INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

PHOENIX ACTION, LTD.
Claimant

v.

THE CZECH REPUBLIC
Respondent

(ICSID Case No. ARB/06/5)

DECISION ON PROVISIONAL MEASURES

Tribunal

Professor Brigitte Stern
Professor Andreas Bucher
Professor Juan Fernández-Armesto

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1. A Request for arbitration was filed in this case on February 15, 2004 before the International Centre for Settlement of Investment Disputes (hereafter ICSID or the Centre), and after numerous exchanges of correspondence between the Centre and the Claimant, was registered on March 23, 2006. The Tribunal was constituted on January 8, 2007.

2. The Claimant is Phoenix Action Ltd (hereafter Phoenix), an Israeli company registered under the laws of the State of Israel on October 14, 2001, entirely owned by Mr. Vladimir Beno. Phoenix became the owner and sole shareholder of two Czech companies, Benet Praha and Benet Group on December 13, 2002. The Respondent is the Czech Republic.

I. THE FACTS RELEVANT TO THE DECISION ON PROVISIONAL MEASURES

3. In order to take a decision on the requested provisional measures, the Tribunal has to describe some of the facts of this complex case, in which several different national and international proceedings are at stake: a criminal investigation against Mr. Beno; customs proceedings against Benet Praha; civil proceedings in the Czech courts involving Benet Praha, Benet Group and other entities relating to the ownership of some disputed companies and the transfer of plots of land and buildings they possess to third parties; a constitutional complaint lodged on November 15, 2002 which was rejected; and a complaint before the European Court of Human Rights filed by Benet Praha alleging an infringement of its right to a just trial pursuant to Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, presently pending. The two last proceedings will not be elaborated on, but are just mentioned in order to state that the provisional measures for the unfreezing of the assets of Benet Praha requested from these two courts were not granted to Benet Praha. Some more details will now be given on the other proceedings.

4. For the avoidance of any doubt, the Tribunal emphasises that at this preliminary stage the outline of facts is nothing more than a summary drawn from the Request for

arbitration and the submissions received so far on preliminary objections and is presented as a general framework in order to understand the case, but entails no prejudgment whatsoever on questions of fact or law.

The criminal investigation

5. A criminal investigation commenced in April 2001 against Mr. Vladimir Beno, who was at that time Benet Praha's Executive Officer. The investigation related to the alleged committing of a series of tax and custom duty evasions, when importing metals into the Czech Republic. Further investigations revealed a suspicion that Mr. Beno engaged also in income tax fraud. On the basis of an arrest warrant issued against Mr. Beno, the Czech police took him into custody and attempted to escort him to the Office of corruption and financial crimes, but Mr. Beno escaped police and fled to Israel. There he registered a new company, Phoenix, on October 14, 2001. Meanwhile, as it was determined that the funds of Benet Praha were proceeds of a criminal activity – customs evasion – the Police of the Czech Republic, with the approval of the High Prosecuting Attorney's Office in Prague, seized all of Benet Praha's assets held in CSOB Bank in the Czech Republic on April 25, 2001 and April 27, 2001, pursuant to Czech legislation. It has to be noted that the freezing of Benet Praha's funds is related to the criminal proceedings against Mr. Beno. It is stated in the Request for arbitration that "(t)he seizure of Benet Praha's funds actually terminated all of the company's commercial activities."

The customs proceedings

6. As it had appeared that Benet Praha, due to the alleged fraudulent altering or forging of customs documents by Mr. Beno, did not pay to the Czech Republic the customs duties owed to it, customs proceedings were started against the company in order to obtain payment of the sums of money that were due. It has to be stressed that some of the frozen assets under the criminal procedure were released in order to allow Benet Praha to pay customs duties in the customs proceedings. The reality and amounts of these customs duties were harshly litigated in numerous cases before the Czech courts, with the result that more than hundred decisions of the Czech customs authorities were

annulled by the Czech courts, mainly on formal grounds. This meant that new assessments of the customs authorities could still be made. It appears however from the file that Benet Praha seems to have cleared the slate as far as its unpaid custom duties are concerned: in a letter from the General Headquarters of Customs to Benet Praha, dated May 2, 2006, it is asserted that "we confirm that the subject Benet Praha … **Does not have any record of arrears** at the Customs Administration of the Czech Republic as of 26. 4. 2000" (emphasis in the letter).

The civil proceedings relating to the ownership of lands

7. Phoenix acquired on December 13, 2001 from Benreal, whose sole shareholder was Mrs. Vladimira Benova, Benet Group and Benet Praha. It should be noted that when Phoenix acquired Benet Praha, its bank accounts had already been frozen for a little more than six months. Benet Group had acquired on November 26, 2000 two other companies belonging to Mr. Miroslav Raška, Druha Slevarna Blanko (hereafter DSB) and Cash & Capital (hereafter C&C). Cash and Capital had thereafter acquired CKD, a bankrupt company owning large parcels of land – on December 29, 2000. The ownership of CKD – and the lands possessed by this company – is in dispute before the Czech courts. At the present time, the land is registered in the name of CKD Blansko Strojirny, a company entirely owned by Mr. Raška. There is the same kind of dispute on the ownership of DSB and properties belonging to it. It does not seem necessary for the purpose of this decision on provisional measures to enter into the intricacies of these civil proceedings. It should however be mentioned that the dispute started before the investment of Phoenix. In other words, when Phoenix acquired Benet Group, the ownership of DSB and C&C and the related lands was already under litigation. The Benet Group had brought an action with the Municipal Court in Prague on September 19, 2001 to declare the non-existence of certain decisions taken by the sole shareholder of C&C. A similar action had been brought against DSB with the Regional Court in Hradec Kralove on October 29, 2001. The claim in respect of the ownership of C&C with the court of Blansko was submitted on September 24, 2001 and a second claim relating to the ownership of DSB was brought to the attention of Bro's court on October 29, 2001.

II. BRIEF HISTORY OF THE PROCEEDING ON PROVISIONAL MEASURES

The Claimant's Request for provisional measures

8. On January 25, 2007, the Claimant sent to the Centre a letter to which it attached an order requesting a transfer of frozen funds in a bank account of Benet Praha, while invoking ICSID Arbitration Rule 39 on provisional measures.

9. On receipt of this Claimant's letter, the Centre answered on the same day, requesting clarification from the Claimant and asking it to specify:

   (i) the rights to be preserved;

   (ii) the measures the recommendation of which is requested;

   (iii) the circumstances that require the measures.

The Claimant's letter of explanations in support of its Request

10. The Claimant answered to the Centre's request in a letter dated January 28, 2007.

11. In its answer to the first question raised – specification of the rights to be preserved – the Claimant stated that the rights to be preserved were respectively: access to justice, access to the dispute and access to the property.

12. In its answer to the second question – requested measures from the Tribunal – the Claimant asked for two measures. Firstly, it asked the Tribunal to order the blocking of all properties which the Claimant asserted that it owned, by the Czech authorities, because "right to use the property in the future is connected with the right to save the property today". Secondly, the Claimant requested the Tribunal to make an injunction asking the Czech Government to release the funds that were still blocked, one of the arguments presented earlier in support of such injunction being that the Claimant needed these frozen funds to be able to pay the first advance payment to cover the costs of the ICSID arbitration, and were therefore essential for its access to justice.

13. The Claimant did not really elaborate on the special circumstances that would require provisional measures, stating simply that "the dispute should **start** and also be finished in a reasonable amount of time" and that "the real chance to lose leverage without the procedural steps leading to injunction, for preserving the **basic rights** … is enormous" (emphasis by the Claimant).

The Respondent's first observations on the Request for provisional measures

14. The Respondent provided its observations regarding Claimant's Request for provisional measures of January 28, 2007 in a letter dated February 14, 2007. In the Respondent's view, both provisional measures requested by the Claimant should fail.

15. Firstly, as far as the injunction linked with the properties is concerned, the Respondent considered that it should be refused, because the Claimant knew when it invested in the Czech Republic that the properties it was buying were subject to a dispute in the Czech courts. Therefore, according to the Respondent, "the requested injunction would create new rights for that Claimant rather than preserve those that the Claimant already had".

16. Secondly, as far as the Claimant's request for release of the frozen funds is concerned, the Respondent, recalling that initially the Claimant had asked this measure even before the constitution of the Tribunal, in order, according to it, to be able to pay its share of the ICSID request for advance payments to cover the costs of the arbitration, pointed to the fact that the Claimant "paid its share of the advanced payment from alternative funds" and added that "(h)aving made its share of the advanced payment, the Claimant has not explained why the issue of the frozen funds cannot await the outcome of the award on the merits".

17. This important point being made, the Respondent added however that the Tribunal should deny the Claimant's request for release of funds for no less than five reasons. First, according to the Respondent, the release of the funds, which were already blocked when Phoenix acquired Benet Praha, would not preserve its rights but give it

more rights than it possessed, in other words would create new rights. The reasoning here is similar to the one advanced for denying the right of the Claimant to the provisional measure requested in relation to the lands and buildings. Second, there is no necessity or urgency to release these funds, as the Claimant has paid its advance payment to ICSID under Administrative and Financial Regulation 14. Third, as the funds were frozen in connection with a criminal case, such an order would interfere with an ongoing criminal investigation by a sovereign State. Fourth, the request for the release of the funds presented to the Tribunal had already been presented in the Czech legal order and rejected by the High Court whose decision was endorsed by the Constitutional Court, and the request is thus asking the Tribunal to sit as a reviewing body of the Czech courts, which it cannot do. Fifth, the request asks provisional measures concerning an entity, Benet Praha, whose bank accounts are the subject of the freeze order, but which is not a party to this arbitration.

The Tribunal's first session

18. During the first session of the Tribunal, held in Paris, at the World Bank offices, on February 23, 2007 (hereafter Hearing), the two parties were given the opportunity to present their respective positions on the question of provisional measures. In addition to the provisional measures requested so far, the Claimant presented a new request at the Hearing concerning what it called "Access to information". The Tribunal requested both parties to summarize their contentions in a brief Post-Hearing submission of 5 pages to be sent to the Tribunal no later than March 5, 2007, which they did.

The Claimant's Post-Hearing Brief

19. In its Post-Hearing Brief, the Claimant requested three different provisional measures: the two initial ones and the new one presented at the Hearing.

20. It first requested an order relating to DSB's and C&C's properties, the two factories as well as the plots of land and buildings. In its own words, "Claimant seeks a provisional measure recommending that the Czech government block further transfers

of these properties … Such a measure would be appropriate to preserve Claimant's rights because further transfers of these properties will only make it more difficult, if not impossible, for Claimant to recover them. It is the recovery of these properties, not damages for their loss, that is Claimant's preferred remedy in this action." The Tribunal notes that the Claimant did not request any return of its properties in the Request for arbitration which states the following:

> "The tribunal will be requested, inter alia, to declare that the Czech Republic violated the terms of the treaty, and to declare that the Czech Republic is obliged to remedy the injury and the losses suffered by the Claimant as a result of the Respondent's violations of the treaty by payment of the fair market value of the Claimant's property prior to the violations of the treaty by the Respondent".

21. The Claimant also requested an order for the unfreezing of Benet Praha's frozen accounts. While, when this request was first presented, it was deemed necessary and urgent in order for the Claimant to be able to have sufficient money to initiate the ICSID arbitration, a new justification of the urgency of this requested provisional measure was presented in the Post-Hearing Brief: "Claimant submits that BP's funds were, and remain, frozen, to prevent BG, and thus now the Claimant, from completing its purchase of the factories and lands discussed above."

22. Finally, the Claimant introduced a request for a new provisional measure, arguing that Mr. Raška, who is one of the protagonists in the civil litigation with Benet Group over the ownership of DSB and C&C, and some of his friends are in fact acting on behalf and with the help of the Czech government. The Claimant therefore asked an order to be directed to the Czech government to let it examine the official archives. According to the Claimant, "(i)nformation concerning affiliations of such persons with the security services of the prior communist government, and, possibly, with the current security services, could be of great value – certainly in combination with other information – in demonstrating the involvement of elements of the Czech government in this dispute, from its beginning to the present … Therefore … the Claimant should be granted access to official Czech archives to help develop evidence that will support its claim".

23. The final petitions of the Claimant are thus the following:

> "Phoenix Action requests provisional measures recommending that the Czech government **block any further transfers of the factories and land** at issue.
> The Claimant respectfully requests that the Tribunal grant a provisional measure recommending that the Czech government **unfreeze the monies in BP's accounts** with the CSOB, a.s. branch office in Prague …
> The Claimant respectfully requests that the Tribunal grant a provisional measure requesting the Czech government to **permit the Claimant's representatives to examine documents in the official archives of the Czech State Security Services … and the military counter-intelligence**"(emphasis by Claimant).

The Respondent's Post-Hearing Brief

24. In its Post-Hearing Brief, the Respondent noted that a new provisional measure had been added by the Claimant at the Hearing to the effect that the Tribunal should recommend that the Respondent release the identities of Czech secret service agents, and considered that the three requested provisional measures should be swiftly rejected.

25. As far as the request for an injunction regarding plots of land and buildings is concerned, the Respondent contended that it should be rejected for six reasons. First, it asserted that as the Claimant had not requested specific performance in its Request for arbitration, it cannot request a provisional measure to obtain it, as it was satisfied in its Request for arbitration to receive monetary compensation, which is not put in jeopardy if the provisional measure is not granted. Moreover, in the Respondent's view, only the purported owners, DSB and C&C, can request specific performance, not the Claimant who is only the shareholder of the two companies and thus has only a right to the value of the shares in these companies. Second, it should have been for DSB and C&C to follow the normal Czech existing internal procedure to have an insertion in the Czech Cadastre to the effect that the registered properties' ownership is under litigation. The purpose of provisional measures is not to afford a remedy when the same remedy has not even been pursued in the internal legal order. Third, even if DSB and C&C had followed this procedure, and the right to an inscription of a note in the Cadastre would have been denied to them, it would still be necessary, in the Respondent's view, for Phoenix, the Claimant, to show how this could affect its rights

under the Czech/Israeli BIT. Fourth, as already stated in its letter of February 14, 2007, it points to the fact that the requested measure does not aim at preserving an existing right, but rather at creating a new right. Fifth, as the order requested seems to ask the Czech government to prohibit the transfer of properties registered in the name of parties which are not parties to the present arbitration, it is the contention of the Respondent that the Tribunal has no jurisdiction, *ratione personae*, to grant such provisional measure. Sixth, and finally, the Respondent added that the requested provisional measure is "futile", or at least not clearly shaped, as the Claimant has not identified what is requested from the Czech government in order to prohibit a transfer of property between private parties.

26. The Respondent also requested the Tribunal to deny the request for an injunction regarding the release of the frozen assets, but it mainly reiterated on this point arguments already made in its letter of February 14, 2007, and the Tribunal thus refers to what has been said earlier.

27. With respect to the Claimant's new request for a provisional measure asking the Czech government to open its archives, the Respondent noted that the release of the identities of the Czech secret service agents is a question of national security. Moreover, this request is not based on any evidence of any kind of involvement of the Czech secret services and it is difficult to see how it could be a measure deemed to preserve any existing right. According to the Respondent, this is not really a legal request, but a "political" move on the part of the Claimant:

> "The unfortunate reality is that the Claimant appears to have made this request not because it expects to prevail on it (which it cannot possibly do) but because it seeks to "plant the seed" in the Tribunal's collective mind that the Respondent has something to do with the ongoing dispute between private litigants in the Czech courts".

28. For all these reasons, the Respondent respectfully requests that the Tribunal deny the Claimant's Request for provisional measures.

III. THE TRIBUNAL'S DECISION

The power to grant provisional measures

29. The case was brought under the Israel/Czech Republic Bilateral Investment Treaty for the Reciprocal Promotion and Protection of Investment (BIT). The parties have not questioned the Tribunal's authority to recommend provisional measures even though its jurisdiction is being challenged. ICSID tribunals have previously confirmed their jurisdiction to rule on requests for provisional measures pending jurisdictional objections.[1] The Tribunal will thus not deal at this stage with the objections to jurisdiction *ratione temporis*, which have been articulated briefly in the Respondent's letter of February 14, 2007.

30. The authority of the Tribunal to recommend provisional measures is governed by Article 47 of the ICSID Convention, which provides:

> **Article 47**
>
> 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.

31. This provision has been elaborated on in Arbitration Rule 39:

> **Rule 39**
> **Provisional Measures**
>
> (1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

[1] See e.g., *Holiday Inn S.A. and others v. Morocco* (ARB/72/1), Decision of July 2, 1972, Extracts published in Pierre Lalive, "The First "World Bank" Arbitration – Some Legal Problems", *British Yearbook of International Law*, 1980, p. 123 at, p. 136.

(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.
(5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.
(6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.

32. It is common understanding that provisional measures should only be granted in situations of absolute necessity and urgency, in order to protect rights that could, absent these measures, be definitely lost.

The requested provisional measures

33. It is not contested that provisional measures are extraordinary measures which should not be recommended lightly. 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 that need is *urgent*. The international jurisprudence on provisional measures indicates that a provisional measure is necessary where the actions of a party "are capable of causing or of threatening irreparable prejudice to the rights invoked."[2] A measure is urgent where "action

[2] *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Request for the Indication of Interim Measures of Protection, Order, September 11, 1976, Separate Opinion of President Jiménez de Aréchaga, *ICJ Reports*, 1976, p. 15.

prejudicial to the rights of either party is likely to be taken before such final decision is given."[3]

34. Also, it has to be emphasised that the purpose of provisional measures is to guarantee the *protection of rights*, whose existence might be jeopardized in the absence of such measures. In its Procedural Order No. 2 in the *Maffezini* case, the tribunal has elaborated on the meaning of an existing right:

> "Rule 39(1) specifies that at party may request '… provisional measures for the preservation of its rights …' The use of the present tense implies that such rights must exist at the time of the request, must nor be hypothetical, nor are ones to be created in the future. An example of an existing right would be an interest in a piece of property, the ownership of which is in dispute. A provisional measure could be ordered to require that the property not be sold or alienated before the final award of the arbitral tribunal. Such an order would preserve the *status quo* of the property, thus preserving the rights of the party in the property"[4].

This definition will be helpful to solve the case under discussion here.

The request for an injunction regarding plots of lands and buildings

35. It seems that the Claimant requests the Tribunal to recommend that the relevant Czech authorities, more precisely the Czech Cadastral Office, enter a note in the Land Cadastre that certain plots of lands and properties registered in the name of third parties should not be sold, in case the Tribunal would decide that the Claimant is the rightful owner of the companies owning such real property. It is not self evident that the question of the rightful owner of DSB and C&C and their properties is before the Tribunal, but even if it were, there are some considerations that prevent the granting of the requested provisional measures.

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[3] *Case Concerning Passage Through the Great Belt (Finland v. Denmark)*, Request for the Indication of Provisional Measures, July 29, 1991, *ICJ Reports*, 1991, p.17.

[4] *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case ARB/97/7, Procedural Order No. 2 of October 28, 1999, English translation of Spanish original available at http://www.worldbank.org/icsid/cases/emilio_DecisiononRequestforProvisionalMeasures.pdf and 16 *ICSID Rev.-FILJ*, 2001, paras 12-13, p. 208.

36. Applied to the present case, the statement in *Maffezini* means that if the properties in question would be disputed between the Claimant and the Respondent, it could well be appropriate to grant provisional measures to the effect that such property is not sold to a third party, before the outcome of the case. The situation here is different. The rights that the Claimant can purport to protect through provisional measures must be rights that the Claimant did possess at one moment or another. The Claimant's ownership of DSB and C&C, and their plots of land and buildings, is under dispute. The Claimant has become the owner of DSB and C&C at a time when the court's proceedings in order to ascertain ownership of these companies and their assets were already launched. It is noticeable that in the deed through which Phoenix acquired Benet Praha and Benet Group on December 13, 2001, it is clearly stated that:

> "(a) In relation to C&C and DSB it was brought to the attention of the Purchaser the fact that certain third entities claim to be shareholders of C&C and DSB and presented shares certificates which the Company and the Seller claim that they are null and void and were issued as a fraudulent behaviour which is investigated by the police;
> (b) Court proceedings are pending to adjudicate the title and ownership of the concerned shares of C&C and DSB …"

37. Provisional measures are indeed not deemed to give to the party requesting them more rights than it ever possessed and has title to claim. In other words, provisional measures are deemed to maintain the *status quo*, not to improve the situation of the Claimant before the rendering of the Tribunal's award. The Tribunal considers that, far from seeking to maintain the *status quo*, the recommendations sought by the Claimant are plainly directed to affect a fundamental change to it, by improving the Claimant's situation. In fact, the requested provisional measure concerning the ownership of the land cannot be granted as it is equivalent to the final result sought.

38. At this point, it is not quite clear whether the Claimant asks for monetary compensation, as was stated in its Request for arbitration, or specific performance, as was indicated at the Hearing and in the Post-Hearing Brief. It should be noted that, even assuming that all properties whose ownership is under discussion in the Czech courts are finally recognized as not belonging to DSB and C&C, and thus not to Benet Group, Phoenix, the Claimant in this arbitration, will still be able to pursue its claim for a breach of the Czech/Israeli BIT, if it can prove that the Czech Republic has violated one of its rights under this treaty. The rights that Phoenix tries to enforce

before this Tribunal are rights that have purportedly been violated by the Czech Republic and for which it was, according to its Request for arbitration, seeking damages, and this right is not jeopardized if the provisional measure requested is not granted.

39. The Tribunal therefore concludes that the requested provisional measure related to the ownership of lands and buildings cannot be granted as it is equivalent to the final result sought and is not necessary and urgent in order to protect rights that could be irremediably forfeited.

The request for the release of the frozen funds

40. A similar analysis has to be made as far as the second provisional measure is concerned, relating to the unfreezing of Benet Praha's bank accounts. As Respondent rightly observes, such request is a claim for final relief. Claimant cannot request as a provisional measure the release of funds it claims to be granted through the Tribunal's award. Further, Claimant does not provide arguments that would show that such claim would need immediate and urgent protection through provisional measures in order to ensure that the funds would still be available in the event this Tribunal would accept Claimant's request for relief in this respect.

41. The Tribunal therefore concludes that the requested provisional measure related to the release of frozen funds cannot be granted as it is identical to the final relief sought and is not necessary and urgent in order to protect rights that could be irremediably forfeited.

The request for the opening of classified governmental archives

42. At the Hearing and again in its Post-Hearing Brief, the Claimant requested the opening of the secret services archives, stressing that this would help it to prepare its case, without requesting any specific information.

43. The Tribunal does not see what right of the Claimant such a vague and general request is deemed to protect. It should be emphasized that this last request is an application for disclosure of unspecified evidence rather than a proper request for provisional measures. This seems to be analogous to what is sometimes called a "fishing expedition".

44. This is not to say that a request for production of documents can never be made in a request for provisional measures. However, the granting of such provisional measure requesting one of the parties to produce documents or other evidence is only warranted if it is necessary in order to protect evidence that could otherwise – that is without the provisional measure – be lost or jeopardized.[5]

45. The Tribunal recalls that it has a broad power in order to obtain evidence, at any stage of the proceedings, under Article 43 of the ICSID Convention:

> "Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,
>
> (a) call upon the parties to produce documents or other evidence, …."

Rule 34 of the ICSID Arbitration Rules is also in similar terms. If need be, the Tribunal keeps the right to request evidence it would deem necessary in the course of the proceedings, in case the Claimant brings some convincing evidence supporting a suspicion of Mr. Raška's involvement in the events on which Claimant's claims are based and of particular links between Mr. Raška and the Czech secret services.

46. The Tribunal therefore concludes that the requested provisional measure related to the opening of the secret service archives is a request for document production not to be dealt with under Article 47 of the Convention. It appears anyhow overly broad and unspecific. Therefore, it cannot be granted.

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[5] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 1 of March 31, 2006, available at www.worldbank.org/icsid/cases/arb0522-ProceduralOrder1.pdf, paras. 71-74.

Conclusions

47. The Tribunal, after having reviewed the Claimant's and Respondent's arguments, both as presented in writing and orally, as well as the applicable law, finds that the Claimant has failed to demonstrate that its rights in this arbitration would be irreparably harmed without the measures it seeks, and therefore that Claimant has failed to demonstrate that the imposition of an order for provisional measures should be warranted.

48. Accordingly, the Arbitral Tribunal hereby rejects the Claimant's Request for provisional measures in its entirety.

signed

Andreas Bucher

signed

Juan Fernández-Armesto

signed

Brigitte Stern

Dated: April 6, 2007