INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.
(CLAIMANTS)

and

The Argentine Republic
(RESPONDENT)

(ICSID Case No. ARB/09/1)

DECISION ON PROVISIONAL MEASURES

Members of the Tribunal
Judge Thomas Buergenthal, President
Mr. Henri C. Alvarez Q.C., Arbitrator
Dr. Kamal Hossain, Arbitrator

Secretary of the Tribunal
Mrs. Mercedes Cordido-Freytes de Kurowski

Date of Decision April 8, 2016:

Representing Claimants

Mr. R. Doak Bishop,
Mr. Craig S. Miles,
Mr. Roberto Aguirre Luzi
Ms. Silvia Marchili
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Representing Respondent

As of December 23, 2015:
Dr. Carlos Francisco Balbín
PROCURADOR DEL TESORO DE LA NACIÓN ARGENTINA
Posadas 1641
1112, Buenos Aires
Argentina

Until December 22, 2015:
Dra. Angelina María Esther Abbona
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I. INTRODUCTION

1. This decision addresses an Application for Provisional Measures submitted by Claimants on 29 July 2015 ("Claimants' Application") in respect of criminal complaints made by entities of Respondent against Claimants and their subsidiary, Air Comet, S.A.U. ("Air Comet"), the legal representatives of these companies and their Spanish court-appointed receivers, Claimants' counsel in these proceedings, as well as Claimants' third-party funder, and the criminal investigation commenced by the Office of the Public Prosecutor of Argentina on the basis of these complaints.

II. PROCEDURAL BACKGROUND

2. On 29 July 2015, Claimants submitted their Application.[1]

3. On 30 July 2015, the Tribunal acknowledged receipt of Claimants' Application and invited Respondent to comment on it within eight business days from its receipt of the electronic version of the Spanish translation of this document. The Spanish translation was received from Claimants on 31 July 2015.

4. By communication of the Secretary of the Tribunal dated 3 August 2015, and in accordance with the Tribunal's directions of 30 July 2015, the deadline for the filing of Respondent's response to Claimants' Application was scheduled for 12 August 2015.

5. On 12 August 2015, Respondent filed its Response to Claimants' Application ("Respondent's Response"). In its prayer for relief, Respondent requested that the Tribunal dismiss Claimants' Application and requested leave to submit a decision of the Argentine

[1] This is Claimants' third application for provisional measures. The first request for provisional measures was submitted by Claimants on 12 April 2011 and it was decided by Procedural Order No. 4 dated 3 October 2012. The second request for provisional measures was submitted by Claimants on 26 March 2012 and it was decided by Procedural Order No. 5, dated 3 October 2012.

Federal Court of Appeals and a report filed in the criminal proceedings in Spain against one of Claimants' ultimate shareholders.[2]

6. On 8 September 2015, the Tribunal invited Claimants[3] to (i) file observations on Respondent's request of 12 August 2015, concerning the admissibility of new evidence; and (ii) if they so wished, to submit a reply to Respondent's Response, both by 15 September 2015.

7. On 15 September 2015, Claimants submitted a letter informing the Tribunal of the filing by the Argentine Attorney General of the Treasury (the "Treasury Attorney General") and the head of the Office of the Prosecutor for Economic Crimes and Money Laundering (the "PROCELAC") of a criminal complaint against Claimants, Burford Capital, Ltd. ("Burford"), Air Comet, King & Spalding LLP ("King & Spalding"), and Fargosi & Asociados (the "PROCELAC Complaint"), together with a number of supporting documents.

8. In light of the above, Claimants requested that the Tribunal: (i) grant a 10-day extension of the deadline for the filing of their reply to Respondent's Response and Respondent's request for admissibility of new evidence; (ii) order that Respondent immediately produce a copy of the PROCELAC Complaint (the "Production Request", incorporated into Claimants' Application); and (iii) schedule a hearing on Claimants' Application.

9. On 16 September 2015, the Tribunal informed the Parties that the deadline for the filing of Claimants' response to Respondent's letter of 12 August 2015 was suspended until the Tribunal issued directions on Claimants' Production Request. The Tribunal also

[2] Respondent's Response, ¶ 81. The documents the Respondent sought leave to submit are: "…the decision rendered by the Federal Court of Appeals in Contentious-Administrative Matters of the City of Buenos Aires in the local expropriation proceeding, and the accusation report filed by the Prosecutor's Office in the criminal proceedings pending in Spain for fraudulent concealment of assets and other crimes, which account of the facts and crimes was admitted by Mr. Díaz Ferrán and the other accused parties in such proceeding on July 1, 2015."
[3] The majority of the Tribunal uses the term "Claimants" as it has been defined since the beginning of these proceedings, i.e. Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.

requested that Respondent advise the Tribunal by 18 September 2015 whether and how quickly it could provide a copy of the PROCELAC Complaint to Claimants.

10. Also on 16 September 2015, Respondent informed the Tribunal that "the Argentine Treasury Attorney General's Office has already transmitted to the head of PROCELAC the Tribunal's request for a copy of the PROCELAC Complaint filed by such body, which copy is not in the possession of this representation. Any responses provided by the PROCELAC in this respect will be duly transmitted to the Tribunal."[4]

11. On 23 September 2015, the Tribunal invited (i) Respondent to inform the Tribunal by 25 September 2015, whether it had received any response from the PROCELAC on the Tribunal's request for a copy of the PROCELAC Complaint; and (ii) Claimants to provide a response by 29 September 2015. The Tribunal also confirmed its availability to hold a hearing in Washington, D.C. on 3 and/or 4 November 2015. It further invited the Parties to confirm their availability by 28 September 2015, should the Tribunal determine that a hearing on Claimants' Application was required.

12. On 24 September 2015, Respondent submitted PROCELAC's response on the Tribunal's request for a copy of the PROCELAC Complaint dated 18 September 2015. In its response, the head of PROCELAC indicated that because the PROCELAC Complaint had been filed with the court, pursuant to Article 204 of Argentina's Code of Criminal Procedure (the "ACCP"), no copy of such complaint could be provided.

13. On that same date, both Parties confirmed their availability to hold a hearing on Claimants' Application during 3 and/or 4 November 2015, in Washington, D.C.

14. On 29 September 2015, Claimants submitted their response to Respondent's communication of 24 September 2015.

[4] Respondent's letter dated 16 September 2015, pp. 3-4.

15. On 2 October 2015, the Tribunal acknowledged receipt of the Parties' respective submissions of 24 and 29 September 2015, and took note that the Parties had confirmed their availability on the proposed hearing dates. It further (i) requested that Respondent produce a copy of the PROCELAC Complaint; (ii) requested Claimants to confirm whether their letter of 29 September 2015 constituted their Reply in Claimants' Application or whether they still wished to submit a full Reply; and (iii) requested Claimants to respond to Respondent's request for the admission of the two new documents set out in paragraph 81(c) of Respondent's Response.

16. On 6 October 2015, Claimants submitted their reply to the Tribunal's letter of 2 October 2015, noting that they wished to submit a full Reply, for reasons of expediency, and not opposing the incorporation into the arbitral record of the two new documents set out in paragraph 81(c) of Respondent's Response of 12 August 2015.

17. On that same date, Respondent submitted its reply to the Tribunal's letter of 2 October 2015, reiterating its inability to produce the PROCELAC Complaint and providing details permitting identification of the relevant domestic court to which the PROCELAC Complaint had been submitted.

18. By letter of 8 October 2015, the Tribunal acknowledged receipt of the Parties' respective letters of 6 October 2015. It further acknowledged receipt on 6 October 2015, of the Spanish translation of Claimants' letter of 29 September 2015, and on 7 October 2015, of the English translation of Respondent's letter of 6 October 2015.

19. In the same letter, the Tribunal (i) set deadlines for a second round of written submissions, (ii) scheduled a hearing on Claimants' Application for 3 November 2015, at the seat of the International Centre for Settlement of Investment Disputes (the "Centre") in Washington, D.C. (the "Hearing"), (iii) provided the hearing schedule and related logistics information, and (iv) reminded the Parties that Respondent's share of the sixth advance

payment requested by the Centre on 18 May 2015 remained outstanding. The Tribunal ordered:

(a) Claimants to file a Reply to Claimants' Application by 14 October 2015, with the Spanish translation to follow by 16 October 2015;

(b) Respondent to file its Rejoinder to Claimants' Application, including any comments that it might have with regard to Claimants' letter of 29 September 2015, and/or any other correspondence on this matter, by 23 October 2015, with the English translation to follow by 27 October 2015; and

(c) both Parties to inform the Tribunal and opposing counsel by 16 October 2015, of the names and affiliations of all representatives who will attend the Hearing.

20. In accordance with this schedule, on 14 October 2015, Claimants filed their Reply to Claimants' Application. On 15 October 2015, Claimants filed a corrected version of their Reply to Claimants' Application ("Claimants' Reply"), together with a complete version of the PROCELAC Complaint and related file materials which they had been able to obtain from the court.

21. On 16 October 2015, both Parties submitted their respective lists of participants for the Hearing.

22. On 22 October 2015, Claimants submitted a letter to the Tribunal attaching three public deeds executed by Claimants' court-appointed receivers in Spain, as a new exhibit, Exhibit C-1200.

23. On 23 October 2015, the President of the Tribunal invited Respondent to submit any observations that it might have on Claimants' letter of 22 October 2015, and Exhibit C-1200 attached to it, within two business days from its receipt of the Spanish translation of said

letter. Respondent would then have one business day to provide the English translation of its observations.

24. On that same date, the President of the Tribunal supplemented the Tribunal's directions of 8 October 2015, by providing further logistical instructions to the Parties in preparation for the Hearing.

25. Also on 23 October 2015, Respondent filed its Rejoinder to Claimants' Application ("Respondent's Rejoinder") and Claimants provided a Spanish translation of their letter of 22 October 2015.

26. On 26 October 2015, Claimants provided an English translation of the relevant parts of their Exhibit C-1200, filed with their letter of 22 October 2015.

27. On 27 October 2015, Respondent provided an English translation of its Rejoinder. On that same date, Respondent submitted to the Tribunal a letter with its observations on Claimants' letter of 22 October 2015 and Exhibit C-1200.

28. On 28 October 2015, Respondent provided an English translation of its letter of 27 October 2015.

29. On 3 November 2015, the Tribunal held the Hearing on Claimants' Application in Washington, D.C. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the hearing were:

For the Claimants:

Mr. Guillermo Aguilar Álvarez	King & Spalding
Mr. Roberto Aguirre Luzi	King & Spalding
Mr. R. Doak Bishop	King & Spalding
Ms. Ashley Grubor	King & Spalding
Ms. Silvia Marchili	King & Spalding
Mr. Craig S. Miles	King & Spalding
Ms. Margrete Stevens	King & Spalding

Mr. Diego Fargosi	Estudio Fargosi & Asociados
Mr. Luis Arqued Alsina	Teinver
Mr. Christopher Bogart	Burford Capital
Mr. Mariano Hernández	Air Comet
Mr. Alvaro Martínez	Air Comet

(V.C. from Madrid, Spain):

Mr. Esteban Leccese	King & Spalding
Mr. Jesús Verdes Lezana	Transportes de Cercanías
Mr. Miguel Vilella Barrachina	Transportes de Cercanías
Mr. Edorta Etxarandio	Teinver
Mr. José Carlos González Vázquez	Autobuses Urbanos del Sur
Mr. Ramón Soler Amaro	Autobuses Urbanos del Sur

For Respondent:

Dr. Angelina Abbona	Procuradora del Tesoro
Mr. Horacio Diez	Procuración del Tesoro de la Nación
Mr. Carlos Mihanovich	Procuración del Tesoro de la Nación
Ms. Mariana Lozza	Procuración del Tesoro de la Nación
Mr. Sebastián Green	Procuración del Tesoro de la Nación
Ms. Soledad Romero	Procuración del Tesoro de la Nación
Ms. Magdalena Gasparini	Procuración del Tesoro de la Nación
Mr. Nicolás Duhalde	Procuración del Tesoro de la Nación
Mr. Manuel Dominguez Deluchi	Procuración del Tesoro de la Nación
Mr. Eduardo Barcesat	Asesor
Mr. Gabriel Bottini	Asesor
Mr. Nicolás Sykes	Aerolíneas Argentinas S.A.

III. FACTUAL BACKGROUND[5]

30. On 23 February 2015, the Treasury Attorney General, who has conduct of the arbitration on behalf of Respondent, the Republic of Argentina, submitted a complaint pursuant to Article 177(1) of the Argentine Criminal Code ("ACC") to the office of the Public

[5] The majority of the Tribunal is of the view that a detailed review of the factual background related to the criminal proceedings, which are the cause of Claimants' request for provisional measures, is necessary in order to permit the Parties to know the basis for this decision.

Prosecutor of the Nation (*Procuradora General de la Nación*) against the legal representatives and/or officers or directors of the following companies: Burford, Claimants' third-party funder; the Claimant Teinver S.A.; Air Comet, Claimants' subsidiary; the Claimant Autobuses Urbanos del Sur S.A.; and the Claimant Transportes de Cercanías S.A. (the "TAG Complaint").[6] The TAG Complaint alleged that the parties it named had committed fraud pursuant to Article 174(5) of the ACC. The TAG Complaint stated that the Treasury Attorney General's office had learned of the alleged fraudulent conduct within the context of these arbitration proceedings.

31. At the heart of the TAG Complaint are two agreements: the Credit Assignment Agreement, dated 18 January 2010, between Claimants as the assignors and Air Comet as the assignee of the collection rights that may arise out of Claimants' claim in these proceedings (the "Assignment Agreement"); and the Funding Agreement, dated 14 April 2010, between Claimants and Burford concerning the financing of Claimants' litigation expenses in this arbitration (the "Funding Agreement").[7] The TAG Complaint also referred to the fact that during the course of 2013 the Treasury Attorney General's office had learned that the voluntary insolvency proceedings of Claimants (which had commenced in late 2010 and early 2011) had progressed to liquidation proceedings and been entrusted to the administration of court-appointed receivers.[8] The TAG Complaint goes on to state that as a result of this new judicial occurrence, Respondent had raised, as a new defense to Claimants'

[6] See Exhibit RA-686.
[7] These agreements, respectively Exhibits RA-159 and RA-160, were addressed in the Tribunal's Decision on Jurisdiction of 21 December 2012.
[8] As recorded in the Decision on Jurisdiction, Air Comet commenced voluntary insolvency proceedings on 20 April 2010 and on 22 December 2010, the Spanish court supervising its insolvency suspended Air Comet's powers of administration. The Claimants subsequently commenced voluntary insolvency proceedings on 22 December 2010 (Teinver S.A.), 28 January 2011 (Autobuses Urbanos del Sur S.A.) and 16 February 2011 (Transportes de Cercanías S.A.). The suspension of the powers of administration and disposition of Claimants and their liquidation proceedings were ordered by the Spanish court on 10 April 2013 (Autobuses Urbanos del Sur S.A.), 29 April 2013 (Transportes de Cercanías S.A.) and 26 April 2013 (Teinver S.A.).

claim in this arbitration, that Claimants' counsel lacked legal standing since the powers of attorney originally granted to them had been terminated by Claimants' insolvency.[9]

32. The TAG Complaint alleges that the Funding Agreement entails a fraud against the groups of creditors of the companies that make up the "Marsans Group", which includes each of Claimants and Air Comet. It alleges that after the signature of the Assignment Agreement, Air Comet commenced voluntary insolvency proceedings a few days after Claimants and Burford executed the Funding Agreement. It also alleges that at the time of the Funding Agreement, Claimants had already planned their voluntary insolvency proceedings at the end of 2010 and the beginning of 2011. As a result of these agreements and conduct, the TAG Complaint alleges that the potential compensation sought in these arbitration proceedings by Claimants was excluded from the insolvency proceedings, which amounts to a fraud on the creditors, which include Respondent by way of its shareholdings in the Argentine Airlines.[10]

33. Although the TAG Complaint does not refer to them in its initial "Purpose" section, the complaint goes on to make allegations involving the court-appointed receivers[11] and counsel for Claimants[12] in its subsequent sections. The TAG Complaint suggested that there

[9] With their reply on the merits, Claimants submitted letters from each of the administrators and receivers for Claimants in which the authors give their names and say they are making an appearance before the Tribunal and make certain declarations. Among the statements made by the receivers is that they ratify all acts performed on behalf of Claimants from the beginning of the arbitration to the date of signature of their letter and they ratify the power of attorney originally granted by each Claimant to counsel. Although the statements were signed by the relevant receivers, they were not dated. In the proceedings before the Tribunal, the Respondent took the position that the letters from the receivers were not in proper form and were not valid documents.

[10] See Exhibit RA-686, pp 6-7.

[11] See TAG Complaint, Exhibit RA-686, pp 4-5, 8. At p 8, the TAG Complaint states that "the trustees in insolvency of the four companies of the "Marsans Group" have taken part (criminal involvement) in the scheme behind the agreement of 14 April 2010, which is considered here as the *corpus delicti*. Indeed, it is not admissible for the trustees in insolvency to consent to an agreement which, as explained above, provides that the payments in favour of the Funder (BURFORD CAPITAL LTD) should be made outside the framework of the insolvency proceedings - thus committing fraud against the estate in insolvency - before any payment is made to any other creditor." **[Exhibit RA-686, p. 11 (Spanish version)]**

[12] Reference is made to Claimants' counsel, King & Spalding LLP, in several places in the TAG Complaint. Amongst others, see Exhibit RA-686, p 6, where the TAG Complaint states that while King & Spalding LLP is not a formal party to the Funding Agreement, it is expressly mentioned as the legal firm in charge of the claim before this Tribunal. It goes on to state that the Funding Agreement entails committing fraud against the respective groups of creditors of the companies that make up the "Marsans Group", which includes Claimants

had been connivance between Claimants, their legal counsel and their funder which affected the creditors in the insolvency proceedings of Claimants and other members of the "Marsans Group" in Spain and Argentina.[13]

34. The TAG Complaint also stated that although the requirements for a completed crime had not yet been satisfied, as there had not yet been a disposition of assets or economic harm, it requested the investigation of the crimes referred to as attempted crimes. It also alleged that the fraudulent conduct it describes was designed to mislead both this Tribunal and the Argentine Republic.

35. The relief contained in the TAG Complaint included, *inter alia*, a request that it be forwarded to the PROCELAC. It also requested that the matter be forwarded to the Federal Criminal Court for the City of Buenos Aires (the "Federal Court") in order for the relevant criminal investigation to be conducted.[14]

36. On 3 March 2015, Respondent wrote to the Tribunal to request leave to submit into the record a copy of the TAG Complaint. The request was made on the basis that the "…criminal complaint is closely intertwined with certain facts at stake in this arbitration and is intended to prevent the Argentine Republic - in the hypothetical case that this tribunal found it must pay compensation - from making a payment to detriment of the legitimate creditors in Claimants' insolvency proceedings. If such were the case, the Argentine Republic would be making a wrong payment and would therefore be forced to pay twice. This will result in an irreparable harm to Argentina."[15]

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in these proceedings and their subsidiary, Air Comet, as the alleged assignee of the claim. The TAG Complaint also alleges that King & Spalding LLP acted without proper authorization or valid powers of attorney and suggests that letters filed by King & Spalding LLP, allegedly on behalf of Claimants' insolvency receivers confirming their authorization of King & Spalding LLP's representation of Claimants, were not in an appropriate form and constituted a case of "document fraud": see Exhibit RA-686, pp 7-8. **[Exhibit RA-686, p. 8 (Spanish version)]**

[13] See Exhibit RA-686, p 9 (English version). **[Exhibit RA-686, p. 12-13 (Spanish version)]**

[14] Exhibit RA-686, p 13 (English version). **[Exhibit RA-686, p. 19 (Spanish version)]**

[15] See Respondent's letter of 3 March 2015, p 1. The letter went on to state that the TAG Complaint referred "…in essence to the agreement entered into between Claimants and Air Comet S.A.U. on 18 January 2010 and

37. On 17 March 2015, Claimants responded to Respondent's letter of 3 March 2015. In their letter, Claimants stated that they had not seen the alleged criminal complaint since a copy had not been provided to them, nor was it publicly available. As a result, Claimants reserved their rights to request production of the document and to request relief from the Tribunal, including provisional measures with a view to preventing Respondent from further aggravating the dispute. Nevertheless, Claimants stated that in the interest of a rapid resolution of the arbitration, they did not object to the submission of the TAG Complaint into the record.[16]

38. In their letter, Claimants went on to make a number of further comments, including the fact that both the Funding Agreement and the Assignment Agreement had previously been addressed before the Tribunal, that both agreements are valid and post-dated Claimants' acquisition and management of the Argentine Airlines and the expropriation of Claimants' investment of 2008. As a result, Claimants stated that the agreements impugned by Respondent were immaterial to both the jurisdiction of the Tribunal and the merits of Claimants' claims.[17]

39. In light of Claimants' position with respect to the submission of the TAG Complaint, the Tribunal granted leave, on 18 March 2015, for the submission of the TAG Complaint.

40. On 13 May 2015, Respondent submitted the TAG Complaint.[18]

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the agreement entered into between Claimants and Burford Capital Ltd on 14 April 2010." Further, the letter stated that the facts in question had been raised before the Tribunal at the hearing on the merits and in subsequent communications and were relevant to the Tribunal's decision. The letter also stated that at the hearing on the merits, the Respondent had brought to the Tribunal's attention that it would file a complaint with the Argentine judicial authorities in respect of the potential commission of a crime.

[16] See Claimants' letter of 17 March 2015.

[17] See Claimants' letter of 17 March 2015, pp 2-3. The Claimants went on to suggest that the motive for the filing of the TAG Complaint was for political reasons and was not related to any issue of substance nor based on a legitimate motive relating to the merits of the arbitration: see pp 3-4.

[18] See Respondent's letter of 13 May 2015. In its letter accompanying the TAG Complaint, the Respondent contested a number of statements made by Claimants in their letter of 17 March 2015 and made reference to the obligation to file criminal complaints in connection with what it referred to as the deceitful or fraudulent operations relating to the management of the Argentine Airlines. In this regard, it referred to a criminal

41. On 29 July 2015, Claimants submitted their Application. In their Application, Claimants alleged that Respondent had recently:

> - Threatened criminal prosecution against Claimants' and Air Comet, S.A.U. ("Air Comet")'s legal representatives for their participation in this arbitration, including the execution of the Assignment and Funding Agreements;
> - Threatened King & Spalding with criminal prosecution for its role in representing Claimants in this arbitration;
> - Threatened Burford Capital Limited ("Burford"), the capital provider in this arbitration under arrangements repeatedly recognized by the competent Spanish courts, and Burford's directors personally with criminal prosecution;
> - Issued a formal Petition for Investigation in that regard necessitating the retention of Argentine criminal defense counsel and interfering with freedom of travel to Argentina;
> - Summoned its Attorney General before a domestic criminal court to answer preliminary accusations of failing to discharge her obligations by not earlier investigating Claimants; and
> - Engineered media coverage about this matter, including a particularly inflammatory article labelling King & Spalding and Burford as a "fraudulent ring" and calling Claimants' submissions to this Tribunal the product of a "vultures and crows committee."[19]

In addition, Claimants submitted that the Tribunal had previously ordered, on a number of occasions, that the Parties refrain from taking any steps that would aggravate or extend the dispute and that Respondent's conduct violated those previous orders and warranted immediate relief.[20]

42. In their Application, Claimants went on to respond to Respondent's allegations, including those relating to the Funding Agreement and the Assignment Agreement, as well as counsel's authority to represent Claimants in this arbitration. In respect of the latter,

investigation commenced in October 2002 in connection with the alleged commission of the crime of fraudulent administration of the Argentine Airlines, amongst other legal proceedings.

[19] Claimants' Application, pp 1-2 (footnotes omitted).

[20] Claimants' Application, pp 2-3. In this regard, Claimants referred to the following: Procedural Order No. 2; Tribunal's letter of 13 May 2011; Tribunal's letter of 1 April 2012; Procedural Order No. 4; and Procedural Order No. 5.

Claimants explained that after the commencement of Claimants' voluntary insolvency proceedings in late 2010 and early 2011, the court-appointed administrators had, in April 2013, taken over the administration of Claimants' affairs and since then had been giving instructions to counsel for Claimants in their capacity as court-appointed insolvency receivers or trustees.[21] Claimants' Application went on to contest that there was any basis for the allegations set out in the TAG Complaint. Claimants also alleged that an article which had appeared in the Argentine newspaper, *Página 12*, on 12 April 2015, reflected that it had received direct access to information that is a part of a confidential criminal investigation and in evidence in this arbitration. Claimants alleged that access had been obtained from Respondent and requested an order directing Respondent to refrain from further aggravating the dispute by disclosing details regarding the arbitration to the press.

43. Claimants went on to allege that they were entitled to provisional measures on the basis that Respondent had caused them irreparable harm that would not adequately be repaired by an award of damages. They also asserted that Respondent's conduct reflected that it had no intention of complying with an eventual award in these proceedings and that Respondent's conduct violated Articles 26 and 53 of the ICSID Convention and constituted a new breach of its treaty obligations.[22]

44. In their request for relief, Claimants requested provisional measures:

> (i) Enjoining Argentina from aggravating the dispute between the Parties;
>
> (ii) Ordering Argentina to refrain from altering the *status quo*;
>
> (iii) Ordering Argentina to refrain from harassing Claimants through baseless domestic litigation and unlawful resort to the media; and
>
> (iv) Ordering Argentina to cease and desist from its criminal investigation, which violates Article 26 of the ICSID Convention.[23]

[21] Claimants' Application, pp 4-5. These facts and the related issues were covered in considerable detail in evidence and argument at the hearing on the merits and in the Parties' submissions.
[22] Claimants' Application, p 14. The Claimants went on to submit that this conduct further supported their request for the payment of compound interest on any amounts awarded to them until full payment.
[23] Claimants' Application, pp 16-17.

45. On 12 August 2015, Respondent submitted its Response to Claimants' Third Application for Provisional Measures (the "Respondent's Response"). In its Response, Respondent reviewed the requirements for the granting of provisional measures and submitted that Claimants had failed to meet at least three of the five requirements for the granting of such measures.[24]

46. Among the requirements which Respondent said Claimants had not met, was the requirement of a right to be protected in connection with this arbitration. In this regard, Respondent noted that in their Application, Claimants had stated that the allegations raised in the TAG Complaint would have no effect on the ultimate outcome of the arbitration.[25] Respondent went on to cite a number of arbitral awards holding that the rights to be preserved in a request for interim measures must relate to the requesting party's ability to have its claims and requests for relief in the arbitration fairly considered and determined and for any award granted to be effective and capable of being enforced. Respondent submitted that, in this case, the TAG Complaint would not impair Claimants' right to have their claims heard and determined by the Tribunal given the current stage of the proceedings.

47. Further, Respondent submitted that although the facts in the TAG Complaint at issue are related to these arbitration proceedings, this did not permit an inference that the exclusivity of the arbitration proceedings under Article 26 of ICSID Convention, or the rights of Claimants under Article 53 of the ICSID Convention are in jeopardy. In this regard, Respondent referred to ICSID awards which had held that the exclusivity of ICSID proceedings does not extend to criminal proceedings.[26]

48. Respondent went on to submit that the TAG Complaint did not give rise to a risk of irreparable harm to Claimants and that the latter had failed to specify which right related to

[24] Respondent's Response, pp 3-5. The Respondent noted that Claimants had requested provisional measures on two previous occasions and that the measures had been denied by the Tribunal.
[25] Respondent's Response, pp 5-6.
[26] Respondent's Response, pp 6-8 and sources cited there.

the arbitration might be threatened by the TAG Complaint. It also submitted that the making of a criminal complaint was a sovereign act relating to criminal liability of individuals who were outside the scope of the Tribunal's jurisdiction.

49. Respondent also referred to Article 177(1) of the ACC which, in its view, had required the Treasury Attorney General to make the TAG Complaint. Respondent also submitted that the TAG Complaint had been made to the PROCELAC which was now responsible for assessing whether a preliminary investigation should be commenced and that it was only upon completion of its assessment that the office of the Public Prosecutor would determine, in its own discretion, whether to implement any relevant measures and conduct a preliminary investigation. According to Respondent, it was only upon completion of that investigation that, in the event that there was sufficient evidence, the TAG Complaint would be referred to the relevant judicial authorities.[27]

50. Respondent also went on to point out that in the event that the Argentine judicial authorities determined that there was a sufficient basis to initiate a criminal investigation, then the Argentine Constitution and legal system provided abundant guarantees of the accused's procedural rights.

51. In addition, Respondent submitted that there was no urgency to justify the granting of provisional measures. In this regard, Respondent submitted that if the TAG Complaint gave rise to the commencement of a criminal proceeding, this would not amount to a case of urgency since the procedure would take time. Respondent submitted that whatever the result, the decision in the criminal proceedings would not be issued before the Tribunal rendered its final award in this arbitration.[28]

[27] Respondent's Response, pp 13-15.
[28] Respondent's Response, pp 23-25.

52. In its request for relief, Respondent requested that Claimants' Application be dismissed with costs.[29]

53. On 14 September 2015, the general prosecutor in charge of the PROCELAC, Mr. Carlos Gonella, filed the PROCELAC Complaint before the Federal Appeals Chamber against all of the parties named in the TAG Complaint as well as Claimants' counsel in this arbitration, King & Spalding and Fargosi & Asociados, and all of the court-appointed receivers in the insolvencies of Claimants and Air Comet for fraud pursuant to Article 174(5) of ACC. In addition, a complaint pursuant to Article 1 of Law 14,034, for promoting political or economic sanctions against the State, was made against all of those persons involved in the alleged fraud who were Argentine citizens. The filing of the PROCELAC Complaint was announced at a joint, televised press conference held by the Treasury Attorney General and the head of PROCELAC on the same day.

54. The filing of the PROCELAC Complaint by the PROCELAC and the press conference were brought to the Tribunal's attention by way of Claimants' letter to the Tribunal of 15 September 2015.[30]

55. In their letter to the Tribunal, Claimants alleged that the PROCELAC Complaint had personally named the individual lawyers representing Claimants and was an attempt to use domestic criminal laws to circumvent the arbitration and put pressure on Claimants, their funder and their lawyers to drop the claims in this arbitration. Claimants also submitted that

[29] Respondent's Response, pp 26-27. In addition, the Respondent sought leave to submit the decision of the Federal Court of Appeals in Contentious-Administrative Matters of the City of Buenos Aires in the local expropriation proceeding and a copy of the report of the Spanish prosecutor's office in respect of the fraudulent concealment of assets and other crimes alleged against Mr. Díaz Ferrán, one of the ultimate shareholders of Claimants.

[30] See Claimants' letter of 15 September 2015 together with attachments consisting of: an extract from the PROCELAC website which contained a video of the press conference; a notice published by the PROCELAC; various press articles which had reported on the Criminal Complaint and press conference; and a copy of the presentation slides used by the Treasury Attorney General and the head of PROCELAC at the press conference. The slides set out the corporate organization of Claimants and their holdings in the Argentine Airlines, the relationships between counsel, Claimants and Burford, relevant provisions of Articles 172 and 174 of the ACC and the relevant article of Law 14,034.

contrary to Respondent's Response, the head of PROCELAC had indicated that the case would move quickly such that a decision could be expected within three months.[31] In light of the new criminal complaint (the PROCELAC Complaint) and press conference, Claimants requested an extension of the deadline to file their Reply on their Application and a hearing on the matter.

56. As described previously, the Tribunal extended the deadline for Claimants' Reply and requested that Respondent advise it as to whether and how quickly it could provide a copy of the PROCELAC Complaint to Claimants. In its response of 16 September 2015, Respondent advised that it did not have a copy of the PROCELAC Complaint and had forwarded a copy of the Tribunal's request to the PROCELAC.

57. On 24 September 2015, Respondent advised that it had been advised by the PROCELAC that since the PROCELAC Complaint had been filed with the court, pursuant to Article 204 of the ACC no copy of the PROCELAC Complaint could be provided. Respondent attached to its letter a copy of the PROCELAC's response to that effect.[32]

58. On 29 September 2015, Claimants wrote to the Tribunal to request that Respondent produce a copy of the PROCELAC Complaint and order Respondent to, amongst other things, suspend the criminal complaints (the TAG Complaint and the PROCELAC Complaint, together referred to as the "Complaints") and to stop what it said was Respondent's unlawful conduct.[33]

59. On 2 October 2015, the Tribunal requested that Respondent provide a copy of the PROCELAC Complaint and set deadlines for the submission of Claimants' Reply and Respondent's Rejoinder.

[31] See Claimants' letter of 15 September 2015, pp 2-3 and the sources cited there.
[32] See Respondent's letter of 24 September 2015 and PROCELAC's note of 23 September 2015.
[33] See Claimants' letter of 29 September 2015. In their letter, Claimants provided further information and detail regarding the Criminal Complaint as well as argument in support of Claimants' Application. The Claimants also provided a copy of the transcript of the press conference of 14 September 2015.

60. On 6 October 2015, Claimants wrote to the Tribunal to advise that they ~~had been~~might be able to obtain a copy of the PROCELAC Complaint which they would file with their Reply.

61. On 13 October 2015, Mr. Marijuan, the Federal Prosecutor in the Public Prosecutor's office to whom the matter had been assigned, issued a Request for Letters Rogatory addressed to the appropriate court of first instance in the city of Washington D.C., requesting certified copies of the record in this arbitration.[34]

[34] See copy and translation of the Request for Letters Rogatory issued by Federal Prosecutor Marijuan, Exhibit C-1215. The Request states that it attaches a copy of the PROCELAC Complaint which it states was filed on 14 September 2015. The Request states, in part, as follows:

> Through said complaint, [the Prosecutor in charge of the PROCELAC] requested the investigation of the alleged fraudulent maneuvers carried out against the Argentine state by the legal representatives, officers and executives of the companies "Burford Capital Ltd.", "Teinver S.L.", "Air Comet S.A.U.", "Auto Urbanos del Sur S.A.", and "Transportes de Cercanías S.A.". In this respect, it is hereby made known that the procedural subject matter of the investigation referred hereto are different maneuvers in relation to a series of agreements entered into by the above mentioned companies, and the submission of certain documentational allegedly apocryphal before the International Centre for Settlement of Investment Disputes (ICSID), aiming at the misappropriation of funds arising from a possible conviction against the Argentine republic under the arbitration process filed before the above mentioned organization, pursuant to the expropriation of the controlling capital stock of the companies "Aerolineas Argentinas S.A." and "Austral Líneas Aéreas S.A.". Said maneuvers would aim at prejudicing those creditors in the bankruptcy proceedings of the companies' claimant before the ICSID; which proceedings are filed before the Kingdom of Spain; and which, at the same time, would prejudice public funds, as the State could end up paying a compensation amounting to USD 1,036,200,000 to those who would not be the legitimate creditors thereof, being potentially exposed to the risk of being forced to pay for such compensation twice.
>
> Having said that, and in order to set a legal framework to the Request herein, I make known that based on the records appearing on the case file, King & Spalding law firm - legal representative of the companies' claimant before the ICSID - would have submitted invalid documents in the arbitration proceedings to certify its legal capacity, in an attempt to lead the Arbitration Court to error, thus making an award that would oblige the Argentine state to make a payment to the detriment of itself and of the creditors of the failed companies.

62. On 14 October 2015, Claimants submitted their Reply. Claimants attached a copy of the PROCELAC Complaint dated 14 September 2015, which they were able to obtain on October 9, 2015 in the afternoon.[35]

63. The PROCELAC Complaint is filed by the General Prosecutor in charge of the PROCELAC and the Coordinator of the Bankruptcy and Insolvency Division of PROCELAC. It states that it is a criminal complaint against the legal representatives, executives, and/or directors of Burford, the three Claimants and Air Comet. It also names specifically King & Spalding and each of the individual lawyers as well as a paralegal who have participated in this arbitration as well as the lawyers of Claimants' Argentine counsel's law firm, Fargosi & Asociados. The PROCELAC Complaint also names the insolvency administrators of each of Claimants and Air Comet as well as "any other individual or legal entity that is identified in the course of the investigation that should be carried out due to the crime of fraud against the public administration (Art. 174, subsection 5 of the Criminal Code [Código Penal, C.P.]) and, for those previously identified who are Argentine citizens, for promoting political or economic sanctions against the State (Art. 1, Law 14,034)…".[36]

64. By way of background, the PROCELAC Complaint referred to the TAG Complaint as follows:

> The PTN indicated in its presentation that the persons involved were the legal representatives, executives, or directors of the Burford, Teinver, Air Comet, Autobuses Urbanos and Transportes de Cercanias companies. In addition, it detailed

[35] See Exhibit C-1198. The PROCELAC Complaint itself, produced as part of a larger file with Claimants' Reply, consists of 30 pages and was signed by PROCELAC's General Prosecutor, Mr. Carlos Gonella. It appears to have been received by the Secretariat of the Federal Appeals Court on 14 September 2015 and received by Office No. 9 of the Federal Prosecution Service on 14 September 2015. In addition, it appears that the PROCELAC Complaint was assigned by a federal judge to Federal Criminal Prosecution Office No. 9 on 15 September 2015. Further, the file attached as Exhibit C-1198 also contained a note from Federal Prosecutor Guillermo Fernando Marijuan dated 21 September 2015. As described further below, Prosecutor Marijuan's note, in its description of the Complaints submitted to his office, expressly refers only to the legal representatives, officers and management of Burford, Teinver S.L., Air Comet, Autobuses Urbanos del Sur S.A. and Transportes de Cercanías S.A. According to the Respondent, Prosecutor Marijuan's description of the Complaints narrowed the scope of the investigation which he has undertaken. This is disputed by Claimants and reviewed by the Tribunal in its analysis below, in Section IV.E of this Decision.

[36] See Exhibit C-1198, pp 1-2 (footnotes omitted).

> the maneuver subject to the complaint describing a series of agreements made between the referred to companies and the presentation of certain documentation, possibly apocryphal, to the International Center for the Settlement of Investment Disputes (hereinafter, "ICSID"). All of this, with the purpose of illegally appropriating the sums arising from a possible ruling against the Argentine republic, in the framework of the arbitration that it pursues before the referred to body, arising from the expropriation of the controlling share package of Aerolinas [*sic*] Argentinas S.A. (hereinafter, "**Aerolineas**") and Austral Lineas Areas [*sic*] S.A. (hereinafter "**Austral**").
>
> This maneuver would have the purpose of harming the interests of the creditors in the insolvency liquidation proceedings of the complainant companies before the ICSID – proceedings that they pursue in the Kingdom of Spain, but, in addition, the national public treasury, which may be liable for paying an indemnity that would amount to the sum of **USD 1,036,200,000** to those who would not be its legitimate creditors. To this should be added that, in these circumstances, the Argentine republic would be exposed to the risk of paying the referred to indemnity for a second time.
>
> Specifically, the PTN asserted that "*should the counterclaim not be considered favorably by the ICSID tribunal, it would be an attempt to oblige the Argentine state to make a clearly fraudulent payment to the legitimate creditors, a circumstance that the Argentine state cannot allow."* It also stated that the "*accused are trying, by means of a fraudulent maneuver to avoid the rightful intervention of Spanish justice in the various insolvency procedures in order – by means of a ruse – to induce the Arbitrational tribunal into an error and to thereby obtain an improper benefit.*"
>
> It adds that "*in the case of transferring future sums of money arising from a favorable decision for the complainants in the arbitrational proceedings we would be witnessing a consummated crime when the financial damage to the bankruptcy creditors is verified of the companies identified above*" and that "*added to this would be the damages that the State would undoubtedly experience, if it were to pay a hypothetical indemnity established in a ruling, to those who were not the legitimate creditors, and thereby being exposed to a situation that would involve the principle that states that* ***he who pays badly should pay twice.***"
>
> Along with the complaint, the PTN included a copy of various documents, presentations, and resolutions relating to the file being processed before the ICSID and reports in relation to the universal proceedings being pursued in Spain.[37]

65. As part of its description of the relevant events, the PROCELAC Complaint reviews the corporate structure of Claimants, the amounts of the claim and counter-claim and

[37] Exhibit C-1198, pp 2-4 (emphasis in original). The PROCELAC Complaint also notes that the PROCELAC has received a witness statement from Mr. Eduardo Barcesat, who appeared as counsel on behalf of the Respondent in the arbitral proceedings and that it would request that the office of the Public Prosecutor obtain duly certified copies of the bankruptcy proceedings of Claimants and Air Comet in Spain, copies of all the criminal proceedings registered against the ultimate, personal shareholders of Claimants and certified copies of the ICSID file in these proceedings.

Respondent's defence in this arbitration that Claimants' claim is of a "derived or indirect nature" and refers to Mr. Eduardo Barcesat's witness statement to the effect that Claimants lack capacity to sue since they were "not contracting parties, as defined by Article 25 of the ICSID regulations [*sic*], and that in the application of Article 42, subsection 2 of the same regulations," the provisions of the domestic legal system of the state receiving the investment applied.[38]

66. The PROCELAC Complaint goes on to review the Assignment Agreement and the Funding Agreement and concludes that in the event Respondent were required to make a payment to Claimants pursuant to an award in the arbitration, the claims of the creditors of Claimants would be evaded and Respondent would be exposed to the possibility of having to make a double payment.[39] The PROCELAC Complaint also states that due to the insolvency of Claimants, the powers of attorney authorizing King & Spalding to represent Claimants had become invalid. It also suggests that the letters from the insolvency administrators of Claimants[40] were possibly "apocryphal documents" or signed by the

[38] Exhibit C-1198, pp 12-13. The PROCELAC Complaint goes on to state that Air Comet was the principal, direct shareholder of Interinvest which, in turn, is the parent company of the Argentine Airlines and that the liquidation stage of its insolvency commenced in 2011. The PROCELAC Complaint speculates that this might be why Claimants commenced the arbitration, rather than Air Comet. It goes on to suggest that the object of such a maneuver was to evade the rights of the creditors of Air Comet. The PROCELAC Complaint also goes on to state that although the Respondent had put forward an objection to jurisdiction on the basis of Claimants' lack of ability to sue, the matter had not yet been addressed in the arbitration.

[39] In this regard, the PROCELAC Complaint relies on the witness statement of Mr. Barcesat which it quotes as follows:

> This mechanism consists of an ostensible fraud against the Argentine republic given that were there to be a possible payment in favor of the claimants, the amounts would not be received by the group of creditors of the respective bankruptcy files but rather by Burford Capital LTD… In addition, if the Argentine republic paid incorrectly it would not only be exposed to a double payment, but also to pay the fine that Spanish bankruptcy law applies when a payment is made in favor of a single creditor to the detriment of the rest of the creditors.
>
> …
>
> [T]here is a procedural fraud and it puts the national treasury at risk of having to pay the amount of the award, plus another as a punitive measure in favor of the verified creditors in bankruptcy proceedings in Spain.

See Exhibit C-1198, pp 15-16.

[40] Exhibits C-842, C-843 and C-844.

insolvency administrators in excess of their powers. The PROCELAC Complaint suggests that the letters from the administrators could be either null and void or, perhaps, reflect possible connivance of the insolvency administrators with Claimants in order to evade Claimants' creditors and detrimentally affect Respondent.[41] The PROCELAC Complaint also addressed the question of the immunities provided for under the ICSID Convention, Articles 21 and 22, noting that in the circumstances of this case any protection afforded by these articles would not be an impediment for proceeding with the charges described since these put the public order of Respondent at threat. The PROCELAC Complaint also referred to certain arbitral awards which have held that states have the right and duty to investigate crimes, independent of the existence of an ICSID arbitration.[42]

67. As will be described in the next section, in their Reply, Claimants took into account the contents of the PROCELAC Complaint and responded to Respondent's Response. In addition, they repeated and expanded upon the measures requested in their Application.

68. Included in the file that Claimants were able to obtain from the Public Prosecutors' office, was a note signed by the Federal Prosecutor assigned to the PROCELAC Complaint, Mr. Marijuan, acknowledging receipt of the PROCELAC Complaint and notifying it to the Coordinator of the Bankruptcy Division of PROCELAC and requesting the referral of PROCELAC Preliminary Investigation File No. 890. That note reads in relevant part as follows:

[41] Exhibit C-1198, p 17. In addition, the PROCELAC Complaint goes on to state that the authorization by the court in the Air Comet insolvency for Air Comet's insolvency administrators to approve the Funding Agreement was of no effect since, according to it, that agreement as well as the powers of attorney authorizing King & Spalding LLP to represent Claimants should have been authorized by the court in charge of Claimants' insolvencies. See Exhibit C-1198, pp 10-19.

Further on, the PROCELAC Complaint alleges that in order to validate their legal capacity "…representatives of King & Spalding would have included in the case file invalid documents that accredit said capacity, in an attempt to induce the arbitrational tribunal into an error, and in this manner obtain a ruling that obliges the Argentine state to make a payment to its detriment and to the detriment of the creditors, leading to the referred to criminal concept." See Exhibit C-1198, p 23.

[42] Exhibit C-1198, pp 27-28 and the sources cited there.

> I. Received, provide for its entry into the IT system FiscalNet and proceed with the prosecution in accordance with article 196 of the Argentine Procedural Criminal Code.
>
> II. An investigation on the criminal complaint submitted by Dr. Carlos Gonella, Attorney- General and head of the Economic and Money Laundering Attorney- General's Office (PROCELAC), which consists of the alleged fraudulent manoeuvres conducted against the National State by the legal representatives, officers or directors of "Burford Capital LTD", "Teinver S.L.", "Air Comet S.A.U.", "Autobuses Urbanos del Sur S.A." and "Transportes de Cercanías S.A." is being carried out.
> In order to describe the manoeuvres subject to the criminal complaint, several agreements entered into the abovementioned corporations among themselves have been detailed and certain documentation allegedly apocryphal submitted before the International Centre for Settlement of Investment Disputes (ICSID) has been presented. Such manoeuvres have the purpose of obtaining sums resulting from a potential award against the Argentine Republic illegally; all this within the framework of the arbitration conducted before the abovementioned centre for the expropriation of the controlling shares of "Aerolineas Argentinas S.A." and "Austral Líneas Aéreas S.A.".
> Said manoeuvres may have the purpose of damaging the creditors in the bankruptcy proceedings of Claimants before the ICSID - proceedings conducted in the Kingdom of Spain - which, in turn, may also damage the national public treasury, as it may end up paying a compensation of USD 1,036,200,000 to those illegitimate creditors and exposing itself to a risk of having to pay the potential compensation twice.
>
> III. The purpose of this proceeding having been identified, be it notified to the Coordinator of the Bankruptcy Division of the Economic Money Laundering Attorney-General's Office (PROCELAC) and request the referral of the Preliminary Investigation No. 890 and its corresponding documentation.[43]

69. On 22 October 2015, Claimants submitted three public deeds executed in Spain by the court-appointed receivers acting on behalf of Claimants in the various insolvency proceedings in Spain, all before notaries public.[44] In the public deeds, the court-appointed receivers in each of the insolvency proceedings of Claimants deposed to the following:

[43] See Federal Prosecutor Marijuan's note dated 21 September 2015, included in Exhibit C-1198. Although not referred to in Claimants' Reply nor the Respondent's Rejoinder, this note and its interpretation were the object of argument and discussion at the Hearing, as described below.
[44] These were submitted by Claimants as Exhibit C-1200 in these proceedings.

- They confirmed their identity and powers to act on behalf of the respective Claimants in their capacity as court-appointed receivers, and attached evidence of their appointment.[45]

- They confirmed that they executed the letters submitted in these proceedings as Exhibits C-842, C-843 and C-844, which confirmed and ratified the powers of attorney granted to King & Spalding to act as counsel for each of Claimants in the arbitration. They refer to the letters by their exhibit numbers in the arbitration and confirm the dates on which those letters were executed by them.

- They confirmed the terms and effects of the letters filed as Exhibits C-842, C-843 and C-844 and that King & Spalding has acted at all times with valid powers of attorney to represent Claimants in the arbitral proceedings and continue to be in force.

- They confirm they were aware of the PROCELAC criminal investigation and deny fully the allegations made in both the TAG Complaint and PROCELAC Complaint and, in particular, deny that the individuals accused have attempted to defraud Claimants' creditors in the arbitral proceedings or before the Argentine Public Administration.

- They confirm that the Funding Agreement executed by Burford and Claimants is in force and has not been affected by the insolvency proceedings, nor by

[45] Exhibit C-1200 is made up of a series of deeds notarized by notaries public in Spain, which must be read together. Each Claimant is represented in Spain by two court-appointed receivers. In the first deed, one of the court-appointed receivers for each of Claimants made declarations on his own behalf and on behalf of his co-court-appointed receiver. In notarizing this deed, notary public Manuel Gerardo Tarrío Berjano noted that he had not been presented with documents to confirm the representation of the deponents' co-court-appointed receiver and that the notarized deed was subject to the subsequent ratification of those receivers. In a second deed, notary public Tarrío confirms the ratification by two of the other co-court-appointed receivers who appeared personally before him to confirm their ratification. In a third deed, notary public Francisco Regalado Marichalar notarized the ratification of the first deed by the third co-receiver who appeared before him in Bilboa.

the initiation of the liquidation stage or by the current regime of suspension of faculties of the insolvent Claimants.

70. On 23 October 2015, Respondent submitted its Rejoinder.

71. On 27 October 2015, Respondent wrote to the Tribunal to object to the admission of Exhibit C-1200 on the basis that it was untimely and, therefore, inadmissible. While reserving its rights to respond more fully, Respondent noted that the objection to the validity of counsel's powers of attorney had been raised some time ago and that despite this, the notarial deeds from Claimants' court-appointed receivers had only been produced on the eve of the Hearing. Further, and in any event Respondent submitted that the deeds submitted could not cure the deficiencies in the powers of attorney since the deeds did not reflect the intervention of the judge or judges overseeing the relevant insolvency proceedings and did not permit determining in any conclusive manner the dates on which the letters identified as Exhibits C-842, C-843 and C-844 had been issued.

IV. THE POSITION OF THE PARTIES ON THE CLAIMANTS' APPLICATION

A. Claimants' Application

72. At the time of filing their Application, Claimants contended as the basis for their request that Respondent had threatened criminal prosecution against them, their representatives, lawyers and their funder. The basis for and scope of Claimants' Application was expanded as events unfolded.

73. In their Application as filed on 29 July 2015, Claimants first identified a series of actions of Respondent that motivated the request. Second, Claimants argued that Respondent's ongoing allegations about improprieties in the Spanish insolvency proceedings were baseless. Third, they addressed Respondent's letter of 13 May 2015, which was said to aggravate the dispute between the Parties and threaten the *status quo* of this arbitration. Fourth, Claimants considered that the TAG Complaint was groundless and made numerous

false statements. Finally, Claimants submitted that Respondent's dissemination of its misleading and groundless accusations to the Argentine media further aggravated the dispute.

74. The actions underlying Claimants' Application were that Respondent had:

- Threatened criminal prosecution against Claimants' and Air Comet's legal representatives for their participation in this arbitration, including the execution of the Assignment Agreement and the Funding Agreement;
- Threatened King & Spalding with criminal prosecution for its role in representing Claimants in this arbitration;
- Threatened Burford, the capital provider in this arbitration under arrangements repeatedly recognized by the competent Spanish courts, and Burford's directors personally with criminal prosecution;
- Issued a formal Petition for Investigation (the TAG Complaint) in that regard necessitating the retention of Argentine criminal defense counsel and interfering with freedom of travel to Argentina;
- Summoned [the Treasury] Attorney General before a domestic criminal court to answer preliminary accusations of failing to discharge its obligations by not earlier investigating Claimants; and
- Engineered media coverage about this matter, including a particularly inflammatory article labelling King & Spalding and Burford as a "fraudulent ring" and calling Claimants' submissions to this Tribunal the product of a "vultures and crows committee."[46]

[46] Claimants' Application, pp. 1-2 (internal citations omitted).

75. In Claimants' view, such conduct violates international law and it is entirely within the powers of the Tribunal to order Respondent to cease and desist from continuing it.[47]

76. Claimants contended that Respondent's actions appear to have a single end: to enable it to mount a smear campaign in front of the Tribunal to attempt to raise some sort of suspicion about Claimants' legitimacy and King & Spalding's authority to represent Claimants in this arbitration.[48] In this regard, they noted that the Funding Agreement's validity and enforceability has been recognized, *inter alia*, in all three of Claimants' respective insolvency proceedings.[49] Moreover, Claimants affirmed that the insolvency proceedings in Spain and all the issues regarding Claimants' assignment of rights to a portion of the proceeds of any award rendered in this arbitration to their subsidiary, Air Comet, have been conducted in strict accordance with the Spanish Bankruptcy Law and in a fully transparent manner. Hence, Respondent's allegations about improprieties in the Spanish insolvency proceedings are baseless.[50]

77. Claimants also asserted that Respondent's letter of 13 May 2015, which had not been authorized by the Tribunal, aggravated the dispute and threatened the *status quo* of the arbitration.[51] Respondent's letter of 13 May 2015 was said to aggravate the dispute in two ways: (i) by continuing Respondent's irrelevant allegations about the legality of the Assignment Agreement and the Funding Agreement; and (ii) by presenting new, improper claims on the merits, that Claimants' underlying investments were illegal.[52]

78. Claimants also submitted that the TAG Complaint is groundless and makes numerous false statements. Claimants argued that, even at face value, the TAG Complaint does not provide the alleged factual basis that would warrant an investigation of a potential fraud

[47] Claimants' Application, p. 2.
[48] Claimants' Application, p. 3.
[49] Claimants' Application, p. 6.
[50] Claimants' Application, pp. 3-7.
[51] Claimants' Application, p. 7. That letter attached a copy of the TAG Complaint filed by the Treasury Attorney General with the PROCELAC.
[52] Claimants' Application, p. 7.

against this Tribunal, the Argentine Republic, its authorities, or any party at all. Rather, it simply describes facts that are well known by this Tribunal, and that the Treasury Attorney General happens to disagree with, including legitimate actions carried out by Claimants during this arbitration, such as the execution of the Assignment Agreement and the Funding Agreement.[53]

79. Claimants also submitted that Respondent had disseminated misleading and groundless accusations to the Argentine media and further aggravated the dispute. Claimants cited a "particularly inflammatory" article labeling King & Spalding and Burford as a "fraudulent ring" and calling Claimants' submissions to this Tribunal the product of a "vultures and crows committee." In Claimants' view, the fact that the article falsely accuses King & Spalding, specifically naming Claimants' counsel, and Burford, provides evidence of "the irreparable damage that the Treasury Attorney General's and the [newspaper's] irresponsible behavior has already *caused.*" On that basis, Claimants requested that the Tribunal order Respondent to refrain from further aggravating this dispute by disclosing any details regarding this arbitration to the press.[54]

80. In their Application, Claimants referred to their previous requests for provisional measures to sustain that the Tribunal has the power under Article 47 of the ICSID Convention and [Article] 39 of the ICSID Arbitration Rules to order provisional measures to ensure compliance with its earlier orders.[55] Further, Claimants relied on a decision of the tribunal in *Quiborax S.A., Non-metallic Minerals S.A. and Alan Fosk Caplún v. Plurinational State of Bolivia*[56] to assert that they are "entitled to provisional measures because, as explained above, Argentina has caused irreparable harm that would not be adequately repaired by an award of damages."[57]

[53] Claimants' Application, p. 8. See also *id.*, pp. 9-11.
[54] Claimants' Application, pp. 12-13.
[55] Claimants' Application, fn. 48.
[56] ICSID Case No. ARB/06/2 ("*Quiborax v. Bolivia*")
[57] Claimants' Application, p. 13-14 and the various sources cited there.

81. Claimants also contended that Respondent's letter of 13 May 2015 and the TAG Complaint improperly attempted to prolong this arbitration and further aggravated the dispute between the Parties in five ways. First, by raising issues that the Parties have already fully briefed and argued at the proper procedural stages and, hence, Respondent should not be allowed to unilaterally initiate a new round of substantive briefing at this late stage. Second, by using the TAG Complaint to make misleading allegations about conduct that, even if true (*quod non*), would not impact the ultimate resolution of this arbitration. Third, by making clear that it has no intention of complying with an eventual award in these proceedings, a declaration which violates Articles 26 and 53 of the ICSID Convention, constitutes a new breach of Argentina's treaty obligations, and further supports Claimants' request for compound interest. Fourth, by threatening the *status quo* by harassing Claimants with domestic litigation. Finally, by irresponsibly leaking or communicating to the press details regarding this arbitration.[58]

B. Respondent's Response

82. Respondent submitted its Response on 12 August 2015.

83. In its Response, Respondent asserted that Claimants' Application failed to meet the requirements of the ICSID Convention and international law for the granting of provisional measures.[59]

84. Respondent submitted that Claimants' Application only identified one of several requirements[60] for the granting of provisional measures, namely irreparable harm, and states

[58] Claimants' Application, pp. 14-16.
[59] Respondent's Response, ¶ 13.
[60] Respondent's Response, ¶¶ 15-16 ("the legal grounds on which an ICSID Tribunal may recommend provisional measures are stated in Article 47 of the ICSID Convention and Arbitration Rule 39, and the relevant requirements have been developed by international case law, to wit: (a) existence of a right to be protected in connection with a main case; (b) danger as a result of delay (emergency); (c) risk of irreparable harm; (d) *prima facie* existence of a basis of competent jurisdiction and admissibility of the claim; and (e) the judgment on the merits must not be anticipated. Said requirements must be met irrespective of the content of the provisional measure required. As stated by the tribunal in *CEMEX v. Venezuela*, even the so called 'principle of non-aggravation' cannot supplant the requirements of Article 47").

some general assertions on the facts supporting Claimants' request. In Respondent's view, Claimants failed to link such facts with the requirements to be met for the granting of such measures and also failed to submit any supporting evidence.[61] Respondent also submitted that Claimants had provided no evidence supporting their assertions that it had threatened Claimants' legal representatives or leaked information regarding the arbitration to the press.[62]

85. On that basis, Respondent submitted that the Tribunal should analyze Claimants' Application on the basis of the TAG Complaint.[63]

86. Respondent then provided an analysis of three out of a total of five requirements which Claimants had failed to prove: (i) the provisional measures sought are intended to protect Claimants' right(s) in connection with their claim before ICSID;[64] (ii) there is risk of irreparable harm for Claimants;[65] and (iii) there is urgency or danger in delay for Claimants.[66]

87. According to Respondent, Claimants had failed to explain the right which is the subject matter of their claim before ICSID whose protection is sought by way of their request for provisional measures. In addition, Claimants state in their Application that the TAG Complaint does not undermine the rights which are the subject matter of their claim in this arbitration.[67] Respondent cites Claimants' Application where it states that "even if they were true (*quod non*) the allegations raised in the [TAG Complaint] would have no effect on the ultimate outcome of this arbitration."[68]

[61] Respondent's Response, ¶ 18.
[62] Respondent's Response, ¶ 19. In addition, the Respondent submitted that since Claimants asserted that it had already caused them irreparable harm, this was now a *fait accompli* and an application seeking a recommendation for provisional measures was pointless. See Respondent's Response, ¶ 18.
[63] Respondent's Response, ¶ 19.
[64] Respondent's Response, ¶¶ 21-31.
[65] Respondent's Response, ¶¶ 32-55.
[66] Respondent's Response, ¶¶ 72-80.
[67] Respondent's Response, ¶ 21.
[68] Respondent's Response, ¶ 21.

88. Respondent also cited a number of decisions by other ICSID tribunals, such as in *Plama Consortium Limited v. Republic of Bulgaria*[69] and *Caratube International Oil Company LLP v. Republic of Kazakhstan*[70], which, according to it, have rejected provisional measures similar to those requested by Claimants here, given the inexistence of a right to be protected in connection with the main case.[71]

89. Further, according to Respondent, the TAG Complaint, upon which Claimants' Application was based, does not impair either the exclusivity of the ICSID arbitration proceeding under Article 26 of the Convention, or the potential use of Article 53. In this regard, Respondent relied on the decisions in *Quiborax v. Bolivia*, *Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*,[72] and *Lao Holdings N.V. v. Lao People's Democratic Republic*[73] to note that although criminal proceedings can be related to an ICSID arbitration, that does not *per se* threaten the exclusivity of the arbitration proceedings under Article 26 of the ICSID Convention. The exclusivity of the ICSID proceedings applies only to investment disputes and, hence, it does not extend to criminal proceedings.[74]

90. With respect to irreparable harm, Respondent submitted that there is no such risk for Claimants because (a) the TAG Complaint does not constitute a risk of irreparable harm,[75] (b) the TAG Complaint was made in compliance with a legal duty,[76] and (c) there are sufficient guarantees of the fairness of any court proceedings which may be commenced.[77]

91. According to Respondent, the petition for a criminal investigation could not be deemed to give rise to a risk of irreparable harm because: a criminal investigation which

[69] ICSID Case No. ARB/03/24 ("*Plama v. Bulgaria*").
[70] ICSID Case No. ARB/08/12 ("*Caratube v. Kazakhastan I*").
[71] Respondent's Response, ¶¶ 23-25 and the sources cited there.
[72] ICSID Case No. ARB/10/2 ("*Convial Callao v. Peru*").
[73] ICSID Case No. ARB(AF)/12/6 ("*Lao Holdings v. Lao*").
[74] Respondent's Response, ¶¶ 26-29.
[75] Respondent's Response, ¶¶ 33-41.
[76] Respondent's Response, ¶¶ 42-55.
[77] Respondent's Response, ¶¶ 56-71.

would normally take years could hardly amount to an impairment considering that all procedural stages have been completed in the arbitration; the Parties and the purpose of this arbitration proceeding are different from those of the criminal investigation; and criminal prosecution is a sovereign act relating to the criminal liability of individuals who, by definition, are outside the scope of the Centre's jurisdiction and the competence of this Tribunal.[78]

92. Further, Respondent submitted that the TAG Complaint was made in compliance with a legal duty. According to Argentina's domestic law, any and all public officers or employees who, in the performance of their duties, may be aware of or become acquainted with the commission of any crime liable to be prosecuted, are under a duty to report such crime, *proprio motu*. The TAG Complaint was made in compliance with this duty imposed upon the Treasury Attorney General's Office and, therefore, upon its public officers and employees. Accordingly, the TAG Complaint had been submitted within the framework of the laws in force, which provide that the independent office of the PROCELAC be the addressee of any complaints in order to assess the commencement of any preliminary investigations in respect of institutionally significant events.[79]

93. Respondent also submitted that in the event the TAG Complaint gave rise to a criminal investigation, the proceeding would be governed, and the individuals affected would be protected, by guarantees afforded by Argentina's National Constitution and the international instruments to which Argentina is a party.[80] Respondent also asserted that in the Spanish legal system there are similar guarantees and recalls that in the criminal proceeding in Spain for concealment of assets, Mr. Díaz Ferrán, together with other accused

[78] Respondent's Response, ¶¶ 33-41.
[79] Respondent's Response, ¶¶ 42-55. The Respondent further noted that the tribunal in the case of *Lao Holdings v. Lao* recognized the government's sovereign right to enforce its criminal laws, the power to pursue a criminal investigation of any acts which may constitute a crime in its own territory, as well as to investigate whether the claimants have made investments in accordance with the legal requirements set forth in the applicable general laws.
[80] Core principles governing the criminal procedure in Argentina include due process of law guarantee, the principles of legality, innocence, and the non-retroactive nature of criminal laws. Respondent's Response, ¶ 59.

parties, pleaded guilty at trial of the crimes attributed to them and they accepted sentences for such offenses. Furthermore, the guarantees of due process and the right to defense in the local expropriation trial were also respected.[81]

94. Finally, Respondent submitted that Claimants had failed to explain the urgency which would justify granting any provisional measures. Whatever the outcome of the TAG Complaint, Respondent submitted that a decision on it would not be issued before the Tribunal renders its final award in this arbitration. Therefore, according to Respondent, there is clearly no urgency or danger in the delay for Claimants.[82] Relying on the decision of the International Court of Justice in the *Asylum Case*, Respondent submitted that the danger of being made subject to an ordinary court proceeding does not constitute a case of urgency, nor does any right exist to request protection against the ordinary action of justice, given that such an action would entail hindering the application of the law, and it would therefore amount to a guarantee of immunity. Therefore, as found in *Caratube v. Kazakhstan I*, no provisional measures which unduly infringe the sovereign right of any State to carry out criminal proceedings should be granted.[83]

C. Claimants' Reply

95. With their Reply, Claimants submitted a copy of the PROCELAC Complaint and modified and expanded their Application in light of it. In their Reply, Claimants covered three principal topics: (i) immunity under the ICSID Convention; (ii) the Complaints; and (iii) Claimants' request for provisional measures.

1. Immunity Under The ICSID Convention

96. Articles 21 and 22 of the ICSID Convention grant immunity against legal process to persons appearing in ICSID arbitration proceedings with respect to acts performed by them

[81] Respondent's Response, ¶¶ 56-71.
[82] Respondent's Response, ¶ 73.
[83] Respondent's Response, ¶¶ 77-80.

in the exercise of their functions. Claimants submitted that this includes them, their representatives and their legal counsel. Claimants relied on the decisions in *Caratube v. Kazakhstan I* and *Libananco Holdings Co. Limited v. Republic of Turkey*[84] and submitted that immunity granted by Articles 21 and 22 of the ICSID Convention is applicable even without a specific order of an ICSID tribunal. According to Claimants, the right and duty to investigate crime cannot mean that by starting a criminal investigation, a State may baulk an ICSID arbitration.[85]

97. Claimants submitted that in the present case, Respondent had initiated criminal investigations into an alleged fraud perpetrated by Claimants and their representatives and agents in this proceeding. According to Claimants, there is no doubt that all of these individuals are "persons appearing in proceedings under this Convention" in the terms of Article 22 of the ICSID Convention. Furthermore, the underlying acts for which these individuals are being investigated are directly related to their participation in this ICSID arbitration, either as Claimants' representatives (*i.e.*, the receivers), funder (Burford) or lawyers and paralegals (members of the law firms King & Spalding and Fargosi & Asociados). Finally, Claimants submitted that the PROCELAC Complaint is based on facts and allegations before this Tribunal. Therefore, all of the acts mentioned in the PROCELAC Complaint are covered by the immunity against legal process under Article 22 of the ICSID Convention and the Tribunal should, therefore, order Respondent to cease and desist its criminal investigations.[86]

2. The Complaints

98. Claimants submitted that Respondent has aggravated the dispute by initiating criminal proceedings against them, their counsel, and their third-party funder on the basis of the arguments and evidence that Respondent has placed before the Tribunal in these arbitral

[84] ICSID Case No. ARB/06/08 ("*Libananco v. Turkey*").
[85] Claimants' Reply, ¶¶ 13, 17.
[86] Claimants' Reply, ¶¶ 18-20. The Claimants also submitted that ICSID tribunals have interpreted the immunities and privileges under Articles 21 and 22 of the ICSID Convention in broad terms.

proceedings.[87] Based on a preliminary review of the PROCELAC Complaint, Claimants noted that it alleges that Claimants, their court-appointed receivers, their funder, their counsel, and any other individual or juridical person that may be identified during the criminal investigation, may have committed two crimes: fraud against the Argentine public administration (Article 174(5) of the ACC), and, pursuant to Law 14,034, the crime of "fostering political or economic sanctions against the State," specifically targeting the Argentine nationals that currently represent Claimants in this arbitration.[88]

99. With respect to the latter, Claimants submitted that if the mere appearance of Argentine nationals as Claimants' counsel is a crime subject to the very severe penalties under Argentine law, then Claimants submitted that their right to pursue their investment claims under the BIT and freely design their legal strategy is unlawfully restricted by Argentine law. According to Claimants, Respondent cannot argue at the same time that Argentine law governs this dispute and also that Claimants are not entitled to be assisted by Argentine lawyers. Hence, Claimants submitted that the Tribunal should adopt the necessary measures to allow them to continue presenting their case in the manner they deem fit, and protecting their right to freely choose counsel in this arbitration and in any ensuing proceedings to enforce a potential award and to preserve the immunity provided in Articles 21 and 22 of the ICSID Convention.[89]

100. Claimants then addressed and contested a number of the allegations that the PROCELAC Complaint contains.[90] They also argued that the allegations of the PROCELAC's prosecutor not only contradict applicable international law, such as the ICSID Convention, but also contradict Argentine law because Law 14,034 should be considered repealed under Argentina's current constitutional regime.[91]

[87] Claimants' Reply, ¶ 22.
[88] Claimants' Reply, ¶ 28.
[89] Claimants' Reply, ¶ 30.
[90] Claimants' Reply, ¶¶ 34-44.
[91] Claimants' Reply, ¶ 31.

101. In sum, according to Claimants, both the TAG Complaint and the PROCELAC Complaint represent an abuse of Argentina's domestic criminal process for the purpose of avoiding the payment of compensation required under international law for the admitted expropriation of Claimants' investment in Argentina. They further represent an attempt to intimidate Claimants, their court-appointed receivers, their attorneys, their funder, and even this Tribunal, to illicitly influence the final award.[92]

3. Claimants' Request For Provisional Measures

102. Claimants asserted that the Tribunal has the power to issue the provisional measures requested and noted that Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules set forth the requirements of an application for provisional measures.[93]

103. Claimants submitted that Article 47 of the ICSID Convention allows the Tribunal to grant provisional measures based on two, and only two, criteria: (a) the "provisional measures should be taken to preserve the rights of either Party;" and (b) the "circumstances must so require it." According to Claimants, the latter standard has been interpreted as meaning that the provisional measures be both "necessary" and "urgent."[94]

104. In particular, Claimants asserted that the requested provisional measures (i) would be taken to preserve Claimants' rights,[95] (ii) are necessary to preserve them and avoid significant harm,[96] and (iii) it is urgent that the Tribunal issue them.[97]

105. With respect to preservation of their rights, Claimants submitted that by launching the criminal proceedings, Respondent was unlawfully seeking to prevent Claimants from pursuing their BIT claim and eventually enforcing this Tribunal's final award. Relying on

[92] Claimants' Reply, ¶ 46.
[93] Claimants' Reply, ¶¶ 47-49.
[94] Claimants' Reply, ¶ 50.
[95] Claimants' Reply, ¶¶ 52-62.
[96] Claimants' Reply, ¶¶ 63-75.
[97] Claimants' Reply, ¶¶ 76-79.

the findings in *Tokios Tokelés v. Ukraine*[98] and *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*,[99] Claimants noted that provisional measures are appropriate to preserve a tribunal's mission to determine finally the issues between the parties and to protect a party from actions that prejudice the implementation of an eventual award. Provisional measures are thus necessary to preserve Claimants' right to access to justice and to enforce their rights under the BIT.[100]

106. According to Claimants, other rights affected by Respondent's criminal accusations include the obstruction of their right to present an effective defense (*i.e.*, without improper interference from Respondent), and Claimants' right to access to legal counsel, both of which have been acknowledged by the *Quiborax v. Bolivia* and *Libananco v. Turkey* tribunals.[101] In addition, the provisional measures are necessary to preserve Claimants' rights to the *status quo* (and restoration thereof) and to the non-aggravation of the dispute. Claimants also submitted that Respondent's conduct increased its damages by way of expenses incurred in relation to the criminal defense in Argentina, reputational moral damages, and further breaches to the fair and equitable treatment standard provided for in the BIT.[102]

107. In respect of irreparable harm, Claimants maintained that there is no stand-alone requirement to prove irreparable harm for granting provisional measures. Referring to the Tribunal's reasons in Procedural Order No. 4, Claimants said that the only requirement is to demonstrate urgency and necessity. In this regard, Claimants submitted that necessity means that provisional measures must be required to avoid harm or prejudice, including harm caused to the integrity of ICSID arbitration proceedings, being inflicted upon the applicant. Claimants noted that the alleged requirement that harm must be "irreparable" is not found in Article 37 of the ICSID Convention or Rule 39 of the ICSID Arbitration Rules and that many

[98] ICSID Case No. ARB/02/18.
[99] ICSID Case No. ARB/06/21 ("*City Oriente v. Ecuador*").
[100] Claimants' Reply, ¶¶ 52-54.
[101] Claimants' Reply, ¶55.
[102] Claimants' Reply, ¶¶ 57-61.

tribunals have found that the harm at risk need only be significant. They also submitted that a number of tribunals have found that a direct relationship between criminal proceedings and an ICSID arbitration may justify the preservation of a claimant's rights in ICSID arbitrations by way of provisional measures.[103]

108. According to Claimants, the provisional measures are necessary to protect their ability to pursue their claims before the Tribunal for the following reasons:

- Respondent's criminal proceedings and the international media campaign it has staged have created an atmosphere designed to hinder Claimants' ability to pursue their claims before the Tribunal by exerting undue pressure on Claimants to desist from the claim, on their counsel to desist from representing their clients in this arbitration, and on their funder, Burford, to cease to provide funds to Claimants.

- If the requested measures are not granted, Respondent may continue to exert such pressure during any future annulment or enforcement proceedings, given that Respondent has stated that the criminal proceedings it has initiated might take years.

- Respondent's measures threaten the *status quo* of the arbitration and threaten to aggravate and extend the dispute. The measures also disregard the immunities provided for in Articles 21 and 22 of the ICSID Convention. The use of Argentina's court system to antagonize the Parties and unduly intimidate Claimants to desist from their complaint in this arbitration is sufficient to demonstrate irreparable harm.

- Respondent's conduct complained of undermines the integrity of the arbitral proceedings, which cannot be compensated by a monetary award.

[103] Claimants' Reply, ¶¶63, 65 and the various sources cited there.

- The criminal proceedings are exclusively based on arguments and submissions made before this Tribunal. In this regard, Respondent is undermining the integrity of the process by having recourse to an alternative forum in violation of Articles 26 and 53 of the ICSID Convention. The criminal investigation against Claimants' counsel and funder are intended to deprive Claimants of the legal expertise and capital required to advance their claims in this arbitration.

- The due process rights of Claimants, their representatives, counsel and funder would be compromised in the domestic criminal proceedings despite Respondent's assurances. In this regard, Claimants' concerns are said to be illustrated by Respondent's refusal to produce a copy of the PROCELAC Complaint when requested to do so by the Tribunal.

- Respondent's statements with respect to the time required for the criminal investigations to take place are not accurate. Within two months of Respondent's Response, the PROCELAC has concluded its investigation and has proceeded to file a complaint with the Public Prosecutor.

- Suspending the criminal proceedings would not disproportionately burden Respondent. While Claimants would suffer irreparable harm if the provisional measures are not granted, Respondent would not incur any meaningful harm. Further, the Spanish creditors in Claimants' insolvency proceedings have no legal basis for a double recovery. Any payment by Respondent would be made pursuant to an award issued by an ICSID tribunal and it is unlikely that the Spanish authorities would consider that Respondent was in breach of any legal obligation for complying with any such award. [104]

[104] Claimants' Reply, ¶¶74-75.

109. On the question of urgency, Claimants argued that, according to ICSID jurisprudence, such as in *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania,*[105] "urgency" simply means that the provisional relief cannot await the outcome of the award on the merits. Claimants state that Respondent's argument that the criminal proceedings will take considerable time assumes that no adverse consequences or harm will arise unless and until the parties investigated are either indicted or convicted. However, the mere fact that the criminal investigation has given rise to a formal complaint before the Argentine courts while Claimants' Application was pending indicates that the granting of interim measures cannot await the issuance of an award on the merits. Claimants submit that contrary to Respondent's characterization of its criminal proceedings, these are not a legitimate exercise of a State's police powers. Rather, the criminal investigation is intended to deprive Claimants of the legal expertise and capital to advance their claims in arbitration and to, ultimately, avoid complying with the final award.[106]

110. Finally, Claimants submitted that this criminal proceeding is not a legitimate exercise of a State's police powers. Rather, the criminal investigation is tailored to deprive Claimants of the legal expertise and capital to advance their claims before this Tribunal and ultimately to avoid complying with the final award.[107]

111. As indicated previously, Claimants modified and extended the scope of the relief requested in their Application. They revised their request for relief to request the award of the following provisional measures:

> (i) confirm that Argentina's conduct is in violation of Article 22 of the ICSID Convention;
>
> (ii) order Argentina to restore the status quo ante by ceasing and desisting the criminal investigation;

[105] ICSID Case No. ARB/05/22 ("*Biwater Gauff v. Tanzania*").
[106] Claimants' Reply, ¶¶76-77.
[107] Claimants' Reply, ¶¶76-79.

> (iii) order Argentina to refrain from further harassing Claimants, their counsel, and their funder through baseless domestic proceedings and unlawful resort to the media;
>
> (iv) enjoin Argentina from otherwise further aggravating the dispute between the Parties;
>
> (v) order Argentina to pay the costs of this provisional measures proceeding;
>
> (vi) order Argentina to pay the cost of Claimants', their representatives', counsel's, and funder's cost of defense in the local criminal proceedings;
>
> (vii) order Argentina to pay Claimants damages for moral and reputational injuries inflicted on their counsel and funder; and
>
> (viii) order Argentina to provide satisfaction to Claimants.
>
> Additionally, if Argentina fails to comply with the Tribunal's order regarding (ii), (iii) and (iv), Claimants request a finding in the final award that Argentina has further violated the Treaty's obligation to afford fair and equitable treatment.[108]

D. Respondent's Rejoinder

112. In its Rejoinder, Respondent repeated its position that Claimants' Application does not meet the requirements for the provisional measures to be granted. In particular, it submitted that (i) the provisional measures requested are not intended to protect a right of Claimants in connection with their claim before ICSID;[109] (ii) there is no risk of irreparable harm for Claimants;[110] and (iii) there is no urgency or danger in the delay for Claimants.[111]

1. There Is No Right Sought To Be Protected In Connection With Claimants' Claim Before ICSID

113. In this regard, Respondent submitted that (1) there is no threat to exclusivity, *status quo*, non-aggravation of the dispute or integrity of the proceeding;[112] and (2) immunity does not mean impunity.[113]

[108] Claimants' Reply, ¶¶ 80-81.
[109] Respondent's Rejoinder, ¶¶ 11-40.
[110] Respondent's Rejoinder, ¶¶ 41-83.
[111] Respondent's Rejoinder, ¶¶ 84-98.
[112] Respondent's Rejoinder, ¶¶ 11-22.
[113] Respondent's Rejoinder, ¶¶ 23-40.

114. Respondent asserted that in their Application, Claimants had failed to identify the rights that are the subject of their claim before ICSID whose protection they seek by way of Claimants' Application. Further, Claimants had stated in their Application that the TAG Complaint challenged by them did not undermine those rights.[114] Without identifying the rights whose protection they sought, Claimants in their Application merely stated that the criminal complaint in question undermined the integrity of the arbitration in violation of Articles 26 and 53 of the ICSID Convention.[115] According to Respondent, Claimants simply state that "Argentina's criminal proceedings do not constitute a legitimate exercise of a State's police powers," but fail to provide any evidence to support their assertion. In this regard, Claimants had failed to meet their burden of proof.[116]

115. In respect of the element of necessity pleaded by Claimants, Respondent maintained that generally stating that a criminal investigation affects the *status quo* aggravates the dispute and undermines the integrity of the proceeding is not sufficient for a provisional measure to be granted.[117] Relying on the decision of the tribunal in *Churchill Mining and Planet Mining Pty Ltd. v. Republic of Indonesia*,[118] Respondent argued that without any concrete element of intimidation, harassment or otherwise abusive behavior, provisional measures cannot be justified. In Respondent's view, Claimants in this case have not met their burden of proof, since merely claiming that being the subject of a criminal investigation is intimidating does not suffice to obtain protection through provisional measures.[119]

116. Finally, Respondent cited the findings of tribunals to the effect that when issuing provisional measures the State's sovereignty should not be unduly encroached.[120]

[114] Respondent's Rejoinder, ¶ 11.
[115] Respondent's Rejoinder, ¶ 12.
[116] Respondent's Rejoinder, ¶ 14.
[117] Respondent's Rejoinder, ¶¶ 15-16.
[118] ICSID Case No. ARB/12/14 and ARB/12/40 ("*Churchill Mining v. Indonesia*").
[119] Respondent's Rejoinder, ¶¶ 16-19 and the sources cited there.
[120] Respondent's Rejoinder, ¶¶ 20-21 and the sources cited there.

117. With regard to the question of immunity, Respondent asserted that the immunity provided for in Articles 21 and 22 of the ICSID Convention is functional, *i.e.*, *ratione materiae*, and not *ratione personae*, as Claimants incorrectly plead in their Reply. Respondent cited the decision of the International Court of Justice in the Case concerning the Arrest Warrant of 11 April 2000 to support its assertion that the invocation of arguments of immunity to obtain impunity cannot be admitted.[121]

118. Respondent distinguished between personal immunity (granted to Heads of State from the jurisdiction of foreign courts while in office) from functional immunity (granted only with respect to specifically identified acts). It then relied on the wording of Article 21 of the ICSID Convention and cited the preparatory work of the Convention where it was noted "that parties would in fact be immune only in respect of acts done before the tribunal as parties to the dispute." Thus, in Respondent's view, the acts of persons appearing in ICSID proceedings that are not performed "in the exercise of their functions" fall outside the scope of the immunities set forth in Article 22 of the ICSID Convention.[122]

119. According to Respondent, the Complaints instituted by the Argentine Treasury Attorney's General Office and PROCELAC are related to the Funding Agreement between Burford and Claimants, as well as to the possible commission of the crime of attempted fraud. It maintained that the subject matter of the Complaints does not relate to an event that took place before the Tribunal. Rather, the TAG Complaint was based on the Funding Agreement, which Respondent discovered during these proceedings and submitted in evidence, and on the exchange of communications between Burford and the court-appointed receivers of Air Comet, which allegedly came to the knowledge of Respondent and was submitted in the arbitration proceedings with the Tribunal's leave in early 2015.[123] Consequently, the subject of the criminal proceedings did not take place before the Tribunal but is, in fact, external to

[121] Respondent's Rejoinder, ¶¶ 2, 24.
[122] Respondent's Rejoinder, ¶¶ 27-29.
[123] Respondent's Rejoinder, ¶ 32 and the source cited there. The Respondent goes on to allege that Claimants attempted to keep these circumstances secret.

these arbitration proceedings. Further, Claimants' reliance on *Caratube v. Kazakhstan I* (concerning witness intimidation) and *Libananco v. Turkey* (where there was a breach of the lawyer-client privilege by intercepting communications between Libananco Holdings Co. Limited and its counsel) is factually inapposite in light of the different circumstances of this case.[124]

120. Finally, Respondent submitted that during the hearing on jurisdiction, Claimants did not claim that there had been violation of immunities, nor question the independence of the Argentine judiciary, when two witnesses (Mr. Díaz Ferrán and Mr. Pascual Arias, the ultimate shareholders of Claimants) reported that they had been summoned before Argentine criminal courts in another investigation. On this basis, Claimants' Application is at odds with their previous position and cannot be accepted because it violates the principle of good faith and more specifically the prohibition of *venire contra factum proprium*.[125]

2. There Is No Risk Of Irreparable Harm For Claimants

121. Respondent contended that (1) the Complaints do not pose a risk of irreparable harm;[126] (2) the Complaints were made in compliance with a legal duty;[127] and (3) court proceedings are sufficiently guaranteed.[128]

122. According to Respondent, the Complaints do not pose a risk of irreparable harm, nor do they jeopardize Claimants' ability to develop their claims before this Tribunal, contrary to Claimants' assertions. Respondent says that Claimants' allegations have not been proved or even alleged on a concrete basis, but are merely generic statements with no supporting documentation or evidence. Further, Respondent said that the Complaints are only the first

[124] Respondent's Rejoinder, ¶¶ 31-36.
[125] Respondent's Rejoinder, ¶¶ 37-39. The Respondent noted that the criminal proceedings in question were at a "… much more advanced stage than the [Complaints] on which the [Application] is based." The criminal investigation in question was stated to be those before National Criminal Court No. 27, Secretariat 124 of the City of Buenos Aires (which appear to have been commenced in 2002 in relation to the alleged […]
[126] Respondent's Rejoinder, ¶¶ 46-57.
[127] Respondent's Rejoinder, ¶¶ 58-65.
[128] Respondent's Rejoinder, ¶¶ 66-83.

step in the beginning of criminal investigations. The investigations themselves are still to be carried out, and the courts have to decide whether there is sufficient merit for the respective criminal cases to continue their course.[129] In Respondent's view, it is not reasonable to seek the suspension of a criminal investigation before the clarification of the events under investigation.

123. Respondent also submitted that provisional measures are, by definition, temporary and meant to cease upon the issuance of the award that settles the dispute. Claimants' submissions appeared to request the issuance of a measure whose effects persist beyond the award, which is clearly inadmissible. Further, Claimants request specific relief on the merits, such as compensation and moral damages, which are not appropriate in an application for provisional measures.[130]

124. With regard to the second defence, Respondent stated that the TAG Complaint was simply aimed at informing the relevant authorities of the possible commission of a crime requiring public prosecution of which it had become aware, and the Public Prosecutor's Office considered that there was sufficient evidence to initiate the appropriate preliminary investigation.[131] Claimants' submission that the legal and factual issues raised in the TAG Complaint are closely related to the issues that have been extensively discussed in this arbitration are opportunistic and contradict Claimants' original position when they first became acquainted with the complaint: "the criminal complaint that Attorney General Abbona filed on February 23, 2015 - whatever its content may be - has nothing to do with the merits of this arbitration."[132] Respondent contended that such criminal proceedings do not affect the exclusivity of the ICSID proceedings under Article 26 of the ICSID Convention.[133]

[129] Respondent's Rejoinder, ¶ 47.
[130] Respondent's Rejoinder, ¶¶ 46-50.
[131] Respondent's Rejoinder, ¶¶ 58-60.
[132] Respondent's Rejoinder, ¶ 62.
[133] Respondent's Rejoinder, ¶ 64.

125. In respect of its third defence, Respondent referred again to the lack of objection by Claimants concerning the criminal proceedings in Argentina involving Messrs. Díaz Ferrán and Pascual Arias and which were referred to during the hearing on jurisdiction and considered this to be sufficient to dismiss Claimants' Application.[134] Further, Respondent submitted that the current status of the PROCELAC Complaint is that it is still within the preliminary investigation stage. Therefore, the investigation into the possible commission of criminal offenses has no impact on the resolution of this arbitration and there is no urgency to justify the issuance of provisional measures.[135]

126. Respondent also reiterated that the criminal proceedings will be based on the guarantees enshrined in the Argentine Constitution and international instruments with constitutional status. Hence, the guarantees to achieve an independent and impartial administration of justice are protected under Argentine law.[136] Finally, according to Respondent, Claimants can rely upon another due process guarantee, which relates to the possibility of resorting to a system of subsidiary protection of rights - the Inter-American system of human rights protection, once all internal avenues of protection of their fundamental rights and freedoms are exhausted, and of obtaining a favorable judgment.[137]

3. There Is No Urgency Or Danger In The Delay For Claimants

127. Respondent submitted that Claimants' conduct in this arbitration confirms that the measures requested are not urgent. Claimants' Application was submitted nearly four months after the TAG Complaint that motivated such requests was filed in February 2015.[138] Respondent also noted that during the proceedings on provisional measures, Claimants requested that deadlines be extended and a hearing be held. Respondent asserted that these

[134] Respondent's Rejoinder, ¶¶ 67-68.
[135] Respondent's Rejoinder, ¶¶ 69-73.
[136] Respondent's Rejoinder, ¶¶ 75-82.
[137] Respondent's Rejoinder, ¶¶ 82-83.
[138] Respondent's Rejoinder, ¶¶ 84, 88.

facts show that the provisional measure requested is not "urgent" for this Tribunal to grant it.[139]

128. Respondent also suggested that Claimants had misrepresented its position by contending that it allegedly stated that the TAG Complaint would not give rise to a "criminal complaint" in the near future. Respondent said that what it asserted was that it was to be expected that a "decision" on the TAG Complaint would not be issued before the Tribunal renders its final award.[140]

129. Finally, Respondent noted that Claimants again referred to the International Court of Justice decision in the *Asylum* case for "the principle that 'urgent cases' do not include the danger of regular prosecution" and stated that Claimants had not demonstrated that the exception to that principle, that arbitrary action had been substituted for the rule of law.[141]

130. Hence, according to Respondent, the measures requested by Claimants do not meet the "urgency" requirement that must be satisfied for a provisional measure to be granted by this Tribunal.

E. The Parties' Oral Submissions

131. In their oral submissions, Claimants clarified and expanded upon their previous written submissions, taking into account Respondent's Rejoinder. By way of overview, Claimants stated that while they recognized that a State has authority to investigate and prosecute real crime, it has no right to abuse its criminal process for an improper purpose such as harassing or intimidating counsel or parties by trying to undermine the integrity of the arbitration and the award.[142]

[139] Respondent's Rejoinder, ¶ 89.
[140] Respondent's Rejoinder, ¶¶ 93-94, 96.
[141] Respondent's Rejoinder, ¶¶ 96-97.
[142] Hearing transcripts ("TR"), p 15.

132. Claimants emphasized what they said are the mistaken premises of the criminal proceedings and the lack of merit of the TAG Complaint, the PROCELAC Complaint and the investigation commenced by the Public Prosecutor. In this regard, Respondent's fundamental premise that it might have to pay Claimants or their creditors twice is false since the creditors have brought no other claims against Argentina and the only form in which they can obtain compensation is through Claimants in this arbitration.[143]

133. Claimants also addressed each of the criminal allegations raised in the Complaints, noting that each of them was intimately linked to the arbitration and matters before the Tribunal. In this regard, Claimants say that the claims against their Argentine counsel for a breach of Article 1 of Law 14,034 were clearly stated in the PROCELAC Complaint to be purely on the basis of their participation as counsel before the Tribunal in these proceedings and would deny Claimants in this case, and in any other case, access to local law expertise and have a chilling effect on the exercise of ICSID arbitration rights in general.[144] Claimants also submitted that Law 14,034 could not have been intended to apply in the circumstances of this case and that pursuing complaints against Claimants' Argentine counsel on this basis constituted a violation of international law, the United Nations Convention on Human Rights and Article 22 of the ICSID Convention, amongst others.

134. With respect to the allegations of fraud contained in the Complaints, Claimants submitted that each of these was based on arguments or evidence before the Tribunal and the subject of its inquiry. In this respect, Claimants say that the PROCELAC Complaint bases one of its allegations of fraud on the fact that Claimants have brought a derived or indirect claim which is inadmissible under the BIT. The PROCELAC Complaint also notes that although Respondent put forward this argument in the arbitration proceedings in the jurisdictional phase, the issue has yet to be resolved "…even though it is an essential point

[143] TR, pp 16-17. The Claimants suggested that the Respondent is not seeking to protect the creditors but, rather, to avoid compensating them.
[144] TR, pp 19, 53-58; PROCELAC Complaint, Exhibit C-1198, pp 22, 24. The Claimants refer to the complaint relating to Law 14,034 as the peace time equivalent of an allegation of treason.

of the allegedly illegal manoeuvre that is intended against the Argentine Republic and the bankruptcy creditors."[145] Claimants point out that this issue was considered and rejected as a basis to the Tribunal's jurisdiction in the Decision on Jurisdiction at paragraphs 208 through 214.

135. With respect to the allegations of fraud based on the Funding Agreement and the Assignment Agreement, Claimants submit that these agreements were found by the Tribunal, in the Decision on Jurisdiction, not to have affected the Tribunal's jurisdiction and were currently before the Tribunal which had received substantial evidence that the agreements in question had been approved by Air Comet's and Claimants' insolvency receivers and approved by the Spanish courts.[146] In addition, Claimants said that the court-appointed receivers have repeatedly confirmed their approval and the continuing validity of the Funding Agreement, most recently in their sworn notarized declarations submitted as Exhibit C-1200.[147] With respect to the Assignment Agreement, Claimants submitted that it clearly only assigned the proceeds of an eventual award to Air Comet, after payment of fees owed to Burford and counsel and did not transfer any claims or right to a claim, which remained with Claimants. They also noted that the Assignment Agreement had been disclosed in the insolvency proceedings and it has not been challenged in any court or by any creditor.[148]

136. Finally, with respect to King & Spalding's authorization to represent Claimants, Claimants submitted that this issue was also squarely before the Tribunal and there was substantial evidence before it in support of the ongoing validity of the relevant powers of attorney, including repeated statements from Claimants' court-appointed receivers.[149]

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[145] TR, pp 39-40, 78-79; PROCELAC Complaint, Exhibit C-1198, pp 11-13.
[146] TR, pp 23, 40-48.
[147] TR, p 46; Claimants' demonstrative slides 34-36.
[148] TR, pp 46-47.
[149] TR, pp 20-22, 48-53; Claimants' demonstrative slides 42-47. Claimants also said that Respondent's suggestion, at Exhibit C-1198, p 23, that "…the legal representatives of King & Spalding would have included in the case file invalid documents that accredit said capacity, in an attempt to induce the arbitral tribunal into error, and in this manner obtain a ruling that obliges the Argentine state to make a payment to its detriment and to the detriment of the creditors, leading to the referred criminal concept…" is completely contradicted by the sworn, notarized statements of Claimants' court-appointed receivers, Exhibit C-1200. The Claimants also

137. With respect to each of these issues, Claimants submitted that they were properly before the Tribunal and that by commencing the criminal proceedings, Respondent was attempting to supersede or impede the Tribunal's determination of these issues, thereby demonstrating that the criminal proceedings relate to the arbitration and violate the principle of exclusivity of ICSID jurisdiction set out in Article 26 of the ICSID Convention.[150]

138. Claimants also submitted that the Complaints and the criminal investigation commenced by the Federal Prosecutor breached a number of their protected rights, including their right to enforce their rights under the BIT through ICSID arbitration conducted fairly and in good faith, the right to the exclusivity provided for in Article 26 of the ICSID Convention, the right to have the Tribunal determine its own jurisdiction and the merits of the case, the right of immunity of counsel, representatives and agents under Article 22 of the ICSID Convention, the preservation of the *status quo* and non-aggravation of the dispute, and the right to an enforceable award under Article 53 of the ICSID Convention. Claimants submitted that all of these rights related to the integrity of the arbitration proceedings, which the Tribunal had the authority to control in its inherent jurisdiction.[151] Claimants also emphasized that Respondent, through the joint press conference held by the Treasury Attorney General and the head of PROCELAC had unnecessarily and improperly publicized the Complaints, thereby aggravating the dispute and harming Claimants, their counsel, their court-appointed receivers and their funder.[152]

139. In their oral submissions, Claimants further developed their claim and relief requested in respect of the immunity provided by Article 22 of the ICSID Convention. In this regard, Claimants submitted that Argentina is bound by Articles 21 and 22 of the ICSID Convention

submitted that the criminal chamber of the Spanish *Audiencia Nacional* of 7 September 2015, Exhibit C-1210, recognized the legal representation of Claimants by King & Spalding in these proceedings.
[150] TR, pp 77-79; Claimants' opening statement slides 61-68, 81.
[151] TR, pp 25-28, 70-79.
[152] TR, pp 26-27, 32-33; PowerPoint presentation used at the press conference and transcript of the press conference. In addition, Claimants emphasized that the press conference had been televised and made accessible on the PROCELAC's website.

and that each of Claimants, their court-appointed receivers, their counsel and their funder were covered by the immunity provided for in Article 22 of the ICSID Convention from legal process, including the Complaints and criminal investigation. Claimants also submitted that the Complaints and the criminal investigation breached Articles 21 and 22 of the ICSID Convention by targeting protected individuals with respect to acts performed by them in the exercise of their functions in pursuit of the arbitration. According to Claimants, Respondent's conduct in pursuing the Complaints and criminal investigation was intended to intimidate and coerce Claimants, their court-appointed receivers, their counsel and their funder and to derail the arbitration and frustrate the enforcement of the final award. This conduct justifies the granting of the provisional measure requested to order Respondent to cease and desist from pursuing the criminal investigation as well as the permanent injunction requested in this regard.

140. In addition, Claimants submitted that they had the legitimate expectation that their BIT arbitration with Respondent would proceed as provided by the ICSID Convention, including the immunity afforded by Articles 21 and 22 of the ICSID Convention. Claimants submitted that Respondent's breach of the expectation, protected by the terms of the BIT, was justiciable as such.[153]

141. Claimants submitted that each of them, their court-appointed receivers, their counsel and their funder[154] were covered by the immunity afforded by Article 22 of the ICSID Convention on the basis of the clear language in that article as "persons appearing in proceedings under [the Convention] as parties, agents, counsel, advocates, witnesses or experts." Further, Claimants submitted that, contrary to Respondent's argument, the

[153] TR, pp 59-60; Claimants' demonstrative slides 57, 69.
[154] With respect to Claimants' funder, Burford, Claimants submitted that as an "agent" of Claimants, it was covered in the same manner as the escrow agent was found to covered by immunity under Article 22 of the ICSID Convention in the tribunal's Decision on Preliminary Issues, dated 23 June 2008, in the *Libananco v. Turkey* case. According to Claimants, they were required to turn to a litigation funder after the Respondent's uncompensated expropriation of their investment in order to permit them to pursue the arbitration. See TR, pp 60-61.

Complaints and criminal investigation specifically targeted acts performed in pursuit of the arbitration and reviewed the criminal offences alleged in the Complaints. According to Claimants, the allegations contained in the Complaints and the subject of the criminal investigation repeatedly refer to this arbitration and matters before the Tribunal, including Respondent's objection to jurisdiction based on an indirect or "derivative" claim, the Funding Agreement which was executed exclusively in pursuit of the arbitration and King & Spalding's authority to represent Claimants in the arbitration.[155]

142. As concerns the relief sought by Claimants, at the Hearing they refined their request as follows:

> As provisional measures:
>
> i. Declare that Argentina has breached the rights to be protected (*e.g.*, Claimants' right to good-faith ICSID arbitration, including immunity under Articles 21/22, preservation of the *status quo*, and non-aggravation of the dispute)
>
> ii. Order Argentina to (a) restore the *status quo ante* by ceasing and desisting the criminal investigation and (b) refrain from further aggravating the dispute
>
> In the final award:
>
> i. Permanently enjoin Argentina from criminally prosecuting Claimants and their representatives, counsel and funder, for actions taken in relation to this Arbitration
>
> ii. Order Argentina to pay the costs of this provisional measures proceeding
>
> iii. Order Argentina to pay the cost of Claimants' and their representatives', counsel's and funder's cost of defense in the local criminal proceedings
>
> iv. Order Argentina to pay Claimants damages for moral and reputational injuries inflicted on their representatives, counsel and funder[156]

143. Further, Claimants explained the relief requested in the following terms:

> So, first, as interim relief, we request that [the Tribunal] make a declaration that Argentina has violated each of the rights at issue… and then, second, as interim

[155] TR, pp 61-67; Claimants' demonstrative slides 60-68.
[156] Claimants' demonstrative slide 99.

> relief, we request that [the Tribunal] order Argentina to cease and desist from the criminal proceedings, and order it, once again, not to further aggravate or extend the dispute until such time as the Tribunal issues its Final Award.
>
> Now, that is all that we are seeking… as immediate, urgent interim relief, and we ask that [the Tribunal] issue an order to that effect as soon as possible.
>
> Now, the remaining requests… can all be deferred and be incorporated into the Final Award. And these include, perhaps most importantly, a request that [the Tribunal] convert the interim injunction into a permanent one that would forever bar Argentina from criminally prosecuting Claimants, their agents, counsel, and funder for actions taken during the course of and in relation to this arbitration for which we had ICSID immunity.
>
> In addition, the Award should include all costs of this Provisional Measures hearing, reimbursement by Argentina of the attorney's fees that Claimants, their representatives, counsel, and funder have incurred in defending against the criminal accusations in Argentina, and damages for moral and reputational injury to Claimants, their representatives, counsel, and funder, and all these additional damages should also include a compound post-Award interest.[157]

144. By way of a general response to the various aspects of the relief requested in Claimants' Application, Respondent submitted that requests for a declaration of a breach of international law and any request for compensation was beyond the appropriate scope of an application for interim measures. According to Respondent, such requests were issues on the merits of an award, and not intended to be addressed in an application for interim measures.[158] In addition, Respondent submitted that Claimants' request that the Tribunal make a finding of a breach of the fair and equitable treatment standard under the BIT in the event that Respondent did not comply with a number of the provisional measures requested was also clearly beyond the scope of an application for interim measures. In this regard, Respondent noted that Claimants were requesting new substantive relief in this arbitration

[157] Claimants' demonstrative slide 99; TR, pp 85-87. The Claimants then went on to provide argument and refer to various decisions in support of both the interim and permanent relief sought. In respect of the remedy of satisfaction, which Claimants had set out in their request for relief in their Reply, they submitted that this was properly due for the various breaches of international law committed by the Respondent, including the breach of the right to immunity under Article 22 of the ICSID Convention, the right to an arbitration conducted in good faith, the right to preservation of the *status quo*, and the right to fair and equitable treatment under the BIT. They went on to state that insofar as the remedy of satisfaction was concerned, Claimants believed that a declaration of the Respondent's breaches would be sufficient remedy: see TR, pp 86-87.
[158] TR, p 152.

and that such new claims cannot be introduced by a claimant after the submission of its reply on the merits without the authorization of the tribunal, which had not been requested or obtained in this case.[159]

145. Respondent repeated its position that there was no factual or legal basis for the provisional measures requested by Claimants.

146. Respondent went on to submit that there were serious indicia in materials before the Tribunal to permit a reasonable suspicion that *prima facie* criminal conduct had occurred to the detriment of the mass of creditors in the Spanish insolvency proceedings affecting Claimants and to the detriment of the interest of Argentina. According to Respondent, the facts and conduct giving rise to this suspicion were completely outside of the realm of the arbitration proceedings and, therefore, were not protected by the immunities provided for in the ICSID Convention.

147. Respondent also addressed the process pursuant to which the Complaints and the criminal investigation would be handled under Argentine law and the due process guarantees afforded by independent courts consistent with constitutional guarantees.

148. Respondent also addressed the principles and rules of international law applicable in this case and Claimants' failure to meet the requirements for the grounding of provisional measures in this case, including the lack of an interest to be protected, the lack of urgency and the failure to demonstrate a risk of irreparable harm.[160]

149. In respect of the reasons which led the office of the Treasury Attorney General to file the TAG Complaint, Respondent stated that the basis for its reasonable suspicion of criminal conduct had been discovered in the arbitration proceedings when it learned that Claimants

[159] TR, pp 153-154. In addition, the Respondent submitted that by requesting relief on the merits and compensation for the breaches alleged by Claimants, the latter had demonstrated that, in fact, any damage or harm that they might suffer was compensable by damages and, therefore, not irreparable.
[160] TR, pp 100-102.

had assigned their right to collect on an eventual favorable award in this arbitration to Air Comet, after deduction of costs for their legal advisors, consultants and experts. Respondent noted that Claimants' funder, Burford, was not a party to this agreement and that Claimants and Air Comet were preparing a scenario conducive to the signing of the Funding Agreement. The Funding Agreement was then entered into, without the participation of Air Comet. Respondent said that pursuant to the terms of the Funding Agreement, Claimants turned to King & Spalding and Burford to take the necessary measures to ensure that the funds recovered in an eventual award in Claimants' favor would be deposited into an escrow account, satisfactory to Burford, located outside the United States. Thereafter, if Claimants receive any award proceeds, these shall be paid immediately to the nominated lawyers or the escrow account from which Claimants and Burford direct that the recovery amount due to Burford shall be paid as soon as practicable and then other outstanding invoices owed to counsel and consultants shall be paid, with the remainder going to Claimants. Respondent submitted that this structure established by the Assignment Agreement and the Funding Agreement was intended to elude the mass of creditors in the various insolvency proceedings affecting the Grupo Marsans, to which Claimants and Air Comet belong. They also noted that Mr. Díaz Ferrán, one of the ultimate shareholders of Claimants, and other individuals, have been convicted of concealment of assets and a conspiracy to defraud in the insolvency proceedings affecting Grupo Marsans.[161]

150. Respondent said that it learned of the Assignment Agreement and Funding Agreement only by chance, in the context of the arbitration, and that they were not filed or disclosed by Claimants. Rather, Respondent said that Claimants refused to provide a copy of the Assignment Agreement when Respondent first requested a copy of it in April 2010.[162]

[161] TR, pp 106-113.
[162] On 23 April 2010, the Respondent requested that the Tribunal require that Claimants provide all available information with respect to a report in a newspaper article in which it was reported that Grupo Marsans had ceded part of its claim against Argentina to an investment fund in return for US $25 million to cover legal expenses. In response, on 28 May 2010, Claimants stated that they had not sold their claim as alleged and that no such transaction had occurred or was contemplated. They also objected to the request on the basis that they had no obligation to disclose agreements with third parties with respect to the funding of their costs of the

Further, Respondent said that the Funding Agreement was submitted in these proceedings by it, not Claimants.[163] Respondent said that Claimants were not transparent in this regard and with respect to other information and documents of which it has learned in the court proceedings in Spain or by chance during the course of the arbitration hearing.[164]

151. Respondent also pointed to the attempts by Claimants to extend or ratify the original powers of attorney granted to King & Spalding as adding to the well-founded nature of its suspicion of the commission of criminal conduct. In this regard, Respondent said that the three letters submitted by Claimants in 2013 (Exhibits C-842, C-843 and C-844) were manifestly flawed since they were not in public form, not dated and not approved or filed with the court and yet it was only shortly before the hearing on provisional measures that the court-appointed receivers sought to submit notarized statements confirming the powers of attorney and ratifying the representation of Claimants by King & Spalding. In any event, Respondent maintained that the notarized statements from the court-appointed receivers (submitted as Exhibit C-1200) were still deficient in that they did not show a date certain of the issuance of the letters and they do not show any approval or intervention by the judges in the insolvency proceedings.[165]

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arbitration and noted that the Respondent had not supported its request for the production of documents by demonstrating their necessity or otherwise complying with the usual requirements for production of documents. The Claimants also submitted that the question of financing of their costs did not affect the jurisdiction of the Tribunal: see Claimants letter of 28 May 2010. The Tribunal subsequently declined to order the production of the documents requested by the Respondent at that early stage of the proceedings: see the instructions of the Tribunal conveyed by the Secretariat's message of 16 June 2010.

[163] It appears that the Assignment Agreement and the Funding Agreement were filed in the Air Comet insolvency proceedings and were acknowledged and approved by the administrators/receivers in Air Comet's insolvency. These then applied to the relevant court for approval of the Funding Agreement and specifically referred to the Assignment Agreement in their request. The court subsequently approved the administrators/receivers' consent to the Funding Agreement. It appears that the Funding Agreement was submitted in evidence in these proceedings by the Respondent who obtained a copy from the Spanish lawyer representing the Argentine Airlines as creditors in the insolvency proceedings of Air Comet and Claimants.

[164] In this regard, the Respondent mentioned the insolvency proceedings of Claimants and correspondence between the court-appointed receivers of Air Comet and Burford filed in the insolvency proceedings in Spain: TR, pp 109-110. The Respondent also questioned whether Claimants' court-appointed receivers had informed the court of the Respondent's counter-claim which would constitute another liability against the business of the Grupo Marsans: see TR, p 110.

[165] TR, pp 119-121.

152. As a result, Respondent said that the office of the Treasury Attorney General had a well-founded suspicion that criminal conduct had occurred. Further, according to Respondent, the relevant facts and conduct, such as the signing of the Funding Agreement, are outside the scope of the arbitration.[166]

153. Respondent also further explained the legal duty on the office of the Treasury Attorney General to report any crimes liable to prosecution observed by public officials or employees.[167] In accordance with that obligation, the office of the Treasury Attorney General had submitted its complaint to the office of the Prosecutor General and, specifically, the PROCELAC which is the specialized agency with the technical capability to investigate a possible economic crime. It was then up to the PROCELAC to conduct an investigation of the facts and information contained in the TAG Complaint and to draw up its conclusions and present them to the appropriate federal court.[168]

154. Respondent went on to explain and emphasize that the scope of the investigation that would be conducted as a result of the TAG Complaint and the PROCELAC Complaint was determined by the federal prosecutor in charge of the case who has conduct of the investigation. According to Respondent, in a note dated 21 September 2015, Federal Prosecutor Marijuan had defined a more limited scope of investigation.[169] According to Respondent, the criminal investigation pursued by the Federal Prosecutor will address only the alleged maneuvers aimed at channeling payment of an eventual award by way of the Funding Agreement in order to elude the rights of the creditors in the insolvency proceedings in Spain, thereby exposing Respondent to the risk of having to make a payment which would not necessarily be final.[170] As a result, since the Federal Prosecutor's note does not mention

[166] TR, p 118.
[167] Pursuant to Article 177 of the ACC (Exhibit RA-691) and Article 249 of the ACC (Exhibit RA-692).
[168] TR, pp 122-123. The Respondent submitted that the office of the Treasury Attorney General and the PROCELAC acted pursuant to a legal duty and merely filed a criminal complaint. They did not promote a prosecution in strict legal terms and were not parties to any criminal action: see TR, pp 116-117.
[169] See the quoted passage from Federal Prosecutor Marijuan's note of 21 September 2015 at ¶ 68, above: Exhibit C-1198.
[170] TR, pp 125-126, 167-169, 174-177.

Law 14,034, no potential charges in respect of a breach of its provisions were being investigated.[171]

155. In this regard, Respondent submitted that in his note, Federal Prosecutor Marijuan restricted the scope of the investigation to "…the legal representatives, officers or directors" of Burford, Air Comet and Claimants. According to Respondent, under Argentine law the expression "legal representatives" (*representantes legales*) is a term of art having a specific meaning which includes only the authorized legal representatives of a company such as its president and officers or its directors and does not include legal counsel who may represent a party in litigation. As a result, Respondent stated that King & Spalding and its lawyers as well as Fargosi & Asociados and its lawyers were not included within the scope of the Federal Prosecutor's criminal investigation.[172]

156. Respondent also reviewed the requirements for the granting of provisional measures and the relevant sequence of events and facts and submitted that on this basis Claimants had not demonstrated urgency,[173] a right to be protected or any irreparable harm or effect on Claimants' ability to pursue the arbitration.[174]

157. In respect of Claimants' submissions relating to immunity under the ICSID Convention, Respondent submitted that this was not an issue as far as counsel to Claimants were concerned since the criminal investigation did not include them within its scope.[175] With respect to Burford, Respondent submitted that as a funder to Claimants it was not included within the scope of immunity provided for in Article 22 of the ICSID Convention. In this regard, Respondent pointed to the language of the Funding Agreement which

[171] TR, pp 125-126, 164-165, 169.
[172] TR, pp 168-169, 174-178. The Respondent also submitted that the court-appointed receivers of Claimants were not included within the scope of the Federal Prosecutor's investigation since they were not the ones who represented Claimants with respect to the documents in question: TR, p 178.
[173] TR, pp 158-160.
[174] TR, pp 161-162. Amongst other things, the Respondent submitted that the investigation commenced by the Federal Prosecutor was merely at the investigative stage and that given that early status, there was no harm to the legal situation of Claimants in the arbitration: TR, p 156.
[175] TR, p 169.

specifically provided that nothing in the agreement created a fiduciary, lawyer client or agency relationship between Claimants and Burford.[176] Respondent went on to distinguish Burford's status from that of the escrow agent in the *Libananco v. Turkey* case, noting that in the latter case the escrow agent held shares as part of a mechanism decided by the arbitral tribunal and was not an external funder.[177]

158. In response to Respondent's submissions in respect of the narrowing of the scope of the criminal investigation by Federal Prosecutor Marijuan, Claimants made a number of points. Among these was the submission that the note itself made no reference to narrowing or setting the scope of the investigation. Rather, the note contained only a summary description of alleged "maneuvers" subject to the Complaints and goes on to refer to several documents, the three allegedly "apocryphal" letters from Claimants' court-appointed receivers and that the conduct subject of the investigation had the "purpose of obtaining sums resulting from a potential award against the Argentine Republic illegally…". As a result, Claimants submitted that the note actually maintained the full scope of the TAG Complaint and the PROCELAC Complaint.[178] Claimants also pointed to language contained in the Request for Letters Rogatory issued by the Federal Prosecutor, which referred specifically to King & Spalding as the "legal representative" of Claimants and that they were alleged to have submitted "invalid documents" in the arbitration in order to certify their legal capacity.[179] Claimants said that this contradicts Respondent's interpretation of Federal

[176] TR, pp 169-171. See also Funding Agreement, Exhibit RA-160, Article 15.3.
[177] TR, p 172. The Respondent also repeated its reference to the fact that Messrs. Díaz Ferrán and Pascual Arias had appeared to give testimony in an earlier criminal investigation commenced in 2002 and that Claimants had described those proceedings as simply at the investigative stage and had not raised any complaint in respect of that investigation or the hypothetical violation of the immunities provided for in the ICSID Convention. Similarly, in the present investigation, no specific accusations have been made and, therefore, there was no basis for complaint or possible grounds for a breach of any right to immunity under the ICSID Convention: TR, pp 126-128.
[178] TR, pp 196-198. The Claimants also maintained that the only reason they were able to obtain a copy of the PROCELAC Complaint and the investigation file was that Mr. Fargosi, Claimants' Argentine counsel, was granted access because he was the subject of or a party to the investigation.
[179] See Exhibit C-1215, p 2: "Having said that, and in order to set a legal framework to the request herein, I make known that based on the records appearing on the case file, King & Spalding law firm - legal representative of the companies Claimant before the ICSID - would have submitted invalid documents in the

Prosecutor Marijuan's note as excluding counsel to Claimants from the scope of the criminal investigation.[180]

159. In response to Respondent's submissions regarding the inappropriateness of claiming substantive relief in an application for interim measures, Claimants submitted that in order to request interim measures they were required to establish the rights to be protected or a predicate for ordering the provisional measures. In this regard, Claimants submitted that as a predicate for the issuance of the restraining orders requested they had alleged various breaches of rights that entitled them to protection, including the right to immunity. In Claimants' submission, it would be entirely appropriate for the Tribunal to find that the rights in question had, in fact, been breached as part of their determination to grant the interim measures requested.[181]

160. Finally, with respect to Respondent's argument that Claimants' request for relief in the final award demonstrated that no risk of irreparable harm existed, Claimants submitted that any such argument did not apply to the urgent interim relief requested in respect of conduct alleged to affect the immunities under the ICSID Convention or threatening the procedural integrity of the arbitral procedure.[182] Further, Claimants also submitted that granting relief such as an award of the defence fees incurred in defending against the criminal proceedings was in no way inconsistent with the request for provisional measures.

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arbitration proceedings to certify its legal capacity, in an attempt to lead the Arbitration Court into error, thus making an award that would oblige the Argentine state to make a payment to the detriment of itself and of the creditors of the failed companies."

[180] TR, pp 200-202. The Claimants also referred to information contained on the Argentine Supreme Court's website which listed in its description of the PROCELAC Complaint both King & Spalding and Fargosi & Asociados and all of the individual lawyers involved as counsel in the arbitration. In addition, Claimants referred to the covering page of the Federal Prosecutor's file which listed as "*imputados*" in alphabetical order, the first two lawyers from King & Spalding acting as counsel for Claimants, followed by the summary reference to "and others" (*y otros*): see Exhibit C-1198. Further, Claimants also noted that in the English translation of the Letters Rogatory provided by the Federal Prosecutor's office, the term "*representantes legales*" used in referring to King & Spalding appeared as "legal representative": TR, pp 205-206; Exhibit C-1215. Finally, Claimants also alleged that even if the Respondent's interpretation of Prosecutor Marijuan's note were correct, he could at any time broaden the scope of the proceedings.

[181] TR, pp 218-222.

[182] TR, pp 222-223.

161. In its response, Respondent commented on Claimants' interpretation of the Federal Prosecutor's Request for Letters Rogatory (Exhibit C-1215) and contested that King & Spalding was named a subject of the investigation. Rather, Respondent submitted that in referring to the Complaints being investigated, the Federal Prosecutor referred only to the legal representatives, officers and executives of Burford and of Claimants. Further, Respondent submitted that Claimants had not contested that under Argentine law the term "legal representative" of a company does not include counsel authorized to represent the company at trial.[183] In addition, Respondent noted that no mention of any possible infraction of Law 14,034 was mentioned in the Federal Prosecutor's Request for Letters Rogatory and that this supported their interpretation of the Federal Prosecutor's note that no investigation for treason or its equivalent was being pursued.

162. Finally, Respondent referred to the various convictions in Spain of Mr. Díaz Ferrán and other individuals related to the Marsans Group regarding, amongst other things, the concealment of assets subject to the insolvency proceedings of the Marsans Group in Spain. In this context, Respondent referred to the judgment of 7 September 2015 of the Spanish National Criminal Court as demonstrating the illegitimate nature of the payment mechanism provided for in the Funding Agreement.[184] It also repeated its position that the TAG Complaint relating to the Funding Agreement, seen in the context of the court's judgment, was not related to the arbitration.[185] Finally, Respondent made reference to a recent criminal complaint filed by Aerolineas Argentinas S.A. ("ARSA"), in which ARSA had alleged the misappropriation and mismanagement of funds paid by Sociedad Estatal de Participaciones Industriales ("SEPI") to Air Comet pursuant to the terms of the Share Purchase Agreement by which Air Comet, and Claimants, acquired an interest in the Argentine Airlines.[186]

[183] TR, pp 231-232.
[184] TR, pp 252-254; Exhibit RA-687/C-1210.
[185] TR, p 254.
[186] TR, pp 227-230, 255-256.

V. ANALYSIS AND DECISION

163. Claimants' Application is somewhat unusual. Unlike the situations addressed by other ICSID tribunals to which the Parties have referred, the alleged conduct giving rise to the request for provisional measures comes near the end of the proceedings. In this case, the oral hearing has been completed, the Parties have submitted their post-hearing briefs and submissions on costs and what remains is for the Tribunal to formally close the proceedings and issue its award. Further, each of Claimants and their related corporate entities are in some form of insolvency proceedings in Spain.

164. Since the submission of the Parties' post-hearing briefs, the Tribunal has received a series of requests, primarily from Respondent, to admit additional documents and judgments from the insolvency proceedings in Spain of the Marsans corporate group to which Claimants belong, as well as a number of documents and judgments from related criminal proceedings. As noted previously in the Tribunal's Decision on Jurisdiction and in this Decision, Claimants have also been the subject of their own insolvency proceedings and have had receivers appointed by the Spanish courts. These various proceedings have given rise to many different decisions and judgments in the insolvency and criminal proceedings in Spain, a number of which have made reference to Claimants, the ultimate shareholders of Claimants, and the company through which they made their investment, Air Comet. Given the possible relevance of some of these developments to this arbitration, the Tribunal has permitted the submission of most of the documents in question.

165. Given the timing of Claimants' Application, it does not address the "usual" arguments made in this type of application like the possible effect that the criminal proceedings at issue could have on the obtaining of evidence, the possible intimidation of witnesses or other effects which would impede the procedural progress of the arbitration. Rather, Claimants say the Complaints and the criminal investigation, together with the publicity that Respondent has given to these, have affected or threatened to affect rights related to this arbitration which are entitled to protection, despite the late stage of the proceedings. These

rights are said to be: the right to enforce Claimants' rights under the BIT through ICSID arbitration conducted in good faith; the right to the integrity of the proceedings, including the right of exclusivity of the Tribunal's jurisdiction under Article 26 of the ICSID Convention; the right for the Tribunal to determine its own jurisdiction and the merits of the case; the right of immunity of Claimants, their counsel, representatives and funder; and the right to an enforceable award under Article 53 of the ICSID Convention. In their final form, Claimants' requests for relief include orders granting provisional measures as well as substantive relief on the merits in the final award.

A. Claimants' Requests On The Merits

166. The Tribunal first addresses Claimants' requests on the merits. In respect of these, in their Reply, Claimants requested that the Tribunal award Claimants damages for moral and reputational injuries,[187] satisfaction for the injury caused by Respondent's internationally wrongful acts[188] and, in the event Respondent fails to comply with the Tribunal's provisional orders, a finding that Respondent has breached its obligation to ensure fair and equitable treatment under the terms of the BIT.[189]

167. At the hearing, Claimants requested a permanent injunction restraining Respondent from criminally prosecuting Claimants, their representatives, counsel and funder for acts relating to this arbitration and an order that Respondent pay damages for moral and reputational injuries caused to their representatives, counsel and funder.[190] With respect to their claim for satisfaction in their Reply, Claimants specified that the breaches of international law committed by Respondent in respect of which satisfaction was due included

[187] Claimants' Reply, ¶¶ 8 and 80, 59-61.
[188] Claimants' Reply, ¶¶ 8 and 80, FN 6. While Claimants did not specifically identify these in their Reply, the alleged breaches of international law which, according to them, would give rise to a finding of breach and satisfaction, appear to be the alleged breaches of the immunity afforded under Articles 21 and 22 of the ICSID Convention.
[189] Claimants' Reply, ¶¶ 8 and 80, 81.
[190] See Claimants' request for relief: demonstrative slides 115-117. The Claimants stated that they would submit a brief, supplemental costs and damages application for consideration as part of the final award, if the Tribunal ruled in Claimants' favour on the requested provisional measures.

the breach of the right to immunity under Article 22 of the ICSID Convention, the right to an arbitration conducted in good faith, the right to preservation of the *status quo* and the right to fair and equitable treatment under the BIT.[191]

168. As indicated previously, Respondent maintains that Claimants' requests for relief on the merits, including the request for declarations of new alleged breaches of international law or Claimants' BIT rights and the requests for moral damages and satisfaction come too late and cannot be advanced at this late stage without authorization of the Tribunal. In any event, Respondent says that these forms of relief are inappropriate in an application for provisional measures. Claimants, on the other hand, say that the Tribunal has the authority to award the additional relief and damages they seek. They also submitted that in addition to giving rise to relief on the merits, their claims of breaches of international law by Respondent served as the predicate for the various provisional measures requested.[192]

169. In the Tribunal's view, Respondent is correct that, in principle, an application for provisional or interim measures is not the appropriate vehicle for requesting relief on the merits, nor for the Tribunal to grant an award of relief on the merits. Further, the Tribunal accepts that in order for a party to submit a new claim or defence after the pleadings are complete, it requires the authorization of the Tribunal, which has not been sought in this case.[193]

170. Accordingly, subject to the Tribunal's comments below in respect of the integrity of the proceedings, Claimants' request for relief on the merits cannot properly be addressed in

[191] See ¶ 143, above, and FN 157 and the sources cited there. The Claimants also stated that in so far as satisfaction was concerned, a declaration of the Respondent's breaches would be sufficient remedy. The Claimants also requested an order that the Respondent pay the cost of defence in the Argentine criminal proceedings of Claimants, their representatives, counsel and funder.
[192] See above at ¶¶ 81 and 144. The Claimants did not directly address the Respondent's objection that their new claims on the merits were too late and not admissible on that basis.
[193] In this regard, see ¶ 18 of the minutes of the first session on March 22, 2010 in which the procedure for this arbitration was determined. It provides that the Parties would not bring new arguments, witnesses or evidence in their reply and rejoinder on the merits, unless these are in rebuttal to claims or issues raised by the other Party in the previous pleading.

Claimants' Application. At this stage of the proceedings, adding new requests for relief on the merits would require the authorization of the Tribunal after having heard both Parties on the issue.[194] As a result, the Tribunal must dismiss Claimants' claims for relief on the merits as brought in Claimants' Application.

171. Before turning to the provisional measures requested by Claimants, the Tribunal addresses Respondent's objection to the admission of the sworn and notarized statements submitted in the form of public deeds by each of the court-appointed receivers of Claimants (Exhibit C-1200). In this regard, Respondent has objected that the statements in question come late and have not been authorized by the Tribunal. In addition, Respondent submitted that the filing of these statements reflects the seriousness with which Claimants and the court-appointed receivers take Respondent's position that the powers of attorney are no longer valid and shows that at the time of filing the TAG Complaint there were justified reasons for doing so.[195] On the other hand, Claimants said that the public deeds are relevant to the issues before the Tribunal on this Application.[196]

172. In the Tribunal's view, the public deeds submitted by the court-appointed receivers should be admitted into evidence in these proceedings. The public deeds are relevant to a number of issues before the Tribunal on Claimants' Application and, more generally, in the arbitration. They clearly relate to the question of the validity of King & Spalding's powers of attorney and their authority to represent Claimants in the arbitration and, indeed, in Claimants' Application. As noted previously, the question of the authorization of counsel to

[194] Further, in the event Claimants were to seek authorization to request additional relief on the merits and the Tribunal were to authorize the same, the Respondent would be entitled to present its response on the merits of those claims and further evidence and argument would likely be required in order for the Tribunal to address the claims fully.
[195] See Respondent's letter of 27 October 2015. In addition, the Respondent took the position that even these most recent statements from the court-appointed receivers were defective since, in its view, the public deeds do not establish a date certain on which the previous letters from the court-appointed receivers (Exhibits C-842, C-843 and C-844) were issued. In addition, the Respondent submitted that the public deeds did not show any involvement or intervention by the judges in the respective insolvency proceedings in Spain. See TR, pp 120-121.
[196] See Claimants' letter of 22 October 2015.

represent Claimants figures prominently in the Complaints and appears related to the allegation that there had been connivance among Claimants, their legal representation and Burford with respect to the Funding Agreement. This question also relates to the suggestion that the court-appointed receivers participated in a scheme to deceive the Tribunal (whether by way of "apocryphal" documents or use of authentic documents in a fraudulent manner) set out in the PROCELAC Complaint.[197] Further, the PROCELAC Complaint requests the investigation of the court-appointed receivers in the insolvency proceedings of Claimants in respect of their alleged participation in illegitimate conduct.[198] This is the first opportunity that the Spanish court-appointed receivers have to respond to the allegations contained in the Complaints and the Tribunal believes it is appropriate for them to do so in the circumstances.[199] In this regard, the Tribunal notes that the statements made in the public deeds are consistent with the previous statements in evidence from the receivers.

173. Accordingly, the Tribunal admits the public deeds of the court-appointed receivers submitted as Exhibit C-1200.

B. Provisional Measures Requested by Claimants

174. The Tribunal now turns to the provisional measures requested by Claimants and the requirements for granting such measures. In this regard, the focus of Respondent's position was that Claimants had not met at least three of the requirements for the granting of provisional measures: the need to demonstrate a right related to the arbitration which must be protected; the need to demonstrate the threat of irreparable harm if the measures are not granted; and the need to demonstrate an urgent need to issue the measures requested. The Tribunal will address each of these requirements in turn, including the differences between

[197] See PROCELAC Complaint, Exhibit C-1198, pp 22-23.
[198] PROCELAC Complaint, Exhibit C-1198, p 25.
[199] It appears that Claimants were first able to obtain a copy of the PROCELAC Complaint on or about 9 October 2015 (see ¶ 62, above). The Claimants submitted the public deeds from the court-appointed receivers with their letter of 22 October 2015. A summary of the contents of these deeds are set out at paragraph 69, above.

the Parties' positions in respect of the nature and content of the requirements in question and whether these have been met.

1. The Rights To Be Protected By Provisional Measures

175. As described above, Claimants submitted that a number of their rights require protection by way of provisional measures. Those rights were articulated in their final form at the hearing and can be summarized as follows: the right to enforce Claimants' rights under the BIT through ICSID arbitration conducted in good faith; the right to integrity of the proceedings, including the right of exclusivity of the Tribunal's jurisdiction under Article 26 of the ICSID Convention; the right for the Tribunal to determine its own jurisdiction and the merits of the case; the immunity of counsel, Claimants and their representatives and funder; and the right to an enforceable award under Article 53 of the ICSID Convention.

176. Respondent submits that the measures requested by Claimants are not intended to protect rights at issue in the arbitration before the Tribunal. According to Respondent, only the rights at issue in the arbitration may be protected by way of provisional measures. Respondent says that although they have some connection to this arbitration, the Complaints and the criminal investigation which are the subject of Claimants' Application are unrelated to the matters before the Tribunal in this case. Respondent says that the Complaints and the criminal investigation are separate criminal proceedings relating to events which did not take place before the Tribunal and are external to the proceedings before it. In this regard, Respondent maintains that the Complaints are related to the Funding Agreement and conduct related to it, which are external to these arbitration proceedings.[200] In addition, Respondent says that it is difficult to see how the Complaints and criminal investigation can affect any of Claimants' rights at this late stage of the proceedings when only the final award is pending. Finally, Respondent submits that Claimants have not met what it says is the high burden on them to demonstrate that provisional measures should be granted to require the suspension

[200] See, for example, Respondent's Rejoinder, ¶¶ 31-32.

of criminal proceedings. In particular, Respondent says that Claimants have not provided any concrete evidence of conduct in breach, or threatening imminent breach, of Claimants' rights.

177. In the Tribunal's view, the rights available for protection by provisional measures are not restricted to rights which may form the subject matter of the dispute between the Parties. As a number of tribunals have found, the rights which may be protected include procedural rights, such as the preservation of the integrity of the proceedings and the preservation of the *status quo* and non-aggravation of the dispute.[201] As found in the *Quiborax v. Bolivia* and *Plama v. Bulgaria* decisions, the applicable criterion is that the right or rights to be preserved are related to the dispute in the sense that those rights must relate to the applicant's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants the relief sought to be effective and capable of carrying out.[202]

178. The materials and evidence before the Tribunal reflect a close relationship between both the TAG Complaint and the PROCELAC Complaint and this arbitration. Further, the criminal investigation, as described in the Federal Prosecutor's note of 21 September 2015 is based on the Complaints and while its precise scope may remain somewhat uncertain, it clearly incorporates a number of the same allegations contained in the Complaints which are closely connected with the arbitration and the issues before the Tribunal.

179. Among the various indicia of the close relationship between the Complaints and this ICSID arbitration are, in the first place, Respondent's letter of 3 March 2015 which stated that the TAG Complaint was closely intertwined with certain facts at stake in the arbitration and was intended to prevent Respondent from making a payment in detriment to the creditors

[201] See in this regard, *Quiborax v. Bolivia*, Decision on Provisional Measures, dated 26 February 2010, ¶¶ 117-118 and the other decisions and sources cited there.
[202] See *Plama v. Bulgaria*, Order, dated 6 September 2005, ¶ 40, as quoted in *Quiborax v. Bolivia*, Decision on Provisional Measures, ¶ 118.

in the insolvency proceedings as well as to Respondent itself. The TAG Complaint and the PROCELAC Complaint both allege that Claimants, together with their counsel, court-appointed representatives and funder were, in essence, perpetrating a fraud not only on the creditors in the insolvency proceedings and Respondent, but also on the Tribunal itself.[203]

180. A close review of the Complaints indicates that the matters in respect of which the Treasury Attorney General's office and the PROCELAC complain and request an investigation are matters which Respondent has placed before the Tribunal in these arbitral proceedings. Respondent has alleged before the Tribunal that Claimants have attempted to mislead the Tribunal and that the purpose behind the Assignment Agreement and Funding Agreement was to exclude from the insolvency proceedings in Spain any sums possibly awarded to Claimants in this arbitration, thereby defrauding the creditors and creating the risk that Respondent would be required to pay twice. In this regard, Respondent essentially argues that the Tribunal and any eventual award in Claimants' favor will be the instrument of the fraud it alleges against Claimants.

181. The Complaints also make reference to one of Respondent's jurisdictional defences in this arbitration: that Claimants' claim is derivative and indirect and, therefore, falls outside the scope of the BIT. This is an issue that has been extensively briefed and addressed in this arbitration.

[203] In this regard, see ¶¶ 32-33, above, and the references to the TAG Complaint made there; the PROCELAC Complaint, Exhibit C-1198, ¶¶ 63-66 where specific reference is made to each of counsel for Claimants, the court-appointed receivers of Claimants and Burford, the alleged use of certain documents in this arbitration with the purpose of illegally appropriating the sums arising from a possible award and the Respondent's counter-claim in the arbitration is made. The PROCELAC Complaint goes on to refer to the witness statement of Mr. Barcesat, counsel for the Respondent in this arbitration, with respect to Claimants' lack of capacity to sue since its claim was a derivative one based on indirect shareholdings. The PROCELAC Complaint further alleges that the Respondent's argument had not yet been addressed by the Tribunal. It also went on to refer to the allegation in these arbitration proceedings that King & Spalding had no authority to represent Claimants since their powers of attorney had lapsed or become invalid and the alleged "apocryphal" nature of the letters from the court-appointed receivers in evidence before the Tribunal.

182. The Complaints also make repeated reference to the Funding Agreement (and the Assignment Agreement) which are said to be at the heart of the fraudulent scheme concocted by Claimants. These agreements have been placed before the Tribunal by Respondent as part of its defence on both jurisdiction and the merits and have been the subject of extensive evidence and argument.

183. Further, Respondent has raised the question of the alleged invalidity of the powers of attorney held by King & Spalding and their authority to represent Claimants in this arbitration. This matter has been before the Tribunal for some time and has been the subject of extensive expert evidence and argument. Respondent has also raised the same or similar arguments before both this Tribunal and in the Complaints as to the alleged motives for which Claimants and their counsel would seek to uphold the validity of the powers of attorney. Again, this is clearly a matter squarely within the jurisdiction of the Tribunal to decide in its award. Finally, the allegations contained in the PROCELAC Complaint regarding the violation of Article 1 of Law 14,034 by any Argentine citizen representing Claimants in this matter also has an apparent close connection to this arbitration.[204]

184. This brief review of certain aspects of the Complaints indicates a close relationship between them and these arbitration proceedings. Indeed, Respondent's request to admit the TAG Complaint in these proceedings was made on the basis of the close connection between the TAG Complaint and the facts at stake in this arbitration and Respondent's intention to prevent the risk of harm to it if it were ordered to pay compensation pursuant to an eventual award. As a result, it would appear that these arbitral proceedings could be seen as the motivation, at least in part, for the filing of the Complaints.

185. The Tribunal is aware of the distinction which has been drawn by other ICSID tribunals between claims under a BIT relating to the protection of an investment and criminal

[204] See, generally, the table comparing the alleged offenses set out in the Complaints and the proceedings in this arbitration at slides 61-68 of Claimants' demonstrative slides used at the Hearing.

prosecutions brought by a State in respect of crimes alleged to have been committed in its territory. The Tribunal is also aware of the decisions of other tribunals which have expressed the view that provisional measures are an extraordinary remedy and that tribunals should exercise particular caution when asked to restrain a sovereign State's exercise of its right to conduct criminal investigations and prosecutions relating to conduct within its territory.[205] However, such powers must be exercised in good faith, respecting a claimant's rights to have its claims fairly considered and decided by an arbitral tribunal.[206] These issues will be considered further below. At this stage, the Tribunal concludes that there is a direct relationship between the Complaints and the criminal investigation commenced by the Federal Prosecutor and this ICSID arbitration such that certain rights of Claimants in this arbitration may warrant protection.

186. In addition, and in any event, the Tribunal has the inherent jurisdiction and powers required to preserve the integrity of its own process and the duty to ensure that the Parties comply with their obligation to arbitrate fairly and in good faith. In this regard, the Tribunal agrees with the decision in *Libananco v. Turkey* when it held as follows:

> 78. These allegations and counter-allegations strike at principles which lie at the very heart of the ICSID arbitral process, and the Tribunal is bound to approach them accordingly. Among the principles affected are: basic procedural fairness, respect for confidentiality and legal privilege (and indeed for the immunities accorded to parties, their counsel, and witnesses under Articles 21 and 22 of the ICSID Convention); the right of parties both to seek advice and to advance their respective cases freely and without interference; and no doubt others as well. For its own part, the Tribunal would add to the list respect for the Tribunal itself, as the organ freely chosen by the Parties for the binding settlement of their dispute in accordance with the ICSID Convention. It requires no further recital by the Tribunal to establish either that these are indeed fundamental principles, or why they are. Nor does the Tribunal doubt for a moment that, like any other international tribunal, it must be regarded as endowed with the inherent powers required to preserve the

[205] See Exhibit AL RA-424: *Churchill Mining v. Indonesia*, Procedural Order No. 14, dated 22 December 2014, p 23, as cited by the Respondent in its Rejoinder, ¶ 16. See also the other decisions cited by the Respondent to the same or similar effect.
[206] See *Quiborax v. Bolivia*, Decision on Provisional Measures, ¶ 123; *Plama v. Bulgaria*, Order, ¶ 40; *Libananco v. Turkey*, Decision on Preliminary Issues, ¶ 78; and *Caratube v. Kazakhstan I*, Decision on Provisional Measures, dated 31 July 2009, ¶ 139.

> integrity of its own process - even if the remedies open to it are necessarily different from those that might be available to a domestic court of law in an ICSID Member State. The Tribunal would express the principle as being that parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with; this principle applies in all arbitration, including investment arbitration, and to all parties, including States (even in the exercise of their sovereign powers).[207]

In this regard, the Tribunal has previously ordered the Parties not to aggravate or extend the dispute on a number of occasions and has the authority to ensure the respect of its orders.[208]

187. The Tribunal now turns to its assessment of the various rights which Claimants allege have been threatened or breached and whether the requirements for the granting of provisional measures in respect of these have been met.

2. The Right To ICSID Arbitration Conducted In Good Faith

188. Claimants submit that Respondent's conduct in filing the Complaints and commencing the criminal investigation breaches its duty to arbitrate in good faith and threatens the integrity of these ICSID proceedings. In essence, Claimants say that the Complaints and the criminal investigation are guerrilla tactics employed in bad faith by Respondent in order to derail this arbitration and avoid having to pay an award rendered against it. Claimants say that the facts of this case represent exceptional circumstances which justify the suspension of the criminal proceedings initiated by Respondent's authorities.

189. On the other hand, Respondent says that it has the right and duty to investigate criminal conduct where it has a legitimate basis to suspect that the same has occurred. It says that this is a sovereign prerogative and that a high threshold must be met in order to restrain

[207] *Libananco v. Turkey*, Decision on Preliminary Issues, ¶ 78. Other tribunals have identified the same duty on the parties to an arbitration to conduct the procedure in good faith. See, for example, *Caratube v. Kazakhstan I*, Decision on Provisional Measures, ¶¶ 117-120, as cited by the tribunal in *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13 ("*Caratube v. Kazakhstan II*"), Decision on Claimants' Request for Provisional Measures, dated 4 December 2014, ¶ 113.

[208] See Procedural Order No. 2, dated 29 April 2011; Tribunal's letter of 13 May 2011; Tribunal's letter of 1 April 2012; Procedural Order No. 4, dated 3 October 2012, ¶ 62.

a State's exercise of that power. It goes on to submit that Claimants have not met that threshold by, *inter alia*, demonstrating how the Complaints and criminal investigation have affected Claimants' right to have their claims heard before the Tribunal.

190. As has been held by a number of arbitral tribunals, Respondent clearly has the sovereign right to conduct criminal investigations and it will usually require exceptional circumstances to justify the granting of provisional measures to suspend criminal proceedings by a State. Nevertheless, where exceptional circumstances do exist and threaten the integrity of the arbitration proceedings and the principle of due process, provisional measures may be warranted.[209] In addition, separate from the question of whether provisional measures are warranted, the abuse of the sovereign power of a State to pursue criminal proceedings may give rise to damage and a claim for the breach of rights protected by a BIT or international law, more generally. In addressing Claimants' Application currently before it, the Tribunal must focus on the former and restrict its inquiry to the question of whether Claimants have demonstrated that their right to continue or pursue this arbitration in procedurally fair conditions is threatened.

191. In considering this question, the Tribunal must bear in mind the current stage of the proceedings. As indicated previously, the only remaining steps are the closure of the proceedings and the issuance of the Tribunal's award. All previous procedural steps in the arbitration, including the submission of pleadings and evidence and the conduct of an oral hearing at which all of the relevant witnesses requested by the Parties appeared to testify, have been completed. This distinguishes the circumstances of this case from those in the other arbitral decisions brought to the Tribunal's attention and reduces the aspects of the arbitration in respect of which provisional measures can be sought.

[209] *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14 ("*EuroGas v Slovak*"), Procedural Order No. 3 - Decision on Request for Provisional Measures, dated 23 June 2015, ¶ 82.

3. The Right To Exclusivity Of ICSID Proceedings

192. Claimants categorize the right to exclusivity of ICSID proceedings as an aspect of the integrity of the proceedings. Claimants submit that the Complaints and the criminal investigation are intended to prevent an award in their favor on the basis of an alleged fraud and breach of the provisions of Article 1 of Law 14,034. In this regard, Claimants point to the fact that the Complaints refer to the following: Claimants' claims in the arbitration are derivative or indirect and therefore inappropriate and the fact that the Tribunal has either not decided the issue or incorrectly decided it; the alleged lack of valid powers of attorney or authority of counsel to represent Claimants; the allegation that the Assignment Agreement and Funding Agreement constitute a fraudulent attempt to exclude the proceeds of an eventual award against Respondent from the insolvency proceedings of Claimants in Spain; and the allegation that Claimants, their representatives and counsel are committing a fraud on the Tribunal. According to Claimants, these matters are all before the Tribunal and attempting to re-litigate them by way of criminal proceedings violates the exclusivity of the Tribunal's jurisdiction under Article 26 of the ICSID Convention.

193. As has been recognized previously, the right to exclusivity of ICSID proceedings under Article 26 of the ICSID Convention can be protected by way of provisional measures.[210] This right of exclusivity relates to the resolution of investment disputes only and does not include or extend to criminal proceedings which deal with criminal liability and not with investment disputes.[211] As a result, in principle, the criminal proceedings commenced by way of the Complaints and the Federal Prosecutor's preliminary investigation do not address the investment dispute before the Tribunal and, therefore, do not threaten the exclusivity of these ICSID proceedings.

[210] See *Quiborax v. Bolivia*, Decision on Provisional Measures, ¶ 127; *Tokios Tokelés v. Ukraine*, Order No 1, dated 1 July 2003, ¶ 7.
[211] See *Quiborax v. Bolivia*, Decision on Provisional Measures, ¶¶ 128-131 and the sources cited there.

194. Nevertheless, the fact that the Complaints rely upon matters such as the indirect nature of Claimants' claims, the alleged lack of authority of Claimants' counsel, documents alleged to be part of a fraudulent scheme and the alleged misleading of the Tribunal itself, all matters which have been placed before the Tribunal by Respondent before the Complaints were filed, or the Tribunal's award is rendered, is troubling. In the Tribunal's view, these are all matters properly before it and relevant to its determination of the dispute between the Parties. These are matters which the Tribunal must and will address and determine in its award. As a result, there is some basis for concern that despite the distinction between the rights at issue in an investment dispute and criminal proceedings, the exclusivity of these proceedings is being infringed.

195. However, on the basis of the evidence currently available, there is some doubt in this regard. This arises from the uncertainty surrounding the scope of the preliminary investigation which has been commenced by the Federal Prosecutor. As will be discussed further below, there is a debate between the Parties as to whether this investigation includes counsel for Claimants and their court-appointed receivers. Respondent argued strongly that the Federal Prosecutor in his note set the limits of his investigation, which did not include allegations against counsel or Claimants' court-appointed receivers (nor any allegations of breaches of Law 14,034). While Claimants dispute this, the scope of the preliminary investigation remains uncertain from the Tribunal's perspective. As a result, it is not clear whether issues such as the derivative nature of Claimants' claims and counsel's alleged lack of authority form part of the preliminary investigation.

196. In addition, it is important to recall that both Parties have repeatedly stated and accepted that the judgments of criminal courts in Spain and in Argentina do not and will not bind this Tribunal.[212] As a result, even if the Tribunal were to conclude that the criminal

[212] In this regard, see: Respondent's Reply on Jurisdiction, ¶ 370; Claimants' Counter-Memorial on Jurisdiction, ¶ 332; Claimants' Application, FN 41, p 11.

investigation did infringe on the exclusivity of these proceedings, it is unlikely to have any effect on the continuation of this arbitration and the Tribunal's award.

197. As a result, the Tribunal concludes that the Complaints and the criminal investigation initiated by the Federal Prosecutor of Respondent do not sufficiently threaten the exclusivity of these ICSID proceedings such that the provisional measure requesting the suspension of the criminal proceedings should be granted.[213]

4. The Right To The Preservation Of The *Status Quo* And The Non-aggravation Of The Dispute

198. The right to the preservation of the *status quo* and the non-aggravation of the dispute is well established in arbitral case law.[214] In addition, several tribunals, with which this Tribunal agrees, have found that preservation of the *status quo* and the non-aggravation of the dispute are self-standing rights.[215] Claimants allege that by submitting the Complaints and commencing the criminal investigation, as well as publicizing these proceedings broadly, Respondent has sought to intimidate Claimants, their court-appointed receivers and all of Claimants' counsel to pressure them to either drop the arbitration or face criminal charges for pursuing it. Claimants also say that by way of the criminal proceedings, Respondent

[213] The Claimants listed the right to have the Tribunal determine its own jurisdiction and the merits of the case as one of the protected rights related to the integrity of the proceeding which is threatened by the Respondent's conduct. The Tribunal sees no material distinction between this right and the right of exclusivity of ICSID proceedings. Consequently, it reaches the same conclusion as expressed here with respect to the exclusivity of the ICSID proceedings.

[214] See *Quiborax v. Bolivia*, Decision on Provisional Measures, ¶¶ 134-136; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11 ("*Occidental v. Ecuador*"), Decision on Provisional Measures, dated 17 August 2007, ¶ 96; *City Oriente v. Ecuador*, Decision on Provisional Measures, dated 19 November 2007; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 ("*Burlington v. Ecuador*"), Procedural Order No. 1, dated 29 June 2009, ¶¶ 61-68; *Caratube v. Kazakhstan I*, Decision on Provisional Measures, ¶¶ 117-120, as quoted in *Caratube v. Kazakhstan II*, Decision on Claimants' Request for Provisional Measures, ¶ 113.

[215] See Exhibit C-547: *Burlington v. Ecuador*, Procedural Order No. 1, dated 29 June 2009, ¶ 60; Exhibit C-550: *Ioan Micula, Viorel Micula S.C., European Food S.A., SC Star Mill S.R.L., and SC Multipack SRL v. Romania*, ICSID Case No. ARB/05/20 ("*Micula v. Romania*"), Decision on Claimants' Application for Provisional Measures, dated 2 March 2011, ¶¶ 41-42; Exhibit C-543: *Quiborax v. Bolivia*, Decision on Provisional Measures, dated 26 February 2010, ¶ 117; *Biwater Gauff v. Tanzania*, Procedural Order No. 1, dated 31 March 2006, ¶ 71.

seeks to intimidate their funder, Burford, in order to cut off the funding necessary for the arbitration.[216] In response, as outlined previously, Respondent says that Claimants have not demonstrated how the alleged conduct would affect Claimants' rights to continue the arbitration or provided any evidence that the Complaints and the criminal investigation have affected or threatened to affect Claimants, its representatives, counsel or funder, as alleged.

199. Claimants have not specified how the *status quo* of their investment in Argentina would be affected by the criminal proceedings. The Argentine Airlines in which Claimants held their disputed investment has been expropriated for some time now and there was no indication how the criminal proceedings would affect this or otherwise affect the *status quo*. Accordingly, the relevant question is whether the criminal proceedings have aggravated the dispute or threatened to aggravate the dispute such that a provisional measure is warranted.

200. In this regard, there is no doubt that the criminal proceedings have exacerbated the already difficult climate in which this dispute has unfolded. This is particularly so with respect to the allegations made in the Complaints against counsel for Claimants, the court-appointed receivers and Claimants' funder. However, insofar as Claimants themselves are concerned, the Tribunal notes that the expropriation at the heart of the dispute occurred in 2008 and that since that time the Argentine Airlines have been in the hands of Respondent. Further, each of Claimants are currently in liquidation proceedings under the supervision of their court-appointed receivers and their former ultimate shareholder, Mr. Díaz Ferrán, as well as a number of other former shareholders or officers have been convicted of various offenses relating to the insolvency of the Marsans Group and have been sentenced to imprisonment in Spain. In these circumstances, in the absence of any specific indication of how Claimants or their officers and directors have been harassed or intimidated, there is no basis for provisional measures in that regard.

[216] See TR, pp 26-27. In addition, Claimants claim that the Respondent seeks to unduly influence the Tribunal by claiming that the issuance and enforcement of an award would be the final element of the alleged fraud.

201. The Tribunal reaches the same conclusion with respect to Burford. While it does appear that the criminal investigation includes Burford within its scope, there is no indication that this has affected, or is likely to affect, Claimants' funding. In this regard, Respondent notes that Claimants have met all requests for advances on account of costs by the ICSID Secretariat and there was no evidence that Claimants are otherwise unable to meet their financial commitments in this arbitration pending the issuance of the award.

202. The situation is quite different with respect to Claimants' counsel and their court-appointed receivers. Dealing first with counsel, the TAG Complaint and, particularly the PROCELAC Complaint, make a number of serious allegations against counsel, including participation in fraudulent activity and, in the case of Argentine counsel, a breach of Article 1 of Law 14,034. These crimes carry very serious penalties, particularly for lawyers. The simple allegation of fraud against lawyers can carry heavy consequences and cause damage to reputation as well as a lawyer's business interest. In the case of a breach of Article 1 of Law 14,034, a conviction carries with it penalties of permanent disbarment and up to 25 years in prison.[217]

203. The allegations in the Complaints made against Claimants' court-appointed receivers are also serious, particularly when one bears in mind the fact that they are appointed by the Spanish courts to serve a public function by representing the interest of the creditors in the various insolvency proceedings. They act under the authority and direction of the relevant Spanish courts. The Tribunal also notes that the court-appointed receivers were appointed some time after the Assignment Agreement and Funding Agreement were executed. Further,

[217] The Tribunal notes that the PROCELAC Complaint lists every member of Claimants' counsel team in the body of the complaint, including paralegals and interns who are unlikely to have had any involvement in the Funding Agreement and Assignment Agreement which the Respondent impugns nor any substantial responsibility in the representation of Claimants. Further, it appears that at least two members of Claimants' counsel team have left King & Spalding and are now employed elsewhere.

the evidence in the record demonstrates that both of these agreements were filed in the Spanish courts and were reviewed and approved by at least one court.[218]

204. Of particular concern to the Tribunal is the joint, televised press conference held by the Treasury Attorney General and the head of the PROCELAC on 14 September 2015. Claimants submitted substantial evidence in regard of that press conference, including a video posted on the PROCELAC's website, a transcript of what was said at the press conference and the slides used by the Treasury Attorney General and the head of PROCELAC in support of their comments.[219] This evidence was not contested by Respondent.

205. In the Tribunal's view, the threat of criminal proceedings against counsel in the circumstances of this case places substantial pressure on counsel. This, in turn, threatens to affect Claimants' right to be represented by counsel of their choice in this arbitration. Similarly, the possible prosecution of Claimants' court-appointed receivers places pressure on them to choose between continuing their court-mandated function of representing Claimants and pursuing the latter's claims in this arbitration and withdrawing from their role or desisting in pursuing Claimants' claims. Each of these possible threats is of concern.

206. Nevertheless, it is not clear whether the criminal investigation commenced by the Federal Prosecutor includes allegations against counsel or Claimants' court-appointed receivers. Respondent, represented by the Treasury Attorney General, argued forcefully at the Hearing that the investigation did not include within its scope the investigation of

[218] In this regard, on 22 December 2010, the Spanish court overseeing the insolvency of Air Comet issued an order authorizing the court-appointed receivers of Air Comet to consent to the Funding Agreement: Exhibit RA-165. In their application to the court, the court-appointed receivers referred to the Assignment Agreement: Exhibit RA-164. Further, it appears that the commercial court in charge of the insolvencies of the three Claimants, Spanish Commercial Court No. 7 of Madrid, is aware of the Funding Agreement and has approved Burford's claim in the proceedings relating to Transportes de Cercanías S.A.'s insolvency on 19 April 2012. In this regard, see Annex B-11 to Mr. Cigarrán Magán's Report of 3 May 2013, p 3. See also Claimants' Application, pp 5-6 and FNs 16-18 and the sources cited there.

[219] See Exhibit C-1213. The Claimants also submitted a number of articles and news reports from a broad variety of newspapers, both in Argentina and overseas, including the Legal Press.

allegations against counsel or the court-appointed receivers. Claimants argue that this is not at all clear and, in any event, the Federal Prosecutor may choose to expand the scope of the criminal investigation. As a result, the situation remains uncertain.

207. Possible criminal allegations against, and investigation of, Claimants' counsel and the court-appointed receivers are of considerable concern to the Tribunal. As a result, the Tribunal has decided to defer its determination on this aspect of Claimants' Application and grant Claimants liberty to bring this aspect of their Application back to the Tribunal, should it become necessary. In the Tribunal's view, this is appropriate given the current uncertainty regarding the precise scope of the criminal investigation as it relates to counsel and the court-appointed receivers. It is regrettable that Respondent did not address or clarify this issue prior to the Hearing.

208. Accordingly, the Tribunal defers its decision on Claimants' Application as it relates to the request that the Tribunal order the suspension of the criminal proceedings in regard of counsel for Claimants and Claimants' court-appointed receivers. Claimants shall be at liberty to bring this issue back before the Tribunal in the event there is confirmation that the criminal proceedings and investigation include the alleged crimes against counsel or the court-appointed receivers.

209. The Tribunal now addresses Claimants' allegation that the press conference held by the Treasury Attorney General and the head of the PROCELAC has aggravated the dispute.

210. In this regard, the Tribunal concludes that the uncontested evidence regarding the joint press conference held by the Treasury Attorney General and the head of the PROCELAC on 14 September 2015 reflects an aggravation of the dispute. In the Tribunal's view, the matters described and commented on in the press conference and the very broad dissemination sponsored by Respondent exceeded by a wide margin any reporting which may have been appropriate. Indeed, Respondent gave no reason for holding the press conference or for its broad dissemination of the Complaints and the allegations made in them.

In the Tribunal's view, the press conference and the matters described and commented upon by representatives of Respondent, including details of this arbitration and the alleged conduct of counsel and the court-appointed receivers for Claimants, is inconsistent with the Tribunal's repeated orders to the Parties not to aggravate the dispute. Accordingly, a provisional measure ordering Respondent to refrain from further aggravating the dispute by publicizing the filing of the Complaints or the criminal investigation and any relation they may have to this arbitration, whether by way of the press or otherwise, is appropriate.

5. The Right To Immunity

211. Claimants allege that by filing the Complaints and commencing a preliminary investigation, Respondent has breached the immunity afforded to Claimants as parties, their counsel, their court-appointed receivers and their funder. Claimants say that as a party to the ICSID Convention, Respondent is bound by Articles 21 and 22 of the ICSID Convention and that the immunity provided applies *ipso iure* without a specific order of an ICSID tribunal. Claimants also submit that a breach of Articles 21 and 22 of the ICSID Convention is justiciable as a breach of Claimants' legitimate expectation that Respondent would proceed as provided by the ICSID Convention, including its provisions on immunity.

212. As it relates to Claimants' Application, the Tribunal understands Claimants' position to be that Respondent's alleged breach of the immunity afforded by Article 22 of the ICSID Convention reflects what it says is Respondent's bad faith conduct in filing the Complaints and commencing a criminal investigation in the circumstances of this case.[220]

213. Respondent does not dispute that Article 22 of the ICSID Convention provides for immunity from suit for the persons listed in it, but stresses that any such immunity applies only to acts performed by those persons in the exercise of their functions. According to Respondent, the acts or conduct in respect of which the Complaints were filed and the

[220] TR, pp 67-69.

criminal investigation has been commenced were not performed in respect of the arbitration.[221]

214. As a result, the practical issue of interest between the Parties is whether the acts or conduct performed by Claimants, their court-appointed receivers, their counsel and their funder was in the exercise of their functions in the arbitration.

215. Respondent submits that the Complaints and the criminal investigation relate to the Funding Agreement which it says was an agreement signed outside the scope of the arbitration and was not part of the functions of parties as referred to in Article 22 of the ICSID Convention (Claimants, as parties, counsel or Claimants' representatives). On the other hand, Claimants say that the Funding Agreement, signed between Claimants and Burford in April 2010, was executed exclusively in pursuit of this arbitration following Respondent's uncompensated expropriation of the Argentine Airlines in order to permit Claimants to pursue their claims in the arbitration.[222]

216. The question of the nature and scope of the immunity granted to parties, their counsel and the other persons referred to in Article 22 of the ICSID Convention is a complex one, particularly when one considers the various persons to whom immunities may apply in the particularly complex circumstances of this case. In the Tribunal's view, even assuming that only the Funding Agreement were relevant to the Complaints and criminal investigation, there are serious, plausible grounds on which some, if not all, of Claimants, their counsel,

[221] As described previously, the Respondent's position is that immunity under Articles 21 and 22 of the ICSID Convention is functional or *ratione materiae*. The Respondent says that the Complaints are related to the Funding Agreement and the possible commission of fraud. It says that the Funding Agreement did not take place before the Tribunal and is external to these arbitral proceedings. See Respondent's Rejoinder, ¶¶ 23-32; TR, p 118.

[222] TR, pp 64-65. As noted previously, Claimants contested that the Complaints and the criminal investigation relate only to the Funding Agreement. They say the Complaints refer, *inter alia*, to the Respondent's allegations relating the derivative nature of Claimants' claims and the alleged lack of authorization for counsel to appear on behalf of Claimants in the arbitration, and that the criminal investigation includes these allegations.

their court-appointed receivers and their funder are entitled to immunity under Article 22 of the ICSID Convention.[223] However, the Tribunal need not decide this question at this stage.

217. It is important to recall that this is an application for interim measures and the Tribunal's determination of whether these are warranted must focus on the effect, or the threatened effect, the Complaints and the criminal investigation may have on Claimants' rights related to this arbitration. The alleged breach of immunities afforded under Article 22 of the ICSID Convention by the filing of the Complaints and commencement of the criminal investigation may characterize or qualify Respondent's conduct in respect of which Claimants complain. However, the Tribunal need not decide whether a breach of the immunities invoked has occurred in order to decide this aspect of Claimants' Application. As mentioned previously, an application for provisional measures is not the appropriate occasion to decide this question on the merits. Rather, the Tribunal's focus must be the effect of the Complaints and the criminal investigation on Claimants' rights to pursue the arbitration.[224]

218. Turning to the possible effect of the criminal proceedings on Claimants and their ability to pursue the arbitration, the Tribunal notes that as far as Claimants themselves are concerned, they were represented by Messrs. Díaz Ferrán and Pascual Arias in the execution of the Funding Agreement. The former is currently imprisoned in Spain and the latter has been deceased for some time. Accordingly, there is no apparent additional pressure or effect which the alleged failure to respect any immunity provided by Article 22 of the ICSID Convention may have with respect to the pursuance of this arbitration by them as

[223] In addition, if the investigation relates to more than simply the Funding Agreement, then the basis for the application of immunity of counsel and the court-appointed receivers becomes broader.
[224] It is also relevant to recall that since the immunity claimed by Claimants exists independently of any declaration by this Tribunal, Claimants, their counsel, their court-appointed receivers and Burford are in a position to raise the immunities in their defence as they deem appropriate in any relevant forum. Further, a breach of the immunities provided by the ICSID Convention may give rise to a substantive claim, whether by a person directly covered by immunity, or their home State, in the appropriate forum.

representatives of Claimants. The new representatives of Claimants in the insolvency proceedings, the court-appointed receivers, are considered separately, below.

219. As to Claimants' funder, Burford, as noted above, there was no indication that the Complaints or the criminal investigation had affected, or were likely to affect, Burford's willingness or ability to fund Claimants at this stage of the arbitration.

220. Further, for the purposes of Claimants' Application, the Tribunal has not been persuaded that Burford falls within the scope of the immunity afforded by Article 22 of the ICSID Convention. In this regard, the Tribunal has considered Claimants' reference to the decision in the *Libananco v. Turkey* case in which the Tribunal found that the immunity under Article 22 of the ICSID Convention applied to an escrow agent. However, as pointed out by Respondent, the escrow agent in question was part of an arrangement established by the Tribunal to permit the production and examination of share certificates relevant to the issues before the Tribunal for examination by Respondent.[225] The circumstances of that case were that the tribunal made specific provision for the holding of shares to be examined for evidentiary purposes in the arbitration, which are quite different from the circumstances relevant to the Funding Agreement in this case. On the basis of the limited evidence and argument before it, the Tribunal has not been persuaded that the immunity provided in Article 22 of the ICSID Convention applies to Burford. This conclusion is for the purposes of Claimants' Application and is without prejudice to Burford's invocation of immunity elsewhere.

221. This leaves the question of immunity as it may apply to counsel for Claimants and the court-appointed receivers. Respondent made representations to the Tribunal during the Hearing that counsel and the court-appointed receivers were not within the scope of the criminal proceedings. At this stage, there is sufficient uncertainty surrounding the scope of

[225] See *Libananco v. Turkey*, Decision on Preliminary Issues, ¶¶ 61-65 where the tribunal describes the bearer share certificates as lying at the heart of the arbitral proceedings.

the preliminary criminal investigation that the Tribunal does not believe that it is in a position to make a determination as whether the investigation includes counsel or the court-appointed receivers. As a result, it is premature to consider whether the criminal proceedings breach any possible immunity and, if so, whether this contributes to a finding of an aggravation of the dispute by Respondent.

222. Accordingly, for the reasons set out above at paragraphs 206 through 208, the Tribunal's determination in respect of this issue is deferred, with liberty to Claimants to bring this aspect of the Application back before the Tribunal, if it becomes necessary.

6. The Right To An Enforceable Award Under Article 53 Of The ICSID Convention

223. Claimants also submit that an aspect of the integrity of the proceedings is their right to an enforceable award under Article 53 of the ICSID Convention. According to Claimants, the purpose of the Complaints and criminal investigation is to prevent the enforcement of any award rendered against Respondent by de-legitimizing this arbitration and any award.[226]

224. The Tribunal is not persuaded that this is a right of Claimants which is threatened by the Complaints and criminal investigation for essentially the same reasons as set out above in respect of the exclusivity of ICSID arbitration. As previously noted, the purpose and scope of an arbitration relating to an investment dispute is different from that of a criminal prosecution. Further, the obligation to abide by and comply with the terms of an award is an international law obligation and both Parties have accepted that the Tribunal is not bound by the decisions of national courts.

225. The Tribunal now turns to the remaining requirements at issue for the granting of provisional measures.

[226] See TR, pp 29, 71, 73; Claimants' demonstrative slide 75.

7. Irreparable Harm

226. The Parties differ as to whether the threat of irreparable harm must be demonstrated in order to grant provisional measures. Claimants maintain that there is no standalone requirement to prove irreparable harm. Rather, they submit that the proper test is that the measures requested must be "necessary" in the sense that they are required to avoid infliction of harm upon the applicant. That potential harm is then subjected to a balancing test which considers the harm or interference the respondent may suffer if the measures requested are granted.[227] Claimants submit that when the harm threatened relates to the integrity of the proceedings, then the element of necessity will be met.[228] Claimants submit that the criminal proceedings and the media publicity Respondent has given to them exerts undue pressure on Claimants, their counsel, their court-appointed receivers and their funder to desist from the arbitration and from any future annulment or enforcement proceedings.[229]

227. On the other hand, Respondent says that the power to issue provisional measures should only be exercised where there is an urgent need to prevent irreparable harm.[230] Respondent also says that the Complaints and criminal investigation pose no risk of irreparable harm. Respondent also says that Claimants have only made general assertions and not demonstrated how the Complaints and the criminal investigation could harm Claimants' rights to pursue the arbitration at this late stage.[231]

228. As noted previously, Claimants' Application comes late in the arbitral proceedings. Therefore, issues such as the preservation of evidence or intimidation of witnesses, which have been the subject of decisions of other tribunals which have considered provisional

[227] Claimants' Reply, ¶¶ 63-64.
[228] *Ibid*; *Quiborax v. Bolivia*, Decision on Provisional Measures, ¶ 156. The Claimants say that harm of this nature is, in itself, irreparable in the sense that it cannot properly be compensated by damages, in any event.
[229] See Claimants' Reply, ¶¶ 66-72.
[230] See, for example, Respondent's Rejoinder, ¶¶ 41-45.
[231] See Respondent's Rejoinder, ¶ 46; TR, pp 161-162. The Respondent also pointed to the guarantees of due process built in to the Argentine criminal process as well as the protection available to Claimants and their representatives and counsel in international conventions and instruments.

measures in the context of criminal proceedings, do not arise here. As the taking of evidence has been completed in this case, there is only a limited possibility that the criminal proceedings and investigation can now affect the procedural integrity of these proceedings. As a result, with one exception, the Tribunal is not persuaded that Claimants have, on the basis of the evidence presented to date, demonstrated irreparable harm or necessity for the granting of the provisional measures requested.

229. The exception to this conclusion is with respect to the right to counsel. Although this arbitration is nearing its conclusion, the possible need for legal representation by counsel in this arbitration, and the right to the same, continues. Until the Tribunal issues its award and concludes its mandate, Claimants, and their court-appointed receivers, may require the assistance of counsel. This is a fundamental right and the threat to it by way of criminal proceedings while the arbitration is ongoing may give rise to harm or necessity sufficient to justify the suspension of the criminal proceedings against counsel.

230. As indicated previously, there is uncertainty as to the scope of the criminal investigation commenced by the Federal Prosecutor and it is not clear whether counsel or Claimants' court-appointed receivers are included within the scope of the investigation. At this stage, on the basis of the evidence and arguments before it, the Tribunal is unable to determine whether there is sufficient likelihood that counsel and the court-appointed receivers are included within the scope of the criminal investigation so as to justify granting the interim measure sought in their regard. Nevertheless, this is a matter of some concern to the Tribunal and, therefore, Claimants will be at liberty to renew their application if necessary once clarification in this regard has been obtained.

8. Urgency

231. Claimants submit that the provisional measures requested are urgently needed since they are intended to protect the procedural integrity of the arbitration and they are therefore, by definition, urgent. They also note that since the filing of the TAG Complaint, the criminal

investigation is advancing at an unusually fast pace, noting that in a period of approximately seven months, the PROCELAC investigated the TAG Complaint, received reports from Respondent's Spanish counsel in the insolvency proceedings, took witness statements from one of Respondent's counsel and submitted its own complaint to the Federal Prosecutor's office. In addition, the Federal Prosecutor has requested and received the file from PROCELAC and issued requests for the production of certain evidence, including Letters Rogatory for production of a certified copy of the proceedings in this arbitration. In response to Respondent's objection that a period of four months elapsed between the filing of the TAG Complaint and the submission of Claimants' Application, Claimants say that when they learned of the filing of the TAG Complaint, they reserved their right to address the complaint and to request provisional measures once they had received a copy of the TAG Complaint. The TAG Complaint was only provided to Claimants by way of Respondent's letter of 13 May 2015.

232. Respondent says that Claimants have not treated the Complaints as urgent and delayed in filing their Application. It also submits that the criminal investigation is only in the preliminary stages and will take some time. In any event, Respondent says that a decision on the criminal investigation will not be issued before the Tribunal renders its final award.

233. In the Tribunal's view, for the purposes of provisional measures, the requirement of urgency is met when a question cannot await the outcome of the award on the merits.[232]

234. From its review of Respondent's submissions relating to the steps involved in the criminal investigation and the procedural guarantees said to exist under Argentine criminal procedure, the Tribunal's view is that it will take some time before the investigation is completed and a recommendation or charge, if any, is submitted to the Federal court. While there was no specific evidence given on how much time this process can be expected to take,

[232] See *Quiborax v. Bolivia*, Decision on Provisional Measures, ¶ 66, quoting C.H. Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press, p 751 (Exhibit C-543); *Biwater Gauff v. Tanzania*, Procedural Order No. 1, ¶ 14.

the Tribunal's sense is that it is likely to take several months and, therefore, formal charges are not imminent.

235. Nevertheless, where the integrity of the arbitral proceedings is threatened, the Tribunal believes that the need for the measures is inherently urgent. Although very few, if any, procedural steps remain in the arbitration, the Tribunal regards Claimants' access to counsel of their choice as a critical element of the integrity of the arbitral proceedings. As a result, insofar as the criminal investigation relates to counsel for Claimants, the Tribunal considers that the requirement of urgency would likely be satisfied should it be necessary to consider Claimants' Application further in regard of counsel.

236. In regard of Claimants' court-appointed receivers, the Tribunal defers further consideration of this issue, until it should become necessary.

237. With respect to Claimants themselves and Burford, the Tribunal has not been persuaded on the basis of the evidence currently before it that the requirement of urgency has been met.

C. Decision

238. For the reasons set out above, the Tribunal gives the following orders.

239. The Tribunal:

(a) orders that Respondent refrain from publicizing the Complaints or the criminal investigation and any relation they may have to this arbitration, whether by communications to the press or otherwise;

(b) defers its decision in respect of Claimants' Application for Provisional Measures as it relates to the suspension of the criminal proceedings in regard of counsel for Claimants and Claimants' court-appointed receivers, with

liberty to Claimants to bring this Application back before the Tribunal in this respect should it become necessary;

(c) reminds the Parties that they are obligated to refrain from aggravating the dispute;

(d) denies the remaining aspects of Claimants' Application for Provisional Measures; and

(e) reserves its decision on the costs of the procedure relating to Claimants' Application for Provisional Measures to the final award

[signed]

Judge Thomas Buergenthal
President of the Tribunal

[signed]

Mr. Henri C. Alvarez Q.C.
Arbitrator

[signed]

Dr. Kamal Hossain
Arbitrator
Subject to the attached dissenting opinion