

# **International Centre for Settlement of Investment Disputes**

**Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún**  
CLAIMANTS

**v.**

**Plurinational State of Bolivia**  
RESPONDENT

**ICSID Case No. ARB/06/2**

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## **DECISION ON PROVISIONAL MEASURES**

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Rendered by an Arbitral Tribunal composed of:

Prof. Gabrielle Kaufmann-Kohler, President

Hon. Marc Lalonde, P.C., O.C., Q.C., Arbitrator

Prof. Brigitte Stern, Arbitrator

Secretary of the Tribunal

Natalí Sequeira

Date: 26 February 2010

## TABLE OF CONTENTS

<b>I.</b>	<b>SUBJECT MATTER OF THIS DECISION</b> .....	<b>3</b>
<b>II.</b>	<b>FACTUAL AND PROCEDURAL BACKGROUND</b> .....	<b>4</b>
A.	ORIGIN OF THE DISPUTE AND PROCEDURAL HISTORY .....	4
B.	FACTS UNDERLYING THE REQUEST FOR PROVISIONAL MEASURES .....	8
1.	<i>NMM's corporate audit</i> .....	8
2.	<i>The criminal proceedings</i> .....	9
<b>III.</b>	<b>POSITIONS OF THE PARTIES</b> .....	<b>17</b>
A.	CLAIMANTS' POSITION .....	17
1.	<i>Rights that require preservation</i> .....	18
a.	Right to the preservation of the status quo and non-aggravation of the dispute .....	18
b.	Right to the procedural integrity of the arbitration proceedings .....	19
c.	The right to the exclusivity of the ICSID proceedings under Art. 26 of the ICSID Convention .....	21
2.	<i>Requirements for provisional measures</i> .....	22
a.	Urgency .....	22
b.	Necessity .....	23
B.	RESPONDENT'S POSITION .....	23
1.	<i>Rights for which protection is sought</i> .....	24
a.	With respect to the right to the preservation of the status quo and non-aggravation of the dispute .....	25
b.	With respect to the right to the integrity of the arbitral proceedings .....	26
c.	With respect to the exclusivity of the ICSID proceedings .....	27
2.	<i>Requirements for provisional measures</i> .....	28
a.	Urgency .....	29
b.	Necessity .....	29
<b>IV.</b>	<b>DISCUSSION</b> .....	<b>31</b>
A.	APPLICABLE STANDARDS .....	31
1.	<i>Legal framework</i> .....	31
2.	<i>Prima facie jurisdiction</i> .....	31
3.	<i>Requirements for provisional measures</i> .....	32
B.	EXISTENCE OF RIGHTS REQUIRING PRESERVATION .....	32
1.	<i>Rights that may be protected by provisional measures</i> .....	33
2.	<i>Right to exclusivity of the ICSID proceedings in accordance with Art. 26 of the ICSID Convention</i> .....	36
3.	<i>The right to the preservation of the status quo and the non-aggravation of the dispute</i> .....	37
4.	<i>Right to the procedural integrity of the arbitration proceedings</i> .....	39
C.	URGENCY .....	41
D.	NECESSITY .....	42
<b>V.</b>	<b>DECISION</b> .....	<b>46</b>

## I. SUBJECT MATTER OF THIS DECISION

1. The present decision deals with a Request for Provisional Measures (“Claimants’ RPM”) filed by Claimants Quiborax S.A. (“Quiborax”), Allan Fosk and Non Metallic Minerals S.A. (“NMM”) on 14 September 2009, by which Claimants request that the Arbitral Tribunal:
  - (1) Order Bolivia and/or Bolivia’s agencies or entities to refrain from engaging in any conduct that aggravates the dispute between the parties and/or alters the *status quo*, including any conduct, resolution or decision related to criminal proceedings in Bolivia against persons directly or indirectly related to the present arbitration;
  - (2) Order Bolivia and/or Bolivia’s agencies or entities to discontinue immediately and/or to cause to be discontinued all proceedings in Bolivia, including criminal proceedings and any course of action relating in any way to this arbitration and which jeopardize the procedural integrity of these proceedings;
  - (3) Order Bolivia and/or Bolivia’s agencies or entities to discontinue immediately and/or to cause to be discontinued all proceedings in Bolivia, including criminal proceedings and any course of action relating in any way to this arbitration and which threaten the exclusivity of the ICSID arbitration.<sup>1</sup>
2. In their Reply on Provisional Measures (“Claimants’ Reply”), Claimants supplemented this request with a fourth request for relief:
  - (4) Order Bolivia and/or Bolivia’s agencies or entities to deliver to Claimants the corporate administration of NMM sequestered in the course of the criminal proceedings.<sup>2</sup>
3. The Plurinational State of Bolivia (“Bolivia” or “Respondent”) has objected to Claimants’ Request for Provisional Measures and has requested the Tribunal to:
  - (1) Reject Claimants’ Request for Provisional Measures;
  - (2) Refrain from adopting the measures that have been requested; and
  - (3) Order Claimants to pay the expenses that Bolivia has had to incur because of their groundless and reckless request.<sup>3</sup>

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<sup>1</sup> Claimants’ RPM, p. 22.

<sup>2</sup> Claimants’ Reply, ¶ 126.

<sup>3</sup> Respondent’s Rejoinder, ¶ 81.

## II. FACTUAL AND PROCEDURAL BACKGROUND

### A. Origin of the Dispute and Procedural History

4. The dispute between the Parties originates from the revocation by Presidential Decreto Supremo 27.589 of 23 June 2004 (“D.S. 27.589”), of eleven mining concessions allegedly held by Claimants in Bolivia (the “Bolivian Concessions”). The concessions were held by investment vehicle and co-Claimant NMM. Co-Claimants Quiborax and Allan Fosk, both Chilean nationals, claim to have a 51% majority interest in NMM and a 100% interest in the Bolivian Concessions.
5. Claimants allege that the revocation of the Bolivian Concessions was a confiscatory measure. Claimants state that D.S. 27.589 revoked the Bolivian Concessions for alleged violations of Bolivian law, on the basis of Law 2.564 of 9 December 2003 (“Law 2.564”), which Claimants allege was tailor-made to authorize the Executive to annul Claimants’ concessions retroactively. Claimants also claim that D.S. 27.589 applied Law 2.564 incorrectly, because the Executive’s authority to annul had expired on 9 February 2004, and thus D.S. 27.589 is unlawful under domestic Bolivian law.
6. Claimants allege that D.S. 27.589 violates Claimants’ rights as foreign investors in Bolivia under the *Acuerdo entre la República de Bolivia y la República de Chile para la Promoción y Protección Recíproca de Inversiones* (the “BIT”). On 22 July 2004, Claimants requested friendly consultations in accordance with Art. X of the BIT. This request did not lead to a resolution of the dispute, and on 4 October 2005, Claimants filed a Request for Arbitration before ICSID, which was registered on 6 February 2006.
7. In their Request for Arbitration, Claimants asked the Tribunal to declare that Bolivia breached: (i) Art. VI of the BIT by depriving Claimants of their investment in Bolivia; (ii) Art. IV of the BIT by not providing Claimants fair and equitable treatment; and (iii) Art. III of the BIT by not protecting Claimants’ investment in Bolivia and submitting Claimants to unreasonable and discriminatory measures. Claimants requested compensation of all damages suffered as a consequence of these violations, plus interest, as well as all costs of arbitration and all other costs incurred as a consequence of Bolivia’s allegedly unlawful acts.
8. The dispute continued to escalate after Claimants’ request for friendly consultations. Bolivia set up an inter-ministerial task force to evaluate the merits of Claimants’ claims. In an internal memorandum dated 8 December 2004 (the “2004 Memo”), the task force concluded that D.S. 27.589 suffered serious legal defects and that the case was about

to become an international predicament for Bolivia.<sup>4</sup> The task force outlined different scenarios to aid Bolivia's defense strategy, recommending as the "best alternative" to try to demonstrate the existence of flaws in the processing of the concessions.<sup>5</sup>

9. On 28 October 2004, the Bolivian Mining Superintendency annulled the already revoked concessions.<sup>6</sup> At the same time, Claimants allege that Bolivia submitted NMM to multiple tax investigations. By November 2007, Claimants state that NMM had been ordered to pay approximately US\$ 1,200,000 in alleged taxes and fines.
10. During this period, the Parties engaged in prolonged negotiations. Following constitution of the Tribunal on 19 December 2007, on the day of the first Procedural Session on 20 March 2008, the Parties communicated to the Tribunal that they had reached an oral settlement agreement. Upon request from the Parties, the proceedings were suspended.
11. Nine months later, Bolivia initiated criminal actions against several persons related directly or indirectly to the present arbitration, including co-Claimant Allan Fosk. Claiming that Bolivia had repudiated the oral agreement, on 14 January 2009 Claimants requested the Tribunal to resume the arbitration.
12. By Procedural Order No. 1 of 5 March 2009, the Tribunal set the calendar for the Parties' presentations. After certain changes requested or agreed by the Parties, by letter of 17 September 2009 the Tribunal amended the procedural schedule as follows:

1. On or before **14 September 2009**, the Claimants shall file their Memorial.
2. At its option, the Respondent shall file either:
  - 2.1 Objections to the jurisdiction of the Tribunal by no later than **15 January 2010**; or
  - 2.2 A Counter-memorial on the merits by no later than **15 January 2010**.

**Proceedings following paragraph 2.1 above:**

3. On or before **16 April 2010**, the Claimants shall file their Counter-memorial on jurisdiction.
4. On or before **18 June 2010**, the Respondent shall file its Reply on jurisdiction.
5. On or before **20 August 2010**, the Claimants shall file their Rejoinder on jurisdiction.

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<sup>4</sup> See 2004 Memo (Annex CPM-5), p. 11.

<sup>5</sup> *Id.*, pp. 10-11.

<sup>6</sup> See Writs of Annulment (Annex CPM-6).

6. On **23 September 2010**, the Tribunal will hold a hearing on jurisdiction in Paris, at a location to be later specified. On a date to be later determined but at least two weeks before the hearing on jurisdiction, the Tribunal will hold a pre-hearing telephone conference to address any outstanding issues relating to the forthcoming hearing.
7. Thereafter, the Tribunal will issue a decision or award on jurisdiction and, if applicable, a procedural order on the continuance of the proceedings on the merits, it being specified that, in this latter case, the Respondent will be required to submit its Counter-memorial on the merits no later than four months from the date of the said procedural order.

**Proceedings following paragraph 2.2 above:**

8. On or before **15 March 2010**, the Claimants shall file their Reply on the merits.
  9. On or before **17 May 2010**, the Respondent shall file its Rejoinder on the merits.
  10. On **22 to 26 June 2010** (the exact number of days being determined during the pre-hearing telephone conference), the Tribunal will hold a hearing on the merits and, if applicable on jurisdiction, in Paris, at a location to be later specified. On a date to be later determined but at least two weeks before said hearing, the Tribunal will hold a pre-hearing telephone conference to address any outstanding issues relating to the forthcoming hearing.
13. On 14 September 2009, Claimants submitted their Memorial, simultaneously with a Request for Provisional Measures.
  14. By letter of 22 September 2009, the Tribunal invited Respondent to submit its observations on Claimants' Request for Provisional Measures by 13 October 2009. On 23 September 2009, Respondent requested an extension to submit its observations. The Tribunal invited Claimants to comment on this request by 5 October 2009.
  15. On 2 October 2009, Claimants filed a request for a "temporary restraining order." On that same date, the Tribunal invited Respondent to provide its observations by 5 October 2009.
  16. On 5 October 2009, after receiving Respondent's observations, the Tribunal denied Claimants' request for a "temporary restraining order" and, based on the circumstances surrounding Claimants' latest request, denied Respondent's request for an extension to submit its observations on Claimants' Request for Provisional Measures. The Tribunal invited the Parties to submit brief rebuttals on 21 October 2009 and 29 October 2009, respectively.
  17. On 14 October 2009, Respondent filed its Objection to Claimants' Request for Provisional Measures ("Respondent's Objection"). On 21 October 2009, Claimants filed their Reply, and on 29 October 2009 Respondent filed its Rejoinder.

18. On 24 November 2009, the Tribunal and the Parties participated in a telephone conference where the Parties supplemented their written submissions. The following persons participated in the telephone conference:

*Members of the Tribunal*

Professor Gabrielle Kaufmann-Kohler, President of the Tribunal

Professor Brigitte Stern, Arbitrator

Hon. Marc Lalonde, Arbitrator

*ICSID Secretariat*

Ms. Natalí Sequeira, Secretary of the Tribunal

*Representing Claimants*

Mr. Allan Fosk, Claimant

Mr. Andrés Jana, Bofill Mir & Álvarez Hinzpeter Jana

Mr. Jorge Bofill, Bofill Mir & Álvarez Hinzpeter Jana

Ms. Johanna Klein Kranenberg, Bofill Mir & Álvarez Hinzpeter Jana

Ms. Dyalá Jiménez F., Bofill Mir & Álvarez Hinzpeter Jana

Mr. Sebastián Yanine, Bofill Mir & Álvarez Hinzpeter Jana

*Representing Respondent*

Ms. María Cecilia Rocabado Tubert, Minister of Legal Defense of the State

Mr. Javier Antonio Viscarra, Vice-Minister of Legal Defense of the State

Mr. Alfredo Mamani, Director for Jurisdictional and Arbitral Defense

Mr. Paul Reichler, Foley Hoag LLP

Mr. Ronald E.M. Goodman, Foley Hoag LLP

Mr. Alberto Wray, Foley Hoag LLP

Mr. Diego Cadena, Foley Hoag LLP

19. At the telephone conference, the Tribunal heard the Parties' oral arguments. A transcript was made and distributed to the Parties.
20. By letter of 5 January 2010, Foley Hoag LLP informed the Tribunal that it no longer represented Respondent.

21. On 15 January 2010, Respondent requested a 30-day extension to submit its Objections to jurisdiction or its Counter-memorial on the merits, which the Tribunal granted. Respondent requested another 60-day extension to submit either of these pleadings on 12 February 2010. This time the Tribunal granted an extension only until 24 March 2010. At the date of issuance of this Decision, the procedural calendar described in paragraph 12 above had been extended approximately 2 months.

## **B. Facts Underlying the Request for Provisional Measures**

22. The facts described below are based on the Parties' submissions but reflect the Tribunal's review of the record. As a result, they are presented in the manner that the Tribunal considers most intelligible. The findings of fact are made on the basis of the record as it presently stands; nothing herein shall preempt any later finding of fact or conclusion of law.

### **1. NMM's corporate audit**

23. On 18 January 2005, six months after Claimants' request for friendly consultations and one month following the issuance of the 2004 Memo, the *Superintendencia de Empresas* ordered a corporate audit of NMM. The audit was carried out by employees of the *Superintendencia*, Ms. Lorena Fernández and Mr. Yury Espinoza. According to the testimony of Lorena Fernández, this audit was directed to establish whether NMM's shareholders were Chilean nationals.<sup>7</sup> The audit appears to have been ordered at the request of the Ministry of Foreign Affairs.<sup>8</sup>
24. During the course of the audit, Ms. Fernández and Mr. Espinoza reviewed copies of the shareholders' registry and other corporate documents, including copies of minutes of board and shareholders' meetings. The company had stated that the original corporate documents were not available because they were in Chile, and the *Superintendencia* allowed the company to provide copies. The report that ensued from the audit ("Informe 001/2005" of 11 February 2005) noted that, according to NMM's shareholders' registry, NMM's shareholders were Quiborax, with 13,636 shares, David Moscoso, with 13,103 shares, and Allan Fosk, with one share.<sup>9</sup> With respect to investment by Chilean nationals, the report concluded that the Chilean company

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<sup>7</sup> See Minutes of Informative Declaration before the Prosecutor as Means of Defense of Ms. María Mónica Lorena Fernández Salinas, Case No. 9394/08, 14 January 2009 ("Declaration of Lorena Fernández", Annex CPM-37).

<sup>8</sup> See Declaration of Lorena Fernández (Annex CPM-37) and correspondence between the Ministry of Foreign Affairs and the *Superintendencia de Empresas* regarding NMM's corporate inspection (Annex CPM-48).

<sup>9</sup> Informe 001/2005 (Annex CPM-14), p. 3.



Quiborax had acquired 26,680 shares in NMM from Compañía Minera Río Grande Sur S.A. (“RIGSSA”) on 17 August 2001 (part of which were later transferred to David Moscoso), and thus this investment was protected by the BIT.<sup>10</sup> The report also concluded that the corporate documentation showed signs of improper handling and care.<sup>11</sup> Finally, the report contained certain recommendations with respect to Bolivia’s defense strategy in the ICSID arbitration triggered by the revocation of NMM’s mining concessions (that is, the present arbitration). These recommendations included: (i) analyzing the potential unconstitutionality of Law 1854, which would render the granting of the mining concessions null and void; (ii) establishing whether Quiborax had paid for the acquisition of its shares in NMM from RIGSSA, and thus made an effective investment in Bolivia, and (iii) taking the necessary steps to declare the annulment of the public deed whereby RIGSSA – original owner of the Bolivian Concessions – had contributed those Concessions to NMM, thus rendering Quiborax’s purchase of RIGSSA’s shares in NMM invalid as well.<sup>12</sup>

25. Informe 001/2005 does not appear to have been questioned by the *Superintendencia de Empresas* at the time of its issuance. Nonetheless, on 10 October 2008, the Minister of the State’s Legal Defense requested the *Superintendente* to once again review the file on NMM and certify if there were any irregularities that could give rise to the annulment of NMM’s corporate acts or the annulment of the company’s incorporation.<sup>13</sup>
26. On 17 October 2008, the *Superintendente de Empresas* confirmed the findings of Informe 001/2005 and denied the existence of any irregularities that could give rise to the annulment of the company’s acts, certifying, among other things, the shareholder composition of NMM, consisting of Quiborax, David Moscoso and Allan Fosk.<sup>14</sup>

## 2. The criminal proceedings

27. Despite the certification issued by the *Superintendencia de Empresas* on 17 October 2008, Bolivian authorities continued to review Claimants’ corporate documentation

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<sup>10</sup> *Id.*, p. 6.

<sup>11</sup> *Id.*, p. 6.

<sup>12</sup> *Id.*, pp. 6-7.

<sup>13</sup> See Letter from Héctor E. Arce, Ministry of State’s Legal Defense to Rolando Morales, *Superintendencia de Empresas*, 10 October 2008 (Annex CPM-49).

<sup>14</sup> See Letter from Rolando Morales, *Superintendencia de Empresas*, to Héctor E. Arce, Ministry of State’s Legal Defense, and the attached certification dated 17 October 2008. (Annex CPM-49).

registered in Bolivia's Commercial Register, and noted the existence of certain irregularities in NMM's corporate documentation.<sup>15</sup>

28. Specifically, the Bolivian government discovered the existence of the minutes of a shareholders' meeting of NMM dated 11 September 2001,<sup>16</sup> which had not been provided during the audit, and which contained a different list of shareholders from that included in the minutes of a meeting allegedly held 2 days later, on 13 September 2001.<sup>17</sup> Both minutes had almost identical content, but while the minutes of 11 September 2001 stated that the shareholders of NMM were Fernando Rojas, Gilka Salas, Dolly Paredes and RIGSSA, the minutes of 13 September 2001 stated that the shareholders of NMM were Allan Fosk, Empresa Química Industrial del Bórax S.A. (currently Quiborax) and David Moscoso Ruiz.
29. According to Bolivia, the existence of these two contradictory documents, seen jointly with other corporate documents of NMM, suggests that the minutes of 13 September 2001 may have been forged.<sup>18</sup> Based on this suspicion, on 8 December 2008, the *Superintendente de Empresas* presented a criminal complaint against the following persons:<sup>19</sup>
- (i) Co-Claimant Allan Fosk;
  - (ii) David Moscoso, Claimants' Bolivian business partner;
  - (iii) Fernando Rojas and María del Carmen Ballivián, former legal counsel of Claimants;
  - (iv) Daniel Gottschalk, attorney at Guevara & Gutiérrez, current legal counsel of Claimants;
  - (v) Dolly Teresa Paredes de Linares and Gilka Salas Orozco, employees of Estudio Rojas;
  - (vi) María Mónica Lorena Fernández Salinas and Yury Alegorio Espinoza Zalles, the two (now former) employees of the *Superintendencia de Empresas* who authored Informe 001/2005; and

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<sup>15</sup> Respondent's Objection, ¶¶ 21-29.

<sup>16</sup> Minutes of NMM's Shareholders Meeting dated 11 September 2001 (Annex 8 to Respondent's Objection).

<sup>17</sup> Minutes of NMM's Shareholders Meeting dated 13 September 2001 (Annex 7 to Respondent's Objection).

<sup>18</sup> Respondent's Objection, ¶ 29.

<sup>19</sup> See for all accusations, Criminal Complaint of 8 December 2008, Case N° 9394/08 ("Querrela Criminal", Annex CPM-09). María del Carmen Ballivián was added to the list of persons under investigation on 14 April 2009. See Correction of Extension of Criminal Complaint, 14 April 2009 ("Querrela Modification," Annex CPM-10).

- (vii) Tatiana Giovanna Terán de Velasco and Ernesto Ossio Aramayo, two Notaries Public whose services NMM had used.
30. The accusation underlying the criminal prosecutions (which have been identified as Case N° 9394/08) is that some of the persons listed above forged the minutes of 13 September 2001 (replacing what Bolivia deems to be the real minutes, those of 11 September 2001), while others improperly used such forged document. Specifically, Bolivia accuses the persons listed above of the following crimes:<sup>20</sup>
- (i) Allan Fosk, David Moscoso, Fernando Rojas, and Dolly Paredes are accused of four different crimes: (i) *falsedad ideológica* (forgery) in accordance with Art. 199 of the Bolivian Penal Code (“BPC”); (ii) *uso de instrumento falsificado* (use of forged document); Art. 203 BPC; (iii) *estafa* (fraud), Art. 335 BPC; and (iv) *destrucción de cosas propias para defraudar* (destruction of personal property to defraud), Art 339 BPC;
  - (ii) María del Carmen Ballivián is accused of *falsedad ideológica* and *uso de instrumento falsificado*;
  - (iii) Daniel Gottschalk was accused of *uso de instrumento falsificado* only;
  - (iv) Isaac Frenkel of *destrucción de cosas propias para defraudar*;
  - (v) Lorena Fernández, Yury Espinoza, Ernesto Ossio, and Tatiana Terán are all accused of *incumplimiento de deberes* (dereliction of duties), Art. 154 BPC;
  - (vi) Gilka Salas is mentioned among the persons accused but has not been accused of any crime in particular.
31. Bolivia’s reasons to suspect this forgery are, among others:<sup>21</sup>
- (i) The minutes of 11 September 2001 were inserted into a public deed and used several times in the following years to grant powers of attorney for the company, which suggests that the minutes of 11 September 2001 are the real minutes, while the minutes of 13 September 2001 were created *ex post facto*.<sup>22</sup>
  - (ii) The minutes of 11 September 2001 indicate that one of the shareholders was RIGSSA, which according to the Shareholders’ Registry had transferred its shares to Quiborax on 17 August 2001. Bolivia also claims that this transfer was in breach of NMM’s corporate bylaws, as they provided for a right of first refusal to the remaining shareholders that Bolivia claims was not respected.<sup>23</sup>

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<sup>20</sup> See Querella Criminal (Annex CPM-9) and Querella Modification (Annex CPM-10).

<sup>21</sup> Respondent’s Objection, ¶¶ 22-29. See Public Instrument No. 523/2001, September 20, 2001 (Exhibit 9 to Respondent’s Objection) Public Instrument 291/2002, July 1, 2002 (Exhibit 10 to Respondent’s Objection); NMM’s Shareholders Registry dated January 27, 2009 (Exhibit 11 to Respondent’s Objection); NMM’s Bylaws (Exhibit 12 to Respondent’s Objection).

<sup>22</sup> See, e.g., Annexes 9 and 10 of Respondent’s Objection.

<sup>23</sup> There is contradictory evidence on this point – Claimants attach the minutes of a shareholders meeting held 17 August 2001 that authorizes the transfer in the presence of all shareholders. See Minutes of NMM’s shareholders meeting dated 17 August 2001 (Annex CPM-40).

- (iii) According to Bolivia, Dolly Paredes's signature in the minutes of 13 September 2001 does not match her signature in other documents.<sup>24</sup>
  - (iv) Bolivia also asserts that co-Claimant Allan Fosk was not in Bolivia on 13 September 2001.<sup>25</sup>
32. Bolivia finds support for this allegation of forgery in other inconsistencies found in NMM's corporate documentation that shed doubts on the validity of Quiborax's acquisition of shares, namely:
- (i) Quiborax allegedly acquired its shares from RIGSSA on 17 August 2001.<sup>26</sup> This acquisition was reflected in the minutes of NMM's shareholders' meeting of 17 August 2001.<sup>27</sup> However, the minutes of such meeting were formalized in the presence of a notary only on 26 November 2004, more than three years after the meeting was supposedly held.<sup>28</sup>
  - (ii) In addition, RIGSSA had only recently acquired the shares it allegedly transferred, and Bolivia contends that such acquisition was not legally complete when RIGSSA transferred those shares to Quiborax. Bolivia's argument in this respect can be summarized as follows, although it must be noted that Bolivia's statement of the facts contains certain errors, in particular with respect to dates:
    - (a) NMM's shareholders approved RIGSSA's entry as a new shareholder and NMM's capital increase by means of RIGSSA's contribution in kind of seven mining concessions on 3 August 2001.<sup>29</sup> This capital increase was formalized by public deed dated 10 August 2001.<sup>30</sup> Bolivia alleges that NMM requested the Commercial Registry to record this capital increase on 21 August 2001, when allegedly RIGSSA was no longer a shareholder in NMM.<sup>31</sup>
    - (b) Bolivia also alleges that, pursuant to Bolivian law, NMM's capital increase had to be authorized by the Commercial Registry. This authorization, which according to Bolivia was a prerequisite for the issuance of NMM's shares, was only granted on 28 August 2001.<sup>32</sup> In other words, the alleged transfer of shares from RIGSSA to Quiborax on 17 August 2001 could not have happened because the shares could not have been issued prior to 28 August 2001.

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<sup>24</sup> See Querella Criminal (Annex CPM-9), p. 6.

<sup>25</sup> Respondent's Rejoinder, ¶ 5.

<sup>26</sup> See NMM's Shareholders' Registry (Exhibit 11 to Respondent's Objection).

<sup>27</sup> See Minutes of NMM's shareholders meeting dated 17 August 2001 (Annex CPM-40).

<sup>28</sup> See Exhibit 14 to Respondent's Objection and Exhibit 2 to Respondent's Rejoinder.

<sup>29</sup> Bolivia states that RIGSSA contributed its mining concessions on 17 August 2001, but the record shows that such contribution was approved on 3 August 2001. (Respondent's Objection to the RPM, ¶ 25).

<sup>30</sup> Bolivia alleges that the public deed is dated 16 August 2001 and thus was issued only one day prior to RIGSSA's transfer to Quiborax (See Respondent's Observations to the RPM ¶ 25). However, the public deed attached as Annex 16 to Respondent's Objection is dated 10 August 2001.

<sup>31</sup> See Respondent's Objection, ¶ 25. Respondent cites to Annex 16 of its Objection, but this document does not support this allegation.

<sup>32</sup> See Exhibit 18 to Respondent's Objection.

- (iii) Bolivia also alleges that, under Bolivian Law, the title that contains transfers of mining concessions must be recorded in the Real Property Register in order to become effective, which Bolivia claims was not done.
- (iv) Bolivia claims that NMM's Financial Statements filed with the National Revenue Service of Bolivia continued to reflect RIGSSA's shareholder stake in NMM, with an interest of 99.75% of the stock package.<sup>33</sup> Similarly, RIGSSA's Financial Statements at 30 September 2003 show that its shareholder stake in NMM at that date amounted to Bs 2,793,000.<sup>34</sup>
33. Claimants maintain that what Bolivia claims is forgery is merely the result of a clerical error. Claimants argue that the minutes of 11 September 2001 were incorrectly prepared by one of NMM's lawyers using old models that listed previous shareholders, and when the error was discovered, a new shareholders' meeting was held on 13 September with the correct shareholders. Claimants also insist that the minutes of 11 September were used by mistake to grant powers of attorney for the company.<sup>35</sup>
34. In this regard, Claimants maintain that in 2004, Claimants' legal counsel at the time of their investment, María del Carmen Ballivián of Estudio Rojas, informed Claimants of an error she had detected in the issuance of powers of attorney upon revision of NMM's corporate administration. According to Ms. Ballivián, the powers of attorney incorporated the 11 September 2001 draft minutes of a shareholders' meeting instead of the definitive 13 September 2001 minutes which are part of the company's book of shareholders' meetings.<sup>36</sup>
35. Claimants allege that, based on this information, on 21 January 2005 the Board of Directors of NMM acknowledged the mistake and ratified all acts performed by virtue of the powers of attorney that incorporated the 11 September 2001 draft minutes to avoid any challenge of these acts.<sup>37</sup> Later that same day, the Board of Directors revoked the powers of attorneys and issued new ones.<sup>38</sup>
36. In the months following the initiation of the criminal proceedings, Bolivia took several measures related to the criminal investigations, including:

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<sup>33</sup> Respondent's Objection, ¶ 24. Respondent does not attach NMM's Financial Statements nor indicates their date.

<sup>34</sup> See Exhibit 15 to Respondent's Objection. Bolivia mistakenly states that the shareholder stake was Bs 2,770,000 (Respondent's Objection, ¶ 24).

<sup>35</sup> Claimants' Reply, ¶¶ 60-63.

<sup>36</sup> Claimants' Reply, ¶ 61. This affirmation is supported by Ms. Ballivián's voluntary testimony. See Minutes of Informative Declaration of Ms. María del Carmen Ballivián Ascarrunz dated 5 February 2009. (Annex CPM-36).

<sup>37</sup> Claimants' Reply, ¶ 62. See also Minutes of NMM's Board Meeting dated 21 January 2005. (Annex CPM-59).

<sup>38</sup> *Id.*

- (i) The sequestration of corporate records;<sup>39</sup> and
  - (ii) The interrogation of persons related to Claimants/NMM's business, including Claimants' former and present legal counsel in Bolivia.<sup>40</sup>
37. On 16 March 2009, formal charges were presented against David Moscoso, Fernando Rojas, Dolly Paredes, Lorena Fernández, and Yury Espinoza.<sup>41</sup>
38. The proceedings regarding David Moscoso, Claimants' Bolivian business partner, moved swiftly. At a hearing on preventive measures held on 4 June 2009 before Judge Margot Pérez, Moscoso was ordered to report to the court on a weekly basis, not to leave the country and to present two witnesses as sureties. The *Superintendencia* was not satisfied with this decision and appealed. As a result of this appeal, a bail of US\$300,000 was set on David Moscoso's personal liberty, to be deposited within seventy-two hours.<sup>42</sup>
39. On 7 August 2009, on notice that bail would be set, David Moscoso wrote to Allan Fosk informing him that, as of the date of the notice he would have 72 hours to pay such bail or risked going to prison. Mr. Moscoso asked Allan Fosk for the bail money in compliance with the "gentlemen's agreements" reached with him and Fosk's father that they would cover all expenses related to the arbitration, and announced that if the money was not forthcoming, he would have to look for ways to preserve his freedom. Mr. Moscoso stated that "[o]ne way could be to ask for summary judgment in my condition as director of the company and be punished with a sanction that would allow me not going to prison...", and added that, if Allan Fosk did not provide him with the bail money, he would immediately start negotiations for the summary judgment.<sup>43</sup>
40. On 11 August 2009, the *Fiscal* (Prosecutor) presented a request for a summary judgment against David Moscoso sentencing him to two years of imprisonment, stating that this was done at David Moscoso's request.<sup>44</sup>

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<sup>39</sup> See Deed of Sequestration, 29 January 2009 (Annex CPM-17).

<sup>40</sup> Jorge Luis Inchauste, current legal counsel of Claimants in Bolivia, was interrogated about documents related to the arbitration and his relationship with Claimants (See Annex CPM-18). Fernando Rojas, former legal counsel and one of the accused persons within the criminal proceedings, was also interrogated (See Annex CPM-35).

<sup>41</sup> See Formal Indictment, 16 March 2009 (Annex CPM-11).

<sup>42</sup> See Resolution No. 179/2009 of the Third Criminal Chamber, 8 August 2009 (Annex CPM-57).

<sup>43</sup> See E-mail from David Moscoso to Allan Fosk, 7 August 2009 (Annex CPM-58). (Original in Spanish).

<sup>44</sup> See Resolution No. 01/2009, 11 August 2009, Request for Abbreviated Proceeding (Annex CPM-19).

41. The hearing on David Moscoso's summary proceeding took place on 14 August 2009. The decision rendered as a result of that hearing indicated that Mr. Moscoso had confessed his participation in the forgery of the minutes NMM's shareholders' meeting of 13 September 2001.<sup>45</sup> The decision noted that such forgery had caused a harm to the Bolivian State by allowing Quiborax to initiate an arbitration against Bolivia and that the existence of harm was an essential requirement for the crimes alleged, but that Mr. Moscoso had not known of the harm that his actions could cause.<sup>46</sup> As a result of Mr. Moscoso's confession, he was sentenced to two years of imprisonment, receiving immediate judicial pardon based on his previous clean record.<sup>47</sup> Following his judicial pardon, Mr. Moscoso expressly waived his right to appeal.<sup>48</sup>
42. On that same day, David Moscoso signed an affidavit, given expressly "within the request for Arbitration" initiated by Quiborax and others against Bolivia, where he "freely and spontaneously" confessed to his participation in the crimes of *falsedad ideológica* and *uso de instrumento falsificado*.<sup>49</sup> In that affidavit, he stated that he first learned of the existence of the minutes of 13 September 2001 at NMM's board meeting held on 21 January 2005.<sup>50</sup> Although he does not expressly say that the minutes were forged, Mr. Moscoso acknowledges that they were used to replace the minutes of 11 September 2001 in order to revoke previous powers of attorney and grant new ones, including powers of attorney related to the ICSID arbitration initiated by Quiborax "with the purpose of having the claim before ICSID prevail against the Bolivian State."<sup>51</sup> This affidavit contradicts Mr. Moscoso's previous declaration before the criminal courts, rendered on 30 January 2009.<sup>52</sup>
43. While the proceedings against David Moscoso were under way, the Minister of the State's Legal Defense and the Minister of Institutional Transparency and Defense

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<sup>45</sup> The decision does not cite explicitly to the confession, but rather states that "regarding the existence of the act and the participation of the accused in the same, the Prosecutor has proved clearly with all the literal proof that he has presented to this judicial chamber that the accused has participated in the fabrication [*facci3n*] of these minutes that are accused as false..." and that "the accused... has acknowledged his guilt on the illegal acts that the prosecutor accuses him of..." See Resolution No. 313/2009 dated 14 August 2009, pp. 3-4. (Original in Spanish) (Annex CPM-20).

<sup>46</sup> See Resolution No. 313/2009 dated 14 August 2009, pp. 2-3 (Annex CPM-20).

<sup>47</sup> *Id.*, p. 4.

<sup>48</sup> *Id.*, p. 6.

<sup>49</sup> See Affidavit of David Moscoso, 14 August 2009 (Annex CPM-21). (Original in Spanish).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* (Original in Spanish).

<sup>52</sup> See Informative Declaration before the Prosecutor as Means of Defense of Mr. David Moscoso Ruiz, Case No. 9394/08, 30 January 2009 (Annex CPM-22).

against Corruption presented criminal charges of *prevaricato* (malfeasance in office) against Judge Margot Pérez for failing in her functions by, among others, refusing to grant Bolivia's initial request for Mr. Moscoso's preventive detention.<sup>53</sup> The Minister of the State's Legal Defense justified his standing to file this criminal complaint on the basis of his legal responsibilities to "promote, defend and protect the interests of the plurinational state in jurisdictional proceedings and arbitrations in investment disputes."<sup>54</sup> Both Ministers accused Judge Pérez of not "taking into consideration the importance of this case that concerns the protection of the goods and interests of the State that are subject of an international arbitration"; "without valuing the procedural risks that continue to exist, and that affect the arbitration that the State of Bolivia confronts before an international tribunal" and by delaying the proceedings "which negatively affects the interests of the Bolivian state, since this causes harm and delay in the international arbitration."<sup>55</sup>

44. On 21 September 2009, the criminal court summoned Fernando Rojas and Dolly Paredes to a hearing on preventive measures.<sup>56</sup> Claimants feared that their personal liberty and the possible fabrication of evidence were at stake, as they allege had happened in the case of David Moscoso. On 2 October 2009, Claimants filed a request for a "temporary restraining order" to prevent the continuation of criminal proceedings related to this arbitration.<sup>57</sup> The Tribunal rejected this request, holding that the request did not meet the urgency requirement, and that at that stage it lacked sufficient information to assess whether the requirement of necessity was met or to determine whether any of Claimant's rights required preservation.<sup>58</sup>
45. The hearing on preventive measures that was supposed to take place on 6 October 2009 did not take place. Dolly Paredes submitted a challenge against Judge Margot Pérez for alleged lack of impartiality as a consequence of the criminal proceedings initiated against her by the Minister of the State's Legal Defense.<sup>59</sup> Judge Pérez accepted the challenge, declaring that her acts "are being controlled within the

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<sup>53</sup> See Complaint for crimes committed by competent authority, 10 June 2009 (Annex CPM-23), p. 8.

<sup>54</sup> *Id.*, p. 8 (Original in Spanish).

<sup>55</sup> *Id.*, pp. 3, 5-6. (Original in Spanish).

<sup>56</sup> See Annex CRO-1.

<sup>57</sup> Claimants' Request for a Temporary Restraining Order, 2 October 2009.

<sup>58</sup> See ICSID letter dated 5 October 2009.

<sup>59</sup> See Challenge filed by Dolly T. Paredes, 5 October 2009 (Annex CPM-54).



proceedings for *prevaricato*, since any decision of this judge may result in further criminal charges as they have done before...”<sup>60</sup>

### III. POSITIONS OF THE PARTIES

#### A. Claimants’ Position

46. Claimants contend that the criminal proceedings are motivated by and aimed at the present arbitration, that they have no self-standing merit, and are instrumental to Bolivia’s defense strategy to avoid arbitration on the merits. Specifically, Claimants allege that “[t]he criminal proceedings are merely instrumental to Bolivia’s goals in the arbitration, which are to (i) deny the condition of Claimants as foreign investors under the BIT; (ii) obtain, manipulate and fabricate evidence that supports Bolivia’s defense strategy, and (iii) ultimately, force Claimants to give up their claims in the arbitration.”<sup>61</sup>
47. Claimants also argue that this is a unique case, because Bolivia is prosecuting Claimants and persons related to them for a crime that consists in presenting a claim in an international arbitration.<sup>62</sup> Claimants support this allegation by asserting that Bolivia has claimed within the criminal proceedings that the harm which is a constituent element of the crimes attributed to the accused persons consists of Bolivia’s exposure to this international arbitration.<sup>63</sup>
48. Finally, Claimants submit that, just as investors must pass certain tests in order to fall under the protection of the ICSID Convention, States too must abide by certain basic notions of behavior and act in accordance with ICSID rules and guiding principles. Claimants argue that “States cannot be allowed to avail themselves of their intrinsically superior powers under their own domestic legal systems in order to obstruct [an] investor’s legitimate access to ICSID arbitration”, and that coercing Claimants and persons related to their investment in Bolivia by criminal prosecution is an unacceptable means of boycotting the ICSID system that must not be permitted.<sup>64</sup>

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<sup>60</sup> See Resolution No. 389/2009, Decision on challenge, 7 October 2009 (Annex CPM-55). (Original in Spanish).

<sup>61</sup> Claimants’ RPM, ¶ 18.

<sup>62</sup> Transcript, p. 30, lines 15-20.

<sup>63</sup> Transcript, p. 17, lines 2-6; p. 76, lines 18-22; p. 77, lines 1-12.

<sup>64</sup> Claimants’ RPM, ¶ 64.

## 1. Rights that require preservation

49. Claimants submit that, in accordance with Art. 47 of the ICSID Convention, provisional measures can only be requested to preserve the rights of either party. Claimants allege that the criminal proceedings initiated by Bolivia impair the following rights that need preservation: (1) the right to preservation of the *status quo* and non-aggravation of the dispute; (2) the right to the procedural integrity of the arbitration proceedings; and (3) the right to exclusivity of the ICSID proceedings in accordance with Art. 26 of the ICSID Convention.<sup>65</sup>
50. Claimants reject Bolivia's argument that the Tribunal may only order provisional measures if Bolivia's actions impair the rights "in dispute". Claimants argue that identity between the object of the coercive measures and the rights in dispute is not required, and that in any event Bolivia's actions do affect the rights "in dispute", because Claimants are not only requesting compensation for the unlawful expropriation but also moral damages for the acts of harassment perpetrated by Bolivia against Claimants, in particular by way of criminal proceedings.<sup>66</sup>

### **a. Right to the preservation of the *status quo* and non-aggravation of the dispute**

51. Claimants submit that the right to preservation of the *status quo* and the non-aggravation of the dispute is a self-standing right under international law.<sup>67</sup> Claimants rely on *Burlington v. Ecuador*,<sup>68</sup> *Electricity Company of Sofia v. Bulgaria*,<sup>69</sup> and *Amco Asia v. Indonesia*,<sup>70</sup> among others.
52. Claimants allege that the criminal proceedings have aggravated, and continue to aggravate, the dispute between the Parties. Claimants assert that Bolivia is doing everything in its power to obstruct the ICSID proceedings, and is using the criminal proceedings and other forms of harassment to ultimately force the Claimants to give up their claims.

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<sup>65</sup> Claimants' RPM, ¶ 34.

<sup>66</sup> Claimants' Reply, ¶¶ 78-79.

<sup>67</sup> Claimants' RPM, ¶¶ 36-37.

<sup>68</sup> *Burlington Resources Inc. and others v. Republic of Ecuador*, ICSID Case No. ARB/08/5, ("Burlington v. Ecuador"), Procedural Order No. 1 of 29 June 2009 ¶ 60.

<sup>69</sup> *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Judgment of 5 December 1939, PCIJ series A/B No. 79, p. 199.

<sup>70</sup> *Amco Asia Corporation v. Indonesia*, ICSID Case No. ARB/81/1 ("Amco Asia v. Indonesia"), Decision on Request for Provisional Measures of 9 December 1983, p. 412.

53. Claimants note as an example that the court issued an order of restraint prohibiting David Moscoso from contacting the other accused, including his former legal counsel Fernando Rojas. Claimants allege that “the direct pressure placed on David Moscoso by the government of Bolivia has made him turn against his own business partners, as well as virtually eradicated him as a source of information and a buttress for the cause of Claimants in the arbitration.”<sup>71</sup>
54. Claimants allege that Bolivia’s course of action has changed the *status quo* of the dispute, as Claimants have become defendants in Bolivia, and has created serious obstacles for Claimants’ presentation of their claim. Claimants contend that at the time they submitted their Request for Arbitration, the Parties were equal in arms as to their possibility to present their case, but since December 2008 Claimants’ position has been weakened as the persons involved in the criminal proceedings have been forced out from the ICSID proceedings as potential witnesses or sources of information.<sup>72</sup>
55. Claimants argue that the criminal proceedings are aimed at avoiding discussion on the merits of the dispute and put intolerable pressure on Claimants to drop their claim. As support for this allegation, they cite declarations in the Bolivian press by Bolivian authorities, including Oscar Cámara, former Vice-Minister of the State’s Legal Defense and Executive Director of the *Autoridad de Fiscalización y Control Social de Empresas* (the agency that has since replaced the *Superintendencia de Empresas*), claiming the existence of an agreement between the Parties without any payment of compensation by Bolivia to Claimants, allegedly due to Claimants acceptance of the criminal accusations against them.<sup>73</sup>

**b. Right to the procedural integrity of the arbitration proceedings**

56. Claimants assert that the criminal proceedings impair their right to the procedural integrity of the arbitration proceedings, in particular with respect to their access to evidence and the integrity of the evidence produced.
57. In particular, Claimants allege that Bolivia is impairing Claimants’ access to evidence by sequestering corporate documents and intimidating potential witnesses (including

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<sup>71</sup> Claimants’ RPM, ¶ 38.

<sup>72</sup> Claimants’ RPM ¶ 39, Claimants’ Reply on PM, ¶ 88-90.

<sup>73</sup> Claimants’ Reply, ¶¶ 91, 33. See Press Article, “Quiborax withdrew arbitration because the Government found alleged fraud” [“Quiborax levantó arbitraje porque el Gobierno halló presunto fraude”], La Razón - Bolivia, 10 September 2009 (Annex CPM-65).

Claimants' former and current legal counsel) who now fear to testify.<sup>74</sup> Claimants note that the persons involved in the criminal proceedings have been defined by Bolivia as "indispensable witnesses to reach the historic truth of the facts"<sup>75</sup> but that, fearing for their situation in Bolivia, they are not prepared to participate in this arbitration.<sup>76</sup> As a result, Claimants claim they have been left without indispensable witnesses for their case.<sup>77</sup>

58. Claimants specifically point to the fact that David Moscoso is now legally impeded to act as a witness for Claimants, as he has made a confession within the criminal proceedings and any testimony to the contrary in the ICSID proceedings would allow Bolivia to prosecute him for false testimony or false self-incrimination (*autocalumnia*).<sup>78</sup>
59. Claimants allege that by forcing confessions such as that of David Moscoso, Bolivia is manipulating and fabricating *ex post facto* evidence to be used in the ICSID proceedings (in particular with respect to the Claimants' standing as investors under the BIT).<sup>79</sup> Claimants contend that "[i]f the criminal proceedings are allowed to continue, there is every reason to fear that other potential witnesses will find themselves forced to make false statements to save themselves from imprisonment or otherwise face Bolivia's persecution."<sup>80</sup>
60. Claimants also claim that, by questioning Informe 001/2005 and harassing its authors, Bolivia has destroyed information that supports Claimants' status under the BIT. Claimants maintain that "[t]he intricate maneuvers deployed by Bolivia to diminish the value of the report are only within the means of a sovereign State with investigative and coercive powers and not permissible in international arbitration."<sup>81</sup>
61. Claimants reject Bolivia's contention that no harm is done because the Tribunal is free to weigh the evidence as it deems appropriate, arguing that this faculty will be contaminated by Bolivia because the persons involved in the criminal proceedings will no longer be able to render candid testimony.<sup>82</sup>

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<sup>74</sup> Claimants' RPM, ¶¶ 40, 42; Claimants' Reply on PM, ¶¶ 98-102.

<sup>75</sup> Formal Indictment, p. 10 (Annex CPM-11). (Original in Spanish).

<sup>76</sup> Claimants' Reply, ¶ 99.

<sup>77</sup> *Id.*

<sup>78</sup> Claimants' Reply, ¶ 97.

<sup>79</sup> Claimants' RPM, ¶ 41; Claimants' Reply, ¶¶ 101-102.

<sup>80</sup> Claimants' RPM, ¶ 42.

<sup>81</sup> *Id.*

<sup>82</sup> Claimants' Reply, ¶ 95.

**c. The right to the exclusivity of the ICSID proceedings under Art. 26 of the ICSID Convention**

62. Claimants contend that the criminal proceedings are aimed at destroying Claimants' status as foreign investors under the Bolivia-Chile BIT and are thus parallel proceedings on jurisdiction prohibited by the exclusivity of ICSID jurisdiction under Art. 26 of the ICSID Convention, which provides in relevant part:

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

63. Claimants submit that "Bolivia is raising and discussing in an alternate forum issues that are aimed at attacking the jurisdiction of the Centre", and that it "has construed the mere existence of being subject to the present arbitration as the object of its domestic criminal prosecution."<sup>83</sup> Claimants argue that, as a consequence, the criminal proceedings initiated by Bolivia constitute what Art. 26 of the ICSID Convention calls "other remedy".<sup>84</sup> Claimants rely on *City Oriente v. Ecuador*, where the Tribunal ordered the Ecuadorian General Prosecutor to refrain from pursuing the criminal investigation of three of City Oriente's executives on charges closely related to the subject of the arbitration.<sup>85</sup>
64. Citing *Tokios Tokelés v. Ukraine*, Claimants submit that parallel proceedings are prohibited under Art. 26 of the ICSID Convention, if they "relate to the subject matter of the case before the tribunal and not to separate, unrelated issues or extraneous matters."<sup>86</sup> Relying on *CSOB v. Slovak Republic*, Claimants also argue that it is not necessary for the criminal proceedings to deal with the same subject matter as the ICSID proceeding to constitute such "other remedy", and that it is sufficient that the proceedings refer to matters under consideration by the Tribunal.<sup>87</sup>

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<sup>83</sup> Claimants' RPM, ¶ 50.

<sup>84</sup> Claimants' RPM, ¶ 51.

<sup>85</sup> *City Oriente Ltd. v. Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/06/21 ("*City Oriente v. Ecuador*"), Decision on Provisional Measures of 19 November 2007, ¶ 50.

<sup>86</sup> *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18 ("*Tokios Tokelés v. Ukraine*"), Order No. 3 of 18 January 2005, ¶ 11.

<sup>87</sup> *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4 ("*CSOB v. Slovak Republic*"), Procedural Order No. 4 of 11 January 1999, preamble.

## 2. Requirements for provisional measures

65. Claimants state that provisional measures must be urgent and necessary for the rights invoked to be protected, and that both requirements are fulfilled in the present case.<sup>88</sup>

### a. Urgency

66. Citing *Burlington v. Ecuador* and Prof. Schreuer, Claimants submit that “the criterion of urgency is satisfied when [...] ‘a question cannot await the outcome of the award on the merits’”.<sup>89</sup>

67. According to Claimants, what is essential is that the harm is likely to be produced before the date of the award.<sup>90</sup> For that reason, the urgency requirement must be assessed in the context of the case, as stated by the tribunal in *Biwater Gauff v. Tanzania*:

In the Arbitral Tribunal’s view, the degree of “urgency” which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measure at a certain point in the procedure before the issuance of an award. [...] The Arbitral Tribunal also considers that the level of urgency required depends on the type of measure which is requested.<sup>91</sup>

68. Claimants argue that the requirement of urgency is met in this case.<sup>92</sup> Specifically, Claimants contend that because the provisional measures are intended to protect against the aggravation of the dispute and to safeguard the jurisdictional powers of the Tribunal and the integrity of the arbitration, they are urgent by definition.<sup>93</sup>

69. Claimants argue that the urgency of the provisional measures is evidenced by the conviction of David Moscoso,<sup>94</sup> and that it has become evident that the passage of time in the present case only makes the threat of irreparable harm to Claimants’ rights more imminent.<sup>95</sup>

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<sup>88</sup> Claimants’ RPM, ¶ 35.

<sup>89</sup> *Burlington v. Ecuador*, Procedural Order No. 1 of 29 June 2009, ¶ 73; Christoph H. Schreuer. *The ICSID Convention: A Commentary* (2001), p. 751, ¶ 14.

<sup>90</sup> Claimants’ Reply, ¶ 115.

<sup>91</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (“*Biwater Gauff v. Tanzania*”), Procedural Order No. 1 of 31 March 2006, ¶ 76.

<sup>92</sup> Claimants RPM ¶¶ 52-55.

<sup>93</sup> Claimants rely on *Burlington v. Ecuador*, Procedural Order No. 1 of 29 June 2009, ¶ 74 and *City Oriente v. Ecuador*, Decision on Provisional Measures of 19 November 2007, ¶ 69.

<sup>94</sup> Claimants’ RPM, ¶ 54.

<sup>95</sup> Claimants’ Reply, ¶ 119.

### **b. Necessity**

70. Claimants submit that “[t]he necessity requirement requires the Tribunal to consider the proportionality of the requested provisional measures to the harm Claimants have already suffered and will continue to suffer in consequence of the actions of Bolivia.”<sup>96</sup>
71. According to Claimants, the appropriate standard to assess the necessity of Claimants’ request for provisional measures is that established in Art. 17A of the UNCITRAL Model Law, which requires the party requesting an interim measure to satisfy the tribunal that:

Harm not adequately repaired by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted.

72. Following this standard, Claimants argue that the provisional measures requested are necessary because the harm caused would not be adequately repaired by an award on damages. Specifically, Claimants allege that “[t]he harm to Claimants caused by the criminal proceedings, consisting of restrictions on the personal liberty of co-Claimant Allan Fosk and the other persons accused, as well as the corruption of evidence relevant to the present arbitration, is not the kind of harm that can be adequately repaired by an award of damages”, and that “[i]t can only be avoided by immediate termination of the criminal proceedings in Bolivia.”<sup>97</sup> In contrast, Claimants assert that Bolivia suffers no harm if the criminal proceedings are stayed.<sup>98</sup>

### **B. Respondent’s Position**

73. Respondent notes at the outset that provisional measures are exceptional in nature and should not be granted lightly. Respondent cites *Occidental Petroleum Corporation v. Ecuador*, where the Tribunal held:

It is not contested that provisional measures are extraordinary measures that cannot be recommended lightly. In other words, the circumstances under which provisional measures are required under Article 47 of the ICSID Convention are those in which the measures are necessary to preserve a party’s rights and where the need is urgent in order to avoid irreparable harm. The jurisprudence of the International Court of Justice dealing with provisional measures is well-established: a provisional

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<sup>96</sup> Claimants’ RPM, ¶ 53.

<sup>97</sup> Claimants’ RPM, ¶ 62.

<sup>98</sup> Claimants’ RPM, ¶ 63.

measure is necessary where the actions of a party 'are capable of causing or of threatening irreparable prejudice to the rights invoked' [...]<sup>99</sup>

74. In Respondent's view, Claimants' request for provisional measures must fail because it meets none of these requirements.

### 1. Rights for which protection is sought

75. As a preliminary matter, Respondent contends that provisional measures may not be granted in this case because the criminal proceedings do not affect any of Claimants' rights in the dispute.<sup>100</sup> Specifically, Respondent claims that "[a] criminal proceeding initiated with full factual and legal justification, exclusively to establish the existence of crimes that affect legal rights protected by Bolivian Law, does not constitute a threat to the arbitral proceeding, its development and its results."<sup>101</sup>

76. Respondent also asserts that Claimants have not established "the existence of even a single objective element from which it could be determined that the rights that are significant to this dispute, including the procedural rights that they invoke, may have been affected or could be affected in an imminent and irreparable manner by the legitimate exercise of the powers that Bolivia can engage in as a sovereign state in order to demand compliance with its legislation and to apply current criminal laws in observation of the principle of due process."<sup>102</sup>

77. In addition, Respondent states that the dispute in this arbitration proceeding would be limited to establishing whether the Claimants have the right to the monetary compensation that they are demanding as a result of the revocation of the mining concessions they claim to have held.<sup>103</sup> In contrast, the criminal proceedings deal with the prosecution of crimes, specifically the alteration and falsification of documents, the use of a falsified instrument and dereliction of duty by public officers.<sup>104</sup>

78. Respondent relies on precedent from the International Court of Justice, in particular the *Case Concerning Certain Criminal Proceedings in France (Republic of Congo v.*

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<sup>99</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11 ("*Occidental v. Ecuador*"), Decision on Provisional Measures of 17 August 2007, ¶ 59.

<sup>100</sup> Respondent's Objection, ¶¶ 5-7.

<sup>101</sup> Respondent's Objection, ¶ 6.

<sup>102</sup> *Id.*

<sup>103</sup> Respondent's Objection, ¶ 7.

<sup>104</sup> Respondent's Objection, ¶ 8, 30.



*France*), according to which the power of the Court to indicate provisional measures to maintain the respective rights of the parties is to be exercised only if there is an urgent need to prevent irreparable prejudice to the rights that are the subject of the dispute before the Court has had an opportunity to render its decision.<sup>105</sup>

79. Respondent objects to each of Claimants' specific grounds for requesting provisional measures, as described below.

**a. *With respect to the right to the preservation of the status quo and non-aggravation of the dispute***

80. As noted above, Respondent contends that there is no aggravation of the dispute or need to preserve the *status quo*, because the criminal proceedings do not affect the rights in dispute. Respondent argues that the fact that the criminal proceedings cause inconveniences and suffering to Claimants does not prove that they interfere with the rights in dispute.<sup>106</sup>

81. In this regard, Respondent submits that there is no self-standing right to the preservation of the *status quo* or the non-aggravation of the dispute. Such right exists only when there is an imminent threat that a right in dispute will suffer irreparable harm.<sup>107</sup>

82. Even if such self-standing right existed, as held by the tribunal in *Burlington v. Ecuador*, Respondent argues that the sole existence of this right does not necessarily mandate the adoption of provisional measures. Claimants would have to demonstrate that: (a) the initiation of the criminal proceeding alters the *status quo* of the dispute as it was submitted to the Tribunal; (b) the existence of the criminal proceeding produces a threat of irreparable harm that may affect the disputed rights; and (c) if the requested measures are not adopted, harm would be imminent.<sup>108</sup>

83. Respondent argues that Claimants' reliance on *Burlington v. Ecuador* is misguided because the circumstances of that case were totally different from those of the present arbitration. In *Burlington*, Ecuador's actions giving rise to the provisional measures related to the same monetary obligations being examined by the arbitral tribunal, there

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<sup>105</sup> *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Order of June 17, 2003, ICJ Reports 2003, ¶ 22.

<sup>106</sup> Respondent's Objection, ¶ 45.

<sup>107</sup> Respondent's Objection, ¶¶ 11; 46-48.

<sup>108</sup> Respondent's Objection, ¶ 51.

was an ongoing business relationship between the parties that the tribunal deemed worth protecting, and the contract governing that relationship gave rise to an obligation of specific performance that also merited protection. None of those elements is present here.

84. In any event, Respondent claims that there is no change to the *status quo*, because claimant Allan Fosk has not been formally accused and his procedural status has not changed since December 2008. Respondent also notes that none of the persons involved in the criminal proceedings has been called as a witness by Claimants, so their procedural status is not relevant to this arbitration.<sup>109</sup>
85. In addition, Respondent claims that there has been no aggravation of the dispute because Claimants have not identified any measure by Bolivia that could exercise a prejudicial effect on the execution of the decision or aggravate or extend the dispute.<sup>110</sup>
86. Relying on *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*,<sup>111</sup> Respondent also argues that even when the conduct of one of the parties allegedly aggravates or prolongs the dispute, provisional measures may only be ordered if there is evidence of some irreparable harm to the rights of the other party. As this is not the case here, provisional measures may not be granted.

***b. With respect to the right to the integrity of the arbitral proceedings***

87. Respondent contends that there is no threat to the integrity of the proceedings, particularly with respect to the production of evidence.
88. Respondent notes that Claimants have already presented substantial evidence, including corporate documentation, both in their Request for Provisional Measures and in their Memorial on the merits. Thus, provisional measures directed to protect Claimants' right to present evidence would serve no purpose.<sup>112</sup>
89. If Claimants refer to the evidence that may be presented by Bolivia, Respondent claims that there is no urgency or necessity to support the granting of provisional measures because any evidence that Bolivia presents will be examined, criticized and verified by

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<sup>109</sup> Respondent's Objection, ¶¶ 54-61.

<sup>110</sup> Respondent's Objection, ¶¶ 64-69.

<sup>111</sup> *Pulp Mills on the River Uruguay, (Argentina v. Uruguay)*, Order of January 23, 2007, ICJ Reports 2007, ¶ 50.

<sup>112</sup> Respondent's Objection, ¶¶ 12, 72.

Claimants and freely evaluated by the Tribunal.<sup>113</sup> Indeed, Respondent argues that any provisional measure intended to prevent such evidence from being presented would be equivalent to ruling on and rejecting such evidence without having examined it, which would affect Bolivia's right to defense.<sup>114</sup>

90. In this regard, Respondent states that provisional measures directed to prevent the "contamination" of evidence are appropriate only where such evidence is likely to disappear, be destroyed or become unavailable. In these cases, provisional measures are appropriate because they protect the Tribunal's ability to examine evidence in the future. Respondent argues that what Claimants seek is the opposite, that is, the issuance of provisional measures that would prevent particular evidence from ever being submitted to the Tribunal.<sup>115</sup>
91. Respondent rejects Claimants' accusation that the criminal proceedings were artificially instituted by Bolivia to destroy or distort the evidentiary value of certain documents relevant to proving their condition as investors. This would imply falsely accusing Bolivia of a crime. Respondent asserts that the Bolivian State is governed by the principle of separation of powers and that the Executive branch does not interfere in the administration of justice. Respondent contends that the factual circumstances that motivated the criminal proceedings fully justify such proceedings.<sup>116</sup>

***c. With respect to the exclusivity of the ICSID proceedings***

92. Respondent maintains that the exclusivity of the ICSID proceedings may only be threatened by a parallel proceeding, i.e., one that deals with the same matter. Respondent relies on *Tokios Tokelés v. Ukraine*<sup>117</sup> and *City Oriente v. Ecuador*<sup>118</sup>, where the rights subject to the parallel proceedings were the same rights submitted to the consideration of the tribunal in the ICSID proceedings.<sup>119</sup>
93. Respondent rejects Claimants' argument that the criminal proceedings are directed to denying Claimants' condition as investors protected by the BIT or deciding on the Tribunal's jurisdiction. To the contrary, Respondent argues that the purpose of the

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<sup>113</sup> *Id.*

<sup>114</sup> Respondent's Objection, ¶ 72.

<sup>115</sup> Respondent's Objection, ¶¶ 70, 73.

<sup>116</sup> Respondent's Objection, ¶ 12

<sup>117</sup> *Tokios Tokelés v. Ukraine*, Order No. 1, July 1, 2003, ¶ 3.

<sup>118</sup> *City Oriente v. Ecuador*, Decision on Provisional Measures of 19 November 2007, ¶¶ 49- 54.

<sup>119</sup> Respondent's Objection, ¶¶ 74-76.

criminal proceedings is to establish whether the individuals prosecuted committed certain crimes and, if so, to sanction such criminal conduct. Thus, the criminal proceedings do not interfere with the sphere of jurisdiction and competence of the Tribunal.<sup>120</sup>

94. As a result, Respondent contends that the criminal proceedings are not parallel to the ICSID proceedings. While the criminal proceedings seek to sanction crimes that may have been committed, the ICSID arbitration is directed to determining whether the Claimants have the right to the relief they invoke and the compensation they are claiming. Respondent argues that “[t]he circumstance that the documents whose falsification is being investigated are related to the Claimants’ status as shareholders in a Bolivian company does not transform the criminal proceeding into a proceeding that is parallel to the ICSID arbitration, because the results of the criminal proceeding will be the application, or not, of penalties for falsification pursuant to Bolivian law, regardless of the decision of the Arbitral Tribunal regarding the relevance of the claims under the BIT with Chile.”<sup>121</sup>
95. In addition, Respondent claims that the proceedings are legitimate *per se*, and not motivated by the ICSID arbitration. Indeed, Respondent argues that by requesting provisional measures Claimants seek to prevent Bolivia from exercising its sovereign right to prosecute crimes within its own territory.<sup>122</sup> Respondent asserts that the existence of documentation with indications of forgery offers sufficient grounds to merit the initiation of criminal proceedings. In addition, Respondent claims that public officials are required by law to report the commission of a crime.<sup>123</sup> The fact that Bolivia paid more attention to NMM’s corporate structure after Claimants filed their Request for Arbitration and thereby discovered irregularities does not mean that the criminal proceedings are a reaction to the ICSID arbitration.<sup>124</sup>

## **2. Requirements for provisional measures**

96. Respondent submits that provisional measures may be granted only in situations in which there exists an urgent need to safeguard rights that are in imminent danger of

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<sup>120</sup> Respondent’s Objection, ¶¶ 76-77.

<sup>121</sup> Respondent’s Rejoinder, ¶ 22.

<sup>122</sup> Respondent’s Rejoinder, ¶ 6.

<sup>123</sup> Respondent’s Rejoinder, ¶ 6. Respondent’s Rejoinder is accompanied by the Expert Report of Dr. Mary Elizabeth Carrasco Condarco, which describes the principles of Bolivian criminal procedure.

<sup>124</sup> Respondent’s Rejoinder, ¶ 28.

irreparable harm, in such a way that the party could find the party's rights irreparably affected before a decision is made on the merits.<sup>125</sup> Respondent relies on *Occidental v. Ecuador*,<sup>126</sup> *Tokios Tokelés v. Ukraine*<sup>127</sup> and the *Aegean Sea Continental Shelf Case (Greece v. Turkey)*.<sup>128</sup>

97. In this case, Respondent claims that the provisional measures requested are neither urgent nor necessary, because there is no imminent threat of an irreparable harm.

**a. Urgency**

98. With respect to the urgency requirement, Respondent states that the threat of irreparable harm must be present and imminent. If the threat is not present or the harm is not imminent, there is no need to decide anything before the award or decision is issued. The urgency must be assessed at the time of the request, and should not be a speculation on the future.<sup>129</sup> Respondent relies on the *Case Concerning Certain Criminal Proceedings in France (Republic of Congo v. France)*.<sup>130</sup>
99. According to Respondent, Claimants' allegations that they will not be able to access key documents or witnesses to present their case on jurisdiction (particularly their fear that key witnesses will be deprived of their liberty) are mere speculations conditional on future events, and thus are incompatible with the notion of urgency.<sup>131</sup>

**b. Necessity**

100. Respondent denies that the measures are necessary to prevent irreparable harm to Claimants' rights. As a preliminary matter, Respondent claims that the requirement of necessity is premised on the existence of a right that requires protection from an irreparable harm. As explained above, Respondent denies that such a right exists in this case.

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<sup>125</sup> Respondent's Objection, ¶ 40.

<sup>126</sup> *Occidental v. Ecuador*, Decision on provisional measures of 17 August 2007, ¶ 61

<sup>127</sup> *Tokios Tokelés v. Ukraine*, Order No. 3, January 18, 2005, ¶ 8.

<sup>128</sup> *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Order of September 11, 1976, ICJ Reports 3, ¶¶ 25, 33.

<sup>129</sup> Respondent's Rejoinder, ¶ 38.

<sup>130</sup> *Certain Criminal Proceedings in France (Republic of the Congo v. France, 2003)*, Order of June 17, 2003, ICJ Reports 2003, ¶ 35.

<sup>131</sup> Respondent's Rejoinder, ¶¶ 34-37, 41, 44.

101. In any event, as outlined in the preceding section, Respondent denies that there is any threat of harm to any of the rights invoked by Claimants. Thus, the requirement of necessity is not met.
102. Notwithstanding the above and to support its claims that no provisional measures are necessary, Respondent has committed to:
- (a) Provide certified copies of the corporate documentation sequestered by the Bolivian authorities; and
  - (b) Collaborate so the persons involved in the criminal proceedings can be called as witnesses in the arbitration.
103. With respect to documents, Respondent stated in its Rejoinder that “as a clear sign that it has no intention of putting obstacles in the way of the Claimants’ probative task, Bolivia has agreed to obtain from the Prosecutor’s Office certified copies of any documents identified by the Claimants, if they should have any difficulty in doing so.”<sup>132</sup> During the telephone conference that took place on 24 November 2009, Respondent stated that more than a commitment, this was an expression of Claimants’ unrestricted right to access to documents under Bolivian law.<sup>133</sup> This said, after being specifically asked by the President of the Tribunal, Respondent confirmed the commitment undertaken in the Rejoinder with respect to access to documents.<sup>134</sup>
104. With respect to access to witnesses, Respondent stated in its Rejoinder that the persons involved in the criminal proceedings “could be witnesses if they wanted. In fact, since Respondent would certainly be interested in questioning them to see if it would finally be possible to clarify the famous issue of the ‘formal errors’, it would cooperate as necessary so that they could offer their testimony to the Tribunal.”<sup>135</sup> This commitment was confirmed by Respondent during the telephone conference.<sup>136</sup>

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<sup>132</sup> Respondent’s Rejoinder, ¶ 33.

<sup>133</sup> Transcript, p. 81, lines 16-22; p. 82, lines 1-11.

<sup>134</sup> Transcript, p. 86, lines 10-22; p. 87, lines 1-14; p. 92, lines 12-22.

<sup>135</sup> Respondent’s Rejoinder, ¶ 35.

<sup>136</sup> Transcript, p. 89, lines 13-16; p. 90, lines 2-22; p. 91, line 1, 18-22.

## IV. DISCUSSION

### A. Applicable Standards

#### 1. Legal framework

105. The relevant rules are found in Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, which are generally considered to grant wide discretion to the Arbitral Tribunal on the issue of provisional measures.

106. Article 47 of the ICSID Convention provides that:

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.

107. Rule 39 of the ICSID Arbitration Rules (effective as of January 1, 2003) provides in relevant parts:

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

[...]

#### 2. *Prima facie* jurisdiction

108. It is undisputed by the Parties that the Arbitral Tribunal has the power to order provisional measures prior to ruling on its jurisdiction. The Tribunal will not exercise such power, however, unless there is a *prima facie* basis for jurisdiction.

109. The Tribunal is satisfied that it has *prima facie* jurisdiction for the purposes of rendering this decision. The Request for Provisional Measures was filed by Claimants in this arbitration. Claimants claim to be Chilean nationals, and Chile is a signatory to the

ICSID Convention. At the date when Claimants' Request for Arbitration was filed, as well as at the date when the Request for Arbitration was registered by the ICSID Secretariat, Bolivia was still a signatory to the ICSID Convention. Thus, the Tribunal has *prima facie* jurisdiction *ratione personae*.

110. Claimants claim that the disputes brought before this Tribunal arise from breaches by Bolivia of its obligations with respect to Claimants' investments in Bolivia under the Chile-Bolivia BIT. To this date, Bolivia has not contested this allegation. Thus, the Tribunal has *prima facie* jurisdiction *ratione materiae*.
111. Further, Claimants allege that the dispute arose in June 2004, long after the entry into force of the BIT in 1999. Bolivia has not contested this allegation. The Tribunal therefore also has *prima facie* jurisdiction *ratione temporis*.
112. Finally, by ratifying the Chile-Bolivia BIT, Bolivia consented in writing to the jurisdiction of the Centre over disputes such as those brought by Claimants. Claimants consented in writing to the jurisdiction of the Centre by filing their Request for Arbitration. Consequently, the Tribunal has *prima facie* jurisdiction *ratione voluntatis*, on the basis of the Parties' consent.

### **3. Requirements for provisional measures**

113. There is no disagreement between the Parties, and rightly so, that provisional measures can only be granted under the relevant rules and standards, if rights to be protected do exist (Section B below), and the measures are urgent (Section C below) and necessary (Section D below), this last requirement implying an assessment of the risk of harm to be avoided by the measures. By contrast, the Parties disagree on the type and existence of the rights to be protected. The Parties further disagree on whether the measures are urgent and/or necessary. The Tribunal will now review the different requirements for provisional measures set out and the Parties' divergent positions in this respect.

#### **B. Existence of Rights Requiring Preservation**

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



115. As a preliminary matter, the Tribunal will deal first with Bolivia's contention that the rights that may be protected by provisional measures may only be the rights "in dispute", and specifically whether under the circumstances of this case the rights invoked by Claimants may be preserved by provisional measures (Section 1 below). The Tribunal will then review the right to exclusivity of the ICSID proceedings (Section 2 below); then the right to preservation of the *status quo* and non-aggravation of the dispute (Section 3 below); and finally the right to the procedural integrity of the arbitration proceedings (Section 4 below).

### 1. Rights that may be protected by provisional measures

116. Bolivia contends that provisional measures may not be granted in this case because the criminal proceedings do not affect any of Claimants' rights "in dispute", understood as the rights that are the subject matter of the ICSID arbitration. In contrast, Claimants argue that identity between the object of the coercive measures from which protection is sought and the rights in dispute is not required.

117. The Tribunal agrees with Claimants' position. In the Tribunal's view, the rights to be preserved by provisional measures are not limited to those which form the subject matter of the dispute, but may extend to procedural rights, including the general right to the preservation of the *status quo* and to the non-aggravation of the dispute. As stated by the Tribunal in *Burlington v. Ecuador*, these latter rights are self-standing rights.<sup>137</sup> The Tribunal in *Biwater Gauff v. Tanzania* reached a similar conclusion.<sup>138</sup>

118. In the Tribunal's view, the applicable criterion is that the right to be preserved bears a relation with the dispute. This was the standard adopted by the tribunal in *Plama v. Bulgaria*:

The rights to be preserved must relate to the requesting party's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out. Thus the rights to be preserved by provisional measures are circumscribed by the requesting party's claims and requests for relief. They may be general rights, such as the rights to due process or the right not to have the dispute aggravated, but those general rights must be

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<sup>137</sup> *Burlington v. Ecuador*, ¶ 60.

<sup>138</sup> See *Biwater Gauff v. Tanzania*, Procedural Order No. 1, 31 March 2006, ¶ 71 ("The type of rights capable of protection by means of provisional measures are not only substantive rights but also procedural rights").

related to the specific disputes in arbitration, which, in turn, are defined by the Claimant's claims and requests for relief to date.<sup>139</sup>

119. It is evident from the record that the criminal proceedings are related to, and may even be motivated by, the ICSID arbitration. Most of the documents in the criminal proceedings refer expressly to the ICSID arbitration. To cite one example, when David Moscoso made his alleged confession, such confession specifically stated to be issued “within the Request for Arbitration initiated by [Quiborax].”<sup>140</sup>
120. Although the subject matter of the criminal proceedings is the prosecution of crimes of forgery, use of forged documents, fraud, destruction of personal property to defraud and dereliction of duties, the factual accusation underlying these proceedings is that the minutes of 13 September 2001 of NMM were forged to support Claimants’ contention that they were shareholders of NMM at the time the dispute brought before this Tribunal arose, thus allowing them to gain access to ICSID arbitration under the Chile-Bolivia BIT.<sup>141</sup> This access to ICSID arbitration is expressly deemed to constitute the harm caused to Bolivia that is required as one of the constituent elements of the crimes prosecuted.<sup>142</sup> Thus, the criminal proceedings are related to this arbitration because both the conduct alleged and the harm allegedly caused relate closely to Claimants’ standing as investors in the ICSID proceeding.
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 *Querella 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.<sup>143</sup> Lorena Fernández, one of the authors of Informe

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<sup>139</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 (“Plama v. Bulgaria”), Order, 6 September 2005, ¶ 40.

<sup>140</sup> Affidavit of David Moscoso (Annex CPM-21). (Original in Spanish).

<sup>141</sup> See, e.g. Request for Abbreviated Proceeding (Annex CPM-19), p. 5 (“For the above reasons [and] the existing evidence Mr. David Moscoso recognizes freely and spontaneously the falsity introduced in the minutes of 13 September of 2001, whose only objective was to make the Chilean company QUIBORAX a participant in the incorporation of the company N.M.M. and to use this to benefit from the Bolivia-Chile bilateral treaty and in this way sue the Bolivian State and cause a harm to it.”) (Original in Spanish).

<sup>142</sup> See *Querella Criminal* (Annex CPM-9) pp. 1209-1210; Formal Indictment (Annex CPM-11), pp. 4-5; Request for Abbreviated Proceeding (Annex CPM-19), p. 5; Resolution No. 313/2009 (Annex CPM-20), p. 3; Complaint for crimes committed by competent authority (Annex CPM-23), p. 2.

<sup>143</sup> See *Querella Criminal* (Annex CPM-9), p. 1209 (“In consideration of the request for arbitration filed by the company Química e Industrial del Bórax Ltda., Non Metallic Minerals S.A. and Mr. Allan Isaac Fosk Kaplún, against the Bolivian State, a series of irregularities had been detected because certain documentation appeared

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.<sup>144</sup> 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.<sup>145</sup>

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.<sup>146</sup> 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.
123. Whether such defense strategy amounts to harassment, as Claimants allege, is not clear to the Tribunal. Bolivia has the sovereign power to prosecute conduct that may constitute a crime on its own territory, if it has sufficient elements justifying prosecution. Bolivia also has the power to investigate whether Claimants have made their investments in Bolivia in accordance with Bolivian law and to present evidence in that respect. But such powers must be exercised in good faith and respecting Claimants' rights, including their *prima facie* right to pursue this 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. The Tribunal will now examine specifically whether any or all of the three rights invoked by the Claimant merit such protection in the specific circumstances of the case.

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to have been fabricated in order to mislead the *Superintendencia de Empresas*, during audits carried out to such company due to the incomplete documentation that was presented to the auditing entity, so that it would certify that the company Non Metallic Minerals had foreign capital so that it could benefit from the Bilateral Investment Treaty signed with the Republic of Chile and thus not [have to] go before Bolivian courts.”). (Original in Spanish)

<sup>144</sup> See Declaration of Lorena Fernández (Annex CPM-37), pp. 2, 4.

<sup>145</sup> See Informe 001/2005 (Annex CPM-14), pp. 6-7.

<sup>146</sup> See 2004 Memo (Annex CPM-5).

## 2. Right to exclusivity of the ICSID proceedings in accordance with Art. 26 of the ICSID Convention

125. Claimants argue that provisional measures are necessary to preserve the exclusivity of the ICSID proceedings under Article 26 of the ICSID Convention, which provides in relevant part:

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

126. Claimants argue that the criminal proceedings are aimed at destroying their status as foreign investors under the Bolivia-Chile BIT and thus constitute “other remedy” for purposes of Art. 26 of the ICSID Convention. Bolivia rejects this argument by pointing out that the subject matter of the ICSID proceeding (determining whether Bolivia has breached its obligations under the BIT and Claimants are entitled to the relief sought) is distinct from the subject matter of the criminal proceedings (prosecuting and punishing crimes in accordance with Bolivian law).

127. The Tribunal has no doubt that the right to exclusivity of the ICSID proceedings is susceptible of protection by way of provisional measures. In the words of the *Tokios Tokelés v. Ukraine* tribunal:

Among the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the ICSID arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy, whether domestic or international, judicial or administrative.<sup>147</sup>

128. The question that arises is whether the continuation of the criminal proceedings referred to in this decision threatens the exclusivity of the ICSID proceedings. The Tribunal considers that it does not. Although it finds that the criminal proceedings are related to the ICSID arbitration, that does not *per se* threaten the exclusivity of the arbitration proceedings under Article 26 of the ICSID Convention. Pursuant to Article 25 of the ICSID Convention, the Centre has jurisdiction to resolve investment disputes. Thus, the exclusivity of the ICSID proceedings applies only to investment disputes, i.e. here to the determination of whether Respondent has breached its international obligations under the BIT and whether Claimants are entitled to the relief they seek.

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<sup>147</sup> *Tokios Tokelés v. Ukraine*, Order No. 3 of 18 January 2005, ¶ 7, citation omitted.

129. Consequently, the exclusivity of the ICSID proceedings does not extend to criminal proceedings. Criminal proceedings deal with criminal liability and not with investment disputes, and fall by definition outside the scope of the Centre's jurisdiction and the competence of this Tribunal. Neither the ICSID Convention nor the BIT contain any rule enjoining a State from exercising criminal jurisdiction, nor do they exempt suspected criminals from prosecution by virtue of their being investors.
130. Thus, the Tribunal finds that the criminal proceedings initiated by Respondent do not threaten the exclusivity of the ICSID proceedings. Even if the criminal proceedings result in evidence that is later used by Respondent in this arbitration, that would not undermine the Tribunal's jurisdiction to resolve Claimants' claims, if such jurisdiction is established at the appropriate procedural instance.
131. In this respect, the Tribunal notes that the practice of ICSID tribunals has been to consider that other proceedings are parallel for purposes of Art. 26 of the ICSID Convention when such proceedings deal with the same subject matter as the ICSID dispute. This was the criterion adopted by the tribunal in *Perenco v. Ecuador*<sup>148</sup>, for instance.

### **3. The right to the preservation of the *status quo* and the non-aggravation of the dispute**

132. Claimants allege that the criminal proceedings are aggravating the dispute because they put intolerable pressure on them to abandon their claim and are thus aimed at avoiding the resolution of the dispute. Claimants also allege that the criminal proceedings have changed the *status quo* of the dispute, as they have become defendants in Bolivia, and have created serious obstacles for Claimants' presentation of their claim. Respondent opposes that there is no self-standing right to the preservation of the *status quo* or the non-aggravation of the dispute and that, in any event, there is no aggravation of the dispute or need to preserve the *status quo*, because the criminal proceedings do not affect the rights in dispute.
133. As noted above, the Tribunal considers that although the criminal proceedings do not deal with the same subject matter as the ICSID proceeding, they are sufficiently related to merit the protection of Claimants' rights to the non-aggravation of the dispute and the preservation of the *status quo*, which the Tribunal considers to be self-standing rights.

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<sup>148</sup> *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/08/6) ("*Perenco v. Ecuador*"), Decision on Provisional Measures, 8 May 2009, ¶ 61.

134. The existence of the right to the preservation of the *status quo* and the non-aggravation of the dispute is well-established at least since the case of the *Electricity Company of Sofia and Bulgaria*.<sup>149</sup> In the same vein, the *travaux préparatoires* of the ICSID Convention referred to the need “to preserve the *status quo* between the parties pending [the] final decision on the merits” and the commentary to the 1968 edition of the ICSID Arbitration Rules explained that Article 47 of the Convention “is based on the principle that once a dispute is submitted to arbitration the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of the award.”<sup>150</sup>
135. In ICSID jurisprudence, this principle was first affirmed in *Holiday Inns v. Morocco*<sup>151</sup> and then reiterated in *Amco v. Indonesia*. In the latter case, the tribunal acknowledged “the good and fair practical rule, according to which both Parties to a legal dispute should refrain, in their own interest, to do anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult”<sup>152</sup>.
136. The principle was re-affirmed in *Plama v. Bulgaria*<sup>153</sup> (although with a somewhat more limited approach), *Occidental v. Ecuador*<sup>154</sup>, *City Oriente v. Ecuador*<sup>155</sup>, and *Burlington v. Ecuador*.<sup>156</sup>
137. Having established the existence of these rights, the question that arises is whether the criminal proceedings are in fact aggravating the ICSID dispute or have changed the *status quo*.
138. The Tribunal agrees with Claimants that the criminal proceedings exacerbate the climate of hostility in which the dispute is unfolding. However, it also notes that Claimants have no more activities or presence in Bolivia. Their mining concessions have been revoked, so there is no ongoing investment to protect. Co-Claimant Allan Fosk – the only Claimant implicated in the criminal proceedings – has not been formally

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<sup>149</sup> *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Judgment of 5 December 1939, PCIJ series A/B, No 79, p.199. See also the *LaGrand case (Germany v. United States)*, Judgment of 27 June 2001, ¶ 103, ICJ Reports 2001, p. 466.

<sup>150</sup> 1 ICSID Reports, p. 99.

<sup>151</sup> *Holiday Inns S.A. and others v. Kingdom of Morocco* (ICSID Case No. ARB/72/1), Order of 2 July 1972, not public but commented in Pierre Lalive, “The First ‘World Bank’ Arbitration (*Holiday Inns v. Morocco*) – Some Legal Problems”, BYIL, 1980.

<sup>152</sup> *Amco Asia v. Indonesia*, Decision on request for provisional measures of 9 December 1983, ICSID Reports, 1993, p. 412.

<sup>153</sup> *Plama v. Bulgaria*, Order of 6 September 2005, ¶ 40.

<sup>154</sup> *Occidental v. Ecuador*, Decision on provisional measures of 17 August 2007, ¶ 96.

<sup>155</sup> *City Oriente v. Ecuador*, Decision on provisional measures of 19 November 2007, ¶ 55.

<sup>156</sup> *Burlington v. Ecuador*, Procedural Order No. 1 of 29 June 2009, ¶¶ 61-68.

accused and does not live in Bolivia. Thus, the Tribunal cannot agree with Claimants that the criminal proceedings place “intolerable pressure” on Claimants to drop their claims. Likewise, the Tribunal cannot concur with Claimants’ argument that the criminal proceedings have changed the *status quo* of the dispute because they have turned them into defendants in Bolivia. If there are legitimate grounds for the criminal proceedings, Claimants must bear the burden of their conduct in Bolivia.

#### **4. Right to the procedural integrity of the arbitration proceedings**

139. Claimants assert that the criminal proceedings impair their right to the procedural integrity of the arbitration proceedings, in particular with respect to their access to evidence and the integrity of the evidence. Specifically, Claimants claim that through the criminal proceedings Respondent has obstructed their access to indispensable evidence by sequestering their corporate records and alienating potential witnesses; that Respondent has fabricated *ex post facto* evidence by forcing false confessions out of a potential witness and thus making him unavailable to testify, and seeks to do the same with other potential witnesses; and that Respondent attempts to destroy the probative value of certain documents, such as Informe 001/2005.
140. Respondent denies that the criminal proceedings pose a threat to the procedural integrity of the arbitration proceedings, in particular with respect to the production of evidence. If Claimants’ allegation refers to the evidence to be presented by Claimants, Respondent submits that Claimants have already presented substantial evidence, and that Respondent is in no way restricting its access to documentary evidence or potential witnesses. To the contrary, Respondent submits that granting provisional measures would deprive it of the possibility to present its own case, because the criminal proceedings may result in evidence that could be submitted to this Tribunal. Respondent also rejects Claimants’ accusation that the criminal proceedings were artificially instituted by Bolivia to destroy or distort the evidentiary value of certain documents relevant to proving their condition as investors.
141. The Tribunal has no doubt that it has the power to grant provisional measures to preserve the procedural integrity of the ICSID proceedings, in particular the access to and integrity of the evidence. Such measures were granted in *Biwater Gauff v. Tanzania*<sup>157</sup> and *Agip v. Congo*<sup>158</sup> with respect to documentary evidence.

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<sup>157</sup> *Biwater Gauff v. Tanzania*, ¶¶ 84- 98.

142. The Tribunal considers that the criminal proceedings may indeed be impairing Claimants' right to present their case, in particular with respect to their access to documentary evidence and witnesses. Claimants have been deprived of their corporate records and, although it appears from the record that Claimants have had access to copies of certain documents, it is unclear whether they are still missing relevant documentation that might assist them in presenting their case on jurisdiction or the merits.
143. The Tribunal is also troubled by the effect that the criminal proceedings may have on potential witnesses. The record shows that Respondent has pressed formal charges against several persons involved in Claimants' operation in Bolivia, including its business partner, former counsel, the authors of Informe 001/2005, and the judge who refused to order the preventive detention of Mr. Moscoso. It is true that Claimants have already produced evidence with their Memorial and that these persons have not been named as witnesses. However, Claimants have not answered any possible objections to jurisdiction yet nor submitted their Reply to Respondent's Counter-Memorial on the merits, if any. If such objections are raised, then the record as it stands seems to indicate that these persons may indeed be privy to relevant facts and be asked to give evidence.
144. Respondent denies that it has exercised any undue pressure on these persons that could prevent them from acting as witnesses in this arbitration. However, at least one of them – David Moscoso – is as a result of the criminal proceedings legally prevented from testifying for Claimants in the ICSID proceedings because he cannot testify against his own confession.
145. In addition, the way in which the criminal proceedings against David Moscoso developed suggests that Respondent indeed may be exercising undue pressure against potential witnesses. The record shows that David Moscoso had first denied participation in the crimes charged and confessed only after bail of US\$300,000 was set on his personal liberty. Such bail had first been denied by the competent judge, and was only set after that judge was charged with malfeasance in office for having neglected to consider the importance of the case for the State of Bolivia. The Tribunal also finds it troubling that although the Bolivian authorities first insisted on Mr.

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<sup>158</sup> *Agip SpA v. People's Republic of Congo*, ICSID Case No. ARB/77/1, Decision, 18 January 1979, reported in the Award of 30 November 1979, 1 ICSID Reports, p. 310.



Moscoso's preventive detention, once he had confessed he was immediately pardoned, which seems to suggest that the restriction on his personal liberty was meant as an intimidation measure and not because the nature or circumstances of the crime required Mr. Moscoso's detention.

146. Even if no undue pressure is exercised on potential witnesses, the very nature of these criminal proceedings is bound to reduce their willingness to cooperate in the ICSID proceeding. 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.
147. The Tribunal is not persuaded by Respondent's argument that if provisional measures are granted this would affect Respondent's ability to present its case in this ICSID arbitration. Somewhat paradoxically, Respondent itself has argued that the criminal proceedings are not directed to determine the jurisdiction of this Tribunal. In any event, whether Claimants made an investment in Bolivia that is covered by the Chile-Bolivia BIT will not be proved or disproved by criminal proceedings, but by evidence related to ownership and to the manner in which the investment was made, among others. Even if the criminal proceedings could potentially result in evidence of facts related to this Tribunal's jurisdiction, the Tribunal would not be bound by it.
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. In the words of the *Plama* tribunal, the Tribunal finds that, under the particular circumstances of this case, the rights invoked by Claimants and analyzed in this Section relate to Claimants' "ability to have [their] claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal".<sup>159</sup>

### **C. Urgency**

149. The Parties agree that there is urgency when there is a need to safeguard rights that are in imminent danger of irreparable harm before a decision is made on the merits. They disagree, however, on whether the present facts meet the urgency requirement.

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<sup>159</sup> *Plama v. Bulgaria*, Order, 6 September 2005, ¶ 40.

150. The Arbitral Tribunal agrees with Claimants that the criterion of urgency is satisfied when “a question cannot await the outcome of the award on the merits”<sup>160</sup>. This is in line with the practice of the International Court of Justice (“ICJ”)<sup>161</sup>. The same definition has also been given in *Biwater Gauff v. Tanzania*:

In the Arbitral Tribunal's view, the degree of ‘urgency’ which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measures at a certain point in the procedure before the issuance of an award.<sup>162</sup>

151. Claimants argue that the requirement of urgency is met in this case. Specifically, Claimants contend that because the measures are intended to protect against the aggravation of the dispute and to safeguard the jurisdictional powers of the Tribunal and the integrity of the arbitration, they are urgent by definition.

152. By contrast, Respondent argues that there is no imminent threat to any of Claimants’ rights because the alleged harm to such rights is mere speculation.

153. The Tribunal agrees with Claimants that if measures are intended to protect the procedural integrity of the arbitration, in particular with respect to access to or integrity of the evidence, they are urgent by definition. Indeed, the question of whether a Party has the opportunity to present its case or rely on the integrity of specific evidence is essential to (and therefore cannot await) the rendering of an award on the merits.

#### **D. Necessity**

154. The Tribunal has found that the criminal proceedings threaten the procedural integrity of the ICSID proceeding, and that provisional measures are urgent. The Tribunal will now examine if provisional measures such as those requested by Claimants are necessary.

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<sup>160</sup> Christoph Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press, 2001, p. 751, ¶ 14.

<sup>161</sup> In the words of the ICJ, “[w]hereas the power of the Court to indicate provisional measures will be exercised only if there is urgency in the sense that there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision (see, for example, *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order of 29 July 1991, ICJ Reports 1991, p. 17, ¶ 23; *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measures, Order of 17 June 2003, ICJ Reports 2003, p. 107, ¶ 22; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Preliminary Objections, Order of 23 January 2007, p. 11, ¶ 32), and whereas the Court thus has to consider whether in the current proceedings such urgency exists”, *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Order of 15 October 2008, ¶ 129.

<sup>162</sup> *Biwater Gauff v. Tanzania*, Procedural Order No. 1 of 31 March 2006, ¶ 76.

155. The Parties agree that provisional measures must be necessary, in other words, that they must be required to avoid harm or prejudice being inflicted upon the applicant. However, they disagree on the qualification of the harm, whether serious or irreparable, and also whether the criminal proceedings present a harm to Claimants' rights that requires avoidance by granting provisional measures.

156. The Tribunal considers that an irreparable harm is a harm that cannot be repaired by an award of damages. Such a standard has been adopted by several ICSID tribunals and embodied in Art. 17A of the UNCITRAL Model Law.<sup>163</sup> That provision requires the party requesting an interim measure to satisfy the tribunal that:

Harm not adequately repaired by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted.

157. Following this standard, Claimants submit that the provisional measures requested are necessary because the harm caused would not be adequately repaired by an award of damages. The Tribunal agrees with Claimants in this respect: any harm caused to the integrity of the ICSID proceedings, particularly with respect to a party's access to evidence or the integrity of the evidence produced could not be remedied by an award of damages.

158. However, Claimants have accurately pointed out that the necessity requirement requires the Tribunal to consider the proportionality of the requested provisional measures. The Tribunal must thus balance the harm caused to Claimants by the criminal proceedings and the harm that would be caused to Respondent if the proceedings were stayed or terminated.

159. Respondent claims that its sovereignty would be harmed if the Tribunal orders the provisional measures sought by Claimants, as this would unduly interfere with its right to prosecute crimes committed on its territory. Respondent also argues that the criminal proceedings may provide evidence that it could present in the ICSID proceedings, and that granting the measures requested by Claimants would prevent such evidence from ever reaching the Tribunal and would thus affect its right to present its case.

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<sup>163</sup> See *City Oriente v. Ecuador*, Decision on Revocation of Provisional Measures, 13 May 2008, ¶ 72, n. 21; *Sergei Paushok v. Republic of Mongolia*, Order on Interim Measures of 2 September 2008 ¶¶ 68-69; *Burlington v. Ecuador*, Procedural Order No. 1 of 29 June 2009, ¶¶ 81-82.

160. In addition, Respondent has committed to collaborate with Claimants' access to documentary evidence and witnesses. Specifically, it has committed to:

- (a) "obtain from the Prosecutor's Office certified copies of any documents identified by the Claimants, if they should have any difficulty in doing so";<sup>164</sup>
- (b) "cooperate as necessary so that [the persons charged in the criminal proceedings] could offer their testimony to the Tribunal".<sup>165</sup>

161. In Claimants' view, these commitments are not sufficient. Claimants insist that they require the entire set of original documents sequestered by Bolivia, and that they have serious difficulties accessing documents from the criminal proceedings, so Respondent's assurance that the criminal documents are available to them is an empty promise.<sup>166</sup>

162. With respect to witnesses, Claimants contend that Respondent's assurances are insufficient because it is not in Respondent's power to grant them access to the witnesses. Claimants assert that the persons involved in the criminal proceedings cannot or are not willing to appear as witnesses in this arbitration, either because they are legally impeded from rendering testimony contrary to their prior testimony in the criminal proceedings (as is the case of David Moscoso), or because they fear that their participation in the arbitration will worsen their status in the criminal proceedings. Thus, Claimants argue that the only way to make these persons available would be to stop the criminal proceedings so that these persons can testify freely and without fear.<sup>167</sup>

163. The Tribunal takes due notice of Respondent's commitments set out in paragraph 160 above. Nonetheless, the Tribunal agrees with Claimants that in the particular circumstances of this case the commitment with respect to witnesses is insufficient. Regardless of whether the criminal proceedings have a legitimate basis or not (an issue which the Tribunal is not in a position to determine), the direct relationship between the criminal proceedings and this ICSID arbitration is preventing Claimants from accessing witnesses that could be essential to their case. No assurance of cooperation from Respondent can guarantee that persons who are being prosecuted for having allegedly caused harm to Respondent by permitting Claimants to present

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<sup>164</sup> Respondent's Rejoinder ¶ 33; see also Transcript, p. 81, lines 16-22; p. 82, lines 1-11.

<sup>165</sup> Respondent's Rejoinder ¶ 35; see also Transcript, p. 86, lines 10-22; p. 87, lines 1-14; p. 92, lines 12-22.

<sup>166</sup> Transcript, p. 86-88.

<sup>167</sup> Transcript, p. 93-95.

this arbitration will be willing to participate as witnesses in this very same arbitration. Under these circumstances, the Tribunal considers that Claimants' access to witnesses may improve if the criminal proceedings are stayed until this arbitration is finalized or this decision is reconsidered.

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. As mentioned in paragraph 129 above, the international protection granted to investors does not exempt suspected criminals from prosecution by virtue of their being investors. However, the situation encountered in this case is exceptional. The Tribunal has been convinced that there is a very close link between the initiation of this arbitration and the launching of the criminal cases in Bolivia. It has become clear to the Tribunal that one of the Claimants is being subjected to criminal proceedings precisely because he presented himself as an investor with a claim against Bolivia under the ICSID/BIT mechanism. Likewise, the Tribunal has been convinced that the other persons named in the criminal proceedings are being prosecuted because of their connection with this arbitration (be it as Claimants' business partners or counsel, or as authors of a report ordered by a state agency). Although Bolivia may have reasons to suspect that the persons being prosecuted could have engaged in criminal conduct, the facts presented to the Tribunal suggest that the underlying motivation to initiate the criminal proceedings was their connection to this arbitration, which has been expressly deemed to constitute the harm caused to Bolivia that is required as one of the constituent elements of the crimes prosecuted.

165. In addition, the Tribunal is of the opinion that a mere stay of the criminal proceedings would not affect Respondent's sovereignty nor require conduct in violation of national law. Respondent's expert in criminal procedure, Dr. Mary Elizabeth Carrasco Condarco, notes that the prosecutor may request the competent judge to refrain from prosecuting a criminal action in certain cases, such as when the event is of little social relevance or judicial pardon is foreseeable.<sup>168</sup> The fact that David Moscoso was

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<sup>168</sup> Dr. Carrasco Condarco states: "The exercise of the public criminal action may not be suspended, interrupted, nor ceased, except in the cases expressly provided by law. The prosecutor's office shall have the obligation to exercise the public criminal action in all the cases where it applies, however, it may request the Judge that exercises jurisdictional control to dispense with criminal persecution of one or more of the events prosecuted, with respect to one or more participants, only in the following cases: 1.- When it is an event of little social relevance due to its minimal effect on the legally protected interest, 2.- When the prosecuted person has suffered as a

immediately pardoned, allegedly on the basis of a clean record, suggests that others in a similar situation may be pardoned as well, and that Respondent does not consider them a threat to society. In any event, the harm that such a stay would cause to Bolivia is proportionately less than the harm caused to Claimants if the criminal proceedings were to continue their course. Once this arbitration is finalized, Respondent will be free to continue the criminal proceedings, subject to the Tribunal terminating or amending this Decision prior to the completion of this arbitration.

## **V. DECISION**

On this basis, the Arbitral Tribunal makes the following decision:

1. Respondent shall take all appropriate measures to suspend the criminal proceedings identified as Case N° 9394/08, initiated against Allan Fosk, David Moscoso, Fernando Rojas, María del Carmen Ballivián, Daniel Gottschalk, Dolly Teresa Paredes de Linares, Gilka Salas Orozco, María Mónica Lorena Fernández Salinas, Yury Alegorio Espinoza Zalles, Tatiana Giovanna Terán de Velasco and Ernesto Ossio Aramayo, and any other criminal proceedings directly related to the present arbitration, until this arbitration is completed or until reconsideration of this decision, whether at the request of a Party or of the Tribunal's own motion.
2. Respondent shall also refrain from initiating any other criminal proceedings directly related to the present arbitration, or engaging in any other course of action which may jeopardize the procedural integrity of this arbitration.
3. Claimants' other requests for provisional measures are denied.
4. Costs are reserved for a later decision or award.

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consequence of the event a physical or moral damage more serious than the sentence to be imposed; 3.- When the sentence that is expected for the crime which prosecution is dispensed with lacks importance in consideration of a sentence that has already been imposed for another crime, 4.- When judicial pardon is foreseeable and 5.- When the expected sentence lacks importance considering those of other crimes, or that which would be imposed in a proceeding taking place abroad and the requested extradition may be granted (article 21 of the [Code of Criminal Procedure].” Expert Report of Mary Elizabeth Carrasco Condarco, p. 3. (Original in Spanish).



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Hon. Marc Lalonde

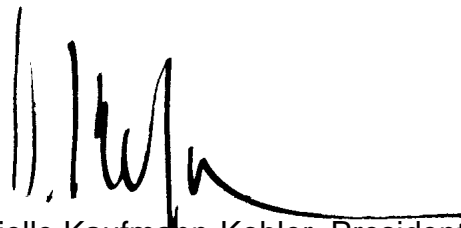
Date: 01.02.2010



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Prof. Brigitte Stern

Date: 01.02. 2010



Prof. Gabrielle Kaufmann-Kohler, President

Date: 01.02.2010