

# International Centre for Settlement of Investment Disputes

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**Caratube International Oil Company LLP & Mr. Devincci Salah  
Hourani**  
The Claimants

v.

**Republic of Kazakhstan**  
The Respondent

ICSID Case No. ARB/13/13

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## **DECISION ON THE CLAIMANTS' REQUEST FOR PROVISIONAL MEASURES**

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Rendered by the Members of the Arbitral Tribunal

Dr. Laurent Lévy, President  
Prof. Laurent Aynès, Arbitrator  
Dr. Jacques Salès, Arbitrator

*Secretary of the Tribunal*  
Ms. Milanka Kostadinova

*Assistant to the Tribunal*  
Dr. Silja Schaffstein

Date: 4 December 2014

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## I. THE PARTIES

1. The Claimants are Caratube International Oil Company LLP ("**Caratube**"), a Kazakh-incorporated company, and Mr. Devincci Salah Hourani, a U.S. national (jointly "**the Claimants**").<sup>1</sup>
2. The Respondent is the Republic of Kazakhstan ("**Kazakhstan**" or "**the Respondent**").

## II. PROCEDURAL HISTORY

3. On 5 June 2013, the Claimants submitted a Request of Arbitration against the Respondent (the "**Request of Arbitration**") to the International Centre for Settlement of Investment Disputes ("**ICSID**").
4. On 28 June 2013, the Secretary-General of ICSID registered the Request of Arbitration pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 18 March 1965 (the "**ICSID Convention**").
5. The Tribunal was constituted on 7 January 2014, in accordance with the ICSID Convention and the ICSID Arbitration Rules, and reconstituted on 29 April 2014, following the disqualification of an arbitrator and the subsequent appointment of Dr. Jacques Salès.
6. The first session of the Arbitral Tribunal was held on 4 June 2014 at the World Bank Paris Conference Centre. Thereafter, on 20 June 2014, the President of the Arbitral Tribunal issued Procedural Order No. 1, together with the Timetable for the present arbitration in Annex A.
7. The last issue addressed in Procedural Order No. 1 ("Other matters") recorded a concern voiced by the Claimants at the end of the first session with respect to the Respondent's conduct in the present proceedings. The Claimants expressly reserved their right to request provisional measures. The relevant paragraph of Procedural Order No. 1 states as follows:

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<sup>1</sup> Request of Arbitration dated 5 June 2013, para. 1, p. 3.

*At the end of the first session, counsel for the Claimants raised expectations that the Republic of Kazakhstan would not interfere indirectly in the proceedings, by way of example and without any intention to be exhaustive, by attempting to intimidate or harass any person involved or potentially involved, such as fact witnesses, expert witnesses, or party representatives. Counsel clarified that Claimants did not apply for a protective order at this time, but indicated that they might seek such an order from the Tribunal should the situation change.*

8. On 14 July 2014, the Claimants submitted a Request for Provisional Measures (the “**Request**”), together with three witness statements by Messrs. Thomas Kennedy, Yasser Mahmoud Abbas and Issam Salah Hourani.
9. On 17 July 2014, the Tribunal acknowledged receipt of the Claimants’ Request and invited the Respondent to file a response by 31 July 2014, while at the same time authorizing the Respondent to request an extension of this time limit if necessary. In the same letter, the Tribunal also invited the Parties to state (i) by 24 July 2014, which dates for a possible hearing would be convenient; and (ii) by 18 August 2014, whether a hearing in the matter would be required.
10. On 24 July 2014, the Respondent requested a two week extension for the filing of its response to the Claimants’ Request, namely until 14 August 2014.
11. On 25 July 2014, the Tribunal granted the Respondent’s request and extended the time limit to file a response until 14 August 2014. At the same time, the Tribunal informed the Parties that it had reserved Wednesday, 8 October 2014 for a possible hearing with respect to the Claimants’ Request.
12. On 14 August 2014, the Respondent submitted its Response to Claimants’ Request for Provisional Measures (the “**Response**”), together with witness statements of Mr. Andrey Nikolayevich Kravchenko and Ambassador Yerzhan Khozeyevich Kazykhanov, as well as expert reports of Professors Hadi Slim and Martha Brill Olcott.
13. On 15 August 2014, the Claimants requested an extension until 20 August 2014 of the time limit to provide the Parties’ position as to the necessity of a hearing. On 16 August 2014, the Claimants clarified that they requested such extension of the time limit not until 20 August 2014, but until 26 August 2014.

14. On 19 August 2014, the Tribunal granted the Claimants' request for an extension until 26 August 2014 for stating their position as to the necessity of a hearing.
15. On 26 August 2014, the Claimants requested that a hearing on provisional measures be held on 8 October 2014. While the Respondent considered "that the time and cost of a hearing is not warranted with respect to Claimants' request for provisional measures", it indicated that it would not object to a decision by the Tribunal ordering the taking place of such a hearing, while at the same time "reserving its right to claim reimbursement of the costs incurred by the Republic with respect to the Claimants' request".
16. On 2 September 2014, the Tribunal, *inter alia*, confirmed that a hearing on the Claimants' Request would take place on 8 October 2014 at the World Bank Paris Conference Centre.
17. On 12 September 2014, the Parties submitted a joint tentative hearing schedule for the hearing on provisional measures.
18. On 1 October 2014, the Parties provided their lists of attendees at the hearing.
19. On 8 October 2014, a hearing on the Claimants' Request took place at the World Bank Paris Conference Centre. Following the Parties' opening statements, the Tribunal heard the Respondent's fact witness, Mr. Andrey Nikolayevich Kravchenko in his capacity as Deputy Prosecutor General of the Republic of Kazakhstan, followed by the Respondent's expert witness, Professor Martha Brill Olcott.
20. On 10 October 2014, the Claimants submitted amended prayers for relief, in accordance with the Tribunal's instructions at the hearing of 8 October 2014.
21. On 16 October 2014, the Respondent submitted its comments on the Claimants' amended prayers for relief, in accordance with the Tribunal's instructions at the hearing of 8 October 2014.
22. On 13 November 2014, the Claimants, due to the urgency of the situation and having received no acknowledgement of receipt from ICSID, directly transferred to the Arbitral Tribunal an email, informing the Tribunal that a demonstration

had been held on 13 November 2014 in front of Mr. Devincci Hourani's home in Mclean Virginia, similar to the one held in London on 19 June 2014. The Claimants also advised that they would brief the Tribunal of this event in more detail shortly.

23. Following up on the 13 November email, by letter dated 16 November 2014, the Claimants provided details on the latest events, namely a gathering held on the night of 31 October/1 November 2014 in front of Mr. Devincci Hourani's home. In their letter, the Claimants stated that they "will not comment on the timing and implications of above event that reinforce Claimants' pending application for provisional measures so as not to cause delay and open further round of submissions [...]". The Claimants also specified that (i) items 2.2 and 2.3 of their amended prayers for relief should be adjusted in accordance with the latest developments; (ii) their request for moral damages would be increased in due course; and (iii) they reserve their right to seek an earlier hearing date and to waive the Reply Memorial.
24. By email dated 18 November 2014, the Claimants directly informed the Tribunal of a further demonstration held on 17 November 2014 outside Kensington Palace in London, near the Lebanese Embassy, and targeting Messrs. Devincci and Issam Hourani on the basis of allegations of murder of Ms. Anastasiya Novikova. The Claimants requested the Tribunal to adjust items 2.2 and 2.3 of their amended prayers for relief accordingly and reiterated their call for an urgent ruling on their Request for Provisional Measures.
25. Also on 18 November 2014, the Tribunal invited the Respondent to comment on the Claimants' latest correspondence by no later than 24 November 2014.
26. On 24 November 2014, the Respondent advised the Tribunal that it had requested Mr. Andrey Kravchenko, the Deputy General Prosecutor of the Republic of Kazakhstan, to conduct an enquiry as to whether the Respondent had any involvement with the events described in the Claimants' correspondence of 13, 16 and 18 November 2014. The Respondent further advised that Mr. Kravchenko would be able to submit the results of his enquiry on or before 28 November 2014 and requested a corresponding extension of their deadline to provide comments.

27. The Respondent provided its comments at midnight on 28 November 2014: Mr. Kravchenko's enquiries confirmed that the Republic of Kazakhstan "had no involvement with these new developments" and that the "Claimants have provided no evidence of any involvement of the Republic with respect thereto".
28. On 29 November 2014, the Claimants noted that they "maintain their amended requests for interim measures".
29. On 2 December 2014, the Claimants directly informed the Tribunal that the Lebanese border authorities had a few hours earlier on that same day "withheld at the Beirut airport, upon Mr. Devincci Hourani's arrival, his passport pending consideration by the Bureau of Intelligence Services of the General Security, on the basis that his name appears in their system of persons warranting investigation for murder". At the time of the Claimants' email, Mr. Hourani was still blocked at Beirut airport. The Claimants further specified that, other than informing the Tribunal of this latest event, they make "no particular requests", but "reserve their right to make all appropriate requests once further information is obtained, the situation is fully assessed, and the decision of the Tribunal on provisional measures issued [...]".

### **III. RELIEF SOUGHT BY THE PARTIES**

#### **A. Relief Sought by the Claimants**

30. In their Request (para. 82, pp. 26-27), the Claimants request the Arbitral Tribunal to order the Republic of Kazakhstan to:

*82.1. Disclose any role it had, whether as direct or indirect funder or instigator, as well as all associated internal and external documents (be it emails, letters, memos, notes, minutes, invoices, instructions and the like), in relation to the two websites, [www.justicefornovikova.com](http://www.justicefornovikova.com) and [www.rakhataliyev.com](http://www.rakhataliyev.com), the "protests" that occurred in London on June 19, 2014, including correspondence with the company Envisage Promotions Ltd. and/or any other company, individual or the like and to take all measures required for the immediate closure of these websites;*

*82.2. Justify the fierceness and timing of the prosecution by Kazakhstan of the allegations of murder against the Houranis and the associated lobbying before Lebanese authorities,*



*including Ministers, prosecutors and ambassadors regarding the investigations relating to the death of Ms. Anastasya Novikova, which were closed multiples times;*

*82.3. Undertake that Kazakhstan will refrain from taking any direct or indirect measures or any action that would aggravate the dispute and/or jeopardize the integrity and the legitimacy of this arbitration and the equality of the Parties, including any assault or the like or threats and intimidation against the Hourani family and any potential witnesses and their families, including Messrs. Issam Hourani, Omar Antar, Kassem Omar, Hussam Hourani, and Nader Hourani (Mr. Devincci's cousin) and Ms. Hiam Hourani (Mr. Devincci's sister); and*

*82.4. Undertake that Kazakhstan comply with the fundamental principle of the presumption of innocence of the Hourani family and of the prohibition of unlawful attacks on one's honor and reputation, and refrain from taking any direct or indirect measures or any action that would violate these principles, including but not limited to refraining from directly or indirectly organizing, instructing, funding, encouraging and/or the like of protests, articles, books, and websites alleging murder perpetrated by Hourani family.*

31. At the hearing on provisional measures of 8 October 2014, upon invitation by the President of the Tribunal (see Transcript, p. 2, lines 5-17), the Claimants applied to amend their prayer for relief (see Transcript, p. 30, line 3 to p. 31, line 12). On 10 October 2014, the Claimants confirmed the amendment of their prayers for relief in writing, in accordance with the Tribunal's instructions at the close of the hearing (see Transcript, p. 181, lines 14-19), in the following terms:

*Claimants request the Arbitral Tribunal to order to Republic of Kazakhstan to:*

*2.1. Withdraw as "partie civile" from the criminal proceedings launched with Ms. Novikova's family on July 24, 2012 against three (i.e. Messrs. Issam, Devincci and Hussam Hourani) out of the four (being Mr. Rakhat Aliyev) persons specifically accused of the murder of Ms. Novikova, and cease any direct or indirect interference with or before the Lebanese authorities in relation to these criminal proceedings, unless expressly required by the Lebanese judges in relation to Kazakhstan's status as "partie civile," including encouraging directly or indirectly, be it financially or otherwise, members of the family of Ms. Novikova or any third parties to initiate, maintain or provide testimonies in the criminal proceedings against the Hourani family, until a Final Award is rendered, or to order any other measures that the Tribunal deems appropriate.*

*2.2. Proceed with investigations, before all organs of the State, including the KNB, the Prosecutor General's Office, and the Ministry of Interior in relation to their direct or indirect involvement with the websites (www.justicefornovikova.com and www.rakhataliyev.com) and the demonstrations carried out in London on June 19, 2014 against the Hourani family and to report as soon as possible in writing to the Tribunal as to the conclusions:*

- If Kazakhstan confirms that the State has direct or indirect involvement with the websites and the demonstrations, ORDER Kazakhstan to take all the measures for the immediate closing of all the websites;*
- If Kazakhstan finds that the State has no direct or indirect involvement therewith, ORDER Kazakhstan (i) to make a declaration that Kazakhstan has no involvement in the websites or the demonstration held in London on June 19, 2014, and that it condemns these acts as being in violation of the presumption of innocence, for Mr. Devincci Hourani to use if and when appropriate and (ii) to make all necessary investigations to find out who is at the origin of same, including with Ms. Novikova's family, who Kazakhstan has access to, and to take every measure necessary so that the instigators and/or authors of these websites and demonstrations cease the same;*

*2.3. Undertake that Kazakhstan will refrain from taking any direct or indirect measures or any action that would aggravate the dispute and/or jeopardize the integrity and the legitimacy of this arbitration and the equality of the Parties, including any assault or the like or threats and intimidation against the Hourani family and any potential witnesses and their families, including Messrs. Kassem Omar, Hussam Hourani, and Nader Hourani (Mr. Devincci's cousin) and Ms. Hiam Hourani (Mr. Devincci's sister);*

*2.4. Undertake that Kazakhstan comply with the fundamental principle of the presumption of innocence of the Hourani family and of the prohibition of unlawful attacks on one's honor and reputation, and refrain from taking any direct or indirect measures or any action that would violate these principles, including but not limited to refraining from directly or indirectly organizing, instructing, funding, encouraging and/or the like of protests, articles, books, and websites alleging murder perpetrated by Hourani family; and*

*2.5. To order any other measures that the Tribunal deems appropriate, including any variations to the above requested orders.*

32. As mentioned in paragraphs 23 and 24 above, the Claimants have requested the Tribunal to adjust their amended prayers for relief, taking into account the latest developments reported in the Claimants' correspondence of 13, 16 and 18 November 2014.

#### **B. Relief Sought by the Respondent**

33. In its Response (paras 100-102, p. 39), the Respondent requests the Arbitral Tribunal:

*[...] to reject in their entirety all four of Claimants' requests for provisional measures.*

*101. The Republic further respectfully requests that it be awarded the costs it has incurred in connection with Claimants' Request, including but not limited to legal fees and expenses and expert fees and expenses.*

*102. Finally, the Republic hereby expressly reserves the right to submit any additional defenses, arguments and authorities as it may deem appropriate to supplement this Response and to respond to any allegations made by Claimants.*

34. On 16 October, the Respondent commented on the Claimants' amended requests for provisional measures (the "**Amended Requests**").
35. Preliminarily, the Respondent objects to the Claimants' last minute amending of their requests for provisional measures. For the Respondent, this last minute amendment is unjustified given the absence of new events or facts since the submission of the Respondent's Response and the failure by the Claimants to provide any, let alone any valid, reasons for this last minute amendment. For the Respondent, the Claimants amending of their requests is inconsistent with due process (Respondent's letter of 16 October 2014, p. 2).
36. The Respondent underscores that the Claimants' requests for provisional measures must not prejudice the merits of the present case. In this regard, the Respondent firmly objects to the Claimants' pleadings on the merits during the hearing of 8 October 2014 and denies the Claimants' allegations on the merits (Respondent's letter of 16 October 2014, p. 2).
37. In addition, the Respondent argues that the Claimants' Amended Requests must be rejected, essentially for the following reasons:

38. First, the Claimants have not shown that the Respondent is “currently engaging in any activity that creates an urgent necessity for provisional measures to avoid an irreparable harm”. To the contrary, the Respondent has shown that it was not involved in the launch and maintenance of the Websites, the orchestration of the Protest and the recent arrest of Mr. Aliyev in Vienna. Furthermore, it has shown that its actions with respect to the Novikova case were legitimate and in accordance with the law (Respondent’s letter of 16 October 2014, p. 2).
39. Second, concerning in particular the Claimants’ request to order the Respondent to withdraw as an interested party (“*partie civile*”) from the Lebanese criminal proceedings in the Novikova case against the Houranis and to cease any kind of international cooperation with the Lebanese authorities with respect thereto, the Respondent argues that this request does not meet the urgency requirement and is too broad. Indeed, these criminal proceedings and cooperation efforts have existed since long before the present arbitration and are entirely independent from it (Respondent’s letter of 16 October 2014, p. 2).
40. In addition, the Respondent submits that this Arbitral Tribunal should not interfere with the Respondent’s status as *partie civile* in the Lebanese criminal proceedings and the international cooperation. As was held in the *Caratube I* case, “a particularly high threshold must be overcome before an ICSID Tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a State” (Exh. CLA-18, para. 137), and this threshold is not overcome in the present case. That said, the Respondent underscores that the Hourani brothers are considered innocent until proven guilty and that they will have a full opportunity to present their case before the Lebanese courts (Respondent’s letter of 16 October 2014, pp. 2-3).
41. Third, with respect to the Claimants’ request to order the Respondent “to proceed with investigations before all organs of the State, including the KNB, the GPO and the Ministry of International Affairs” in relation to the Respondent’s alleged involvement with the Websites and the Protest and to declare that the Respondent had nothing to do with these Websites and Protest, the Respondent submits that this request is moot and too broad. The Respondent insists that Mr. Kravchenko and his office have already conducted such

investigations with the relevant organs of the Republic of Kazakhstan and such investigations have established that the Respondent was not involved with the Websites and the Protest (Respondent's letter of 16 October 2014, p. 3).

42. Concerning the other requests, the Respondent submits that "it is entirely inappropriate for an arbitral tribunal to order a nation State to conduct investigations into and make condemnations regarding matters with which it has no involvement" (Respondent's letter of 16 October 2014, p. 3).
43. Finally, in its email of 28 November 2014, in response to the Claimants' latest correspondence of 13, 16 and 18 November 2014, the Respondent "respectfully requests that all of the Claimants' Amended Requests, including those concerning [the] new demonstrations, be rejected by the Tribunal".

#### **IV. POSITION OF THE PARTIES**

##### **A. The Claimants' Position**

44. According to the Claimants, the Respondent recently (at the time of filing the Request) has increased its harassment, threats and intimidations against the Claimants and affiliates to a point of further aggravating the dispute and the Claimants' well-being, as well as jeopardizing the integrity of the present proceedings (Request, para. 1, p. 1). The Claimants' Request for Provisional Measures (see *supra*, paras 30 to 32) is based on all such alleged acts of harassment, threats and intimidations against the Claimants.

##### **1. The requirements for granting provisional measures**

45. The Claimants assert that under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, arbitral tribunals have broad powers to order "any provisional measures". Such provisional measures are not limited to substantive rights, but may include procedural rights (i.e. inducing behavior that would be conducive to a successful outcome of the proceedings such as securing discovery of evidence, preserving the parties' rights, preventing self-help, keeping the peace) (Request, para. 6, p. 2).
46. According to the Claimants, the granting of provisional measures is subject to two requirements: first, "provisional measures can only be ordered when it is

necessary to preserve the petitioner's rights"; and second, "the preservation of such rights must be urgent to prevent irreparable harm". It is the Claimants' case that "the urgency requirement is met when States attempt to pressure claimants, through various means, and aggravate the dispute in doing so" (Request, paras 8-9, p. 3; para. 78, p. 24). The Claimants acknowledge that the party applying for provisional measures must show that there is a right to be preserved by means of the provisional measures (Request, para. 3, pp. 1-2 and para. 78, p. 24). Furthermore, the Claimants also recognize that the provisional measure must not prejudice the Tribunal's finding on the merits (Request, para. 83, p. 27).

***a. The existence of a right to be preserved***

47. The Claimants seek protection of "their right to pursue their claims and the integrity of the process in this arbitration in an orderly fashion without the ongoing risk that they, or any potential witnesses on which they wish to rely to produce evidence or to provide information or documents, be exposed to further sanctions or harassment". In this respect, they invoke "the right to access evidence through potential witnesses" and the equality of the Parties (Request, para. 79, p. 24 and para. 82, pp. 26-27).
48. Furthermore, the Claimants invoke the right to be presumed innocent until proven guilty and to be protected against unlawful attacks on one's honor and reputation (Request, paras 79-80, pp. 24-25 and para. 82, p. 27).

***b. Necessity***

49. The Claimants submit that the requested provisional measures are "necessary to assist the Parties to avoid actions that might aggravate or extend the dispute, and render its resolution more difficult" (Request, para. 79, p. 24). It is the Claimants' case that the present dispute "indeed is being aggravated by the abusive exercise of Sovereign means and persecution of Claimants, and moreover, and in any event, by the violation of the principle of the presumption of innocence, and the principle of prohibition of unlawful attacks on one's honor and reputation, which must cease" (Request, para. 79, pp. 24-25).
50. In support of their Request the Claimants refer to several alleged acts of harassment and intimidation by the Respondent, including "the initiation of

criminal proceedings against members of the Hourani family, both in Kazakhstan and abroad, interrogations, searches, seizures, Interpol notices and freezing of assets of the Hourani family's businesses, including of Caratube, and the criminal prosecution of its employees" (Request, para. 42, p. 13). In particular, the Claimants rely on the Respondent's taking of the Claimants' investments and their harassment as part of the larger framework of a State campaign against Mr. Aliyev and, by extension, the Houranis. For the Claimants, the exclusive political motivations behind the taking of the Claimants' investments and their harassment are, *inter alia*, confirmed by the witness statement of Mr. Yasser Abbas, to whom President Nazarbayev reportedly confirmed this fact directly during an official visit together with the promise that the Houranis would be able to return safely to Kazakhstan and their assets fully returned in exchange for information about Mr. Aliyev (Request, paras 43-46, pp. 13-14).

51. Furthermore, the Claimants invoke the "lobbying" allegedly undertaken in Lebanon by the Respondent's highest authorities, including various Ministers, prosecutors and ambassadors, in an attempt to incriminate the Houranis and implicate them in the alleged murder of Ms. Novikova in Lebanon in 2004. In this regard, the Claimants rely in particular on (i) a letter dated 9 March 2012, in which the Lebanese Minister of Justice instructed the Public Prosecutor before the Cour de Cassation of Lebanon to provide information regarding the Novikova case to the Kazakh Delegation; (ii) a letter dated 27 March 2013, addressed by the Honorary Consul of Lebanon to the Republic of Kazakhstan to the Lebanese Minister of Foreign and Expatriate Affairs, in which the Ambassador of the Republic of Kazakhstan to Lebanon requested the Minister to take notice of the Respondent's and Ms. Novikova's mother's new claim in the Novikova matter and requested "the necessary information to pursue the claim and establish the truth"; and (iii) a letter dated 24 July 2013, transmitted by the Kazakh Embassy in Amman, Jordan to its Lebanese counterpart in Jordan, in which Mr. Kravchenko, in his capacity as Vice-Prosecutor General of the Republic of Kazakhstan, offered Kazakhstan's assistance to the Lebanese authorities in investigating the Novikova case and requested information regarding financial crimes committed by Mr. Aliyev and others. According to the Claimants, as a result of the above lobbying efforts, the Novikova case has

been reopened, after having been closed four times by the Lebanese authorities (Request, paras 48-51, pp. 14-15).

52. The Claimants also submit that, shortly before the first session in the present Arbitration, on 25 May 2014, a website was launched with the stated objective to mark the tenth anniversary of Ms. Novikova's alleged murder ([www.justicefornovikova.com](http://www.justicefornovikova.com)). This website is regularly updated (Request, para. 65, p. 20). Similarly, shortly after the first session, on 17 June 2014, another website was launched relating to Mr. Aliyev and depicting him as a "murderer, racketeer, transnational criminal, and money launderer". The website names the Hourani brothers as Mr. Aliyev's accomplices, accompanied by pictures of the latter and allegations of various crimes ([www.rakhtaliyev.com](http://www.rakhtaliyev.com)). For the Claimants, it is obvious that the websites "could only be made possible with the financial and human resources as well as the persistence of backers with ulterior motives", namely the Respondent (Request, paras 53-58, pp. 16-18).
53. In addition, the Claimants allege that on 19 June 2014, a staged protest took place in front of Mr. Issam Hourani's apartment in London, with the protesters, who were allegedly hired for this purpose and paid for, wearing masks representing the late Ms. Novikova and carrying posters and banners with photographs of Messrs. Devincti and Issam Hourani as well as Mr. Aliyev, with "Murderer" written on top. A video of the protest was thereafter posted on the above referenced website and on YouTube. It is the Claimants' position that the protest was aimed at discrediting and intimidating Messrs. Devincti and Issam Hourani and their families. The Claimants point out that such protests can be tailored and purchased in London from specialized companies (Request, paras 60-64, pp. 18-20).
54. As was seen in paragraphs 22 *et seq.*, the Claimants argue that on the night of 31 October/1 November 2014 a further demonstration took place in front of Mr. Devincti Hourani's home in Mclean Virginia, similar to the one held in London on 19 June 2014. Furthermore, another demonstration was organized on 17 November 2014 in London, near the Lebanese Embassy, which targeted Messrs. Devincti and Issam Hourani on the basis of allegations of murder of Ms. Anastasiya Novikova. In relation with these murder allegations, on 2



December 2014, Mr. Devincci Hourani was blocked at Beirut airport in Lebanon and his passport withheld.

55. The Claimants question the Respondent's motivation, perseverance and timing with respect to the matter of Ms. Novikova's death, pointing out that the case not only relates to the death in 2004 of an Uzbek national in Lebanon, with no direct links to Kazakhstan, but also that it "was closed no less than four times by the Lebanese authorities" before being reopened once again merely weeks before the Ruby Roz final hearing in early 2013 (Request, paras 26-39, pp. 8-12 and para. 66, p. 20).
56. For the Claimants, the above actions of harassment and intimidation, taking into consideration their timing, confirm the Respondent's involvement therewith and its underlying motives. This is further confirmed by the Respondent's past pattern of conduct, which includes – say the Claimants – "harassment, threats and intimidation as well as other means necessary to ensure that any interest adverse to those of Kazakhstan's ruler are crushed or neutralized" (Request, para. 12, p. 3). The Claimants draw this Tribunal's attention in particular to the Respondent's conduct in several dispute resolution proceedings initiated against the Respondent. For instance, the Claimants submit that the Respondent engaged in threats and intimidation in the *Rumeli* case, which involved the brother, daughter and son-in-law of President Nazarbayev. In this case, the Respondent allegedly exercised pressure not only against the executives of the claimants by means of initiation of criminal proceedings, but also against the professionals involved in the representation of the claimants. In particular, Professor Didenko, who had provided a legal opinion on Kazakh law in favor of the claimants before local Kazakh courts, later refused to testify in a subsequent ICSID arbitration against Kazakhstan, allegedly as a result of the pressure exercised against him by the Respondent. The Claimants observe that Professor Didenko was later retained by the Respondent as an expert on Kazakh law in the *Ruby Roz* arbitration. Around the same time, the partners in Almaty of Salans, who were representing the claimants, also suddenly refused to continue providing their assistance against the Respondent, allegedly as a result of threats received from Kazakhstan (Request, paras 16-22, pp. 4-6).

57. According to the Claimants, the same pattern of conduct - of harassment, threats and intimidation - was followed by the Respondent in arbitrations involving the Hourani family, namely in the first *Caratube* arbitration and the *Ruby Roz* arbitration (see Request, paras 23-39, pp. 6-12).
58. The Claimants submit that such acts of harassment, threats and intimidation “go beyond legitimate State prerogatives and rights”. Even if some of the Respondent’s acts are authorized *per se*, such as the initiation of criminal proceedings, the manner in which they are being pursued by the Respondent “turn them into persecution and/or an inequitable, unfair, abusive and/or unreasonable process”. Moreover, the direct accusations against the Houranis, as well as the protest and/or websites dubbing them as murderers, “which are caused, promoted, encouraged and/or funded by Kazakhstan”, violate the principles of the presumption of innocence and of the prohibition of unlawful attacks on one’s honor and reputation. Finally, other acts, such as physical threats, are intolerable (Request, para. 68, p. 21).
59. According to the Claimants, the Respondent’s acts have had multiple impacts on Caratube, Mr. Devincci Hourani and his family, namely (i) they have caused a deterioration of Mr. Devincci Hourani’s health; (ii) they have inflicted on Mr. Devincci Hourani and his family a loss of credit and reputation, with banks unwilling to lend them money and businessmen unwilling to engage with them; (iii) they have resulted in Mr. Devincci Hourani and his family being socially isolated and humiliated. The Claimants submit that the requested measures “are both necessary to preserve the Claimants’ rights and urgent”. The ongoing and increasing blows to health, reputation and the humiliation must cease as they cannot be remedied by compensation alone. It is further noted that with respect to such impacts, the Claimants will request that “exceptionally high monetary damages be awarded” in that they constitute “a textbook case for moral and reputational damages” (Request, paras 69-76, pp. 21-23 and para. 81, p. 26).
60. For the Claimants, the Respondent’s acts of threats and intimidation jeopardize the integrity of the present arbitration, with witnesses being unwilling to testify and Mr. Devincci Hourani being put under pressure by his family to drop the claims. Furthermore, Mr. Aliyev, who had submitted a testimony in the previous

ICSID arbitration, will not be able to act as a witness in the present arbitration as he “has been arrested on June 6, 2014 and placed in custody in Vienna on allegations, made and pursued by Kazakhstan, of murder of two bankers” (Request, para. 77, p. 23).

**c. Urgency**

61. According to the Claimants, the requested measures are urgent. Indeed “it has been recognized that measures intended to protect the procedural integrity of the arbitration, including in particular with respect to access to or integrity of evidence, are urgent by definition, as they cannot await the rendering of an award on the merits” (Request, para. 81, p. 26).

**d. No prejudice on the merits**

62. Finally, the Claimants submit that the requested measures “would not prejudice the Tribunal’s finding on the merits” (Request, para. 83, p. 27).

**B. The Respondent’s Position<sup>2</sup>**

63. The Respondent asserts “that it has not engaged and is not engaging in harassment of Claimants or their witnesses, violations of good faith and equality, or improper conduct” (Response, para. 3, p. 2).

**1. The requirements for granting provisional measures**

64. With respect to the requirements for granting provisional measures, the Respondent points out that while the Tribunal certainly has the power to issue provisional measures, those measures should be considered extraordinary and should not be recommended lightly. Furthermore, in accordance with ICSID’s Note D to Rule 39, the recommended measures must be “provisional” and be “appropriate in nature, extent and duration to the risk existing for the rights to be preserved” (Response, para. 6, p. 4). Citing the decision on provisional measures in *Perenco Ecuador*, the Respondent further stresses that the extraordinary and limited nature of provisional measures is recognized in particular in cases where the Arbitral Tribunal has not yet decided on its jurisdiction (Response, para. 7, p. 4).

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<sup>2</sup> For the Respondent’s position on the Claimants’ Amended Requests, see *supra* paras 34 *et seq.*

65. According to the Respondent, various cases show that the granting of provisional measures is subject to the following requirements: (i) the claimant must have a right that exists at the time of the request and that requires preservation in the arbitration; (ii) there must be circumstances of necessity in order to avoid irreparable harm caused to claimant by the party against whom measures are sought; (iii) there must be circumstances of urgency; (iv) the provisional measures requested must not be too broad; and (v) any recommendation of the provisional measures must not prejudice the merits of the case (Response, para. 8, pp. 4-5). It is the Respondent's case that the listed requirements are not met in the present case. The Claimants' have failed to meet their burden of showing an entitlement to the provisional measures they are requesting (Response, para. 16, p. 8).

***a. Specific and existing rights requiring preservation in the arbitration***

66. With respect to the first requirement, the Respondent states that under Rule 39 the Claimants (as opposed to anyone else) must clearly identify a specific right that they have that needs to be preserved in the present proceedings. This right must exist at the time of the request; it must not be a hypothetical or future right (Response, para. 9, p. 5 and para. 15, p. 8).

67. The Respondent notes that the Claimants in their Request invoke their rights to pursue their claims, to the integrity and legitimacy of the arbitration and the equality of the parties therein, to the presumption of innocence and to the prohibition of unlawful attacks on one's honor and reputation (Response, para. 17, p. 9).

***b. Urgency and necessity to avoid irreparable harm caused to the Claimants by the party against whom measures are sought***

68. Concerning the second and third requirements, the Respondent argues that provisional measures must only be recommended if there is an urgent necessity to avoid an irreparable harm to the Claimants' rights caused by the party against whom measures are sought. This means that provisional measures can only be recommended if the Respondent is currently causing or will cause an irreparable harm to the Claimants' identified right, there is an urgent necessity to avoid such irreparable harm, and the provisional measures requested by the

Claimants, when implemented, will in fact cause the irreparable harm to be avoided (Response, paras 10-11, pp. 5-6 and para. 15, p. 8).

69. The Respondent points out that the Claimants have based their Request on alleged past and current actions of the Respondent.

*i. The alleged current or ongoing actions of the Respondent*

70. The Respondent notes that the Claimants submit that provisional measures are urgently needed with respect to the following four allegedly current or ongoing actions of the Respondent, which – says the Respondent – “have nothing to do with this Arbitration” (Response, paras 19-20, pp. 9-10): (i) the launch of two websites targeting Messrs. Rakhat Aliyev, Issam Hourani, Devincci Hourani and accusing them of the alleged murder of Ms. Anastasia Novikova in Lebanon in 2004, namely [www.justicefornovikova.com](http://www.justicefornovikova.com) and [www.rakhatalivev.com](http://www.rakhatalivev.com); (ii) the organization or orchestration of the protest of 19 June 2014 in front of Mr. Issam Hourani’s apartment in London, which targeted Messrs. Rakhat Aliyev, Issam Hourani and Devincci Hourani in that the protesters accused them of the murder of Ms. Anastasia Novikova (the “Protest”); (iii) the arrest in June 2014 of Mr. Rakhat Aliyev in Vienna; and (iv) the Respondent’s involvement as “*partie civile*” in the criminal investigation in Lebanon of Messrs. Rakhat Aliyev, Issam Hourani and Devincci Hourani in connection with the alleged murder of Ms. Anastasia Novikova.<sup>3</sup>

71. With respect to the first of these alleged current or ongoing actions, the Respondent submits that it did not launch or maintain the two websites. The Respondent asserts that the Claimants have not presented any evidence in support of their allegations, which appear to be based on assumptions. By contrast, in his witness statement, Mr. Andrey Kravchenko, Deputy General Prosecutor of the Republic of Kazakhstan, has confirmed that the Respondent has nothing to do with the two websites. Likewise, in her expert report, Prof. Olcott has also confirmed that there is no evidence of any links between the Respondent and the websites. Furthermore, her expert report undermines the Claimants’ allegation that only the Respondent has the human and financial

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<sup>3</sup> As was seen in paragraph 27 above, it is the Respondent’s case that it has no involvement with the latest developments reported by the Claimants in their correspondence of 13, 16 and 18 November and the Claimants have provided no evidence of any involvement of the Respondent with respect thereto.

resources to launch and maintain the websites. On this basis, the Respondent asserts that it “has had no part in the launching or maintaining of these Websites and has nothing further to disclose in that regard” (Response, paras 25-31, pp. 11-14).

72. Concerning the second alleged current or ongoing action, the Respondent argues that the Claimants have not provided any proof of the fact that the Respondent organized the Protest. By contrast, Mr. Kravchenko has confirmed in his witness statement that the Respondent had nothing to do with the Protest and had no contact with companies specialized in the orchestration of fake protests. The absence of any involvement of the Respondent with respect to the Protest is also corroborated by Prof. Olcott’s expert report. Furthermore, the Respondent points out that the Protest took place on the tenth anniversary of Ms. Novikova’s death and that, if the Protest was indeed a fake, “virtually anyone could have had the means to organize it”, a fact which is acknowledged by the Claimants. The Respondent concludes that it “did not organize the Protest and has nothing further to disclose in this regard”; “there is no basis for recommending the provisional measures with respect to the Protest requested by the Claimants” (Response, paras 32-37, pp. 14-16).
73. With respect to the third alleged current or ongoing action, the Respondent submits that the Claimants have not produced any evidence to support their allegations that the arrest of Mr. Rakhmat Aliyev in Vienna was intended to prevent the latter from testifying in this Arbitration and that the Respondent was somehow behind this. The Respondent points out that Mr. Aliyev was not arrested by the Respondent. He was arrested in Vienna by the Austrian authorities in accordance with Austrian law and procedure, in connection with the kidnapping and murder of two managers of Nurbank, a Kazakh private bank controlled by Mr. Aliyev at the time of the murders. Furthermore, the Respondent argues that the Claimants’ account of Mr. Aliyev’s arrest is clearly contradicted by Mr. Kravchenko’s witness statement and Prof. Olcott’s expert report, which explain the background of the arrest, as well as by the evidence linking Mr. Aliyev to the death of the two Nurbank managers, the death of Ms. Novikova and other serious criminal charges against him. On this basis, the Respondent concludes that the Claimants’ request for provisional measures must be rejected to the extent that the Claimants suggest that Mr. Aliyev’s

arrest constitutes harassment by the Respondent to create a chilling effect on other witnesses (Response, paras 38-44, pp. 16-17).

74. Regarding the fourth alleged current or ongoing action, the Respondent asserts that its actions with respect to the Novikova case in Lebanon were entirely justified and in conformity with the applicable law. In this regard, the Respondent first observes that the Novikova matter and the evidence implicating Mr. Aliyev and the Houranis in the alleged murder have nothing to do with this Arbitration. The Respondent further submits that, as is detailed in Mr. Kravchenko's witness statement and confirmed in Prof. Olcott's expert report, there is very serious evidence that Ms. Novikova, who is alleged to have been Mr. Aliyev's mistress, was sequestered, tortured and murdered, including (i) eyewitness accounts of two persons who were present during the sequestration and torture of Ms. Novikova; (ii) the Kazakh forensic report of August 2007; (iii) the German Charité Report which confirmed the Kazakh forensic report and showed that Ms. Novikova must have been dead before the fall from the balcony; (iv) the fact that neither Mr. Aliyev nor the Houranis informed Ms. Novikova's mother of her daughter's death due to what they claim was a suicide; and (v) other evidence mentioned. According to the Respondent, despite such serious evidence and Ms. Novikova's mother's attempts to have the investigations reopened in Lebanon, no prosecution ever took place in respect of this matter. Therefore, in July 2012 the Respondent, being under an obligation to press charges against Mr. Aliyev and the Houranis to investigate their role in the circumstances of Ms. Novikova's death, agreed to file a joint complaint with Ms. Novikova's mother in Lebanon against Mr. Aliyev and the Houranis. Thereafter, the criminal investigation was legitimately reopened in Lebanon in accordance with Lebanese law, which is confirmed by Prof. Slim's expert report and Mr. Kravchenko's witness statement. The validity of the reopening of the Novikova investigations was also confirmed twice by Lebanon's highest court, the Cour de Cassation. In this regard, the Respondent points out that, contrary to the Claimants' allegation, the investigation in Lebanon was never "closed", but rather was archived, which means that it can be reopened (Response, paras 45-70, pp. 18-26).

75. Furthermore, the Respondent refutes the Claimants' allegation that the Respondent, via *inter alia* two letters exchanged with the Lebanese authorities,

was “lobbying” to unjustly incriminate Mr. Aliyev and the Houranis. Rather, it is the Respondent’s case that such letters, which are common practice in cases where two countries are investigating the same alleged facts, were requests for information and offers of assistance, prompted by the Lebanese authorities’ failure to respond to prior requests for information and offers of assistance. Accordingly, the letters in question were legitimate cooperation efforts between states and can in no way be considered as “lobbying” attempts before the Lebanese authorities. In this regard, the Respondent draws the attention to the fact that the Claimants were not entitled to obtain copies and submit in this Arbitration the two letters in issue in that they constitute confidential diplomatic correspondence (Response, paras 71-74, pp. 26-28).

76. Finally, while the Respondent agrees with the Claimants’ insistence upon the presumption of innocence, it points out that “the presumption of innocence does not mean that state authorities cannot prosecute individuals who are seriously suspected of committing a crime, or that prosecuting under those circumstances constitutes harassment” (Response, para. 75, pp. 28-29).

*ii. The alleged past pattern of conduct of the Respondent*

77. With respect to the alleged past conduct, namely “a ‘pattern of conduct in investment arbitrations’ consisting of alleged threats, intimidation and harassment by the Republic of Kazakhstan against adverse parties, their attorneys, experts and factual witnesses” (Response, para. 77, p. 29), the Respondent argues that it is not relevant because the Claimants have not alleged that it is ongoing or that it could cause irreparable harm to the Claimants in the future (Response, para. 18, p. 9 and para. 78, p. 29). This notwithstanding, the Respondent submits that the Claimants’ allegations with respect to past conduct are in any case incorrect, not supported by evidence and have not been recognized by any arbitral tribunal.
78. Preliminarily, the Respondent points out that the Claimants sometimes misleadingly construe certain alleged facts as “recent developments”, even though they refer to events that allegedly occurred in 2007 and 2008, *i.e.* between five and seven years ago (Response, para. 79, p. 30).



79. With respect to the allegations of harassment and intimidation by the Respondent invoked in the Claimants' Request for Arbitration and in Mr. Yasser Abbas' witness statement, the Respondent notes that all of these allegations pertain to the merits of the Claimants' case in this Arbitration. In addition, these allegations are false.
80. First, in his witness statement, Ambassador Yerzhan Kazykhanov asserts that President Nazarbayev and Mr. Yasser Abbas never had a private meeting in October 2008 or at any other time (and, as a matter of protocol, never could have had such a private meeting, at least not without agreement made prior to the arrival of the visiting diplomat), and never discussed the Hourani family (Response, para. 81, pp. 30-31).
81. Second, the Respondent firmly denies the Claimants' allegations regarding its purported misconduct in the *Rumeli* arbitration. The Respondent further points out that Rumeli never requested any provisional measures in view of protecting any individuals from alleged pressures exercised by the Respondent and that the Rumeli tribunal did not make any findings against the Respondent regarding any alleged misconduct, nor did it draw any adverse inferences against the Respondent from such allegations (Response, para. 82, p. 31).
82. Third, the Respondent submits that in the *Ruby Roz* arbitration, the tribunal refused to strike Prof. Didenko's expert opinion from the record based on the claimant's accusations of lack of independence. Furthermore, the claimant chose not to question Prof. Didenko's credibility face-to-face during the hearing. Ultimately, the tribunal dismissed Ruby Roz's claims for lack of jurisdiction (Response, para. 83, p. 32).
83. Fourth, the Respondent points out that in *Caratube I*, the tribunal rejected all of the provisional measures requested by Caratube International Oil Company LLP ("CIOC") and ultimately rejected the CIOC's case for lack of jurisdiction (Response, para. 84, pp. 32-33).
84. Fifth, the Respondent refutes the Claimants' arguments based on the alleged intimidation of witnesses in the *Ruby Roz* arbitration. According to the Respondent, the Claimants' argumentation "does not make any sense". Rather, for the Respondent, "what appears to have happened is that Ruby Roz simply

wanted to avoid the cross-examination of its witnesses and sought to blame the Republic [of Kazakhstan] for the non-appearance of nine witnesses, most of whom had nothing to do with the Lebanese [Novikova] investigation or the alleged intimidation” (Response, paras 85-87, pp. 33-34). Furthermore, the Respondent points out that the Ruby Roz tribunal did not hold the Respondent liable for any procedural misconduct and no provisional measures were ever recommended against the Republic. As mentioned, ultimately, the tribunal dismissed Ruby Roz’s case for lack of jurisdiction (Response, para. 88, p. 34).

85. Finally, the Respondent asserts that it “welcomes the opportunity to cross-examine the Claimants’ witnesses” in the present Arbitration and “that it has no interest whatsoever in trying to prevent them from testifying” (Response, para. 90, pp. 34-35).

***c. The provisional measures requested must not be too broad***

86. For the Respondent, the fourth requirement is that the provisional measure must be specific in its object and scope. It must not be too broad and extend to measures that are not urgently needed to avoid an irreparable harm (Response, para. 12, pp. 6-7 and para. 15, p. 8).

***d. The provisional measures must not prejudice the merits of the case***

87. Finally, the fifth requirement is that the provisional measure requested must not prejudice the merits of the case, which is further explained by the fact that it is a measure of protection and not of enforcement (Response, paras 13-15, pp. 7-8).

**2. The Claimants’ four individual requests for provisional measures must be rejected in their entirety<sup>4</sup>**

***a. The Claimants’ request for disclosure concerning the Websites and the Protest***

88. The Respondent asserts that while the Claimants have not produced any evidence implicating the Respondent in the Websites and the Protest, the Respondent, on the other hand, has shown that there is no evidence to the

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<sup>4</sup> Regarding the Respondent’s position on the Claimants’ amended prayer for relief, see *supra*, paras 34 *et seq.*

effect that the Respondent was involved in the Websites or the Protest.<sup>5</sup> As a result, the Respondent cannot be found to be causing irreparable harm to the Claimants, even if it were to be found that the Websites or the Protest themselves are causing such harm. The Respondent draws the conclusion that “the Respondent has nothing further to disclose with respect to these matters and, thus, the requested measure is moot” and should not be recommended (Response, para. 92, p. 35).

***b. The Claimants’ request for justification of the Respondent’s actions in the Novikova case***

89. According to the Respondent, it has shown that (i) “the murder charges against the defendants in [the Novikova] case are very serious indeed”; (ii) the Respondent’s joining with Ms. Novikova’s mother in filing a complaint as “*parties civiles*” in Lebanon and the reopening of the case by the Lebanese authorities were justified and in accordance with Lebanese law. In particular, the Claimants have not shown that the murder charges in the Novikova case are frivolous or trumped up, nor that the prosecution of such charges is mere harassment for the purpose of intimidating witnesses, whose testimony the Respondent welcomes. Hence, the Claimants’ request for a provisional measure recommending that the Respondent justify its actions in the Novikova case is moot. Furthermore, the Respondent argues that it is difficult to understand how recommending any further justification by the Respondent would be urgently needed to avoid irreparable harm to the Claimants. Thus, this provisional measure should not be recommended (Response, para. 93, p. 36).

***c. The Claimants’ request for the omission by the Respondent of any direct or indirect measures or any action that would aggravate the dispute and/or jeopardize the integrity and the legitimacy of this arbitration and the equality of the Parties***

90. The Respondent submits that the Claimants have not shown (and the Respondent firmly denies) that the Respondent has engaged or will engage in harassment, assault, threat and intimidation of Mr. Devincci Hourani, his family, and the Claimants’ potential witnesses and families. Furthermore, the Claimants have not shown that there have been any current or ongoing actions by the

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<sup>5</sup> As was seen in paragraph 27 and footnote 3 above, it is the Respondent’s case that it has no involvement with the latest developments reported by the Claimants in their correspondence of 13, 16 and 18 November and the Claimants have provided no evidence of any involvement of the Respondent with respect thereto.

Respondent which create an urgent necessity to avoid irreparable harm by recommending a provisional measure.<sup>6</sup> In addition, the requested provisional measure is far too broad and may require determinations connected to the merits of the present Arbitration. Finally, the Respondent stresses that authorities of any State have the duty and the right to prosecute entities and individuals in accordance with the law and arbitral tribunals generally should not interfere with such matters. Therefore, the Respondent concludes that the requested provisional measure should not be recommended (Response, para. 94, pp. 37-38).

***d. The Claimants' request with respect to the fundamental principles of the presumption of innocence and of the prohibition of unlawful attacks on one's honour and reputation***

91. While the Respondent agrees that any accused person is innocent until proven guilty, it argues that the Claimants are not entitled, based on the presumption of innocence, to use this Tribunal to shield them from legitimate criminal investigations and prosecution unrelated to the present Arbitration. Furthermore, the Respondent submits that the Claimants have not met their burden of proving the allegations underlying this request for provisional measures, which the Respondent firmly opposes. In particular, the Claimants have not established the existence of any current or ongoing action by the Respondent which creates an urgent necessity to avoid an irreparable harm by recommending the requested provisional measure. In addition, the Respondent submits that the requested measure is far too broad and may require determinations connected to the merits of this Arbitration. Hence, the requested provisional measure should not be recommended (Response, paras 96-99, p. 38).

## **V. ANALYSIS**

### **A. Timeliness of the Claimants' Amended Request**

92. As was stated in paragraph 35 above, the Respondent objects "to the Claimants' last minute amending of their requests" (Respondent's letter of 16

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<sup>6</sup> As was seen in paragraph 27 above (see also footnotes 3 and 5 above), it is the Respondent's case that it has no involvement with the latest developments reported by the Claimants in their correspondence of 13, 16 and 18 November and the Claimants have provided no evidence of any involvement of the Respondent with respect thereto.

October 2014, p. 1). Therefore, the question of the timeliness of the Claimants' Amended Requests as set forth in their letter of 10 October 2014 is posed.

93. This question concerns in particular the Amended Request 2.1.,<sup>7</sup> where the Claimants now request an order for the Respondent's withdrawal as "*partie civile*" from the criminal proceedings in Lebanon against Messrs. Issam, Devincci and Hussam Hourani, who are accused (together with Mr. Aliyev) of the murder of Ms. Novikova. Under the same Amended Request 2.1, the Claimants now also request an order for the Respondent to cease any direct or indirect interference with or before the Lebanese authorities in relation with these criminal proceedings.
94. Moreover, the question of timeliness is raised with respect to the Claimants' Amended Request 2.2.,<sup>8</sup> where the Claimants now request the Tribunal to order the Respondent to declare that it had no involvement with the Websites and the Protest (as well as the latest developments of November 2014) and to condemn these acts, and to make all the necessary investigations to identify the individuals behind these acts and to take the necessary measures for these acts to stop.
95. As was seen in paragraphs 34 *et seq.* above, the Tribunal has noted the Respondent's objections to the Claimants' "last minute" amending of their requests. In particular, the Tribunal shares the Respondent's concerns regarding requirements of due process, which would require further submissions by the Parties on the issue and thus additional resources in terms of time, effort and costs.
96. That said, the spending of additional resources on the issue of the timeliness of the Claimants' Amended Request is not necessary. For the reasons set out below, the Tribunal finds that the Claimants' Requests for Provisional Measures must in any event be rejected on the merits. Therefore, rather than further investigating and deciding the issue of the timeliness of the Claimants' Amended Requests, the Tribunal considers it more efficient and appropriate to

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<sup>7</sup> See *supra* para. 31.

<sup>8</sup> See *supra* para. 31.

consider the merits of the Amended Requests and to set out below the reasons why such requests cannot be granted.

## **B. Applicable Legal Framework**

97. The Parties agree that 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.*

98. Rule 39 of the ICSID Arbitration Rules provides in relevant part:

*(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.*

[...]

99. The ICSID's Notes to Rule 39<sup>9</sup> provide the following explanations:

*A. This Rule provides the procedural framework for implementing Article 47 of the Convention, which is based on the principle that once a dispute is submitted to arbitration the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of the award. Because of the generality of this principle, not only can a party request the Tribunal to recommend provisional measures at any time during the proceeding, i.e., in principle from its institution (Arbitration*

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<sup>9</sup> ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), 1986, *ad* Rule 39.

*Rule 6(2)), but in practice only from the constitution of the Tribunal (Arbitration Rule 6(1)) since it is the Tribunal that must make the recommendation - until the award is rendered (Rule 48(2)), but the Tribunal may also make recommendations on its own initiative (see paragraph (3) of the present Rule).*

*B. However, this power of the Tribunal exists (pursuant to Article 47 of the Convention) only "except as the parties otherwise agree"; moreover, unless the parties otherwise agree, the Tribunal only has the power to "recommend". This restriction is not as serious as it appears, for not only is the authority of a recommendation emanating from an international tribunal very considerable but the Tribunal can normally take into account in its award the effects of any noncompliance with its recommendations.*

*C. Paragraph (2) is based on the assumption that to preserve the rights of a party speedy action may be required. Accordingly the President of the Tribunal may, if he considers the request as urgent, propose a decision to be taken by correspondence (Rule 16(2)), or even convene the Tribunal for a special session.*

*D. The measures recommended must be "provisional" in character and be appropriate in nature, extent and duration to the risk existing for the rights to be preserved. Paragraph (3) therefore allows the Tribunal to recommend measures other than those proposed by the moving party, and to modify or revoke its recommendations as circumstances may require.*

*E. In order to avoid surprises or unintentionally unfair dispositions, paragraph (4) requires that both parties be given an opportunity to present their observations before the Tribunal makes its recommendations or modifies or revokes them. The Tribunal must decide how this opportunity will be given.*

### **C. Requirements for Provisional Measures**

100. It is common ground between the Parties that provisional measures must (i) serve to protect certain rights of the applicant and (ii) meet the requirements of necessity and (iii) urgency, which imply the existence of a risk of irreparable harm. Furthermore, it is not disputed that (iv) the recommendation of the requested provisional measures must not prejudice the Tribunal's decision on the merits of the case.
101. However, it is unclear whether the Parties agree with respect to the existence of a fifth requirement, namely that the provisional measures must not be too broad, the Claimants not having taken a position on this requirement.

102. The Parties disagree on the fulfilment *in casu* of the requirements referred to above.
103. Before addressing these requirements, the Tribunal stresses that the applicant's burden of proof is that it must establish the requirements with sufficient likelihood, without however having to actually prove the facts underlying them.<sup>10</sup> Moreover, the Tribunal's assessment is necessarily made on the basis of the record as it presently stands; any conclusion reached in this decision could be reviewed if relevant circumstances were to change and would in any event not be binding on the Tribunal when it shall rule on the evidence on record in the ensuing conduct of this Arbitration.
104. The Respondent, relying on the decision on provisional measures in the *Perenco Ecuador* case, has argued that a somewhat higher threshold should apply in cases where the tribunal has not yet decided on its jurisdiction (Response, para. 7, p. 4; Transcript, p. 53, lines 11-16). In this respect, the *Perenco Ecuador* tribunal noted:

*[Article 47 and Rule 39] also recognize that a Tribunal must be slow to grant to a party, before a full examination of the merits of the case, a remedy to which, on such examination, the party may be found to be not entitled. The Tribunal must be even slower where, as here, the jurisdiction of the tribunal to entertain the dispute has not been established. So the test laid down by the Article for the grant of provisional measures is a stringent one: "if [the Tribunal] considers that the circumstances so require".<sup>11</sup>*

105. The Tribunal observes that the procedural setting in the *Perenco Ecuador* decision was the same as in the present case to the extent that, at this time, the Tribunal has formed, and expresses, no opinion on its jurisdiction to entertain the Claimant's claims, on the facts so far as these are in dispute, or on the merits of the claims.<sup>12</sup> These issues are not before it for decision at this stage and have not been the subject of argument, even though at the first session the

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<sup>10</sup> The Tribunal has taken note of the Claimants' contention that "it is impossible in [the circumstances of the present case], in such cases, to obtain direct documentary evidence, or admission even. [...] [U]nder the circumstances, circumstantial evidence is enough [...]" (Transcript, p. 9, lines 7-9 and lines 19-20).

<sup>11</sup> *Perenco Ecuador Limited v. the Republic of Ecuador and Empresa Estatal Petroleos Del Ecuador (Petroecuador)* (Exh. RL-3), para. 43.

<sup>12</sup> See *Perenco Ecuador Limited v. the Republic of Ecuador and Empresa Estatal Petroleos Del Ecuador (Petroecuador)* (Exh. RL-3), para.19.



Respondent expressed its intention to submit a jurisdictional objection with its Counter-Memorial.<sup>13</sup> In paragraph 14.3 of Procedural Order No. 1, the Respondent also has expressly reserved its right to request a bifurcation of jurisdictional issues after the first round of pleadings.

106. The Parties have not questioned this Tribunal's authority to recommend provisional measures. Indeed, as already noted, Article 39(1) of the ICSID Arbitration Rules confirms this authority and provides: "[a]t 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". This implies that the Tribunal may decide a request for provisional measures before having ruled on its jurisdiction. This rather uncontroversial statement is further confirmed by SCHREUER, who pertinently states as follows:

*Giving priority to a request for provisional measures means that it has to take precedence over any other issues pending before the tribunal. Where a party has raised jurisdictional objections, the tribunal may have to decide on provisional measures before having ruled on its own jurisdiction. As a consequence, a party may be exposed to provisional measures even though it contests the jurisdiction of an ICSID tribunal. On the other hand, the urgency of the matter often makes it impossible to defer provisional measures until the tribunal's jurisdiction has been fully argued and decided.*

(Christoph SCHREUER, *The ICSID Convention*, 2<sup>nd</sup> ed., Cambridge 2009, p. 771)

107. In the opinion of this Tribunal, the application by the Tribunal of such a stricter standard to the Claimants' Request is problematic as this would appear to entail a *prima facie* assessment of the Tribunal's jurisdiction.<sup>14</sup> However, the Tribunal cannot do so in the present case: first, at the hearing of 8 October 2014, the Respondent - who requested the application of the stricter standard based on

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<sup>13</sup> The Tribunal notes that the Respondent in the *Perenco Ecuador* case also simply reserved the right to challenge the jurisdiction of the tribunal (*Perenco Ecuador Limited v. the Republic of Ecuador and Empresa Estatal Petroleos Del Ecuador (Petroecuador)* (Exh. RL-3), para. 18).

<sup>14</sup> *Perenco Ecuador Limited v. the Republic of Ecuador and Empresa Estatal Petroleos Del Ecuador (Petroecuador)* (Exh. RL-3), para. 39 ("While the Tribunal need not satisfy itself that it has jurisdiction to determine the merits of the case for the purposes of ruling on the application for provisional measures, it will not order such measures unless there is at least a *prima facie* basis upon which such jurisdiction might be established: *Victor Pey Casado and President Allende Foundation v. Chile*, ICSID Case No. ARB/98/12, *Decision on the request for provisional measures*, 25 September 2001 ¶¶ 1-12.").

the *Perenco Ecuador* decision - made it clear that the present decision on provisional measures does not concern the question of the Tribunal's jurisdiction over the Claimants' claims in this arbitration.<sup>15</sup> Second, unlike the tribunal in the *Perenco Ecuador* case, this Tribunal does not find that there is a reason to proceed with this *prima facie* assessment, given the lack of any substantiated jurisdictional objection so far (unless, *quod non*, the Tribunal should decide to raise an issue of jurisdiction *ex officio*). More importantly, the Claimants would not be in a position to express their view on any such jurisdictional objection. Given the alleged urgency of the Claimants' Request for Provisional Measures, it would defeat that Request's purpose to first seek the Parties' respective positions on this issue. This is further confirmed by Article 39(2) of the ICSID Arbitration Rules, which stipulates that "[t]he Tribunal shall give priority to the consideration of a request made pursuant to [Article 39] paragraph (1)". It also bears mentioning that a preliminary examination of this Tribunal's jurisdiction has already taken place when the Claimants' Request for Arbitration was registered by the Secretary-General pursuant to Article 36(3) of the ICSID Convention.<sup>16</sup>

108. In the opinion of this Tribunal, there is no room for the application of a stricter standard or, in the words of the *Perenco Ecuador* tribunal, of a "slower" approach, simply because a party has reserved its right to raise a jurisdictional objection. Rather, a tribunal may take such a reservation of rights into account in the exercise of its discretion to recommend provisional measures, namely when deciding whether or not the urgency of the matter requires it to defer the provisional measures until after the issue of the tribunal's jurisdiction has been argued and decided. For instance, there should be urgency to recommend some measures that could not await the final Award in an arbitration while such urgency would not make it necessary to recommend such measures before the

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<sup>15</sup> See Transcript, p. 49, lines 1-10: "MR WOLRICH: [...] What the hearing is not about is whether the Tribunal has jurisdiction over Claimants' claims. As Procedural Order No. 1 clearly states, the Republic of Kazakhstan has reserved its right to seek bifurcation of these proceedings at the time of the filing of its memorial. The procedural order also clearly says that if that happens, the Tribunal shall – if the other side doesn't agree – determine whether or not to do this; and if so, there will be a new schedule. But this hearing is not about that".

<sup>16</sup> According to Article 36(3) of the ICSID Convention, "[t]he Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. [...]".

arbitral tribunal's determination on its jurisdiction.<sup>17</sup> Be it as it may, as stated in paragraph 107 above, this Tribunal finds that, given the alleged urgency of the Claimants' Request for Provisional Measures, it would defeat that Request's purpose to first seek the Parties' respective positions on the issue of jurisdiction.

109. In any event, ultimately it is not necessary to further investigate and decide the question of the applicability of a stricter standard to the Claimants' Request for Provisional Measures. For the reasons set out below, the Claimants' Request must be rejected even in application of the threshold outlined in paragraph 103 above.

### **1. The existence of rights requiring preservation**

110. As noted in paragraph 100 above, the Parties agree that provisional measures must serve to protect certain rights of the applicant.
111. Furthermore, as mentioned in paragraph 67 above, the Respondent does not take issue with the Claimants invoking their rights to pursue their claims, to the integrity and legitimacy of the arbitration and the equality of the parties therein, to the presumption of innocence and to the prohibition of unlawful attacks on one's honor and reputation (see also Response, para. 17, p. 9; Request, para. 79, p. 24 and para. 82, pp. 26-27). The Respondent does not contest that these are specific and clearly identified rights belonging to the Claimants and existing at the time of the Request.
112. As will be seen in further detail below, the Respondent denies however that it ever conducted itself in this Arbitration in a manner that would contravene these rights and has affirmed in its written submissions and through its Counsel at the hearing of 8 October 2014 that it will continue to abstain from such actions (see, e.g., Response, para. 3, p. 2; paras 75-76, pp. 28-29; para. 94, p. 37 and para.

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<sup>17</sup> In this sense, see also the Procedural Order No. 1 issued on 31 March 2006 in *Biwater Gauff v. Tanzania* (Exh. CLA-14): "It is also clear, and apparently not in issue between the parties here, that a party may be exposed to provisional measures even though it contends that ICSID has no jurisdiction (SCHREUER, p. 764). As noted on behalf of the UROT, there may be cases, however, where the likely objections to jurisdiction might be a relevant factor in a tribunal's exercise of its discretion to recommend provisional measures (for example in a case where there is no urgency or questionable necessity)".

97, p. 38; Transcript, p. 65, lines 18-25; p. 71, lines 15-16; Respondent's letter of 16 October 2014, p. 3).

113. The Tribunal has taken note of these denials and representations. That said, the Tribunal is of course aware that such kind of denials and representations are not unusual and that even the most unethical parties will not concede their sins but rather deny them and represent that they would profess to have conducted themselves as they should and intend to continue doing so. Moreover, while the honourability of Counsel is of course undeniable, it bears mentioning that the arbitral tribunal in the first *Caratube* arbitration noted that Kazakhstan may not always have been totally transparent towards its own Counsel:

*117. First of all, regarding Claimant's Request [that Kazakhstan desists from any conduct which violates the parties' duties of good faith and equality in this arbitration], this discussion records that the Parties and the Tribunal agree to the effect that the Parties indeed have an obligation to conduct the procedure in good faith.*

*118. While this is now agreed and on the record of the hearing, the Tribunal considers it nevertheless necessary to formally record this duty of the Parties in the present Decision. In this context, the Tribunal sees a particular need to remind Respondent of this duty in view of certain measures taken by various of its authorities after this arbitral procedure has started which are identified by Claimant in its Amended Request of 29 April 2009. In particular, the Tribunal reiterates the "surprise" its Chairman expressed during the hearing (Tr p. 95) that, on 16 April 2009, the same day the Parties and the Tribunal had their 1st Session in Frankfurt to discuss and decide on the further procedure including the exchange and production of documents, the Respondent raided Claimant's offices and seized a great volume of documents and other evidence. This was done without any notice at the Frankfurt session. While the Tribunal appreciates the assurance of Respondent's Counsel that he did not know of these measures of Respondent at the time of the Session, this conduct and the further similar measures taken by Respondent after that date make it necessary in the view of the Tribunal to clearly put on record the basic procedural duties of the Parties to an international arbitration procedure and particularly an ICSID procedure.*

*119. Regarding the Claimant's requests [that Kazakhstan desist from any conduct which violates the parties' duties of good faith and equality in this arbitration; and any other measures in relation to Caratube that would aggravate the dispute], the*

*Tribunal agrees with the essence and result of the discussion at the hearing referred to above to the effect that the accepted duty of a party in an arbitration to act in good faith includes and covers a duty to avoid any unnecessary aggravation of the dispute and harassment of the other party. And again, in view of the measures taken by Respondent and for the reasons mentioned in the preceding paragraph, the Tribunal considers it necessary to formally record this in this Decision.*

*120. In conclusion, therefore, the Tribunal confirms that the Parties have an obligation to conduct the procedure in good faith and that this obligation includes a duty to avoid any unnecessary aggravation of the dispute and harassment of the other party.*

(Exh. CLA-18, Caratube I Decision on Provisional Measures, paras 117-120)

114. This Tribunal appreciates the wisdom of this statement, it being specified however that the Respondent's alleged "past pattern of conduct" in the *Caratube I* arbitration or otherwise is not relevant for the purposes of deciding whether the Claimants' Request for Provisional Measures must be granted and can in no way be considered as evidence in support of the Claimants' Request, namely of the set of facts that would establish the Request's justification in this Arbitration. It also bears mentioning that the above comments by the *Caratube I* tribunal were made in rather particular circumstances, where the concomitance between events was striking so as to warrant, in and of itself, a most solemn admonition fitting the concrete factual circumstances.
115. As will be seen below, this Tribunal finds that, based on the record as it presently stands, the Claimants have not satisfied their burden of proving that the Respondent has indeed committed the alleged acts and thereby caused an irreparable harm to the Claimants' rights to be preserved in this Arbitration. While it is therefore not necessary to render any decision on the Respondent's representations, the Tribunal nevertheless stresses, as a general and abstract advice to all Parties, that they have a 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.

## 2. Urgent necessity to avoid an irreparable harm to the Claimants' rights

116. The second and third requirements of urgency and necessity, which imply the risk of an irreparable harm to the Claimants' identified rights, can be subsumed under one larger requirement, as has been done in the *Occidental Petroleum* case in the following terms:

*In order for an international tribunal to grant provisional measures, there must exist both a right to be preserved and circumstances of necessity and urgency to avoid irreparable harm.*<sup>18</sup>

117. The same uncontroversial idea was pertinently expressed by Alan Redfern in the following terms:

*In considering whether it is "appropriate" to issue interim measures, the tribunal must appreciate that in effect it is being asked to take immediate action, without a full knowledge of the facts, at the risk of pre-judging or even rendering irrelevant its final Award in the arbitration. For this reason, the tribunal will need to consider whether or not the measure sought is really necessary. Is there an urgent need for the measure? What harm will result if it is ~~not~~ granted? Will that harm exceed the harm likely to result if the measure sought is not granted?*<sup>19</sup>

118. And Redfern adds:

*In other words, is the interim relief necessary in order to preserve the rights that are the subject of the dispute, pending the Tribunal's decision, and in order to avoid irreparable damage to the applicant? The concept of "irreparable damage" is one of loss for which an award of monetary damages is unlikely to compensate.*<sup>20</sup>

119. Accordingly, this Tribunal must investigate whether there is an urgent need, *i.e.* a need that cannot await the rendering of the Award, for the provisional measures requested by the Claimants in order to avoid an irreparable harm to the Claimants' rights, namely "to pursue their claims and the integrity of the process in this arbitration in an orderly fashion without the ongoing risk that they, or any potential witnesses on which they wish to rely to produce evidence

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<sup>18</sup> Exh. CLA-10, para. 59.

<sup>19</sup> Alan REDFERN, *Interim Measures*, The Leading Arbitrators' Guide to International Arbitration, Newman, Hill (eds.), Juris Publishing Inc. 2004, p. 233.

<sup>20</sup> REDFERN, *op. cit.* fn 19, p. 233, footnote 25.

or to provide information or documents, be exposed to further sanctions or harassment” (Request, para. 79, p. 24), and to avoid this dispute “being aggravated by the abusive exercise of Sovereign means and persecution of Claimants, and moreover, and in any event, by the violation of the principle of the presumption of innocence, and the principle of prohibition of unlawful attacks on one’s honor and reputation” (Request, para. 79, pp. 24-25).

120. As has been pointed out by the Respondent, the requirement of urgent necessity to avoid an irreparable harm presupposes that the irreparable harm is caused by the party against whom the provisional measures are sought, and the implementation of the requested measures will cause the irreparable harm to be avoided (Response, para. 11, p. 6). This does not appear to be disputed by the Claimants.

121. For the Tribunal, this implies that the requested measures be “appropriate” in the circumstances of the individual case to achieve their purpose. This includes a balancing of the Parties’ respective interests at stake.<sup>21</sup> The fact that the Respondent is a State is relevant in this regard. Indeed, any party to an arbitration should adhere to some procedural duties, including to conduct itself in good faith; moreover, one can expect from a State to adhere in that very capacity, to at least the same principles and standards, in particular to desist from any conduct in this Arbitration that would be incompatible with the Parties’ duty of good faith,<sup>22</sup> to respect equality and not to aggravate the dispute.<sup>23</sup> But

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<sup>21</sup> This idea also emerges from Alan Redfern’s statement cited in paragraph 103 above where he asks “What harm will result if it is ~~not~~ granted? Will that harm exceed the harm likely to result if the measure sought is not granted?”

<sup>22</sup> See, e.g., Articles 18 and 27 of the Vienna Convention on the law of treaties of 23 May 1969. See also *Técnicas Medioambientales Tecmed SA v. Mexico*, Award (Exh. CLA-76), para. 71 (“Writings of publicists point out that Article 18 of the Vienna Convention does not only refer to the intentional acts of States but also to conduct which falls within its provisions, which need not be intentional or manifestly damaging or fraudulent to go against the principle of good faith, but merely negligent or in disregard of the provisions of a treaty or of its underlying principles, or contradictory or unreasonable in light of such provisions or principles. It should be noted that the principle inspiring such article has been applied in order to settle, through international arbitration, disputes between States and individuals which, in order to be decided, required a pronouncement on obligations of the former vis-à-vis the latter based on the law of treaties. The Mixed Greek-Turkish Arbitral Tribunal, in the case *A.A. Megalidis v. Turkey*, stated: qu’il est de principe que déjà avec la signature d’un Traité et avant sa mise en vigueur, il existe pour les parties contractantes une obligation de ne rien faire qui puisse nuire au Traité en diminuant la portée de ses clauses. Qu’il est intéressant de faire observer que ce principe –lequel en somme n’est qu’une manifestation de la bonne foi qui est la base de toute loi et de toute convention- a reçu un certain nombre d’applications”). As additional authority, see also Patrick DAILLIER/Mathias

this Tribunal must be mindful when issuing provisional measures not to unduly encroach on the State's sovereignty and activities serving public interests.<sup>24</sup>

122. As was noted in paragraphs 100 to 102 above, while the Parties generally appear to agree on the principle that the recommendation of provisional measures is subject to the requirements of urgency and necessity as outlined above, they disagree however on whether these requirements are met in the present case. In particular, the Parties disagree whether the Respondent is taking any actions that cause an irreparable harm to the Claimants' identified rights in this Arbitration and that urgently require the recommendation of the measures requested by the Claimants.
123. As was seen in paragraphs 50 *et seq.* above, the Claimants rely on a certain number of alleged acts of harassment and intimidation, which they attribute to the Respondent. Of relevance for the Claimants' Request for Provisional Measures are the following three allegedly current or ongoing actions of the Respondent, namely the alleged involvement of the Respondent in (i) the websites [www.justicefornovikova.com](http://www.justicefornovikova.com) and [www.rakhataliyev.com](http://www.rakhataliyev.com); (ii) the protest carried out on 19 June 2014 in front of Mr. Issam Hourani's apartment in London; and (iii) the criminal proceedings in the Novikova case initiated in

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FORTEAU/Nguyen QUOC DINH/Alain PELLET, *Droit International Public*, 8th ed., Paris 2009, p. 239, para. 39 (“*Le principe de bonne foi s’élève au rang d’une institution qui régit l’ensemble des relations internationales*”); Emmanuel GAILLARD, *La jurisprudence du CIRDI*, Vol. I, Paris 2004, p.133, para. 4, regarding the ICSID Award in *Klöckner v. Cameroon* of 21 October 1983 (“*cette [obligation de tout révéler à un partenaire ou cocontractant] trouve tout naturellement sa place parmi les principes généraux du droit applicables aux contrats internationaux. Elle découle directement des exigences de la bonne foi dans l’exécution des contrats que chacun s’accorde à compter au rang des principes existant dans la quasi-totalité des systèmes juridiques*”).

<sup>23</sup> *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, Decision on provisional measures (Exh. CLA-11), paras 57, 59 and 62 (“the principle that neither party may aggravate or extend the dispute or take justice into their own hands prevails”); *Víctor Pey Casado v. Chile*, Decision on provisional measures (Exh. CLA-13), para. 67 (“*Il s’agit du principe général, fréquemment affirmé dans la jurisprudence internationale, judiciaire ou arbitrale, selon lequel ‘toute partie en litige a l’obligation de s’abstenir de tout acte ou omission susceptibles d’aggraver le litige ou de rendre l’exécution de la sentence à intervenir plus difficile*”).

<sup>24</sup> See, e.g., the right of a State to conduct criminal investigations: *Quiborax v. Bolivia*, Decision on provisional measures (Exh. CLA-19), para. 164 (“The Tribunal has given serious consideration to Respondent’s argument that an order granting the provisional measures requested by Claimants would affect its sovereignty. In this respect, the Tribunal insists that it does not question the sovereign right of a State to conduct criminal cases”); *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, Decision on provisional measures (Exh. CLA-11), para. 62 (“the Tribunal notes that it has great respect for the Ecuadorian Judiciary and that it acknowledges Ecuador’s sovereign right to prosecute and punish crimes of all kinds perpetrated in its territory”).



Lebanon against Messrs Issam, Devincci and Hussam Hourani, as well as against Mr. Rakhat Aliyev.<sup>25</sup>

124. Before examining these three alleged actions, it is noted that, in their Request for Provisional Measures, the Claimants also have briefly mentioned a fourth current or ongoing action, namely the arrest on 6 June 2014 of Mr. Rakhat Aliyev in Vienna on allegations of kidnapping and murder of two bankers, without sufficiently clarifying however whether and, if so, how this arrest by the Austrian authorities must be considered in this Arbitration as an act of harassment and intimidation by the Respondent (Request, para. 77, p. 23). Moreover, the Claimants have not addressed Mr. Aliyev's arrest in Vienna during the hearing of 8 October 2014 or in their letter of 10 October 2014. By contrast, in its Response and at the hearing, the Respondent explained that Mr. Aliyev was arrested in Vienna by the Austrian authorities on the basis of a European arrest warrant issued by the Austrian authorities as a result of their own investigations into the kidnapping and murder of the two bankers. Mr. Aliyev returned to Vienna on 5 June 2014 and, as he then was within the jurisdiction of the Austrian authorities, was arrested the following day by these authorities in conformity with Austrian law and procedure (Response, paras 38-44, pp. 16-17; Transcript, p. 62, line 3 to p. 63, line 11 and p. 111, line 7 to p. 112, line 1).
125. The Claimants do not dispute the Respondent's explanations. Nor do they allege that the Austrian judiciary is biased or impervious to the requirements of due process, or that the Respondent would have attempted to use the Austrian judiciary against the Claimants in a way that would be incompatible with the rights that the Request for Provisional Relief aims to preserve. Therefore, based on the record as it presently stands, the Tribunal finds that the Claimants have not proven (to the extent that this might have been alleged) that Mr. Aliyev's arrest in Vienna could and should be considered in this Arbitration as an act of harassment and intimidation by the Respondent, which causes an irreparable harm to the Claimants' rights as identified above. Hence, the Tribunal will not

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<sup>25</sup> As was seen in paragraphs 22 *et seq.* above, since the hearing of 8 October 2014, the Claimants have informed the Tribunal of further events that occurred in November and December 2014, without however making any comments on the timing and implications of such events with respect to the Claimants' Request for Provisional Measures, other than that such events would reinforce the Claimants' Request.

further consider Mr. Aliyev's arrest as a possible basis for the Claimants' Request for Provisional Measures, it being recalled that the Claimants themselves have not clearly identified this arrest as an act of the Respondent.

***a. The Respondent's alleged involvement in the Websites and the Protest***

126. As was seen in paragraphs 52 and 53 above, the Claimants argue that the websites [www.justicefornovikova.com](http://www.justicefornovikova.com) and [www.rakhataliyev.com](http://www.rakhataliyev.com) "could only be made possible with the financial and human resources as well as the persistence of backers with ulterior motives". Put simply, this means that for the Claimants the Respondent is behind the Websites and the Protest in one way or another. Indeed, according to the Claimants, the Websites and the Protest have been "caused, promoted, encouraged and/or funded by Kazakhstan in blatant violation of the principle of the presumption of innocence, and of the principle of prohibition of unlawful attacks on one's honor and reputation" (Request, para. 68, p. 21). Their purpose is to harass, discredit and intimidate the Hourani brothers, thereby putting the integrity of this Arbitration in jeopardy (Request, paras 70-77, pp. 21-23; Transcript, p. 6, line 14 to p. 8, line 4). According to the Claimants, the evidence presented to this Tribunal – condensed at the hearing into ten categories – proves that the Respondent is behind the Websites and the Protest (Transcript, p. 9, line 25 to p. 29, line 4).
127. As was seen in paragraphs 71-72 above, the Respondent asserts that while the Claimants have not provided any evidence in support of their allegations, the Respondent has presented evidence by Mr. Andrey Kravchenko and Prof. Olcott which shows that the Respondent has nothing to do with either the Websites or the Protest (see also Transcript, p. 50, lines 14-19 and p. 60, line 4 to p. 62, line 2). As was seen in paragraph 41 above, the Respondent submits that the Claimants' requests pertaining to the Websites and the Protest are moot because Mr. Kravchenko and his office have already conducted investigations with the relevant organs of the Republic of Kazakhstan and such investigations have established that the Respondent had nothing to do with the Websites and the Protest (Respondent's letter of 16 October 2014, p. 3).
128. Based on the record as it presently stands, the Tribunal finds that the Claimants have not proven that the Respondent was in any way involved with the

Websites or the Protest. The evidence currently before the Tribunal does not establish that the Websites and the Protest “could only be made possible with the financial and human resources as well as the persistence of backers with ulterior motives”, *i.e.* the Respondent, as alleged by the Claimants.

129. That said, neither has the Respondent been able to show that is was not somehow behind the Websites and the Protest. It is obviously well known that proving a negative fact is the “*probatio diabolica*”. But it bears mentioning that the Tribunal was not particularly impressed by the testimony of Deputy Prosecutor General Kravchenko with respect to the Websites and the Protest. The Tribunal has no reason to question the candour of his testimony and thus retains it. At the same time, the Tribunal has some reservations concerning the conception, scope and implementation of the investigations and disclosures the Respondent claims to have undertaken and submitted in these proceedings with regard to the Websites and the Protest. Such investigations appear less efficient than they could have been. Similarly, Professor Olcott failed to supply fully conclusive evidence that the Respondent indeed had nothing to do with the Websites and the Protest. Furthermore, the Tribunal has noticed the conspicuous timing of the launching of the Websites and of the Protest, which, as has been pointed out by the Claimants, coincides with developments in this Arbitration, namely the holding of the first session on 4 June 2014 (see Request, para. 53, p. 16; para. 57, p. 17 and para. 60, p. 18).
130. The Tribunal remains in doubt and is not convinced one way or the other. This Tribunal is thus prepared to give credence to the Claimants’ allegations of harassment. However, based on the record as it presently stands, it is not clear to the Tribunal whether and to what extent the Respondent was involved with the Websites and the Protest. Consequently, the Claimants having not met their burden of proof, this Tribunal cannot but dismiss the Claimants’ allegations. From this it follows that the Claimants also have not demonstrated how or why the investigations and declarations in their Amended Request 2.2 are urgently necessary to avoid irreparable harm to their rights in this Arbitration. The Tribunal therefore must reach the conclusion that the Claimants have not established that their Amended Request 2.2 is urgently needed in order to prevent the Respondent from causing an irreparable harm to the Claimants’ rights to be preserved in this arbitration.

***b. The Respondent's allegedly unlawful involvement in the Novikova case before the Lebanese courts***

131. As was seen in paragraphs 51 and 55 above, the Claimants allege that the Respondent has extensively “lobbied” the Lebanese authorities to incriminate the Hourani brothers and implicate them in the criminal proceedings for the alleged murder of Ms. Novikova in Lebanon in 2004 (see Transcript, p. 21, line 8 to p. 23, line 7). For the Claimants, the facts and circumstances underlying these criminal proceedings, as well as the Respondent's motivation, perseverance and timing with respect to the Novikova case confirm that this is not an ordinary case of a State legitimately exercising its prerogatives and rights, but rather of the abusive exercise of sovereign powers. While it may have been lawful under Lebanese law for Ms. Novikova's mother to request the reopening of the Novikova case, there is nothing to suggest that the Respondent has standing, *i.e.* to participate as it does as *partie civile* in these criminal proceedings (see Transcript, p. 21, lines 8-17 and p. 23, line 10 to p. 24, line 9). Moreover, the involvement of the Hourani brothers and, in particular, of Mr. Devincci Hourani, in the Novikova case as from July 2012 and, in particular, their summoning to a hearing in Lebanon in February 2013, *i.e.* merely days before the final hearing in the *Ruby Roz* arbitration and shortly after the present Arbitration was initiated, further confirms the abusive nature of the Respondent's conduct (see Transcript, p. 19, line 16 to p. 25, line 14).
132. As was seen in paragraphs 74 *et seq.* above, it is the Respondent's case that its actions with respect to the Novikova case, which has nothing to do with the present Arbitration, were entirely justified and in conformity with the applicable law. Given the seriousness of the evidence it was the Respondent's obligation to press charges against Mr. Aliyev and the Hourani brothers to investigate their role in the alleged murder of Ms. Novikova. The evidence submitted by the Respondent in this Arbitration confirms that the reopening of the Novikova case was legitimate and in conformity with Lebanese law. Moreover, the Respondent argues that there has not been any “lobbying” before the Lebanese authorities, but rather legitimate requests for cooperation, which is common practice in cases where two countries are investigating the same alleged facts or where criminal investigations have ramifications in two countries. At the hearing of 8 October 2014 the Respondent further insisted that the evidence before this

Tribunal shows that the murder charges against Mr. Aliyev and the Hourani brothers were neither trumped up nor frivolous. They cannot be considered as harassment but constitute compliance with the law. The Respondent contends that it is not the role of this Tribunal to interfere with legitimate criminal actions based on serious charges. In any event, this Tribunal has no jurisdiction over Ms. Novikova's parents so as to prevent them from continuing the criminal proceedings (Transcript, p. 63, line 12 to p. 72, line 25).

133. What is at issue are the Respondent's investigations in the Novikova case and its requests submitted to the Lebanese authorities, which the Claimants describe as "excessive lobbying" of the Lebanese authorities to have the Novikova case reopened and move forward against the Hourani brothers. Furthermore, what is also at issue is the Respondent's standing in the Lebanese criminal proceedings in the Novikova case. In a nutshell, this means that this Tribunal is requested to recommend provisional measures with respect to the Respondent's investigations and participation as *partie civile* in the criminal proceedings.
134. The Tribunal agrees with the findings of the arbitral tribunal in the *Caratube I* arbitration that "criminal investigations and measures taken by a state in that context require special considerations". In particular, in the *Caratube I* arbitration, the tribunal pertinently held as follows:

136. [...] *the language authorizing ICSID Tribunals in Article 47 of the Convention and Rule 39 is very broad and does not give any indication that any specific state action must be excluded from the scope of possible provisional measures. Therefore, this Tribunal does not agree with the strict approach which seems to have been taken by the Tribunal in the SGS decision (page 301) quoted by Respondent. Rather this broad language can be interpreted to the effect that, in principle, criminal investigations may not be totally excluded from the scope of provisional measures in ICSID proceedings. The present Tribunal, in this regard, agrees with the approach taken by the ICSID Tribunal in the Tokios case in its Orders 1 and 3 to which both Parties in the present case have referred.*

137. *But, similarly to the considerations of the Tokios Tribunal in §§ 12 and 13 of its Order No.3, this Tribunal feels that a particularly high threshold must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a state.*

138. *This threshold and the respective burden of proof cannot be overcome by Claimant's Request (f) in the present case in order for this Tribunal to issue provisional measures.*

139. *First of all, applying Rule 39(1), the Tribunal does not find that the right to be preserved is threatened. Claimant has not shown that its procedural right to continue with this ICSID arbitration is precluded by the criminal investigation [...].*

(Emphasis added)

135. This Tribunal agrees that a “particularly high threshold must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a state”. Whether this high threshold would affect the burden of proof as the *Caratube I* tribunal appears to suggest may remain undecided. What is certain however is that it would take proof of exceptional circumstances to recommend that a State refrain from conducting criminal investigations, including from participating as *partie civile* in criminal proceedings, including joining in already pending criminal proceedings, possibly in another State. The Claimants would have to establish that the Respondent's investigations and participation as *partie civile* in the criminal proceedings in Lebanon constitute an impermissible act that prevents them from asserting their rights in this Arbitration, thus causing an irreparable harm to the Claimants' rights to be preserved in this Arbitration by the recommendation of urgent provisional relief. This would imply a showing that there is no higher or equivalent public interest of the State to be a party to the criminal proceedings.
136. In the opinion of the Tribunal, this the Claimants have not done. It may well be unusual for a State to conduct criminal investigations, or require the reopening of criminal proceedings abroad and to participate as *partie civile* in such criminal proceedings in circumstances such as the ones in the present case. However, this does not mean that the Respondent's involvement in the criminal proceedings in Lebanon is unlawful and that it deprives the Claimants of their rights to be preserved in this Arbitration.
137. That said, it is true that doubts remain as to the Respondent's standing and motivations in the criminal proceedings in Lebanon. Professor Hadi Slim's expert report does not answer this question, but refers to a decision by the Lebanese *Cour de Cassation* in which the Court leaves this question open

because the standing of Ms. Novikova's mother in the criminal proceedings is enough for these proceedings to continue (see Professor Slim's expert report dated 13 August 2014, para. 59). Based on the record as it presently stands, the Tribunal thus remains in doubt as to the Respondent's standing in the criminal proceedings in Lebanon. That being so, it does not appear to be disputed that Ms. Novikova's mother has standing in the criminal proceedings in Lebanon and that these proceedings would continue even if the Respondent were to withdraw as *partie civile* (see Transcript, p. 54, line 7 to p. 55, line 2). It is therefore not clear whether and how the Respondent's withdrawal as *partie civile* constitutes an urgent and necessary measure, capable of avoiding the alleged irreparable harm to the Claimants' rights in this Arbitration that the criminal proceeding in Lebanon would cause. In particular, there is no actual evidence that the Respondent is using Ms. Novikova's family as a means to pursue its own objectives rather than assist these relatives of a possible victim of an alleged abominable crime looking for the truth and remedy.

138. At the hearing of 8 October 2014 the Claimants have relied on the decision on provisional measures rendered in the *Quiborax v. Bolivia* arbitration (Exh. CLA-19). According to the Claimants,

*[t]ribunals in less harsh circumstances for the claimant have gone as far as ordering the state to suspend criminal proceedings within that state. I refer to Quiborax v Bolivia, tab 11 (CLA-19), because the tribunal considered that the claimants could not in these circumstances put forward their case. I quote, at tab 11, the tribunal saying: "146. Even if no undue pressure is exercised on potential witnesses, the very nature of ... criminal proceedings is bound to reduce their willingness to cooperate in the ICSID proceeding." And: "... 'ability to have [their] claims and requests for relief in the arbitration fairly considered ...'" Here the circumstances warrant -- even more so -- the provisional measures that we are requesting.*

139. While this Tribunal appreciates the wisdom of the *Quiborax* tribunal's findings, they cannot apply in the present case. Indeed, the *Quiborax* decision must be distinguished, given that the *Quiborax* tribunal found that the existence of a direct relationship between the criminal proceedings and the ICSID arbitration had been established, meriting the preservation of the claimants' rights in that arbitration. The *Quiborax* tribunal held in relevant part:

121. In addition, although the Tribunal has every respect for Bolivia's sovereign right to prosecute crimes committed within its territory, the evidence in the record suggests that the criminal proceedings were initiated as a result of a corporate audit that targeted Claimants because they had initiated this arbitration. Indeed, the Querrela Criminal expressly states that the alleged irregularities in Claimants' corporate documentation were detected in consideration of ("en atención a") the Request for Arbitration filed by Claimants against Bolivia. Lorena Fernández, one of the authors of Informe 001/2005, testified that the corporate audit was made at the request of the Ministry of Foreign Affairs in the context of an arbitration proceeding and was aimed at establishing whether the shareholders in NMM were Chilean nationals. Indeed, the very content of Informe 001/2005 suggests that the underlying motivation for the audit was to serve Bolivia in the defense of this arbitration claim, as it contained specific recommendations for such defense.

122. The Tribunal cannot fail to note that these actions were taken after an inter-ministerial committee specifically recommended in the 2004 Memo that Bolivia should try to find flaws in Claimants' mining concessions as a defense strategy for the ICSID arbitration. Seen jointly with the 2004 Memo, the corporate audit and the criminal proceedings appear to be part of a defense strategy adopted by Bolivia with respect to the ICSID arbitration.

[...]

124. What is clear to the Tribunal is that there is a direct relationship between the criminal proceedings and this ICSID arbitration that may merit the preservation of Claimants' rights in the ICSID proceeding. [...]

146. [...] Given that the existence of this ICSID arbitration has been characterized within the criminal proceedings as a harm to Bolivia, it is unlikely that the persons charged will feel free to participate as witnesses in this arbitration.

[...]

148. Thus, the Tribunal finds that Claimants have shown the existence of a threat to the procedural integrity of the ICSID proceedings, in particular with respect to their right to access to evidence through potential witnesses. [...]

140. As was noted above, doubts remain as to the Respondent's standing and motivations in the Lebanese criminal proceedings. However, unlike the *Quiborax* tribunal, it is *not* clear to this Tribunal that there is a direct relationship between the criminal proceedings in Lebanon and this Arbitration so that the



Claimants' rights in this Arbitration are being defeated and must thus be protected. Unlike the claimants in the *Quiborax* case, the Claimants in the present case have not met their burden of proof in this respect.

141. Finally, similarly to what was stated at paragraph 129 above, the Tribunal feels the need to stress that there are troubling circumstances or coincidences also with respect to the Novikova case, in particular when one puts various events into perspective and looks at the timeline as a whole rather than individual event by individual event. To take an example, it is conspicuous that the Respondent's actions in Lebanon are often contemporaneous with events going to the developments concerning Mr. Aliyev or the *Ruby Roz* and the *Caratube I* arbitrations.

142. As has been pointed out at paragraph 114 above, the Respondent's alleged past conduct in previous arbitrations is not relevant for this Tribunal's decision on the Claimants' Request and can in no way be considered as evidence for the Respondent's alleged current or ongoing actions. However, it is rather conspicuous that the tribunals in the *Caratube I* and *Ruby Roz* arbitrations felt the need to point out troubling circumstances and coincidences, as does this Tribunal. The *Ruby Roz* tribunal made the following comment with respect to the Hourani brothers being summoned to appear at a hearing before the Lebanese *juge d'instruction* on 4 February 2013 and their ensuing failure to testify before the arbitral tribunal during the 11-12 February 2013 hearing:

*Having considered the matter with great care, the Tribunal notes the timing of the criminal complaint in Lebanon, of the hearing on that complaint and of the reported investigatory interview in Lebanon. Respondent has not provided an entirely satisfactory explanation of that timing. The Tribunal is not in a position to ascertain precisely what has been taking place or why, but it accepts the stated fear of reprisals by Claimant's witnesses, whether those fears are in fact justified or not. Accordingly, the Tribunal grants the Claimant's request that the witness statements of the witnesses who, as of now, have declined to appear to be cross-examined, will be maintained on the record and will be given the weight that the Tribunal deems appropriate. However, their failure to attend will have a very serious impact on the weight the Tribunal gives to their testimony.*

(Exh. C-55, Ruby Roz Procedural Order No. 5, paras 18-19)

143. As was mentioned in paragraph 114 above with respect to the *Caratube I* arbitration, the above comments by the *Ruby Roz* tribunal were made in particular circumstances, where the concomitance between events was more striking than in the case at hand. Therefore, the present case is not directly comparable. Suffice it to say that the summons to appear before the *juge d'instruction* in Lebanon was served on the Hourani brothers not only days before their scheduled testimony in the *Ruby Roz* arbitration, but also only a few months after the Claimants had sent the Notice of Dispute in this Arbitration (Request, para. 32, p. 10).
144. Based on the foregoing, this Tribunal finds that the Claimants have not overcome the applicable “particularly high threshold”. While the record as it presently stands lends credence to the allegations of harassment against the Claimants, the Tribunal cannot but reach the conclusion that the Claimants have not established that their Amended Request 2.1 is urgently needed in order to prevent the Respondent from causing an irreparable harm to the Claimants’ rights to be preserved in this Arbitration.

**c. Conclusion**

145. Based on the foregoing, the Tribunal must draw the conclusion that, while doubts remain, the Claimants have not sufficiently proven that the Respondent has taken any ongoing actions or is currently taking any actions that cause an irreparable harm to the Claimants’ identified rights in this Arbitration, which, in order to be preserved, urgently require the recommendation of the measures requested by the Claimants.
146. As was seen above, this conclusion applies with respect to the Claimants’ Amended Requests 2.1 and 2.2, which concern the Respondent’s alleged involvement in the Websites and Protest, as well as the criminal proceedings in Lebanon in the Novikova case.
147. But this conclusion applies also with respect to the Claimants’ Amended Requests 2.3 and 2.4, which broadly request an undertaking from the Respondent to abstain from any direct or indirect measures or actions that could aggravate the present dispute, jeopardize the integrity and the legitimacy of this Arbitration and the equality of the Parties, or that could contravene the

fundamental principles of the presumption of innocence of the Hourani family and of the prohibition of unlawful attacks on one's honour and reputation. Indeed, the Claimants have not proven that the Respondent has taken any ongoing actions or is currently taking any actions that would contravene such rights of the Claimants. What is more, as was seen in paragraph 112 above, the Respondent has affirmed in its written submissions and through its Counsel at the hearing of 8 October 2014 that it will continue to abstain from any actions that would contravene such rights, thereby rendering any urgent provisional measures aimed at protecting such rights unnecessary. The Tribunal will definitely grant considerable weight to any representation Counsel, on either side, would make in this Arbitration.

148. That being said, the Tribunal recalls its statement in paragraph 113, namely that it would not be unprecedented that a party, be it a State, would in fact not keep by its commitments and protestations of good faith, possibly even make representations without the slightest intent to fulfil them. It remains that recommending compliance with such representations would in practice not significantly alter the situation, considering in particular the relative lack of specificity of the Amended Requests 2.3 and 2.4.
149. In conclusion, the Claimants have shown a certain need for protection in this Arbitration, and the filing of their Request for Provisional Measures does not appear unreasonable in the circumstances of the present case. However, the Claimants have not been able to concretely and specifically prove that the Respondent has engaged, is engaging or will engage in any actions that could cause an irreparable harm to the Claimants' rights to be preserved in this Arbitration and that would urgently require the provisional measures they request.<sup>26</sup>

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<sup>26</sup> In the opinion of the Tribunal, the reasons and conclusions set forth in paragraphs 116 *et seq.* also apply with respect to the latest events reported by the Claimants in their correspondence of 13, 16 and 18 November 2014, and their email of 2 December 2014. While the Tribunal remains in doubt as to the origin of such events and is prepared to give credence to the Claimants' allegations of harassment, it must conclude that the Claimants have been unable to meet their burden of proof in this regard, namely that the Respondent has engaged, is engaging or will engage in any actions that could cause an irreparable harm to the Claimants' rights to be preserved in this Arbitration. This Tribunal thus cannot but dismiss the Claimants' allegations.

### **3. The recommendation of the requested provisional measures must not prejudice the Tribunal's decision on the merits of the case**

150. As was mentioned in paragraph 100 above, the Parties agree that the recommendation of the requested provisional measures must not prejudice the Tribunal's decision on the merits of the case. However, the Parties disagree whether such requirement is met in the present case.

151. In the light of the Tribunal's conclusion that the Claimants have not sufficiently proven the urgent necessity of the provisional measures requested, the Tribunal can dispense with entering into a discussion of the Parties' arguments with respect to the requirement that the Tribunal must not prejudice the merits of the case.

### **4. The provisional measures must not be too broad**

152. As was mentioned in paragraph 101 above, it is not clear whether the Parties agree with respect to the existence of a requirement that the provisional measures requested must not be too broad. In fact, the Claimants have not taken a position on such a requirement.

153. Again, in the light of the Tribunal's conclusion on the requirements of urgency and necessity, the Tribunal can dispense with entering into a discussion of such a possible disagreement, should there be one.

### **5. Final observations**

154. The Tribunal has concluded that the Claimants have not established an urgent necessity for the recommendation of their Amended Requests 2.1 to 2.5. Therefore, the Claimants' Request for Provisional Measures must be denied. However, the Tribunal wishes to again expressly stress the Parties' general duty, arising from the principle of good faith, not to take any action that may aggravate the present dispute, affect the integrity of the arbitration and the equality of the Parties, or that could contravene the fundamental principles of the presumption of innocence of the Claimants and of the prohibition of unlawful attacks on one's honour and reputation.

155. The Respondent requests the Tribunal "that it be awarded the costs it has incurred in connection with Claimants' Request, including but not limited to legal

fees and expenses and expert fees and expenses” (Response, para. 101, p. 39). The Tribunal has found that the Claimants have shown a certain need for protection in this Arbitration and that it was not unreasonable under the circumstances to have submitted its Request for Provisional Measures. In these circumstances, the Tribunal finds that each Party shall bear its own costs.

## **VI. DECISION**

156. For the foregoing reasons

- (i) The Claimants’ Request for Provisional Measures, as amended in writing on 10 October 2014, is denied.
- (ii) Each Party shall bear its own costs, whereas the Tribunal’s costs will be determined in the Final Award.

For the Arbitral Tribunal:

[Signed]

Dr. Laurent Lévy, President