

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

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Mr. Michael Hwang S.C., Arbitrator
Professor Albert Jan van den Berg, Arbitrator

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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

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

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

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

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

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.

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

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

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

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

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

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.

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.

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.

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

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

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

[Signed]

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