogatives -- this goes back to what Iran did in Phelps Dodge: it was considered an expropriation already -- we have her preventing the company from being run in a way that's going to allow it to grow and be profitable, and therefore we're facing really irreparable harm because the company will not be able to survive and develop.

Passing on to Kate Cervantes-Knox for status quo.

MS CERVANTES-KNOX: (Slide 28) Mr President, members of the Tribunal, I will now explain why provisional measures are necessary to protect the Claimant's procedural right to the non-aggravation of the dispute and to preserve the Claimant's substantive right to ownership and control of Caucasus Online.

(Slide 29) The Claimant has a self-standing procedural right to preservation of the status quo and non-aggravation of the dispute. The explanatory notes

15:43 to ICSID Arbitration Rule 39 (CLA-45, paragraph 104) confirm that:

"Article 47 of the [ICSID] Convention ... is based on the principle that once a dispute is submitted to arbitration the parties should not take steps that might aggravate or extend their dispute, or prejudice the execution of the award."

So it is sufficient for the Claimant to show that provisional measures are necessary to avoid an aggravation of the dispute in order to satisfy this element of the test for provisional measures.

(Slide 30) The Quiborax v Bolivia tribunal confirmed that there is this general right to non-aggravation of the dispute. And in that case the tribunal stated (RL-13, paragraph 117) that:

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

(Slide 31) The Claimant also has a right to preservation of his substantive rights, specifically his right to indirect ownership, control and enjoyment of Caucasus Online. Tribunals have also accepted that

15:44 rights of ownership can be protected by provisional measures. This was confirmed in Occidental v Ecuador (RL-6, paragraph 60), amongst other cases, in which the tribunal stated that:

"An example of an existing right would be an interest in a piece of property, the ownership of which is in dispute."

So it is obvious that if the GNCC and the special manager are permitted to take further steps to damage Caucasus Online's business or to continue blocking Claimant from any management and control of Caucasus Online, this will cause a major escalation of the dispute. This in turn will breach Claimant's right to non-aggravation of the dispute, and will deprive him of his substantive rights to ownership, control and enjoyment of Caucasus Online.

(Slide 32) In response, Respondent makes three arguments. The first argument is that if provisional measures are granted, Claimant's position will be impermissibly improved rather than the status quo being preserved. Specifically, the Respondent argues that Claimant is using its request for provisional measures to secure rights it doesn't have, and that the provisional measures would prejudge the issue of the legality of Claimant's investment.

15:45 Yet the question of the legality of Claimant's indirect ownership of Caucasus Online will not be prejudged if the provisional measures are granted. Claimant seeks preservation of the status quo vis-à-vis his current status as an indirect shareholder of Caucasus Online, with the right to participate in the business of the company. Claimant does not seek a ruling from the Tribunal on the issue of the legality of the transaction giving rise to his ownership at this stage. And the Tribunal is not required to decide that issue in determining whether to grant provisional measures.

In fact, it is Respondent who seeks to have this issue prejudged, as Respondent relies upon the alleged illegality of the transaction as a basis for opposing the grant of provisional measures. Moreover, if provisional measures are not granted, then this issue will be prejudged, as Claimant will lose his right to participate in the business of Caucasus Online.

(Slide 33) In any event, in order for provisional measures to be granted, rights do not need to be proven; they only need to be asserted. This was made clear in the case of Occidental v Ecuador (RL-6, paragraphs 63 to 64), where the tribunal stated that:

"... [they] wish[ed] to make clear that although

15:46 a right may not yet have been recognized by the Tribunal, such a right may nonetheless be deserving of protection by way of provisional measures."

And indeed:

"The Respondent's position would have far reaching consequences. It would mean, for example, that a tribunal could never order protection by way of provisional measures in connection with a right whose existence and alleged violation are precisely the subject-matter of the arbitration."

As of course is the case here.

So the tribunal concluded in that case that:

"... the right to be preserved only has to be asserted as a theoretically existing right, as opposed to proven to exist in fact."

THE PRESIDENT: Ms Cervantes-Knox, let me ask you: the special manager is initially appointed, as I recall, on 1st October. Your Request for Arbitration is 19th October. Why isn't the special manager -- as Respondent argued way back when, maybe back in January or December -- why isn't the special manager the status quo? She is in place before the Request for Arbitration. Isn't that the preservation of the status quo, the special manager?

MR SINCLAIR: Thank you, Mr President. Your question is

15:48 actually very timely because on the next slide (34), which we've just pulled up, we're addressing this exact point that the Respondent had made.

Yes, it's correct that the special manager was in place at the time provisional measures were requested, albeit of course her appointment is, on Claimant's case, invalid, illegal and a breach of the treaty. But notwithstanding that, she was in place, she had been appointed. But it's important to look at the decision of the GNCC which appointed her.

That decision (C-34) made very clear -- and it's quoted on this slide -- that her sole purpose was to:

"... ensur[e] restoration of the status (the shareholding) [that] existed before the acquisition by ... [Mr] Hasanov of [his shares] ..."

So, in effect, she was only required to reverse the transaction by which he acquired his ownership in Caucasus Online.

And critically, in paragraph 14 of the GNCC's decision, the GNCC mandated that the special manager:

"... exercise the powers vested in her under [the] Decision in good faith and with the belief that each of her actions/omissions will best ensure the fulfillment of the obligation set forth in paragraph 2 ..."

Which of course is the reversal of the transaction.

15:49 There is no part of the GNCC's decision which states that the special manager has a mandate to operate Caucasus Online, to operate the company, to interfere in the day-to-day management of the company, to exercise control over the company, to deprive the shareholders of their right to participate in the business of the company. She was given one mandate, and of course that mandate was a mandate that she can't fulfil because it's impossible for her to reverse a transaction between third parties.

But the important point is that even if we accept that her appointment was valid -- which of course we don't -- she wasn't appointed to do what she's now doing and what she has done since we made our Request for Provisional Measures.

If I could move on now to the next slide (35). [redacted]

15:51 [redacted]

So what we're saying is: we need to preserve the status quo where she can't exercise the powers that she purports to exercise and she can't continue to interfere in the business of the company. Because in fact, if she were operating in accordance with the remit under the GNCC decision and within the confines of that decision, recognising paragraph 14 of the decision, which requires her only to do things which will ensure the reversal of the transaction, then she wouldn't be able to do any of the things that she's been doing since she was appointed.

THE PRESIDENT: Thank you, Ms Cervantes-Knox. I've interrupted quite a lot. But I think we've got about

15:52 five more minutes, if you want to move on from the special manager. I think there was an intention to have Mr Sinclair speak to us as well. So take five minutes.

MS CERVANTES-KNOX: Certainly. I won't be longer than five minutes, thank you.

(Slide 36) Moving on to the Respondent's second argument, and that is that the right to non-aggravation must relate to the specific relief sought. That's not actually a requirement that it has to relate to the relief; the requirement is that it has to relate to the dispute. And that's evident even from the case that Respondent has cited, Ipek Investment v Turkey (CLA-30, paragraph 9).

In any event, as Mr Ostrove previously said, the Claimant seeks both damages and declarations of breach. So the right to non-aggravation which we seek to protect here relates specifically to the relief that we seek in the form of declarations of breach.

(Slide 37) Finally, the third argument that Respondent advances is that the provisional measures sought should not be granted because they are not necessary to prevent actions that would make the resolution of the arbitration by the Tribunal more difficult.

Again, this is not a requirement. It is not

15:53 a requirement to show that the provisional measures are necessary to avoid the resolution of the dispute being rendered more difficult. This is a very restrictive view, which was taken by the tribunal in Plama v Bulgaria; it was followed in Nova Group, which Respondent relies upon. But most tribunals have found that in fact provisional measures are justified where the actions to be restrained would cause an aggravation of the dispute more generally, including because they would escalate or extend the dispute.

That's clear from the quote on the slide in Tokios Tokelés v Ukraine (CLA-100, paragraph 2), which of course reflects the language in the explanatory note to ICSID Arbitration Rule 39, which I put on the slide earlier. It's key that before "render its decision more difficult", the word "or" appears; it's not conjunctive.

In any event, again, declarations of breach are sought. So in fact, if provisional measures are not granted, then the resolution would be rendered more difficult, in the sense that it would be difficult for the Tribunal to grant meaningful declarations of breach if provisional measures are not granted.

So, Mr President, members of the Tribunal, that concludes what I wanted to say for now about status quo, and I'll invite my colleague Mr Sinclair to address why

15:55 the relief sought is narrow and specific.

THE PRESIDENT: Thank you. Mr Sinclair, I'm afraid we're going to ask you to compress, so please compress.

MR SINCLAIR: Thank you, Dr Shore. I will endeavour to cover what I was going to cover in about two minutes.

(Slide 39) The first thing I would say is that I don't think really we need to spend long on the legal test with this experienced Tribunal. It's common ground, of course, that provisional measures must be necessary, but the cases do not speak of any requirement that measures be narrow or specific or the minimum necessary in the circumstances. And the relevant authority upon which we rely is the Papua New Guinea Sustainable Development case on your screen (RL-9).

Looking at the measures we request, in our submission, they're not overly broad, they're not difficult to understand or police, which are the considerations that have concerned tribunals in the past. They merely seek to protect the status quo, to prevent further aggravation of the dispute, to keep the business alive pending the determination of these proceedings.

The business has cash flow challenges, it has debt service challenges, it has the need for debt restructuring. Frankly, members of the Tribunal, the

15:56 business cannot await your final award; that will come too late.

I won't spend time troubling you with the detail of the measures but, I think, summarise our submissions in the following terms.

Pending the determination of the dispute on the merits, the governing bodies of the company should be free to run the company in its best interests. And more specifically, whilst Mr Hasanov is the indirect owner of the company, he should be able to be free to further invest in the company, to guide its strategic direction in any manner of his choosing, without further interference from Georgia, whether acting by the special manager or otherwise.

Just consider that proposition, members of the Tribunal. If he ultimately prevails in the arbitration, his investment will have been preserved by the interim orders we hope you'll grant. If his claim is ultimately dismissed, however, in the interim he will have invested in the company at his own risk. Mr Hasanov is prepared to run that risk provided that you, members of the Tribunal, put in place interim relief now that will preserve his legitimate interests, because it is only with that relief that there is a viable future for this business.

15:58 By contrast, there is no risk of harm to the Respondent if you were to grant the interim relief. Mr Hasanov's investments, his energy, his strategic direction will only enhance the capabilities and standing of the company and indirectly, in the process, benefit Georgia as a telecommunications hub and critical connection between east and west. And if ultimately his claim fails and he must relinquish control of the company, Georgia will only have gained the benefit of his efforts in the meantime.

Thank you, members of the Tribunal. We urge the Tribunal to grant the requested relief.

DR ALEXANDROV: Can I ask a question, Mr Sinclair, with respect to your last two points.

One point you made is that the shareholder must have the right to operate the company and make strategic decisions, et cetera. I am paraphrasing: you said it, of course, much better than I am trying to summarise now. But is the fact that the owner is prevented from running the company properly a reason to -- does it meet the standard for interim measures if the company is not ruined by the special manager by preventing the shareholder from running it? Because the mere fact that he may be prevented from running the company -- well, let me phrase it as a question. Does the mere fact that

16:00 he is prevented from running the company meet the standard for provisional measures?

The other point you made is that unless the Claimant continues investing in the company, the company will cease to exist as a viable business, which is why I think you stated that he is prepared to continue investing and take the risk of losing the case in the end. What's the evidence for the statement that the company, unless Mr Hasanov continues investing in it, will cease to exist as a viable business in the end?

MR SINCLAIR: Thank you, sir, for the questions, which really are interrelated.

The reality, as I said, is that the company must service its debt, it must restructure its debt, and for this it needs cash flow. And we have addressed this in our submissions.

For so long as the special manager is in place and for so long as there is the threat that the authorisation to carry out business may be revoked, you will, I think, plainly appreciate that third parties are extremely reluctant to do business with Caucasus Online. The company needs to renew very substantial contracts with its major customers, and in the present circumstances of uncertainty, it cannot do so.

Moreover, to generate the cash flows necessary, the

16:01 company must grow. You heard Mr Ostrove, for instance, address you on the matter of partnership investment opportunities with Amazon. For so long as the special manager is in place, is controlling the operations of the company and there is the threat of licence revocation, the company cannot secure the contracts that it needs to generate cash flow and to meet its debt obligations.

So, sir, it's the product of the death by a thousand cuts, which I guess you've heard many times. The situation on the ground with the special manager in place is strangling the business and it will lead to the destruction of any value in it.

I hope I've addressed you, sir.

MR ROWLEY: Mr Sinclair, can you hear me?

MR SINCLAIR: Yes, sir.

MR ROWLEY: Mr Alexandrov asked you, I think, about where the evidence was to support your statement that without relief there was no viable future for the company or the business. You said you dealt with that in submissions, but he was asking for evidence. And you then went on and said that third parties are "extremely reluctant" to do business with the company in the present circumstances and the company cannot renew its contracts.

16:03 To me, those are submissions; they are not evidence before us. And what you will need to do -- and you don't have to do it right now, you've got the day -- but you do have to do what you can to show us what evidence there is to support the statements that you have made and that have been made before you.

MR SINCLAIR: It's noted, Mr Rowley. And we will take that opportunity and come back to you in our rebuttal submissions. Thank you.

DR ALEXANDROV: If I may follow up on my earlier question, Mr Sinclair. I think you made two points. One point is that the company cannot properly operate under the threat of revocation of the authorisation to the business, and I understand the point.

But I thought -- and maybe I misunderstood Claimant's position -- I thought that the issue of the interference with the management of the company was a separate issue for which you are seeking interim measures. And I think you address that as a separate issue in terms of the special manager preventing the company from growing; for example, the Amazon contract.

I wonder to what extent that second issue is ripe for interim measures. On the first point -- well, let me put to you a hypothetical. And obviously we haven't decided anything. But hypothetically, if we deal with

16:05 the issue of the threat of revocation of the authorisation, is there an independent ground for interim measures on the basis solely of the special manager's interference?

MR SINCLAIR: Thank you, sir. You are right: they are two separate issues, and they are two distinct grounds upon which we request relief.

Focusing as you have on the reality of the special manager in place, we have of course asserted that the loss of control on the part of the investor in respect of his investment, the company, is an expropriatory act, and it is one which is continuing and which we seek to forestall by the requested relief.

Secondly, I do hope, sir, that you have appreciated that a relief which is only cast in terms of enjoining Georgia from revoking the licence would not preserve the value of the investment pending your decision because, as we have seen for instance with regard to trying to do business with Amazon -- and we'll come back to you and Mr Rowley on the other evidence on dealing with third parties -- the company needs to renew contracts, it needs to generate cash flow in order to remain viable. And the presence of a special manager who is operating the company on a day-to-day basis, exceeding the purpose for which she was ever installed, is preventing that.

16:07 1 So in short, sir, yes, they are two distinct
2 grounds; and in our submission, they are both properly
3 necessary and appropriate for the grant of provisional
4 relief.
5 DR ALEXANDROV: Thank you.
6 THE PRESIDENT: Thank you very much, Mr Sinclair.
7 After Respondent's submissions and after a brief
8 break, we'll come back to Claimant's reply.
9 So if I can ask Ms Annacker and Respondent to come
10 on now. And we appreciate that you've been waiting past
11 the scheduled time, Ms Annacker, and you have my promise
12 that there will be equal time, even without
13 interruptions, one way or the other.
14 So please, Ms Annacker, Respondent's opposition,
15 please.
16 (4.08 pm)
17 Submissions on behalf of Respondent
18 on the provisional measures application
19 DR ANNACKER: Thank you, Mr President, members of the
20 Tribunal.
21 Claimant requested provisional measures from the
22 Tribunal more than a year ago. Claimant did so after
23 the Georgian courts had already been seised in 2019 with
24 three requests for a stay of the 2019 GNCC decision, the
25 decision at the heart of this dispute.

16:09 The purpose of Claimant's request has not changed. The provisional measures do not aim to protect the integrity of the arbitration; they also do not aim to preserve the right that Claimant seeks to enforce before the Tribunal, a right to monetary compensation. The only purpose of Claimant's requests is to take control of CO, to use the company as a vehicle to carry out the Azerbaijan Digital Hub project.

Claimant has openly confirmed that this is the case. In his letter of May 7th 2021, Claimant vigorously refused to commit to maintain the status quo. Under the guise of interim relief, Claimant instead asserted a right -- and he asserted that right again today -- to decide CO's strategic direction by fiat, to materially change the company's business and supply strategies, and lock it into contractual obligations far beyond the completion of this arbitration.

If granted, the provisional measures would effectively accord Claimant the right to control critical infrastructure in Georgia, in plain violation of Georgian law and in plain violation of the regulator's orders. The provisional measures would do so even though Claimant's putative investment was not even admitted in accordance with Georgian law. Claimant's attempted takeover of CO never satisfied

16:11 fundamental admission requirements. The record shows that Claimant was well aware of the mandatory notification and approval requirements under the Communications Law, but he chose to ignore the law and attempt to impose his takeover of CO as a fait accompli.

(Slide 2) In January 2019 the Claimant secretly purchased, through Weco, a 100% stake in Nelgado, the BVI company that holds, directly and indirectly, all of CO's shares.

(Slide 3) The transaction was structured as follows: Weco formally purchased 49% of Nelgado's shares; Mr Makatsaria would remain the nominal owner of 51% of the shares, but Claimant would become CO's sole beneficial owner through an irrevocable call option and an equitable mortgage over the 51% stake.

(Slide 4) To conceal his plan to take over 100% of CO, the parties agree to prepare a version of the share purchase agreement (C-6) reflecting only the purchase of a 49% stake. This version was to be used for the sole purpose of misleading the Georgian authorities and other third parties about Claimant's secret takeover.

(Slide 6) In addition, in exchange for $1 million, Mr Makatsaria agreed to use his best efforts to assist Claimant with "government relations", and solely for this purpose to remain the nominal holder of 51% of

16:13 Nelgado's shares.

(Slide 7) Weco nevertheless acknowledged that it did not have any specific expectation as to the outcome of Mr Makatsaria's assistance with "government/public institutions of Georgia".

(Slide 7) Claimant also had Weco assume full liability "in connection with not seeking and obtaining consent from [the] Georgian National Communications Commission".

The terms of the share purchase agreement thus make it abundantly clear that Claimant was aware of the applicable mandatory notification and approval requirements, and deliberately chose not to abide by them.

(Slide 8) In accordance with the terms of the share purchase agreement, no approval was sought for the execution of the January 2019 transaction. This was in plain defiance of the Communications Law, a 2016 GNCC decision which expressly requires prior approval of any change in CO's beneficial ownership in excess of 5% (C-29) and a GNCC communication of July 2018 to the same effect (R-8).

(Slide 9) Instead of seeking the GNCC's approval of Claimant's intended takeover of CO, in December 2018 CO sought the GNCC's approval for Mr Makatsaria to become

16:15 CO's sole beneficial owner (R-9 and R-10).

(Slide 10) The GNCC granted the approval as requested (R-4 and R-5).

(Slide 11) In March 2019 CO confirmed to the GNCC that Mr Makatsaria had become CO's sole beneficial owner, as notified to and approved by the GNCC. To hide from the GNCC his secret takeover of CO in January 2019, Claimant had CO misrepresent that -- and I quote from CO's letter to the GNCC, Exhibit R-7:

"... the only beneficiary owner of Caucasus Online is Khvicha Makatsaria."

Thereafter, Claimant continued to hide the January 2019 transaction from the GNCC for several months.

(Slide 12) Finally, at the end of August 2019, in response to a request by the GNCC to all authorised persons to update the beneficial ownership information, Claimant had CO disclose his beneficial ownership of a 49% stake, but misrepresented to the GNCC that Mr Makatsaria remained the beneficial owner of CO's majority stake (C-35).

(Slide 13) Several months after the GNCC held that Claimant's purported acquisition of a beneficial interest of a 49% stake in CO violated the Communications Law, ordered the elimination of this

16:17 violation and imposed fines, Claimant had CO seek the GNCC's ex post facto approval of this purported acquisition. CO did so in February 2020 (R-16), yet again misrepresenting that Mr Makatsaria remained the beneficial owner of CO's majority stake.

(Slide 14) In the same vein, having received a $1 million best-efforts assistance fee, Mr Makatsaria acted as a facade for Claimant before the Georgian courts and he misrepresented to the courts that he was the ultimate beneficial owner of CO's majority stake. Indeed, Mr Makatsaria went as far as requesting the Georgian courts to annul the 2019 GNCC decision because "there was no danger of a radical change in the Company's strategic plans or visions" (R-85), in view of the fact that he would remain CO's majority shareholder.

(Slide 15) CO's and Weco's submissions to the Georgian courts echoed Mr Makatsaria's misrepresentation (R-59 and R-13).

(Slide 16) Claimant eventually exercised the call option in August 2020. Claimant registered 51% of Nelgado's shares in Weco's name on August 31st 2020, in the face of the GNCC's refusal to approve the transfer of his stake less than two weeks earlier. The record thus shows that Claimant sought to impose his takeover of CO through misrepresentations and in plain defiance

16:19 of the Communications Law and the regulator's orders.

The purpose of provisional measures is to preserve rights in dispute during the pendency of the arbitration. The requested measures do not preserve the rights asserted by Claimant; they would give him the full benefit and the full enjoyment of the rights that he has attempted to arrogate to himself: the right to invest in CO without the GNCC's approval and the right to control CO and to direct its operations by fiat. In fact, the provisional measures requested would grant Claimant rights that he would not even acquire if he did prevail in this arbitration.

(Slide 18) Provisional measure request no. 1 seeks a stay of "the making or execution of any administrative decision by the GNCC in respect of CO"; and request no. 2 seeks to "[prohibit] the Special Manager from exercising any of the powers conferred on her". If granted, requests 1 and 2 would thus place CO, a closely regulated company with a dominant market position that owns critical infrastructure, in a regulatory vacuum, allowing Claimant to control strategic infrastructure in Georgia as he deems fit.

(Slide 19) If granted, provisional measure request no. 3 would effectively neutralise the powers of the special manager, given the breadth of the powers that

16:21 would be vested in the management that Claimant installed in CO; in CO's supervisory board, composed of members selected by Claimant; and CO's shareholders' meeting, composed of Nelgado and ION, each controlled by Claimant.

If request 3 were granted, Claimant would be allowed to fundamentally change CO's operations, and business and supply strategies, and to lock it into the Azerbaijan Digital Hub project, which aims at transforming Azerbaijan into the region's digital hub.

On the Claimant's direction, the management he installed at CO could enter into or terminate any commercial agreement and undertake any obligation vis-à-vis third parties. Claimant could freely dispose of the assets of CO and its subsidiaries, including critical infrastructure assets, CO's submarine cable and Railway Telecom's terrestrial cable. Claimant would be free to entirely reorganise the company and even to amend CO's charter.

At the same time, the provisional measures requested by Claimant would preserve none of Respondent's rights. Instead, they would strip Georgia of its regulatory powers over CO, prohibit it from addressing serious and deliberate violations of its laws, and cause it substantial and potentially irreparable harm.

16:23 (Slide 21) Allowing Claimant to control critical telecom infrastructure in Georgia by fiat would have a substantial impact on the Georgian telecommunications market.

(Slide 22) CO would be in a position to unfairly compete, to the detriment of other companies competing in the Georgian telecommunications market. This was emphasised by the Georgian courts in their judgments rejecting the request for a stay of the 2019 GNCC decision (R-14 and R-65-GEO).

(Slide 23) As the Georgian courts also emphasised, Claimant could change CO's strategy of providing services in a manner that would negatively impact more than 2.5 million retail subscribers and 300 Georgian public agencies whose internet supply depends on CO. For example, Claimant could prioritise internet supply to the Azerbaijani market, or terminate or renegotiate important service contracts.

(Slide 24) If granted, the requested provisional measures would also substantially harm Georgia's international competitiveness.

The record shows -- and Claimant openly admits -- that if he were free to do so, he would transform CO into a vehicle to implement the Azerbaijan Digital Hub project. This project is being implemented by the

company Bakcell, through AzerTelecom, controlled by Claimant.

(Slide 25) As Bakcell states in its 2019 annual sustainability report (R-32, page 50), the aim of the Azerbaijan Digital Hub project is to make Azerbaijan the region's primary digital hub of the Digital Silk Road. In Bakcell's words:

"The project is aimed to transfer Azerbaijan into the Digital Hub for the Caucasus, CIS, Central and South Asia, Middle East and neighboring regions [through] ... turning Baku into the Internet Exchange Point ... [and through the] establishment of large regional data center in the country ..."

(Slide 26) There is much at stake for Georgia. Georgia is uniquely placed to develop into the region's primary digital hub. Georgia is the only country in the region with a direct internet infrastructure connection to Europe. And Georgia can act as a hub for two important internet corridors: the first from Europe via Georgia to Armenia and then the Middle East, and the second from Europe via Georgia to Azerbaijan and then to South Asia.

Among other benefits, Georgia's position as the region's primary digital hub will allow it to attract large internet content providers such as Google,

16:27 Facebook and Amazon to create data centres and make significant investments in Georgia. This will in turn foster the Georgian digital economy and create substantial tax revenues and new employment opportunities.

(Slide 27) By contrast, under Claimant's strategic vision, Georgia's role in the Digital Silk Road is that of a mere transit corridor to Azerbaijan. The Azerbaijan Digital Hub programme -- of which CO would form an integral part -- will, in Bakcell's words:

"Add[] the city of Baku to the global internet map as a new Internet Exchange Point and attract[] large content providers (Google, Facebook, Netflix, Apple, Alibaba, Amazon, Tencent, etc.) to Azerbaijan ..."

Not Georgia. As the Georgian courts have found, Claimant's control of CO therefore risks seriously impairing Georgia's ability to develop into the region's primary digital hub.

(Slide 28) In determining whether to recommend provisional measures, the Tribunal must balance the harm caused to Claimant in the absence of the provisional measures and the harm caused to Respondent if the measures are granted. The provisional measures sought by Claimant are wholly disproportionate. Claimant would be granted the right to control CO by fiat without any

16:29 constraint, while Georgia would be prohibited from exercising any of its regulatory powers over CO.

The worst case scenario for Claimant would be the compensable loss of a business opportunity. Georgia, by contrast, would suffer substantial irreparable harm.

MR ROWLEY: Ms Annacker, if I might ask a question. It's similar to the questions that were posed to Claimant.

You've just explained Georgia's ambition to become the region's digital hub, and how it will be thwarted in this by Claimant's plans. Have you referred to evidence of that in your slides or in your submissions? Or will you be doing so?

DR ANNACKER: I think the annual sustainability report that we put up on the slides before, the Bakcell report, very clearly shows that the Azerbaijan Digital Hub project will lead to the creation of data centres, attraction of large internet content providers in Azerbaijan, not Georgia. There can't be two digital hubs in two neighbouring countries. The large content providers will place their data centres either in Azerbaijan or in Georgia.

DR ALEXANDROV: May I --

DR ANNACKER: May I still add -- and we can come back to this point also: what is in the record -- and I'm planning to address it maybe after the break -- is

16:31 Claimant's own applications, the Bakcell applications. These applications refer precisely to the benefits that we discussed of CO's integration into the Digital Silk Road.

What the Bakcell applications did not disclose is that the real plan is to turn Azerbaijan into the primary regional hub of the region. That is clear from Bakcell's sustainability reports.

DR ALEXANDROV: If I may follow up on this point. I'm not sure I understand; perhaps you can help me.

Let me characterise this, perhaps mistakenly, as a strategic rivalry between Georgia and Azerbaijan on who will be the digital hub of the region. How is that relevant to the issue that we have in front of us, which is provisional measures to prevent an irreparable harm to Claimant's business in Georgia? Is it Respondent's position that if this Tribunal orders the measures requested by the Claimant, then Georgia will be -- I think your words were "prohibited from exercising any regulatory power over Claimant's business in Georgia"?

How is that? Because if the provisional measures -- again, just as an example; we haven't decided anything. But if the provisional measures focus on: (1) don't withdraw the authorisation until this Tribunal has rendered the award; and (2) if the provisional measures

16:33 curtail during the course of these proceedings the power of the special manager, how would that prohibit Georgia from exercising regulatory powers over Claimant's business?

You mentioned, for example, competitiveness. I assume there are antitrust or competition regulations in Georgia and a regulator who supervises that. Even in the absence of a special manager, those regulations would still apply, and the regulatory agency that supervises competition laws and regulations in Georgia would still be allowed to intervene any time there is an issue of compliance with those regulations. And that would probably be true with respect to any area of law.

So how would even the removal of the special manager, let alone curtailing the powers of the special manager, lead to a prohibition from exercising any regulatory power by Georgia over Claimant's investment?

DR ANNACKER: So first, if we look back at the wording of the provisional measures requested, Claimant requests that Georgia be ordered that the GNCC refrain from making or executing "any administrative decision". So the wording is clearly much, much broader. And the same is true for request no. 2: exercise of "any ... powers" by the special manager.

But addressing your question regarding narrower

16:35 provisional measures, if the special manager is prohibited from exercising her powers, automatically Claimant will be entitled to control the strategic direction of the company. And Claimant has openly told us that the sole purpose of the acquisition of the company and the sole purpose of the provisional measures is to allow him to integrate the company into the Azerbaijan Digital Hub project. That means the Claimant can lock a company that owns critical infrastructure into contracts far beyond the completion of the arbitration. Even if he loses the arbitration, the company would entirely change its strategy of provision of services and would change its strategic directions.

As regards supervisory control by the GNCC, the GNCC has full regulatory power under Georgian law over CO. But first, the provisional measures as requested by Claimant would prohibit the GNCC from exercising that power; and second, even if the GNCC were allowed to exercise that regulatory power without a special manager in place, given Claimant's track record of defying the GNCC's order, there can't be any confidence that Claimant would simply abide by any orders issued by the GNCC.

Unless there are further questions from the Tribunal, I am now turning to necessity and urgency.

16:37 (Slide 31) Leaving aside the issue that we just discussed, the provisional measures are wholly disproportionate, Claimant has not even demonstrated, as he must, that any of the provisional measures requested are necessary and urgent. The rights requiring protection by provisional measures, including the right to non-aggravation of the dispute invoked by Claimant, are circumscribed by Claimant's request for relief, a damages claim.

Several investment tribunals have rejected requests for provisional measures by investors whose local companies were placed under state administration. These requests, like Claimant's, did not satisfy the necessity requirement because any harm that the Claimant may suffer could be remedied by damages.

(Slide 32) I refer the Tribunal to Ipek Investment v Turkey, Exhibit CLA-30, which is directly on point. Turkey had subjected the Koza Group, a Turkish conglomerate, to administration by a state agency. Ipek Investment claimed to be the group's ultimate shareholder, and it requested that Turkey be restrained from disposing of the group's assets and from destroying its value, invoking the right to the maintenance of the status quo. The tribunal rejected this request because the measures requested were not necessary to protect the

16:39 rights invoked.

(Slide 33) Menzies v Senegal, Exhibit CLA-39, is another case directly on point. Claimant lost control over its local subsidiary when Senegal placed the company under administration. Invoking the right to non-aggravation of the dispute and its economic interests, the claimant requested that Senegal be ordered to terminate or suspend the administration to restore claimant's control over the company. The tribunal rejected this request because the measures requested were not necessary to protect the rights invoked.

The tribunal referred to a string of cases that have reached the same conclusion: Plama v Bulgaria, Occidental v Ecuador, Burlington Resources v Ecuador and Metalclad v Mexico. These authorities are in the record as Exhibits RL-3, RL-6, CLA-25 and RL-42. Two cases also in accord should be added: Dawood Rawat v Mauritius, Exhibit RL-14; and Quiborax v Bolivia, Exhibit RL-13.

As this long string of cases confirms, the provisional measures requested by Claimant are neither necessary to protect any right to damages, claims he may suffer, nor to maintain the status quo. In fact, if granted, the measures requested would fundamentally

16:41 change the status quo in Claimant's favour and to Respondent's detriment.

The status quo is that Claimant's putative investment in CO has not even been admitted. If the provisional measures requested were granted, they would impermissibly alter the status quo in Claimant's favour. Not only would Claimant be treated as if the GNCC had actually approved his attempted takeover, but Claimant could control CO free of any regulatory supervision or constraint. Respondent, by contrast, would be stripped of its regulatory powers over critical infrastructure in Georgia and deprived of its ability to develop into the region's primary digital hub.

Claimant attempts to establish necessity by alleging that the GNCC plans to suspend CO's authorisation and the special manager is in the process of destroying CO as a going concern. But even if Claimant could show an imminent threat to CO as a going concern -- which he has not done -- the requested provisional measures would not be necessary.

(Slide 34) Plama v Bulgaria (RL-3) is instructive. Bulgaria opened insolvency proceedings against Plama's local subsidiary, Nova Plama, and made arrangements to sell its assets. Plama requested that Bulgaria be ordered to discontinue the proceedings to preserve its

16:43 right to operate its subsidiary and the right to non-aggravation of the dispute. In rejecting Plama's request for provisional measures, the tribunal underscored -- and I quote from paragraph 42:

"Even assuming the worst case from Claimant's point of view, i.e., that Nova Plama is liquidated ... Claimant in this arbitration -- which is not Nova Plama -- will still be able to pursue its ECT claims for damages against Bulgaria."

Likewise, Mr Hasanov is not CO. Assuming the worst case from Mr Hasanov's point of view, he will still be able to pursue his BIT claims for damages in this arbitration.

DR ALEXANDROV: Can I ask you a question on that. Investor-state arbitration is about economic harm, and economic harm presumably can always be remedied by the payment of the fair market value of the asset that was lost. What is, in Respondent's view, irreparable harm that would meet the requirement of imposing provisional measures?

DR ANNACKER: The cases that have been cited by tribunals on the very high standard to grant the exceptional remedy of provisional measures clearly support the proposition -- and that is Claimant's position -- that for harm to be irreparable, it must be harm that cannot

16:45 be compensated through an award of damages.

There have been situations in investment treaty arbitration where claimants were intimidated, were threatened by the host state; in isolated instances, interference by the host state with the integrity of the arbitration by intimidating witnesses. Those would be situations where irreparable harm could be incurred. But this is clearly not the case where a claimant is free to pursue its claims for damages in the arbitration without any impact if the provisional measures are not granted.

I will then now turn --

THE PRESIDENT: Ms Annacker, sorry, can I just follow up from one of the questions that Mr Alexandrov asked Claimant, which is -- and your last submission of November 18th dealt with this in the same way. You had a section on the issue of administrative liability and suspension of the authorisation to operate and then the special manager.

You say in your brief that there's no indication that GNCC plans to suspend authorisation to operate, it's certainly not imminent, and it would be, I think, counterproductive to Georgia's interest, given 2.5 million subscribers.

DR ANNACKER: Yes.

16:47 THE PRESIDENT: What would be the harm to Georgia from carving that requested provisional measure and limiting it to during the pendency of the arbitration in order to assess this question of illegality of the investment that the certificate to -- the authorisation to operate would not be suspended? How is Georgia harmed by that?

Leaving the special manager, as the special manager has been operating since, I don't know, April, whether that was in compliance with Procedural Order No. 3 or not. In the way that the special manager has been operating, what's the harm to Georgia if the certificate or the authorisation could not be suspended?

DR ANNACKER: I was about to turn to --

THE PRESIDENT: Sorry.

DR ANNACKER: -- the question. But your question is still tied to the earlier part of my pleading, so I will immediately address it.

As we have made clear in our written pleadings, and I will emphasise it again today in a few moments, the GNCC has made a firm decision not to revoke CO's or not even to suspend CO's authorisation in light of the harm that you mentioned, very substantial harm that the revocation of CO's authorisation would cause for the Georgian telecommunications market.

THE PRESIDENT: Can I stop you there. You say "a firm

16:49 decision". There's no undertaking, there's no obligation that they put on themselves, the GNCC, and we see the 31st December deadline.

What's the harm to Georgia, given the interest of Georgia's citizens, what's the harm in GNCC being -- if we were to impose, or try to impose, a measure saying "For the pendency of the arbitration, that administrative liability should not be implemented?" I still don't see the harm.

DR ANNACKER: I think it is a basic principle that it is upon Claimant, to obtain any provisional measure, to establish that the provisional measure is necessary and urgent. And as I'm going to address, Claimant simply has not begun to satisfy that burden.

THE PRESIDENT: Isn't it the case that --

DR ANNACKER: It is not for Georgia to show --

THE PRESIDENT: Ms Annacker, isn't it the case that any investor, as a matter of economic reality -- leave aside whether the special manager is intrusive or not intrusive. I take the point that the special manager may or may not be, and we can consider that. But how could any investor not be comforted by -- given the mandate of the special manager initially being to reverse the transaction, how would any investor not be comforted and it not be important to have the assurance

16:51 that this company that the investor may be interested in investing in is not going to be suspended? Isn't that just economic reality?

DR ANNACKER: That is certainly economic reality. But it is for Claimant to show, to obtain such a provisional measure, that it is necessary and urgent to prevent irreparable harm.

Let's stay on that point for the revocation of the licence. So we have shown in our written pleadings that the GNCC did consider, in the spring of 2020, the revocation -- it was suspension, not revocation. We are talking about the suspension of the --

THE PRESIDENT: Suspension, yes.

DR ANNACKER: Yes.

So the GNCC did consider that. If we could go to the next slide (35), we see the GNCC decision of 2020 (C-34).

There was a very careful analysis by the GNCC's telecom market regulation department. That analysis showed that the suspension would deprive 40% of the Georgian wholesale internet market of internet access, which would in turn deprive more than 2.5 million internet subscribers and more than 300 public agencies of internet access. In addition, internet transit to neighbouring countries would be severely compromised.

16:52 I refer the Tribunal to Exhibit R-1, which contains the telecom market regulation department's detailed analysis.

It was the very purpose -- the very purpose -- of the appointment of the special manager to avoid this harm and to permit Caucasus Online to continue to operate in accordance with Georgian law. There is not the slightest indication, in light of the very substantial harm identified, that the GNCC would be planning to revoke CO's authorisation. Indeed, for more than two years now, Claimant has not been able to provide a shred of evidence to substantiate his allegation that the GNCC plans to revoke CO's authorisation to operate.

[redacted]

16:54 [redacted]

So Claimant should refrain from accusing Georgia of acting in bad faith and from requesting documents in purported support of his accusation without proffering any evidence whatsoever.

(Slide 37) As the Georgian courts have found, there

16:56 is also no evidence that CO's special manager has or would misuse her powers to drive CO into bankruptcy. Indeed, since her appointment in October last year, the special manager and her successors have exercised their powers very conservatively.

[redacted]

THE PRESIDENT: Ms Annacker, did you want to address a point that the Claimant made earlier this morning/this afternoon about: the special manager's remit had nothing to do originally with running the business or participating in or approving business measures like you've just described, it was simply to reverse the transaction, and therefore everything that the special

16:57 manager has been doing since the Request for Arbitration is not in accord with that original mandate?

DR ANNACKER: I was not planning to address that point in my opening statement.

THE PRESIDENT: If you want to wait till after, it's fine.

DR ANNACKER: I can address that point if you wish.

THE PRESIDENT: No, no, I don't want to take you out of sequence.

DR ANNACKER: But I can certainly address it in the rebuttals.

THE PRESIDENT: Let's save it for rebuttals.

DR ANNACKER: I will then continue with the special manager. I am mindful of the time that's left.

THE PRESIDENT: Try to wrap up in like five minutes.

DR ANNACKER: Yes, I try to wrap up. I only need like two or three minutes to wrap up, and that question would not fit into the rest of the points I would like to present to the Tribunal in my opening statement.

[redacted]

16:59 [redacted]

[redacted]

(Slide 39) The special manager has also granted CO's management residual freedom in the conduct of CO's day-to-day business operations. On June 1st the special manager issued a power of attorney to CO's director (C-47). So CO's director may, without the special manager's consent, carry out various day-to-day transactions. He may further make payments for more than 55 transactions under contracts set forth in annex 1 to the power of attorney. These contracts were jointly identified by the special manager, CO's management and CO's accountants.

Claimant has not shown -- this is a very important point -- that the approval requirement for payments and transactions not included in this power of attorney somehow poses a threat to CO as a going concern. There is simply no evidence in the record that this is the case. The record shows that the special manager has promptly granted approval for numerous transactions, and that in the instances where she withheld her approval, it was instances where the request was for an approval of a change in the strategic direction of the company.

Claimant does complain about a few instances in which the special manager withheld her approval. But

17:01 Claimant cannot show that any of these rejections created any threat to CO's continued existence or suggested the special manager would drive CO into bankruptcy.

(Slide 40) I will very briefly turn to urgency.

(Slide 41) To obtain provisional measures, Claimant must show an imminent risk of irreparable harm. Claimant has not established any risk of a suspension of CO's authorisation to operate, let alone an imminent one. Weco, CO and Mr Makatsaria already alleged in 2019 before the Georgian courts that there was a high risk that the GNCC would revoke CO's authorisation to operate. Now, more than two years later, this allegedly imminent risk has not even begun to materialise.

Claimant has also not identified any decision that the special manager would be about to take that would threaten CO's continued existence. The special manager was appointed more than a year ago, but has not taken any decision that could remotely be characterised as creating a risk to CO as a going concern.

(Slide 43) In fact, Claimant's requests for interim relief have by now been extensively litigated for more than two years. Six judges, three on first instance and three on appeal, have independently held that a stay of the 2019 GNCC decision is not warranted.

17:03 (Slide 44) Four judges have held independently, two on first instance and two on appeal, that a stay of the decision on the appointment of the special manager is not warranted.

(Slide 46) Under the Georgian Administrative Procedure Code (R-63), the courts may suspend an administrative act if there is justified doubt regarding the lawfulness of the individual administrative act or the urgent execution of such an act may significantly damage the party or make the protection of his/her legal rights and interests impossible. Each judge concluded that none of these requirements was satisfied. Claimant has not shown any basis for this Tribunal to come to a different conclusion.

Thank you.

THE PRESIDENT: Thank you very much, Ms Annacker. A little bit later than scheduled, let's take a 10-minute break, and then we're back for 15 minutes with Claimant's reply and then 15 minutes for Respondent's Rejoinder.

So let's reconvene at Central European Time 17.14, 11.14 DC time. Thank you very much, everyone.

(5.05 pm)

(A short break)

(5.15 pm)

17:15 THE PRESIDENT: Very well. Let's have Claimant's reply. Is it Mr Ostrove or Ms Cervantes-Knox? Mr Ostrove, I see.

MR OSTROVE: I will lead off, and my colleagues may jump in at the end if I have not covered their points off.

Reply submissions on behalf of Claimant

MR OSTROVE: We just heard a rather remarkable argument. Half of the presentation that we just heard, or close to half, was premised on the idea that this was critical infrastructure in Georgia, some kind of special protected status, and that there's incredible harm to Georgia if an Azeri national owns the company that owns the submarine cable and is allowed to use it to develop its business. This turns the world on its head for a couple of reasons.

First of all, there isn't even a legal definition in Georgia of "critical infrastructure". And if you look at C-44, the Venice Commission report, one of its criticisms about the passage of the law imposing the special manager, and then the imposition of the special manager, is that it was allegedly done to protect some kind of critical infrastructure. And they actually recommend to Georgia, "Go back and rethink the way you're doing things, because there is no such thing in your legal system".

The second point though is: and then they say,

17:16 "Well, if you grant these provisional measures, and Mr Hasanov can direct the company the way he wants, he could start selling everything off. He could sell these assets off, move them around to other companies, and we lose all control".

There's no other company in Georgia or anywhere else that's going to be able to operate this submarine cable, because precisely you have to be an authorised person in Georgia, under the Telecommunications Act, to operate the internet services. So there is no way for him to go in and sort of fleece the company out and move everything into someplace else, because that entity would have to get authorisation to operate in Georgia, which wouldn't be possible. So there's no danger there.

And also, this idea that running the company Caucasus Online would cut off all of the Georgians who need access and privilege someone else: there are contracts in place. That's assuming that Mr Hasanov would come in, redirect the company not to build its business but to destroy its business by breaching all of its contracts, getting rid of all of its existing revenue, in order to try to do something else. It's a nonsensical approach.

Even more troubling though was this idea that: no, Georgia wants to be a digital hub, Georgia doesn't want

17:18 Azerbaijan to be the digital hub. What you heard was the absolute admission that the reason for all of the attacks on Mr Hasanov's investment are pure discrimination. They don't like an Azeri national running a business that they think might privilege development in Azerbaijan over development in Georgia. They're entitled to feel that way but they're not entitled to act on those feelings, because they signed a bilateral investment treaty with Azerbaijan saying that they wouldn't do that.

Even worse though: even if they could get the reversal of the transaction -- and that's not what the provisional measures are about today -- if they could get the reversal of the transaction and things went back to Mr Makatsaria, Mr Makatsaria was not developing a Digital Silk [Way] with Georgia as the data hub; the company was just going along. It's an Azerbaijani national who came in with the idea of developing and building this into a broader network. But what they really want to do is say, "No, we should let the special manager run the company, not the former owner". So what that means is that they want Georgia to run the company.

So essentially, the lack of provisional measures would allow a continued takeover by Georgia for Georgia to do something else now with the asset. So that's even

17:19 more insidious than we had realised.

But in any case, taking over Caucasus Online will not allow Georgia to become the central hub. The only way Georgia can have a role in the Digital Silk Way project -- including being a hub, because there's no definition exactly of what a hub is; you can have internet servers in multiple places -- is by working together with this project, which is something that our client would warmly welcome.

They also express concern about the competitive system in Georgia. All we have ever asked is that the GNCC, if it's concerned -- and they put up the offer for the Bakcell application, which was a way of saying, "Okay, let's just do over. Go ahead and we'll submit for authorisation". And what the GNCC is supposed to do is the GNCC is supposed to regulate competition on the Georgian market.

So if the GNCC could actually do its job and do a competitive analysis to see whether there's any danger to competition on the market in Georgia, that's all we had ever asked for at the beginning, and they've refused to do that. Instead, what they're raising is some kind of regional competition issue, which is not a legitimate interest of Georgia or the GNCC; that is a political ambition, as I said before.

17:21 With respect to the standard for provisional measures, you already have our slides with -- if we could quickly put that slide up (slide 12) -- which listed the cases, so it's not even necessary you have it in our slides, the list of cases where provisional measures have been granted in areas which were not involving threatened arrests or other kinds of bodily harm or anything like that. And in fact, the Papua New Guinea case, which is described in our Response at paragraphs 123 to 125, and is RL-9, one of the provisional measures involved the issue of replacement of management and preventing that, so it's actually on all fours.

When they tried to compare us to Plama, in Plama there was no request for declaratory relief. And again, at the risk in rebuttal of repeating myself, we're trying to be left in a position where, if we get the declaratory relief, the project can go forward and the interests are maintained. Whereas if we don't get the provisional relief, we will never be able to accomplish the project for which the investment was made, rendering the entire investment worthless.

Counsel argued that the GNCC has made a firm decision not to revoke the licence. Without going through the Q&A that went back and forth, there has

17:22 never been any decision, let alone a firm decision. Yes, the GNCC and Georgia have indicated that they would prefer not to withdraw the authorisation. But in the May and October GNCC sessions, it was very clearly stated that that's the only option that is left if they are unable to obtain the reversal through the special manager.

So at some point that becomes the only thing left, is they say, "We don't want Mr Hasanov here owning, and we can't get rid of him, and the only thing we can do is take away the authorisation to operate". And that would not permanently cut off all of the millions of people that are involved: the asset would just be put into some other entity. The company would go bankrupt, the state would take it over in bankruptcy, or the banks would take it over, and they would just simply destroy Mr Hasanov's investment.

They make a big stink about the fact that we allege that we think that this was also raised again in the July 29th closed hearing. It really doesn't matter because the GNCC had already said it before. We've simply requested that the recording be provided, and that they explain to us how the transcript was done, et cetera, so that we can test whether there might still be a copy of the recording available.

17:23 Then they said, "Well, why didn't CO's director simply record it himself and provide it to the shareholders?" Exhibit C-53 gives you the answer to that question, in which Mr Kopaladze writes to the supervisory board member saying, "No way that I can provide you any information about what happened in there without getting consent from the special manager, because the special manager forbids me from sharing information like that with you".

Another concern they raised --

MR ROWLEY: I have a question for you, Mr Ostrove, if you can hear me. Can you hear me?

MR OSTROVE: Yes.

MR ROWLEY: You've just said -- and I'm paraphrasing -- that if you don't get the preliminary relief, your client will never be able to have the project go forward for which the investment was made. And again, we raised the question of evidence earlier. Can you direct us to the evidence for that?

MR OSTROVE: There were two points.

There was a question of the evidence that the company will go out of business if we don't get the provisionary relief, in terms of the financing. And it's true that in our submissions we had referred to the financial situation of the company and we had not put in

17:25 the audited financial reports or anything like that, which we now have access to. And some of the changes in the revenue stream happened very recently, with the cancellation or the non-renewal of one major contract. So we are certainly happy, if you would like, in a post-hearing submission, to turn over the audited financial reports so you can see the financial condition of the company. We're happy to do that.

But the point I was making was a broader one, which was not that the company is going to go out of business on default on its debt, although we're sure that that will happen, but rather that if, for the next two years while this case is going on, or possibly longer -- I think we have a June 2023 hearing. So without prejudging how long it might take you to issue your award, we're still a couple of years away from a decision here.

For the Digital Silk Road project to go forward, the company needs access to the undersea cable in the Black Sea now. It is a cable that has a certain lifespan, and there is simply no way to wait two and a half years until an award is complied with, and then restart a project where others will come up with competing cables and other things. The moment is now. The deals, the MoUs that we wanted to sign are ready to

17:26 go forward.

If we're just told, "No, the special manager is going to run the company for the next two and a half years and Georgia is going to run the company for the next two and a half years, and maybe two and a half years/three years from now, you can do this", then the entire investment is lost: there is no basis for making that investment.

MR ROWLEY: I think a final question from me. I think it was the Chairman who asked earlier: why is the status quo not the status that you were in when you initiated the arbitration; that is, with the manager in place?

MR OSTROVE: And again, I would refer back respectfully to the point that Ms Cervantes-Knox made, which is: the status quo was that Mr Hasanov was the owner and the ownership bodies, including the supervisory board, et cetera, had access. The special manager was in place with a remit to seek the reversal of the transaction, and not with a remit from the GNCC to take over the management and essentially have the state take over management of the company.

So the status quo was not: special manager in place, running the company as she sees fit in what she considers to be the best interests of the company. The status quo was: a special manager in place with a remit

17:28 to reverse the transaction.

Again, I would refer you to C-44, the Venice Commission and the Directorate General on the Rule of Law, which specifically found that that was a remit that was impossible, and therefore the Special Manager Law violates the European Convention on Human Rights because it's an illegitimate action because it gives powers that have nothing to do with the purported goal.

So the status quo, in our submission, is: ownership of Mr Hasanov, special manager --

MR ROWLEY: I have the point. Thank you.

THE PRESIDENT: Can I just follow up on that. Maybe it's for Ms Cervantes-Knox.

I have had a look at C-34, despite my difficulties with Box. I appreciate that the overarching goal established on 1st October is to reverse the transaction, but there are a whole list of things that nonetheless, in order to support that goal, are part of the mandate for the special manager.

[redacted]

17:29 [redacted] But at least there is -- and if you read C-34 -- there is at least a concern. I take your point, Mr Ostrove: critical infrastructure is not mentioned in terms. But the regional competitiveness of Georgia is certainly is a concern and certainly is expressed here.

And how do we know that -- is it Mr Evers is AzerTelecom in -- is it C-54? Yes, Mr Evers. I mean, he expresses a frustration. But how do we know that that frustration is not directed to the competitive advantage of AzerTelecom and Azerbaijan as a hub, as opposed to frustration of what Caucasus Online might create for Georgia? We just don't know what his actual interest is, do we, in order to say: well, it's not to put Azerbaijan first? It's hard to conclude that, at

17:31 least from C-54. You may have other evidence you can take us to.

But at least all of this is in play from Georgia's perspective, isn't it: regional competitiveness and the concern that alienation of shares -- illegal, as Georgia believes -- illegal alienation of shares is part of it? Why can't we take that into account?

MR OSTROVE: We are just having a debate as to who is answering your question.

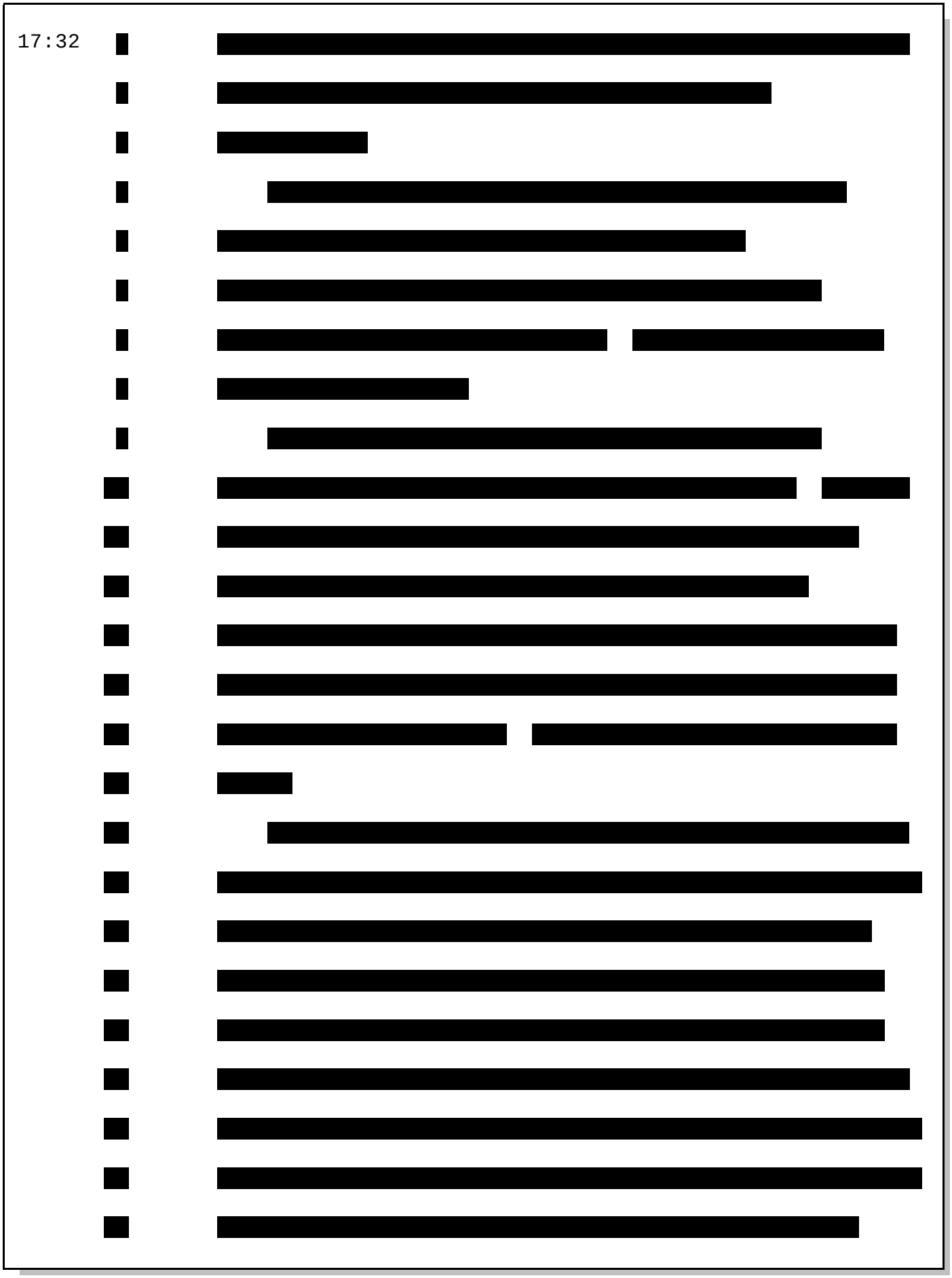
THE PRESIDENT: Yes, sorry. I've crossed the borders on your division. My apologies.

MR OSTROVE: I'll start, and Ms Cervantes-Knox may complete.

THE PRESIDENT: Okay.

MR OSTROVE: First of all, [redacted]

17:32



17:34 [redacted]

THE PRESIDENT: Yes, I follow that. But when you read [paragraph] 14 (C-34), it is:

"The special manager shall exercise the powers vested in her under this Decision in good faith and with the belief that each of her actions/omissions will best ensure the fulfillment of the obligation set forth in paragraph 2 of the decision."

We know what paragraph 2 of the decision is.

You could say that by operating in this way -- and she's got a lot of powers under this decision here -- by operating in this way, it's not connected to fulfilling paragraph 2. You could say that. But that's no different than Georgia saying, "Yes, but his investment was illegal to begin with, and therefore we are not

17:35 going to regard it in the same way".

She is operating under the decision powers that are given to her in C-34. I don't see where she's operating outside those powers, to reach back to Mr Rowley's point about October 1st. Those powers may not fulfil the reversal of the transaction, but the itemised powers that she's been given certainly go into the management of the company. Whether that's illegal or not, I don't think that's the question before us.

MR OSTROVE: It's not a question of whether that's illegal or not; it's a question of what the legal status quo was, without asking you to prejudge either the legality of our Claimant's investment or the legality of her actions right now.

The status quo when we filed is that Mr Hasanov was the owner of the shares in a BVI company. Today they're trying to say that's illegitimate, it shouldn't apply. They can't, in Georgia, say the BVI company ownership is wrong; that was the status quo. And the status quo was that she was appointed -- yes, with an incredible set of powers, but she was appointed with one mandate. And we're saying -- again, it's not a question of whether she's acting illegally or not in doing what she's doing; we're not asking you to judge that. We're asking you to find that the status quo should be that she is in place

17:36 with a mandate and what she is doing is, as a factual matter, beyond the mandate.

She admits that it's beyond the mandate. And we're not asking you to judge whether that's creating illegality or not; we're simply asking you --

THE PRESIDENT: I'm having trouble with that, Mr Ostrove, when I read paragraph 2 (C-34):

"The special manager shall be in charge of ensuring the restoration of the status (the shareholding) existing before the acquisition by the individual ... [and] owned by the individual ..."

And then:

"The special manager shall be appointed until the obligation specified in paragraph 2 is fulfilled."

And then: the special manager shall have a whole bunch of powers. And whether they are geared to paragraph 2 or not, those are the powers that the special manager has as of October 1st 2020, right?

MR OSTROVE: But with respect, I'm going to do something which I tell all of my students and associates never to do, and I'm going to argue by analogy.

The police have all kinds of powers, right? They can arrest you, they can take you downtown and hold you in a cell overnight. But they're only supposed to exercise those powers within the scope of their mission.

17:38 A tribunal has all kinds of powers that are granted to it by law. She's granted all kinds of powers. And the fact even that paragraph 3 says, "She's done when she's accomplished the remit in paragraph 2" means --

THE PRESIDENT: But it says that she's "appointed until the obligation specified in paragraph 2". And then in paragraph 5, she "shall be granted the following powers".

Again, I'll stop there. I'll just say: there are a bunch of powers she has as of October 1st. Whether they're geared to accomplishing the reversal of the transaction, your point being that's something she could never achieve anyway, that's a question we have in mind.

But you've helped me with that. I think I understand the point.

MR OSTROVE: Thanks. And I would encourage the Tribunal to look at C-44 as well, because the Venice Commission was troubled by this as well, and went over it in detail. I'm sure you've already read it.

THE PRESIDENT: Yes, they're troubled, I get it, I understand. I understand they're troubled. I got it. No, that's very helpful, and I will go back to C-44.

MR OSTROVE: I think Ms Cervantes-Knox wanted to add something, as this was, after all, her point.

MS CERVANTES-KNOX: Mr President and Mr Rowley, in relation

17:39 to your question, in terms of the status quo at the time this decision was made, just one other observation I'd like to make about C-34 is that the special manager was specifically authorised to specify in writing the list of powers that could be exercised by the governing bodies of Caucasus Online, which includes directors, the supervisory board, the shareholders. So even if we were to accept that she had the power to exercise certain activities, to undertake certain activities to reverse the transaction, it was even envisaged by the GNCC that she would be conferring certain powers on the governing bodies of the company.

I think you suggested, Mr President, that she is entitled to take a view that this was an illegal transaction, and therefore she can effectively stop the shareholders and the management of the company from having any involvement in the company, and she can construe her powers in that way. But actually it is obviously envisaged that they will have some powers and they will be authorised to exercise certain powers.

So clearly this is not a black-and-white issue where she was supposed to operate the company and they have no powers. And of course, that's one of the aspects of provisional relief that we've sought, and it was given in PO3, was the ability of the supervising bodies to be

17:40 able to exercise powers in the manner envisaged by the GNCC's decision so that they are not constantly unable to access information and have any participation in the company whatsoever.

THE PRESIDENT: Thank you. That's very helpful, Ms Cervantes-Knox.

We've gone way over. If you want to make a final point on any of the questions in particular that the Tribunal asked, or any of the points that Ms Annacker made, now is the opportunity to take a couple of minutes to do so.

MS CERVANTES-KNOX: Thank you. I'd just like to pass over to my colleague Anthony Sinclair, just on the relief sought. Thank you.

THE PRESIDENT: Thank you.

Mr Sinclair.

MR SINCLAIR: Thank you, Dr Shore. I'll be brief again.

I think one of the points made by Georgia's counsel was that the way the relief is formulated is over-broad insofar as it refers to "any administrative decision" in the first line. And you see that in respect of the first measure in particular.

We do think that they've made too much of this point. The relief plainly is drafted and formulated in the context of the alleged violations of the 2016 and

17:42 2019 GNCC decisions and the sanctions flowing therefrom, and we think that is clear from the relief. But of course it's within your discretion, members of the Tribunal, to formulate the relief in the way that you consider more precise.

Secondly, focusing on the relief, there's been a lot of discussion today about revocation of the authorisation to operate; that's one of the first matters. I would say to you, members of the Tribunal, that for all the talk, you did not hear today a formal undertaking from Georgia that they will not cancel the authorisation to operate. If Georgia is making that formal undertaking, I invite them to do so today. But in the absence of them doing so, sir, we do urge you to record that formally in writing.

Lastly, with regard to the breadth of the relief in respect of the special manager, measure 2, and the third measure we seek concerning authorising management to carry on the business -- and I'm picking up the discussion you had just a moment ago, sir -- really it cannot be that you would leave the situation, the status quo, as the special manager having these broad powers and having no constraint upon them. I think that is the point that Mr Ostrove was trying to convey to you and Ms Cervantes-Knox was also trying to convey to you.

17:44 There must be a constraint on those powers. And the constraint is evident in paragraph 2, we submit.

Otherwise you would be tolerating and perpetuating a situation in which the special manager has the power to strangle the company until the transfer of shares at BVI level is de facto reversed, because it becomes untenable for Mr Hasanov to continue to hold the shares or because the investment is effectively destroyed.

Therefore, sir, we urge you to grant the relief articulated in measures 2 or 3 as put to you. Thank you.

THE PRESIDENT: Thank you very much, Mr Sinclair.

Let me check with Mr Alexandrov, Mr Rowley: any further questions?

I just have a quick one, Mr Sinclair. You heard Ms Annacker say that in terms of revocation, it's for you to show that there is an investor out there, or someone who is concerned about this, and that that's imminently a problem. And she rejected the notion that we should just take it as a given that it's a problem; it's for Claimant to show that it is an issue and that they will be imminently harmed, absent a formal constraint from the Tribunal preventing suspension or revocation.

What would you say in response to that?

17:46 MR SINCLAIR: Thank you, sir.

The GNCC has made it plain that it has no other recourse available to it in order to procure compliance with its decisions than revocation, and thus we must fear that revocation is an imminent possibility. The deadline is 31st December at present, as you know.

So I think, sir, that in itself proves the point: there is a serious risk of revocation, and it's neither here nor there whether there's a third party out there who shares our concerns. I think the point is already made.

The reality on the ground, as evident from your exchange with Mr Ostrove earlier, is that we have great difficulties in securing the evidence of Georgian nationals, and in those circumstances we have been constrained. But we have been able to refer you at least to exchanges at the supervisory board level between Mr Evers and others concerning Amazon.

Lastly, I would invite you, sir, to recall that Ms Annacker could not point to any harm on the Georgian side if you were to formally record the undertaking that they will not cancel the authorisation of the licence.

Thank you.

THE PRESIDENT: Thank you very much, Mr Sinclair.

I think that was very helpful in reply, Mr Ostrove,

17:47 Ms Cervantes-Knox, Mr Sinclair. Thank you very much.

Let me see if we can get Ms Annacker on screen. Thank you very much, Ms Annacker.

Again, same provision on time, with the qualification, Ms Annacker, that you stand between the 45-minute break! But don't worry about that; you have ample time. I know that there were a lot of points put to Claimant and there were a couple of points that you had reserved. So, please, we're in your hands.

(5.48 pm)

Reply submissions on behalf of Respondent

DR ANNACKER: Thank you very much, Mr President. I will start with a few words on the legal standard.

Of course the parties have discussed extensively already in their written pleadings the standard of irreparable versus serious harm. I would like to again emphasise that the cases on which Claimant relies for the proposition that serious harm is sufficient, each of these cases did involve claims for specific performance, whereas the present case involves solely a claim for damages.

That was the case in Perenco v Ecuador, where the claimant requested to be reinstated in its rights under a participation contract; Exhibit RL-16, paragraph 46. That was the case in Burlington v Ecuador, where the

17:49 claimant sought specific performance of two production-sharing contracts; Exhibit CL-25, paragraph 71. And in Micula v Romania, where the claimant requested restitution of investment incentives, Exhibit RL-47.

The tribunal in Nova Group v Romania summarised the situation in paragraph 238, Exhibit RL-5:

"... tribunals adapting formulations looser than 'irreparable' harm tend to do so where on the merits, the applicant is seeking specific performance or some other form of equitable or injunctive relief, and not simply monetary compensation."

Claimant has argued this morning and emphasised that they are seeking declaratory relief, and that the declaratory relief should be considered as being sufficient in the absence of a request for specific performance.

Claimant's Request for Arbitration seeks actually -- it's paragraphs 125, 126 and 127, maybe we can bring it up on the screen -- it seeks three declarations, declarations that Respondent has violated the FET standard, the prohibition against discrimination and the prohibition against unlawful expropriation, with relief in the form of monetary damages for these purported treaty violations. This is their request for relief.

17:51 Claimant has not requested specific performance, restitution. It is clear from the request for relief that the Claimant requests declaratory relief as a mere predicate to the claim for monetary damages. It does not request specific performance or restitution.

Let me now turn to the revocation of CO's authorisation. I would emphasise again: the burden is on Claimant. The [Claimant] must show that provisional measures with respect to the revocation of CO's authorisation are urgently needed because of an imminent threat to CO's authorisation to operate.

There is nothing in the record that would suggest that there is such a threat. On the contrary, the record suggests that the GNCC has identified substantial harm, has put the special manager in place and will not proceed with the revocation. We have heard today again without any support, in the rebuttal, "The GNCC said this and this". We have no evidence. There is nothing that suggests that the GNCC would withdraw the authorisation of CO.

There was another insinuation that: because the GNCC, in its October 15th [2021] decision, the latest decision, issued a warning and extended the deadline for compliance with the May 20th 2021 decision until the end of December 2021.

17:53 It is very clear from the documents in the record, from the minutes and the decisions themselves, that the GNCC resorted to the lenient measure available to it to avoid the expiration of the statute of limitations under Georgian administrative law. It is also clear from the documents in the record, the decisions themselves and the minutes of the hearings for these decisions, that the GNCC extended the deadline in order to allow Claimant and Georgia to engage in meaningful settlement discussions.

While the GNCC first set a three-month period for compliance, August 31st 2021, since the negotiations were ongoing by that time, the term was extended until December 31st 2021, as was already discussed at the time when the three-month period for compliance was set.

So there is absolutely nothing to support Claimant's insinuation that the GNCC would set such a deadline because it hopes to be free to be able to revoke CO's authorisation as soon as possible after the hearing.

Now let me turn to the special manager and CO's financial situation. First, CO's financial situation.

Again, the burden is on the Claimant, as the requesting party, to show that there is an imminent threat to CO as a going concern. Nothing in the record suggests that CO is close to bankruptcy.

17:55 Claimant has, I think it was the first time after the written submissions, in the letter of May 7th 2021, alleged without any support that CO will default on its loans unless it participates in the Azerbaijan Digital Hub project. That allegation lacks any evidentiary support.

The Caucasus Online group -- it's a group of companies -- has operated for many, many years successfully. And as a company that owns critical infrastructure assets and has a dominant market position, CO certainly has the capacity to generate sufficient cash flow to cover its loan obligations.

I refer the Tribunal, for example, to an email from CO's director to the special manager of December 2020, Exhibit R-39, which confirms that much. Just from one contract, CO made a $2.5 million profit, which was sufficient to cover its loan obligations for this year.

Let me specifically come back to one point raised by the Claimant in this context: the allegation that the special manager would obstruct CO from being in a position to obtain meaningful new business, and Claimant relied on the example of Amazon.

As we have set forth in our updated submission in our response to Claimant's update on provisional measures, it was not even disclosed to the special

17:57 manager that consent was sought to disclose information to Amazon. The special manager was approached with an unspecified request to submit highly confidential information, including about CO's technical infrastructure, without explaining the purpose, without explaining the customer.

So the accusation that the special manager would refuse to engage with Amazon or would refuse to contract with Amazon is plainly wrong. It was never disclosed to the special manager that the purpose for the disclosure would be to engage with Amazon.

Let me now turn to the question about the special manager's powers, the decision on the appointment of the special manager.

As a preliminary point, I want to emphasise that the lawfulness of the decision on the appointment of the special manager is one of the core issues in dispute in this case. That core issue is a core merits issue which has not yet been briefed at this stage of the proceedings. The Tribunal must not prejudge this core issue by adopting Claimant's position that the special manager cannot fulfil her mandate, and ignoring the judgments of the Georgian courts that have held that there is prima facie no doubt about the lawfulness of this decision.

17:59 Despite the Claimant's rhetoric, the appointment of the special manager was necessary to allow the company to continue to operate in accordance with Georgian law. An authorised person is not allowed to operate in an unlawful manner. Given Claimant's defiance to comply with the regulator's orders, the only way to allow the company to continue to operate was to install a special manager and not to suspend CO's authorisation.

The powers conferred on the special manager allow the special manager to counteract any unlawful influence by the Claimant on CO's management and operations. So by vesting in the special manager the power to approve the decisions of CO's corporate bodies, and authorising her also to suspend payment of dividends and other distributions, the special manager can ensure that the status quo is de facto restored.

It is Respondent's position that Georgian law does not recognise Claimant's indirect beneficial interest in CO, since the January 2019 share purchase agreement violated mandatory statutory requirements under Georgian law. It will be for Claimant to draw the necessary consequences of that, and to cooperate with the special manager. And nothing prevents the Claimant from cooperating with the special manager in finding a solution to reverse the transaction, to cooperate with

18:01 the special manager, to seek approval from the GNCC of his intended takeover of CO.

THE PRESIDENT: Can I ask you about that, Ms Annacker.

DR ANNACKER: Yes.

[redacted]

18:03 [redacted]

DR ANNACKER: Well, the decision on the appointment of the special manager subjects any decision by any corporate body -- CO's director, CO's supervisory board and CO's shareholder meeting -- to approval by the special manager. That is a decision taken by the GNCC.

And again, the decision on the appointment of the special manager is a core issue in dispute: it should not be prejudged at this stage.

The special manager has the power to release, to

18:05 delegate certain powers to CO's corporate bodies. The special manager has done that. Claimant doesn't like the scope of the delegation. But in accordance with the decision on the appointment of the special manager on June 1st 2021, the special manager has delegated routine transactions, routine transfers and, beyond that -- as identified in the annex -- a substantial amount of transactions that can be performed without her prior consent.

But again, there is no showing by Claimant that this approval requirement -- yes, it's an additional administrative step: one needs to obtain approval for transactions and payments that are not included in the power of attorney. But Claimant has not shown that that would drive the company into bankruptcy.

And from the documents in the record, one can see that the special manager did not just approve routine, day-to-day operations but that very substantial operations were approved by the special manager, including new business, highly profitable new business, in millions of US dollars.

I refer the Tribunal to Exhibit R-39, Exhibit R-40, Exhibit R-71. All these exhibits have shown that the special manager does not just confine the company to doing pure day-to-day operations but cutting it off from

18:07 new business, cutting it off from properly developing its infrastructure. The contrary is the case.

One final point. We have discussed in our opening statement and our written pleadings that the provisional measures requested are wholly disproportionate. On the one hand, Claimant would suffer a compensable loss of a business opportunity; on the other hand, in a worst case scenario, Georgia would suffer very substantial economic harm, and potentially irreparable harm.

Let me interject here: the Tribunal has asked for evidence of this harm. We will be happy to identify the relevant documents in the record. But I would emphasise again: this is not just the GNCC saying this -- of course the GNCC, in its recent decisions, has stated with full reasoning why there is such harm -- but it is also the Georgian courts. The Georgian courts have identified and have confirmed that there is substantial harm to the Georgian telecommunications market in terms of competition, in terms of the risk of a change of the strategy in a manner that would negatively affect retail subscribers and Georgian public agencies and, third, the harm to international competitiveness.

Whereas Claimant has done a wholesale attack at the outset of today's hearing on the Georgian judiciary, again, there is nothing whatsoever in the record that

18:09 would support that wholesale attack.

I will just interject that the court decision that was mentioned by Claimant at the outset of his pleading, March 1st 2021 of the Court of Appeal, was reversed, and it wasn't done so because of an application to reargue by the GNCC that had zero basis whatsoever and constituted an attack on the judiciary. I want to emphasise that the GNCC was not participating in the original proceedings, so this was a regular motion to reopen, and it was perfectly legitimate to consider evidence that was not available before the GNCC had the chance to participate as new evidence.

In conclusion, since any duty to refrain from aggravating the dispute and to maintain the status quo is clearly a duty of both parties and aims at protecting the rights of both parties, if the Tribunal were minded to grant provisional measures, then equally Respondent must be protected through a requirement on the Claimant, at a minimum, to refrain from taking any strategic decisions that would materially change CO's operations. This would include the sale or encumbrance of assets of CO's subsidiaries and changes in CO's supply or business strategies, including steps to integrate CO into the Azerbaijan Digital Hub project.

Thank you.

18:12 THE PRESIDENT: Thank you very much, Ms Annacker.

Mr Alexandrov, any questions for Ms Annacker?

DR ALEXANDROV: No, I do not. Thank you, Mr President.

THE PRESIDENT: Thank you.

Mr Rowley?

MR ROWLEY: No questions, thank you.

THE PRESIDENT: Ms Annacker, thank you very much. I think that concludes the submissions on our first issue for today, and I believe that it is now a 45-minute break, before we go to the bifurcated issue.

Any questions before we adjourn for 45 minutes?

Mr Ostrove. (Pause)

MR OSTROVE: Mr President, we just wanted to check -- if you'll excuse the bad pun -- the appetite of the participants for a slightly shorter break, given that it's getting to be quite late in the day in Tbilisi and in Baku. But of course we do understand that some people may have been counting on the 45-minute break to recover.

MR ROWLEY: I'm afraid my appetite is limited.

THE PRESIDENT: I didn't hear, Bill. Sorry.

MR ROWLEY: I said: my appetite to lessen the break is a limited one.

THE PRESIDENT: So with apologies to colleagues in Baku and Tbilisi, it will be a little bit later this evening, but

18:13 counsel are working very hard on each side, and the arbitrators too.

So 45 minutes. Let's reconvene at 19.00 CET, which is 1.00 pm DC time.

(6.14 pm)

(Adjourned until 7.00 pm CET)

(7.00 pm)

THE PRESIDENT: Very well. We have Respondent's submission on jurisdictional objection for 40 minutes.

I can tell everyone, by a Tribunal majority, it is clear that I was deficient in timekeeping, keeping people to time in our first session, so we actually are going to be pretty strict this time round. We didn't have further submissions and we have read before, so I think the Tribunal is clued up. That's not to say that we won't have questions, but it is to say that we will keep to time.

So it's 19.00 CET and you have 40 minutes, Mr Silva Romero. (Pause)

Submissions on behalf of Respondent on the jurisdictional objection

DR SILVA ROMERO: Thank you, Mr President, members of the Tribunal. Good evening or good afternoon, depending on the timezone.

I should start our submissions on our inter-state

19:01 negotiations objection with some introductory remarks on our reading of the treaty on point.

You perfectly know, members of the Tribunal, that states are free to condition their consent to arbitrate as they deem fit. And in our treaty, the Georgia-Azerbaijan BIT, the contracting parties have conditioned their consent on prior inter-state negotiations.

(Slide 2) Through its plain wording, Article 9 of the BIT, as you know, requires negotiations by Azerbaijan and Georgia for at least six months before an investor is entitled to refer a dispute to arbitration. Such negotiations, we say, permit Azerbaijan and Georgia to cooperate in resolving investment disputes before they escalate into arbitration; and we also say this is in the interest of both states.

Pursuant, more precisely, members of the Tribunal, to paragraph 1 of Article 9, any investor-state dispute:

"... will be subject to negotiations between the Contracting Parties in dispute."

The term "Contracting Parties", as you also know, is expressly defined in the treaty's preamble to mean:

"The Government of Georgia and the Government of the Republic of Azerbaijan ..."

19:03 This defined term does not have more than one ordinary meaning in the circumstances. Regardless of the context and the treaty's object and purpose, we say there is only one ordinary meaning of "The Government of Georgia and the Government of the Republic of Azerbaijan".

So, contrary to Claimant's position, members of the Tribunal, we say that the phrase "Contracting Parties in dispute" is far from nonsensical. It is Claimant's view, as you have read, that the investor's home state is a third party to the dispute. But the investor's home state is a contracting party to the treaty and, as such, we say it is directly affected by the other contracting party's conduct.

So the reference in Article 9 to "the Contracting Parties in dispute", and the unnecessary confusion, we say, the Claimant has attempted to generate around this phrase, cannot justify replacing Azerbaijan and Georgia with the parties to this arbitration, or to the arbitration.

The defined treaty term "Contracting Parties" can and must be given effect. So Claimant, we say, members of the Tribunal, cannot seriously argue that there must be a drafting error based solely on his own view that this phrase is nonsensical.

19:04 (Slide 3) Azerbaijan and Georgia have each concluded, as you read in our papers, at least one investment treaty with other states that requires inter-state negotiations by using this very language that I just read, referring to negotiations by "the Contracting Parties in dispute" (RL-27 and RL-142) and "Contracting Parties involved in the dispute" (RL-23), respectively. You can see that on the screen.

(Slide 4) The Republic of Azerbaijan and Georgia have also concluded at least six other investment treaties with inter-state negotiations requirements. So Claimant now admits, as you read, that these six BITs condition resort to arbitration on prior inter-state negotiations, and they did so at paragraph 60.3 of Claimant's April 2021 submission.

We have set forth the investor-state arbitration clauses of these six BITs on the screen (RL-22, RL-76-RU, RL-24, RL-29, CLA-60 and RL-25). Each of these provisions, as you can see, requires prior inter-state negotiations in one form or another; as Claimant, as I said, now acknowledges. And the same is true of the Azerbaijan-Georgia BIT of our case.

These BITs, members of the Tribunal, also demonstrate that Claimant's invocation of the BIT's object and purpose in support of his position is

19:06 misconceived. The object and purpose of an investment treaty is obviously to promote and protect investments, but it is for the contracting states to decide how best to promote and protect those investments.

In Article 9 of the BIT, Georgia and Azerbaijan have chosen to accord the right to arbitration, but they have also explicitly chosen to make that right conditional on the contracting parties having first attempted to resolve their dispute through negotiations for at least six months. This is what the Republic of Azerbaijan and Georgia agreed. And instead of investor-state negotiations, they committed to negotiate inter se to resolve investment disputes.

(Slide 5) In the words for instance of the Daimler tribunal on the screen (RL-31, paragraph 164):

"The texts of the treaties [that states] conclude are the definitive guide as to how they have chosen to [promote and protect investments]."

With these introductory remarks, members of the Tribunal, I will now divide my submissions in three parts. First, I will address the issue of the nature of our inter-state negotiations objection. Second, I will make our submissions on Claimant's invocation of the MFN clause to avoid the inter-state negotiations jurisdictional requirement. And third and last, I will

19:08 respond to what we can call Claimant's factual allegations in relation to our inter-state negotiations jurisdictional objection.

(Slide 6) Turning now to the jurisdictional nature of the inter-state negotiations requirement.

(Slide 7) Article 9 provides, we say, in plain language that any investor-state dispute will be subject to inter-state negotiations, and an investor is only entitled to refer the dispute to arbitration if it cannot be settled through such negotiations. So Article 9, as you know, is the very source of the Tribunal's jurisdiction, and compliance with the inter-state negotiations requirement therefore constitutes a jurisdictional requirement and not, as Claimant argues, a mere procedural nicety or an admissibility requirement.

In his submissions Claimant has continued, we say, to mischaracterise the prevailing view in arbitral case law as allegedly supporting his position. But Respondent has submitted more than 20 cases, including recent cases decided by the ICJ, that expressly qualify the conditions set forth in the dispute resolution clause of a treaty as jurisdictional requirements.

The relevant findings are found on slide 9 on the screen. Claimant however, attempts to minimise these

19:09 findings by asserting that many were obiter dicta, but investment tribunals have repeatedly endorsed the findings that Claimant now dismisses.

(Slide 10) For example, no less than six investment tribunals have cited approvingly to the Enron tribunal's analysis and conclusion that a requirement for prior negotiations is very much a jurisdictional requirement.

(Slide 11) One of these tribunals, the Murphy tribunal, specifically rejected the argument that Claimant has raised here and emphasised that the Enron tribunal made that statement "precisely because of the importance it attributed to the issue" (RL-108, paragraph 153).

(Slide 12) Respondent has demonstrated that the ICJ also consistently qualifies prior negotiations as a requirement of a jurisdictional nature. I refer the Tribunal, for example, to the ICJ's judgment in Application of the International Convention on the Elimination of All Forms of Racial Discrimination, which is Exhibit RL-96.

In this case, members of the Tribunal, the ICJ dismissed Georgia's claims for lack of jurisdiction because the prior negotiations requirement had not been satisfied. Georgia and Russia had engaged in negotiations concerning Russia's armed activities, but

19:11 not concerning Russia's compliance with the convention invoked as the basis for the court's jurisdiction.

(Slide 13) I come now to the second part of my submissions, members of the Tribunal. I will now briefly turn to Claimant's invocation of the most favoured nation clause in Article 4 of the BIT. And I promise I will not bore you too much with this argument that you know pretty well.

The Claimant's reliance, we say, on the MFN clause to avoid the inter-state negotiations jurisdictional requirement fails on several grounds.

You know perfectly well, members of the Tribunal, that as a matter of principle, an MFN clause does not apply to the conditions of the contracting parties' offer to arbitrate unless the MFN clause leaves no doubt that the contracting parties intended to include dispute settlement within the scope of operation of the MFN clause. And absent such clear language or intention, a tribunal has no power to incorporate more favourable dispute resolution terms into the treaty so as to create or expand the contracting states' consent to arbitrate.

Here, the MFN clause in Article 4 of the BIT does not reveal any intention, much less an unambiguous one, to extend MFN treatment to dispute settlement. Article 4 makes no mention of dispute settlement.

19:13 Article 4 does not even refer to "all matters governed by or subject to the treaty". Instead, the BIT's structure and the terms of Article 4 confirm that MFN treatment encompasses only substantive treatment.

Let me make three short observations in this regard.

First, the BIT's structure clearly distinguishes rights from remedies. Articles 3 to 8 accord substantive rights in relation to investments. Articles 9 and 10 establish procedures for resolving disputes in relation to those rights.

(Slide 15) Second point: the MFN treatment to be accorded under Article 4, as you can see in the text, is closely linked to fair and equitable treatment.

(Slide 16) Finally, an MFN clause cannot override, we say, carefully crafted conditions precedent to arbitration. These are part and parcel of the contracting parties' integrated offer to arbitrate, which must be accepted by the investor on the terms offered.

In short, members of the Tribunal, the inter-state negotiations jurisdictional requirement cannot be avoided.

(Slide 17) In the time remaining -- which I hope will be less than the 40 minutes, Mr President -- I must make a few observations, in the third part of my

19:15 submissions, in response to Claimant's arguments that I characterise as "factual" arguments of estoppel, compliance with the inter-state negotiation requirement and futility of those potential negotiations, which we say were never requested, let alone commenced.

(Slide 18) First, we say, members of the Tribunal, that Claimant's invocation of estoppel is simply a non-starter. You know also very well that, from a legal perspective, estoppel cannot create jurisdiction where none would otherwise exist. You also know that estoppel cannot apply to representations of law, like the content of the requirements in Article 9(1) of the BIT, but only to representations of fact.

You also know that tribunals, including the one in Quiborax v Bolivia on the screen (RL-129, paragraphs 257 to 258), have consistently held that participation in discussions to resolve a dispute does not preclude the state from raising or maintaining jurisdictional objections in the context of an eventual arbitration, which I should say is obvious.

But in any event, from a factual standpoint, the requirements for invoking estoppel, we say, are not met in this case. As the Chevron tribunal underlined (RL-38, paragraph 351):

"... the representation upon which the estoppel is

19:16 based has to be 'clear and unequivocal' and there must be actual, justified reliance by the other party."

I must now make three observations on why estoppel does not apply in the circumstances of this case.

(Slide 19) First, members of the Tribunal, we say that Georgia never made a clear and unequivocal representation concerning the interpretation of Article 9, let alone that it does not require inter-state negotiations.

Claimant, as you have seen, has attempted to manufacture what is, at best, an implied representation on the basis of the GNCC's participation in discussions in July 2020, and an August 25th 2020 letter from the administration of the Government of Georgia to Claimant (C-42) which allegedly implied that the negotiations that were taking place with the GNCC were legitimate and that there is no other requirement for some state-to-state negotiations to take place.

We say that no clear and unequivocal representation, in the sense alleged by Claimant, can be drawn from Georgia's behaviour in the circumstances.

The GNCC, members of the Tribunal, like the August 25th letter, made perfectly clear the specific context in which discussions were taking place, namely an attempt to resolve Claimant's concerns within "the

19:18 framework of the ... Georgian legislation". Such an express statement, we say, can hardly amount to an implied, let alone a clear and unequivocal representation by Georgia as to the interpretation of Article 9 of the BIT. And Claimant himself originally framed his dispute with the GNCC as a domestic dispute arising under Georgian law.

So please remember, members of the Tribunal, that by the time of his July 2020 meeting with the GNCC, Claimant's companies and affiliates had launched three separate domestic claims against the GNCC -- and, as we discussed previously, have since launched at least another nine domestic claims -- arguing that the GNCC had unlawfully applied Georgian law on telecoms to CO.

(Slide 20) Second point: Claimant could also not have reasonably relied on any implied representation by the GNCC as to the content of Article 9 and its pre-arbitral requirements because the GNCC is an independent, specialised regulator of the Georgian telecoms sector. It has neither the authority nor the expertise to opine on matters of international law like, for instance, the content and interpretation of Article 9 of the treaty.

(Slide 21) Third and last point on estoppel: Claimant also cannot seriously argue, we say, that it

19:20 was for Respondent, let alone the GNCC, to advise him of the conditions precedent for arbitration under the treaty or to rectify any misunderstanding Claimant could have had as to the requirements of Article 9.

As the ICJ confirmed in the ELSI case (RL-141, paragraph 54), estoppel can only arise from failure to say something "when something ought to have been said", which is not the case in the context of a failure to apprise a party of legal requirements under a treaty in the context of exchanges concerning a dispute.

In the ELSI case, members of the Tribunal -- you'll recall that -- the United States attempted to invoke estoppel on the basis of Italy's failure to apprise the United States of non-compliance with the exhaustion of the local remedies rule. And the ICJ found that Italy had no such obligation and, as a consequence, rejected the estoppel argument in that very case.

Given Claimant's position in this arbitration that Article 9 contains a drafting error, it was rather incumbent on Claimant, we say, and his lawyers to raise this issue with the competent Georgian authorities when they saw Article 9. However, we know -- and this is undisputed -- that they never did so.

(Slide 22) I will now turn to Claimant's argument, members of the Tribunal, that the inter-state

19:22 negotiations requirement has somewhat been fulfilled, and we say that it has not been fulfilled.

(Slide 23) From a legal perspective, Claimant accepts that the inter-state negotiations requirement in Article 9 creates "an obligation of means" for the investor (Claimant's Submission on the Inter-State Negotiation Objection, paragraph 137). At the same time, however, Claimant relies on the Capital Financial award and adds that nothing in the BIT requires the investor himself to take any action at all to ensure those negotiations actually take place.

On that point, I should make now four observations in response.

First, the Capital Financial tribunal's reasoning was treaty-specific, and thus not transposable; it couldn't be transposed here. Contrary to Article 9(1) of our treaty, where inter-state negotiations are the sole mandatory pre-arbitral mechanism, Article 10(1) of the relevant treaty in the Capital Financial case provided for two alternative pre-arbitral mechanisms, which were investor-state or inter-state negotiations.

Second distinguishing element: the facts of the Capital Financial case are different because Cameroon had simply ignored the investor's attempts to negotiate and had not even acknowledged the investor's claims,

19:24 unlike the Respondent in our case, as I will explain later on, in a moment.

Third, and in any case, we say Claimant's position that he does not need to take any action regarding Article 9 is incorrect. It is not sufficient -- and this is a commonsense point, members of the Tribunal -- it is not sufficient, it cannot be sufficient for Claimant to simply draw the contracting parties' attention to the existence of an investment dispute and then sit back and relax.

In addition to submitting a written claim, thereby informing the respondent state of the dispute, a potential claimant should also explicitly request that the contracting parties engage in inter-state negotiations pursuant to Article 9(1). And there is simply no evidence on record, members of the Tribunal, that Claimant ever made such a request for inter-state negotiations to the contracting parties in the present case.

(Slide 24) Lastly, and in any event, it is a fact that Claimant has not properly informed Azerbaijan of this dispute. As a preliminary comment, members of the Tribunal, I must say that Claimant's evolving position regarding the inter-state negotiations requirement lacks any credibility.

19:25 You recall that until February 2021, which was when the Request for Bifurcation was filed, Claimant alleged that Article 9 only contains an investor-state negotiations requirement, and that Respondent's position to the contrary was nonsensical.

Claimant then first noted in his March 8th Response to the Request for Bifurcation that he had already approached the Azerbaijani Government for assistance, and that the Azerbaijani Government refused to take any steps. After March 8th, Claimant's counsel identified the Capital Financial award and took at the previous hearing, as you recall, the position that the inter-state negotiations requirement was allegedly satisfied because some inter-state contacts had occurred.

All these factual positions contradict themselves. We know that we cannot put before any tribunal alternative factual cases; it doesn't make any sense.

Pursuant to this last iteration of Claimant's position anyway, Claimant then submitted a note dated April 1st 2021 and created by the Azerbaijani Ministry of Foreign Affairs for "purposes of protecting the interests of Claimant in the arbitration". This is Exhibit C-43. This note simply, we say, doesn't make it, for the following four reasons.

19:27 First, the Azerbaijani ministry's note was created specifically for Claimant's last submission, and more specifically for the purposes of protecting the interest of Claimant in the arbitration.

Second, the note is submitted without any context whatsoever. There is no evidence of how or when Claimant informed Azerbaijan of his dispute with Georgia. There is no evidence on what Claimant said to the Azerbaijani authorities. And there is no clue as to whether Claimant requested them to initiate inter-state negotiations with Georgia under Article 9 of the BIT.

Third point: there is no evidence either as to when the Azerbaijani Ministry of Foreign Affairs communicated the matter to the Georgian side.

Fourth and last, the type of discussions between Georgian and Azerbaijani officials described in the Azerbaijani ministry's note could not have been inter-state negotiations within the scope of Article 9(1).

You recall, members of the Tribunal, that the ICJ has consistently held that for discussions to meet negotiations requirements, they must concern a state's alleged non-compliance with its substantive obligations under the treaty invoked. In, again, Georgia v Russia for instance (RL-96, paragraph 161), the ICJ underlined

19:29 that:

"... negotiations must relate to the subject-matter of the treaty containing the compromissory clause. In other words, the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question."

So here, members of the Tribunal, the Azerbaijani ministry's note points to no settlement discussions regarding Georgia's substantive obligations under the BIT. At best, the Azerbaijani ministry's note confirms that the situation of CO was brought up during an unrelated meeting in September 2020 and that the parties exchanged some information about it; nothing more. There is no mention of any request or invitation by Claimant for the states to engage in inter-state negotiations; there is no mention of Georgia's alleged non-compliance with its obligations under the BIT; and there is indeed no mention of the BIT tout court.

In the last submission by Claimant on provisional measures, there is an appendix 2, and this appendix 2 is a list which contains reference to a September 2020 meeting and several other meetings that have taken place between Azerbaijan and Georgia in the last year or so.

As the members of the Tribunal can appreciate,

19:31 officials from these two countries meet regularly to discuss matters of relevance to both states. And the mere fact that Azerbaijani and Georgian representatives have met does not mean that they did so to negotiate a resolution of this dispute before you; and indeed, they did not do so.

If you take the table, you will see the first column with some dates, and then a second column with names of officials who participated in those meetings. But there is no evidence whatsoever regarding the subject matter of those meetings. This is all you have. The only evidence you have on record regarding this objection is the note, C-43, and this table, with no supporting documentation establishing the points in it.

In practical terms, members of the Tribunal, an investor, we say, must take active steps by approaching the contracting parties and requesting the initiation of inter-state negotiations to attempt to resolve the dispute, as we have explained in our written pleadings.

(Slide 28) This brings me to my series of comments on Claimant's third and last fact-related argument, which is that Claimant has not shown that inter-state negotiations would be futile in this case.

First, from a legal perspective, the threshold for

19:33 proving the futility of further negotiations, we say, is high. Negotiations can only be futile when a party has openly refused to enter into negotiations or when they were attempted and then a point of deadlock was reached.

Again, as the ICJ recently confirmed in the ICAO case (RL-149, paragraph 93):

"... a requirement that a dispute cannot be settled through negotiations 'could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies that ... "no reasonable probability exists that further negotiations would lead to a settlement"' ..."

And a priori, when negotiations have not even been initiated, a claimant cannot simply assume their futility.

As the Murphy tribunal put it (RL-108, paragraph 135), to determine whether negotiations would succeed or not, the parties must first initiate them. I'm sorry to make such an obvious point, but that's the job.

From a factual standpoint, Claimant cannot presume the futility of inter-state negotiations in this case, members of the Tribunal, given the importance of the project underlying the dispute. As you know -- and this was already discussed -- this dispute is tied to

19:34 a project of great geopolitical significance for the Caucasus region, which is the Digital Silk Road project. Whether and on what terms CO would be integrated into this project and the Azerbaijan Digital Regional Hub project will directly affect whether Georgia or Azerbaijan will become the region's primary digital hub, and hence the competitiveness of both states in the telecoms sector. All of that is at stake.

Given the states' competing interests, members of the Tribunal, they certainly should have a say on how these projects develop and the benefits are shared.

Even the Azerbaijani ministry note that Claimant relies on, C-43, recorded the contracting parties' commitment to communicate with the concerned authority for the sake of speeding up the process.

Georgia remains ready to address the issues raised by Claimant's stake in CO with Azerbaijan, should Claimant ask the contracting parties to seek to resolve the present dispute.

With this, members of the Tribunal, Georgia concludes its opening statement on the inter-state negotiation objection. Thank you.

THE PRESIDENT: Thank you very much, Mr Silva Romero.

Mr Rowley, any questions for Mr Silva Romero?

MR ROWLEY: No, I do not. Thank you very much.

19:36 THE PRESIDENT: Thank you, Mr Rowley.

Mr Alexandrov?

DR ALEXANDROV: No questions either. Thank you.

THE PRESIDENT: Thank you, Mr Silva Romero. Very helpful. We'll see you again on reply after the break.

Claimant, good to continue now?

(Pause to resolve a technical problem)

Thank you, Mr Ostrove. Claimant has 40 minutes.

(7.37 pm)

Submissions on behalf of Claimant on the jurisdictional objection

MR OSTROVE: Mr President, members of the Tribunal, the Respondent's inter-state negotiations objection is based on a clearly erroneous interpretation of Article 9 of the bilateral investment treaty, and on that basis alone, this has been a wasteful distraction.

Our first reaction when this objection was made was just to point out how wrong Respondent's reading is. But it's actually turned out that that doesn't matter. Even if the BIT did require that states negotiate for six months prior to filing a claim, Mr Hasanov fulfilled every obligation that was incumbent on him before filing his arbitration.

We only discovered that after we first raised the interpretation question because we learnt belatedly that

19:38 our client actually had requested the Azerbaijani Government to reach out to Georgia, starting nearly a year before the case was filed; not because of an obligation to do so, but simply because Mr Hasanov was trying all methods available to resolve the dispute.

(Slide 2) Then we learnt that there had actually been attempts between the two states to negotiate, including renewed attempts more recently. On the slide you have our appendix 2, recently criticised by the other side. But the fact is that these are the dates of meetings at which this dispute was raised between the parties.

These inter-state negotiations have now been, to some extent, going on for over a year, and they have proved absolutely futile, as it was clear from very, very early on with the case.

So I will actually address first the issue of compliance with any inter-state obligation that could possibly exist, under any reading of the treaty, before turning over the floor to my colleagues, who will address how wrong Respondent is as a matter of basic treaty interpretation. And there are several other reasons why their argument is wrong.

(Slide 3) So if there were an obligation, Claimant complied with any obligation on him because, at most,

19:40 Claimant had an obligation to bring to the state's attention the existence of the dispute, which he did. And this, even taking Respondent's reading, is what comes out of the BIT.

(Slide 5) The bilateral investment treaty does not put an obligation on the Claimant to undertake state-to-state negotiation. Rather, it puts an obligation on the state party.

This is a treaty between the two state parties, and they -- the state parties, not Claimant -- have agreed, on Respondent's reading, that any investor-state dispute will be subject to negotiation between the contracting parties in dispute. That is an obligation incumbent on the states, not an obligation incumbent on any investor. The treaty does not say that Claimant shall engage in or do any such thing, because how could it?

(Slide 6) So what would a claimant have to do if there really were an obligation here to do something in this regard? And while this kind of provision -- an actual provision like this -- is exceptionally rare, it's amazing that we have any jurisprudence about it at all, and we have the Capital Financial Holdings v Cameroon case, CLA-90.

The Belgium-Luxembourg-Cameroon BIT has itself clear language saying that there has to be an attempt at

19:42 conciliation between the contracting parties through the diplomatic channel. That clearly is, with the reference to "diplomatic channel", a reference to state-to-state dispute.

The tribunal there found that:

"What is certain [it says] is that ..."

It is the beginning of [paragraph] 159 on the screen (slide 8):

"... the Treaty does not provide for any obligation incumbent on the investor alone to initiate conciliation through diplomatic channels."

And that:

"... the Claimant ... took all necessary measures ... reasonably expected ... to inform the authorities of both ... Parties to the Treaty about the existence and ... evolution of the dispute."

That reading of what possibly could be imposed on a claimant makes good sense.

It is true that in many cases the home state actually will have no way of knowing that its national has a problem with the host state; which actually goes, of course, to the question of who is in dispute here. Very often, home states actually have no reason to know that there is a problem; there is no dispute with them.

So in those cases, one can imply an obligation on

19:43 an investor -- as a way of, in good faith, accepting the arbitration offer in the treaty -- to inform his or her home state of the dispute, so that the parties to the treaty can say, "Ah, we have an obligation under the treaty to negotiate: let's fulfil our obligation". Once the claimant has informed the state parties, he is done: the rest is state-to-state obligation, it's on them.

(Slide 7) Here the Claimant did inform both contracting parties about the dispute. With respect to Georgia, after months of in-person discussions seeking to resolve the dispute, Claimant wrote several times to Respondent formally seeking an amicable settlement. In May, he provided a pre-notice letter -- that's not on the screen -- at C-25, which was followed a month later by the notice letter, which is on the slide, C-26, and that specifically referenced Article 9(2) as being a notice letter.

If Georgia at that point felt, "Okay, Article 9(1) imposes an obligation on me as a state to enter into state-to-state negotiations", then it should have complied with that obligation and launched state-to-state discussions with Azerbaijan, saying, "Hi, we have an investor-state dispute and the two of us need to negotiate to settle it somehow".

Claimant also informed the Ministry of Foreign

19:45 Affairs of Azerbaijan, his home state, back in January 2020, five months before sending this notice letter. That's on the right-hand side of this slide: that's the C-43 that you just heard heavily criticised. But frankly, this is a note from the Azerbaijani Government explaining historically what happened. It's hard to know what more we could do, because Azerbaijan of course is not a party to this dispute, so it's not here today.

MR ROWLEY: Mr Ostrove, can you hear me?

MR OSTROVE: Yes, Mr Rowley.

MR ROWLEY: You have referred a few times in your submission to what is on a particular slide, and you say, "It's on slide". That's all very well for us who are looking at it; it's no good for the transcript. And I can't tell by looking at these whether these slides are numbered. They were this morning; on my screen, they don't appear to be this afternoon.

Can you do what you are able, when you refer to a slide, to locate it for the transcript purposes, please.

MR OSTROVE: Certainly, Mr Rowley. Thank you. This is the slide (7) "Claimant informed both Contracting Parties to the BIT about the dispute", referencing C-43 on the right-hand side that I was referring to.

19:46 Claimant did not inform Azerbaijan because he felt he was obliged to do so under Article 9 of the BIT, which is why we didn't know about it: he didn't think that he was under any such obligation. If he were under such obligation, well, then he complied because he was lucky: he had just done things that way. And so be it. As the famous New York Yankee Lefty Gomez said, it's better to be lucky than good.

(Slide 8) But what matters is what he did. And Capital Financial Holdings (CLA-90), the tribunal there held that very similar efforts were sufficient to fulfil the rare requirement of state-to-state negotiations: you can't require more of a claimant.

Respondent tries to say, "Well, there's more: you're obliged to ensure that the negotiations actually happen", and they contest the relevance of Capital Financial Holdings. I will come back in rebuttal to some of the detailed arguments that they made a bit earlier. But their main argument to date had been buried in footnote 100 of their 6th April submission, which was an argument that this is just obiter dicta.

(Slide 8) That's wrong. The Capital Holdings finding is not obiter dicta. The tribunal expressly found that there was a requirement "for conciliation through diplomatic channels when private conciliation

19:48 has not been successful". That quote is on the slide "The relevance of the Capital Financial Holdings [case]", paragraph 157 (CLA-90).

Frankly, even if it were obiter dictum, it doesn't matter in investment treaty arbitration; it's not like there's binding precedent. What matters is that there was a very highly qualified tribunal, Professors Tercier, Alexis Mourre and Professor Pellet, analysing in careful detail the issue and giving persuasive reasoning.

(Slide 9) Second, Respondent tries to argue that: well, six months of negotiations must actually have taken place as a precondition to ICSID arbitration. But that's also wrong. The BIT does not say that negotiations must take place, and that arbitration can be filed only if negotiations have taken place. What it says is arbitration can be filed if the two contracting parties -- reading it the way Respondent does -- cannot settle the -- if the case cannot be settled in such a manner. That's in Article 9(2).

(Slide 10) The bilateral investment treaty puts one requirement on the investor, which is to submit a written claim to the host state, which he did. And we can imagine the implication in Capital Financial Holdings of an additional requirement, which is to

19:49 inform the home state. It doesn't require more. The actual negotiations are a requirement on the states.

That's quite different from all the cases where there is a requirement of investor-state negotiations, because there the investor has some control. Even if the state doesn't respond, the investor can try. Here, the investor has no control over the parties who are supposed to negotiate.

The Respondent's suggestion that you actually have to have caused the negotiations to happen would allow Respondent to avoid any proceedings being commenced by simply refusing to negotiate. That would deprive the BIT and the dispute resolution clause of their effect. And it's not surprising that Respondent has cited no jurisprudence in support of that argument.

Its reliance on Urbaser (RL-88) is completely misplaced. In Urbaser, either party to the dispute could submit the dispute to the state courts. But the investor was one of the parties to the dispute, and therefore the investor had some control. Here, as Respondent reads the treaty, the investor has no control.

So for all of these reasons, if there were an inter-state negotiations requirement, it's been fulfilled by Claimant because he informed the states

19:50 parties; and if there is an obligation to negotiate, it was on them, not on him.

(Slide 11) In any event, even if you said, "No, no, he had to do more before he could file arbitration and inform the parties", it's clear that any effort to do more, to wait longer, would be futile.

The Foreign Ministry of Azerbaijan explained in C-43 -- next slide (12), please. Thank you. This is the slide "The Respondent showed no interest in settling the dispute with Azerbaijan". The Ministry of Foreign Affairs of Azerbaijan explained that when they raised this dispute several times in 2020, the Georgian side, as they put it, showed no interest in discussing the matter, basically saying they were leaving this to the GNCC to do whatever it wanted.

We see over and over again that they didn't even want to raise it with the GNCC. They said, "We are just leaving this to be worked out internally". They refused to accept it as an inter-state issue or as an investment treaty issue; despite the fact that, of course, they were already themselves on notice from Claimant of the existence of an investor-state dispute.

So at the time the Claimant filed this arbitration, it was clear that this case was not going to be settled by state-to-state negotiations. Claimant didn't think

19:52 there was any obligation to do so, but it is certainly clear that there was no prospect of that happening.

(Slide 13) As I mentioned earlier, there have been four additional inter-state negotiation meetings since the beginning of 2021: in January, July and twice in September. The states parties have found no solution after more than a full year of meetings. So the question is absolutely futile. And to the extent that there were any obligation of ongoing negotiations that should have gone for a full six months, we would submit that that has been cured, even if it were required.

But it's no surprise that the states haven't been able to settle the dispute because it's Claimant's claim, it's not Azerbaijan's claim. Azerbaijan has no dispute with Georgia. It's not Azeri state property rights that are at issue here. Only the investor and the state can settle their dispute, and we certainly hope that that remains a possibility.

(Slide 14) The finding of futility overcomes any cooling-off period. You have our submissions on that in paragraphs 159 to 161 of our brief on the point. I will just mention the Oxford Handbook on International Law, CLA-91, which covers this point on page 846:

"[All that] matters is whether or not there was a promising opportunity for a settlement."

19:53 Here there is no promising opportunity for a settlement in inter-state negotiations, either when we filed for arbitration or, frankly, at any time since then. And for that additional reason, we believe that there really is no basis at all to this argument.

So enough on the compliance if there were an obligation. I am going to give Kate Cervantes-Knox the chair back so that she can explain to you or go over with you why there actually is no inter-state obligation. Thank you very much. Unless there are questions for me, in which case I will not give up the seat.

THE PRESIDENT: Give up the chair, I would say, Mr Ostrove!

MS CERVANTES-KNOX: Thank you.

(Slide 15) I will now explain why Respondent's objection is based on an erroneous reading of the BIT which disregards the rules of treaty interpretation.

(Slide 16) The Tribunal has already been shown Article 9 and the text there. But of course it refers to "Any dispute ... between an investor of one Contracting Party and the other Contracting Party". So the dispute is an investor-state dispute and it refers to "negotiation between the Contracting Parties in dispute".

Of course, the Tribunal will be aware of the content

19:55 of Article 31 of the Vienna Convention (CLA-12) and the rules on treaty interpretation, where we don't just look to the ordinary meaning, we also must look to the ordinary meaning of the terms in their context and in the light of their object and purpose.

We have already given oral submissions at the last hearing on interpretation of the treaty, and in our written submissions, and I won't repeat all of them here, in the interest of time. I refer to the Claimant's Response on Provisional Measures, paragraphs 64 to 75, and Claimant's Submission on the Bifurcated Issue, paragraphs 16 to 62. Today I will focus principally on why the Respondent's approach disregards the requirements of Article 31 of the treaty, which both parties agree applies.

Essentially, Respondent's position is that the Tribunal should ignore the words "in dispute" which are underlined on the slide, and read Article 9(1) as referring to negotiations between the contracting parties, because "Contracting Parties" is a defined term. This of course requires the Tribunal to effectively delete the critical words underlined on the slide, "in dispute"; and that's because it really isn't possible, in the context of Article 9, to give the words "Contracting Parties in dispute" any sensible meaning.

19:56 (Slide 17) Respondent's attempts to give meaning to this phrase have only served to reinforce the conclusion that this phrase is inherently problematic in the context of Article 9(1). The Tribunal need only look at Respondent's Reply on Provisional Measures, paragraph 85, to see how difficult it is for Respondent to give some sense to these words. They say here that:

"A Contracting Party's failure to treat the investments of the other Contracting Party in accordance with [the treaty] ... implicates the treaty rights and economic interests of the latter."

And of course, the investments are not investments of the other contracting party: they are investments of the investor.

They then, in their Submission on the Bifurcated Issue, slightly tried to retreat from that position and talk about states' shared interest in settling disputes arising under the treaty.

Respondent's difficulty in ascribing a sensible meaning to this phrase stems from the fact that they seek incorrectly to interpret the words "Contracting Parties" in isolation and to divorce them from the context of Article 9. And yet of course they must be construed in accordance with context, as required by Article 31 of the Vienna Convention. And when they are

19:58 interpreted in context, it is abundantly clear that this phrase is an oxymoron, and that the drafters of the treaty must have intended to refer to the investor-state disputes being subject to negotiations between the parties in dispute, and not between the contracting parties, who are not in dispute.

(Slide 18) Respondent then argues that Claimant's position flies in the face of investment treaty practice, and they point to other BITs which they say make provision for inter-state negotiation. But again, there's no requirement in Articles 31 to 33 of the Vienna Convention that we must have regard to investment treaty practice as an aid to interpretation.

In any event, the treaties that Respondent seeks to call in aid represent a tiny minority of the investment treaties in existence: less than 0.5% of those treaties. And in the rare cases where inter-state negotiation is referred to in the treaties in relation to an investor-state dispute, this very unusual requirement is, as one would expect, clear and unambiguous, in stark contrast to the language of the Georgia-Azerbaijan BIT.

(Slide 18) I've put on this slide the six BITs which Respondent refers to which talk about "diplomatic channels" and diplomatic protection (RL-74-FR, RL-75, RL-72, RL-29, RL-73 and RL-30).

19:59 It's very different to the language in the BIT at issue here. It's also worth noting that in a number of those treaties, there's only a requirement for inter-state negotiation where investor-state negotiations have already failed. And this is the case for the BLEU BITs listed on this slide.

(Slide 19) So the BITs that don't use "diplomatic channels"/"diplomatic protection" language refer instead to negotiations between the two contracting states, with no conflicting and nonsensical reference to the contracting states being in dispute. And exceptions to that are the two BITs that the Respondent has identified which contain similar language to the BIT at issue here, and those are the Georgia-Ukraine BIT and the Azerbaijan-Kazakhstan BIT, which also refer to "Contracting Parties in dispute".

(Slide 20) It must be assumed that these two anomalous treaties, which were signed at approximately the same time as the Georgia-Azerbaijan BIT, contain the same drafting error that's been repeated in these treaties to which Georgia and Azerbaijan are a party. If Georgia had intended to subject an investor's recourse to arbitration to inter-state negotiations, it certainly knew how to do so and provide clearly for this, as it did in the Georgia-BLEU BIT (CLA-60,

20:01 Article 10), which was signed around two years prior to the Georgia-Azerbaijan BIT.

In conclusion, therefore, Respondent's whole approach to the interpretation of Article 9(1) is wrong. It's only possible to arrive at Respondent's erroneous interpretation of Article 9(1) if applicable rules of treaty interpretation are simply disregarded.

(Slide 21) The Claimant also submits that the Respondent is precluded from relying upon the alleged failure by the Claimant to comply with the purported requirements of Article 9 in order to challenge the Tribunal's jurisdiction by the principle of estoppel and the duty of good faith.

In short, the position is that during many months of negotiations which took place between the Claimant and the Respondent, which were instigated by the Claimant explicitly on the basis that they were required by Article 9(1) of the bilateral investment treaty, the Respondent didn't at any time indicate or communicate to the Claimant that such negotiations did not in fact, in its view, comply with Article 9.

(Slide 22) On the contrary, the Respondent -- through its instrumentality, the GNCC -- participated in investor-state discussions from March to September 2020. The meetings were followed by a letter from the head of

20:02 the administration of the Government of Georgia dated 25th August 2020; that's C-42. It's on this slide. It refers to the issue between Mr Hasanov and the GNCC, and then goes on to talk about that:

"... Georgia remained hopeful the parties will be able to resolve all outstanding matters amicably ... and, if need be, [would] use its best endeavours to facilitate peaceful resolution of any controversy between the parties concerned."

There is no reference in that letter to a need for inter-state negotiations.

A number of points were made by Mr Silva Romero in relation to estoppel, and I won't have time to address them all now; we may address some in reply. But I would here point out that the letter which was quoted on slide 19 of the Respondent's presentation -- and it's R-57, a GNCC letter to DLA Piper dated 13th July 2020 -- you may recall that it was relied upon to support a proposition that that letter, which referred to negotiations within the framework of the Georgian legislation, was actually referring to negotiations of domestic disputes before the Georgian courts. But that letter refers to letters from DLA Piper or from the Claimant dated 22nd May 2020 and 9th July 2020.

The 22nd May 2020 letter which Exhibit R-57 is the

20:04 response to -- and that's Exhibit C-25 -- explicitly refers to Article 9 of the BIT. It describes the dispute as being a dispute under this investment treaty. It makes no reference to Georgian domestic court proceedings. So it's clearly not the case that when the GNCC wrote to DLA Piper on 13th July -- Exhibit R-57 -- that they were referring to negotiations or settlement of Georgian court disputes.

One other point that I will address now in relation to estoppel is the argument that it must be a factual representation. But of course, what was effectively being represented by Georgia was that the negotiations that were taking place were in compliance with the treaty. It was a factual representation that they were in compliance and an acceptance that they were being conducted in accordance with Article 9.

(Slide 23) In Fraport v Philippines (RL-87, paragraph 346), the tribunal referred to the question of estoppel and indicated that:

"Principles of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law."

On the facts of that case, the tribunal found that

20:05 the claimant had concealed the illegality from the respondent. But in this case, it's beyond doubt that the Respondent was aware of the alleged failure to comply with Article 9 of the BIT and endorsed the Claimant's approach in instigating investor-state negotiations; and in so doing, they represented that Claimant's conduct was in compliance with Article 9.

In the Desert Line Projects v Yemen case (RL-132, paragraph 99), the tribunal cited the Fraport tribunal's conclusion regarding estoppel, and they stated that:

"The objection to the effect that the Claimant's investment was never 'accepted by [the Respondent] as an investment according to its laws and regulations' is as unpersuasive as it is unattractive."

Similarly here, Respondent's objection to the effect that the investor-state negotiations which took place did not comply with Article 9 is as unpersuasive as it is unattractive, in view of the Respondent's contradictory conduct.

(Slide 24) Respondent's conduct is also contrary to Respondent's duty to perform the treaty in good faith enshrined in Articles 26 and 31(1) of the Vienna Convention (CLA-112). A cynical and deliberate failure to draw Claimant's attention to Respondent's differing interpretation of Article 9 of the BIT would clearly

20:07 breach the principle of good faith.

(Slide 25) I will now pass over to my colleague Séréna Salem to address the effect of the most favoured nation clause in the treaty, unless the Tribunal has any questions on interpretation of the treaty and estoppel.

THE PRESIDENT: No. I just would say, Ms Salem, you have ten minutes: it will be a hard stop.

MS SALEM: Thank you very much, Mr President, members of the Tribunal.

(Slide 26) There is yet another reason why the Respondent cannot prevail on this jurisdictional objection. Even if an inter-state negotiations requirement existed in this BIT, Claimant is entitled to avoid it based on the most favoured nation clause at Article 4 of the treaty that you can see on the slide. It's slide 26.

If we adopt Respondent's interpretation, Azerbaijani investors do not have access to arbitration unless there are prior inter-state negotiations. Yet Respondent offered direct access to arbitration, with no requirement for prior inter-state negotiation, to other investors. That's the case for the investors from the Netherlands, for example. This is slide 27, where you can see Article 9 of the Georgia-Netherlands BIT (CLA-102). As a consequence, by application of the MFN

20:08 clause, Claimant should be granted access to arbitration with no requirement for prior negotiation.

Now we have just heard Respondent argue that the MFN clause does not extend to dispute settlement clauses. And if we can move on to the next slide, please, which is slide 28. As acknowledged by the tribunal in the Gas Natural v Argentina case (CLA-63, paragraph 49):

"The Tribunal understands that the issue of applying a general [MFN] clause to the dispute resolution provisions of bilateral investment treaties is not free from doubt, and that different tribunals faced with different facts and negotiating background may reach different results."

Yet -- and this is at the very bottom of the slide -- as this tribunal helpfully clarified:

"Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, [MFN] provisions in BITs should be understood to be applicable to dispute settlement."

The tribunal therefore allowed Gas Natural to import a more favourable dispute settlement provision on the basis of the MFN clause. The applicable BIT in that case the Argentina-Spain BIT, required the investor to

20:09 negotiate for 6 months, then bring judicial proceedings in the local courts, and then wait for a further period of 18 months in the local courts before having recourse to arbitration. Gas Natural was able to rely on the dispute settlement provision from the France-Argentina BIT, which allowed it to have recourse to arbitration after a period of 6 months only of negotiation. That is the important part.

The rationale is that most favoured nation clauses can be used to invoke a procedural advantage accorded to more favoured investors in another treaty. They just should not be used to import jurisdiction where that jurisdiction was not already contemplated in the underlying treaty.

The extract on the next slide, slide 29, which is taken from one of Respondent's authorities, RL-150 (paragraph 7.342), confirmed this reasoning:

"Provided the tribunal is properly endowed with the jurisdiction according to the scope of the arbitration agreement in the basic treaty ... it may be possible for the claimant to invoke the MFN clause in order to invoke procedural advantages accorded to more favoured investors by reference to other treaties ..."

In the present case, Claimant is invoking the MFN clause precisely to import a procedural advantage that

20:11 allows it to have direct access to arbitration, as opposed to having to fulfil a requirement for prior negotiation. It does not seek to create ICSID jurisdiction where such jurisdiction would not have existed in the first place.

It is true that in the Plama case referred to by Respondent earlier today, the tribunal did not agree that an MFN clause should apply to the dispute resolution provision. But it was precisely in a scenario where the investor was seeking, through the MFN clause, to replace one means of dispute settlement, ad hoc arbitration in that case, with another, ICSID arbitration. It's therefore completely irrelevant here.

Finally, we have heard today Respondent mention that the MFN clause in our treaty cannot apply because it does not expressly state all matters and because it does not expressly include MFN.

I will, on this, refer the Tribunal to our April submission at paragraph 68, and in particular to the Suez v Argentina case, which is CLA-61, to support our contention to the contrary: that the wording of Article 4(1) is broad enough, and that Georgia should have expressly excluded the application of the MFN to dispute resolution matters if this was its intent. It did not do it. It actually excluded other matters, as

20:12 you can see in Article 4(3) of the treaty.

For all these reasons, Claimant is at liberty to use the MFN clause to circumvent any inter-state negotiation requirement.

(Slide 31) I will pass now to my colleague Anthony Sinclair for our last point, unless the Tribunal has any questions.

THE PRESIDENT: No, thank you very much, Ms Salem.

Mr Sinclair, four minutes.

MR SINCLAIR: Thank you, Dr Shore.

THE PRESIDENT: More time than you usually have!

MR SINCLAIR: (Slide 31) In this closing part of our presentation, I'll address why Georgia's objection is not an impediment to your jurisdiction for three reasons: as a matter of textual interpretation, doctrine and principle.

(Slide 32) First, a close look at the text reveals that Georgia has overstated the extent to which the language of Article 9 supports its interpretation that this alleged negotiations requirement is a jurisdictional condition precedent. As I will show in a moment, prior arbitral tribunals have agreed with our interpretation, although of course we recognise that you need to look at every treaty specifically.

What Article 9(1) does is to define "any dispute"

20:14 which may be referred to arbitration, and it does so by reference to two conditions only, and I've annotated the text there. That is, it must be "between an investor of one Contracting Party and the other Contracting Party", and it must be "[concerned] with an investment in the territory of the latter". Those are the two conditions that alone provide the jurisdictional definition of what disputes may be referred to arbitration.

What then follows in Article 9(1) and then Article 9(2) is a statement of intent and desire that such disputes will be subject to negotiations. "Subject to" may mean amenable to negotiation, or it may mean that negotiations ought to take place. But one cannot put it any higher since it cannot have been the contracting parties' intent that a respondent state might prevent arbitration by declining to participate in negotiations. This is a statement of desirability that inter-state negotiations should occur.

Now, we contrast the language of Article 9 with other cases, and we will see that these words do not properly qualify the concept of any dispute which the contracting parties have agreed may be referred to arbitration.

Contrast, for instance, with the language of the UK-Bolivia BIT, which is discussed in the Guaracachi

20:15 v Bolivia case (RL-100) on which the Respondent relies. If you look closely at the language of that treaty, you will see that the term "disputes" has a quality, it is defined: "which have not been ... settled". The word "which" qualifies the word "dispute", and you don't see that sort of language in our treaty.

As I mentioned, our interpretation is supported by prior arbitral practice, whereas the cases upon which Georgia relies are each properly distinguishable or truly obiter, as explained at paragraph 95 of our submissions of 23rd April.

(Slide 33) I'll give you three examples of authorities that support our position. First, in SGS v Pakistan (CLA-53), the Switzerland-Pakistan BIT said that "consultations will take place", and:

"If [those] consultations do not result in a solution ... the dispute [may] be [referred] to ... arbitration ..."

That language is not dissimilar to the words at issue here. And the SGS v Pakistan tribunal noted that these conditions are generally treated to be "directory and procedural", and non-compliance is not seen as amounting to an obstacle to jurisdiction. These are not conditions precedent for the vesting of jurisdiction.

Secondly, Westwater Resources v Turkey (CLA-55). In

20:17 that case, the clause in issue said that disputes "shall initially" be referred to "consultations [or] negotiations in good faith". And if the dispute is not resolved in that way, the dispute shall be submitted to arbitration. Again, not dissimilar to our formulation.

And the Westwater tribunal again didn't find that sort of language determinative of the existence of a jurisdictional condition. Rather, the tribunal found this to be a procedural rule which permitted relief against non-compliance in circumstances such as demonstration that further negotiations would have been futile.

(Slide 34) Then a final example -- if more were required -- is Içkale Insaat v Turkmenistan (CLA-69). That BIT (CLA-106) allowed for arbitration provided that the investor had sought to exhaust local remedies. And the tribunal there held that:

"The provision does not concern the issue of whether the [States] have given their consent to arbitrate ... but rather the issue of how that consent is to be invoked by [an] ... investor; as an issue of 'how' rather than 'whether', it must be considered [to be] a matter of procedure and not ... [a condition to] consent."

(Slide 35) Secondly, at the level of doctrine,

20:18 commentators you might have heard of, like Paulsson, Born and Schreuer, all agree as a general matter that, properly analysed, these conditions -- like those that exist in Article 9, allegedly -- are not matters of jurisdiction and that they do not restrict the authority of the tribunal, but they are rather focused on the claim.

So in his famous article on admissibility (CLA-68), Paulsson had no difficulty in accepting that objections about adherence to a prior negotiation requirement is a matter that seeks to impede determination of the claim and not the tribunal, and hence it's not a matter of jurisdiction.

Born referred to these conditions as "non-mandatory and aspirational" (CLA-72).

Schreuer went on to say (CLA-73) that it would make no sense to decline jurisdiction if, for instance, a waiting period has elapsed; or, in the event of non-compliance, it can or has been cured; or if negotiations, for instance, have proceeded in the interim.

What these three commentators all agree upon is that these conditions of this nature are not conditions to jurisdiction, and their breach would not ordinarily preclude resort to arbitration.

20:19 Lastly --

THE PRESIDENT: It should be your last submission, Mr Sinclair.

MR SINCLAIR: Yes, sir. I was just going to point out that it is accepted between the parties before you that any breach could be excused by evidence of futility or subsequently cured by reference to substantial compliance (slide 36).

Thank you, sir.

THE PRESIDENT: Mr Sinclair, sorry to cut you off. Thank you, but I know that you have a chance for rejoinder.

So let's take a 10-minute break, and then we're back for 15 minutes each.

Thank you all very much. Celeste, if you can put us in the breakout room.

(8.20 pm)

(A short break)

(8.31 pm)

THE PRESIDENT: Thank you very much.

Mr Silva Romero, you have 15 minutes for reply.

Reply submissions on behalf of Respondent

DR SILVA ROMERO: Thank you, Mr President and members of the Tribunal.

I will organise my rebuttal submissions in two parts. First, I'll come back to some points regarding

20:31 the interpretation of Article 9(1) of the treaty, if we can please have it on the screen. And secondly, I will come back to some of the factual issues that were mentioned by our friends opposite.

Regarding the interpretation of Article 9, paragraph 1 and 2, I want to make three points in rebuttal.

The first point is this: if you look at Article 9(1), you will see the expression which is an object of controversy here, "Contracting Parties in dispute". And I will try to simplify for you the debate.

You have two different interpretations before you. Our interpretation relies on the defined term in the preamble of the treaty, "Contracting Parties", and gives effect to the expression "Contracting Parties" pursuant to the principle of effet utile, and provides an interpretation of the expression "in dispute" which is unclear. Pursuant to our interpretation, "in dispute" refers to the affectation that a dispute between a contracting state and an investor of the other contracting state may have in relation to the home state of the relevant investor.

You saw some different languages in other treaties. You saw the language "concerned", "Contracting Parties

20:33 concerned". "In dispute", in our interpretation, means -- or is close to -- that expression "concerned" in other treaties.

What is, members of the Tribunal, the other interpretation that you have before you of this expression "Contracting Parties in dispute"? It is one interpretation which removes from Article 9(1) the expression defined expressly in the preamble of the treaty, "Contracting Parties".

So we say, members of the Tribunal, that our interpretation is not only the one in accordance with the relevant rules of the Vienna Convention, but also the most reasonable and commonsense-oriented one.

The second point on the interpretation of this provision, members of the Tribunal, concerns one of the arguments made by our friends opposite. They say: on the basis of this Article 9(1) and (2), the investor doesn't know what the investor has to do. There is no specific language as to how, they say, the investor should trigger the inter-state negotiations.

I would propose to you, for the sake of rebuttal, to make a very simple exercise. Let's assume for a moment that you, members of the Tribunal, and if you accept that you include myself in that group for a moment, we are counsel for the investor and we have a dispute with

20:35 Georgia, and we are asked by our client, the investor, to consider different options to sue the state because of some measures taken by the state.

We obviously will analyse the relevant treaty, and specifically Article 9 of the treaty. Let's look first at Article 9(2), which is the one referring to arbitration. It says that the investor can resort to arbitration after six months within which the dispute could not be settled in the manner described in paragraph 1 of Article 9 of the treaty.

Then we go to paragraph 1 of Article 9 of the treaty. What do we see? We see that it says that:

"Any dispute ... will be subject to negotiations between the Contracting Parties in dispute."

So here counsel will have different alternatives or considerations to make. The first one would be: I don't understand what this means. So what do you do, as counsel? You ask. Who do you ask? You ask Azerbaijan; you ask Georgia. Do we have evidence on record that the investor asked that question? We don't.

Or we consider that the interpretation of this expression is the one proposed by Georgia. So what should we do in the circumstances? We would send a letter to both states invoking Article 9(1), asking them to undertake negotiations, and we would keep that

20:37 letter in our dossier, just in case that after the six months, when we commence the arbitration, Georgia raises the inter-state negotiations objection.

Either counsel in this case or the investor in this case understood "Contracting Parties in dispute" as the dispute between the investor and the contracting state or simply removed from its analysis the expression defined in the preamble, "Contracting Parties".

But the point is this: any diligent investor, members of the Tribunal, would have done something in connection with Article 9(1), and the record shows to us that the investor of our case did simply nothing. As you know, international investors are deemed to be competent professionals: they are deemed to know what they do in the international plane.

The third point I wanted to make on the interpretation of this provision, and the last one, is simply that this inter-state negotiation requirement is not something unique in our treaty. And this is an important point to have in mind. We showed to you -- and this is undisputed -- that both Georgia and Azerbaijan have included similar wording in various treaties. So this is something that these two states are willing to accept.

Coming now to the second part of my submissions very

20:39 rapidly, on the facts.

First of all, I wanted to say a word in connection with C-43 -- you remember the note from Azerbaijan -- and I wanted to make two points on this.

First of all, we produced a translation of the cover letter of the note, which is R-73, and it is in this cover letter where it is stated that note was prepared to protect the interest of the investor in the arbitration.

And second point: in that note by Azerbaijan, there is no mention whatsoever of that request that the investor should have sent to both governments for them to undertake inter-state negotiations pursuant to Article 9(1).

Second point on the facts: you saw our friends referring again to appendix 2. I already mentioned that appendix 2 to the last submission on provisional measures simply contains a list of dates and then some people who participated in those meetings.

The first exercise that I wanted to make is that there is not a third column on the subject matter of the meetings; there is not a fourth column with reference to specific evidence on record supporting what is in this table.

And the last point I wanted to make is that, if you

20:40 recall, the Request for Arbitration was filed on 19th October 2020. So on their own case, all meetings after that simply don't make it. We may discuss about the meetings before, but the meetings after the Request for Arbitration are not obviously in compliance with a pre-arbitral requirement. And the two others we can discuss, but we should come, obviously, to the same conclusion.

The third point is that our friends referred again to some letters exchanged between the GNCC and CO. But obviously this correspondence is irrelevant because it doesn't pertain to the very requirement we are speaking [of] here, which is the inter-state negotiations in Article 9(1).

And last point, Mr President, is that they refer again to futility; but as I said during our submission, the futility cannot make it here because the inter-state negotiations were never commenced.

Thank you.

DR ALEXANDROV: Dr Silva Romero, can I ask you a question, and it relates to your earlier point about the interpretation of Article 9. It may help if you can put on the screen your slide 7, which is the text of Article 9.

DR SILVA ROMERO: Yes, will do, Dr Alexandrov.

20:42 DR ALEXANDROV: Thank you.

Paragraph 2 says:

"If [a] dispute between an investor ... and the other Contracting Party cannot be settled in such a manner ..."

"Such a manner" relates to paragraph 1:

"... [then] the investor shall be entitled to refer the matter [to arbitration]."

Applying the rules of treaty interpretation of the Vienna Convention, is there an argument that all we need to decide is whether the dispute could be settled in the manner provided for in paragraph 1; and if it couldn't, within six months, then the investor is entitled to submit the matter to arbitration?

It doesn't say: if the parties -- "the parties" meaning Georgia and Azerbaijan -- never negotiated, or they negotiated but failed to reach an agreement, or one party wanted to negotiate but the other didn't. It doesn't specify any particular result other than the dispute could not be settled through negotiations between Georgia and Azerbaijan; and it doesn't seem controversial here that the dispute could not be settled in such a manner, meaning through negotiations between the contracting parties, within six months.

Why is that not the proper interpretation of

20:43 paragraph 2?

DR SILVA ROMERO: I think there are two different points in your question, Dr Alexandrov, if I may, and let me start with the factual point.

It is not undisputed that the dispute between the investor and Georgia could not be settled by way of inter-state negotiations. As I said at the end of the opening submissions, Georgia is open to discuss with Azerbaijan a possible settlement of the dispute before you. The point here is that the investor never gave the opportunity, before filing the arbitration, to the two states to undertake those negotiations.

Coming now to the interpretation point, I think that what Article 9 says is what we find in many other different treaties, which is that if there is a dispute, there shall be negotiations -- in this case, negotiations between the contracting parties, pursuant to our interpretation -- and then if, within six months, those negotiations do not end with a settlement, then the investor can file for arbitration.

DR ALEXANDROV: Thank you.

MR ROWLEY: If I may add to that. I'm looking at 9(2), second line:

"... cannot be settled in such a manner within 6 months from the day on which a written claim was

20:45 submitted ..."

And we're referring to "such a manner" being the negotiations between the contracting parties.

The words "written claim was submitted" presumably are a reference to the need for the submission of a written claim by either the investor or the contracting party in which the investor is resident to the recipient contracting party of the investment.

I'm not sure: have you dealt with that in your submissions, Mr Silva Romero?

DR SILVA ROMERO: Thank you for your question, Mr Rowley. I think we read this sentence as you do: the investor has indeed to file a written claim and, in our submission, at the same time has to send a communication to both states asking them to undertake these inter-state negotiations. But I don't have any other point to add on this.

MR ROWLEY: The next thing that one might worry about, as we all worry about all these things, is whether or not the claim was submitted in writing may or may not make that much of a difference if the contracting party that was the host of the investment was -- it was made known that there was a dispute.

DR SILVA ROMERO: Correct. And I think it's undisputed on the record of this case, Mr Rowley, that there was no

20:47 letter sent to either Azerbaijan or Georgia referring specifically to Article 9(1) and asking both states to undertake inter-state negotiations.

MR ROWLEY: Alright. Well, we can look at the record. Good. I don't have any further questions, thank you.

DR ALEXANDROV: May I follow up on this point.

Dr Silva Romero, assuming that the written claim is a claim by the investor notifying Georgia of the dispute, on that reading, you added an element in your response to Mr Rowley saying, "and the investor must invite the parties to negotiate". I'm not sure whether those were your precise words.

Where do you see in the text of Article 9 this second element of the obligation?

DR SILVA ROMERO: That's the only reading, we say, Dr Alexandrov, that one can give to this provision to give it effect, because the question is how this pre-arbitral requirement could be fulfilled. And our submission is that for these negotiations between the contracting parties to commence, someone has to inform the contracting parties that there is a dispute and someone should ask them to undertake these settlement negotiations.

So we see, if you will, implied in Article 9(1) an obligation on the investor to send this letter that

20:49 I have referred to to the contracting parties for them to undertake these negotiations. (Pause)

MR ROWLEY: I think I have one further question.

Let us assume that there is an obligation, for the purposes of this question, for there to be some sort of notification and negotiation period. Your application is one for bifurcation, to determine whether we have jurisdiction; is that a fair summary? And one of the matters to be considered in bifurcation is whether the claim could be made much simpler or reduced or disposed of with finality, and money could be saved and so on.

Claimant makes the argument that the majority of the tribunals that have considered whether this kind of question goes to jurisdiction conclude that it really goes to admissibility; and that in any event, if there is an obligation and we were to find one after a bifurcation, they would say, "Well, alright, let's suspend these proceedings and we'll have our six months of negotiations", which are, in their view, almost bound to fail; and if they do, this will be a terrible waste of time.

Could we just hear you on that for a moment, please.

DR SILVA ROMERO: Yes. And I'll make two points, Mr Rowley.

First, your question pertains to the legal characterisation of the objection: is it

20:52 a jurisdictional objection or an admissibility objection? If it is an admissibility objection, it could theoretically be cured in the course of the arbitration, for instance in the way you mentioned: by suspending the proceedings for six months and asking the parties to tell their states to undertake inter-state negotiations.

But we say, for all the reasons that we have put in our papers and I mentioned today, that this is a jurisdictional objection. And if this is a jurisdictional objection, it cannot be cured in the course of the arbitration. If you come to the conclusion that this is a jurisdictional objection, you need to declare that you don't have jurisdiction over the claim, and that's it. You cannot cure the problem now.

The second point is you mentioned saving costs, saving time: let's say the pragmatic standpoint from which too often, in my view, this type of clauses are looked at. And here, this is one of those cases where I truly believe, because of all the stakes that we have mentioned, that sending the parties to ask the states to undertake negotiations goes in the interests of both parties, and in my submission it would be a very good decision for anyone here.

20:53 MR ROWLEY: Well, I suppose if you were right that we don't have jurisdiction, we wouldn't be in a position to do that, would we?

DR SILVA ROMERO: Well, if you say that you don't have jurisdiction, they can file the letter that they never filed.

MR ROWLEY: Thank you. I understand the situation, I think, better now. Thank you.

DR SILVA ROMERO: Thank you.

THE PRESIDENT: Thank you very much, Mr Silva Romero.

Let's move to Claimant for Rejoinder. Is it Mr Ostrove?

MR OSTROVE: Yes, thank you, Mr President. (Pause)

(8.55 pm)

Reply submissions on behalf of Claimant

MR OSTROVE: Just picking up on a few points that have just been made.

We are slightly amazed to hear this hypothetical scenario of: if you were advising an investor, what would you do, faced with this clause? No matter how you look at this treaty, there is a trigger letter that's required, a written claim to be submitted. A written claim. And then what you heard opposing counsel argue is that: well, faced with this, you should write, Georgia, and say, "We'd like some negotiations to go on

here, or we'd like something to happen here, so please tell us if this is going to be state to state or what is this". And then we were told we did nothing.

I've put on the screen Exhibit C-25, 22nd May 2020. This was not a trigger letter and it wasn't intended as a trigger letter, but it put Georgia on notice that, in the third paragraph:

"We are ... advising our client on claims that he may bring ... under the [Treaty] ..."

That there have already been:

"... meetings [with] the Georgian Prime Minister's office and our client's representatives ... where ... there has not been any meaningful progress.

"Our client's preference is to resolve [this] dispute ... without recourse to international arbitration proceedings pursuant to Article 9 of the Treaty."

And:

"... therefore invite Georgia to engage in amicable discussions ... [in order] to avoid the need ... to serve a formal Notice of Dispute as the first step towards the commencement of international arbitration pursuant to the Treaty."

So already in May we're referencing the dispute resolution provisions under Article 9 and seeking to

20:57 engage in amicable discussions between the parties that are in dispute there. Certainly, even under opposing counsel's point of view, if I'm advising my client, a state, and I receive something and I think that this triggers if there's a dispute between the parties, and then I think there has to be inter-state dispute settlement, then I'm going to say something or contact Azerbaijan.

But even more, C-26, which I've now put on the screen, which is a month later, on 22nd June, is now absolutely undoubtedly saying, "Since we've received no response to our invitation in May to engage in amicable discussions, we are therefore" -- in paragraph 4 -- "providing a letter that constitutes our written claim within the meaning of Article 9(2)". It puts Georgia on notice that, "unless amicable settlement can promptly be agreed between the investor and Georgia ..."

So to say that we did nothing is simply to ignore the hard facts of the trigger letter that was sent. Obviously our main submission is that this fulfils the provision because the only way to read the provision about "Contracting Parties in dispute" is an erroneous use of the defined term, because otherwise the words "in dispute" have absolutely no meaning; whereas, under our submission, the words "Contracting Party" still have

20:58 meaning, it's just been miswritten and it's referring to the parties' dispute. But to say that we did nothing, and didn't notify them of the dispute in a way that, if they are correct, puts them on notice that they should be negotiating with Azerbaijan, is simply wrong.

The next point I'd like to move to is: there is a complaint, both during the main submissions and again in rebuttal, that C-43 -- which was the note from the Azerbaijani Foreign Ministry -- was a note, according to the cover letter in R-73, to protect the investor, and therefore it should be sort of discounted because this was written to protect the investor.

That is not what R-73 says. And this is Respondent's translation:

"Dear Mr Yusif,

"In response to your request, we offer to your attention information prepared by the Ministry ..."

Not "to protect you":

"... on the protection of the interests of [the] Azerbaijani investor in the International Arbitration Court."

This is about protection of investor rights that is a dispute in international arbitration. So to claim that there's no evidence that when the Azeri Ministry of Foreign Affairs wrote this letter, that they were

21:00 actually referring to negotiations and discussions relating to an investment dispute, when the cover letter -- which thank you very much to Georgia for submitting it -- specifically refers to the fact that this is in relation to investor protection dispute that's going on, really lacks any grounding in reality.

Finally, just looking over to the treaty again and the language of Article 9, which is back up on the screen, this goes to the point that Dr Alexandrov was raising about saying: what does that mean when it says that the dispute "cannot be settled in such a manner within 6 months from the day [of the] written claim"?

The treaty could have been drafted differently. The treaty could have said, "After six months have expired from the filing of a written claim, if the dispute has not been settled, then you could go file your claim". It does not say, "You have to wait a fixed period of time of six months". It says: if it cannot be settled during a six-month time period.

That clearly, under the plain meaning of the treaty, opens the door to any kind of futility argument that says, "Come on, we've had discussions going on for nearly a year, we've had formal requests to both parties -- to both states to get involved; again, not because we thought it was required under the treaty but

21:01 just as a matter of good practice". And there is no requirement that you wait six months: there is a requirement that you can only go to arbitration if the dispute cannot be settled within six months.

Clearly the dispute could not be settled within six months by inter-state negotiations, it couldn't be settled in a year, it couldn't be settled probably in ten years with inter-state negotiations.

Thank you very much. Nothing further.

THE PRESIDENT: Thank you, Mr Ostrove.

Just before I turn to Mr Alexandrov and Mr Rowley for questions, I just wanted to make sure I understood your first submission.

When you were talking about 9(2) and the submission of a written claim, are you also proposing as one possible interpretation that, once the claim is submitted to Georgia, Georgia is in a position -- under 9(2), properly interpreted -- to initiate inter-state negotiations with Azerbaijan, if you take the point that it's got to be the two contracting parties? Did I hear you correctly that that's what you were suggesting?

MR OSTROVE: Absolutely. My submission was that under Article 9(1), read even as Respondent reads it, the contracting parties have taken on an obligation vis-à-vis each other. So once one of them is aware of

21:03 a claim, they have agreed to negotiate, and that's what they're supposed to do. That's their obligation, not Claimant's.

THE PRESIDENT: Understood. Thank you very much.

Mr Alexandrov.

DR ALEXANDROV: Thank you, Mr President.

Mr Ostrove, a question that relates to your submission in chief, and it's the other side of the coin, the coin being the question that I asked Dr Silva Romero.

I thought you made an argument that the right of the investor to go to arbitration cannot be conditioned upon something that is not in the investor's hands. Because paragraph 1 of Article 9 talks about the obligation of the contracting states -- meaning Georgia and Azerbaijan -- to negotiate, and it's not in the investor's hands to in any way affect that obligation, whether they comply with it or not, therefore the investor's right to go to arbitration cannot be conditioned on the contracting states' failure to comply with their obligation.

My question is: why is that right? The two contracting states can condition the investor's right on anything they want. They can say -- to take an extreme example, just to make the point -- they can say, "The

21:05 investor shall not be entitled to submit the dispute to arbitration unless lightning strikes Mount Elbrus", for example. And they are free to do that: they are free to impose conditions that are outside the powers of the investor to do anything about. Why couldn't they do that?

MR OSTROVE: Thank you, Dr Alexandrov. And you did correctly summarise what was our first submission on this, which is: you cannot argue that a claimant has failed to fulfil a jurisdiction requirement when it is something that is beyond the claimant's control. So, yes.

But that goes hand in glove with our argument that I just was discussing with the Chairman: that once you've submitted your claim and notified the other party, there is nothing else that you can do; it is out of your hands, and to say that you must have caused the negotiations to happen cannot help. And if the state parties don't negotiate, then there's no requirement to go forward.

It could be viewed a bit as the flipside of the coin: if it cannot be settled within six months, it's outside of your control. If the state parties aren't going to do anything about it, well, then there's no way that the dispute can be settled in six months and you're

21:06 free to go ahead.

THE PRESIDENT: Mr Rowley?

MR ROWLEY: No, I don't have any further questions. Thank you very much.

THE PRESIDENT: Thank you both.

Thank you, counsel. I think we've come to the end of the scheduled proceedings. This has been extremely helpful for the Tribunal and we're grateful.

Let me just say something about timing, before I ask counsel if they have any concluding procedural matters that they wish to raise.

The Tribunal intends to work assiduously on the issues presented, but it may not be before Christmas that you would get a decision; in fact, it's quite likely -- as in almost 100% sure -- that you won't.

In light of that -- and I think it was raised earlier in the afternoon -- there is paragraph 19 of Procedural Order No. 3, and that is in place until there is a decision on the application. We have now had a hearing and we will work on that decision; but until we issue it, Procedural Order No. 3, with its provisions, remains in effect.

We will, however -- as I said, not before Christmas, but we are hoping pretty quickly thereafter. We know that you're waiting for a decision on both issues, and

21:08 the Tribunal will be quick in getting it to you; it's just that it won't be before December 31st.

Any questions about timing or any other issues that Claimant wished to raise right now? Mr Ostrove?

MR OSTROVE: Yes, thank you, Mr President.

Earlier in the procedure, I forget where it's been exchanged, but I believe there is an agreement that the Tribunal -- or the Tribunal accepted that it would issue its ruling in an initial form of being unmotivated, with motivation to follow, in order to shorten the period of time for decision-making. I just wanted to ensure that that was taken into account in your reference to the timeframe: that you're unlikely to be in a position to make a decision, at least on the jurisdictional objection, even in an unmotivated form, before Christmas.

THE PRESIDENT: Well, I want to talk to Mr Alexandrov and Mr Rowley about that. I would have said we're pretty far down the road from the time in which we initially discussed that. So I'm not sure of the usefulness, and it may slow us down in getting a determination on provisional measures. But let me confer with them and we'll come back to you on that.

MR OSTROVE: Thank you. And --

THE PRESIDENT: And point taken. Thank you for raising

21:10 that, Mr Ostrove, and we will come back to you on the format in which we'll get decisions out to the parties.

MR OSTROVE: Thank you very much.

And if I may, there is the thing that you requested of the parties, which was to try on agree on a revised procedural calendar. I believe that we are very close, and we thank, as always, our colleagues at Dechert for the really excellent cooperation between counsel teams.

So we are very close, subject to client review, to a procedural calendar. But of course, the earlier we know just yes or no on jurisdiction makes a major difference, obviously, on costs and other issues that will be incurred. That's my reason for raising it.

Thank you.

THE PRESIDENT: Understood. Understood. Thank you very much.

Ms Annacker, Mr Silva Romero, any points to raise from Respondent's side at this time? (Pause)

DR ANNACKER: We have no issues to raise at this point. We also thank our colleagues for their cooperation and hope to have a procedural calendar agreed by both parties.

THE PRESIDENT: Thank you very much, Ms Annacker.

Let me ask Mr Alexandrov, Mr Rowley: anything to raise, before we go into breakout room?

MR ROWLEY: Nothing from me, thank you.

21:12 THE PRESIDENT: I see Stanimir also shaking his head.

Thank you all, counsel and party representatives. I will repeat: extremely helpful for the Tribunal. Have a good very little left of the evening in Baku and Tbilisi, and more of the evening in other places. So thank you very much. And the Tribunal will give you an indication on the point that Mr Ostrove raised about the jurisdictional objection and format of a decision.

So thank you all.

MR OSTROVE: Thank you very much.

DR ANNACKER: Thank you.

THE PRESIDENT: We are adjourned.

(9.13 pm)

(The hearing concluded)