INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia
(ICSID Case No. ARB/12/14 and 12/40)

PROCEDURAL ORDER NO. 9

Provisional measures

Professor Gabrielle Kaufmann-Kohler, President of the Tribunal
Mr. Michael Hwang S.C., Arbitrator
Professor Albert Jan van den Berg, Arbitrator

Secretary of the Tribunal
Mr. Paul-Jean Le Cannu

Assistant to the Tribunal
Mr. Magnus Jesko Langer

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I. PROCEDURAL BACKGROUND

1. The present order deals with an Application for Provisional Measures (the "Application") filed by Churchill Mining Plc and Planet Mining Pty Ltd (the "Claimants") on 27 March 2014, by which the Claimants requested that the Tribunal:

    a. Recommend that the Republic of Indonesia ("Indonesia" or the "Respondent"), its agencies and instrumentalities:

        i. Refrain from threatening or commencing any criminal investigation or prosecution against the Claimants, their witnesses in these proceedings, and any person associated with the Claimants' operations in Indonesia, including their wholly owned subsidiary, PT Indonesia Coal Development (PT ICD), pending the outcome of this arbitration;

        ii. Stay or suspend any current criminal investigation or prosecution against the Claimants' current and former employees, affiliates or business partners pending the outcome of this arbitration;

        iii. Refrain from engaging in any other conduct that would:

            i. Threaten the exclusivity of this ICSID arbitration;

            ii. Aggravate the dispute between the Parties;

            iii. Alter the *status quo*; or

            iv. Jeopardize the procedural integrity of these proceedings; and

    b. Recommend any further measures or relief that the Tribunal deems appropriate in the circumstances to preserve (i) the right to exclusivity of the ICSID proceedings under Article 26 of the ICSID Convention, (ii) the right to the preservation of the *status* quo and the non-aggravation of the

dispute, and (iii) the right to the procedural integrity of the arbitration proceedings.[1]

2. Following the receipt of the Application, the Tribunal invited the Respondent on 2 April 2014 to submit its response to the Application by 16 April 2014. Upon a request for an extension of such time by the Respondent and after having heard the position of the Claimants, the Tribunal agreed on 11 April 2014 to extend the time limit for the Respondent's response until 25 April 2014. The Respondent subsequently filed its response within this time limit.

3. In its Response to the Claimants' Application for Provisional Measures (the "Response"), Indonesia objected to the Application and requested the Tribunal to:

   a. Reject the Claimants' request for provisional measures, as it fails to satisfy the elements to be applied in determining whether to grant provisional measures; and

   b. Award to the Respondent the costs associated with its opposition to the Claimants' Application, including Indonesia's legal and administrative fees and expenses and the fees and expenses of the Tribunal.[2]

4. On 28 April 2014, having reviewed the Parties' submissions, the Tribunal invited the Claimants to submit a reply by 12 May 2014 and the Respondent a rejoinder by 26 May 2014, which the Parties did.

II. POSITIONS OF THE PARTIES

1. Position of the Claimants

5. The Claimants contend that the announcement made by the Regent of East Kutai just days after the Tribunal's Decisions on Jurisdiction of his intention to initiate criminal proceedings "against the Claimants and their witnesses",[3] and the Regent's reported filing on 21 March 2014 of criminal charges against the Ridlatama group on the ground

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1 Claimants' Application for Provisional Measures, 27 March 2014, ¶ 2.

2 The Republic of Indonesia's Response to Claimants' Application for Provisional Measures, 25 April 2014, ¶ 76 ; Respondent's Rejoinder to Claimants' Application for Provisional Measures, 27 May 2014, ¶ 64.

3 Application, ¶ 16.

of forgery of official documents "are not a good faith exercise of sovereign powers, but rather a calculated act designed to obstruct or derail these ICSID proceedings".[4] According to the Claimants, the timing of the investigation "leaves no doubt that it is a tactical response to this Tribunal's decision to scrutinize the merits of the Claimants' claims".[5]

6. In the Application, the Claimants allege that Indonesia has "reacted impetuously" to the Tribunal's Decisions on Jurisdiction by engaging in "strong-arm tactics" targeted at intimidating or otherwise destabilizing the Claimants' witnesses and potential witnesses, thus "seeking to usurp the jurisdiction of this Tribunal".[6] Specifically, the Claimants call on the Tribunal to recommend that Indonesia refrain from threatening or commencing any criminal investigation or prosecution against the Claimants, their witnesses in these proceedings, or any other person associated with the Claimants' operations in Indonesia.

7. For the Claimants, at the hearing on jurisdiction lead counsel for Indonesia made explicit threats of criminal investigation and prosecution against the Claimants' witnesses and potential witnesses, including the Claimants' current and past employees still residing in Indonesia.[7] He also made "a clear and direct threat" to one of the Claimants' key witnesses, Mr. Paul Benjamin. He did not refer to him as a mere "cooperating witness" as now alleged by Indonesia, but insisted that Mr. Benjamin would be accused of a serious crime as "the one who arrange[d] control of all the quote unquote production of that document".[8] Upon a close review of the transcript of the hearing, it becomes clear that "Mr. Dermawan intended to intimidate, harass, and put undue pressure and influence on the Claimants and their witnesses".[9]

8. Relying on Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, the Claimants assert that the Tribunal is empowered to recommend the provisional measures it seeks, in particular the preservation and protection of the rights

4 Application, ¶ 20; Reply, ¶ 18.
5 Reply, ¶ 18.
6 Application, ¶ 1.
7 Reply, ¶ 8.
8 Reply, ¶ 10, citing Mr. Dermawan's comments at the hearing, at Tr. 14052013, 153:16-18.
9 Reply, ¶ 11.

which they assert in these proceedings, and which run the risk of being destroyed or seriously prejudiced by the actions of the Respondent.[10]

9. In reliance on arbitral decisions, the Claimants submit that the requirements for provisional measures are (i) that the Claimants have rights requiring protection by this Tribunal, (ii) that the requested measures are urgent, and (iii) necessary. They add that some tribunals have in addition applied a *prima facie* test on the likelihood of success on the merits and enquired whether the requested measures would disproportionately burden the other party. At any rate, the Claimants submit that they satisfy all the requirements and that this Tribunal should therefore grant the provisional measures sought.

a. Rights requiring protection

10. For the Claimants, the power of the Tribunal to grant provisional measures is "very broad" and extends to procedural rights in addition to substantive rights.[11] Pending the outcome of the arbitration, the rights that are subject to the arbitration must be protected if necessary by provisional measures. The Claimants submit that Indonesia's threats to commence criminal proceedings imperil three types of self-standing rights: (i) the right to the exclusivity of these ICSID proceedings; (ii) the right to the preservation of the *status quo* and the non-aggravation of the dispute; and (iii) the right to the procedural integrity of the arbitration proceedings.

11. It is through the actions of Indonesia that these rights "imminently stand to be violated" with respect to "actual and potential witnesses".[12] While acknowledging that these witnesses and potential witnesses are not parties to these proceedings and thus not vested with these rights, the fact that the Claimants seek the protection of these rights "does not amount to arguing that the non-parties in question also hold the same rights".[13]

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10 Application, ¶ 25.
11 Application, ¶ 27.
12 Reply, ¶ 30.
13 *Id*.

i. Right to exclusivity of the ICSID proceedings

12. The Claimants submit that Article 26 of the ICSID Convention "establishes the autonomy and exclusivity of ICSID arbitration from local administrative or judicial remedies".[14] According to the Claimants, Indonesia's threats and initiation of criminal proceedings on the basis of allegations of forgery are inconsistent with Article 26 of the ICSID Convention. This is so because the allegations of forgery now investigated in Indonesia are the same allegations as those put forward by Indonesia as a defense in these ICSID proceedings.

13. The Claimants refer to decisions in which tribunals have enjoined pending court proceedings in order "to preserve a party's right to have the dispute decided by an international tribunal without having its rights eviscerated before an award on the merits".[15] In *Quiborax* and *Burlington*, the tribunals held that there could be no doubt that the right to exclusivity of ICSID proceedings may be protected by provisional measures.[16] Criminal investigations and prosecution are prohibited under Article 26 of the ICSID Convention "if they relate to the subject matter of the base before the tribunal and not to separate, unrelated issues or extraneous matters".[17] Since the question of allegedly forged documents squarely falls within the subject matter of the present dispute, Indonesia must await the resolution by this Tribunal and refrain from pursuing local proceedings, in particular criminal proceedings focused at obtaining evidence in support of their defense strategy.[18]

14. For instance, the *CSOB* tribunal recommended the suspension of bankruptcy proceedings on the grounds that the latter may deal with matters before the tribunal.[19]

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14 Reply, ¶ 48.

15 Reply, ¶ 49.

16 Application, ¶¶ 31-32, citing *Quiborax S.A., Non Metallic Minerals S.A. & Allan Fosk Kaplún v. Plurinational State of Bolivia ("Quiborax v. Bolivia")*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 127 (**Exh. CLA-170**); and *Burlington Resources Inc. & Ors. v. Ecuador & Empresa Estatal Petróleos del Ecuador (PetroEcuador) ("Burlington v. Ecuador")*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 57 (**Exh. CLA-173**).

17 Application, ¶ 33, referring to *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999, ¶ 23 (**Exh. CLA-177**); and *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 3, 18 January 2005, ¶ 11 (**Exh. CLA-176**).

18 Application, ¶ 37.

19 Reply, ¶ 50, referring to *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic ("CSOB v. Slovak Republic")*, ICSID Case No. ARB/97/4, Procedural Order No. 4, 11 January 1999 (**Exh. CLA-178**).

So too in *Zhinvali*, the tribunal recommended the stay of local proceedings found to be in violation of Article 26 of the ICSID Convention.[20]

15. In the present case, the allegations of forgery made by Indonesia in the criminal investigation are identical to those that Indonesia appears to intend to raise in these ICSID proceedings. Resorting to local proceedings after having raised the issue of forgery in the ICSID arbitration breaches Article 26 of the ICSID Convention; Indonesia is not at liberty to resort to domestic proceedings unless and until the Tribunal renders is final ruling.[21]

ii. Right to the preservation of the status quo and the non-aggravation of the dispute

16. The Claimants invoke a right to be free of criminal proceedings or threats of such proceedings and of any undue influence exerted by Indonesia on the Claimants' witnesses. Furthermore, the Claimants also invoke the right to present their claims before this Tribunal "unobstructed by intimidation or detention of their witnesses".[22] In light of the fact that the criminal proceedings threatened and initiated are "clearly motivated by and aimed at the present arbitration", the requested measures would ensure the preservation of the *status quo* and prevent the aggravation of the dispute.

17. Various tribunals have recognized the right to the preservation of the *status quo* and the non-aggravation of the dispute, in particular to avoid the "continued harassment and intimidation" such as the one faced by the Claimants, their witnesses, and "persons associated with the Claimants' investment in Indonesia".[23] In *Burlington*, the tribunal

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20 Reply, ¶ 40, referring to *Zhinvali Development Ltd. v. Republic of Georgia ("Zhinvali v. Georgia")*, ICSID Case No. ARB/00/1, Award, 24 January 2003, ¶ 45 (**Exh. CLA-194**).

21 Reply, ¶ 51.

22 Application, ¶ 46.

23 Application, ¶ 40, referring to *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, P.C.I.J. Series A/B No. 79, Order of 5 December 1939, ¶ 24 (**Exh. CLA-180**); *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, ¶ 103 (**Exh. CLA-182**); *Amco Asia v. Indonesia*, Decision on Provisional Measures, 9 December 1983, ¶ 5; *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005, ¶ 40 (**Exh. CLA-172**); *Occidental Petroleum Corporation & Ors. v. Ecuador ("Occidental v. Ecuador")*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶ 96 (**Exh. CLA-183**); *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, ¶ 135 (**Exh. CLA-184**); *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 117 (**Exh. CLA-170**).

held these rights to be "self-standing" rights,[24] and in *City Oriente*, the tribunal ordered Ecuador to stop pursuing administrative and criminal proceedings as a means to pressure the claimant.[25]

18. In addition to Mr. Benjamin, whom lead counsel of Indonesia directly threatened of criminal investigation at the hearing on jurisdiction, current and former employees of the Claimants still working and residing in Indonesia and certain of the Claimants' key witnesses, such as Messrs. Gunter, Gartman and Gibbs, are presently at risk of criminal investigation. This causes "extraordinary stress and mental anguish to the Claimants and their witnesses",[26] and it is reasonable to presume – so the Claimants submit – that the same is also true of "all persons currently or previously associated with the Claimants' investment in Indonesia".[27]

iii. Right to the procedural integrity of the arbitration proceedings

19. The Claimants maintain that Indonesia's threat and initiation of criminal proceedings will substantially, if not totally, impair their access to witnesses and evidence and thereby affect their due process right to present their case.[28]

20. Arguing that the factual scenario in *Quiborax* is "directly analogous" to the present one, the Claimants stress that the *Quiborax* tribunal acknowledged that criminal proceedings could indeed prejudice the capacity of a party to present its case, in particular with respect to its access to documentary evidence and witnesses. The *Quiborax* tribunal also noted the troubling effect of criminal proceedings on potential witnesses and their willingness to cooperate in arbitral proceedings.[29] Just as in *Quiborax*, Indonesia's use of its criminal system threatens the integrity of the ICSID proceedings.

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24 *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 60 (**Exh. CLA-173**).

25 Application, ¶ 45; Reply, ¶¶ 54-57, referring to *City Oriente Limited v. The Republic of Ecuador & Empresa Estatal Petróleos del Ecuador (PetroEcuador) ("City Oriente v. Ecuador")*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, ¶ 62 (**Exh. CLA-181**).

26 Application, ¶ 47.

27 *Id.*

28 Application, ¶ 49.

29 Application, ¶¶ 50-55; Reply, ¶¶ 61-65, referring to *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010 (**Exh. CLA-170**).

21. The fact that none of the Claimants' witnesses has been prosecuted or imprisoned to date does not distinguish the present case from *Quiborax*, since the main purpose of provisional measures is to preserve the *status quo* pending a decision on the merits, *i.e.*, to ensure that no irreparable harm occurs in the first place. In any event, Indonesia's filing of criminal charges against Ridlatama on 21 March 2014 is sufficient to demonstrate that the threats proffered at the hearing on jurisdiction against Mr. Benjamin "were not merely hot air". Therefore, the Claimants are "deeply concerned" that Indonesia will shortly initiate criminal proceedings against them, their local subsidiary PT ICD, and their witnesses or potential witnesses.[30]

22. In *Quiborax*, while the tribunal found a threat to the procedural integrity of the arbitration to exist, it specifically declined to award provisional measures to preserve the *status quo* and prevent the non-aggravation of the dispute on the grounds that the claimants had ceased all activities and presence in Bolivia at the time when the criminal proceedings were instituted and that the targets of the criminal proceedings were no longer living in Bolivia.[31] By contrast, in the present case, the Claimants are still present in Indonesia and several of their witnesses and potential witnesses, including Messrs. Benjamin, Gunther, Gartman and Gibbs, still reside and work in Indonesia.[32]

23. According to the Claimants, "Indonesia's threats already caused disruption during the Hearing on Jurisdiction, and the Regent of East Kutai's renewed and publicized threats and actions have aggravated the dispute and caused apprehension among the Claimants' witnesses, who are liable to become unavailable upon the formal filing of criminal charges against them".[33] In conclusion, the Claimants argue that there is a "clear and imminent threat" to the integrity of the proceedings, most notably to the Claimants' right to access evidence and present their case through witness testimony.[34]

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30 Application, ¶ 58.
31 Reply, ¶ 66.
32 Reply, ¶ 67.
33 *Id*.
34 Application, ¶ 59.

b. *Prima facie* case

24. Referring to the *Paushok* decision, which undertook a *prima facie* review of the merits as alleged in the claimant's memorial,[35] the Claimants submit that the factual and legal bases set out in the Claimants' Memorial and the present application establish a *prima facie* case on the merits, thus fulfilling this particular requirement for the granting of provisional measures.[36]

c. Urgency

25. For the Claimants, there is "real urgency" for this Tribunal to recommend the requested provisional measures, since there is a "real risk that action prejudicial to the rights" of the Claimants might be taken before the Tribunal could make its final determination. The filing of criminal charges against Ridlatama combined with the continued threat of criminal proceedings against the Claimants and their witnesses "will result in imminent harm" to the Claimants and their witnesses, thus making the requested measures urgent.[37]

26. As stated in *Quiborax*, the measures seeking to protect the Tribunal's jurisdiction, maintain the *status quo*, prevent the aggravation of the dispute, and protect the integrity of the arbitration, are "urgent by definition".[38] Or, as noted in *Burlington*, "when the measures are intended to protect against the aggravation of the dispute during the proceedings, the urgency requirement is fulfilled by definition".[39]

27. Hence, the threshold for proving urgency "is low and can be met if the underlying right to be protected is of high importance".[40] In the present situation, like in *City Oriente*, the threat and initiation of the criminal investigations exercise pressure aggravating and

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35 *Sergei Paushok & Ors. v. Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, ¶ 55 (**Exh. CLA-186**).

36 Application, ¶¶ 60-61.

37 Application, ¶ 64.

38 Application, ¶ 65; Reply, ¶ 77, citing *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 153 (**Exh. CLA-170**); and further referring to *City Oriente v. Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, ¶ 69 (**Exh. CLA-181**)..

39 *Id*., citing *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 74 (**Exh. CLA-173**).

40 Reply, ¶ 76.

extending the dispute, while at the same time impairing the rights which the Claimants seek to protect.[41]

d. Necessity

28. The Claimants submit that the requirement of necessity is fulfilled if the provisional measures are required to "avoid harm or prejudice being inflicted upon the applicant".[42] The Tribunal should follow the standard enshrined in Article 17A of the UNCITRAL Model Law and applied by the *Quiborax* tribunal pursuant to which "harm not adequately repaired by an award of damages is likely to result if the measure is not ordered" and satisfy itself that such harm "substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted".[43]

29. The Claimants further contend that Indonesia's actions will necessarily cause harm which could not be adequately repaired by an award on damages, since they will not have access to evidence and witnesses to support their case. The requested measures are also proportional since the Claimants would suffer irreparable harm while Indonesia would incur no harm if the criminal proceedings are stayed. Indeed, Indonesia would be at liberty to investigate and prosecute eventual crimes once this arbitration concludes, as Indonesia conceded at the hearing on jurisdiction when it indicated that the statute of limitations for the offences now alleged by Indonesia is 12 years.

30. Moreover, the Respondent's own account of its criminal procedure shows that the Claimants' will suffer irreparable harm. As acknowledged by the Respondent, during a criminal investigation, the investigative authority is competent "to carry out an examination, to arrest, place in custody, search, seize documents and summon a person to be heard or examined as a suspect or witness".[44] Further, once the investigation is completed, the prosecutor may file a letter of indictment "with a request that the case

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41 Reply, ¶ 80.

42 Application, ¶ 67, referring to *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 155 (**Exh. CLA-170**); *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 3, 18 January 2005, ¶ 8 (**Exh. CLA-176**).

43 Application, ¶ 67.

44 Reply, ¶ 20, citing Response, ¶ 19.

be promptly adjudicated".[45] Hence, "persons associated with Ridlatama, and potentially other important witnesses in this arbitration, could have their documents seized and could be searched or summoned, arrested and placed in custody".[46] For instance, under the Indonesian criminal procedure, a person suspected of document forgery may be detained during the investigation for up to 60 days; upon assignment of the case to the prosecutor, a further 50 days; and if the matter reaches a court, the trial judge may extend the detention up to 90 days; the Court of Appeal may then do so for 90 additional days; and the Supreme Court an additional 110 days; totaling potentially 400 days of detention prior to a final and binding decision.

31. In this context, Indonesia's attempts to dismiss the anxiety now incurred by the Claimants' witnesses disregard not only the legal consequences attached to a criminal investigation, but also Indonesia's own "dismal record in affording due process to individuals under police investigation".[47] The Claimants point to two reports by Amnesty International referring to excessive police violence and other human rights violations.[48] It is therefore incorrect for the Respondent to state that the Claimants' witnesses need only "fear the prospect of giving evidence". While the Claimants' witnesses do not fear answering Indonesia's unfounded allegations, they "must and do fear police raids and abuse, property seizure and loss of their personal liberty for many months even if they have committed no crime".[49]

32. As to the Respondent's argument that the requested measures would immunize entities or individuals having committed a crime, the Claimants retort that Indonesia itself acknowledged at the hearing that the statute of limitations for the crime of document forgery is 12 years. Hence, there can be no question of immunity since "Indonesia will still be able to exercise its power to investigate and prosecute alleged crimes upon the conclusion of the ICSID proceedings".[50]

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45 Reply, ¶ 20, citing Response, ¶ 22.
46 Reply, ¶ 21.
47 Reply, ¶ 23.
48 Reply, ¶ 23, referring to Amnesty International, "Excessive Force: Impunity for Police Violence in Indonesia", p. 2 available at http://www.amnesty.org/en/library/asset/ASA21/010/2012/en/4e9322f8-5dd3-4e81-9f6b-3be702934d5e/asa210102012en.pdf (**Exh. C-371**); Amnesty International, "Annual Report 2013: The state of the world's human rights", p. 1 available at http://www.amnesty.org/en/region/indonesia/report-2013#page (**Exh. C-372**).
49 Reply, ¶ 24.
50 Reply, ¶ 25.

33. Finally, the Respondent is wrong to assert that provisional measures are confined to situations where specific performance is required. Indonesia's reliance on *Plama*, *Cemex* and *Occidental* is misleading, since Indonesia's position has been explicitly rejected in various cases, such as *Paushok* and *Saipem*, where the concepts of "substantial" or "irreparable" harm have been deemed flexible and "not necessarily requir[ing] that the injury complained of be not remediable by an award on damages".[51] By contrast, in *Cemex*, the claimants sought to prevent Venezuela from seizing maritime vessels and financial assets while admitting that the only consequence of the seizure would be a financial loss. Similarly, in *Plama* and *Occidental*, the respondent's actions "merely increased the monetary damages resulting from an already existing dispute".[52] In "sharp contrast" to these three cases, the criminal investigation initiated by Indonesia impairs the Claimants' right to procedural integrity, "in particular with respect to their access to evidence, the unfettered freedom and willingness of witnesses to testify, and their fundamental due process right to present their case generally".[53]

34. In conclusion, the Claimants submit that "Indonesia's attempt to intimidate the Claimants and persons related to their investment in Indonesia by criminal prosecution is an unacceptable means of obstructing the ICSID proceeding that must not be permitted".[54] Pointing to *Himpurna*, the Claimants further allege that this is not the first time that Indonesia has sought to "undermine or derail" ongoing arbitration proceedings. Indonesia, so the Claimants submit, has "no protectable right to threaten or actually pursue criminal proceedings for an illicit purpose such as intimidation, undue influence, or other ulterior motives".[55] Accordingly, the Tribunal should grant the Claimants' requested provisional measures.

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51 Reply, ¶¶ 70-72, citing *Sergei Paushok v. Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, ¶ 39 (**Exh. CLA-186**); and referring to *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation of Provisional Measures, 21 March 2007, ¶ 182 (**Exh. CLA-171**).

52 Reply, ¶ 73, referring to *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela ("Cemex v. Venezuela")*, ICSID Case No. ARB/08/15, Decision on the Claimants' Request for Provisional Measures, 3 March 2010, ¶ 58 (**Exh. RLA-138**); *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005, ¶¶ 46-47 (**Exh. CLA-172**); and *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶ 98 (**Exh. CLA-183**).

53 Reply, ¶ 74.

54 Application, ¶ 72.

55 *Id*.

2. Position of the Respondent

35. According to Indonesia, the Claimants are wrong to allege that the criminal investigation initiated upon the request of the Government of the Regency of East Kutai is a "strong-arm tactic" used to derail or obstruct the present proceedings.[56] Nor is this action taken impetuously "in bad faith and for no legitimate purpose".[57] In addition to the 2009 BPK Audit Report that already identified indications of forgery, further concerns have surfaced regarding other documents produced by the Claimants in the course of this arbitration, making recourse to criminal proceedings inevitable under Indonesian law.

36. For the Respondent, the criminal investigation is "the only proper way to get to the bottom of this matter", which "would have been initiated even if the Tribunal had declined to exercise jurisdiction".[58] Indonesia adds that this is so "because only the competent Indonesian authorities have access to all of the witnesses, including the Ridlatama companies and their principals, and only they have the powers to investigate and prosecute violations of the applicable Indonesian laws".[59] The Claimants also err in charging Indonesia with bad faith or intimidation, pointing to the absence of evidence of any purported pressure, harassment or undue influence of their witnesses. The criminal investigation initiated in March 2014 is at the first stages; it is "sheer speculation" to predict its outcome "and certainly impossible to show that it will in any way derail or obstruct this Arbitration".[60]

37. For Indonesia, none of the proposed provisional measures is warranted under applicable legal standards. Only the right to the integrity of the arbitration is arguably implicated in this case. However, the Claimants have failed to show that the inchoate criminal investigation "has impinged in any way on the ability of Claimants to present their case to this Tribunal".[61] The Respondent recalls that arbitral tribunals have

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56 Response, ¶ 2.
57 Response, ¶¶ 2-3.
58 Response, ¶ 3.
59 *Id*.
60 Response, ¶ 4.
61 Response, ¶ 6.

stressed that provisional remedies are extraordinary measures which should not be granted lightly, in particular when it comes to restraining a sovereign to investigate and prosecute crimes within its jurisdiction.[62] The burden of showing that provisional measures are urgent and necessary to avoid irreparable harm rests with the Claimants. Where evidence is lacking, the requested measures must be denied.[63]

38. The Respondent further characterizes the breadth of relief sought as extraordinary and going "well beyond what has ever been ordered by an ICSID tribunal in comparable circumstances", since it would "essentially immunize potentially criminal actors for an indefinite number of years".[64] The fact that the Claimants seek to include within the reach of the requested measures the Ridlatama companies and principals, who – according to the Respondent – "are the most likely culprits of any wrongdoing" shows that the Claimants pursue an agenda going "well beyond preserving the procedural integrity of this Arbitration".[65]

39. The Respondent argues that the investigation and prosecution of crimes committed within the territory of the Republic of Indonesia are "unquestionably core functions of the sovereign", which neither the ICSID Convention nor the BITs at issue seek to limit.[66] To the contrary, respect for national sovereignty is clearly enshrined in Rule 39 of the Arbitration Rules, as recalled by commentators.[67] As stated in *Quiborax*, criminal proceedings fall outside the scope of ICSID's jurisdiction or the Tribunal's

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62 Response, ¶ 29; Rejoinder, ¶ 24; referring to *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures, 6 April 2009, ¶ 32 (**Exh. RLA-128**); *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶¶ 59 (**Exh. CLA-183**); *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005, ¶¶ 33-34 (**Exh. CLA-172**); *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Company v. Grenada*, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs, 14 October 2010, ¶ 5.17 (**Exh. RLA-129**); *Sergei Paushok v. Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, ¶ 39 (**Exh. CLA-186**); *Burimi SRL and Eagle Games SH.A v. Albania ("Burimi v. Albania")*, ICSID Case No. ARB/11/18, Procedural Order No. 2, 3 May 2012, ¶ 34 (**Exh. RLA-130**).

63 Response, ¶ 32; Rejoinder, ¶ 24, referring *i.a.* to *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures, 31 July 2009, ¶ 75 (**Exh. RLA-133**); *Tanzanian Electric Supply Co. Ltd. v. Independent Power Tanzania Limited*, ICSID Case No. ARB/98/8, Decision on the Respondent's Request for Provisional Measures, 20 December 1999 (**Exh. RLA-139**).

64 Response, ¶ 7.

65 *Id*.

66 Rejoinder, ¶ 36.

67 Rejoinder, ¶ 35, citing Y. Fortier, *Interim Measures: An Arbitrator's Provisional Views*, Fordham Law School Conference on International Arbitration and Mediation, 16 June 2008, pp. 5-6 (**Exh. CLA-192**), and further referring to C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001), p. 758 (**Exh. RLA-152**).

competence.[68] And in *Caratube*, the tribunal established that "a particularly high threshold must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a state".[69] Such a high standard is indeed appropriate since a recommendation to suspend an investigation or to refrain from prosecuting purported crimes "creates a vacuum of authority, which functions as zone of immunity".[70]

40. In addition, the Respondent submits that the factual circumstances do not warrant provisional measures.

41. First, the remarks of Counsel at the hearing on jurisdiction can hardly be characterized as a "threat" or a "campaign".[71] Counsel merely confirmed Indonesia's "long-standing intention" to initiate a criminal investigation into the "Ridlatama forged documents", which had only been deferred because Indonesia expected a swift dismissal of the ICSID arbitrations. As to Mr. Benjamin's role, Counsel only stated that his role with respect to the licenses had been put "on the record" and that he should "be prepared to explain the irregularities identified in the documents".[72]

42. Second, as to the timing of the investigation, it is clear from Mr. Dermawan's comments at the hearing, that the decision to commence a criminal investigation had already been taken. The fact that it was deferred while the jurisdictional objections were pending "is of no moment".[73] In any event, the Claimants themselves acknowledged at the hearing that "the irregularities in the license documentation, if indicative of forgery, warrant criminal investigation".[74] In the end, "Claimants cannot be in a better position today than they would have been if the request for a criminal inquiry had been initiated immediately after the Hearing".[75]

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68 Rejoinder, ¶ 36, citing *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 129 (**Exh. CLA-170**).

69 Rejoinder, ¶ 37, citing *Caratube v. Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures, 31 July 2009, ¶ 137 (**Exh. RLA-133**)

70 Rejoinder, ¶ 38.

71 Rejoinder, ¶ 8.

72 Rejoinder, ¶ 10.

73 Rejoinder, ¶ 11.

74 Rejoinder, ¶ 12, referring to Tr. 14052013, 105:16-17 ("No issue was taken against the claimants in two and a half or more years, until we get the allegations being suggested in the context of these proceedings, that these documents are not authentic in some way, when there has been plenty of opportunity to investigate it").

75 Rejoinder, ¶ 11.

43. Third, the Claimants are wrong when they state that being subject to criminal investigation and possible detention constitutes by definition irreparable harm. The Claimants' reliance on two Amnesty International reports is to no avail since these reports deal with very different circumstances involving mass protests and do not deal with so-called "white collar" crimes.[76] Furthermore, to the Claimants' argument regarding the chilling effect on potential witnesses the Respondent answers that the "Claimants cannot possibly be prejudiced by an investigation of the Ridlatama principals" whom Churchill itself has described as "sharks" in the context of its various lawsuits against Ridlatama.[77] In addition, Mr. Benjamin has not been accused of a crime, nor have the Claimants alleged that he has been interrogated by the police or "told that he is anything more than a witness".[78] The fact that his conduct will be scrutinized "does not mean that his rights will be abused or that he will be prevented from testifying" in the present proceedings.[79]

44. Fourth, granting the relief sought by the Claimants could amount to complete immunity from criminal investigation and prosecution "for all of the Churchill/Ridlatma 'business partners'",[80] and would inflict irreparable harm on the Respondent by precluding it to uncover "evidence that would be relevant, and perhaps decisive, for the merits of this arbitration".[81] Thus, by granting the requested measures the Tribunal would in fact be prejudging the merits of this dispute.[82]

a. Rights for which protection is requested

45. The Claimants' choice to structure the Application by repeating the same arguments presented in the *Quiborax* case is of no assistance because the tribunal in that case (i) rejected similar arguments "on grounds that equally apply here" and (ii) granted provisional measures for exceptional circumstances not present here. For the Respondent, *Quiborax* is not at all analogous to the present case and does not support the extraordinary relief sought by the Claimants.

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76 Rejoinder, ¶¶ 16-17.
77 Rejoinder, ¶ 18.
78 Rejoinder, ¶ 19.
79 *Id*.
80 Rejoinder, ¶ 22.
81 Rejoinder, ¶ 21.
82 *Id*.

i. The right to the exclusivity of ICSID proceedings

46. For the Respondent, Article 26 of the ICSID Convention is not infringed through the initiation of criminal proceedings by the Regent of East Kutai, since "there are two exclusive remedies to be obtained from two distinct forums".[83] The jurisdiction of Indonesia's criminal authorities and that of this Tribunal do not overlap; and both "possess distinct legal competence over their respective matters".[84]

47. The Respondent explains that the Claimants have no ongoing business activities in Indonesia and only seek monetary damages as remedy in this arbitration. In contrast, the purpose of the criminal investigation is "to uncover the truth about the suspect documents utilized by the Ridlatama group to carry out its mining business".[85] While no criminal charges have yet been asserted, the remedy would be criminal sanctions, which fall beyond the jurisdiction of this Tribunal.

48. The Claimants' reliance on *Tokios Tokelés*, *CSOB* and *Zhinvali* is ill-founded. Although, in a first order the CSOB tribunal directed the Ukrainian authorities to abstain from, suspend or discontinue, any proceedings before domestic courts, it thereafter refused to uphold a request to stop criminal proceedings against the general director of the claimant's subsidiaries in Ukraine.[86] For the Respondent, the Claimants' failure to quote *Quiborax* on this particular issue is noteworthy. In that case, the tribunal held that the exclusivity of ICSID proceedings does not extend to criminal proceedings, since the latter deal with matters outside ICSID's jurisdiction.[87]

49. According to the Respondent, the Tribunal should follow other tribunals and look to "the nature of the causes of action and relief sought in the investment arbitration". For instance, the *CSOB* and *Zhinvali* tribunals held that the domestic proceedings infringed

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83 Response, ¶ 54.
84 Response, ¶ 55.
85 *Id*.
86 Response, ¶ 53.
87 Response, ¶ 55, citing *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶¶ 128-129 (**Exh. CLA-170**).

Article 26 of the ICSID Convention because these proceedings dealt with the same issues as those before those submitted to arbitration, a situation that must be distinguished from the present one.[88]

ii. The right to the preservation of the status quo and non-aggravation of the dispute

50. The Respondent submits that the right to the preservation of the *status quo* and non-aggravation of the dispute is subject to the requirements of necessity and urgency to avoid irreparable harm.[89] Here, the Claimants "fail to explain how the forgery investigation alters the *status quo* and aggravates the dispute in such a way that it impedes their ability to present their treaty claim before this Tribunal".[90]

51. Various tribunals have insisted on the requirements of necessity and urgency. For instance, the *Plama* tribunal held that the *status quo* must be preserved "when a change of circumstances threatens the ability of the Arbitral Tribunal to grant the relief which a party seeks and the capability of giving effect to the relief".[91] Therefore, argues the Respondent, "a party's entitlement to preserving the *status quo* and non-aggravation of an arbitration proceeding is ancillary to the requirements for issuing provisional measures under Article 47 of the ICSID Convention".[92]

52. The Respondent also points to the case law of the Permanent Court of International Justice (the "PCIJ") and its successor, the International Court of Justice (the "ICJ"), where the right to preserve the *status quo* and non-aggravation was recognized, albeit in the context of "non-commercial cases involving potential loss of human life, threat of armed aggression, fear of genocide or on-going humanitarian violations, none of which could be remedied by monetary compensation".[93] Significantly, in *Pulp Mills*,

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88 Rejoinder, ¶ 49, referring to *CSOB v. Slovak Republic*, ICSID Case No. ARB/97/4, Procedural Order No. 4, 11 January 1999 (**Exh. CLA-178**); *Zhinvali v. Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003 (**Exh. CLA-194**).

89 Response, ¶ 57, referring to *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶ 61 (**Exh. CLA-183**).

90 Response, ¶ 56.

91 Response, ¶ 58, citing *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005, ¶ 45 (**Exh. CLA-172**); also referring to *Cemex v. Venezuela*, ICSID Case No. ARB/08/15, Decision on the Claimants' Request for Provisional Measures, 3 March 2010, ¶ 61 (**Exh. RLA-138**).

92 Response, ¶ 58.

93 Response, ¶ 59.

the ICJ refused to indicate provisional measures relating to the non-aggravation of the dispute since it found no imminent risk of irreparable harm.[94]

53. The Claimants' reliance on *Quiborax* and *City Oriente* is ill-founded; these cases must be distinguished. Even if *Quiborax* and others recognize that the right to preserve the *status quo* and non-aggravation is a a "self-standing right", that tribunal held that the criminal proceedings did not alter the *status quo* and therefore did not order provisional measures on this ground.[95] The same is true of *Burlington*, which recognized the self-standing nature of the right in question, but noted that its preservation through provisional measures was only warranted if urgent and necessary.[96] *City Oriente*, for the Respondent, presents a totally different scenario from the present one in that Ecuador sought payment under a new law which was at issue in that arbitration, and the tribunal held that the criminal proceedings should be suspended since they stemmed from the non-payment under the new law.[97] Here, to the contrary, the Claimants have no ongoing investments in Indonesia and they only seek monetary relief, not specific performance. In addition, the Respondent argues that it has a right to conduct "legitimate criminal investigations of serious allegations of forgery that arose prior to the start of these arbitration proceedings".[98]

54. To sum up, the Respondent submits the following:

> "In this case, the alleged aggravating circumstances consist of a criminal investigation of a non-party to this dispute and the purported harassment, mental anguish and intimidation that Claimants claim to be suffered by their witnesses and 'potential witnesses'. In truth, Claimants have not even been interviewed. Nor have Claimants supplied any evidence, much less an affidavit or statement from any of their witnesses, that they are unwilling or unable to testify in the arbitration. There can be no relief for aggravation of the dispute if no aggravation has been demonstrated".[99]

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94 Response, ¶ 60, referring to *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order, 23 January 2007, ICJ Reports 2007, p. 16, ¶ 49.

95 Response, ¶ 61, referring to *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 138 (**Exh. CLA-170**).

96 Response, ¶ 63, citing *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 51 (**Exh. CLA-173**).

97 Rejoinder, ¶ 54, referring to *City Oriente v. Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, ¶ 63 (**Exh. CLA-181**).

98 Rejoinder, ¶ 55.

99 Rejoinder, ¶ 57.

iii. The right to the procedural integrity of the arbitration

55. By invoking the right to the integrity of the arbitration as a separate ground, the Claimants "have taken on the burden of demonstrating bad faith and an illicit purpose on the part of the Republic designed, not to investigate the *bona fides* of the allegedly forged documents, but rather to frustrate Claimants' ability to prosecute their case".[100] Additionally, the Claimants must show that the mere commencement of criminal proceedings "without more, constitutes an imminent threat to their access to evidence or their witnesses" in these proceedings.[101] On both counts, the evidence before the Tribunal is insufficient to make such a showing.

56. *Quiborax*, on which the Claimants rely, must be distinguished. In that case, Bolivia initiated criminal proceedings after the ICSID proceedings had commenced as a defense strategy in the latter proceedings.[102] Unlike here, the conclusion reached by the *Quiborax* tribunal was supported by a "robust factual record",[103] *i.e.*, by documents in the criminal proceedings making express reference to the ICSID arbitration and thus showing a direct link between the two proceedings.[104] In the present case, the forgery allegations predate the commencement of the ICSID proceedings "and were the subject of long-standing governmental concern", as demonstrated by the BKP audit of February 2009 and the reiterations for clarification issued by the Regency of East Kutai "before they [i.e. the Claimants] filed their Request for Arbitration before ICSID".[105]

57. According to the Respondent, it was already apparent to the Tribunal since the filing of the Respondent's Memorial on Objections to Jurisdiction that "there are very serious questions as to the authenticity of the documents secured by Claimants' former business partners, on which Claimants rely in this proceeding".[106] The Claimants themselves acknowledged that a criminal investigation is the normal procedure by which evidence of a suspected forgery is collected.[107] The Respondent also points to the lack of plenary power of this Tribunal "to examine all persons with potential

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100 Response, ¶ 66; Rejoinder, ¶ 44.
101 *Id*.
102 Response, ¶ 67, referring to *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶¶ 119, 121 (**Exh. CLA-170**).
103 Rejoinder, ¶ 45.
104 Response, ¶ 67.
105 Response, ¶ 68.
106 Response, ¶ 69.
107 *Id*.

knowledge of the true facts" and to compel the production of evidence from persons employed by the Claimants or Ridlatama, other than the Claimants' witnesses in these proceedings:[108] "Just as the Tribunal has its own role in resolving the treaty dispute over which it has assumed jurisdiction, so too does the Republic have a responsibility to adhere to its internal law enforcement procedures in investigating and prosecuting conduct in violation of its domestic laws. Surely, Claimants have no protectable right to immunize or shelter entities or persons who have committed crimes".[109]

58. The present case must be further distinguished from *Quiborax* for the following reasons.

59. First, Indonesia's conduct in initially holding off the investigation is the "polar opposite" of Bolivia's behavior in *Quiborax*.[110] The forgery allegations were made by a Governmental audit body, not lead counsel in the present proceedings. Counsel's comments during the hearing on jurisdiction "reflected a legal determination by counsel that an investigation should be deferred, not because it was unwarranted, but rather because of a concern that it would lead to very sorts of reckless allegations made by Claimants in their Application".[111] For Indonesia, regardless of the Tribunal's rulings on jurisdiction, there can be no doubt that a criminal investigation would have been set in motion.[112]

60. Second, the facts underlying *Quiborax* are different from the present ones. The Claimants here have full access to their books and records, as well as to all the documents and testimony provided by their witnesses. The Claimants do not allege being deprived of their documentation as a result of the investigation; they "have enjoyed full freedom in presenting their case".[113]

61. Third, the Claimants are wrong in arguing that, like in *Quiborax*, the criminal proceedings were initiated by the Government officials who are mandated with Indonesia's defense in this arbitration. While the Government of the Regency of East Kutai is the complaining party, it is not the investigative body in the ongoing

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108 *Id*.
109 *Id*.
110 Response, ¶ 70.
111 *Id*.
112 *Id*.
113 Response, ¶ 71.

investigation and the Minister of Law and Human Rights of the Republic was not involved in filing the criminal complaint nor is he responsible for the investigation or prosecution of any suspected crimes. In sum, "the fact that certain government officials may have relevant knowledge and interest in this Arbitration as a result of their ordinary scope of authority is hardly grounds for insinuating interference".[114]

62. Finally, the Claimants have offered nothing to explain why the mere commencement of an investigation of Ridlatama has put an "intolerable pressure" on the Claimants' witnesses or potential witnesses leading them to withdraw from this arbitration. Provisional measures cannot be issued on the basis of speculation; they require a showing of imminent harm.[115]

b. Urgency

63. The Respondent cites commentators and decisions pursuant to which provisional measures are only indicated "if it is impossible to wait for a specific issue to be settled at the merits stage".[116] The Respondent stresses that the Claimants recognize that urgency requires more than harm, namely a showing of a real risk of imminent harm.[117] This follows from the Claimants' argument that the harm to their witnesses is imminent because criminal charges have been lodged against the Ridlatama group and therefore charges against the Claimants are "likely to follow".[118] The Respondent contends, however, that "there is no evidence that any such charges have been asserted against either the Ridlatama principals or Claimants' witnesses".[119] It adds that nothing in the ongoing investigation prevents the Claimants from presenting evidence in these proceedings.

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114 Response, ¶ 72.
115 Rejoinder, ¶ 46.
116 Rejoinder, ¶ 26, citing *City Oriente v. Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, ¶ 67 (**Exh. CLA-181**).
117 Rejoinder, ¶ 26, also referring to *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶ 89 (**Exh. CLA-183**); *Burimi v. Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, 3 May 2012, ¶¶ 34-35 (**Exh. RLA-130**).
118 Rejoinder, ¶ 27.
119 *Id*.

c. Necessity

64. Relying on *Occidental Petroleum* and *Cemex*, the Respondent argues that irreparable harm is an essential requirement, which tribunals have found to be missing "where the alleged prejudice or harm can be compensated by damages".[120] The applicable test therefore is whether, absent provisional measures, the Claimants would lose the ability to recover monetary damages.[121] For instance, the *Plama* tribunal refused to order the discontinuance of insolvency proceedings, accepting that harm is not irreparable if it can be made good through damages.[122] The "same is true where there is no ongoing contractual relationship that Claimants seek to maintain and the remedy sought by Claimants consists solely of money damages".[123]

65. According to the Respondent, the Claimants are wrong in criticizing the irreparable harm test and arguing instead for a test of significant harm, the latter having only been applied in exceptional cases to preserve ongoing contractual relationships where the harm could not be remedied by damages.[124] As stated in *Cemex*, the tribunals in *City Oriente*, *Perenco*, and *Burlington* "could have based their decision on the fact that, the destruction of the ongoing concern that constituted the investment, would have created an 'irreparable harm'".[125] In any event, although they deny the need for irreparable harm, the Claimants nonetheless argue – albeit erroneously – that the initiation of the criminal investigation does meet that standard.

66. In respect of the "extraordinary stress and mental anguish" to which the Claimants' witnesses are allegedly subject, the Claimants fail to identify any actual or imminent harm. As in *Occidental*, the Tribunal should refrain from ordering provisional

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120 Response, ¶ 45, referring to *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶¶ 59, 61 (**Exh. CLA-183**); *Cemex v. Venezuela*, ICSID Case No. ARB/08/15, Decision on the Claimants' Request for Provisional Measures, 3 March 2010, ¶¶ 47-49 (**Exh. RLA-138**).

121 Response, ¶ 49.

122 Response, ¶ 46, referring to *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005, ¶¶ 33-34 (**Exh. CLA-172**).

123 Response, ¶ 47.

124 Rejoinder, ¶ 29, referring to *City Oriente v. Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, ¶¶ 59-60 (**Exh. CLA-181**); *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) ("Perenco v. Ecuador & Petroecuador")*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, ¶ 46, 53 (**Exh. CLA-169**); and *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 83 (**Exh. CLA-173**).

125 Rejoinder, ¶ 30, citing *Cemex v. Venezuela*, ICSID Case No. ARB/08/15, Decision on the Claimants' Request for Provisional Measures, 3 March 2010, ¶ 55 (**Exh. RLA-138**).

measures that would cause irreparable harm to the other party, specifically to a sovereign State's power to investigate and prosecute criminal behavior: "However anxiety-provoking the fear of the unknown may be – so the Respondent submits –, the trepidation of Claimants' witnesses as to what may occur in the investigation is inherently speculative, and cannot be the basis for provisional measures that would have the effect of halting a legitimate investigation into conduct in violation of Indonesia's law".[126] Contrary to the Claimants' submission, suspending the investigation for an indefinite period of time "would be highly prejudicial to the Republic and to the integrity of the criminal justice system".[127]

III. ANALYSIS

1. Legal Framework

67. Article 47 of the ICSID Convention and Rule 39 of the 2006 ICSID Arbitration Rules enable the Tribunal to recommend provisional measures. Article 47 of the ICSID Convention reads as follows:

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

68. Rule 39 of the ICSID Arbitration Rules provides in relevant parts the following:

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

[126] Response, ¶ 48 (emphasis in the original).
[127] *Id*.

in a request. It may at any time modify or revoke its recommendations.

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

[…]

2. Requirements for Provisional Measures

69. According to Rule 39 of the ICSID Arbitration Rules, the request must specify "the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures". Various ICSID tribunals have interpreted these requirements to mean that provisional measures must (i) serve to protect certain rights of the applicant, (ii) meet the requirement of urgency; and (iii) the requirement of necessity, which implies the existence of a risk of irreparable or substantial harm.[128]

70. While there is common ground between the Parties on the first two requirements, they disagree on whether the third requirement entails a showing of irreparable harm as opposed to substantial harm. The Parties further disagree on the fulfillment *in casu* of the three requirements referred to above, specifically whether the rights for which protection is sought are affected (a. below) and whether the measures requested are urgent (b. below) and necessary (c. below).

71. Before addressing these requirements, the Tribunal stresses that the applicant must establish the requirements with sufficient likelihood, without however having to actually prove the facts underlying them. Moreover, the Tribunal's assessment is necessarily made on the basis of the record as it presently stands and any conclusion reached in this order could be reviewed if relevant circumstances were to change.

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[128] See *Plama v. Bulgaria*, Order on Provisional Measures of 6 September 2005, ¶ 38; *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 51 (**Exh. CLA-173**); *Quiborax v. Bolivia*, ICSID Case No. ARB/06/02, Decision on Provisional Measures of 26 February 2010, ¶ 113 (**Exh. CLA-170**); *Iona Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Claimants' Application for Provisional Measures of 2 March 2011, ¶ 12.

a. Existence of Rights Requiring Preservation

72. The Claimants allege that the following three rights need preservation by way of provisional measures: (i) the right to the exclusivity of the ICSID proceedings under Article 26 of the ICSID Convention; (ii) the right to the preservation of the *status quo* and the non-aggravation of the dispute; and (iii) the right to the procedural integrity of the arbitration.

73. As a preliminary matter, the Tribunal will deal with Indonesia's contention that the rights that may be protected by way of provisional measures must belong to a Party, must exist at the time of the Application, and must not be hypothetical or future rights ((i) below). The Tribunal will then review the right to the exclusivity of the ICSID proceedings ((ii) below), the right to the preservation of the *status quo* and non-aggravation of the dispute ((iii) below), and the right to the integrity of the arbitration ((iv) below).

i. The holder of the rights requiring protection

74. Although Indonesia does not dispute that the three rights invoked by the Claimants may be protected by way of provisional measures, it argues that under Article 47 of the ICSID Convention and Rule 39(1) of the ICSID Arbitration Rules, provisional measures may only be issued if the rights of a disputing party are at issue.[129] Relying in particular on *Maffezini*, the Respondent further argues that such rights "must be actual, existing rights at the time the request is made and 'must not be hypothetical, nor are ones to be created in the future'".[130]

75. According to the Respondent, the Claimants preemptively seek to protect not only themselves, but also their witnesses and "any person associated with the Claimants' operations in Indonesia", i.e. the Claimants' current and former employees, affiliates or business partners. The Claimants therefore seek protection of an indefinite number of third parties, making it impossible to determine in what way the Claimants' ability to present their case is affected.

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129 Response, ¶ 35.

130 Response, ¶ 35, citing *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999, ¶ 13 (**Exh. CLA-177**).

76. According to the Respondent, the Tribunal has no jurisdiction under Article 47 of the ICSID Convention to grant provisional measures to protect the rights of the Ridlatama companies and their principals. The same applies to other non-parties in this arbitration, "including entities or individuals who previously were associated with Claimants or who have [appeared] or may appear as witnesses in this Arbitration".[131]

77. In response, the Claimants argue that they are the owners of the rights for which they seek protection, not third parties. They further maintain that these rights stand to be violated by the Respondent vis-à-vis actual and potential witnesses.

78. It is common ground in the ICSID framework that the rights to be protected by provisional measures must belong to a disputing party. This derives from the plain words of Article 47 of the ICSID Convention, which refers to the preservation of "the respective rights of either party". It is also clear from Rule 39(1) of the Arbitration Rules which allows a disputing party to request provisional measures "for the preservation of *its* rights" (emphasis added).

79. In the view of the Tribunal, the Claimants are not seeking provisional measures to protect rights of non-parties. Rather, they seek to protect their own rights in the present proceedings. More specifically, the Claimants seek to secure their right to provide evidence through witness testimony. To this end, they seek to avoid that such right be impaired by criminal investigations brought against actual and potential witnesses. The fact that the Claimants seek to protect their right to submit evidence through potential witnesses does not make this right hypothetical.

ii. The right to exclusivity of the ICSID proceedings

80. The Claimants argue that resort to criminal investigation and prosecution is contrary to Article 26 of the ICSID Convention, thus rendering provisional measures necessary to preserve the exclusivity of the ICSID proceedings. More specifically, the forgery allegations now investigated in Indonesia are part of the subject matter of the present dispute since these allegations appear to be Indonesia's defense strategy.

[131] Response, ¶ 38.

81. For its part, the Respondent replies that the remedies sought in the criminal investigation and this arbitration are distinct. It also refers to *Quiborax*, where the tribunal refused to hold that criminal proceedings threaten the exclusivity of ICSID proceedings.

82. Article 26 of the ICSID Convention reads in relevant part as follows:

> "Consent of the Parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy".

83. It is undisputed that the exclusivity of ICSID proceedings is a procedural right which may find protection by way of provisional measures under Article 47 of the ICSID Convention. As stated in *Tokios Tokéles*:

> "Among the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the ICSID arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy, whether domestic or international, judicial or administrative".[132]

84. The question which the Tribunal must address is whether the criminal investigation initiated in March 2014 as a result of the criminal charges lodged by the Regent of East Kutai on 21 March 2014 against the Ridlatama companies threatens the exclusivity of the present proceedings. The Tribunal must also determine whether the threat of criminal investigation and proceedings against the Claimants, their witnesses and potential witnesses breaches Article 26 of the ICSID Convention.

85. As a starting point, the Tribunal agrees with the *Quiborax* tribunal in that criminal proceedings do not *per se* threaten the exclusivity of ICSID proceedings.[133] This derives from the fact that the jurisdiction of the Centre and the competence of the Tribunal extend to investment disputes, i.e. for present purposes, whether the Respondent breached its international obligations under the UK-Indonesia BIT with

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[132] *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 3, 18 January 2005, ¶ 7 (**Exh. CLA-176**). *See* further, *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 127 (**Exh. CLA-170**); *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 57 (**Exh. CLA-173**).

[133] *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 128 (**Exh. CLA-170**).

respect to Churchill Mining and under the Australia-Indonesia BIT with respect to Planet Mining, and not to criminal proceedings, which fall outside the scope of the Centre's jurisdiction and the Tribunal's competence.

86. A breach of Article 26 of the ICSID Convention only occurs if a claim or right forming part of the subject matter of these proceedings is the object of parallel proceedings in another forum. In the present case, the subject matter of the criminal proceedings (to impose sanctions for the alleged criminal act of document forgery) and of the present arbitration (to grant monetary relief for alleged breaches of the investment treaty) are not the same. It is true that the Tribunal may have to consider documents allegedly forged in the context of its power to determine the admissibility and evidentiary weight of the evidence on record. Yet, this does not imply an identity of subject matter.[134]

87. In this light, the Tribunal finds that the criminal charges lodged by the Regent of East Kutai on 21 March 2014 against the Ridlatama companies do not threaten the exclusivity of the ICSID proceedings. The Ridlatama companies are not parties to the present dispute, and a criminal investigation into their conduct with respect to the alleged document forgery does not impinge on the exclusivity of the present proceedings, nor does it undermine the Tribunal's jurisdiction to resolve the Claimants' claims.

88. The Tribunal also notes that no criminal proceedings have (yet) been instituted against the Claimants, their witnesses or potential witnesses. In these circumstances, there can be no question of a breach of Article 26 of the ICSID Convention. The threat to initiate criminal proceedings voiced by Counsel, if it can be characterized as such, cannot change this conclusion.

iii. The right to the preservation of the status quo and the non-aggravation of the dispute

89. The Claimants argue that the Respondent is employing criminal proceedings or related threats to intimidate the Claimants and their witnesses or potential witnesses, thus altering the *status quo* and aggravating the dispute. In particular, the Claimants contend

[134] *Perenco v. Ecuador & Petroecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, ¶ 61 (**Exh. CLA-169**).

that Indonesia's "recurrent threats" of criminal investigations cause "extraordinary stress and mental anguish to the Claimants and their witnesses",[135] and presumably to "all persons currently or previously associated with the Claimants' investment in Indonesia".[136] For its part, Indonesia retorts that the Claimants have failed to explain how the criminal proceedings have altered the *status quo* or aggravated the dispute such as to affect the Claimants' ability to present their case. Nor have the Claimants established that the requested measures are urgent and necessary.

90. It is undisputed that the right to the preservation of the *status quo* and the non-aggravation of the dispute may find protection by way of provisional measures. As was held in *Burlington*, procedural rights may be preserved by provisional measures like substantive rights.[137] The Tribunal agrees with previous decisions holding that within the ICSID framework the right to the preservation of the *status quo* and the non-aggravation of the dispute is a self-standing right vested in any party to ICSID proceedings.[138]

91. The Tribunal now turns to the question whether Indonesia's actions have altered the *status quo* or aggravated the dispute. It notes the Claimants' allegation that the "continued harassment and intimidation" exerted by the Respondent targets three different groups of persons: the Claimants themselves; the Claimants' witnesses; and persons currently or previously associated with the Claimants' investment in Indonesia. The Tribunal will thus focus on each group of persons separately.

92. The Tribunal agrees with the Claimants that the threat or the initiation of criminal charges is not conducive to lowering the level of antagonism between the Parties. For the following reasons, the Tribunal does not find, however, that Indonesia's (intended) actions have altered the *status quo* or aggravated the dispute. With regard to the first two groups, the Tribunal notes that no investigation has been initiated nor have criminal charges been lodged against the Claimants or their current witnesses. The Tribunal further fails to see how the initiation of a criminal investigation against the

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135 Application, ¶ 47.

136 *Id*.

137 *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 60 (**Exh. CLA-173**).

138 *City Oriente v. Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, ¶ 55 (**Exh. CLA-181**); *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 134 (**Exh. CLA-170**).

Ridlatama companies which are not parties to the present dispute, has altered the *status quo* or aggravated the dispute in the present proceedings. While it is undeniable that the criminal charges lodged against the Ridlatama companies are related to the present arbitration, the Tribunal does not believe at this juncture that the Claimants' rights are affected.

93. As regards the "extraordinary stress and mental anguish" allegedly suffered by the Claimants and their witnesses, due to Indonesia's conduct, the Tribunal does not either find the initiation of criminal proceedings against Ridlatama to have altered the *status quo* or to have otherwise aggravated the dispute. There is no element on record showing any pressure or intimidation against the Claimants and their witnesses.

94. As regards Mr. Benjamin, it is true that counsel to Indonesia argued at the hearing on jurisdiction that he may have to respond to the Indonesian authorities about his involvement in the compilation of the documents the authenticity of which Indonesia now questions. However, there are no concrete elements in the record allowing to conclude that Indonesia is indeed contemplating the possibility of initiating a criminal investigation against Mr. Benjamin. In its latest submission, Indonesia stated that Mr. Benjamin was not accused of forgery at the hearing or thereafter by Indonesian authorities.[139] While Mr. Benjamin may have to appear as a witness in the investigation initiated against the Ridlatama companies in light of his personal role in the collection of the documents that are now under investigation, this does not mean, absent further elements, that Mr. Benjamin is subject to undue pressure.

95. With respect to the third group, the Tribunal equally fails to see how the threat to initiate criminal investigations or proceedings against the unidentified third group of persons "being currently or previously associated with the Claimants' investment in Indonesia" has changed the *status quo* and aggravated the dispute.

iv. The right to the procedural integrity of the arbitration proceedings

96. The Claimants contend that the Respondent's conduct impairs their right to the procedural integrity of these proceedings, in particular their "fundamental due process

[139] Rejoinder, ¶ 19.

right" to present their case. In light of (i) the direct connection between Indonesia's conduct and the developments in these ICSID proceedings, (ii) the identity between the persons initiating the criminal investigation and those defending Indonesia in the present proceedings, and (iii) the timing of the Respondent's conduct, there is a clear and imminent threat to the procedural integrity of these proceedings.

97. The Respondent answers that the Claimants have failed to demonstrate bad faith or an illicit purpose on the part of Indonesia, not to investigate the *bona fides* of the alleged document forgery, but to frustrate the Claimants' ability to present their case. Nor did the Claimants show that the mere commencement of the criminal investigation constitutes an imminent threat to their access to evidence or to their witnesses.

98. The Parties do not disagree that the right to the integrity of arbitration proceedings may be protected by provisional measures. Both Parties rely on the *Quiborax* decision to reach opposite conclusions; the Claimants arguing that *Quiborax* is directly analogous to the present case, and the Respondent arguing that both cases must be distinguished.

99. While presenting certain similarities, the Tribunal is of the view that *Quiborax* must be distinguished, since it dealt with actual criminal investigations against a co-claimant and persons involved in the setting up of the investment. As matters presently stand, the Tribunal considers that the impairment of the Claimants' procedural rights is speculative and hypothetical. .

b. Urgency

100. The Parties agree that the urgency requirement is satisfied if the relief requested cannot await the final award. They disagree, however, on whether this test is met in the present circumstances..

101. Since the specific circumstances as they stand do not affect the Claimants' right to the exclusivity of the ICSID proceedings, their right to the preservation of the *status quo* and non-aggravation of the dispute, and their right to the procedural integrity of these proceedings, it follows that the urgency requirement is not fulfilled.

c. Necessity

102. While the Parties agree that provisional measures must be necessary to avoid harm being inflicted upon the applicant, they disagree on the characterization of the harm. The Claimants argue that a risk of substantial harm is sufficient, while the Respondent insists on irreparable harm. The Respondent also contends that harm is not irreparable if it can be made good through damages.

103. The Tribunal can dispense with entering into a discussion of the Parties' arguments. Since in the present circumstances, the rights for which the Claimants seek provisional measures are not affected, the necessity requirement is consequently not fulfilled.

d. Final Observations

104. While the request for provisional measures must be denied, the Tribunal wishes to expressly stress the Parties' general duty, which arises from the principle of good faith, not to take any action that may aggravate the dispute or affect the integrity of the arbitration.

105. The Respondent requests the Tribunal that "the Republic be awarded the costs associated with its opposition thereto, including its legal and administrative fees and expenses and the fees and expenses of the Tribunal".[140] Considering that it was not unreasonable under the circumstances to file the Application and in line with the practice adopted in earlier decisions and orders, the Tribunal will reserve the issue of costs for a later determination.

IV. ORDER

106. On this basis, the Arbitral Tribunal issues the following decision:

(1) Denies the Claimants' Application for provisional measures;

(2) Costs are reserved for a later decision or award.

[140] Response, ¶ 76; Rejoinder, ¶ 64.

On behalf of the Tribunal

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Gabrielle Kaufmann-Kohler
President of the Tribunal
Date: 8 July 2014

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia
(ICSID Case No. ARB/12/14 and 12/40)

PROCEDURAL ORDER NO. 14

Provisional measures

Professor Gabrielle Kaufmann-Kohler, President of the Tribunal
Mr. Michael Hwang S.C., Arbitrator
Professor Albert Jan van den Berg, Arbitrator

Secretary of the Tribunal
Mr. Paul-Jean Le Cannu

Assistant to the Tribunal
Mr. Magnus Jesko Langer

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I. PROCEDURAL BACKGROUND

1. The present order deals with an Application for Provisional Measures (the "Application") filed by Churchill Mining Plc and Planet Mining Pty Ltd (the "Claimants") on 2 September 2014, by which the Claimants requested that the Tribunal:

   (a) Recommend that the Republic of Indonesia ("Indonesia" or the "Respondent"), its agencies and instrumentalities:

      i. Refrain from threatening or commencing any criminal investigation or prosecution against the Claimants, their witnesses in these proceedings including Mr. Paul Benjamin, and employees or their wholly owned subsidiary, PT Indonesia Coal Development (PT ICD), pending the outcome of this arbitration;

      ii. Return forthwith to PT ICD all documents and other items that were seized by the Indonesian police in the raid on PT ICD's premises on 29 August 2014;

      iii. Stay or suspend any current criminal investigation or prosecution against the Claimants' and PT ICD's current and former employees pending the outcome of this arbitration;

      iv. Refrain from engaging in any other conduct that would:

         1. Aggravate the dispute between the Parties;

         2. Alter the *status quo*; or

         3. Jeopardize the procedural integrity of these proceedings; and

   (b) Recommend any further measures or relief that the Tribunal deems appropriate in the circumstances to preserve the Claimants' rights.[1]

2. On 5 September 2014, the Tribunal invited the Respondent to file its response to the Application by 15 September 2014. The Tribunal further indicated that it would revert

[1] Claimants' Application for Provisional Measures, 2 September 2014, pp. 2-3.

to the Parties with further directions once it had reviewed the Respondent's response to the Application.

3. The Respondent filed its Response to the Claimants' Application (the "Response") within the time limit. In its Response, Indonesia objected to the Application and requested the Tribunal to:

   (a) Reject the Claimants' request for provisional measures; and

   (b) Award to the Respondent the costs associated with its opposition to the Application, including Indonesia's legal and administrative fees and expenses and the fees and expenses of the Tribunal.[2]

4. On 17 September 2014, having reviewed the Parties' submissions, the Tribunal invited the Claimants to submit a reply by 26 September 2014 and the Respondent a rejoinder by 6 October 2014. The Tribunal further asked the Parties to state whether they requested a hearing on provisional measures and, if so, whether the hearing could be held by video link.[3]

5. The Claimants filed their reply ("Reply") within the time limit. The Claimants added the following requests to their initial ones (see above paragraph 1):

   (a) Order, in the interests of due process and procedural integrity, Indonesia to provide full copies of all interview recordings, transcripts, and statements of any party or person that has been interviewed in connection with the criminal investigation into the alleged forgeries;[4] and

   (b) Order Indonesia to produce a copy of all correspondence from and to the London Stock Exchange in respect of Indonesia's decision to deliver the Witness Statement of Mr. Russell Paul Hardwick.[5]

6. Finally, the Claimants informed the Tribunal that they had fully made their case on provisional measures and that the Tribunal could decide on the Application on the basis

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2 The Republic of Indonesia's Response to Claimants' Application for Provisional Measures, 15 September 2014, p. 4.
3 Letter of the Tribunal to the Parties, 17 September 2014, p. 2.
4 Reply, p. 2.
5 Reply, p. 3.

of the documents. The Claimants nonetheless indicated their willingness to attend a hearing via video link should the Tribunal wish to hold a hearing.

7. On 6 October 2014, the Respondent filed its rejoinder ("Rejoinder"), essentially restating its request to deny the Application and award it the costs associated therewith.[6]

8. In light of the Parties' submissions, and the geographic distribution of the Parties, counsel and arbitrators, the Tribunal decided on 14 October 2014 to hold a hearing via teleconference on 21 October 2014 at 1:00 pm CET to deal, *inter alia*, with the provisional measures. The Tribunal circulated the hearing schedule to the Parties.

9. On 21 October 2014, the Parties and the Tribunal held the hearing as scheduled. During the hearing, the Claimants presented oral comments on the measures followed by the Respondent, and the Parties answered questions from the Tribunal.

II. POSITIONS OF THE PARTIES

1. Position of the Claimants

10. The Claimants contend that the police raid on Friday 29 August 2014 of the Jakarta premises of the Claimants' wholly-owned Indonesian investment vehicle, PT ICD, and the seizure of various documents and hard drives, is the "*third* instance where Indonesia uses its sovereign powers as a way of destabilizing the arbitration proceedings".[7] According to the Claimants, this raid was strategically timed to take place at the same time the Parties were attending in Singapore the Tribunal-ordered document inspection. Additionally, Indonesia intimidated and harassed the two employees of PT ICD present during the raid, as they were served with a summons to appear for questioning on 3 September 2014 and were indeed questioned by the Indonesian police "for days on end".[8] For the Claimants, the use of such "strong-arm tactics" constitutes a "new flagrant

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6 Rejoinder, p. 11 (emphasis as in original text). In its Application for the Dismissal of the Claimants' Claims dated 25 September 2014, the Respondent provided further observations regarding the Claimants' Application for Provisional Measures (*see* paragraphs 43-44, 46). In particular, the Respondent requested a hearing on the Claimants' Application and proposed that such hearing also deal with the Respondent's Application for the Dismissal of the Claimants' Claims (*see* paragraph 46). This request has not been reiterated in the Rejoinder.

7 Application, p. 1.

8 Reply, p. 8.

attempt by Indonesia to upset the playing field and derail this arbitration", requiring an order of provisional measures against Indonesia.[9]

11. The Claimants further submit that Mr. Paul Benjamin, one of the Claimants' key witnesses, is "now formally a suspect in Indonesia's criminal investigations" regarding the alleged forgery of documents.[10] While the Tribunal refused to order provisional measures in Procedural Order No. 9 because it found that Indonesia had not yet acted upon its threats of criminal prosecution against the Claimants, their employees, witnesses and potential witnesses in this arbitration, the circumstances have now changed in light of the raid on PT ICD, the seizure of documents and hard drives, the intimidation and harassment of PT ICD's employees, and the classification of Mr. Paul Benjamin as a suspect. In other words, provisional measures are now needed to further prevent Indonesia from destabilizing the Claimants' witnesses and access to evidence, circumventing the agreed document disclosure process, and ultimately usurping the Tribunal's jurisdiction.[11]

12. According to the Claimants, the raid on PT ICD was conducted "without warning" by four Indonesian police officers at around 1:30 pm local time on 29 August 2014; it ended at around 5:00 pm.[12] Mr. Anton Hermawan, a "high-ranking police officer from Police Headquarters in Jakarta", led the raid. This same officer, say the Claimants, had already previously been investigating Mr. Paul Benjamin in connection with Indonesia's forgery allegations. The two employees of PT ICD present at the time, Mses. Paustina and Nurmalia, were presented with a "warrant or court order" to raid PT ICD and seize any documents. The police refused to provide a copy of the "warrant or court order" authorizing the search and seizure of documents on PT ICD's premises.

13. During the raid, say the Claimants, the police seized "numerous documents and hard drives containing, *inter alia*, evidence relevant to this case".[13] According to the

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9 Application, p. 2.
10 Application, pp. 2, 3-4
11 Application, p. 2.
12 Application, p. 3. The Claimants' account of the police raid on PT ICD's offices in Jakarta relies on the account provided by Mr. Suharsanto Raharjo's of the law firm Hiswara Bunjamin & Tandjung in Jakarta, who attended PT ICD's offices in the immediate aftermath of the raid. *See* e-mail from Suharsanto Rahajaro to Russell Hardwick, dated 1 September 2014 (**Exh. C-376**).
13 Application, p. 2.

Claimants, the basic inventory of the seized files compiled by the Indonesian police "does not provide an accurate description of the number and scope of documents confiscated",[14] thus precluding the Claimants from providing the Tribunal with a full list of the documents that have been seized. In any event, the Claimants insist that some of the documents are clearly relevant to the present case, and that some are even confidential or legally privileged.

14. For the Claimants, Indonesia is disingenuous when it argues that only "certain documents" had been seized, while the Indonesian police also seized computers and hard drives. While some documentation has since been returned to PT ICD, the computers and hard drives have not, which increases the uncertainty about the integrity of such equipment should it be returned.[15]

15. The Claimants also argue that while the raid was ostensibly conducted to seize documents in relation to the alleged forgery of mining licenses, the scope of the documents and data seized "was far wider, including letters, receipts of delivery and acceptance, corporate documents, external hard disks, and other items".[16] No legal basis for "such sweeping confiscation of documentation" has been tendered to PT ICD or the Claimants.[17]

16. The Claimants moreover argue that the Indonesian police did not advise PT ICD or the Claimants when they intended to return the remaining documents and equipment, if at all. To the contrary, the Indonesian authorities have informed PT ICD's staff that "these items may never be returned".[18] Accordingly, the Claimants submit that they "have lost access to substantial amounts of information in a manner that was abusive and unjustified".[19] The Respondent was wrong when it stated that there was no reason for concern about the Claimants' ability to utilize the documentation seized from PT ICD's office.[20] In fact, the Claimants requested to be given access to essential computer equipment or to obtain mirror image copies of the hard drives and backup drives to

14 Application, p. 3, referring to the Minutes of Confiscation (**Exh. C-379**) and the Receipt (**Exh. C-380**).
15 Reply, p. 4.
16 Application, p. 4.
17 *Id.*
18 Reply, p. 4.
19 Application, p. 5.
20 Reply, p. 4.

finalize the translations requested by the Tribunal on 27 August 2014. Indonesia, however, replied that such a course of action was "not possible".[21]

17. Mses. Paustina and Nurmalia were, say the Claimants, "intimidated into silence by the suddenness and expansive scope of the raid". They were also served with a summons to appear on 3 September 2014 before Mr. Hermawan for an interrogation in connection with the alleged forgery.[22] These two employees form part of PT ICD's junior secretarial and accounting staff and have nothing to do with the forgery allegations, since they did not work for PT ICD at the relevant time.[23]

18. For the Claimants, the police raid on PT ICD's premises is directly connected to the present proceedings since the raid was "perfectly timed to coincide with the inspection so as to cause maximum surprise and disruption".[24] Several elements serve to prove the point. As noted in the Claimants' first application for provisional measures dated 27 March 2014, Indonesia acted within a matter of days after the Tribunal's decision on jurisdiction when the Regent of East Kutai declared his intention to initiate criminal proceedings against the Claimants and their witnesses, and then initiated criminal proceedings against the Ridlatama companies two weeks later. Just as that action was a direct response to the Tribunal's decision on jurisdiction, the raid against PT ICD is a "tactical move with a direct connection to developments in these ICSID proceedings".[25]

19. Furthermore, Indonesia has not undertaken any raid of the premises, offices or individual residences of any members of the Ridlatama group, which is the alleged focus of the police investigation. According to the Claimants, this further shows that Indonesia seeks to disrupt and circumvent the procedure set in the present proceedings and that it "conducted the raid on PT ICD's premises in order to access the Claimants' documents outside the agreed document disclosure process in these ICSID proceedings".[26]

20. For the Claimants, Indonesia is wrong to assert that the police raid on 29 August 2014 was a non-invasive act. For the Claimants, the police raid must be characterized as

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21 Reply, p. 4.
22 Application, p. 3.
23 Reply, p. 8.
24 Reply, p. 2.
25 Reply, p. 3.
26 Reply, p. 3.

abusive, harassing or strong-arm tactics.[27] Through the raid, the fear which the Claimants voiced in their first application for provisional measures have now materialized; its witnesses must and do fear police raids and abuse, property seizure and loss of their personal liberty, thus affecting their willingness or ability to give evidence in the present proceedings. The "dismal record" of Indonesian police officers with respect to due process rights of individuals under police investigation, as highlighted in two recent Amnesty International reports, confirms and exacerbates these fears.[28]

21. In reliance on Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, the Claimants submit that the Tribunal is empowered to recommend the provisional measures they seek, in particular the preservation and protection of the rights which they assert in these proceedings, which run the risk of being destroyed or seriously prejudiced by the actions of the Respondent.[29]

22. With reference to arbitral decisions, the Claimants submit that the requirements for provisional measures are that (i) the Claimants have rights requiring protection by this Tribunal, (ii) the requested measures are urgent, and (iii) necessary.[30] They add that tribunals have also ascertained that the requested measures would not disproportionately burden the other party.

a. Rights requiring protection

23. For the Claimants, the Tribunal has "wide discretion" to recommend provisional measures. Provisional measures may serve to protect procedural as well as substantive rights.[31] Pending the outcome of the arbitration, the rights that are subject to the arbitration must be protected if necessary by provisional measures. In the present case, the Claimants seek to protect their rights in the present proceedings, and, in particular, their right to access evidence and to present their case through witness testimony, which should not be impaired by (i) police raids on their premises, (ii) document seizures, and

27 Reply, p. 3.
28 Reply, p. 4.
29 Application, p. 5.
30 Application, p. 5.
31 Application, p. 5.

(iii) criminal investigations or the threat of such investigations brought against witnesses and potential witnesses.[32]

24. The Claimants submit that Indonesia's actions impair two types of self-standing rights: (i) the right to the preservation of the *status quo* and non-aggravation of the dispute; and (ii) the right to the procedural integrity of the arbitration.

i. The right to the preservation of the status quo and non-aggravation of the dispute

25. The Claimants invoke a right to be free of criminal proceedings or threats of such proceedings and of any undue influence exerted by Indonesia on the Claimants' employees, witnesses and potential witnesses. For the Claimants, the raid on the premises of PT ICD, the arbitrary seizure of documents and other items, the summoning of PT ICD's employees for police interrogation, and the identification of Mr. Benjamin as a suspect in the ongoing criminal investigation, were "all clearly designed to exert undue pressure" on the Claimants and their witnesses.[33]

26. The timing of the raid also suggests that it was "motivated by and aimed at the present arbitration". Accordingly, Indonesia's actions are "sufficiently related to the ICSID proceedings" to warrant protection of the Claimants' rights to the preservation of the *status quo* and to the non-aggravation of the dispute.[34]

27. The Claimants further point to their first application for provisional measures dated 27 March 2014, where they explained that various tribunals have recognized the right to the preservation of the *status quo* and the non-aggravation of the dispute, in particular to avoid the "continued harassment and intimidation" such as the one faced by the Claimants, their witnesses and potential witnesses.[35] In *Burlington*, the tribunal held

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32 Application, p. 5.
33 Application, pp. 5-6.
34 Application, p. 6.
35 *See* original Application dated 27 March 2014, ¶ 40, referring to *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, P.C.I.J. Series A/B No. 79, Order of 5 December 1939, ¶ 24 (**Exh. CLA-180**); *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, ¶ 103 (**Exh. CLA-182**); *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures, 9 December 1983, ¶ 5; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005, ¶ 40 (**Exh. CLA-172**); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*,

these rights to be "self-standing" rights,[36] and in *City Oriente*, the tribunal ordered Ecuador to stop pursuing administrative and criminal proceedings as a means to pressure the claimant.[37]

ii. The right to the procedural integrity of the arbitration proceedings

28. Here again, according to the Claimants, the timing of the police raid "leaves no doubt that this was not a good faith exercise of sovereign powers", but a deliberate move by Indonesia to gain a tactical advantage, designed to obstruct or derail the present proceedings. Through the raid, Indonesia effectively circumvented the agreed document production process "and the Tribunal's control of that process".[38] Moreover, the document seizure, the summoning of PT ICD's employees, and the identification of Mr. Benjamin as a suspect "pose an imminent threat to the Claimants' access to witnesses and documentary evidence", thus encroaching on the Claimants' due process right to present their case.[39] As of now, so the Claimants argue, the situation is clearly analogous to the one prevailing in *Quiborax*. As in that case, the timing of the raid was "orchestrated by the same officials representing Indonesia in the arbitration to impair the Claimants' right to present their case", with the result that the Claimants have now lost access to the documents seized during the raid, including privileged information.

29. To conclude, the Claimants argue that there is a "clear and imminent threat to the procedural integrity of these ICSID proceedings" and that the measures requested are intended to protect the Claimants' rights in this regard.[40]

ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶ 96 (**Exh. CLA-183**); *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, ¶ 135 (**Exh. CLA-184**); *Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 117 (**Exh. CLA-170**).

36 *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 60 (**Exh. CLA-173**).

37 *See* original Application dated 27 March 2014, ¶ 45; and original Reply, ¶¶ 54-57, referring to *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, ¶ 62 (**Exh. CLA-181**).

38 Application, p. 6.

39 Application, p. 6.

40 Application, p. 7.

b. Urgency

30. The Claimants submit that the requirement of urgency is fulfilled, since there is a "real risk that action prejudicial to the rights" of the Claimants may be taken before the Tribunal could make its final determination.

31. As stated in *Quiborax*, measures seeking to protect the Tribunal's jurisdiction, to maintain the *status quo*, to prevent the aggravation of the dispute, and to protect the integrity of the arbitration are "urgent by definition".[41]

32. In the present case, the conduct of Indonesia has violated the rights for which the Claimants seek protection, namely the *status quo* has been affected, the dispute has been aggravated and there exists a clear and imminent threat to the procedural integrity of these proceedings. Accordingly, the urgency requirement is fulfilled.

c. Necessity

33. The Claimants further contend that the requirement of necessity is met because Indonesia's actions are bound to cause harm that cannot be adequately repaired by an award on damages, in particular because the Claimants will not have access to evidence and witnesses in support of their case.[42]

34. In this context, Indonesia's attempts to dismiss the anxiety now incurred by the Claimants' witnesses not only disregard the legal consequences attached to a criminal investigation. They also ignore Indonesia's own "dismal record in affording due process to individuals under police investigation", as recently highlighted in two reports by Amnesty International referring to excessive police violence and other human rights violations.[43] It is therefore incorrect for the Respondent to state that the Claimants' witnesses need only fear the prospect of giving evidence, since they must and do fear police raids and abuse, property seizure and loss of personal liberty.

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41 Application, p. 7, citing *Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 151 (**Exh. CLA-170**).

42 Application, p. 7.

43 Reply, p. 4, referring to Amnesty International, "Excessive Force: Impunity for Police Violence in Indonesia", p. 2 (**Exh. C-371**); Amnesty International, "Annual Report 2013: The state of the world's human rights", p. 1 (**Exh. C-372**).

d. Proportionality

35. Referring to *Paushok*, the Claimants submit that the Tribunal is called upon "to weigh the balance of inconvenience" when recommending provisional measures. Doing so, the Tribunal should only refuse such recommendation if the requested measures "impose too heavy a burden on the party against whom they are directed".[44] According to the Claimants, a deferral of the criminal investigation for another year until the Claimants' witnesses are heard at the hearing on the merits and an award is made would not disproportionately prejudice Indonesia. Indeed, the latter would only have to await the decision on the merits to commence the criminal investigations.[45]

36. In any event, a stay of the criminal investigation is of no prejudice in light of the 12 year statute of limitations applicable to document forgery under Indonesian law.[46]

2. Position of the Respondent

37. According to Indonesia, none of the grounds mentioned in the Claimants' Application justifies a modification of the Tribunal's decision in Procedural Order No. 9, which denied the Claimants' first request for provisional measures. For Indonesia, the Application is "bereft of any proper evidence" that could warrant the ordering of provisional measures.[47] In fact, the Claimants' argumentation relies on allegations and submissions "which are unsupported by the testimony of any witnesses with first-hand knowledge of the facts".[48] It remains that Indonesia has a "valid interest" in investigating the allegations of document forgery and vindicating the "legitimate interests of the Republic", while the Claimants remain unable to meet their "heavy burden" to show that Indonesia is acting in bad faith.[49]

38. More specifically, according to the Respondent, none of the bases for the Application justifies the issuance of provisional measures. These bases are the following: (i) the police raid of PT ICD's premises on 29 August 2014, (ii) the issuance of a summons to

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44 Reply, p. 10, referring to *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, ¶ 79 (**Exh. CLA-186**).

45 Reply, p. 11.

46 *Id.*

47 Response, p. 1.

48 Rejoinder, p. 1.

49 Response, p. 2.

two PT ICD employees to provide testimony, and (iii) the alleged classification of Mr. Benjamin as a "formal suspect".

39. First, the Respondent advances that the police raid "cannot, by itself, be characterized as abusive, harassing or 'strong-arm tactics'". On-site searches, carried out on the basis of warrants without prior notice, are a common tool in any criminal legal system to gather potentially relevant evidence. Through their silence, the Claimants tacitly accepted as much. In any event, there is no evidence of any employee of PT ICD or witness in these proceedings complaining of any misconduct of the Indonesian authorities.

40. The Respondent notes that the search was conducted pursuant to a warrant and the minutes indicate that PT ICD would receive in return any irrelevant document.[50] In fact, in response to a request of the Minister of Law and Human Rights, the police confirmed on 12 September 2014 that they would return any irrelevant documentation to PT ICD as appropriate. Hence, Indonesia submits that there is no reason for concern "that Claimants will be unable to utilize in this Arbitration any of the documents taken from PT ICD's office during the search by the police on 29 August 2014".[51]

41. As to the scope of the documents and materials seized by the police, the Minutes of Confiscation and Receipt show that "(i) the documents seized by the police were the Ridlatama Companies' documents (including those in various folders, based on their titles, notwithstanding that their exact content was unknown at that time), and (ii) external hard disk and CPU".[52] What is more, the Claimants do not allege that the seizure of those documents "has deprived them of any evidence necessary for this Arbitration that is not available elsewhere".[53] Indeed, for Indonesia, the Claimants have been on notice for over a year of the envisaged criminal investigations. It is therefore "hard to believe that Claimants have not copied long ago, and moved out of Indonesia, all documents of any conceivable relevance to this Arbitration".[54] In any event, the Claimants themselves acknowledge that some of the seized documentation has already

50 Response, p. 2.
51 Response, p. 3.
52 Rejoinder, p. 4.
53 Rejoinder, p. 4.
54 Rejoinder, p. 4.

been returned; they now only complain about the remaining computer equipment and hard drives.

42. As to the timing, the Claimants are wrong to claim that the raid was orchestrated to coincide with the document inspection that took place in Singapore on the same day. Indeed, Indonesia insists that "[b]oth counsel and the officials representing the Republic in this Arbitration first learned of the police action when Claimants served the Request on 2 September 2014".[55] Furthermore, the Claimants fail to explain how Indonesia would have benefitted from orchestrating such a raid.[56] In any event, the Claimants' charge is meritless and "defies logic", since Indonesia was pressing since mid-May to organize a document inspection phase over the Claimants' "vehement objections". In reality, with the document inspection ordered by the Tribunal, Indonesia needed no additional evidence to demonstrate the forgery of the mining licenses. In sum, the police raid "served no purpose or advantage to Respondent's position", especially in light of the risk of having to face a renewed application for provisional measures from the Claimants.[57]

43. The Respondent further opposes the Claimants' argument that the absence of any raid at the Ridlatama offices shows that Indonesia seeks to circumvent the document disclosure phase in these proceedings.[58] It is only logical that the premises of Ridlatama were not raided. Indeed, according to Mr. Benjamin's witness statement, "all of the licenses secured by the Ridlatama Companies were stored at the PT ICD offices".[59] Furthermore, it may well be that Ridlatama officials pointed the police to the premises of PT ICD during one of the police interviews.

44. Coming now to the second basis of the Application, the Respondent observes that the summoning of PT ICD's employees to testify "also is entirely proper". Even the Tribunal itself foresaw this possibility in Procedural Order No. 9.[60]

45. With respect to the third basis of the Application, Indonesia asserts that Mr. Benjamin was not classified as a formal suspect. In this regard, the Claimants rely on a mistranslation of the word ***diduga*** found in the summons handed to Mses. Nurmalia and

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55 Response, p. 2; Rejoinder, p. 2.
56 Rejoinder, p. 2.
57 Rejoinder, p. 3.
58 Rejoinder, p. 3.
59 Rejoinder, p. 3.
60 Response, p. 3.

Paustina. According to Indonesia, the correct translation of the word ***diduga*** is "assumed", not "suspected" as argued by the Claimants. In Bahasa, the word ***tersangka*** means "suspect" and the word ***disangka*** means "suspected". This is further corroborated by the use of the word ***tersangka*** for the word "suspect" in the Indonesian Criminal Procedure Law.[61]

46. The Respondent also stresses that the Claimants have failed to submit a witness statement of Mr. Benjamin evidencing "a change in his status", as required by law.[62] Mr. Benjamin did not either indicate that he has been subjected to "any instances of alleged pressure or intimidation".[63] In this regard, Indonesia submits that by choice or otherwise the "Claimants have left the Tribunal without any evidence supporting their extreme, and irresponsible, charges".[64]

47. Finally, Indonesia reiterates that in light of his own testimony Mr. Benjamin's role is in any event crucial in the criminal investigation on the forgery allegations. Mr. Benjamin, "more than anyone else at PT ICD, would have highly relevant information" on how the alleged forgery occurred. Accordingly, Mr. Benjamin cannot be "artificially cordoned off from the police investigation".[65] In any event, even if the Indonesian police ultimately classifies Mr. Benjamin as a formal suspect – which Indonesia insists has not happened – such a classification alone would not lead to criminal prosecution, which requires a review by a prosecutor. Hence, neither a change of status nor the initiation of criminal proceedings "would necessarily be an automatic trip wire for action".[66]

48. Turning to the legal requirements for the recommendation of provisional measures, Indonesia submits that ICSID tribunals uniformly agree that the imposition of provisional measures "is an extraordinary remedy that should not be granted lightly".[67]

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61 Response, p. 3, referring to Law of the Republic of Indonesia Number 8 Year 1981, Chapter 1, Article 1 (**Exh. RLA-126**).

62 Rejoinder, p. 5, pointing to Regulation of the Head of Police of the Republic of Indonesia No. 14 Year 1012 concerning Management of Criminal Offence Investigation, Articles 1, 70 (**Exh. RLA-168**).

63 Response, p. 3.

64 Response, p. 3.

65 Rejoinder, p. 6.

66 Rejoinder, p. 6.

67 Rejoinder, p. 6, referring to *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited*, ICSID Case No. ARB/98/8, Decision on the Respondent's Request for Provisional Measures, 20 December 2009 (**Exh. RLA-139**); *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 10 on Security for Costs, 18 June 2012, pp. 2-3 (**Exh. RLA-151**).

Where evidence is lacking to show that provisional measures are indeed urgent and necessary, provisional measures must be denied.

a. Rights for which protection is requested

i. The right to the preservation of the status quo and non-aggravation of the dispute

49. For the Respondent, the steps taken by its police, namely the seizure of potentially relevant evidence and the questioning of witnesses, "are normal investigative techniques" that do not alter the *status quo* or aggravate the dispute.[68] While the Claimants complain that two of PT ICD's employees have been questioned for "days on end", they fail to point to a single instance of pressure, intimidation or threats directed towards them. The same applies to Mr. Benjamin, who – says the Respondent – is no longer a PT ICD employee and remains a simple witness in the criminal investigation. Nor can the Claimants make the case that the seizure of documents of the Ridlatama companies effectively alter the *status quo* or aggravate the dispute.

50. Contrary to the Claimants' assertions, *Lao Holdings* does not assist their case, as Laos had agreed to refrain from pursuing ongoing criminal investigations. That tribunal denied Laos' request to reinstate those criminal investigations because such investigations would have been too disruptive shortly before the hearing date in the arbitration. These facts are not analogous to the present instance, since Indonesia "has never consented to suspend or refrain from initiating a criminal investigation of the forged and fabricated Ridlatama mining undertaking licenses".[69] Here, the "decision to delay criminal investigations was reversed only after Claimants' counsel affirmatively questioned the *bona fides* of the forgery allegations at the hearing in May 2013".[70]

ii. The right to the procedural integrity of the arbitration proceedings

51. The Respondent underlines that the Claimants do not negate Indonesia's right to conduct a criminal investigation, as they did in their application of 27 March 2014. They now

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68 Rejoinder, p. 7.
69 Rejoinder, p. 8.
70 Rejoinder, p. 8.

solely focus on the timing.[71] However, neither the argument that the criminal investigation is disruptive and constitutes a diversion of the Claimants' resources, nor the argument that the criminal investigation deters the Claimants' witnesses and potential witnesses from giving evidence, have any merit.

52. First, according to the Respondent, the Claimants did not show any concern for cost when opposing the Respondent's request for document inspection or when filing a second application for provisional measures "on the basis of plainly insufficient evidence".[72] And now again, the Claimants employ the same tactics to oppose the expedited resolution of the forgery issue.

53. Second, regarding the alleged chilling effect of the criminal investigation on the willingness of the Claimants' witnesses, the Claimants' argument fails for lack of evidence of abuse, mistreatment or harassment. No witness has stated his or her unwillingness to testify in the present proceedings out of fear of prosecution.[73]

54. As noted in *Quiborax*, arbitral tribunals cannot prohibit a State from conducting criminal proceedings, since these proceedings fall outside the scope of ICSID's jurisdiction. It is "a right and a responsibility of the State" to conduct such proceedings.[74]

55. On this basis, Indonesia warns that the Tribunal "must take care to avoid overstepping the bounds between the proper exercise of the jurisdiction it has asserted and the legitimate interests of the Indonesian authorities in enforcing the criminal laws of the land".[75]

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71 Rejoinder, p. 9.
72 Rejoinder, p. 9.
73 Rejoinder, p. 9.
74 Rejoinder, pp. 9-10, citing *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision regarding Claimant's Application for Provisional Measures, 31 July 2009, ¶ 137 (**Exh. RLA-133**); *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 13, 27 September 2012, ¶ 39 (**Exh. RLA-169**); and referring to *Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/02, Decision on Provisional Measures, 26 February 2010, ¶ 129 (**Exh. CLA-170**).
75 Rejoinder, p. 9.

b. Urgency

56. For the Respondent, the burden of showing that provisional measures are urgent falls on the requesting party "and, where evidence is lacking, provisional measures must be denied".[76]

c. Necessity

57. Like for the requirement of urgency, the Respondent submits that the burden of showing irreparable harm rests on the Claimants and that the latter failed to discharge their burden.[77]

58. To sum up on the requirements of urgency and necessity, the Respondent contends that, in the absence of proof of actual threats or fears, the alleged breach of the procedural integrity of the arbitration or the alleged change of the *status quo* "remain speculative and hypothetical". There is thus no urgency or necessity to recommend any provisional measures.

d. Proportionality

59. Although the Claimants have not met their burden of showing urgency and necessity, they continue to argue that the requested measures would not disproportionately burden Indonesia. This is incorrect, since any third-party effort to delay the criminal investigation "would be detrimental to its progress because it would sideline the existing investigative team, risk the loss of witnesses or documents and prolong an already long delayed inquiry, all making an ultimate prosecution more challenging".[78] Furthermore, it is unlikely that a stay of the criminal investigation for a year would change the position of witnesses testifying on behalf of the Claimants.

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76 Rejoinder, p. 7, further directing the Tribunal to the Respondent's prior submissions on the legal requirements for provisional measures, *see* Respondent's Response dated 25 April 2014, n. 62; Respondent's Rejoinder dated 27 May 2014, ¶¶ 24-63.

77 Rejoinder, p. 7.

78 Rejoinder, p. 10.

III. ANALYSIS

1. Legal Framework

60. Article 47 of the ICSID Convention and Rule 39 of the 2006 ICSID Arbitration Rules empower the Tribunal to recommend provisional measures. Article 47 of the ICSID Convention reads as follows:

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

61. Rule 39 of the ICSID Arbitration Rules provides in relevant parts the following:

> (1) At any time after the institution of the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
>
> (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
>
> (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.
>
> (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.
>
> […]

2. Requirements for Provisional Measures

62. Rule 39 of the ICSID Arbitration Rules requires a request to specify "the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures". ICSID tribunals have interpreted these requirements to mean that provisional measures must (i) serve to protect certain rights of

the applicant, (ii) be urgent, and (iii) be necessary, which implies the existence of a risk of irreparable or substantial harm.[79]

63. While these requirements are undisputed, the Parties disagree on their fulfillment in the present circumstances. Specifically, they disagree on whether the rights for which protection is sought are affected (a. below) and whether the measures requested are urgent (b. below) and necessary (c. below).

64. The Tribunal recalls that the applicant must establish the requirements with sufficient likelihood, without however having to actually prove the facts underlying them. It also notes that its assessment is necessarily made on the basis of the record as it presently stands. Hence, any findings and conclusions are without prejudice to a different assessment at a later stage.

a. Existence of Rights Requiring Preservation

65. The Claimants contend that (i) their right to the preservation of the *status quo* and the non-aggravation of the dispute and (ii) their right to the procedural integrity of the arbitration, require protection by way of provisional measures.

66. Before addressing these contentions, the Tribunal recalls that in their first request for provisional measures, the Claimants alleged that the initiation of criminal proceedings against the Ridlatama companies (i) threatened the exclusivity of the proceedings, (ii) altered the *status quo* and aggravated the dispute, and (iii) impaired the procedural integrity of these proceedings. In light of the circumstances prevailing at the time, the Tribunal in Procedural Order No. 9 denied the request, *inter alia*, on the grounds that the record showed no undue pressure or intimidation against the Claimants or their witnesses and that the alleged impairment of the Claimants' procedural rights remained speculative and hypothetical. The Tribunal noted, however, that its finding could be revised if the circumstances were to change.

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[79] *See Plama Consortium Limited v. Republic of Bulgaria*, Order, 6 September 2005, ¶ 38 (**Exh. CLA-172**); *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 51 (**Exh. CLA-173**); *Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/02, Decision on Provisional Measures, 26 February 2010, ¶ 113 (**Exh. CLA-170**); *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Claimants' Application for Provisional Measures, 2 March 2011, ¶ 12.

i. The right to the preservation of the status quo and non-aggravation of the dispute

67. The Claimants argue that the circumstances have clearly changed since the issuance of Procedural Order No. 9 and that there is now a "clear and imminent threat" to the *status quo*.[80] According to them, the ongoing criminal investigation "strikes directly at the Claimants and the people and issues involved in this arbitration".[81] More specifically, the Claimants recall that Indonesia's lead counsel made "explicit threats" of criminal investigation against the Claimants, their witnesses and employees, as well as "a clear and direct threat" against Mr. Benjamin.[82] While in Procedural Order No. 9 the Tribunal held that there was no element on record evidencing any pressure or intimidation, that situation has changed in light of (i) the raid on PT ICD's premises, (ii) the seizure of documents and computer hard drives, (iii) the intimidation of two of PT ICD's employees *inter alia* through questioning by police "for days on end", and (iv) the fact that Mr. Benjamin has been labeled a "suspect".

68. For the Claimants, these acts are "intimidatory and abusive behaviour" that crosses the line into "forbidden territory of using the process of the criminal law to obtain an unfair advantage" in this arbitration, which also aggravates "the inequality of arms between the parties".[83] In sum, these recent actions are part of a "campaign of intimidation, harassment, and undue pressure and influence" against the Claimants and their witnesses.[84]

69. Indonesia responds that no change of circumstances warrants a modification of Procedural Order No. 9. The record does not support the Claimants' allegation that the *status quo* has been altered or that the dispute has been aggravated. The police raid, the seizure of documents and the interrogation of witnesses are "normal criminal investigative techniques" common to all legal systems around the world. Without more, they cannot be labeled as abusive or harassing.[85] In any event, the Claimants have not argued that the raid was conducted in breach of Indonesian law.

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80 Claimants' letter to the Tribunal, 26 September 2014, p. 1.
81 Claimants' letter to the Tribunal, 26 September 2014, p. 7.
82 *Ibid*.
83 *Id.*, p. 8.
84 *Ibid*.
85 Respondent's letter to the Tribunal, 15 September 2014, p. 2; Respondent's letter to the Tribunal, 6 October 2014, p. 7.

70. Indonesia further submits that the Claimants fail to cite any instance of pressure, intimidation or threats aimed at the two employees of PT ICD or any other employee. They also fail to mention any mistreatment of Mr. Benjamin, who is a witness in the ongoing investigation and not a suspect as the Claimants now allege. Furthermore, the seizure of the documents of the Ridlatama companies has caused no adverse impact to the Claimants.

71. It is well settled that provisional measures may be recommended to protect the rights to the *status quo* and to the non-aggravation of the dispute, which are self-standing rights vested in any party to ICSID proceedings.

72. At the outset, the Tribunal stresses that the right, even the duty, to conduct criminal investigations and prosecutions is a prerogative of any sovereign State. By way of consequence, ICSID tribunals have rightly held that when it comes to criminal proceedings "a particularly high threshold must be overcome" before an ICSID tribunal can recommend provisional measures.[86] An allegation that the *status quo* has been altered or that the dispute has been aggravated needs to be buttressed by concrete instances of intimidation or harassment. On the basis of the record as it presently stands, the Tribunal is of the view that the Claimants have not met the burden of establishing conduct of this nature.

73. First, the Claimants conceded at the hearing that the raid was conducted in accordance with Indonesian law. It is indeed common practice in criminal law systems to conduct on-site searches and to seize relevant evidence for the purpose of a criminal investigation during these searches. Obviously, procedural safeguards must be respected. In this latter regard, the Claimants admit that PT ICD's employees were shown a warrant prior to the search, received Minutes of Confiscation and Receipt listing the documents seized,[87] and were served a summons to appear for questioning by the police.[88] There is no indication

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86 *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision regarding Claimant's Application for Provisional Measures, 31 July 2009, ¶ 137 (**Exh. RLA-133**).

87 Minutes of Confiscation (**Exh. C-379**); Receipt (**Exh. C-380**).

88 Summon Letter (Ms. Nurmalia) of the Criminal Investigation Division of the Police of the Republic of Indonesia, No.: S.Pgl/2111/IX/2014/Dit Tipidum, 1 September 2014 (**Exh. C-377**); Summon Letter (Ms. Maria Anna Paustina) of the Criminal Investigation Division of the Police of the Republic of Indonesia, No.: S.Pgl/2112/IX/2014/Dit Tipidum, 1 September 2014 (**Exh. C-378**).

that these procedures were irregular. There is no showing either of malfeasance or other abusive behavior on the part of the Indonesian authorities in this context.

74. Second, the Claimants state that documentation and computer material seized was not returned to PT ICD. The Claimants also note that they made "several requests" to the Indonesian police to have essential computer equipment returned (albeit in order to progress on the document translations requested by the Tribunal until 27 August 2014). Yet, the Tribunal observes that there is no evidence of such requests to the police (nor of any refusals for that matter). In this connection, the Tribunal notes the Respondent's commitment that "PT ICD will be given the opportunity to review and take copies of any relevant documents that are not returned",[89] which the Tribunal understands to extend to the seized computer equipment and hard drives.

75. While the Tribunal is mindful of the Claimants' right to present their case, it has not been shown that the Claimants have been deprived of relevant evidence. This is particularly so considering the Respondent's commitment referred to above. Obviously, this assessment could change if that commitment is not kept within reasonable time, and access to relevant evidence is effectively barred.

76. Third, there is no indication either that Mses. Nurmalia and Paustina have been intimidated and harassed by the Indonesian police during the police raid at PT ICD's premises on 29 August 2014 or during the police interrogation that took place on 3 September 2014. The fact that Mses. Nurmalia and Paustina are junior secretarial staff does not shield them from a legitimate police investigation, even if they were not employed at the time when the disputed documents were allegedly forged. Hence, in the absence of other factors, the fact that Mses. Nurmalia and Paustina were summoned to a police interrogation does not appear objectionable. While it is true that any police raid may negatively impress those who are subject to it, that does not in and of itself mean that improper methods were used.

77. Finally, regarding Mr. Benjamin, no concrete element of intimidation or harassment has been brought to the attention of the Tribunal that could warrant provisional measures. While fears and concerns deriving from an ongoing criminal investigation may be

89 Respondent's letter to the Tribunal, 15 September 2014, pp. 2-3.

understandable, it is not sufficient to allege, without more, that the possibility of being the target of a criminal investigation is intimidatory to obtain protection through provisional measures.

78. Another argument turns on the alleged change of status of Mr. Benjamin from a "witness" to a "suspect". The Tribunal need not enter into the semantic discussion on the word ***diduga*** contained in Article 1(14) of Indonesia's Criminal Procedure Law.[90] It only notes, on the one hand, that the Claimants concede that Mr. Benjamin has not been served with a notice of a change of status and, on the other, that Indonesia has explicitly represented that Mr. Benjamin is a witness and not a suspect. Accordingly, the Tribunal sees no change of circumstances with respect to Mr. Benjamin.

79. In this context, the Tribunal stresses that even if Mr. Benjamin were a suspect in the criminal investigation, this would not justify provisional measures in and of itself, failing a showing of intimidation, harassment or malfeasance. In this sense, the situation here must be distinguished from the one in *Quiborax*, where one of the witnesses was effectively neutralized through the local criminal proceedings and thus prevented from testifying in the arbitration.[91]

80. Finally, the Claimants' reliance on *Lao Holdings N.V.* is of little assistance in the present circumstances.[92] In contrast to the present case, the Lao government sought leave by the tribunal to resume a criminal investigation that it had previously voluntarily stayed. The tribunal held that a resumption of the criminal investigation several weeks before the evidentiary hearing would be disruptive and that the proposed course of action amounted to a "change of tactics" designed to obtain an advantage in the arbitration.[93]

81. That said, the Tribunal is mindful of the Claimants' argument that Indonesia may obtain an unfair advantage in the present proceedings by gathering evidence through investigative techniques applicable under its criminal procedure law, thus circumventing the document production procedure available to the Parties in this arbitration. While it

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90 Indonesian Code of Criminal Procedure, Act No. 8/1981 (**Exh. CLA-189**); Law of the Republic of Indonesia Number 8 Year 1981 (**Exh. RLA-126 updated**).

91 *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 144 (**Exh. CLA-170**).

92 *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order, 30 May 2014 (**Exh. CLA-196**).

93 *Id.*, ¶¶ 40, 49.

takes note of Indonesia's statement that it has all the evidence necessary on the forgery and does not need to obtain additional proof by way of the criminal investigation, the Tribunal is also aware that Indonesia is currently in possession of documentation and hard drives obtained through the raid of 29 August 2014. It can thus not rule out that Indonesia may seek to file evidence into the record obtained through the criminal investigation.

82. According to Rule 39(2) of the Arbitration Rules, the Tribunal may recommend provisional measures on its own initiative or recommend measures other than those specified in the Application. To avoid that the risk mentioned above materializes, the Tribunal is of the view that the Respondent should seek leave from the Tribunal before introducing evidence which it has obtained or will obtain through the criminal investigation conducted on the allegation of forgery. This recommendation is meant to avoid any unfair advantage and level the playing field between the Parties. It will in particular allow the Tribunal to hear any objection the Claimant may have with respect to the evidence at issue. Moreover, if the Tribunal admits the evidence, it will assess its evidentiary value taking all the circumstances into account, including its source. Similarly, the Tribunal takes due notice of the Respondent's commitment set out in paragraph 74 above. If the Claimants were to be refused copies of any documents covered by this commitment that may contain relevant evidence in support of the Claimants' case, they may apply for directions from the Tribunal.

ii. The right to the procedural integrity of the arbitration proceedings

83. For the Claimants, Indonesia's conduct poses an immediate threat to the procedural integrity of these proceedings, in particular in light of the direct connection between Indonesia's conduct and developments in these proceedings and the timing of Indonesia's conduct. The ongoing criminal investigation is not only disruptive and diverts resources, it also works as a "powerful deterrent to the Claimants' witnesses and potential witnesses to give evidence contrary to Indonesia's position".[94] The factual scenario is now "highly analogous" to the one in *Quiborax.* Moreover, Indonesia's conduct places an "intolerable pressure" on the Claimants and their witnesses and potential witnesses, since the Claimants still have a presence in Indonesia through PT

94 Claimants' letter to the Tribunal, 26 September 2014, p. 9.

ICD, and the targets of the criminal investigation, in particular Mr. Benjamin and other employees of PT ICD, are residing in Indonesia together with their families.

84. For the Respondent, none of the Claimants' arguments have any merit. The Claimants' concern for costs is contradicted by the efforts they expended to oppose the document inspection, to make a second application for provisional measures, or to oppose the swift resolution of the forgery issue. Furthermore, the Claimants provided no statements of current witnesses demonstrating that they refused to testify out of fear of prosecution. In any event, ICSID arbitration does not confer "automatic immunity" from criminal proceedings, which fall outside of the jurisdiction of ICSID and this Tribunal.

85. It is common ground that the right to the procedural integrity of the arbitration proceedings may find protection by way of provisional measures. The Parties disagree, however, on the existence of a threat to such integrity created by the Respondent's conduct in connection with the police raid. On the one hand, the Claimants contend that the timing of the raid shows the direct link with the developments in the present proceedings. On the other hand, the Respondent insists and "unequivocally confirms" that neither the Respondent's counsel nor Government officials representing the Respondent in these proceedings knew of the police raid until the Claimants filed their Application on 2 September 2014. The Respondent further denies that the Minister of Law and Human Rights in any way orchestrated the police raid or the timing of that action.

86. While it is true that the timing of the raid is remarkable, the Tribunal fails to discern an element allowing it to connect the raid to the latest developments in these proceedings. There is certainly an inherent element of disruption with police raids, as they are usually conducted without prior notice. This being so, the Claimants do not allege that the police raid was conducted in breach of Indonesian law. Beyond that, the Tribunal takes note of Indonesia's representation that neither counsel nor Government officials representing Indonesia in this arbitration were aware of the police raid when it took place. Furthermore, the Tribunal notes the Respondent's statement that it already has the necessary evidence to substantiate its forgery allegations in the present proceedings. As a result, the Tribunal cannot conclude that the police raid of 29 August 2014 threatens the procedural integrity of this arbitration.

87. Nor does the Tribunal believe that that particular raid or the subsequent interrogation of Mses. Nurmalia and Paustina amounted to abusive behavior able to exert such a chilling effect on the Claimants' witnesses and potential witnesses so as to prevent them from testifying against the Respondent in the present proceedings. Again, without any concrete element of intimidation, harassment or otherwise abusive behavior, and failing evidence from any potential witnesses, the present situation does not suffice to justify provisional measures. In this sense, *Quiborax* must be distinguished to the extent that it involved a concrete case of intimidation of one of the claimants' witnesses that had been silenced and prevented from testifying in favor of the claimants in the arbitration. There is no trace of such abusive behavior in the present case.

b. Urgency

88. While the Parties agree on the requirement of urgency, they have divergent views as to whether it is met here. The urgency requirement is met by definition where a procedural right worthy of protection is impaired or imminently risks to be impaired.

89. The Tribunal held above that (i) the police raid, (ii) the seizure of documents and other materials, (iii) the summoning and interrogation of Mses. Nurmalia and Paustina, and (iv) the mention of Mr. Benjamin on the summons were insufficient in the circumstances to jeopardize the rights for which the Claimants seek protection by way of provisional measures. Hence, the urgency requirement cannot be deemed fulfilled on these counts.

90. By contrast, the Tribunal is of the view that the urgency requirement is fulfilled regarding the risk that Indonesia may gain an unfair advantage in the present proceedings by using evidence obtained in the criminal investigation without seeking prior leave by the Tribunal (see above paragraphs 81-82).

c. Necessity

91. For the same reasons as stated above, the Tribunal is of the view that there is no risk of irreparable harm that cannot be made good through an award on damages, except if the Respondent were allowed to put in the record evidence gathered through its criminal investigation without first seeking leave by the Tribunal as specified in paragraph 82 above.

d. Final Observations

92. The Tribunal again stresses the Parties' general duty, which arises from the principle of good faith, not to take any action that may aggravate the dispute or affect the integrity of the arbitration.

93. Finally, the Respondent requests the Tribunal to award it the costs associated with the Claimants' Application, including its legal and administrative fees and expenses, as well as those of the Tribunal.[95] Considering that it was not unreasonable under the circumstances to file the Application and in line with the practice adopted in earlier decisions and orders, the Tribunal will reserve the issue of costs for a later determination.

IV. ORDER

94. On this basis, the Arbitral Tribunal issues the following decision:

(1) Denies the Claimants' Application, as amended, for provisional measures;

(2) Orders the Respondent to request leave from the Tribunal before filing any evidence obtained by way of the criminal investigation into the alleged forgery issue;

(3) Takes due note of the Respondent's commitment set out in paragraph 74 above;

(4) Reminds the Parties of their general duty arising from the principle of good faith not to take any action that may aggravate the dispute or affect the integrity of the arbitration;

(5) Costs are reserved for a later decision or award.

95 Respondent's letter to the Tribunal, 6 October 2014, p. 11.

On behalf of the Tribunal

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Gabrielle Kaufmann-Kohler
President of the Tribunal
Date: 22 December 2014