

**INTERNATIONAL CENTER FOR SETTLEMENT
OF INVESTMENT DISPUTES**

[Unofficial Translation]

**International Quantum Resources Limited, Frontier SPRL and Compagnie Minière de
Sakania SPRL v. Democratic Republic of the Congo
(Case No. ICSID ARB/10/21)**

PROCEDURAL ORDER No. 3

Professor Pierre Tercier, President of the Arbitration Tribunal,

Professor Horacio Grigera Naón, Arbitrator,

Professor Brigitte Stern, Arbitrator

Secretary of the Arbitration Tribunal

Paul-Jean Le Cannu

Procedural Order No. 3

TABLE OF CONTENTS

A. FACTS	3
I. THE PARTIES	3
1. The Claimants	3
2. The Respondent	3
3. Third parties not party to these proceedings	3
II. INSTITUTION OF THE PROCEEDINGS	4
III. THE REQUEST FOR PROVISIONAL MEASURES	6
B. THE LAW	12
I. THE PARTIES' CONCLUSIONS AND DECISION OUTLINE	12
II. SUMMARY OF THE PARTIES' POSITIONS	12
1. The Claimants' position	12
2. The Respondent's position	14
III. THE FOUNDATIONS FOR THE ARBITRATION TRIBUNAL'S JURISDICTION	16
1. Legal foundation	16
2. The conditions for granting provisional measures	18
IV. THE REQUEST RELATING TO THE PERMITS AND OTHER MINING RIGHTS	19
1. The Requests	19
2. The Permits (Request i/a)	20
a) The prohibition against cancelling the Permits (Request i/a/i)	21
b) The prohibition against transferring the mining rights or creating new ones (Request i/a/ii)	22
c) The prohibition against submitting for tender any deposits located within the perimeters of the Permits (Request i/a/iii)	24
d) The prohibition against taking any prejudicial step (Request i/a/iv)	24
3. The Other Mining Rights (Request i/b)	25
V. THE REQUEST RELATING TO THE MINING ASSETS (Request 2)	26
1. The Applications	26
2. The Immoveable Assets (Request ii/a)	26
3. The Moveable Assets (Request ii/b and c)	28
VI. THE REQUESTS RELATING TO THE STAY OF PROCEEDINGS	30
1. The Requests	30
2. The Supreme Court of Justice decision dated May 14, 2010	30
3. The judgement of the <i>Tribunal de commerce de Lubumbashi</i> dated March 12, 2010	31
4. The other administrative proceedings	33
VII. THE REQUESTS RELATING TO NON-AGGRAVATION OF THE DISPUTE	35
VIII. COSTS	35
IX. CONCLUSIONS	36

Procedural Order No. 3

A. FACTS

I. THE PARTIES

1. The Claimants

1. The first Claimant, International Quantum Resources Limited (hereinafter referred to as "IQR" or "First Claimant"), is a company duly constituted under the laws of the British Virgin Islands ("BVI") where it is registered. Its head office is at Geneva Place, 2nd Floor, No. 333 Waterfront Drive, Road Town, Tortola, British Virgin Islands.¹
2. The second Claimant, *Frontier SPRL* (hereinafter referred to as "FRONTIER" or "Second Claimant"), is a company constituted under Congolese law. Its head office is at 1029 Boulevard Kamanyola, BP 555, Lubumbashi, Democratic Republic of the Congo ("DRC"). FRONTIER is held 5% by the DRC and 94.5% by IQR, and Mr. Raphaël Ngoy Mushila holds the remaining 0.5%.²
3. The third Claimant, *Compagnie Minière de Sakania SPRL* (hereinafter referred to as "COMISA" or "Third Claimant"), is a company constituted under Congolese law. Its head office is at 1029 Boulevard Kamayola, BP 555, Lubumbashi, Democratic Republic of the Congo. Until December 3, 2001, the company was called *BwanaMkubwaMining Congo SPRL*: for ease of reference the company is always referred to in this Order as "COMISA". COMISA is held 99.9% by IQR and Raphaël Ngoy Mushila holds the remaining 0.1%.³
4. The three Claimants form a group of companies led by *First Quantum Minerals Limited* (hereinafter referred to as "FQM").

2. The Respondent

5. The Respondent is the *Democratic Republic of the Congo* (hereinafter referred to as "DRC"), represented by the Ministry of Mines, 3rd Floor, Immeuble Gécamines, Boulevard 30 Juin, Kinshasa/Gombe, Democratic Republic of the Congo.

3. Third parties not party to these proceedings

6. The dispute covered by these proceedings also concerns the following companies, which are not however parties in these proceedings:
 - (i) The Congolese state-owned Société de Développement Industriel et Minier du Congo (hereinafter referred to as "SODIMICO").
 - (ii) SODIFOR SPRL (hereinafter referred to as "SODIFOR"), a company constituted under Congolese law, created and jointly held by SODIMICO and FORTUNE AHEAD Ltd (hereinafter referred to as "FORTUNE"), a company constituted under Hong-Kong law. At the time of its constitution, SODIFOR was held 30% by SODIMICO and 70% by FORTUNE. Since that time, SODIMICO and FORTUNE transferred their interests in the company and

¹ Cf. Exhibit C-3(i).

² Cf. Exhibit C-3(iii).

³ Cf. Exhibit C-3(iv).

Procedural Order No. 3

SODIFOR is now wholly owned by two companies registered in the BVI (cf. para 58 hereinbelow).⁴

II. INSTITUTION OF THE PROCEEDINGS

7. The Request that is the subject of this decision was presented in the context of arbitration proceedings instituted September 30, 2010 by the Claimants against the Respondent, pursuant to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (hereinafter referred to as the "CSID Convention"). In their Request (hereinafter referred to as the "Arbitration Request"), the Claimants maintain that the Respondent withdrew certain mining titles held by COMISA and FRONTIER (hereinafter referred to as "the Permits"), in contravention of the provisions of the DRC Mining Code of July 11, 2002 (hereinafter referred to as the "Mining Code") and of the applicable law. The aforementioned Permits authorized COMISA and FRONTIER to explore, develop and operate copper mines, specifically at the LONSHI and KISHIBA deposits in the copper belt of the DRC (hereinafter collectively referred to as the "Mines").
8. According to the Claimants, the DRC's withdrawal of the Permits and the alleged expropriation of various investments and assets of the Claimants were part of a program of reprisals orchestrated by the DRC against the group of companies led by FQM because, on January 29, 2009, a member of that group, Congo Mineral Developments Ltd (hereinafter referred to as "CMD") and two other companies,⁵ filed arbitration proceedings against the DRC and its state-owned company, Générale des Carrières et des Mines (hereinafter referred to as "Gécamines")⁶ for settlement by the International Chamber of Commerce (hereinafter referred to as "the ICC Arbitration").
9. In their Arbitration Request, the Claimants conclusions are as follows:

[Translation:]

- "92. *The Claimants seek by this recourse, which is currently formulated as follows, without prejudice to any other compensation that may be sought further to any other allegations, arguments or points of view set forth in the pleadings or written submissions that may be made in the course of this arbitration. [...] The Claimants respectfully ask the Tribunal to:*
- (a) *Declare that the DRC acted in contravention of the Mining Code of the DRC and of the applicable law by alleging to withdraw the Permits:*
 - (b) *Declare that the alleged withdrawal of the Permits by the DRC is illegal and of no effect, and confirm that the valid holders of the aforementioned Permits are Frontier and Comisa, as the case may be:*
 - (c) *Declare that the DRC acted in contravention of the DRC Mining Code and of the applicable law by depriving Frontier and Comisa of the legitimate use of mining facilities to carry on their activities in accordance with the Permits:*
 - (d) *Order the DRC to reinstate their Permits to Frontier and Comisa and to ensure that the DRC, directly or indirectly, including through the CAMI, takes all necessary and useful measures related thereto:*
 - (e) *Order the DRC to provide Frontier and Comisa with exclusive access to all facilities owned by them within the perimeter of the Permits:*

⁴ Cf. Exhibit R-11 and Exhibit C-71(i).

⁵ Industrial Development Corporation of South Africa Limited (South Africa) and The International Finance Corporation (United States), cf. C-41.

⁶ Cf. Arbitration Request, p. 1 para 1-5.

Procedural Order No. 3

- (f) *Order the DRC to refrain from taking any measure in relation to any third parties that would adversely affect the Claimants' rights concerning the Permits:*
 - (g) *Declare that the Respondent DRC is liable for all the actions of all government departments and all government entities, including inter alia the CAMI and SODIMICO, all institutions and other emanations of the DRC, including inter alia its civil servants and tribunals, if such actions result in a contravention of the Mining Code or of any other provision of the applicable law affecting the direct or indirect rights of the Claimants in relation to the Permits, their investments and assets, or if they result in a violation of the applicable rules of international law:*
 - (h) *Declare that the Respondent engaged in reprisals against the Claimants in contravention of the applicable law (including the Mining Code) and of their legal duty to arbitrate in good faith and refrain from aggravating the dispute, including inter alia by obtaining the judgments of March 12 and May 14, 2010, which constitute contraventions of any reasonable legal standard:*
 - (i) *Order the Respondent to take all necessary measures and actions to cease, or ensure the cessation of, the enforcement of the judgments of March 12, 2010 and May 14, 2010, and to cease all other reprisals or further reprisals, or other measures, against the Claimants or any other entity of the FOM group;*
 - (j) *Order the DRC to do whatever is necessary so that Frontier and Comisa can hold and peaceably exercise their rights and pursue their activities in accordance with the provisions of the Mining Code and of the applicable law, without hindrance by the DRC or any of its emanations:*
 - (k) *Order the DRC to comply with each of the foregoing measures within thirty (30) days of the arbitration award being communicated to the Respondent:*
 - (l) *Order that if the Respondent fails to comply with the aforementioned orders within the time limit fixed by the Tribunal, the Respondent shall pay to the Claimants a US dollar amount to be determined as damages for the loss of their investments and expected net profits, the whole bearing interest from the filing date of this Request and at a rate to be determined by the Tribunal:*
 - (m) *Order the Respondent to indemnify the Claimants against all damages, losses and costs resulting from the legal proceedings in relation to the judgments of March 12, 2010 and May 14, 2010 or the enforcement thereof;*
 - (n) *Alternatively, Order the Respondent to pay to the Claimants all amounts granted by the Congolese courts to the Respondent in satisfaction of such judgments:*
 - (o) *Order the DRC to indemnify the Claimants against all damages, costs, expenses or losses resulting from the delay caused to their activities under the Permits, including inter alia profits lost as a result of production delays due to the Respondent's breaches of its aforementioned obligations, in an amount to be determined by the Tribunal, the whole bearing interest at a rate to be determined by the Tribunal from the filing date of this Request:*
 - (p) *Order the Respondent to pay all costs associated with the arbitration, including all fees of attorney and experts and other costs and expenses incurred by the Claimants, the costs and expenses of the Arbitration Tribunal, the expenses of the Center, and any other expense incurred by the Claimants in connection with the arbitration: and*
 - (q) *Render any other decision and grant any compensation that the Tribunal considers appropriate in the circumstances.*
93. *The Claimants reserve the right to make further claims against the Respondent."*

Procedural Order No. 3

10. According to the Respondent, who reserved its right to contest the jurisdiction of the Arbitration Tribunal regarding the merits of the dispute,⁷ the Claimants' applications are unfounded.⁸
 - FRONTIER and COMISA's mining rights were illegally obtained, being inextricably bound with the wrongful stripping of those rights from SODIMICO. At first, the FQM group tried to cooperate with SODIMICO, who until then held exclusive rights over the mines, before changing strategy and claiming attribution of the zones it sought. In other words, according to the Respondent, the only unjustified withdrawal in this case was the one affecting SODIMICO in 2000, and which was only compensated ten years later in the circumstances described summarily in the Observations⁹.
 - Moreover, the Respondent entirely rejects the reprisals theory put forward by the Claimants: according to it, the Claimants' Requests related to a dispute with SODIMICO well before presentation of the ICC Arbitration by the FQM group.¹⁰
11. On April 25, 2011, the Arbitration Tribunal was formally constituted. It is composed of Professors Pierre Tercier (President), Horacio Grigera Naón and Brigitte Stern. The matter is regarded as having been instituted that day.

III. THE REQUEST FOR PROVISIONAL MEASURES

12. On September 30, 2010, in their Arbitration Request, the Claimants announced that they intended to request provisional conservatory measures.¹¹
13. On May 13, 2011, the Arbitration Tribunal held its first session with the Parties by telephone conferencing. On that occasion, the Claimants confirmed that they intended to request provisional conservatory measures. They also announced their intention to accompany that Request with an application for an interim order to safeguard their rights until the Arbitration Tribunal ruled on the request for conservatory measures.¹² In that first session, the Parties agreed on the calendar for the request for an interim order and the request for conservatory measures.
14. On May 23, 2011, the Claimants filed the *Claimants' Request for Provisional Conservatory Measures'* (hereinafter referred to as the "Request"), accompanied by their application for an interim order (hereinafter referred to as the "Application for an Interim Order").

- (i) In their Request, they seek the following conclusions:

[Translation:]

"279. Therefore, the Claimants respectfully request that the Tribunal render the following orders or any other conservatory measures that it may consider appropriate:

*i. **Transfer of Permits and Other Mining Rights***

- (a) *An order prohibiting the DRC, directly or indirectly by any entity controlled by it, including the Société de Développement Industriel et Minier du Congo*

⁷ Letter from the Defendant of June 15, 2011, cf. para 15 hereinbelow

⁸ Observations, p. 33, para 83 and p. 50, para 135 et seq.

⁹ Observations, p. 7 para 5.

¹⁰ Observations, p. 22 para 48.

¹¹ Arbitration Request, para 10.

¹² Cf. Record of the first session of the Arbitration Tribunal, p. 2.

Procedural Order No. 3

(SODIMICO) ("**Sodimico**"), a state-owned and controlled entity, and the Cadastre Minier (the "**CAMI**"), the government entity responsible inter alia for the administrative management of mining rights, from doing any of the following:

- (i) cancelling the Permits;
 - (ii) transferring in whole or in part the Permits or any deposit located within the perimeters^[n] of the Permits or granting, issuing or transferring any mining title or other right within the perimeters covered by the Permits;
 - (iii) submitting any deposit located within the perimeters of the Permits to a call for tenders; and
 - (iv) taking any measure whatsoever that could further affect the rights of Frontier and Comisa under the Permits,
- until the Tribunal has rendered a final award in this instance;
- (b) An order prohibiting the DRC, directly or indirectly by any entity controlled by it, including Sodimico and the CAMI from doing any of the following:
- (i) withdrawing or cancelling any other mining title or right held by Frontier or Comisa (the "**Other Permits**") or barring the rights of Frontier and Comisa hold thereunder;
 - (ii) transferring in whole or in part Other Permits or any deposit located within the perimeters of Other Permits or granting, issuing or transferring any mining title or right whatsoever within the perimeters covered by the Other Permits;
 - (iii) submitting any deposit located within the perimeters covered by Other Permits to a call for tenders; and
 - (iv) taking any measure whatsoever that could affect the rights of Frontier and Comisa under the Other Permits,
- until the Tribunal has issued a final award in this instance;

ii. Return and safeguarding of Mining Assets

- (c) An order enjoining the DRC to return possession to Frontier and Comisa of, or to grant access to Frontier and Comisa and to their employees, mandataries and their designated subcontractors to, the perimeters covered by the Permits in order to take possession of all moveable or immovable assets within the perimeters covered by the Permits that belong to Frontier or Comisa or to their employees, representatives and subcontractors, including inter alia any mining facility, mining equipment, moveable equipment (trucks, excavators, light vehicles, generators, etc.), spare parts, finished products, stock and any other item belonging to Frontier or Comisa or to their employees or subcontractors (the "**Mining Assets**") in order to control, safeguard and freely dispose of them, a right guaranteed to them under Article 273 of the Mining Code, including by exporting them;
- (d) Alternatively, an order enjoining the DRC to grant to Frontier and Comisa and to their employees, mandataries and subcontractors access to the perimeters covered by the Permits in order to take possession of the Mining Assets for the purpose of controlling, preserving and safeguarding them within the perimeters of the Permits or at another location to be agreed upon by the Parties, including through a Frontier and Comisa mandatary or subcontractor, such as a security company, until the Tribunal has rendered a final award in this instance;

iii. Suspension of proceedings

- (e) An order preserving the status quo by enjoining the DRC to take whatever measures and actions are necessary to suspend, or ensure the suspension of, any further measure to enforce the Judgment of March 12, 2010 and the Decision of May 14, 2010 (as those are terms are defined hereinafter) and of any other decision or

Procedural Order No. 3

measure that may be rendered by the Court of Appeal of Lubumbashi further to currently pending appeal proceedings in relation to the Judgment of March 12, 2010 (as that that term is defined hereinafter), until the Tribunal has rendered a final award in this instance;

(f) *An order preserving the status quo by enjoining the DRC, directly or indirectly by any entity controlled by it, [...] to take whatever measures and actions are necessary to suspend or ensure the suspension of enforcement of the Orders to Pay Taxes (as that term is defined hereinafter) and by prohibiting the DRC from enforcing any other similar order or from taking any other measure, including any tax measure, against the Claimants or any other entity of the FQM group of companies, that could aggravate or prolong the dispute, until the Tribunal has rendered a final award in this instance;*

iv. **Non-aggravation of the dispute**

(g) *An order prohibiting the DRC from taking any measure and from doing anything that could aggravate the dispute, including, without limiting the generality of the foregoing, engaging in further reprisals against the Claimants or any other entity of the group of companies until the Tribunal has rendered a final award in this instance."*

(ii) In their Application for an Interim Order, the Claimants sought conclusions largely similar to those in set forth in their Request, but limited in time until the Arbitration Tribunal rules on the Request.

15. By letters from Respondent dated June 15 and 24, 2011 and from the Claimants dated June 21, 2011, the Parties presented their respective positions on the Application for an Interim Order.
16. On July 1, 2011, the Arbitration Tribunal rendered its *Procedural Order No. 1*, in which it issued the following recommendations and issued the following decision on the Application for an Interim Order:

[Translation:]

- "1. *The Tribunal sates for the record that the Respondent formally declared that it has no intention of cancelling, withdrawing or otherwise affecting the Permits withdrawn from FRONTIER and COMISA and/or acquired by SODIFOR, as well as any other mining title that may still be held by FRONTIER and COMISA.*
2. *The Tribunal formally notes for the record that the Respondent declared that it was prepared to suggest to SODIFOR that it take the necessary measures for promptly conducting a detailed two-party inventory of all Mining Assets, and that it be conducted in the presence of COMISA or FRONTIER representatives. The Tribunal recommends to the Respondent that it make this suggestion to SODIFOR in writing within five days of receiving this Procedural Order and that it send copy of that letter to the Claimants and to the Tribunal, as well as all other future exchange of correspondence between the Respondent and SODIFOR concerning the inventory.*
3. (i) *As regards the judgment of March 12, 2010, the Tribunal recommends to the Respondent that it take whatever measures and actions are necessary and useful to suspend any further enforcement measure until the Tribunal has rendered a decision on the Claimants' Request for Provisional Measures. This recommendation applies equally to any other decision that may be rendered or any other measure that may be taken by the Court of Appeal of Lubumbashi further to the presently pending appeal proceedings in relation to the judgment of March 12, 2010.*
- (ii) *As regards the Decision of May 14, 2010, the Tribunal recommends to the Respondent that it take whatever measures and actions are necessary and useful to suspend any further*

Procedural Order No. 3

enforcement measure until the Tribunal has rendered a decision on the Claimants' Request for Provisional Measures,

- (iii) *As regards the tax recovery measures or those related to payroll taxes, the Tribunal formally notes the Respondent's undertaking that it will instruct the taxation and social administrations responsible for the recovery of the debts concerned to suspend all recovery actions an order is issued further to the hearing scheduled for September 8, 2011. The Tribunal recommends to the Respondent that it give the requisite instructions in writing within five days of receiving this Procedural Order and that it send a copy of the letters related thereto to the Claimants and to the Tribunal.*
4. *The Claimants' request for an order concerning non-aggravation of the dispute is dismissed.*
5. *The Tribunal reserves the right to modify the foregoing recommendations and decisions as it sees fit."*

17. On July 25, 2011, the Respondent filed its '*Observations on the Request for Provisional Conservatory Measures*' (hereinafter referred to as "the Observations"), in which it sought the following conclusions:

[Translation:]

"167. *Given the foregoing developments, the Respondent respectfully requests that the Arbitration Tribunal:*

- *Declare that it reserves Respondent's right to contest the jurisdiction of the ICSID;*
- *Disallow all Claimants' Requests;*
- *Formally note for the record the Respondent's suggestion that SODIFOR promptly conduct a two-party inventory, in the presence of COMISA and FRONTIER representatives, of all the moveable and immovable property (including inter alia any mining facility, mining equipment, trucks, excavators, light vehicles, generators, spare parts, finished products and stock) located within the perimeter of the Mining Permits and Prospecting Licences withdrawn from COMISA and FRONTIER;*
- *Declare the decision regarding costs is postponed to a phase subsequent to the arbitration.*

The Respondent expressly reserves the right to modify, complete and amend the presentation of facts and the legal positions set forth in these Observations on the Request for Provisional Measures."

18. On August 18, 2011, the Claimants filed the *Claimants' Reply respecting the Provisional Conservatory Measures* (hereinafter referred to as the "Reply"), in which they sought the following conclusions:

[Translation:]

"195. *Therefore, the Claimants reiterate that they have made a strong prima facie case of their entitlement to the compensation sought and their rights can be protected only by granting the conservatory measures requested.*

196. *Therefore, the Claimants respectfully request that the Tribunal grant the conservatory measures sought in the Request or any other measures that the Tribunal may consider appropriate."*

19. On September 1, 2011, the Respondent filed the "*Respondent's Rejoinder respecting the Request for Provisional Measures*" (hereinafter referred to as the "Rejoinder"), in which it sought the following conclusions:

[Translation:]

Procedural Order No. 3

"137. In light of all the foregoing developments, the DRC respectfully requests that the Tribunal:

- Dismiss the Requests for conservatory measures related to the Permits, Other Permits and Mining Assets, for suspended enforcement of the judgment of March 12, 2010 and the subsequent decision of May 14, 2010, and for non-aggravation of the dispute, and note for the record its comments in relation thereto, in accordance with §135 *supra*, in relation the measure to suspend any taxation proceedings;
- Recommend (without limitation) that the Claimants take SODIFOR's offer to conduct an inventory more seriously, which inventory *per se* would not adversely affect them;
- Declare that the matter of costs is postponed to a phase subsequent to the arbitration."

20. On September 8 and 9, 2011, the Arbitration Tribunal held a hearing with the Parties on the Request.

- The first day, the Arbitration Tribunal heard the principal pleadings of the respective Counsel of both Parties: it asked them a number of questions to which they were asked to provide answers the next day.
- The second day, the Arbitration Tribunal heard the Replies and Rejoinders, during which Counsel specifically answered the questions they had been asked the previous day, and the Claimants filed the following simplified version of their conclusions:¹³

[Translation:]

"i. **Transfer of the Permits and Other Mining Rights**

(a) An order prohibiting the DRC, directly or indirectly by any entity controlled by it from doing any of the following:

- (i) cancelling the Permits;
- (ii) allowing, in whole or in part the transfer of any mining title or right located within the perimeters of the Permits or granting, issuing or transferring any additional mining title or other right within the perimeters covered by the Permits;
- (iii) submitting any deposit located within the perimeters of the Permits to a call for tenders: and
- (iv) taking any measure that could further affect the rights of Frontier and Comisa under the Permits,

until the Tribunal has rendered a final award in this instance:

(b) An order prohibiting the DRC, directly or indirectly from doing any of the following:

- (i) withdrawing or cancelling any other mining title or right held by Frontier or Comisa (the "Other Permits") or barring the rights of Frontier and Comisa held thereunder;
- (ii) transferring, in whole or in part, Other Permits or any deposit located within the perimeters of the Other Permits or granting, issuing or transferring any mining title or right whatsoever within the perimeters covered by the Other Permits;
- (iii) submitting any deposit located within the perimeters covered by the Other Permits to a call for tenders: and
- (iv) taking any measure that could affect the rights of Frontier and Comisa under the Other Permits,

until the Tribunal has rendered its final award in this instance:

¹³ Cf. Transcript of September 9, p. 32 l. 23-39, p. 33 l. 1-13.

Procedural Order No. 3

ii. **Return and safeguarding of the Mining Assets**

(c) *an order enjoining the DRC to grant to Frontier and Comisa and their employees, mandataries and designated, access to the perimeters covered by the Permits in order to take possession of any of their immovables, including any facility or immovable mining equipment (the "Immovable Mining Assets"), for the purpose of controlling, preserving and safeguarding them, including through a mandatary or subcontractor of Frontier and Comisa, such as a security company, until the Tribunal has rendered a final award in this instance:*

(d) *An order enjoining the DRC to restore possession to Frontier and Comisa or to grant to Frontier and Comisa and to their employees, mandataries and designated subcontractors access to the perimeters covered by the Permits in order to take possession of all their movable property located within the perimeters covered by the Permits, including inter alia all moveable equipment (trucks, excavators, light vehicles, generators, etc.), spare parts, finished products, stock and any other movable property belonging to Frontier or Comisa or to their employees or subcontractors (the "Movable Mining Assets") in order to control and use them for Claimants' other activities, including the exporting thereof, until the Tribunal has rendered a final award in this instance:*

(e) *Alternatively, an order enjoining the DRC to grant to Frontier and Comisa and to their employees, mandataries and designated subcontractors, access to the perimeters covered by the Permits in order to take possession of the Movable Mining Assets for the purpose of controlling, preserving and safeguarding them within the perimeters of the Permits or at another location to be agreed upon by the Parties, including through a mandatary or subcontractor of Frontier and Comisa, such as a security company, until the Tribunal has rendered a final award in this instance:*

iii. **Suspension of proceedings**

(f) *An order preserving the status quo by enjoining the DRC to take whatever measures and actions are necessary to suspend, or ensure the suspension of, any further measure to enforce the Decision of May 14, 2010 and any other decision or measure that may be rendered by the appellate courts further to any appeal proceedings currently pending regarding the Judgment of March 12, 2010, until the Tribunal has rendered a final award in this instance:*

(g) *An order preserving the status quo by enjoining the DRC, directly or indirectly by any entity controlled by it, to take whatever measures and actions are necessary to suspend, the Orders for Payment of Taxes (as that term is defined hereinafter) and prohibiting the DRC from enforcing any other order of a similar a nature and prohibit them from taking any other measure, including any taxation measure, against the Claimants or any other entity of the FQM group of companies, that could aggravate or prolong the dispute, until the Tribunal has rendered a final award in this instance:*

iv. **Non-aggravation of the dispute**

(h) *An order prohibiting the DRC from taking any measure and doing anything that would aggravate the dispute, including, without limiting the generality of the foregoing, engaging in any further reprisals against the Claimants or any other entity of the FQM group of companies until the Tribunal has rendered a final award in this instance."*

This hearing was the re-transcribed *verbatim*, in French and in English, which re-transcriptions the Parties received on September 16 and 17, 2011 respectively. The re-transcriptions were accepted by both Parties, subject to several minor corrections. Regarding the declarations (in English) of Mtre Cowper, the Parties accepted with the official version of the transcripts namely the English version, and on October 5, 2011 the Claimants submitted to the Arbitration Tribunal a consolidated version of the transcripts incorporating the pertinent passages of the French and English versions.

Procedural Order No. 3

B. THE LAW

I. THE PARTIES' CONCLUSIONS AND DECISION OUTLINE

21. It appears from the Claimants' conclusions that they are asking for four types of measures (cf. above, para. 20):
- (i) measures to prohibit the transfer of the Permits and their other mining rights or the granting of concurrent rights to third parties;
 - (ii) measures seeking the immediate recovery or safeguarding of the Mining Assets within the perimeter of the Mines;
 - (iii) measures to suspend certain enforcement proceedings against the Claimants; and
 - (iv) measures intended more generally to prevent the aggravation of the dispute between the Parties.
22. The Respondent, on the other hand, has always asked for all these requests to be denied. Asked about this by the President at the hearing, its Counsel confirmed this regarding the new conclusions.¹⁴
23. The Arbitration Tribunal will begin by summarize the parties' positions (II). It will then briefly recall the principles governing the granting of provisional measures generally (III) before reviewing in turn the demands concerning the Permits and other rights (IV), the Mining Assets (V), the stays of proceedings (VI), the general measures (VII), and costs for this phase of the proceeding (VIII).

II. SUMMARY OF THE PARTIES' POSITIONS

1. The Claimants' position

24. According to the Claimants, the requested measures are necessary to preserve the rights they claim to hold pending a decision, namely:¹⁵
- (i) their substantive right to restitution, consisting of full reinstatement in their rights under the Permits and the recovery of the Mining Assets, as requested by the Claimants in the arbitration proceeding;
 - (ii) their procedural rights to have the *status quo* maintained in order to prevent the aggravation of the dispute and to ensure the usefulness of the final arbitration award which will be rendered by the Arbitration Tribunal.
25. The Claimants assert that their demands meet all the applicable conditions for the granting of provisional measures:

¹⁴ Cf. September 9 transcript, p. 60 l. 21-30.

¹⁵ Request, p. 1 para. 2 and p. 3 para. 10-11.

Procedural Order No. 3

- (i) that the Arbitration Tribunal be satisfied that it has *prima facie* jurisdiction over the object of the arbitration;
 - (ii) that the claimant have shown the *prima facie* existence of the right it is seeking to protect;
 - (iii) that the measures sought be necessary, i.e. necessary to avoid serious or irreparable harm or to prevent a party from engaging in conduct which could cause or threatens to cause irreparable harm;
 - (iv) that such measures be urgent.
26. **The Arbitration Tribunal's *prima facie* jurisdiction.** In this regard, the Claimants submit that it has been recognized many times that an ICSID tribunal has jurisdiction to decide on applications for provisional measures notwithstanding the existence of an objection as to jurisdiction.¹⁶ In the instant case, the Arbitration Tribunal's *prima facie* jurisdiction is allegedly sufficiently established and stems firstly from the acceptance of the case by the Secretary-General of the ICSID according to the Article 36(3) of the Convention, and from the contents of the Request for Arbitration and the Application.
27. **The *prima facie* existence of rights to be preserved.** The Claimants argue that it is sufficient that the claimant show an appearance of right. In this regard, the rights which could be protected are not limited to the rights in question with respect to the merits of the arbitration.¹⁷ In the instant case, the situation would be the following:
- (i) *With respect to the right to restitution they intend to preserve*, the Claimants argue that such a right is provided for in the applicable law; namely Article 320 of the Mining Code, the Mining Code itself as well as the other laws of the DRC, including the principles of customary international law which form part thereof, as well as minimum standards in international law according to Article 42 of the ICSID Convention.¹⁸
 - (ii) *With respect to the procedural rights to the maintaining of the status quo*, the Claimants argue that such rights have been recognized universally by arbitration tribunals.¹⁹
28. **The necessity of the measures sought.** In this regard, the Claimants submit that the possibility of monetary compensation is not sufficient to deny the necessity of provisional measures, and it is sufficient if the harm which could be caused cannot be adequately compensated by the awarding of damages.²⁰ In the instant case, the situation is allegedly the following:
- (i) *With respect to the measures affecting the transfer of the Permits*, the Claimants submit that, without these measures, the Arbitration Tribunal might not be able to re-establish the situation which existed previously by reinstating the Claimants in their rights to the Permits.²¹
 - (ii) *With respect to the measures concerning the Mining Assets*, the Claimants argue a serious risk of looting, theft and illegitimate use, making restitution of these assets impossible.²²

¹⁶ Request, p. 53 para. 161.

¹⁷ Request, p. 54 para. 162-165.

¹⁸ Request, p. 66-67 para. 201-202, pp. 69-81 para. 208-244.

¹⁹ Request, pp. 81-82 para. 245-248.

²⁰ Request, p. 55-57 para. 167-172.

²¹ Request, pp. 82-83 para. 250-254.

²² Request, pp. 84-85 para. 255-259.

Procedural Order No. 3

- (iii) With respect to the measures relating to the stay of the proceedings to enforce the judgements and to collect income and payroll taxes, the Claimants submit that they are necessary to avoid aggravating the dispute and ensure that the arbitration is conducted in good faith.²³

29. ***The urgency of the measures sought.*** In this regard, the Claimants submit that this criteria should be deemed to be met when it is foreseeable that, without the provisional measures sought, actions harmful to the claimant's rights could be taken before the Arbitration Tribunal has rendered its final award. In other words, the protection of the right covered by the measures cannot wait for the final award to be rendered.²⁴ The Claimants argue that this condition has been met; without these measures, it is allegedly likely that the DRC would continue its retaliation campaign against the Claimants and jeopardize the procedural integrity of the arbitration. This issue, it is claimed, cannot wait for the result of the award on the merits of the dispute.²⁵

2. The Respondent's position

30. The Respondent generally argues that the Claimants' Request is unfounded. The arguments raised vary, however, depending on the requested measures and are therefore set forth separately.

31. ***With respect to the conditions applicable for the granting of provisional measures,*** the Respondent argues that the Claimants should demonstrate (i) the existence of a right to be protected, (ii) necessity and urgency of the solicited measure, as well as (iii) that there is no impairment of third party rights or prejudgement of the merits.²⁶

With respect to the Arbitration Tribunal's *prima facie* jurisdiction, the Respondent merely confirmed that it did not admit the Arbitration Tribunal's jurisdiction to decide on provisional measures according to Rule 39 of the Rules of Procedure for Arbitration Proceedings (the "Rules"), while stating that it reserved the right to contest the Arbitration Tribunal's jurisdiction regarding the merits of the dispute.²⁷

32. ***With respect to the measures relating to the Permits,*** the Respondent argues that the granting of these measures would be unfounded for the following reasons:²⁸

(i) ***Inexistence of the Claimants' right to restitution:*** Neither Congolese law nor international law allows "restitution", i.e. reinstatement of the Claimants' rights to the Permits. The only right the Claimants may claim is a right to compensation. Accordingly, the Claimants have not sufficiently established the existence of their alleged right to restitution of the Permits.²⁹

(ii) ***Lack of urgency and necessity of the requested measures:*** To the extent that the Claimants do not have a right to restitution, only an eventual right to compensation, they have not shown how the measures relating to the prevention of the transfer of the Permits is necessary to safeguard their right to compensation. Furthermore, to establish urgency, the Claimants would have had to show that there is a risk of destruction of a "going concern". Such a risk could only exist for a business which is active when the Arbitration Tribunal decides and which is being operated by the author of the request. However, FRONTIER and COMISA are no longer operational.

²³ Request, pp. 85-86 para. 260-265.

²⁴ Request, p. 58 para. 163-176.

²⁵ Request, pp. 86-87 para. 266-273.

²⁶ Rejoinder, p. 3 para. 4.

²⁷ Rejoinder, pp. 11-12 para. 33 ff. Cf. September 8 transcript, p. 51 l. 18-20.

²⁸ Observations, pp. 33-41 para. 84-109; Rejoinder, pp. 13-25 para. 36-66.

²⁹ Rejoinder, pp. 14-15 para. 40-42.

Procedural Order No. 3

- (iii) *Impairment of third party rights, and in particular those of SODIFOR, in the event such measures are granted:* According to the Respondent, the measures sought would impair the rights of a third party, SODIFOR, which is unacceptable. The measure would breach fundamental principles according to which a judge cannot decide for or against entities which do not fall under his jurisdiction; any entity covered by a decision is entitled to due process, which requires that it be heard before a measure is taken against it.
- (iv) *Risk that the granting of the measures would prejudice the merits of the dispute:* To grant as a provisional measure what the Claimants would like to obtain on the merits would cause the Arbitration Tribunal to prejudice the merits, which is inadmissible in connection with provisional measures.
33. ***With respect to the measures relating to the other rights,*** the Respondent submits that the right to non-aggravation of the dispute, recognized in and of itself by the Respondent, is not jeopardized to the point that the requested measures are necessary and urgent to prevent irreparable harm. The only argument put forward by the Claimants is DRC's alleged wish to retaliate. The Respondent maintains that it has no wish to hinder such other rights and that the risk of harm is therefore neither real nor imminent.³⁰
34. ***With respect to the measures relating to the recovery and safeguarding of the Mining Assets,*** including the request relating to the right of access to the perimeters, the Respondent argues that the granting of these measures is unfounded.³¹
- Firstly, the Mining Assets are accessories of the mining titles or, alternatively, accessories of the soil. Their ownership is therefore attached to ownership of the titles and/or the soil. This allegedly applies to both immovables and movables. In Congolese law, movables used in industrial and commercial exploitation are immovables by destination, both under property law and the Mining Code. Accordingly, the Claimants allegedly only have a right to compensation against the owner and/or the soil for unjust enrichment by the owner of these assets. They have neither a right to restitution nor a right to access the Mining Assets.
 - Secondly, the Respondent submits that any risk relating to such Mining Assets could be prevented by drawing up an inventory, which is apparently being done.
 - Finally, the Respondent submits that the Mining Assets formerly built or brought on the land by FRONTIER are all located in the perimeter falling under the Permits reinstated to SODIMICO and transferred to SODIFOR. Accordingly, SODIFOR allegedly has an exclusive right to use such Mining Assets. Any measure affecting them would allegedly impair SODIFOR's rights.
35. ***With respect to the measures relating to the stay of the proceedings to execute the judgements and the recovery of income and payroll taxes,*** the Respondent submits that the requests are unfounded.³²
- (i) With respect to the May 14, 2010 judgement, the request is tardy and moot, as this judgement has already been fully executed by the cancellation of the mining titles incompatible with its conclusions;
 - (ii) With respect to the March 12, 2010 judgement, this judgement has nothing to do with the mining titles, and issues relating to its execution therefore do not fall under the ICSID's jurisdiction. Also, there is no imminent risk of financial harm relating to this judgement since an appeal is pending;

³⁰ Observations, pp. 48-50 para. 128-134; Rejoinder, pp. 34-35 para. 95-99.

³¹ Observations, pp. 50-56 para. 135-153.

³² Observations, pp. 56-58 para. 157-163; Rejoinder, pp. 41-45 para. 124-136.

Procedural Order No. 3

(iii) With respect to the proceedings to collect tax debts, the Respondent was allegedly unable to obtain additional information regarding the legitimacy of these proceedings. However, it fails to see *a priori* on what basis these proceedings should be stayed by the order to be issued. Accordingly, the DRC said that it would [Translation] “*defer to the Arbitration Tribunal with respect to the outcome of that request, subject to reapplying to it, if it so allows, to provide additional information to allow it to postpone it*”³³.

36. *With respect to the measures relating to the general principle of non-aggravation of the dispute*, the Respondent argues that these demands are too general and are moot to the extent that the Respondent has no intention of aggravating the dispute or granting the Claimants favourable treatment.³⁴ However, the Respondent does not see any disadvantage to the Arbitration Tribunal confirming its lack of deign or intention to aggravate the dispute between it and the Claimants.³⁵

III. THE FOUNDATIONS FOR THE ARBITRATION TRIBUNAL’S JURISDICTION

1. Legal foundation

37. These proceedings were instituted by the Claimants based on the ICSID Convention in relation to Articles 312 ff of the Mining Code, and in particular Article 319, which provides as follows:³⁶

**“TITRE XIV:
APPEALS**

**Chapter I:
GENERAL PROVISIONS**

Article 312: Recourse

The holder and the State are afforded the right to appeal through administrative, judicial and/or arbitration as set forth by the present Code.

[...]

**Chapter IV:
APPEAL VIA ARBITRATION**

Article 317: Arbitration

Subject to the provisions relating to administrative and judicial appeals, and subject to the breaches, penalties and sanctions set forth by the present Code, disputes which might arise from the interpretation or application of the provisions of the present Code may be settled by arbitration as specified in Articles 318 to 320 of the present Code.

Article 318: Domestic arbitration

[...]

³³ Rejoinder, pp. 45-45 para. 134.

³⁴ Observations, p. 59 para. 164-166.

³⁵ Rejoinder, p. 145 para. 136.

³⁶ Arbitration Request, p. 4 ff para. 16 ff; cf. Exhibit C-1 (Mining Code).

Procedural Order No. 3

Article 319: International arbitration

Notwithstanding the provisions of Article 318 of the present Code, disputes which might result from the interpretation or application of the provisions of the present Code may be settled, at the request of the party who proceeds first, by arbitration in accordance with the Convention on the Settlement of Disputes Relating to Investments between the State and Nationals of other States, provided that the holder is a "National" of another contracting state according to the terms of Article 25 of said convention.

Upon issuing a mining or quarry title, the holder gives his consent to such arbitration pursuant to said convention, and both on his own behalf and that of his affiliated companies. He also accepts that such affiliated company should be considered as a "National" of another contracting state.

Holders who are not Nationals of another contracting state may submit disputes resulting from the interpretation or application of the provisions of the present Code to any arbitration tribunal of their choice, but must notify the Government of the name, address and regulations of the arbitration tribunal on the date on which the mining title is issued at the Mining Registry.

Article 320: Arbitration rules and decisions

In accordance with the previous article, arbitration shall take place in French at the place agreed to by the Government and the holder.

For arbitration purposes, the arbitration proceedings shall refer to the provisions of the present Code, the laws of the Democratic Republic of the Congo and to its own rules of procedure.

The decisions rendered by the arbitrator are enforceable and their enforcement may be requested before any competent court within the National Territory according to the procedure stipulated by the Congolese Code of Civil Procedure, or in the holder's country of origin.

In the event of application of the provisions of the previous paragraph, the Government waives its right of any immunity from jurisdiction or enforcement."

38. Under Article 47 of the ICSID Convention, "Except as the parties otherwise agree, the Arbitration 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."

The principle is confirmed and restated in Rule 39, which reads as follows:

**"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 Arbitration 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 Arbitration Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

Procedural Order No. 3

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

[...]"

In addition, under Rule 19, the Arbitration Tribunal has jurisdiction to make the orders required for the conduct of the proceeding.

39. In the instant case, the Claimants formally submitted requests for the granting of provisional measures. According to the procedure agreed upon at the first session (cf. above, para. 13), each Party had the opportunity to present its position through two successive exchanges of briefs. The Arbitration Tribunal heard Counsel at length in this regard at the hearing on September 8 and 9 in Zurich (cf. above, para 20); the transcript drawn up at that time was approved by the Parties (cf. above, para. 20). Following the hearing, Counsel expressly stated that they did not have any other Request to be made in this regard.³⁷

The Arbitration Tribunal may therefore decide on the measures asked of it.

2. The conditions for granting provisional measures

40. The texts cited above do not set forth the conditions necessary to allow requests for provisional measures. However, there is significant jurisprudence, completed by the positions taken by commentators.³⁸

We take them to mean that such a request may be admitted if it meets the following conditions:

- (i) The arbitration tribunal has jurisdiction *prima facie* on the object of the arbitration;
- (ii) The claimant demonstrates the *prima facie* existence of the rights to be protected;
- (iii) The measures sought are necessary, which implies that the actions of a party could cause or threaten to cause irreparable harm to the rights in question;

³⁷ Cf. September 9 transcript, p. 60 l. 21-30.

³⁸ Cf. *inter alia*, Christoph Schreuer et al., *The ICSID Convention – A Commentary*, 2nd edition, 2009, p. 759 ff para. 1 aa; *Barmek Holdings A.S. v. Republic of Azerbaijan* (ICSID Case No. ARB/06/16, Decision on request for provisional measures), *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/08/5, Procedural Order No. 1), *Cemex Caracas Investments BV and CEMEX Caracas II Investments BV v. Venezuela* (ICSID Case No. ARB/08/15, Decision on the Claimants' request for provisional measures), *City Oriente Limited v. Republic of Ecuador and Empresa Estatal de Petróleos del Ecuador* (ICSID Case No. ARB/06/21, Decision on request for provisional measures), *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11, Decision on request for provisional measures), *Phoenix Action Ltd v. Czech Republic* (ICSID Case No. ARB/06/5, Decision on request for provisional measures), *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2, Decision on request for provisional measures), *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23, Decision on request for provisional measures), *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18, Procedural Order No. 1), etc.

Procedural Order No. 3

- (iv) The measures sought are urgent, which implies that the harm or threatened harm does not give us the luxury of waiting for a final decision on the merits of the case;
- (v) The granting of the measures sought does not prejudice the merits of the case.

Also, where the jurisdiction of the arbitration tribunal is limited to the dispute submitted to it by the parties involved, provisional measures cannot in theory affect the rights of third parties, who are not involved in the arbitration proceedings.

Moreover, these conditions are expressly admitted by the Parties, as the disagreement only involves the issue of whether or not they are met in the instant case.³⁹

- 41. However, the first condition, regarding the Arbitration Tribunal's *prima facie* jurisdiction, is not contested.

The Claimants, whose capacity to act has not been challenged at this point, have put forward claims which they allege stem from the breach of the applicable rules.⁴⁰

The Respondent has explicitly admitted the Arbitration Tribunal's *prima facie* jurisdiction, both in its pleadings⁴¹ and during its representations before the Arbitration Tribunal.⁴² It certainly reserved for itself the possibility of challenging the jurisdiction of the Arbitration Tribunal regarding the merits of the dispute; however, it is uncontested that this fact alone is not enough to deprive the Arbitration Tribunal of the authority it may have to recommend or order provisional measures.⁴³ It is clear that this does not in any way prejudice the decision it may be asked to make on the merits in the event the objection is made and then sustained.

- 42. It is therefore in order to examine whether the other conditions are met for each of these four groups of requested measures.

IV. THE REQUEST RELATING TO THE PERMITS AND OTHER MINING RIGHTS

1. The Requests

- 43. The Claimants partially amended the conclusions they had initially made on these subjects. At the hearing on September 8 and 9, they made the text substantially more concise (cf. above, para. 20).
- 44. As a reminder, the Claimants' last conclusions with respect to the requests relating to the Permits and other mining rights are the following:

[Translation]

"i. Transfer of the Permits and Other Mining Titles

(a) *An order enjoining the DRC, either directly or indirectly through any entity it controls, from:*

³⁹ Request, p. 48-58; Rejoinder, p. 3 para. 4.

⁴⁰ Arbitration Request, pp. 7-9 para. 27-36.

⁴¹ Observations, p. 33 para. 83, note 101; Rejoinder, pp. 11-12 para. 33.

⁴² Cf. September 8 transcript, p. 51 l. 23-35, and p. 52 l. 23-52.

⁴³ Cf. September 8 transcript, p. 51 l. 17-29.

Procedural Order No. 3

- (i) *Cancelling the Permits;*
- (ii) *Transferring, in whole or in part, any mining title or right located within the perimeters covered by the Permits, or granting, issuing or transferring any further or other right within the perimeters covered by the Permits;*
- (iii) *Submitting for tender any mineral deposit located within the perimeters of the Permits; and*
- (iv) *Taking any step that could further affect the rights of Frontier and Comisa under the Permits,*

until the Arbitration Tribunal has issued a final award in the instant case;

(b) *An order enjoining the DRC, either directly or indirectly, from:*

- (i) *Withdrawing or cancelling any other mining title or right held by Frontier or Comisa (the “Other Permits”) or forfeiting the rights of Frontier and Comisa pursuant thereto;*
- (ii) *Transferring, in whole or in part, the Other Permits or any mineral deposit located within the perimeters of the Other Permits, or granting, issuing or transferring any mining title or right whatsoever within the perimeters covered by the Other Permits;*
- (iii) *Submitting for tender any mineral deposit located within the perimeters covered by the Other Permits; and*
- (iv) *Taking any step that could affect the rights of Frontier and Comisa under the Other Permits,*

until the Arbitration Tribunal has issued a final award in the instant case;

The Respondent, on the other hand, fully rejected these conclusions first in its pleadings⁴⁴ and then at the hearing on September 8/9.⁴⁵

45. The Claimants clearly distinguish between the “Permits” on the one hand and the “Other Mining Rights” on the other hand, a distinction which the Arbitration Tribunal accepts.

2. The Permits (Request i/a)

46. For the Arbitration Tribunal, the four measures it is asked to make under this heading in reality cover two types of Permits: (i) the (former) Permits, those which were granted and then withdrawn from FRONTIER and COMISA, and (ii) the (new) Permits, those which were later attributed to SODIFOR based on the rights which SODIMICO claimed to have before February 2000.

47. According to the Respondent, the first were cancelled by the proceeding which culminated in the May 14, 2010 judgement, which has been executed; they therefore no longer exist and have been replaced by

⁴⁴ Observations, p. 33 para. 83 and p. 60 para. 167; Rejoinder, p. 45 para. 137.

⁴⁵ Cf. September 8 transcript, p. 87 l. 18-29, and September 9 transcript, p. 60 l. 21-30.

Procedural Order No. 3

new Permits.⁴⁶ According to the Claimants, FRONTIER and COMISA's Permits were not cancelled, only withdrawn. They allegedly therefore still exist and the issue is to protect the Claimants' rights with respect to those Permits against any concurrent right covering the same perimeters.⁴⁷

48. The hearing of the case established that the Permits held today by SODIFOR are not officially the same as those which FRONTIER and COMISA had before they were withdrawn from them. The Permits held today by SODIFOR stem from titles of which SODIMICO claimed to be the holder, as they were not quite the same as those subsequently attributed to FRONTIER and COMISA. However, in physical terms, it was asserted that the Permits cover the same objects as COMISA and FRONTIER's Permits, and in particular with respect to the area they cover. It is true that there are some differences with respect to the specific boundaries of the perimeters in question but they stem from the application of new methods of drawing boundaries.⁴⁸
49. The fact remains that the two aspects can and should be distinguished, as it appears from a reading of the conclusions.

a) The prohibition against cancelling the Permits (Request i/a/i)

50. The first request made to the Arbitration Tribunal in this regard is the issuance of an [Translation] "order enjoining the DRC, either directly or indirectly through any entity it controls [...] from cancelling the Permits [...] until the Arbitration Tribunal has issued a final award in the instant case" (emphasis added by the Arbitration Tribunal).

It appears from the context that this request can only involve the Permits with a capital "P", i.e. those which were granted to FRONTIER and COMISA. This request does not cover the Permits held today by SODIFOR.

51. In their written and oral presentations, Counsel for the Parties debated at length the issue of whether it would be possible for the Arbitration Tribunal to order the reinstatement of the Claimants in their rights through the restitution of the Permits of which they claim to have been unfairly deprived.⁴⁹ However, that is not what they are seeking in this Request and, for the Arbitration Tribunal, it is not necessary to discuss this, at least at this stage.
52. What the Claimants would like is for the circumstances of the Permits not to be aggravated in the event the Arbitration Tribunal eventually decides that they should be able to be reinstated in their rights. However, it appears from the proceeding that, for the Respondent, these Permits have already been validly cancelled. This is what Counsel for the Respondent said.⁵⁰
53. We can only infer from this that, according to the Respondent, these Permits no longer exist. This is not the appropriate time to decide whether or not this statement is true, particularly if there really is a difference between a "withdrawal" and a "cancellation"; this will be the subject of debates which will or could be conducted on the merits. It is enough for the purpose of this phase to take note of the Respondent's statements. If it says that these Permits no longer exist, it can no longer take the slightest measure regarding them and it apparently has not indicated any wish to do so at any rate. Any other

⁴⁶ Cf. September 8 transcript, p. 68 l. 25-38, September 9 transcript, p. 44 l. 36 – p. 45 l. 6, and p. 47 l. 27 – 34

⁴⁷ Cf. September 8 transcript, p. 33 l. 22-23 and September 9 transcript, p. 14 l. 21-37.

⁴⁸ Cf. September 8 transcript, p. 41 l. 9 – p. 43 l. 10; p. 68 l-25-39, p. 69 l. 1-26, cf. September 9 transcript, p. 15 l. 16-28.

⁴⁹ Cf. September 8 transcript, p. 11 (p. 19-20 Mtre. Cowper) l. 24-25 and l. 1-10; p. 34 l. 19 – p. 40 l. 6; p. 69 l. 35 – p. 75 l. 28.

⁵⁰ Cf. September 8 transcript, p. 68 l. 25-38, September 9 transcript, p. 44 l. 36 – p. 45 l. 6, and p. 47 l. 27 – 34.

Procedural Order No. 3

measure it might decide to nonetheless take in this regard against these Permits would be in flagrant contradiction with the legal situation it itself has invoked.

54. This is why the requested measure does not seem necessary; all that is required to achieve the result wished by the Claimants is to officially take note of the Respondent's statement.
55. Accordingly, the Arbitration Tribunal will note in its decision that the Respondent officially states that these Permits have been cancelled and therefore no longer exist.

b) The prohibition against transferring the mining rights or creating new ones (Request i/a/ii)

56. The second request made to the Arbitration Tribunal in this regard is the issuance of an [Translation] "order enjoining the DRC, either directly or indirectly through any entity it controls [...] from transferring, in whole or in part, any mining title or right located within the perimeters covered by the Permits, or granting, issuing or transferring any further mining title or other right within the perimeters covered by the Permits [...] until the Tribunal has issued a final award in the instant case" (emphasis added by the Arbitration Tribunal).

At first glance, the conclusion covers two sorts of measures which are not totally related to each other:

57. *1- The prohibition against transferring mining rights.* It appears from the context that this conclusion can only cover the (new) Permits, those which were granted to SODIFOR.
58. As a reminder, SODIFOR is a corporation which was created on June 13, 2010 under the terms of a joint venture contract between SODIMICO and FORTUNE (cf. above, para. 6).⁵¹ When it was incorporated, the DRC indirectly held, through SODIMICO, 30% of the shares of SODIFOR.⁵² However, it was indicated that, on March 28, 2011, SODIMICO transferred its interest in SODIFOR to two BVI corporations. Accordingly, since that date, the DRC no longer has any direct or indirect interest in SODIFOR.⁵³
59. For the Arbitration Tribunal, the measure against the DRC cannot be granted in the form in which it is requested:
- (i) Firstly because, according to Congolese law, the DRC does not have jurisdiction to allow or refuse the transfer of the Permits, which were allegedly granted to a third party. This appears in particular from the introduction to the Mining Code which provides that, [Translation] "*unlike Ordinance-Law no. 81-013 of April 2, 1981, the present Mining Code does not subject the transfer of mining rights and Authorization[s] for a Permanent Quarry Exploitation to the authorization of the Minister [...]*".⁵⁴ This also appears from Articles 182 ff of the Mining Code, which do not provide for or require prior authorization of the State but make the DRC's Mining Registry (the "CAMI") responsible for taking the necessary publicity measures. Once granted, the Permits may be freely transferred.⁵⁵

⁵¹ Exhibit C-71(i).

⁵² Cf. Article 5 of the Joint Venture Contract, Exhibit C-71(i).

⁵³ Observations, p. 45 para. 119, Exhibit R-11.

⁵⁴ Exhibit C-1, p. 16.

⁵⁵ According to Article 182 of the Mining Code, "[t]he mining rights and the Authorizations for Permanent Quarry Exploitation may be conveyed in whole or in part. This conveyance is final and irrevocable. In the absence of any provisions to the contrary, the substantive law on conveyance applies [...]".

Procedural Order No. 3

It is true that the Code nonetheless provides that, when a transfer takes place, it must be registered with the CAMI before it can take effect and be set up against third parties and the State.⁵⁶ However, that is only a formality intended to make the right enforceable against third parties. The State cannot intervene in this procedure for substantive reasons. However, it is automatically informed of transfers reported to the CAMI.

We can infer that the DRC does not have the authority to intervene directly to prevent a subsequent transfer by SODIFOR of the Permits it holds.

- (ii) Also, because the requested measure directly affects the rights of a third party, who is not implicated in this arbitration proceeding. In this regard, we do not see how the Arbitration Tribunal could be authorized to impose on the DRC orders or recommendations involving third parties.

- 60. In fact, what the Claimants would like is for SODIFOR to be prevented from transferring the rights it holds (according to the DRC) to third parties who could then rely on their good faith to challenge any restitution in the event that were to be ordered.
- 61. It is difficult to imagine that SODIFOR could be unaware of this dispute and the rights the Claimants are asserting to the Permits, although it is true that the deed of transfer dated August 20, 2010 states that the transferred titles are not the subject of any third party rights.⁵⁷ To remove any doubt, the Arbitration Tribunal believes that the Respondent should be asked to formally notify SODIFOR of the existence of the dispute.

However, the more serious risk is that SODIFOR will in turn transfer all or part of its Permits to third parties without advising them of the current challenges. For this reason, the Arbitration Tribunal believes that it has the authority to also make the following two recommendations to the Respondent: (i) that, in its letter to SODIFOR, it ask it to advise third parties to which it might transfer all or part of the titles of the existence of the dispute, and (ii) that the Respondent inform the Claimants immediately if SODIFOR makes a transfer.

It is true that there is also a risk that the current shareholders of SODIFOR would transfer units they hold in the corporation to third parties; in such a case, the Permits would certainly not be directly transferred—it would be the owners of SODIFOR who would change. The Arbitration Tribunal considers that, although it has jurisdiction to recommend that the Respondent contact SODIFOR to give it information, it is uncertain that it can go so far as to ask SODIFOR to give information to shareholders, or even prohibit them from transferring their shares. The question may, however, remain moot: the shareholders must be aware of a company's knowledge of circumstances as important as those at issue and the shareholders cannot in theory avail themselves of the good faith reliance defence if the event the company fails to bring the facts in question to their attention. If they intervened, such transfers could not change SODIFOR's situation. Accordingly, the Arbitration Tribunal does not believe it is necessary to issue any particular recommendation with respect to a future acquisition by third parties of shares in SODIFOR.

- 62. *2- The prohibition against taking other action.* The second part of this Request is not completely clear for the Arbitration Tribunal. As it is written, it seems to involve prohibiting the DRC [Translation] “*from granting, issuing or transferring any further title or other right within the perimeters covered by the Permits*” (emphasis added by the Arbitration Tribunal); given the context, we wonder whether the request is not in fact to extend the transfer prohibition referred to in the first part of the sentence..

⁵⁶ Cf. *Exposé des Motifs du Code Minier*, Exhibit C-1, p. 16.

⁵⁷ Cf. Exhibit R-8, para. 4.4.

Procedural Order No. 3

- (i) If it is a prohibition against the DRC issuing new rights, in addition to those granted to SODIFOR, the situation is the following: according to the statements made to the Arbitration Tribunal, the granting of the Permits to SODIFOR in the perimeter includes all the rights which may be drawn from them.⁵⁸ We therefore do not see how the DRC could create and grant new rights when it said that the Permits transferred to SODIFOR cover all possible rights over the perimeters in question.
- (ii) If it is a prohibition which the Claimants would like to be able to impose on SODIFOR, we need only refer to what was said and decided above regarding the communication of information by the DRC (above, para. 60-61).
63. **Accordingly**, the measures sought are not necessary and it is sufficient to recommend that the Respondent:
- (i) write a letter to SODIFOR informing it of this dispute and the challenges concerning the rights to the perimeters in question;
- (ii) ask SODIFOR in that letter, in the event SODIFOR decides to transfer all or part of its title to third parties, to notify such third parties thereof; and
- (iii) if it is informed of such a transfer, to inform the Claimants forthwith.
- c) The prohibition against submitting for tender any deposits located within the perimeters of the Permits (Request i/a/iii)*
64. The third request made to the Arbitration Tribunal in this regard is the issuance of an [Translation] “order enjoining the DRC, either directly or indirectly through any entity it controls [...] from submitting for tender any mineral deposit located within the perimeters of the Permits [...] until the Tribunal has issued a final award in the instant case” (emphasis added by the Arbitration Tribunal).
- The way the Request is worded again raises questions about its true meaning, but the question need not be decided.
65. To the extent that, as we have just pointed out, the DRC granted SODIFOR Permits which – according to it – cover the entire perimeter concerned by the Permits, we do not see how it could decide itself to submit for tender any deposit found therein.
66. Also, it should be recalled that the Respondent officially stated that it does not have any intention of cancelling, withdrawing or otherwise affecting the rights held by SODIFOR.⁵⁹
67. **Accordingly**, it is not necessary to issue any special recommendation and the Arbitration Tribunal refers to the recommendation made in para. 63 above.
- d) The prohibition against taking any prejudicial step (Request i/a/iv)*
68. The fourth request made to the Arbitration Tribunal in this regard is the issuance of an order prohibiting the DRC, directly or indirectly through any entity it controls [Translation] “*from taking any step that could further affect the rights of Frontier and Comisa under the Permits until the Tribunal has issued a final award in the instant case*”.

⁵⁸ Cf. September 9 transcript, p. 19 l. 10-39.

⁵⁹ Letters from the Respondent dated June 21 and 24, 2011.

Procedural Order No. 3

69. The way the Request is worded is too general, since it covers any and all activity. If we read it to mean that it still covers the Permits, we fail to understand its meaning since, as mentioned above, the Respondent officially declared that the (former) Permits had been cancelled and the (new) Permits fully handed over to SODIFOR.

70. **Accordingly**, the requested measure is denied.

3. The Other Mining Rights (Request i/b)

71. Under this heading, the Claimants are asking the Arbitration Tribunal to issue:

[Translation]

(b) *An order enjoining the DRC, either directly or indirectly, from:*

- (i) *Withdrawing or cancelling any other mining title or right held by Frontier or Comisa (the “Other Permits”) or forfeiting the rights of Frontier and Comisa pursuant thereto;*
- (ii) *Transferring, in whole or in part, the Other Permits or any mineral deposit within the perimeters of the Other Permits, or granting, issuing or transferring any other mining title or right whatsoever within the perimeters covered by the Other Permits;*
- (iii) *Submitting for tender any mineral deposit within the perimeters of the Other Permits; and*
- (iv) *Taking any step that could affect the rights of Frontier and Comisa under the Other Permits,*

until the Tribunal has issued a final award in the instant case;”

72. For the Arbitration Tribunal, all the measures requested under this heading may be dealt with together as they all cover the same problem.

The “Other Mining Rights” refer to rights which were granted to COMISA and which were not withdrawn because they are not located within the perimeters covered by SODIFOR’s rights.⁶⁰ They therefore subsist and, in theory, nothing prevents their holders from using them as they see fit.

73. This position was recognized by Counsel for the Respondent.⁶¹ The Respondent also stated several times in both its written pleadings and at the hearing⁶² that it has no intention of cancelling, transferring or otherwise impairing such rights.

74. For this reason, the requested measure does not seem necessary; to achieve the result wished by the Claimants, all that need be done is to take official note of the Respondent’s statements.

75. **Accordingly**, the Arbitration Tribunal will note in its decision that the Respondent officially states that the “Other Mining Rights” exist and are valid, and that the Respondent has no intention of cancelling, transferring or otherwise impairing such rights.

⁶⁰ Cf. September 9 transcript, p. 12 l. 6-26.

⁶¹ Cf. September 9 transcript, p. 40 l. 33-39.

⁶² Cf. Letter from the Respondent dated June 15, 2011, para. 28; Observations, p. 49 para. 133; Rejoinder, p. 35 para. 99; September 9 transcript, p. 41 l. 1-3.

Procedural Order No. 3

V. THE REQUEST RELATING TO THE MINING ASSETS (REQUEST 2)

1. The Applications

76. The second group of requests is related to the “Mining Assets”, and in particular their “recovery and safeguarding” (cf. above, para. 20).
77. “Mining Assets” mean, in the terminology used by the Parties, all the facilities and property attached to the mines and/or their exploitation, whether they be immovables (“Immoveable Assets”) or movables (“Moveable Assets”).
78. Following the proposed distinction, the Arbitration Tribunal considers it appropriate to deal separately with the Immoveable Assets and the Moveable Assets.

2. The Immoveable Assets (Request ii/a)

79. Under this heading, the Claimants are asking the Arbitration Tribunal to issue:

[Translation]

“(c) An order enjoining the DRC to grant to Frontier and Comisa and to their designated employees, agents and sub-contractors access to the perimeters covered by the Permits in order to take possession of all their immoveable assets including all mining facilities and equipment (the “Mining Immoveable Assets”), in order to make them safe and to preserve them and ensure their safekeeping, including through an agent or sub-contractor of Frontier and Comisa, such as a security company, until the Tribunal has issued a final award in the instant case;”

The measure contains several aspects which must be distinguished.

80. With respect to the purpose firstly, it is to compel the DRC to (i) authorize access to the site to certain persons related to the Claimants in order to (ii) take possession of all the immoveable property so (iii) it can be made safe and preserved.

This statement calls for the following comments:

81. The property covered by the conclusion encompasses all immoveable assets, including, depending on the wording chosen, the facilities and the equipment attached to those facilities. Unlike the Moveable Assets, which are the subject of the following conclusion, they can only be facilities which were built, fitted up and maintained by the Claimants at their expense within the perimeter of the mines. These facilities are incorporated into the ground to the point that it is impossible to remove them for the purpose of taking possession of them without their being substantially altered.
82. The Respondent agreed to an inventory of the various Immoveable Assets.⁶³ However, the measures requested by the Claimants go beyond a simple inventory.
83. a) In the end, what is important for the Claimants is that it be possible to *protect* the immoveable assets. They fear that the facilities could be damaged or even destroyed. Strictly speaking, this measure does not involve “taking possession” of this property but of being able to have enough control over it to

⁶³ Cf. September 8 transcript, p. 82 l. 12-18; September 9 transcript, p. 34 l. 31 – p. 35 l. 2; p. 51 l. 36-38; p. 55 l. 19-20.

Procedural Order No. 3

be able to achieve the purpose they are seeking.⁶⁴

The explanations given during the hearing establish that the risk of damage cannot be excluded: the mines have not been in operation for several months and they have apparently been abandoned. There is real urgency in this measure.

84. b) The measure may be *justified* by the rights of the Claimants, with a certain nuance. Although it does not seem to be contested that the Immoveable Assets were built by the Claimants under the aegis of their mining titles and that the said Immoveable Assets therefore belong to them,⁶⁵ the question of whether this is still the case today, and in particular what rights the Claimants can assert, is being challenged:

- The Claimants submit that they own these Immoveable Assets and therefore have a right to access their property in order to make it safe,⁶⁶

- It is not clear from the hearing whether the Respondent considers itself the owner of the Immoveable Assets: on the one hand, it seems to admit that the DRC is, as owner of the ground and under the accession principle ("*superficies solo cedit*"); on the other hand, it asserts that, to the extent that these Assets are found on land forming part of mining titles, the Mining Code allegedly gives priority to the mining rights and these Assets therefore belong to the holder of the mining title, who enjoys exclusive access to this land and therefore to the Assets situated on it.⁶⁷

For the Arbitration Tribunal, this issue need not be decided at this point, especially since, as was just mentioned, the file is currently missing information required for a decision.

To the extent that the Respondent expressly admits that the Claimants have rights relating to the Assets, notably eventual rights to compensation, it seems that it is in the interest of not only the Claimants but also the Respondent to avoid a deterioration of these Assets.

85. c) The measure of protecting the Immoveable Assets can only be assured *with the assistance of the DRC*. Of course, the DRC transferred to a third party, SODIFOR, the exploitation of the mine, with all that forms part thereof. **Furthermore, this measure is also in the DRC's interest.** Whereas the DRC admits in and of itself the interest and necessity of preserving the Immoveable Assets and supports the taking of an inventory,⁶⁸ it issued certain reserves concerning the terms and scope of the safekeeping measures requested by the Claimants. In particular, it asserts that these safekeeping measures would impair SODIFOR's exclusive right over the land.⁶⁹

The Arbitration Tribunal does not find this argument convincing. Although SODIFOR is the holder of the mining titles to the land in question and has an exclusive right of access over the perimeters for any mining prospecting or exploitation, the fact remains, as mentioned, that the DRC owns the land. It therefore has a right to control the land. In this capacity, it necessarily has a right of access over the perimeters and must therefore be able to compel the concession holder to give third parties access, if the request is justified and does not impair the concession holder's rights.

This authorization may include all persons who are able to take the necessary steps to achieve the objective sought, i.e. the Claimants' personnel, their sub-contractors, and even third parties hired by

⁶⁴ Cf. September 9 transcript, p. 20 l. 28 – p. 21 l. 31.

⁶⁵ Cf. September 9 transcript, p. 50 l. 32-35.

⁶⁶ Cf. September 8 transcript, p. 40 l. 14 – p. 41 l. 5; September 9 transcript, p. 32 l. 10 - p. 34 l. 7.

⁶⁷ Cf. September 9 transcript, p. 52 l. 13 (in particular l. 33-37) – p. 53 l. 36.

⁶⁸ Cf. September 8 transcript, p. 82 l. 12-18; September 9 transcript, p. 34 l. 31 – p. 35 l. 2; p. 51 l. 36-38; p. 55 l. 19-20.

⁶⁹ Cf. September 9 transcript, p. 53 l. 31 – p. 54 l. 2.

Procedural Order No. 3

them.

In this regard, although it is true that the requested safeguard measures would prevent SODIFOR from using the Immoveable Assets, this would not be any different from the current situation. It was admitted that no operational use is currently being made of the Immoveable Assets, and in particular the concentrator, and that such a use would first require an agreement regarding compensation of the Claimants.⁷⁰ Accordingly, we do not see how the safeguard measures requested by the Claimants would impair SODIFOR's rights.

86. **Accordingly**, the Arbitration Tribunal

- (i) confirms its recommendation issued in its procedural order dated July 1, 2011 concerning the taking of an inventory and asks both Parties to cooperate so that the said inventory can be taken as soon as possible; and
- (ii) recommends that the Respondent make the necessary requests of SODIFOR so that any useful measure may be taken to give the Claimants and their designated employees, agents or sub-contractors access to the perimeters covered by the Permits in order to make safe, preserve and ensure the safekeeping of the Immoveable Assets until the Tribunal has issued a final award in the instant case. The Respondent is asked to send a copy of its correspondence with SODIFOR in this regard to the Arbitration Tribunal and the Claimants.

3. The Moveable Assets (Request ii/b and c)

87. Under this heading, the Claimants are asking the Arbitration Tribunal for:

[Translation]

“(c) An order enjoining the DRC to deliver up to Frontier and Comisa or to grant Frontier and Comisa and their designated employees, agents and sub-contractors access to the perimeters covered by the Permits in order to take possession of all of their moveable and immoveable assets located within the said perimeters covered by the Permits or their employees, representatives and sub-contractors including, inter alia, all mobile equipment (trucks, excavators, light vehicles, generators, etc.), spare parts, finished goods, inventory and any other moveable property belonging to Frontier or Comisa or their employees, representatives and sub-contractors (the “Moveable Mining Assets”) in order to make them safe and use them for the purpose of the other activities of the Claimants, including through export, until the Tribunal has issued a final award in the instant case;

(d) Subsidiarily, an order enjoining the DRC to grant Frontier and Comisa and their designated employees, agents and sub-contractors access to the perimeters covered by the Permits in order to take possession of the Mining Assets to make them safe, preserve them and ensure their safekeeping within the perimeters covered by the Permits or elsewhere at an area to be agreed upon by the parties, including through an agent or sub-contractor of Frontier and Comisa, such as a security company, until the Tribunal has issued a final award in the instant case;”

88. In reading these conclusions, it appears in short that, through the first one which is the main one, the Claimants intend to repossess the Moveable Assets which they brought and to remove them from the perimeter to use them as they see fit whereas through the second one, subsidiarily, they are asking for such property to be made safe within the perimeter.

⁷⁰ Cf. September 9 transcript, p. 6 l. 4-21; p. 21 l. 27-31, p. 55 l. 5-23.

Procedural Order No. 3

89. The “Moveable Assets” in question are all movable property. They are, as opposed to the Immoveable Assets, anything which may be removed from the perimeter easily, because they do not form an integral part of the soil or the immoveable facilities. Such Moveable Assets include any moveable equipment, such as engines, trucks, excavators, vehicles, generators, mobile equipment, spare parts, finished goods, stock, etc. provided it is established that they were brought by the Claimants.
90. The risk that the Moveable Assets be removed or damaged appears real due to the fact that the mines are not operational (cf. above, para. 85).
91. The Arbitration Tribunal does not see why the Claimants should be deprived of the title they had to these Mining Assets. The principle of accession (“*superficies solo cedit*”) generally does not apply to movables, only to immovables. To this extent, ownership remained with the Claimants.
92. The Respondent seems to draw an argument from the fact that the first article of the Mining Code gives the word “mine” a broad definition which covers the Moveable Assets.⁷¹ For the Arbitration Tribunal, this is not decisive. It was no doubt necessary and justifiable to define what a mine is at the beginning of the Code which deals with mines; however, this definition can only apply generally for all the provisions governing exploitation and it cannot decide in and of itself and indirectly a problem of real rights, which the DRC expressly admitted with respect to the immoveable assets.⁷² As the Claimants noted, the Mining Code does not contain any provisions governing the transfer of ownership of mining facilities and equipment from one holder to another, or from a holder to the State.⁷³ For want of a clear expression otherwise, there is no reason to deny the ownership rights the Claimants claim to have over the Moveable Assets, nor can one be admitted for engines which were made available to the operator by third parties on a contract basis (lease contracts, or engines used by sub-contractors).
93. There is nothing extraordinary about the measure and it seems fair. When the Permits were withdrawn, the DRC became – at least provisionally – the holder of the concessions again. At that time the Claimants should have been authorized to repossess the Moveable Assets in order to remove them if they so wished. The DRC was responsible for making these Mining Assets safe because, based on the execution of a May 14, 2010 judgement of the DRC’s Supreme Court of Justice, and the August 2, 2010 decisions which followed, the Claimants were asked to leave the mines and the mines were given to a third party, SODIFOR.⁷⁴ The Claimants had the right to repossess the Moveable Assets they owned; they should now be able to repossess them or at least repossess those that remain.
94. Another issue is whether the new concession holder intends to take possession of these Moveable Assets. This is a question which does not concern the Arbitration Tribunal and depends on the relationships the Claimants may have with SODIFOR, if SODIFOR so wishes.
95. **Accordingly**, the Arbitration Tribunal
 - (i) confirms its recommendation made in its procedural order dated July 1, 2011 concerning the taking of an inventory and encourages both Parties to work together so the said inventory can be taken as soon as possible;
 - (ii) recommends that the Respondent make the necessary requests of SODIFOR and take any useful step to give the Claimants and their designated employees, agents or sub-contractors access to the perimeters covered by the Permits so they can repossess them and remove from the perimeters all

⁷¹ Cf. September 8 transcript, p. 80 l. 22-38.

⁷² Cf. September 9 transcript, p. 81 l. 31-38.

⁷³ Cf. September 9 transcript, p. 33 l. 24 – p. 34 l. 7

⁷⁴ Cf. September 8 transcript, p. 83 l. 33- p. 84 l. 8.

Procedural Order No. 3

the Moveable Assets it is established following the inventory to belong to them. The Respondent is asked to send a copy of its correspondence with SODIFOR in this regard to the Arbitration Tribunal and the Claimants.

VI. THE REQUESTS RELATING TO THE STAY OF PROCEEDINGS

1. The Requests

96. The third set of requests is related to the stay of the proceedings to execute judicial and administrative decisions.

The Claimants' conclusions relating thereto (cf. above, para. 20) cover three different types of proceedings:

- (i) execution of the Supreme Court of Justice judgement dated May 14, 2010;
 - (ii) the stay of the legal proceeding following the decision of the *Tribunal de commerce du Lubumbashi* dated March 12, 2010;
 - (iii) the stay of certain administrative procedures involving income and payroll tax.
97. According to the proposed distinction, the Arbitration Tribunal considers it advisable to deal with these three types of proceedings separately.

2. The Supreme Court of Justice decision dated May 14, 2010

98. Under this heading, the Claimants are asking the Arbitration Tribunal for:

[Translation]

“(f) an order to preserve the status quo by enjoining the DRC to take all necessary measures and carry out all required actions to stay, or cause to be stayed, any further enforcement measure in respect of the May 14, 2010 Judgment [...] until the Tribunal has issued a final award in the instant case;”

99. The May 14, 2010 judgement of the DRC's Supreme Court constitutes the legal foundation on which the DRC based itself to justify the withdrawal of the Permits from the Claimants and the reinstatement of SODIMICO in its rights as holder before it was allegedly stripped of them in February 2000.
100. The Respondent maintains its position according to which this judgement was already fully executed by the cancellation of the Permits which were incompatible with its conclusions. Accordingly, there is no execution measure to be taken and the Claimants' Request is therefore tardy and moot.⁷⁵
101. The Claimants submit that the requested measures are necessary. In particular, the Claimants submit that, contrary to the Respondent's allegations, there is a risk that the Respondent will continue to rely on the said May 14, 2010 judgement to justify the extension of SODIFOR's perimeters to the country's

⁷⁵ Cf. September 8 transcript, p. 63 l. 27 – p. 65 l. 11, p. 72 l. 13-16, p. 83 l. 28 – p. 85 l. 5, September 9 transcript, p. 54 l. 32 – 37; cf. also Observations, p. 57 para. 159, Rejoinder, pp. 42-43 para. 125-129.

Procedural Order No. 3

borders.⁷⁶

102. The purpose of the Claimants' Request is in fact to ensure that the DRC does not use the May 14, 2010 judgement to justify additional encroachments on their alleged rights or an extension or consolidation of the rights conferred on SODIFOR.
103. The Arbitration Tribunal believes that, to achieve this goal, it is sufficient to take note of the Respondent's statements according to which that judgement has already been fully executed. This is not the time to decide whether these declarations reflect reality; that will be the subject of the debates which will or could be held on the merits. It is sufficient for the purpose of this stage to note the Respondent's statements. If it states that this judgement has been fully executed, the Respondent can no longer rely on it to justify future measures relating to the object of that decision. Any measure which it nevertheless decides to take in relation to the object of that decision would be in flagrant contradiction with the legal situation it admitted itself.
104. For this reason, the requested measure does not seem necessary; to achieve the result wished by the Claimants, it is enough to officially note the Respondent's statement.
105. **Accordingly**, the Arbitration Tribunal notes in its decision that the Respondent officially states that the May 14, 2010 judgement has been fully executed and that there is no longer any measure to be taken based on that decision.

3. The judgement of the *Tribunal de commerce de Lubumbashi* dated March 12, 2010

106. Under this heading, the Claimants are asking the Arbitration Tribunal for:

[Translation]

"(f) An order to preserve the status quo by enjoining the DRC to take all necessary measures and carry out all required actions to stay, or cause to be stayed, [...] any other judgment or measure that could be rendered by the Courts of Appeal in the appeal proceedings presently pending in respect of the March 12, 2010 Judgment until the Arbitration Tribunal has issued a final award in the instant case;"

107. The March 12, 2010 judgement is a judgement rendered by the *Tribunal de commerce de Lubumbashi* in a matter between SODIMICO as plaintiff and COMISA and FQM as defendants ordering the defendants to pay a total amount of over US\$57 million in compensation for damage caused to SODIMICO related to the undue obtaining by FQM of information relating to the LONSHI deposit.⁷⁷
108. Accordingly, the Respondent asserts that this judgement involves a dispute relating to mining data, not mining titles. It is therefore allegedly not a dispute "*which might result from the interpretation or application of the provisions of the Mining Code*" within the meaning of Article 319 of the Mining Code. This dispute therefore allegedly is not covered by the offer to appeal to the ICSID and does not fall within the jurisdiction of the Arbitration Tribunal. Also, there is allegedly no imminent risk of financial harm relating to this judgement since an appeal is pending. In addition, this judgement was rendered against a third party, FQM, which is not a party to this arbitration.⁷⁸

⁷⁶ Cf. September 8 transcript, p. 44 l. 28 – p. 45 l. 30.

⁷⁷ Cf. Exhibit C-41.

⁷⁸ Cf. September 8 transcript, p. 85 l. 8 – p. 86 l. 24, September 9 transcript p. 54 l. 38 – p. 55 l. 4; Letter from the

Procedural Order No. 3

109. In response to the Respondent's arguments, the Claimants submit that this judgement does in fact stem from a dispute which results from the interpretation or application of the provisions of the Mining Code to the extent that it is part of a series of retaliatory actions by the DRC against the Claimants. Accordingly, the Claimants submit that the requested measures are necessary to avoid aggravating the dispute. In particular, they fear that the DRC will use this judgement to take enforcement measures on COMISA's assets and thus take ownership of them.⁷⁹
110. A more detailed reading of the March 12, 2010 judgement provides the following information about the context of the dispute:

In its request to the *Tribunal de commerce*, SODIMICO claimed that FQM deceived it by causing it to believe that FQM was seeking a partnership with it in order to obtain from SODIMICO information resulting from geological and mineralogical research conducted by SODIMICO relating to the LONSHI deposit. Once this information was obtained, FQM allegedly suddenly abandoned its idea of a partnership and, through COMISA, took the necessary steps to be able to exploit the deposit itself. Accordingly, SODIMICO was allegedly deceived and suffered serious harm due to the loss of the information it provided. SODIMICO is therefore asking for compensation for the over US\$67 million worth of damage caused thereby.

Without being able to clearly determine on what evidence the *Tribunal de commerce* based itself and notwithstanding an intervention by the DRC's *Ministère Public* in favour of FQM and COMISA, the *Tribunal de commerce* held that:

[Translation]

"[...] *the disputed deposit in fact actually belonged to [SODIMICO] and [COMISA], the Congolese subsidiary of [FQM] [...] only acquired it at the exploitation stage. What is therefore clear is that it had to use the results of geological and mining research [illegible word] in [SODIMICO]'s exclusive exploration zones.*

It is therefore in order for the Tribunal to solidarily order [COMISA] and [FQM] to pay as principal US\$17,325,435,00 [...], the price of the information relating to the geological and mining exploration conducted in the exclusive exploration zones which belonged to it, considering its lack of evidence to the contrary, and damages grossed up ex æquo et bono to US\$40,000.000.00 [...]."

111. COMISA and FQM appealed this decision and a hearing should take place on October 21, 2011. However, we do not know when a decision will be handed down and it is also difficult to anticipate the amount of time such a decision will take. What is not contested is that, in the meantime, the March 12, 2010 judgement is not enforceable.⁸⁰ What the Claimants are asking for is therefore – according to them – a “preventive measure” to avoid having to return before the Arbitration Tribunal in the event the appeal confirms the judgement.⁸¹
112. It therefore appears from the March 12, 2010 judgement that, although it involves a matter involving parties who are not identical to the Parties to this proceeding, it is based on circumstances closely related to this case. The issue of whether this relationship is close enough to consider that the requested measures relating thereto fall within the jurisdiction of the Arbitration Tribunal can nonetheless remain open at this stage.

Respondent dated June 15, 2011; Observations, p. 57 para. 160; Rejoinder, pp. 43-44 para. 130-133.

⁷⁹ Cf. September 8 transcript, p. 44 l. 8-27, September 9 transcript, p. 21 l. 37 – p. 24 l. 21; Request, pp. 85-86 para. 260-265; Reply, p. 46 para. 180-183.

⁸⁰ Cf. September 8 transcript, p. 44 l. 19-20, p. 85 l. 37 – p. 86 l. 3;

⁸¹ Cf. September 8 transcript, p. 44 l. 21.

Procedural Order No. 3

As it has been established and is not challenged that the March 12, 2010 judgement is currently in appeal and that it is therefore not enforceable, the requested measure does not seem either necessary or urgent. Its purpose is to anticipate and prevent potential and future harm, which is inadmissible under Article 47 of the ICSID Convention and Rule 39.

However, if this harm were to occur, it would appear warranted to give the Claimants the possibility of re-submitting their request for provisional measures.

113. **Accordingly**, the requested measure is denied, although the Claimants will retain the right to re-submit their request at a later date.

4. The other administrative proceedings

114. Under this heading, the Claimants are asking the Arbitration Tribunal for:

[Translation]

“(h) an order to preserve the status quo by enjoining the DRC, directly or indirectly through any entity it controls, to take all necessary measures and carry out all required actions to stay or cause to be stayed the enforcement of the Tax Payment Orders (as defined below) and prohibiting the DRC from enforcing any other similar order or taking any other measure, including of a fiscal nature, against the Claimants or any other entity of the FOM group of companies that could aggravate or extend the dispute, until the Tribunal has issued a final award in the instant case;”

115. The Claimants therefore ask that the recommendation issued in this regard in Procedural Order No. 1 be maintained.⁸² They submit that these measures are necessary to avoid aggravating the dispute and ensure the proper conduct of the arbitration; without them, the DRC could put more pressure on FRONTIER and COMISA, which would aggravate the dispute even further.⁸³ The Claimants’ request is therefore broadly based on the principle of maintaining the *status quo* and non-aggravation of the dispute.

116. The Respondent’s position is somewhat ambiguous. In its request for an interim order, the Respondent had agreed to order the stay of these proceedings until the order concerning the Application was issued.⁸⁴ As for the issue of whether it should be recommended that it maintain the stay of these proceedings, its conclusions were unclear:

- (i) In its Observations, due to insufficient information with respect to the state of these proceedings, the Respondent merely observed preliminarily that [Translation] *“the Mining Code does not give immunity (including in income and payroll tax matters) to mining companies, so that, unless the illicit or fraudulent nature of the current recovery proceedings before the stay ordered by the DRC with the consent of the Arbitration Tribunal is proven, we do not see on what basis they should be stayed by the order to be handed down”*;
- (ii) In its Rejoinder, as well as at the hearing on September 8 and 9, 2011, as it had still been unable to obtain additional information, the Respondent – through its Counsel – declared that it would [Translation] *“defer to the Arbitration Tribunal”* with respect to the outcome of that request⁸⁵;

⁸² Cf. September 8 transcript, p. 45 l. 31-39.

⁸³ Request, pp. 85-86 para. 260-265.

⁸⁴ Reply, p. 58 para. 163 and Exhibit R-42.

⁸⁵ Rejoinder, pp. 44-45 para. 134-135; cf. September 8 transcript, p. 87 l. 22, p. 91 l. 28-35; cf. September 9 transcript,

Procedural Order No. 3

- (iii) Despite several appeals for the missing information, Counsel for the Respondent said that it was unable to provide it and deferred to the Arbitration Tribunal.⁸⁶

In short, the Respondent is aware that it was unable to provide sufficient information to support its dismissal request, which is why it said that it would defer to the Arbitration Tribunal. However, it appears from the statements of Counsel for the Respondent that its position is the equivalent of a request that the measures sought be dismissed.⁸⁷

117. The first issue is whether the object of the measures sought falls within the sphere of the Arbitration Tribunal's *prima facie* jurisdiction. If so, it must be determined whether the conditions for granting the requested measures have been met.
118. The jurisdiction of the Arbitration Tribunal is based primarily on Article 319 of the Mining Code, which submits to arbitration disputes "*which might result from the interpretation or application of the provisions of the present Code*" (cf. above, para. 37). The issue is therefore whether the income and payroll taxes in question can be considered *prima facie* as stemming from the interpretation or application of certain provisions of the Mining Code.
119. There is no doubt that the income and payroll taxes in question levied by the Congolese authorities are directly related to the mining activities exercised by the Claimants pursuant to their rights arising out of the Mining Code. The issue is therefore whether this relationship is sufficient to consider that the Arbitration Tribunal's [jurisdiction] to decide disputes relating to the exercise of rights stemming from the Mining Code also extends to disputes relating to administrative obligations stemming from these rights. *Prima facie* it seems that the scope of the Mining Code is very broad and that the issues covered by it are many and diverse. The provisions of the Mining Code go well beyond mere issues of granting and the validity of mining rights and cover all sorts of situations relating to the exploitation of mines and quarries. Accordingly, it is not, *prima facie* at any rate, excluded that the jurisdiction of the Arbitration Tribunal stemming from the Mining Code also extends to the object of administrative procedures.
120. As mentioned above (cf. para 40 ff), for the Arbitration Tribunal to be able to grant provisional measures, the Claimants must establish the *prima facie* existence of the right to be protected, that the requested measures are necessary and urgent to protect that right and that the granting of the measures would not prejudice the merits of the dispute.
121. In the instant case, the right to be protected is, according to the Claimants, the right to the maintaining of the *status quo* and the protection of the integrity of the arbitration. There is no doubt that this right exists. It remains to be seen whether the measures sought are necessary to protect that right. In this regard, it should be noted that the payment of the income and payroll taxes constitutes a significant financial burden for the Claimants. However, that is not in and of itself sufficient to conclude that the recovery measures should be suspended. This could only be the case if we admit that the income and payroll taxes levied by the Congolese authorities form part – as the Claimants assert – of a series of retaliatory measures taken by the DRC against the Claimants, or are at least being used to unlawfully pressure the Claimants. If these income and payroll taxes are only the result of the legitimate exercise of the State's power pursuant to applicable legal provisions, we do not see how the proceedings for collecting the said income and payroll taxes would jeopardize the integrity of the arbitration. The Arbitration Tribunal considers that, at this stage, it is not in a position to decide this issue due to insufficient information.

p. 55 l. 29 – p. 57 l. 37.

⁸⁶ Cf. Letters from Counsel for the Respondent dated October 3, 2011, October 11, 2011 and November 9, 2011.

⁸⁷ Cf. September 9 transcript, p. 55 l. 32-35 and p. 56 l. 30-34.

Procedural Order No. 3

122. **Accordingly**, the requested measure is denied, but the Arbitration Tribunal nonetheless reserves the right to reconsider its decision in light of future information which may be submitted to it concerning the administrative procedures relating to the income and payroll taxes.

VII. THE REQUESTS RELATING TO NON-AGGRAVATION OF THE DISPUTE

123. The last Request is related to the non-aggravation of the dispute (cf. above, para. 20).

124. Under this heading, the Claimants are asking the Arbitration Tribunal for:

[Translation]

“(h) An order enjoining the DRC to refrain from taking any measure or action that would have the effect of aggravating the dispute including, without limiting the generality of the foregoing, any further retaliatory measures against the Claimants or any other entity of the FQM group of companies until the Tribunal has issued a final award in the instant case.”

125. The purpose of this measure is identical to that solicited by the Claimants in their Request for an interim order. The Arbitration Tribunal dismissed this request through Procedural Order No. 1 dated July 1, 2011, holding that it was [Translation] *“too generally worded to be able to be the object of a recommendation”*. However, the Arbitration Tribunal also recalled that it is a general principle applicable to any party to an arbitration to refrain as far as reasonably possible from any act which could aggravate the dispute.
126. The Claimants did not put forward any new arguments which would justify allowing this request in connection with the Application. As for the Respondent, it maintained its position according to which this measure did not cover any specific or identified risk and was only based on an intention attributed to the DRC.⁸⁸
127. **Accordingly**, the requested measure is denied. The Arbitration Tribunal notes, however, that the principle of non-aggravation of the dispute is a general principle which also applies in this case, and which has been recognized and admitted by both Parties. It therefore encourages them to abide by it.

VIII. COSTS

128. The Claimants did not submit any particular conclusion regarding costs.
129. In its Observations and Rejoinder, the Respondent asked the Arbitration Tribunal to decide [Translation] *“that the issue of costs be deferred to a later stage of the arbitration”* (cf. above, para. 17-19).
130. The Arbitration Tribunal believes that it is in fact premature to decide the issue of costs at this stage of the proceeding.
131. **Accordingly**, the Arbitration Tribunal decides to defer the issue of costs to a later stage of the proceeding.

⁸⁸ Cf. September 8 transcript, p. 87 l. 9-16; September 9 transcript, p. 58 l. 1-6.

Procedural Order No. 3

IX. CONCLUSIONS

132. In view of the foregoing, the Arbitration Tribunal issues the following recommendations and makes the following decisions:

1. With respect to the requests relating to the Permits and Other Mining Rights:

- (i) The Arbitration Tribunal notes that the Respondent officially states that the said licences were cancelled and therefore no longer exist.
- (ii) The Arbitration Tribunal recommends that the Respondent:
 - write a letter to SODIFOR informing it of this dispute and the contestations concerning SODIFOR's rights to the perimeters in question;
 - ask it in that letter to notify such third parties in the event SODIFOR decides to transfer all or part of its title to third parties; and
 - inform the Claimants forthwith in the event it is informed of such a transfer.
- (iii) The Arbitration Tribunal notes that the Respondent officially states that the "Other Mining Rights" exist and are valid, and that the Respondent has no intention of cancelling, transferring or otherwise impairing such rights.
- (iv) The Arbitration Tribunal rejects all the other requested measures relating to the Permits and Other Mining Rights.

2. With respect to the requests relating to the Mining Assets:

- (v) With respect to the Immoveable Assets, the Arbitration Tribunal confirms its recommendation issued in its Procedural Order dated July 1, 2011 concerning the taking of an inventory and encourages both Parties to cooperate so that the said inventory can be taken as quickly as possible. The Arbitration Tribunal also recommends that the Respondent make the necessary requests to SODIFOR and take any useful step to allow the Claimants and their designated employees, agents or sub-contractors access to the perimeters covered by the Permits in order to make safe, preserve and ensure the safekeeping of the Immoveable Assets, including through an agent or sub-contractor of FRONTIER and COMISA, such as a security company, until the Tribunal has issued a final award in the instant case. The Respondent is asked to send a copy of its correspondence with SODIFOR in this regard to the Arbitration Tribunal and the Claimants.
- (vi) With respect to the Moveable Assets, the Arbitration Tribunal confirms its recommendation issued in its Procedural Order dated July 1, 2011 concerning the taking of an inventory and asks both Parties to cooperate so that the said inventory can be taken as soon as possible. The Arbitration Tribunal also recommends that the Respondent make the necessary requests of SODIFOR and take any useful measure to give the Claimants and their designated employees, agents or sub-contractors access to the perimeters covered by the Permits so they can repossess them and remove all the Moveable Assets from the perimeters. The Respondent is asked to send a copy of its correspondence with SODIFOR in this regard to the Arbitration Tribunal and the Claimants.
- (vii) The Arbitration Tribunal rejects all the other requested measures with respect to the Moveable Assets.

Procedural Order No. 3

3. With respect to the stay of the enforcement proceedings:

- (viii) With respect to the May 14, 2010 judgement, the Arbitration Tribunal notes that the Respondent officially states that it has been fully executed and that there are no further measures to be taken based on this decision.
- (ix) With respect to the judgment of the *Tribunal de commerce de Lubumbashi* dated March 12, 2010, the requested measure is denied, although the Claimants will retain the right to resubmit their request at a later stage.
- (x) With respect to the other administrative proceedings, the requested measure is denied, although the Arbitration Tribunal reserves the right to revisit its decision in light of future information which may be submitted to it concerning the administrative procedures relating to the income and payroll taxes.

3. With respect to the Request relating to non-aggravation of the dispute:

- (xi) The requested measure is denied as being too general. The Arbitration Tribunal notes, however, that the principle of non aggravation of the dispute is a general principle which also applies to the instant case, which was acknowledged and admitted by both Parties. It therefore encourages them to abide by it.

4. With respect to costs:

- (xii) The decision respecting costs is deferred to a later stage of the proceeding.

[signed] _____
Professor Pierre Tercier

Arbitration Tribunal President

Date: November 28, 2011