INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Gavrilović and Gavrilović d.o.o.

v

Republic of Croatia

(ICSID Case No. ARB/12/39)

DECISION ON CLAIMANTS' REQUEST FOR PROVISIONAL MEASURES

Members of the Tribunal
Michael C. Pryles, President of the Tribunal
Stanimir A. Alexandrov, Arbitrator
Matthias Scherer, Arbitrator

Secretary of the Tribunal
Lindsay Gastrell

Assistant to the President of the Tribunal
Albert Dinelli

30 April 2015

CONTENTS

I. INTRODUCTION

1. This arbitration arises out of the alleged investments of Mr Georg Gavrilović, a national of Austria, and Gavrilović d.o.o., a company organised under the laws of Croatia (together, the "Claimants"), in the Republic of Croatia (the "Respondent" or "Croatia") (collectively, with the "Claimants", the "Parties").

2. On 21 December 2012, the Claimants commenced this arbitration under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID") on the basis of the Agreement between the Republic of Austria and the Republic of Croatia for the Promotion and Protection of Investments, which entered into force on 1 November 1999 (the "BIT"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "ICSID Convention").

3. This Decision sets out the Tribunal's analysis of, and decision in respect of, the Claimants' Request for Provisional Measures dated 15 December 2014 (the "Claimants' Request").

4. For the reasons elaborated in Section IV below, the Tribunal has decided to refuse the Claimants' Request.

II. RELEVANT PROCEDURAL BACKGROUND

5. On 28 November 2014, the Respondent informed the Tribunal that, on 26 November 2014, a crime unit of the Croatian State Attorney's Office, the Croatian Office for Suppression of Corruption and Organised Crime ("USKOK") had issued a decision to conduct criminal investigations in respect of Mr Georg Gavrilović (the "Investigation Order").

6. On 2 December 2014, the Claimants submitted a letter to the Tribunal, setting out several objections to the investigation initiated by USKOK and informing the Tribunal that the Claimants would file an application for provisional measures shortly.

7. On 15 December 2014, the Claimants submitted their Request, accompanied by the following evidential material:

   (a) a legal opinion of Professor Davor Derenčinović dated 12 December 2014 (the "First Derenčinović Opinion");

   (b) a witness statement of Amela Lovreković dated 12 December 2014;

   (c) a witness statement of Marko Dabić dated 12 December 2014 (the "Dabić Statement");

   (d) a witness statement of Suzana Jurić Sekulić dated 12 December 2014; and

   (e) a witness statement of Tihana Prpić Lužaić dated 12 December 2014 (the "Lužaić Statement").

8. In short, in reliance on that evidential material, the Claimants seek relief ordering the Respondent to take all appropriate measures to suspend any criminal investigation of Mr Gavrilović, to refrain from any criminal prosecution of Mr Gavrilović, and to refrain from any other conduct which may jeopardise the procedural integrity of the arbitration.

9. On 16 December 2014, the Tribunal invited the Parties to confer regarding a procedural timetable for written submissions in relation to the Claimants' Request and to advise the Tribunal of their respective initial views as to whether an oral hearing was necessary.

10. On 22 December 2014, each of the Parties made submissions as to the procedural timetable for the written submissions. The Respondent proposed to submit its observations on the Request by 30 January 2015 and informed the Tribunal that it saw no benefit to holding an oral hearing. The Claimants proposed that the Respondent submit its observations by 31 December 2014 and made no submissions regarding an oral hearing.

11. On 23 December 2014, having considered the Parties' respective submissions as to the procedural timetable, the Tribunal ordered that the Respondent provide its reply to the

Claimants' Request by 28 January 2015. The Tribunal reserved its decision on whether to hold a hearing.

12. On 28 January 2015, the Respondent provided its Reply to the Claimants' Request for Provisional Measures (the "Respondent's Reply"), together with a legal opinion of Professor Petar Novoselec dated 27 January 2015.

13. On 9 February 2015, the Tribunal invited the Claimants, if they so wished, to provide a rejoinder to the Respondent's Reply by 24 February 2015.

14. On 10 February 2015, the Claimants requested that the deadline for the submission of any rejoinder be extended to 27 February 2015. The Tribunal granted that request.

15. On 27 February 2015, the Claimants provided their Rejoinder in Support of their Request for Provisional Measures (the "Claimants' Rejoinder"), together with a supplemental legal opinion of Professor Davor Derenčinović dated 27 February 2015 (the "Second Derenčinović Opinion").

16. On 4 March 2015, the Tribunal invited the Respondent to submit any surrejoinder by 31 March 2015.

17. On 13 March 2015, while the Tribunal was awaiting the Respondent's submission of the surrejoinder, the Claimants made an urgent application to the Tribunal. The Claimants informed the Tribunal that Mr Gavrilović had, the day prior, received an official summons compelling his appearance on 20 March 2015 for an interrogation by the Respondent. In those circumstances, the Claimants sought relief as follows:

> In order to maintain the status quo, and to preserve the procedural integrity of this arbitration, Claimants respectfully request that the Tribunal, order Respondent to temporarily suspend its interrogation of Mr Gavrilović until the Tribunal rules on the Claimants' Request to stay in its entirety the criminal prosecution of Mr Gavrilović.

18. The Respondent immediately sought leave to respond to the Claimants' application, and on 14 March 2015, the President of the Tribunal requested that the Respondent submit its response by 17 March 2015. The Respondent subsequently filed its response on that date.

19. The Tribunal duly considered each Party's submissions and ultimately granted the relief sought in an Order dated 19 March 2015. That relief expires, according to the terms of the Order, when "the Tribunal rules on the Claimants' Request for Provisional Measures dated 15 December 2014 filed in this arbitration". This Decision constitutes such ruling; therefore, the urgent relief granted on 19 March 2015 expires as of the date of this Decision.

20. On 31 March 2015, the Respondent provided its Surrejoinder to Claimants' Rejoinder in Support of their Request for Provisional Measures (the "Respondent's Surrejoinder"), together with a supplemental legal opinion of Professor Petar Novoselec dated 30 March 2015.

21. In the cover letter to the Respondent's Surrejoinder, the Respondent requested that an in-person hearing on the Claimants' Request be held, and informed the Tribunal of its availability to attend such hearing in April. It explained that "considering the importance for what is at stake for the Respondent – namely, interference with its undisputable sovereign right and duty to investigate suspected criminal activity in its territory – the Respondent considers that such a hearing is necessary to ensure that the Arbitral Tribunal engages the issue with the appropriate level of care and attention".

22. On 1 April 2015, the President invited the Claimants to comment on the Respondent's request for an in-person hearing.

23. On 2 April 2015, the Claimants wrote to the Tribunal, asserting that any oral argument could be easily achieved by in a telephone hearing. In so doing, it proffered some further (unsolicited) submissions on the subject matter of the Claimants' Request and submitted two additional exhibits.

24. On 3 April 2015, the Respondent wrote to the Tribunal objecting to these unsolicited submissions and seeking that they be struck off the record or, alternatively, that it be given the opportunity to make submissions in response. In addition, with respect to the issue of a hearing, the Respondent contended that only an in-person hearing would allow the Respondent to rigorously test the evidence of the Claimants' lay and expert witnesses.

25. Having considered the Parties' respective submissions as to the need for an oral hearing (whether by telephone or in-person), the Tribunal concluded that such hearing was unnecessary and informed the Parties accordingly on 7 April 2015. This was so because, as is apparent from Section III below, the legal submissions of the Parties are very extensive and the Tribunal was, and remains, of the view that the testing of the witnesses was unnecessary to resolve the matters in dispute.

26. In this regard, the Tribunal, of course, considers that, irrespective of whether a hearing is held or not, it has given, and will continue to give, the issues between the Parties appropriate care and attention. Indeed, in coming to the conclusions set out herein, it has given careful consideration to all of the submissions of the Parties, and the evidential material relied upon. To contend that an in-person hearing is necessary to *ensure* that appropriate care and attention be given to a matter is a submission that is of no assistance to the Tribunal.

27. On 9 April 2015, the Tribunal invited the Respondent to file a brief response as soon as possible in relation to the submissions the subject of the Claimants' letter dated 2 April 2015.

28. On 13 April 2015, the Respondent provided those submissions.

III. THE PARTIES' SUBMISSIONS

(A) The Claimants' Request

(i) Introduction

29. The Claimants' Request is made pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules. They request that the Tribunal order the Respondent "to take all appropriate measures to suspend criminal investigations recently initiated against Mr Gavrilović and to refrain from engaging in any other conduct which may jeopardize Claimants' rights".[1] More specifically, their Request for Relief, as set out in both Section IV of their Request and Section IV of their Rejoinder, seeks a decision providing as follows:

> (i) Respondent shall take all appropriate measures to suspend any investigation relating to the Investigation Order dated November 25, 2014, and any other criminal investigatory actions or criminal proceedings initiated against Mr. Georg Gavrilović, and to suspend any other criminal proceedings or investigation related in any way to the present arbitration, until the arbitration is completed or upon a further decision of the Tribunal. [("Request No. 1")]
>
> (ii) Respondent shall refrain from engaging in any other course of action which may directly or indirectly jeopardize the procedural integrity of this arbitration, aggravate or extend the dispute, alter the *status quo*, destroy the equality of arms between the parties or threaten the exclusivity of this ICSID arbitration, including, but not limited to:
>
> (a) conducting health or safety inspections of Gavrilović d.o.o. in a manner and frequency that is inconsistent with the manner and frequency in which such inspections were conducted prior to the date this arbitration was commenced; and
>
> (b) publicizing any allegations of health and safety violations of Gavrilović d.o.o. until such allegations are proven.
>
> [("Request No. 2")]

[1] Claimants' Request, §1.

(iii) Respondent shall refrain from providing any instructions or warning to potential witnesses not to communicate with Claimants or their counsel, and shall provide Claimants with written notices, in a form to be approved by the Tribunal, ensuring witnesses and potential witness that they may speak with the Claimants and Claimants' representatives, and appear as witnesses in this arbitration, without fear of reprisal from the Respondent. [("Request No. 3")]

(iv) Respondent shall provide to Claimants copies of all evidence collected during the course of the criminal investigation to date, and any such evidence collected in the future. [("Request No. 4")]

(v) Respondent shall pay all costs associated with the Tribunal's issuance of provisional measures.

(vi) And any such relief as the Tribunal deems just and proper.

30. The gravamen of the Claimants' concern is summarised as follows:

> This investigation, and the initiation of criminal proceedings through the Investigation Order are obviously intended to advantage Respondent in this arbitration and deprive Claimants of their right to a fair hearing. "Evidence" obtained by Respondent's criminal investigation authorities appears to provide the basis for its jurisdictional arguments in this arbitration. Furthermore, Respondent has used its police powers to intimidate current and potential witnesses in this arbitration.
>
> Such egregious conduct obviously prevents Claimants from preparing their case and, if not restrained by this Tribunal, will destroy any possibility that Claimants will be fairly heard in this matter.
>
> Under Croatian law, Respondent's criminal authorities have enormous powers to intimidate Claimants and their witnesses: Respondent may intercept and record telephone calls and emails and other electronic data of any individual or legal entity, use undercover investigators and informants, forcibly question witnesses inside and outside Croatia, and restrict or impose conditions for travel from Croatia. Furthermore, pursuant to the Investigation Order, the Respondent may arrest and incarcerate Mr Gavrilović for at least two years, without further notice or a trial.[2]

[2] Claimants' Request, §§4-7.

(ii) Factual Background: The Criminal Investigation

31. The factual background to the Request in relation to the criminal investigation is as follows.

32. As already noted,[3] on 26 November 2014, USKOK issued the Investigation Order. The Investigation Order alleged that the State Attorney could show a reasonable suspicion that Mr Gavrilović induced an "abuse of power in the privatization process". Those allegations concern the investments made by Mr Gavrilović in 1991 and 1992 which are the subject of this arbitration.

33. On 1 December 2014, the State Attorney released to Mr Gavrilović the material which allegedly supports the charge.

34. In essence, the Claimants contend that the material released to Mr Gavrilović demonstrates that the investigation was commenced in response to the Claimants filing the arbitration, rather than as a *bona fide* attempt to investigate any potential crimes. It follows, the Claimants say, that the Respondent's criminal investigation, which is supported by USKOK's broad investigative powers, is being used to advantage the Respondent in this arbitration and deprive the Claimants of their right to a fair trial.

35. Returning to the factual background, the Claimants point to the following facts in support of their Request:

(a) While the crimes cited in the Investigation Order are alleged to have occurred in 1991 and 1992, and were the subject of civil and criminal proceedings in 1996, the first investigatory action in the criminal case file that was made available to Mr Gavrilović took place on 23 April 2013.

[3] See §5 above.

(b) This is more than 22 years after the alleged wrongdoing and only months after the Claimants commenced this arbitration on 21 December 2012.

(c) In the letter to the Tribunal dated 28 November 2014,[4] the Respondent's counsel said that the Respondent's investigation resulted from "new evidence", but, when the investigation commenced in 2013, the only "new evidence" could have been the materials filed with the request for arbitration. Other material, especially the Order of the Bankruptcy Court to submit payment to Inacomm International SA Panama dated 3 March 1992, cannot be "new evidence", as it has been known to the Respondent for over 20 years.

(d) In these circumstances, the Claimants say that the only possible "new evidence" generated by the Respondent's investigation of Mr Gavrilović is the appearance of Mr Ivica Papeš, and the Respondent admits that it only found Mr Papeš after the Claimants filed their memorial on the merits, at least 10 months after the investigation commenced.

(e) Mr Papeš is a convicted felon currently on probation. In 2012, he was convicted of tax fraud and abuse of power in connection with his theft of over 2 million kuna (HRK) from a Croatian company. He was sentenced to 11 months of imprisonment with five years of parole.

36. Pointing to the wide criminal investigation powers vested in USKOK under Croatian law, the Claimants contend that:

(a) the Respondent is using its investigation to intimidate current and potential witnesses in the arbitration; and

[4] See §5 above.

(b) the Respondent is using its investigation to obtain evidence in this arbitration.

37. Before turning to the Claimants' particularisation of (a) and (b) of the preceding paragraph, the Claimants contend that the powers of USKOK are extensive. They point to the availability of "special discovery measures" and "precautionary measures" and, specifically, to the availability, after the issuance of an investigation order, of a power vested in the State Attorney to request that a judge order that the suspect be put in "investigative prison", which may last over three years, depending on the crime of which he or she is suspected.

38. As to the alleged intimidation of current and potential witnesses, the Claimants point to various matters, including (i) the warning of potential witnesses to not speak to the Claimants and their counsel; (ii) statements by the Respondent's officials that attempts by the Claimants or their representatives to speak to persons with relevant information for the criminal proceeding (which parallels the relevant information for the arbitration) may be construed as a crime of "influencing witnesses"; and (iii) the commencement of the USKOK investigation, which "by its nature is a powerful deterrent to any potential witness to give evidence contrary to the Respondent's position in the arbitration".[5]

39. The Claimants contend that, since the investigation has been publicised, the Claimants have experienced a reduced willingness among potential witnesses to speak with the Claimants and their representatives. Even those who have previously co-operated have been reluctant to co-operate further due to a fear of testifying because of retaliatory measures.

40. The high watermark of the Claimants' case appears to be the following:

> The means by which the Respondent has attempted to gain information for its defense from potential witnesses has been particularly shocking and intimidating. One of the potential witnesses reported having been woken very early in the

[5] Claimants' Request, §28.

> morning by Croatian police forces. The officers brought him to a government building in which he was interrogated by a large group of state attorneys for almost 20 hours without breaks and without food. He was denied the right to call an attorney and the interviewers refused to provide him a copy of the interrogation-protocol when the questioning ended. Before the officers permitted him to leave the premises they issued a "warning", saying that he "better not get in touch with Claimants" and "refuse to talk to Claimants" if he were approached.[6]

41. No evidence was provided by this person, anonymously or otherwise.

42. The Claimants contend that these matters are such that they could be a violation of human rights, in particular Article 3 of the European Convention on Human Rights, which prohibits torture and inhumane, degrading treatment or punishment. The Claimants also identify a number of cases in which Croatia has been found to have contravened Article 3.[7]

43. Further, the Claimants contend that the inappropriate and intimidating interrogation techniques extend to what occurred during the Respondent's excessive raid at Gavrilović d.o.o.'s factory on 21 October 2014. As to this event, they rely on the evidence of Ms Tihana Prpić Lužaić, Gavrilović d.o.o.'s head of production of semi-durable sausages and meat. Her witness statement attests to the following facts:

(a) After the 13-hour long raid, the Respondent's police forces ordered her to the local police station for questioning.[8]

(b) She was interrogated for 2 ½ hours.[9]

---

6 Claimants' Request, §34.

7 Claimants' Request, §37, citing *Gladović v Croatia*, no. 28847/08, ECHR 2011; *Testa v Croatia*, no. 20877/04, ECHR 2008; *Longin v Croatia*, no. 49268/10, ECHR 2012; *Pilčić v Croatia*, no. 33138/06, ECHR 2008.

8 Lužaić Statement, §12.

9 Id.

(c) She was denied defence counsel.[10]

(d) The leading officers warned her that she had to tell them everything, and that a failure to do so would lead to liability.[11]

(e) Further, an officer told her several times that the police had clear evidence against the Claimants and it would be better for her to tell everything immediately.[12]

(f) At the conclusion of the interrogation, she was required to sign a "confidentiality declaration", the officers telling her that the contents of the interrogation must be kept secret.[13]

44. As to the use of the investigation to obtain evidence for the arbitration, the Claimants point to a number of matters, including:

(a) The criminal investigation and the Respondent's defence are "clearly linked".[14]

(b) Several of the Claimants' witness statements in this proceeding, including various exhibits, and correspondence from the Claimants' solicitors, form part of the criminal file.

(c) The Respondent has admitted in correspondence to the Tribunal that it plans to use additional evidence from the criminal investigation in the proceeding.[15]

---

10 Lužaić Statement, §13.

11 Id.

12 Id.

13 Id.

14 Claimants' Request, §40.

15 See letter dated 12 December 2014 from the Respondent's to the Tribunal.

(d) An analysis of the criminal investigation file discloses that the primary purpose of the criminal investigation is to support the Respondent's defence, as evidenced by the subject of the questioning of witnesses.

(e) The Respondent has abused State powers by requesting documents from the Republic of Austria, which are relevant to the arbitration, and not to the criminal allegations.

(iii) The Criminal Investigation is Without Legal Basis

45. The Claimants contend that the Investigation Order is invalid and does not support the criminal investigation. They assert that the Investigation Order does not set forth factual allegations or evidence that lead to a reasonable suspicion that Mr Gavrilović committed the alleged offences.

46. The Claimants make this submission in reliance on evidence of Professor Davor Derenčinović, a Doctor of Law in criminal law sciences, Master of Law in criminal law sciences, a Fulbright scholar, and a university professor, with significant experience on matters related to criminology, criminal sciences, Croatian criminal law and human rights law.

47. In essence, Professor Derenčinović testifies that the Respondent has improperly issued the Investigation Order against Mr Gavrilović.[16]

48. In coming to that conclusion, Professor Derenčinović explains that "the Investigation Order does not meet the standard for issuing an investigation order under Croatian law, because it does not show the existence of a reasonable suspicion that Mr Gavrilović committed the alleged crimes".[17] Further, Professor Derenčinović emphasises that the statute of limitations would have expired long before but for the State Attorney's reliance on the Act on the

[16] See, especially, First Derenčinović Opinion, §55; Second Derenčinović Opinion, §48.

[17] First Derenčinović Opinion, §56.

Abolishment of the Statute of Limitations for Crimes of War Profiteering and Privatization Crimes (the "War Profiteering Act"). But Professor Derenčinović explains that the retroactive exception to the rule that criminal offences must be prosecuted within a certain period of time would be restrictively interpreted, and that the Investigation Order does nothing to explain how Mr Gavrilović's alleged crimes fall within that exception.

49. Further, the Claimants point to allegations of facts that are not relevant to the charges cited in the Investigation Order but are relevant to the Respondent's defences. The Claimants allege that their inclusion goes to its central contention that "the true nature of the Investigation Order [is] not aimed at the *bona fide* prosecution of crimes that … Mr Gavrilović allegedly committed 23 years ago, but … at destroying Claimants' ability to pursue their claims in this arbitration".[18]

50. Although an appeal by Mr Gavrilović against the validity of the Investigation Order failed, the Claimants contend that that failure does not mean that the Order was properly issued under Croatian law. In this regard, they rely on Professor Derenčinović's testimony, including his statement that there is a "well-established, yet extremely questionable, practice of almost unconditional judicial granting of the investigation orders issued by the USKOK".[19] The decision is also criticised for not providing any analysis of the deficiencies in the Investigation Order and its internal contradiction.

51. In short, therefore, for these reasons, the Claimants say that "[t]he Investigation Order is not legitimate, but rather was issued to harass Claimants, their witnesses and otherwise unbalance the equality of arms in this arbitration".[20]

---

18 Claimants' Request, §68.

19 First Derenčinović Opinion, §50.

20 Claimants' Request, §75.

(iv) Factual Background: Other Harassment and Intimidation

52. The Claimants contend that the Respondent's harassment and intimidation has not been limited to its conduct in relation to the Investigation Order, but that conduct extends to conduct by which the Respondent subjected Gavrilović d.o.o. to a vastly increased number of extraordinary health and safety inspections, including a dawn raid on 21 October 2014, to which reference has already been made.

53. In relation to the increased number of inspections, the Claimants point to the fact that there were 11 health and safety inspections in 2014, but only three, five and two in, respectively, 2011, 2012 and 2013.[21]

54. In relation to the so-called dawn raid on 21 October 2014, the Claimants contend that the raid was grossly disproportionate to the allegations. In particular, the Claimants point to Ms Lužaić's testimony that a force of 30 Croatian police officers arrived at the factory at dawn, ordered employees to stand motionless in the corner and threatened them with personal liability if requested information was not provided.[22] This raid was required, the Claimants emphasise, only to pick up meat samples from the factory, a task that in the past has been undertaken by a single inspector.

(v) The Respondent's Harassment Drains the Claimants' Resources and Threatens the Continued Existence of Gavrilović d.o.o.

55. The Claimants contend that this harassment and intimidation has not only affected the procedural integrity of the arbitration, but has severely harmed the reputations of the Claimants and, if continued, will likely cause Gavrilović d.o.o. severe financial distress, and may well threaten the survival of the company.

[21] See Dabić Statement, §11; Exhibit C-0199.

[22] Lužaić Statement, §§5-6.

56. In this regard, the Claimants point to the fact that commercial survival in the food industry depends on strong brand name and the trust of consumers in the safety of the products, all of which has been affected by the disproportionate police raid, the media coverage and the enormous harm so caused. This is particularly so given that Mr Gavrilović is the "face" of the Gavrilović brand.

57. The Claimants point to the fact that, particularly since the issuance of the Investigation Order, certain business partners no longer wish to be associated with the Gavrilović name.[23] Further, there has been a significant strain on human resources and the management of Gavrilović d.o.o. The Claimants contend that Gavrilović d.o.o.'s "entire management is currently working tirelessly on damage control, to the severe detriment of its normal responsibilities. The October raid alone led directly to nearly 1,200 lost man-hours".[24]

(vi) The Provisional Measures Should be Granted

58. The Claimants contend that the Tribunal should grant the provisional measures sought to protect the Claimants' rights to: (i) the procedural integrity of the arbitration; (ii) the preservation of the *status quo* and the non-aggravation of the dispute; (iii) equality of arms; and (iv) the exclusivity of the ICSID proceedings under Article 26 of the ICSID Convention.

59. As already noted, the Claimants' Request is made pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules. The Claimants contend that, as the tribunal explained in *City Oriente v Republic of Ecuador*, Article 47 of the ICSID Convention:

> provides authorization for the passing of provisional measures prohibiting any action that affects the disputed rights, aggravates the dispute, frustrates the

[23] Dabić Statement, §§7-9

[24] Claimants' Request, §93, citing Exhibit C-0199.

effectiveness of the award or entails having either party take justice into their own hands.[25]

60. Further, the Claimants contend that, while Article 47 and Rule 39 use the word "recommend", "it is generally recognized that arbitral tribunals are empowered under these provisions to order provisional measures with binding force and that the parties are obliged to comply with such orders".[26]

61. The Claimants contend that to be entitled to an order for provisional measures, a party must satisfy three requirements:

(a) the party has a right (whether substantive or procedural) which can be protected;

(b) the need for the provisional measures sought is urgent; and

(c) the provisional measures are necessary to protect those rights.

(vii) Prima Facie Jurisdiction

62. Before turning to these three requirements, the Claimants first address the question of jurisdiction, contending that an ICSID tribunal may recommend provisional measures even where (as here) it has yet to decide the question of its jurisdiction.[27]

63. The Claimants contend that all that is required is that the provisions invoked appear *prima facie* to afford a basis for jurisdiction to decide the merits. To support this contention, the

---

[25] *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador),* ICSID Case No. ARB/06/21, Decision on Provisional Measures, §55.

[26] Claimants' Request, §99, citing *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12, Decision on Claimants' Request for Provisional Measures (13 December 2012), §120; *Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures (17 August 2007), §58; *Tokios Tokeles v Ukraine*, ICSID Case No. ARB/2/18, Order No. 1 – Claimants' Request for Provisional Measures (1 July 2003), §§51-53.

[27] Claimants' Request, §102, citing *Quiborax SA Non Metallic Minerals SA & Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010), §108.

Claimants cite a number of authorities, including the *Case Concerning Passage Through the Great Belt*, where the International Court of Justice stated:

> Whereas on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded …[28]

64. This, the Claimants suggest, is a low threshold, which is satisfied in this case, particularly because: first, the Respondent does not contest the Tribunal's jurisdiction *ratione persone* or *ratione temporis*; second, although the Parties are in dispute in relation to jurisdiction *ratione voluntatis* and *ratione materiae*, *ratione voluntatis* has been established by the Respondent's consent to arbitration in Article 9 of the BIT; and, third, jurisdiction *ratione materiae* can be affirmed on the basis of the Claimants' submissions in their Request for Arbitration and Memorial on the Merits and their continued operation of a going-concern in Croatia.

(viii) Requirement (1): Rights to be Protected by Provisional Measures

65. As already noted at §58, the Claimants point to four rights which are to be protected by the grant of provisional measures.

66. Turning first to (i) – the procedural integrity of the arbitration – the Claimants point to their right to have their claims "fairly considered and decided by the Arbitral Tribunal".[29] Referring to *Quiborax v Bolivia*[30] and *Biwater Gauff v Tanzania*,[31] the Claimants point to various aspects of procedural integrity, including the access to and integrity of the evidence,

---

28 *Case Concerning Passage Through the Great Belt (Finland v Denmark)*, ICJ Order (29 July 1991), §14.

29 Claimants' Request, §110, quoting *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order (6 September 2005), §40.

30 *Quiborax SA Non Metallic Minerals SA & Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010).

31 *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No. ARB 05/22, Procedural Order No. 1 (31 March 2006).

the minimisation of any scope for external pressure on any party, witness, expert or other participant in the process, a level playing field and the avoidance of "trial by media". In particular, the Claimants refer to the tribunal's statement in *Quiborax* that:

> [E]ven if no undue pressure is exercised on potential witnesses, the very nature of these criminal proceedings is bound to reduce their willingness to cooperate in the ICSID proceeding.[32]

67. Further, the Claimants cite *Lao Holdings v Laos*, where the respondent similarly alleged potential criminal behaviour by or on behalf of the claimant in relation to the respondent's government officials. As in this case, Laos sought to pursue criminal proceedings arising out of the same facts and at the same time as the arbitration. Because of the direct relationship between the subject matter of the arbitration and the criminal investigation, and the timing of the investigation, the tribunal concluded:

> [T]he integrity of the arbitral process would be compromised by permitting the Respondent to run a criminal investigation concurrently with the arbitration directed to the same people and the same facts at the same time.[33]

68. The tribunal identified the fact that the parallel criminal investigation would be "disruptive", as it would "inevitably divert at least some of the Claimant's resources" needed for the arbitration "to dealing with issues arising out of police interviews with people now or in the past associated with the Claimant".[34] Further, the tribunal was there concerned that concurrent criminal investigations would have a "chilling effect" and constitute a "powerful deterrent" to witnesses giving evidence contrary to the respondent's position.[35] The tribunal concluded that such domestic criminal investigations would

---

32 *Quiborax SA, Non Metallic Minerals SA & Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010), §146.

33 *Lao Holdings NV v The Lao People's Democratic Republic*, ICSID Case No ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order (30 May 2014), §§37-39.

34 Id, §40.

35 Id, §41.

"aggravate the dispute, by endangering the procedural integrity of the arbitral proceeding".[36] The Claimants contend that the same conclusions follow from the Respondent's conduct in this case. Further, they say that the Respondent's actions are similar to those of Bolivia in *Quiborax*, in that the pressure placed on potential witnesses by the criminal investigation has reduced their willingness to cooperate in this arbitration.

69. As to (ii) – the aggravation of the dispute and disruption of the *status quo* – the Claimants rest their case on Article 47 of the ICSID Convention, which they contend is based on the principle that "once a dispute is submitted to arbitration, the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of the award".[37] It follows that the preservation of the *status quo* and the non-aggravation of the dispute are rights capable of protection by provisional measures.[38]

70. Concerning Mr Gavrilović and Gavrilović d.o.o., the Claimants contend:

> Through the announcement of the USKOK Investigation, Mr Gavrilović is at risk of incarceration and extradition. Moreover, Respondent's continued and intensified attacks on the Claimants' business threaten the viability of Mr Gavrilović's business. Respondent's actions also create serious obstacles for Claimants' presentation of their claim and put intolerable pressure on Claimants to abandon their claims. Respondent has continued to disrespect its obligation to treat foreign investors such as the Claimants in accordance with fair and equitable treatment-standard set forth in the Treaty. As such, Respondent's misconduct constitutes (a) a gross aggravation of the dispute and (b) a departure from the *status quo* between the parties.
>
> …
>
> [T]he Claimants own and operate a going-concern in Croatia which severely suffers from the Respondent's harassment. And it is not just any going-concern that is at

[36] Id, §42.

[37] Claimants' Request, §120, quoting G Kaufmann-Kohler & A Antonietti, "Interim Relief in International Investment Agreements", in K Yannaca-Small, *Arbitration Under International Investment Agreements – A Guide to the Key Issues* (OUP, 2010), p 522.

[38] Claimants' Request, §120, citing *Churchill Mining plc and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 9 (8 July 2014), §90.

> risk, but a long lasting family tradition which is today one of the most successful meat processing businesses and one of the largest employers in the region. In addition, Mr Gavrilović and his family reside in Croatia and are fully exposed to all of the pressures resulting from Respondent's improper criminal investigation.[39]

71. As to (iii) – equality of arms – the Claimants contend that equality of arms is a fundamental rule of procedure, emphasising that tribunals have the "inherent power" and a duty to proactively restore equality of arms if it is affected by a State which abuses its "dual role as both equal-level party to an arbitration and, simultaneously, as sovereign State".[40]

72. The Claimants contend that such abuse has occurred here by virtue of the Respondent having used the investigative powers of the USKOK – Croatia's most powerful investigative body – in service of evidence gathering, including interviewing potential and actual witnesses, and having circumvented the arbitration's document production processes by use of judicial assistance under EU law. Further, the Claimants particularise the following actions in support of this submission: surveillance and technical recording of telephone conversations and other means of communication, interception, gathering and recording of electronic data, and entry into the premises for the purpose of conducting surveillance and technical recording at the premises. Finally, the Claimants identify the possibility that Mr Gavrilović may be arrested and detained at any time and held for up to three years.

73. As to (iv) – circumvention of Article 26 of the ICSID Convention – the Claimants assert that their right to international adjudication under the Convention "to the exclusion of any other remedy" is being infringed by the Respondent's misconduct. The Claimants point to the fact that, by investigating the alleged criminal conduct, the Respondent is raising in

---

39 Claimants' Request, §§122, 126.

40 Claimants' Request, §129, quoting T Wälde, "'Equality of Arms' in Investment Arbitration: Procedural Challenges" in K Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (OUP, 2010), pp 161-162, 180-182.

alternate fora the issues that are presently, and exclusively, before the Tribunal relating to the jurisdiction and admissibility of the Claimants' claims. That is to say, "[i]t is evident that Respondent is using the criminal investigation to build its case on the objections on jurisdiction, thereby bringing the criminal investigation in line with this arbitral proceeding and the issues in dispute".[41]

74. While the Claimants do not contest that the Respondent has the sovereign power to investigate and prosecute conduct within its territory that may constitute a crime if it has sufficient evidence to justify prosecution, they highlight that such prosecutorial powers "must be exercised in good faith and with due respect for Claimants' rights".[42] The Claimants say that, as in *Lao Holdings*, this is a case which warrants a departure from the general rule entitling a state to enforce its criminal laws. Indeed, they contend this is a stronger case than *Lao Holdings*, where like relief was granted; effectively, the Claimants say, the Respondent's conduct is such to remove from the exclusive jurisdiction of the Tribunal the very subject matter of this proceeding and, in so doing, to act without due respect for the Claimants' rights.

(ix) Requirement (2): Provisional Measures are Urgent

75. The Claimants note that, while there is no urgency requirement in the language of Article 49 of the ICSID Convention or Rule 39 of the Arbitration Rules, previous tribunals have held that provisional measures are only appropriate if a question cannot await the outcome of the award on the merits.

76. They contend that Tribunals have applied a "low threshold" to the element of urgency and that the observation of the tribunal in *Biwater Gauff* is apposite:

---

41 Claimants' Request, §143.

42 Claimants' Request, §144, quoting *Lao Holdings NV v The Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order (30 May 2014), §25.

> [T]he degree of "urgency" which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measure at a certain point in the procedure before the issuance of an award.[43]

77. In this regard, the Claimants point to the Respondent's misconduct in threatening the physical integrity of Mr Gavrilović, the Claimants' representatives and witnesses with incarceration and extradition, any or all of which require immediate action from the Tribunal. The Claimants emphasise that the Respondent has offered no indication that it will cease what they describe as a "campaign against the Claimants", absent being so ordered by the Tribunal. Further, the Claimants also submit that the circumstances of this arbitration give rise to the question whether the Claimants will have the opportunity to properly present their case and whether they may rely on the integrity of specific evidence. Accordingly, the provisional measures, the Claimants contend, are intended to protect the jurisdictional powers of the Tribunal, the integrity of the arbitration and the final award, among others – it follows *a fortiori*, that such measures are "urgent by definition".[44]

(x) Requirement (3): Provisional Measures are Necessary to Safeguard the Claimants' Rights

78. The third requirement identified by the Claimants is that the provisional measures are "necessary" to avoid harm or prejudice being inflicted on the applicant (here, the Claimants).

79. The Claimants concede that investment treaty tribunals have taken different approaches with respect to the intensity of the harm required to justify provisional measures. Those approaches are as follows:

---

43 *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No. ARB 05/22, Procedural Order No. 1 (31 March 2006), §76.

44 Claimants' Request, §153, quoting *Quiborax SA Non Metallic Minerals SA & Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010), §153.

(a) first, some earlier tribunals, including those in *Occidental* and *Plama*, applied a test of "irreparable prejudice", concluding that provisional measures could only be ordered if there is a threat of "irreparable" harm incapable of being compensated by an award of monetary damages;[45] and

(b) second, on the other hand, a series of recent decisions of ICSID tribunals have invoked a lower threshold and adopted a standard of "harm not adequately reparable by an award of damages".[46] Other tribunals have required "the existence of a risk of irreparable or substantial harm"[47] or even the lower threshold of "a sufficient risk of harm or prejudice".[48]

80. The Claimants contend that the threat of harm to them by the Respondent's conduct is such that it meets either of these standards. Further, an order of provisional measures would be proportionate, because the Claimants' interest in such measures greatly outweighs any harm or disadvantage to the Respondent. Indeed, the continuation of the Respondent's harassment, the Claimants allege, will ultimately lead to the eradication of the investment itself. A monetary award cannot compensate such harm. Alternatively, the Claimants contend that, even if a monetary award were practicable, "irreparable harm" has a flexible meaning and, adopting the words of the UNCITRAL tribunal in *Paushok v Mongolia*, "the

---

45 *Occidental Petroleum Corporation v Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures (17 August 2007), §92; *Plama Consortium Limited v Republic of Bulgaria,* ICSID Case No. ARB/03/24, Order (6 September 2005), §46.

46 *Burlington Resources Inc v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Resource's Request for Provisional Measures (29 June 2009), §75; *Quiborax SA Non Metallic Minerals SA & Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010), §155.

47 *Churchill Mining PLC & Planet Mining Pty Ltd v Republic of Indonesia,* ICSID Case No. ARB/12/14 & 12/40, Procedural Order No. 9 (8 July 2014), §69.

48 *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No. ARB 05/22, Procedural Order No. 3 (31 March 2006), §146.

possibility of monetary compensation does not necessarily eliminate the possible need for interim measures".[49]

81. The Claimants contend that the approach of the tribunal in *City Oriente* should be followed. There, the tribunal held, referring to Article 17A of the UNCITRAL Model Law:

> It is not essential that provisional measures be necessary to prevent irreparable harm, but that the harm spared the petitioner by such measures must be significant and that it exceeds greatly the damage caused to the party affected thereby.[50]

82. The Claimants emphasise that in *City Oriente,* the Ecuadorian State Attorney General announced the filing of a criminal complaint and eventually filed two criminal complaints against the claimant's executives. The tribunal considered that the provisional measures requested by the claimant – including the stay of all proceedings affecting the claimant's offices or employees – "are necessary to preserve Claimant's rights and the claims it has asserted" in the arbitration.[51]

83. In particular, the tribunal found that "pending a decision on this dispute, the principle that neither party may aggravate or extend the dispute or take justice into their own hands prevails" over Ecuador's sovereign right to prosecute and punish crimes.[52] For these reasons, the tribunal ordered Ecuador to "take such measures as may be necessary in order that the Ecuadorian prosecutor's office will not pursue any procedures or make any inquiries that may affect claimant or claimant's offices or employees, or which may require

---

49 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia*, UNCITRAL, Order on Interim Measures (2 September 2008), §68.

50 *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador),* ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and other Procedural Matters (13 May 2008), §72.

51 Claimants' Request, §167, quoting *City Oriente Limited v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador*), ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters (13 May 2008), §57.

52 *City Oriente Limited v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador),* ICSID Case No. ARB/06/21, Decision on Provisional Measures (19 November 2007), §§57, 62.

them to make an appearance, throughout the full force and effect of this provisional measure".[53]

(xi) The Provisional Measures are Proportionate

84. Finally, the Claimants contend that the provisional measures are proportionate. Invoking what was said by the tribunal in *Paushok v Mongolia*, the Claimants assert that the Tribunal "is called upon to weigh the balance of inconvenience in the imposition of the [provisional measures] upon the parties".[54]

85. In this regard, the Claimants assert that ordering the Respondent to suspend the criminal investigations against Mr Gavrilović concerning acts that occurred more than 20 years ago and restraining further harassment or intimidation would not harm the public interest of Croatia or its citizens. A mere stay of criminal investigations does not seriously affect the sovereign rights of a state.[55] The Claimants point out that the Respondent could have initiated the investigation more than 20 years ago; therefore, a decision to stay that process now has little or no impact on the Respondent's sovereign rights. Likewise, no prejudice results from prohibiting the Respondent from publicising any allegations against the Claimants until proven. On the other hand, the Claimants will suffer substantial and irreparable harm without the provisional measures.

---

53 Id, §66.

54 *Sergei Paushok v The Government of Mongolia*, UNCITRAL, Order on Interim Measures (2 September 2008), §79.

55 Claimants' Request, §170, citing *Quiborax SA Non Metallic Minerals SA & Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010), §165; *Lao Holdings NV v The Lao People's Democratic Republic*, ICSID Case No ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order (30 May 2014), §74.

(B) The Respondent's Reply

(i) Introduction

86. The Respondent contends that the Claimants' Request should be dismissed in its entirety. Its case is encapsulated in §2 of its Reply:

> There is no material risk of serious or irreparable injury to the Claimants' existing rights. Specifically, neither the First Claimant's physical integrity nor the Second Claimant's existence are at risk, nor is there any other grave threat of serious harm. The Respondent has not engaged in any intimidation or harassment of the Claimants or any witnesses. Access to and integrity of evidence is unimpaired. Equality of arms is maintained, and the Arbitral Tribunal's jurisdiction is not threatened. There is no question here that cannot await the outcome of this arbitration.

(ii) Factual Background in Summary

87. The Respondent identifies the two events that the Claimants rely upon to found their Request as (i) the health and safety inspections conducted at the premises of Gavrilović d.o.o. and, in particular, the inspection of 21 October 2014; and (ii) the criminal investigation of Mr Gavrilović.

88. The Respondent contends that both of these events have been misdescribed and mischaracterised by the Claimants. The Respondent asserts, in summary:

(a) as to (i) – the health and safety inspections – the number of health and safety inspections since the Claimant has filed its Request for Arbitration has decreased, rather than increased, and the inspection on 21 October 2014 was conducted in good faith, with respect for due process and has involved serious violations of EU health and safety laws; and

(b) as to (ii) – the criminal investigation of Mr Gavrilović, which was initiated *before* the commencement of this arbitration and is legally justified, has been conducted in good faith and does not undermine the integrity of the arbitral process.

(iii) Factual Background: The Health and Safety Inspections

89. The Respondent contends that the two factual premises upon which the Claimants rely – namely that throughout 2014, Gavrilović d.o.o. was subjected to a vastly increasing number of health and safety inspections and that the "dawn raid" on 21 October 2014 was excessive – are false.

90. As to the number of inspections, the Respondent asserts that in 2012, there were 171 planned and seven unplanned inspections, in 2013, there were 88 planned and eight unplanned inspections and, in 2014, there were 24 planned and three unplanned inspections.[56] The allegation is, thus, unsubstantiated and undeveloped.

91. As to the 21 October 2014 inspection, the Respondent states that:

(a) it was a standard health inspection, ordered on the basis of an anonymous complaint;

(b) the inspection was conducted in good faith and respected due process; and

(c) the inspection revealed numerous breaches of EU health and safety regulations and infringements of corresponding provisions of Croatian law.

(iv) Factual Background: The Criminal Investigation

92. Turning now to the factual background to the criminal investigation of Mr Gavrilović, the Respondent contends that the allegations made by the Claimants are also false. In this regard, the bases identified by the Claimants – each of which are contested by the Respondent – are that "the Respondent's investigation of Mr Gavrilović was a direct response to the commencement of this arbitration, not a *bona fide* use of police powers to

[56] Respondent's Reply, §11; Exhibit R-0089.

investigate [crime]" and that the "Respondent has already used its investigat[ory] powers to intimidate actual or potential witnesses".[57]

93. In relation to the former, the Respondent contends that the public prosecution service opened its inquiry into the relevant events in 2011 *before* the Claimants commenced this arbitration, on 16 November 2012. In this regard, it relies on the fact that, in 2010, with the passing of the War Profiteering Act, a complaint was received by the public prosecution service in Zagreb alleging a number of illegalities in respect of the sale of the five Gavrilović companies to Mr Gavrilović.

94. Further, the Respondent contends that it was not until early 2014 that the focus of the investigation turned to Mr Gavrilović himself. The Respondent states that Mr Papeš independently approached the public prosecution service for the first time at around this time with information concerning the events surrounding the sale to Mr Gavrilović of the five companies in bankruptcy. The Respondent relies, in particular, on the following summary of Mr Papeš' interview:

> Mr Papeš alleged during the interview and produced documentation confirming that, in March 1992, a couple of days after informing Mr Gavrilović that he had deposited DEM2,000,000 of State money [in] a bank account in Frankfurt, Mr Gavrilović came to his house with then Minister of Finance, Mr Joso Martinović, who requested that Mr Papeš transfer that money to Mr Gavrilović. Mr Papeš did so.[58]

95. This evidence, according to the Respondent, precipitated the expansion of the inquiry and interviews with further individuals. The Respondent contends, however, that none of these witnesses who were interviewed after Mr Papeš approached the public prosecution service are among the Claimants' witnesses in the arbitration or employed by Gavrilović d.o.o.

---

[57] Claimants' Request, §§15, 11.

[58] Respondent's Reply, §28 (citations omitted).

96. On 25 November 2014, pursuant to Article 27(1) of the Criminal Procedure Act, USKOK issued the Investigation Decision referred to in the Claimants' Request. In this regard, the Respondent contends that:

(a) Mr Gavrilović was provided with all information gathered during the inquiry;

(b) the Investigation Decision was issued on the basis that there is a reasonable suspicion that: (i) as an accessory, Mr Gavrilović induced another to commit the criminal offence of abuse of office and official authority; and (ii) as principal, Mr Gavrilović committed the criminal offence of abuse of office and official authority;

(c) the underlying facts of the investigation are set out therein; and

(d) in accordance with the due process rights provided by Article 218 of the Criminal Procedure Act, Mr Gavrilović appealed the Investigation Decision. The County Court in Zagreb held that the evidence collected during the pre-investigation stage satisfied the threshold required to establish a reasonable suspicion for the commission of the offences.[59]

97. In relation to the Claimants' allegation that the Respondent has already used its investigatory powers to intimidate actual or potential witnesses, the Respondent contends that the investigation is being conducted in good faith, namely with the exclusive purpose of enforcing, and adhering to, its criminal law. By way of particularisation, the Respondent points out that:

(a) it is a party to the United Nations Convention Against Corruption and is committed to its enforcement;

[59] Ruling of the Investigating Judge of the County Court in Zagreb, Ref No: 3 Kir-Us-551/14 (9 December 2014), Exhibit C-0201.

(b) the public prosecution service is duty-bound to inquire into, investigate and prosecute alleged offences where a reasonable suspicion exists that those offences have been committed;

(c) the expert evidence of Professor Petar Novoselec, the former President of the Criminal Division of the Supreme Court of the Republic of Croatia and former head of the Criminal Law Department at the University of Zagreb, shows that reasonable suspicion exists and the Investigation Decision is compliant with Croatian law and European Union standards;[60]

(d) the public prosecution has at all times protected the rights of Mr Gavrilović, which are enshrined in Croatian law.

(e) the criminal investigation is legally justified because the evidence establishes a reasonable suspicion that: (i) Mr Gavrilović induced Mr Martinović to commit the criminal offence of abuse of office and official authority; and (ii) Mr Gavrilović as principal committed the criminal offence of abuse of office and official authority;[61]

98. Thus, according to the Respondent, the criminal investigation respects due process, and the rights of the individuals are at all times respected. In this regard, the Respondent states that "[t]he Claimants make outrageous and irresponsible statements about the pre-investigation stage of the proceedings, alleging that the Croatian police and public prosecution service have abused their powers to threaten witnesses and interrogate them under pressure".[62] The Respondent contends that none of these allegations is supported by any evidence.

---

60 See Professor Petar Novosalec's expert report dated 27 January 2015.

61 The Respondent also relies on Professor Petar Novosalec's expert report dated 27 January 2015 in this regard.

62 Respondent's Reply, §57.

99. Further, the Respondent rejects the Claimants' "generalisations about the Croatian criminal justice system".[63] The Respondent describes the Claimants' appeal to the most extreme procedural measures as "a baseless caricature".[64] In that regard, the Respondent notes that it has not sought any of the measures identified by the Claimants, namely "special discovery measures" or "precautionary measures". Specifically, in relation to the detention of a person pursuant to investigative detention, the Respondent notes that "there is no suggestion that Mr Gavrilović is a flight-risk, or that special circumstances exist that would indicate, at this stage, that Mr Gavrilović has or will tamper with evidence, commit a further offence, hinder the conduct of the criminal investigation, or fail to show up at a court hearing".[65] Further, given Mr Gavrilović's age, only in "exceptional circumstances" would detention be appropriate.[66]

100. It bears emphasis that, with regard to the conduct of the criminal investigation, the Respondent specifically contends as follows:

> [T]he investigation has shown the utmost respect for Mr Gavrilović's due process rights and, as required by the Criminal Procedure Act, <u>will continue to do so going forward</u>.
>
> …
>
> The Criminal Procedure Act ensures that, during the questioning, Mr Gavrilović's basic rights, including his due process rights, will be respected. In particular, *(i)* prior to the questioning, the respective authority must confirm that Mr Gavrilović has received and understood the list of basic rights provided with the Investigation Decision, *(ii)* Mr Gavrilović's lawyer must be present at the questioning; *(iii)* the questioning must be filmed; *(iv)* Mr Gavrilović is entitled to use notes during the questioning and must be given the opportunity to comment on all the circumstances surrounding the alleged offences and to present all the facts supporting his defence,

63 Respondent's Reply, §II(2)(b)(ii).

64 Respondent's Reply, §66.

65 Respondent's Reply, §71.

66 Respondent's Reply, §73.

> and *(v)* following the questioning, Mr Gavrilović must be given the opportunity to fill any gaps and remove any contradictions or ambiguities in his statement.
>
> …If charged, Mr Gavrilović is … entitled to submit an objection to the indictment within eight days from the day of its service. …
>
> …[T]he only measures that could, allegedly, prevent Mr Gavrilović from fully participating – "precautionary measures" or investigative detention – will not and could not be applied, as the particular facts of the Case and Mr Gavrilović's personal circumstances do not warrant them.[67]

(v) The Criminal Investigation in no Way Interferes with the Arbitration

101. Before turning to the requirements for the granting of provisional measures, the Respondent argues that the criminal investigation will not interfere in any way with the arbitration by making the resolution of the ICSID dispute more difficult. In this regard, the Respondent makes three submissions.

102. First, the criminal investigation does not affect the Claimants' rights to pursue this arbitration. In this regard, the Respondent asserts that any "precautionary measures" and investigative detention will not be applied; thus, the on-going investigation does not prevent the Claimants' participation in the arbitration. The Respondent also points to the fact that, even if charged, Mr Gavrilović will remain at liberty for the course of the trial and will be able to fully participate in the arbitration.

103. Second, the criminal investigation does not prevent any witnesses from testifying or sharing information with the Claimants or their lawyers. Indeed, the Respondent contends that only one of the Claimants' witnesses has been interviewed, and emphasises that "with the exception of this one witness, none of the Claimants' witnesses will be questioned during the course of the formal investigation".[68] Further, the Respondent states that individuals interviewed by the public prosecution service will be at liberty to discuss with

[67] Respondent's Reply, §§58, 63, 76 (citations omitted; emphasis added).

[68] Respondent's Reply, §78.

the Claimants and their representatives everything they know about the subject matter of the arbitration; the only restriction is that those individuals are unable to discuss what was revealed to them by the public prosecution service, which given the nature of the interviews, would be limited to who conducted the interview, the documents shown and the questions asked.

104. Third, the criminal investigation does not disadvantage the Claimants or advantage the Respondent. In this regard, the Respondent points to the fact that the public prosecution service has not collected any evidence beyond that which is strictly necessary for the inquiry. Further, in short, it contends that: (a) whatever may have been the case during the inquiry that led to the Investigation Decision, when the exact nature and characterisation of the offences was not known, the investigation is now limited to those alleged offences cited in the Investigation Decision; (b) the investigation and arbitration are being carried out by distinct agencies – respectively, the public prosecution service and the civil division of the State Attorney's Office – and the work of the former is confidential and the substance of its inquiries cannot be disclosed; and (c) Mr Gavrilović has, and has already exercised, the right to request the entire case file of the investigation.

(vi) The Requirements for Granting Provisional Measures

105. The Respondent notes that it is common ground that this Tribunal has power to grant provisional measures under specific conditions. It makes submissions directed to four topics.

106. First, in relation to the legal framework, the Respondent submits that Article 47 of the ICSID Convention and Rule 39 govern the Tribunal's power to recommend provisional measures.

107. Second, the Respondent emphasises that the Claimants bear the burden of proof of establishing the requirements for provisional measures. In this regard, the Respondent contends that the Claimants must provide sufficient evidence to show that the Tribunal has

prima facie jurisdiction, that there is an urgent need for the requested measures and that the Claimants have a *prima facie* case on the merits.

108. Third, and without prejudice to its jurisdictional objections, the Respondent does not contest that the Tribunal need not satisfy itself of its jurisdiction in respect of the merits of the dispute for the purposes of determining the Claimants' Request. Nevertheless, the Respondent points out that provisional measures are not a means to expand the jurisdiction of the Tribunal, and contends that the fact that it has raised serious preliminary objections in relation to admissibility and jurisdiction is relevant to the Tribunal's exercise of discretion in relation to the Claimants' Request.

109. Fourth, and most fulsomely, the Respondent identifies a number of factors which inform the appropriateness (or otherwise) of provisional measures.

110. The first factor the Respondent identifies is the exceptional nature of provisional measures. The Respondent cites *Phoenix Action v Czech Republic*, where the tribunal reasoned that "provisional measures are extraordinary measures which should not be recommended lightly".[69] The Respondent explains:

> The core rationale for provisional measures is to protect the object of the litigation, i.e. the decision to be given. Neither party should render proceedings meaningless or frustrate a potential result. Those are evidently extreme situations.[70]

111. Further, the Respondent argues that particular stringency is required where, as in this case, the jurisdiction of the tribunal has not yet been established, citing *Perenco v Ecuador*.[71] It

---

[69] *Phoenix Action Ltd v The Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures (6 April 2007), §33.

[70] Respondent's Reply, §99.

[71] *Perenco Ecuador Ltd v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Provisional Measures (8 May 2009), §59.

emphasises the high threshold to be met, relying on the commentary of Kaufmann-Kohler and Antonietti, who explain:

> [A]pplicants are faced with a high threshold when seeking to establish that the interim relief requested is urgent and needed. This may explain the reluctance of the vast majority of the tribunals to grant interim relief in the context of investor-state arbitration, whether in the ICSID system or under UNCITRAL rules. [72]

112. Finally, the Respondent asserts that this stringency is further supported by the fact that the Tribunal can review any conclusion it reaches now, if relevant circumstances change.

113. The second factor to which the Respondent points is the existence of a right requiring preservation. In this regard, the Respondent emphasises that the purpose of provisional measures is to safeguard *existing* rights, not to assert hypothetical rights or prejudge the substance of a dispute.

114. The third factor identified by the Respondent is the urgent necessity to avoid irreparable harm. The Respondent contends that, consistently with the exceptional nature of provisional measures, provisional measures may only be issued if they are necessary and urgent.[73] The Respondent contends:

> A measure is said to be necessary if it is required to avoid a party causing or threatening irreparable prejudice to the rights invoked. Accordingly, where less intrusive relief is available, typically monetary damages, provisional measures are inappropriate.[74]

115. Further, the Respondent points to established international legal practice, including past decisions of ICSID tribunals, which it contends does not recognise a need for provisional

---

72 G Kaufmann-Kohler & A Antonietti, "Interim Relief in International Investment Agreements" in K Yannaca-Small, *Arbitration under International Investment Agreements: A Guide to the Key Issues* (OUP, 2010), p 550.

73 Respondent's Reply, §107, citing *Quiborax SA, Non Metallic Minerals SA & Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010), §113.

74 Respondent's Reply, §108 (citations omitted).

measures in situations where the alleged prejudice, if established, can be readily repaired by an award of damages at a later stage of the proceedings. It quotes the *CEMEX* tribunal, which, on the basis of a survey of the relevant cases, concluded:

> In the light of the preceding analysis, the Tribunal sees no reason not to retain the generally accepted standard of 'irreparable harm' as criterion for the "necessity" required by Article 47 of the ICSID Convention.[75]

116. It follows, the Respondent argues, that a measure can be considered to be urgent only where the action which would irreparably harm the rights of a party is very likely to be taken before a final decision is rendered. That is, the Respondent submits that the threatened harm must be imminent, and not just theoretical.

117. The fourth factor raised by the Respondent is the fact that conducting criminal investigations is the duty of a State. The Respondent contends that "[s]imply by virtue that they filed for ICSID arbitration, the Claimants cannot seek to prevent [the] criminal investigation of Mr Gavrilović, when the competent authorities have independently established that wrongful conduct is likely to have occurred".[76] Further, the Respondent submits that provisional measures in the context of domestic criminal investigation require "special consideration", such criminal law being an obvious and undisputed part of State sovereignty. It follows, the Respondent says, that "the already high threshold … for recommending provisional measures is further increased in the context of criminal investigations".[77] The Respondent relies on various ICSID authorities to support this position.[78]

---

75 *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Claimants' Request for Provisional Measures (3 March 2010), §§46, 56.

76 Respondent's Reply, §116.

77 Respondent's Reply, §117.

78 See, eg, *Caratube International Oil Company LLP v The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures (31 July 2009), §137; *Churchill Mining and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 & 12/40, Procedural Order No. 14

(vii) The Circumstances do not Justify Provisional Measures

118. The Respondent accepts that the following are existing rights vested in all disputing parties and, in principle, susceptible of protection: (i) the integrity of an arbitration; (ii) non-aggravation of a dispute; (iii) equality of arms; and (iv) the exclusivity of ICSID proceedings.

119. But, according to the Respondent, there are six reasons that point against the recommendation of provisional measures in this case, each of which is set out below.

(I) The Claimants are not entitled to confidential or privileged information under the guise of a request for provisional measures

120. This contention responds to the Claimants' request that they be provided "all evidence collected during the course of the criminal investigations to date, and any such evidence collected in the future".[79] The Respondent objects in particular to the inclusion within this category of correspondence between the Respondent and its legal counsel in the ICSID arbitration.

121. The Respondent characterises the Claimants' application for such an order as, in reality, an application for disclosure, rather than a request for provisional measures. In that regard, the Respondent submits that provisional measures cannot give the Claimants more rights than they possess and can claim. More specifically, the Respondent explains that "the Claimants have no existing right to confidential information or privileged documentation, including correspondence with counsel".[80]

(22 December 2014), §72; *Quiborax SA, Non Metallic Minerals SA & Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010), §129; *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2 (16 October 2002), §36.

79 Claimants' Request, Section IV, §(iv).

80 Respondent's Reply, §128.

(II) The integrity of the arbitral proceedings is not at risk

122. Regarding the Claimants' reliance on the threat to the integrity of the arbitral proceeding as a basis for the provisional measures, the Respondent points, as a general matter, to the fact that "it is established tribunal practice that an exercise of the procedural power to safeguard the integrity of the proceedings is an extraordinary step that should be resorted to only if extreme circumstances have been established".[81] Further, the Respondent contends that the Claimants' two assertions concerning access to, and integrity of, evidence – supposed interference with witnesses and supposed efforts to improperly obtain evidence – are without merit.

123. Turning first to access to and integrity of witness evidence, the Respondent contends that the Claimants have not particularised any concrete instance of harassment, intimidation or otherwise abusive behaviour regarding actual or potential witnesses that would endanger the integrity of the arbitration. Rather, it characterises the Claimants' Request as one "replete with unsubstantiated supposition".[82]

124. In short, the Respondent contends that the Claimants have identified no witnesses who can give evidence of such matters. Insofar as the Claimants rely on the testimony of persons such as Ms Lužaić, the Respondent points to the fact that, first, she has provided a witness statement and is not in any way prevented from participating in the proceedings, and, second and in any case, it is difficult to see how her questioning in relation to the semi-durable sausage production in an unrelated health and safety matter could impair the Claimants' ability to fairly present their case in this arbitration. Further, the Respondent

---

81 Respondent's Reply, §133, citing *Commerce Group Corp & San Sebastian Gold Mines Inc v Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs (20 September 2012), §§44-45.

82 Respondent's Reply, §136.

contends that decisions regarding provisional measures are highly context-dependent and, on this basis alone, *Quiborax* and *Lao Holdings* can be distinguished.[83]

125. Insofar as the Claimants point to Croatian law and criminal procedure in support of this limb of their argument, the Respondent contends that their submissions are misleading. Two points are highlighted by the Respondent: (a) the standard instructions public prosecutors are obliged to issue to interviewees do not prevent them from appearing as witnesses or divulging personal knowledge in the arbitration - those instructions prevent only disclosure of confidential information given to him or her by the State; (b) people are invited back for interviews because information gathered in the (preliminary) inquiry stage is inadmissible in criminal proceedings, so official questioning must occur at a later point.

126. As to the independence of the criminal investigation from the arbitration, the Respondent points, again, to the fact that there is no substantiation by the Claimants of any evidence having been improperly obtained. In relation to the commencement of the investigation, the Respondent explains, as it has already, that the inquiry commenced in 2011, nearly two years before the Claimants initiated the arbitration. Further, the Respondent contends that the decisive evidence supporting the Respondent's preliminary objections and the documentation relevant thereto was obtained independently from the criminal investigation and the health inspections. The Respondent identifies three sources, namely Mr Papeš, the Claimants' voluntary disclosure in the course of the arbitration and the original bankruptcy file, none of which were obtained through improper use of the criminal investigative powers of the State.

[83] See *Quiborax SA, Non Metallic Minerals SA & Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010), §§142-146 and *Lao Holdings NV v The Lao People's Democratic Republic*, ICSID Case No ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order (30 May 2014), §§28, 32, 37, 40.

127. The Respondent also argues in this regard that the issues and evidence in the arbitration are not identical to those in the criminal investigation. It submits that the arbitration concerns the Respondent's purported treaty violations and the Claimants' claim for damages, while the criminal investigation is about whether Mr Gavrilović embezzled corporate funds and incited a government minister to abuse his position. Similarly, the Respondent contends that the core issues and arguments are distinct, pointing out that the bankruptcy irregularities at issue in the arbitration are civil law matters while the criminal investigation concerns abuse of a management position by Mr Gavrilović.

128. The Respondent contends that the criminal investigation is not, as the Claimants allege, a fishing expedition. It asserts that the asking of what the Claimants describe as irrelevant questions during the informal process is explicable on the basis that a preliminary inquiry will cover more ground than that which is ultimately the subject of a formal investigation. And, even if some irrelevant questions were asked, the Respondent submits that this cannot imply coercion, bad faith or that the rights of the Claimants are being defeated.

129. Finally, the Respondent contends that it has always acted transparently in informing the Tribunal of its criminal investigation, including by providing the Tribunal with a copy of its letter dated 12 December 2014. The Respondent rejects the Claimants' argument that this letter constitutes an admission that the investigation serves the arbitration, and argues that in any event, "even an admission that an investigation was directed at conduct relevant to a defence in an arbitration would not itself be a sufficient basis for enjoining a State".[84]

(III) The Investigation Decision does not affect the regular, fair and orderly conduct of this arbitration

130. Third, the Respondent contends that the Investigation Decision does not affect the regular, fair and orderly conduct of the arbitration. Insofar as the Claimants contend that the

[84] Respondent's Reply, §178, citing *Lao Holdings NV v The Lao People's Democratic Republic*, ICSID Case No ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order (30 May 2014), §29.

Investigation Decision disrupts the *status quo* and aggravates the dispute because Mr Gavrilović is at risk of incarceration and Gavrilović d.o.o. suffers threats to its continued existence, the Respondent contends that these submissions are wrong in fact and law. Before turning to those matters, the Respondent emphasises that the Claimants have not satisfied the burden of proving such egregious conduct.

131. As to Mr Gavrilović's personal integrity, the Respondent contends that the proposition that he is at risk of incarceration or personal endangerment is impossible to credit.[85] The Respondent again points to the fact that Mr Gavrilović continues to enjoy the full range of due process rights. In short, therefore, the Respondent's position is that the Claimants have not shown, and cannot show, that the Respondent has engaged in, or will engage in, the alleged harassment, intimidation, seizure or any other abusive treatment of Mr Gavrilović.

132. Further, the Respondent points to the fact that Mr Gavrilović has not brought any judicial review proceedings, any criminal complaints, any civil action concerning the accusations made in the Request with respect to his personal well-being or that of his family or any objection to the conduct of the public prosecution service. Notably, even though Mr Gavrilović brought his appeal against the Investigation Decision, he made no allegations therein about the risk of abuse that is the subject of the Request.

133. Insofar as the Claimants otherwise pursue this ground, the Respondent contends that the submissions involve generalised misrepresentations of Croatian law and criminal procedure, as to which the Respondent's submissions have been summarised at §125 above.

134. The Respondent summarises its contentions in this regard as follows:

> In sum, the Claimants have not demonstrated how the resolution of this arbitration is being made more difficult by the Investigation Decision, let alone any abusive

[85] At the time of the Reply, the Respondent was able to contend that Mr Gavrilović had not even been invited to be formally questioned, but that has now changed: see §17 above.

> conduct or threat to [Mr Gavrilović's] liberty or welfare. The offences that form the subject of the investigation in Croatia are not claims before this Tribunal. They will not affect the Claimants' pursuit of their monetary claims here or the Tribunal's ability to dispose of them. Provisional measures are hence inappropriate.[86]

135. As to the continued existence of Gavrilović d.o.o. or any risk to it of substantial damages, the Respondent again points to the fact that the Claimants have not provided any evidence demonstrating that any of the Respondent's alleged actions threaten to, as they say, "destroy the Claimants' investments".[87] The Respondent contends that:

(a) Mr Gavrilović's ownership of Gavrilović d.o.o. and the corresponding shares is not contested, whether by the Investigation Decision, the health and safety inspection of 21 October 2014, or otherwise;

(b) there is no indication that the relationship between the foreign investor and the host State will come to an end;

(c) the official documentation of the Ministry of Agriculture's Directorate for Veterinary and Food Safety shows that any health and safety inspections are instances of genuine concern by Croatian authorities, and nothing more;

(d) as to the Investigation Decision, there is no evidence that this will, or could, cause Gavrilović d.o.o.'s imminent demise or seriously harm it; and

(e) in any case, there is no reason why any such damage could not be compensated by an award of monetary damages.

136. Further, the Respondent contends that Gavrilović d.o.o. is not being intimidated, harassed or otherwise harmed. Highlighting that there is no evidence to support the Claimants'

---

86 Respondent's Reply, §199 (citations omitted).

87 Claimants' Request, §165.

contentions, the Respondent argues that the criminal investigation is based on reasonable suspicion, that there is no basis for the allegation that the number of health and safety inspections has increased, and that the inspection on 21 October 2014 was warranted on the facts. These submissions have been summarised above. Specifically, in relation to the inspection on 21 October 2014, the Respondent further emphasises that any allegation that employees of Gavrilović d.o.o. were mistreated is contradicted by the fact that no complaint was made at the time.

137. Finally in relation to this factor – the fact that these matters do not affect the regular, fair and orderly conduct of the arbitration – the Respondent refutes the allegation that there has been an orchestrated "media campaign" against the Claimants. It contends that, first, the Respondent has not publicised any information on the inspection of 21 October 2014 or the investigation, and, second, and in any case, freedom of the press is a constitutional right in Croatia and any publicity cannot be attributed to the Respondent.

(IV) Equality of arms is maintained

138. The Respondent refutes the allegation that it has upset the equality of arms between the Parties. Noting that it is common ground that equality of arms denotes basic procedural fairness including equal rights to be heard and put one's case, the Respondent points to its previous submissions, summarised above, that the Claimants' capacity to argue their claims, including through witnesses, has not been effected. That leaves only what the Respondent contends is a groundless assertion of inequality derived from the Respondent's status as a State. The Claimants' factual allegations, including describing the surveillance of the Claimants as an "open secret",[88] are not supported by evidence.

[88] Claimants' Request, §134.

(V) The Arbitral Tribunal's jurisdiction is not being usurped

139. This fifth point addresses the Claimants' argument that the current and future criminal proceedings should be enjoined to maintain the exclusivity of the ICSID proceedings enshrined in Article 26 of the ICSID Convention. The Respondent contends that Article 26 protects the Tribunal's jurisdiction to resolve the investment dispute before it. Citing various ICSID awards,[89] the Respondent contends that exclusivity extends only to investment disputes and does not apply to criminal investigations. With respect to this case, the Respondent contrasts the subject matter of the arbitration, which concerns whether the Respondent has breached international obligations under Articles 2, 3(1), 4(1) and 8(2) of the BIT, with that of the criminal investigation, which concerns whether the legal and evidential requirements to charge Mr Gavrilović are satisfied. The Respondent further submits that, since the subject matter and facts are not identical, the evidence is also different. It follows, the Respondent contends, that the criminal proceedings initiated in Croatia do not threaten the exclusivity of the ICSID arbitration or the jurisdiction of the Tribunal.

140. The Respondent further contends that, in any case, as several ICSID tribunals have explained,[90] a mere relation between criminal proceeding and an investment arbitration

---

89 See *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 (28 October 1999), §23; *Tokios Tokelés v Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 1 (1 July 2003), §1; *Lao Holdings NV v The Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order (30 May 2014), §21; *Perenco Ecuador Ltd v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Provisional Measures (8 May 2009), §59; *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 & 12/40, Procedural Order No. 9 (8 July 2014), §86; *Quiborax SA Non Metallic Minerals SA & Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010), §129.

90 See, eg, *Quiborax SA, Non Metallic Minerals SA & Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010), §128; *Churchill Mining and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 & 12/40, Procedural Order No. 9 (8 July 2014), §85.

does not threaten the exclusivity of an arbitration. In particular, any duplicate use of materials or evidence is not improper, as the tribunal explained in *Quiborax*:

> Even if the criminal proceedings result in evidence that is later used by Respondent in this arbitration, that would not undermine the Tribunal's jurisdiction to resolve the Claimants' claims, if such jurisdiction is established at the appropriate procedural instance.[91]

(VI) Provisional measures are neither urgent nor necessary

141. Sixth, and finally, the Respondent contends that the provisional measures are neither urgent nor necessary. In short, the Respondent contends that it has not taken any on-going actions, or is not currently taking any actions, that impact the Claimants' identified rights in this arbitration. In particular, the Respondent refutes the Claimants' contention that urgency is "satisfied easily in practice",[92] instead contending that the circumstances must be serious and extreme.

142. In regard to this sixth point, the Respondent makes three submissions.

143. First, it contends that the measures requested are not required to achieve their stated aim. More specifically, the Respondent says that, even leaving aside the Claimants' failure to demonstrate substantial or irreparable harm, restraining the criminal investigation is not required to safeguard Mr Gavrilović's physical integrity. At the time of the Reply, the Respondent also contended that there was no urgency on the basis that Mr Gavrilović had not yet been invited for questioning. The Respondent also relies on Mr Gavrilović's constitutionally guaranteed presumption of innocence and right of defence. Further, the Respondent emphasises that there are no other criminal investigatory actions or criminal proceedings initiated against Mr Gavrilović, and there is no urgency attendant to the

---

91 *Quiborax SA, Non Metallic Minerals SA & Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010), §130.

92 Claimants' Request, §148.

conduct and frequency of food inspections. Insofar as any loss arises from the improper publications of allegations of health and safety violations, which the Respondent denies, damages would be adequate compensation.

144. Second, the measures requested by the Claimants would, the Respondents say, constitute a disproportionate interference with the sovereignty of the Republic of Croatia. The Respondent emphasises that the balancing between the prejudice to be suffered by each party cannot be used to circumvent the particularly high threshold to be met by the Claimants, where the subject matter of the application for provisional measures is a criminal investigation. The Respondent submits that "[a] tribunal should be mindful not to unduly encroach on State activities serving the public interest [and] [i]nvestigation and prevention of crime are paramount amongst these".[93]

145. Third and finally, the Respondent contends that the measures sought are too broad and unspecific. In particular, they constitute a disproportionate interference with the sovereignty of the Republic of Croatia, and any compliance would be impossible and unsafe. The Respondent points to the ambiguity surrounding what investigations or proceedings are "relate[d] in any way to the present arbitration" and to the imprecise and open-ended nature of the injunction sought.[94] And any restraint on the Respondent providing "instructions or warnings" to potential witnesses would lead to the Respondent being required to violate provisions of the Croatian Constitution and basic due process requirements.

[93] Respondent's Reply, §284.

[94] Respondent's Reply, §287.

(C) The Claimants' Rejoinder

146. In their Rejoinder, the Claimants further refine the focus of their application. In particular, the Claimants state:

> The most important basis for Claimants' Request, is that the Respondent has, through a specialized crime unit under the auspices of the State Attorney's Office, the [USKOK] concurrently with this arbitration, conducted a criminal investigation of [Mr Gavrilović] that is closely related to the facts of its jurisdictional objections (though those facts occurred over 20 years ago), and on November 26, 2014, issued [the Investigation Order].[95]

147. Pointing to the chronological order of events described in their Request, the Claimants contend that the Respondent's characterisation of the criminal investigation as an innocent coincidence should be rejected. Indeed, the Claimants explain that "[m]ost tellingly, although the Respondent claims that Croatian law requires the independence of the arbitration and litigation, it appears that a State Attorney with the civil division of the State Attorney's Office working on this arbitration, and a Criminal State Attorney from USKOK were both present at at least one interrogation included in the criminal case file".[96]

148. The Claimants maintain their position that: (a) the Respondent's unsubstantiated claims of independence should be rejected, the criminal investigation should be stayed pending the conclusion of this arbitration, and any improperly gained fruits should be made available to the Claimants; and (b) the extraordinary health and safety inspections should also be enjoined because such harassment threatens the very existence of the Claimants.

149. The Claimants' Rejoinder is divided into two main submissions, each of which will be considered separately, namely: (i) the Respondent misstates or mischaracterises certain

[95] Claimants' Rejoinder, §3.

[96] Claimants' Rejoinder, §5.

relevant facts; and (ii) the Claimants' Request should be granted to safeguard the Claimants' rights.

(i) The Respondent Misstates or Mischaracterises Certain Relevant Facts

150. The Claimants' submissions in this regard are three-fold.

151. First, they contend that the criminal investigation of Mr Gavrilović is directly linked to the arbitration. Indeed, they say that "it is obvious that the criminal investigation and the arbitration are fundamentally linked".[97]

152. The Claimants contend that the only fact used to substantiate the commencement of the inquiry is the file number assigned to the investigation. They emphasise the lacunae in the Respondent's evidence, namely the failure to provide the complaint that supposedly precipitated the investigation, the date it started and what, if anything occurred, between 2011 (when the file was allegedly opened) and 2013 (when the Claimants contend the first undisputed action occurred on the file). The Claimants further assert that the file itself supports the true (improper) purpose of the investigation. In this regard, the Claimants state:

> [T]he content of the criminal file shows that the true purpose of the criminal investigation was to gain evidence for the arbitration, rather than a *bona fide* investigation of Mr Gavrilović for the crimes included in the Investigation Order, as the evidence contained that file deals with issues such as the bankruptcy proceedings of the Gavrilović companies, and Mr Gavrilović's payment for those companies, that are not relevant to the alleged crimes Mr Gavrilović committed.[98]

153. Further, the Claimants point to the fact that three additional interviewees are named in the Investigation Order, who have no knowledge of the matters raised by Mr Papeš' testimony, but do have knowledge of matters related to the Respondent's jurisdictional objections.

---

97 Claimants' Rejoinder, §9.

98 Claimants' Rejoinder, §12.

And the Claimants contend that "most concretely … Ms Ines Videnić, a State Attorney with the civil division of the State Attorney's Office whom Respondent's counsel has copied on multiple emails to the distribution list in this arbitration, and a Criminal State Attorney Gordana Haramina Hranilović, were both present at at least one interrogation included in the criminal case file".[99]

154. Second, the Claimants contend that the criminal investigation of Mr Gavrilović is interfering, and will continue to interfere, with the conduct of the arbitration. They point, again, to the wide variety of investigative powers at the State's disposal, and identify one other witness extensively questioned by the State Attorney in 2014, who was a long-time employee of Gavrilović d.o.o. Further, in this regard, they repeat the content of their Request, insofar as they allege that (i) the Respondent has approached potential key witnesses and employees of Gavrilović d.o.o.; (ii) has warned them not to speak to Claimants or their counsel; (iii) under threat of criminal charges; and (iv) denied them their right to defence counsel.

155. In this regard, the Claimants again contend that the Investigation Order is not justified under Croatian law; they assert that Professor Novoselec's conclusion has no merit. They further rely on the First and Second Derenčinović Opinions, which set out three matters, each of which renders the Investigation Order inappropriate, namely:

(a) the Investigation Order does not set out a reasonable suspicion that Mr Gavrilović induced an abuse of authority. The Claimants refer to the First Derenčinović Opinion, and criticise the First Novoselec Opinion as being based on the assumption or invention of relevant facts;

[99] Claimants' Rejoinder, §18.

(b) the limitation period applicable to the alleged crimes has long expired. In this regard, the Claimants again point to the First Derenčinović Opinion, contending that the War Profiteering Act would be read restrictively, and thus not retrospectively. In any case, the crimes cited in the Investigation Order do not fall within the ambit of that Act, which applies to matters that are a direct threat to independence and territorial sovereignty of the State; and

(c) furthermore, USKOK does not have jurisdiction over the prosecution of Mr Gavrilović because he is not an "official person", and USKOK would have power to prosecute him only in conjunction with a prosecution of Mr Martinović.

156. Third, the Claimants describe the health and safety inspections of Gavrilović d.o.o. as extraordinary. Two broad submissions are made in response to the Respondent's Reply, namely:

(a) the Respondent cannot claim good faith for the excessive raid, it having not even attempted to explain the need for such police force. This is particularly so, the Claimants say, given the fact that the matters being investigated (namely, the so-called "fresh return" issue and the use of sodium nitrate in one sample) are minor. Specifically, the Claimants say that "a force of around 30 armed policemen is clearly out of proportion for investigating such violations (even if true, which Claimants deny)";[100] and

(b) the Respondent's stated number of inspections are disconnected from reality. In this regard, the Claimants seek to draw a distinction between "ordinary" inspections and "extraordinary" inspections, the latter of which has increased considerably. And any

[100] Claimants' Rejoinder, §45.

justification for the increased health and safety inspections, including any legitimate concern for food safety, is unfounded.

(ii) The Claimants' Request Should be Granted to Safeguard the Claimants' Rights

157. The Claimants also make four substantive submissions in response to the Respondent's Reply, supporting their contention that the Request should be granted to safeguard the Claimants' rights.

158. First, they contend that the Respondent proposes an improperly high standard for granting provisional measures under Article 39(1) of the ICSID Convention.

159. Before turning to the different approach advocated by the Claimants, some semblance of agreement between the Parties is to be found in their concession that they appear to agree that the fundamental standards that are applicable to a request for provisional measures are that they are necessary to protect the rights of the applicant, they are urgent and they are proportional. The Claimants make three specific submissions:

(a) They say that the appropriate standard is "material risk", which is lower than irreparable harm. In this regard, the Claimants point to the recent decision of *PNG v Papua New Guinea*, where the tribunal said:

> In the Tribunal's view, the term "irreparable" harm is properly understood as requiring a showing of a material risk of serious or grave damage to the requesting party, and not harm that is literally "irreparable" in what is sometimes regarded as the narrow common law sense of the term. The degree of "gravity" or "seriousness" of harm that is necessary for an order of provisional relief cannot be specified with precision, and depends in part on the circumstances of the case, the nature of the relief requested and the relative harm to be suffered by each party; suffice it to say that substantial, serious harm, even if not irreparable, is generally sufficient to satisfy this element of the standard for granting provisional measures.
> …
>
> The Tribunal is also of the view that the requesting party need not prove that "serious" harm is certain to occur. Rather, it is generally sufficient to show that

> there is a material risk that it will occur. The requirement of showing material risk does not, however, imply a showing of any particular percentage of likelihood, or probability, that the risk will materialize. The proper requirement is that the requesting party must establish the existence of a sufficient risk or threat that grave or serious harm will occur if provisional measures are not granted.[101]

(b) Insofar as the Respondent relies on *Perenco v Ecuador*[102] to suggest that "particular stringency is warranted", the Claimants submit that this view is not shared by other investment tribunals.[103] In particular, the Claimants refer to the decision in *Caratube v Kazakhstan*, where the tribunal stated that there was "no room" for the approach followed in *Perenco v Ecuador*.[104]

(c) The Claimants contend that the Respondent is wrong to argue that tribunals do not question the sovereign rights and duties of States to conduct criminal cases. Instead, the Claimants rely on *Burlington v Ecuador*, where the tribunal stated:

> [B]y ratifying the ICSID Convention, [the Respondent State] has accepted that an ICSID tribunal may order measures on a provisional basis, even in a situation which may entail some interference with sovereign powers and enforcement duties.[105]

---

101 *PNG Sustainable Development Program Ltd v Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures (21 January 2015), §§109-111 (emphasis in Claimants' Rejoinder).

102 *Perenco Ecuador Ltd v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Provisional Measures (8 May 2009).

103 See, eg, *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Claimant's Request for Provisional Measures (17 May 2006), §27; *Phoenix Action Ltd v The Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures (6 April 2007), §29; *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ARB/01/13, Procedural Order No. 2 (16 October 2002), §20 *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No 1 (1 July 2003), §6; *Railroad Development Corporation v Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Provisional Measures (15 October 2008), §31.

104 *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Claimants' Request for Provisional Measures (4 December 2014), §108.

105 *Burlington Resources Inc v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Resource's Request for Provisional Measures (29 June 2009), §66.

160. It follows, the Claimants contend, that the appropriate inquiry is not whether the requested relief interferes with sovereign powers, but the ultimate prejudice caused by such interference, compared to the prejudice the investor might suffer if the measures are not granted. They rely on *PNG v Papua New Guinea*, where the tribunal stated that "in deciding whether to grant provisional measures, tribunals also generally look to the nature of the provisional measures that are requested, and the relative injury to be suffered by each party".[106]

161. Second, the Claimants submit that the requested measures are urgent and necessary to protect the procedural integrity of the arbitration and equality of arms. They submit:

(a) The available evidence shows that the criminal investigation of Mr Gavrilović is not independent from the arbitration. The Claimants assert that the "strong linkage" to which reference was made in *Lao Holdings* is satisfied here.[107] The Claimants again point to the chronological link between the commencement of the arbitration and the opening of the criminal file. They also cite the communications between the Respondent's counsel in this arbitration and USKOK regarding their concurrent cases, as well as the fact that "there can be no legitimate disagreement that the events relevant to Respondent's objections to jurisdiction in the arbitration, and the evidence contained in the criminal file and relied upon in the Investigation Order, are substantially similar, if not identical".[108]

(b) The criminal investigation has been, and may continue to be, used to interfere with witnesses. The Claimants explains that the fact that certain of the allegations are not

106 *PNG Sustainable Development Program Ltd v Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures (21 January 2015), §113.

107 *Lao Holdings NV v The Lao People's Democratic Republic*, ICSID Case No ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order (30 May 2014), §37.

108 Claimants' Rejoinder, §69.

supported by witness statements points to the threat of criminal prosecution if potential witnesses were to testify.

162. Third, the Claimants contend that the requested measures are necessary to avoid aggravation of the dispute and to preserve the *status quo*. The Claimants continue to submit that the incarceration of Mr Gavrilović would threaten the procedural integrity of the arbitration, and say that no comfort is to be drawn from the Respondent's submissions which suggest that there is no imminent danger of his arrest. Further, the Claimants point to, as a particular of this contention, the prosecution of Mr Gavrilović and continued harassment of Gavrilović d.o.o. through the extraordinary health inspections.

163. Fourth, the Claimants submit that the Respondent is wrong to characterise the provisional measures as disproportionate and too broad. Indeed, they contend that the measures sought are narrowly tailored to address any remedial harm the Claimants have suffered due to the Respondent's actions, and avoid any future harm. In this regard, the Claimants point to the acceptance of a temporary stay of a criminal investigation in *Lao Holdings*.[109] Insofar as the Claimants seek copies of all documents collected during the course of the criminal investigation, and any evidence in the future, the Claimants assert that this is to remedy past harm. Indeed, they say that this measure will restore a level playing field.

(D) The Respondent's Surrejoinder

(i) Overarching Submissions

164. In its Surrejoinder, the Respondent makes various overarching submissions, namely:

(a) the Claimants' Request should be seen as an attack against the Respondent to shield themselves from their own wrongdoing;

[109] *Lao Holdings NV v The Lao People's Democratic Republic*, ICSID Case No ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order (30 May 2014), §70.

(b) the alleged conduct of Mr Gavrilović involves serious violations of Croatian law and "[i]t is only natural, therefore, that a State governed by the rule of law investigates them".[110] The public prosecution service was duty-bound to investigate the conduct;

(c) the War Profiteering Act, which was adopted in 2011, opened a wide-ranging inquiry into conduct that had occurred many years prior, during the privatisation period;

(d) the Investigation Decision was issued in full compliance with Croatian law and the *acquis communautaire* of the European Union;

(e) there is no substance to the Claimants' allegation that the investigation began after the Claimants commenced the arbitration;

(f) being an EU Member State, the Republic of Croatia has achieved stability of institutions guaranteeing democracy, the rule of law and human rights; and

(g) "[c]onsidering *(i)* the seriousness of the offences for which Mr Gavrilović is being investigated, *(ii)* the respect for fundamental rights that is enshrined in the Croatian justice system, and *(iii)* the fact that criminal law and procedure are a most obvious and undisputed part of State sovereignty, the stakes in this matter could not be higher".[111]

(ii) This Arbitration, and the Claimants' Request, was Brought Solely to Obstruct the Lawful Investigation of a Suspected Criminal

165. The Respondent again points to the timing of the commencement of the criminal investigation, this time to establish that Mr Gavrilović is using the arbitration to avoid criminal prosecution. According to the Respondent, the Claimants' Request should be viewed similarly.

110 Respondent's Surrejoinder, §4.

111 Respondent's Surrejoinder, §13.

166. Regarding the Claimants' allegation that 20 years have passed since Mr Gavrilović committed the acts cited in the Investigation Decision, the Respondent points out that until the passage of the War Profiteering Act, these offences were time-barred. Further, the Respondent cites the complaints filed on 8 December 2010 by an association of former employees of the Gavrilović companies in which, *inter alia*, allegations of unlawful possession of State property are made. The Respondent refers to these complaints to support its chronology of events from the commencement of the criminal investigation in 2011.

(iii) The Claimants Continue to Fail to Provide any Evidence of the Alleged Urgent Need for Provisional Measures

167. The Respondent emphasises that, despite having had opportunities to do so, the Claimants have failed to provide any evidence demonstrating a serious risk of substantial or irreparable harm to Mr Gavrilović, the continued existence of Gavrilović d.o.o. or the orderly and fair conduct of these arbitral proceedings. The Respondent contends that "[t]he reason is obvious. There is no such evidence, and the Request must fail because the Claimants have not even remotely met their heavy burden of proof".[112]

168. The Respondent makes three specific submissions.

169. First, it asserts that the provisional measures are not urgently needed to safeguard Mr Gavrilović's personal integrity. The Respondent notes, in this regard, that the Claimants' Rejoinder does not dispute the availability and effectiveness of the full range of due process rights and remedies available to Mr Gavrilović. It contends that "[i]nstead of being genuinely concerned about any irreparable prejudice, the Claimants are, fully in line with their strategy of abusing the arbitral process as a shield from legitimate criminal

[112] Respondent's Surrejoinder, §30.

investigation, simply trying to run out the clock for the criminal investigation".[113] The Respondent points to the fact that the Investigation Order expires on 25 May 2015, and alleges that the Claimants' Request is an attempt to stall the investigation.

170. Second, the provisional measures are not urgently needed to save Gavrilović d.o.o. from imminent ruin or substantial harm. The Respondent points again to the alleged absence of any evidence to this effect. Further, it says that the Claimants seek to reverse the onus of proof and rejects the Claimants' suggestion that the Respondent had conceded that compensable harm was caused to Gavrilović d.o.o. by the hygiene inspection or that the company's existence is threatened. Finally, the Respondent describes the Claimants' attempt to contest the misdemeanour charges regarding the reprocessing of certain types of meat or the contamination of food products with excessive sodium nitrate as misplaced.

171. Third, according to the Respondent, the Claimants' "direct link", "interference" or "procedural integrity" argument is a meritless ruse contrived to evade lawful investigation for suspected crimes. In relation to this argument, the Respondent repeats what it has stated elsewhere in relation to, *inter alia*, the relevant timeline for the investigation and the commencement of the arbitration and the inadequacy of the Claimants' grounds for its Request.

(iv) The Balance of Convenience Cannot Substitute the Lack of Material Risk of Substantial or Irreparable Injury

172. The Respondent contends that the Claimants' reliance on an inappropriately low threshold for the recommendation of provisional measures should be rejected. The Respondent refers, in this regard, to its Reply, where it contended that an exceptionally high threshold to interfere with criminal proceedings is appropriate. The Respondent criticises the test the Claimants propose, suggesting that it "would make provisional measures available in every

[113] Respondent's Surrejoinder, §35.

case where an applicant is simply more inconvenienced than a respondent, irrespective of whether an issue can await a final award. This defeats the purpose of awards on the merits".[114] Further, it points to *PNG v Papua New Guinea*, where the tribunal emphasised that, "of course, the harm alleged by the requesting party must not be purely hypothetical or theoretical".[115] In relation to that case, the Respondent cites four points made by that tribunal which support the Respondent's position, namely: (i) it considered measures unwarranted where the applicant was not even sure the alleged actions were planned; (ii) it expressly affirmed the high threshold in matters of criminal justice; (iii) it held that a connection between criminal proceeding and an arbitration was not enough; and (iv) it rejected similarly illusory allegations of harassment.

(v) The Investigation Order is Justified Under Croatian Law

173. The Respondent notes that the Second Derenčinović Opinion appears to have dropped the allegation that there does not exist a reasonable suspicion that Mr Gavrilović committed the criminal offence of abuse of official and official authority to the detriment of Gavrilović d.o.o. But, in any case, the Respondent contends that his opinion is irrelevant. The Respondent explains that "[s]ince the Claimants are seeking provisional measures, the question at issue is not whether the investigation order was issued in accordance with the law (which it was), but whether there is such a risk of prejudice that the Claimants cannot await an award on the merits".[116] Further, the Respondent criticises the Second Derenčinović Opinion for raising a new jurisdictional argument and contends that, in any case, USKOK has jurisdiction to investigate the alleged crimes, relying in this regard on the Second Novoselec Opinion. Indeed, the Respondent relies upon that opinion to undermine the evidence offered by the Claimants' expert, Mr Derenčinović. In short, based on the

114 Respondent's Surrejoinder, §71.

115 *PNG Sustainable Development Program Ltd v Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures (21 January 2015), §112.

116 Respondent's Surrejoinder, §76.

Second Novoselec Opinion, the Respondent contends that the Investigation Order issued against Mr Gavrilović was in full compliance with Croatian and European standards.

(vi) The Claimants' Manipulation of these Arbitral Proceedings Causes Prejudice to the Respondent and Should be Remedied

174. Finally, the Respondent contends that the Claimants' Request is an abuse of process and seeks the entirety of its costs of defending it.

(E) Further Submissions

(i) The Claimants' Letter Dated 2 April 2015

175. On 2 April 2015, the Claimants, ostensibly for the purpose of making submissions as to the appropriateness, or otherwise, of an oral hearing, made further substantive submissions to the Tribunal. Therein, they submit that:

(a) the Respondent has not presented any evidence or testimony of any investigatory acts prior to April 2013 that could have alerted the Claimants to this existence of the investigation before this arbitration was commenced in December 2012;

(b) the Respondent is wrong to say that the criminal investigation had to be completed within six months, as this deadline can be extended by one year, pursuant to Article 229(1) of the Croatian Criminal Procedure Act;

(c) the Respondent's allegation that the requested provisional measures are inappropriate because Croatia "has achieved stability of institutions guaranteeing democracy, the rule of law, and human rights" should be rejected. The Claimants refer to the latest *Global Corruption Barometer* by Transparency International, a global anti-corruption NGO, in which 70% of survey participants believe that the Croatian judiciary is "corrupt" or "extremely corrupt." According to the Claimants, the poor state of the justice system in Croatia is further reflected in the *Global Competitiveness Report 2014-*

2015 of the World Economic Forum, in which Croatia ranks 100th out of 144 countries in judicial independence, behind Bolivia – which was ordered to suspend criminal proceedings until completion of the arbitration in *Quiborax*[117] - and Laos – which was ordered to suspend criminal proceedings by the tribunal in *Lao Holdings*.[118]

176. The Claimants also point to two further factual developments since the filing of the Claimants' Request that they consider support their position. First, they noted that a potentially important witness had been interviewed as part of the investigation, yet the statement was not in the criminal file. Second, one of the two misdemeanor charges that resulted from the police raid on 21 October 2014 was dismissed by the Misdemeanor Court of Sisak.

(ii) The Respondent's Letter Dated 13 April 2015

177. The Respondent characterises the five matters raised in the Claimants' correspondence dated 2 April 2015 as being "unsubstantiated allegations", "false and misleading" and, indeed, not supporting the need or urgency for provisional measures. The Respondent makes five brief submissions:

(a) first, it matters not whether the Claimants were aware of the criminal investigation from 26 November 2014, or earlier – rather, what matters is the fact that the investigation was started before the Claimants commenced the arbitration, thus showing the "fiction" that the State is responding to the arbitration by commencing a criminal investigation;

---

117 *Quiborax SA, Non Metallic Minerals SA & Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010).

118 *Lao Holdings NV v The Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order (30 May 2014).

(b) second, while a twelve month extension of the criminal investigation may be granted, this would demand an especially complex case and the approval of the Public Prosecutor General of the Republic of Croatia, such approval not being guaranteed;

(c) third, the Claimants' reliance on what the Respondent describes as internet opinion polls and surveys is of no utility and, in any case, the EU Commission has observed that Croatia enjoys "efficient, effective and unbiased investigation, prosecution and court rulings in organised crime and corruption cases at all levels";[119]

(d) fourth, the Claimants' reliance on the fact that one of the misdemeanour charges brought after Gavrilović d.o.o. failed a standard hygiene inspection was dismissed on procedural grounds is irrelevant. Indeed, the Respondent points to the ruling as evidence that Croatia has an independent and functioning judiciary; and

(e) fifth, the Respondent notes that the Claimants have decided to not defend their misrepresentations, other than by issuing bare denials. This, the Respondent says, is in marked contrast to the Respondent, who has provided specific and substantiated responses to the Claimants' misstatements in the Surrejoinder and elsewhere.

IV. ANALYSIS

178. Having carefully considered the submissions of the parties, the Tribunal has decided to deny the Claimants' Request.

179. Despite the length of the submissions, and extensive material, filed on behalf of each Party, the ultimate resolution of the Claimants' Request turns on various discrete issues as part of a careful analysis of the material in relation to what, for the most part, are accepted principles. Insofar as any of the arguments summarised above are not referred to below,

[119] EU Commission, *Monitoring Report on Croatia's Accession Preparations* (26 March 2013), §5.

that should not be taken to mean that the argument has not been considered. Rather, all arguments have been considered, and the analysis that follows is intended to set out the reasoning of the Tribunal so as to explain the basis of its decision, rather than reciting its consideration of each and every argument. Not only is this sufficient, but it is appropriate where there is, at least in the view of the Claimants, an urgency attendant to the Tribunal's determination of this application.

180. Before turning to the reasons for the Decision, it is necessary to put to one side some preliminary matters, namely jurisdiction and the appropriate standard to be applied.

(A) Jurisdiction

181. First, the Tribunal has no hesitation in confirming its jurisdiction to hear, and determine, the Claimants' Request. While acknowledging that the Respondent has made various jurisdictional and admissibility objections, each of which will be considered at the hearing on preliminary objections and the merits in March 2016, those objections do not prevent the consideration by the Tribunal, and its consideration now, of a request for provisional measures. An ICSID tribunal may recommend provisional measures even where it is yet to decide the question of its jurisdiction.[120]

182. The Claimants contend, and the Tribunal accepts, that all that is required is that the provisions invoked appear *prima facie* to afford a basis for jurisdiction to decide the merits. While the Tribunal is not, of course, finally satisfied that it has jurisdiction on the merits of the case, it is satisfied that the provisions invoked by the Claimants are such that this Tribunal has the requisite *prima facie* jurisdiction. Indeed, the Respondent does not strongly contend otherwise. It does submit, by reference to *Perenco v Ecuador*,[121] that particular

120 *Quiborax SA, Non Metallic Minerals SA & Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010), §105.

121 *Perenco Ecuador Ltd v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Provisional Measures (8 May 2009), §59.

stringency is required where the question of jurisdiction is yet to be determined. However, the matters relied on in support of that argument, including the writing of Kaufmann-Kohler and Antonietti,[122] are matters which the Tribunal considers are appropriately considered in exercising the discretion to recommend provisional measures, rather than in shutting an applicant for interim relief out as a jurisdictional matter. While the Tribunal notes, as the Claimants have, that there is some doubt as to whether the caution expressed by the tribunal in *Perenco* is correct, it is unnecessary to determine that question here. Even when "particular stringency" is applied, it is plain to the Tribunal that it is empowered to consider the questions raised by the Claimants' Request. (The Tribunal does, in any case, note that the weight of authority does appear to disfavour the approach in *Perenco*,[123] but it need not form a final view on this question.)

183. So, therefore, it is clear that the ICSID Convention and the ICSID Arbitration Rules provide a sufficient basis for the existence of the Tribunal's power to decide the questions the subject of the Claimants' Request.

(B) The Appropriate Standard

184. The second preliminary matter is the appropriate test to be applied. The Claimants' Rejoinder, in particular, showed a sharp distinction in the test said to be applicable to the question of the appropriateness of a recommendation of provisional measures.

185. While it is right to say, as the Claimants acknowledged, that the Parties agree on the fundamental standards that are applicable to a request for provisional measures, namely

122 G Kaufmann-Kohler & A Antonietti, "Interim Relief in International Investment Agreements", in K Yannaca-Small, *Arbitration Under International Investment Agreements – A Guide to the Key Issues* (OUP, 2010), p 522.

123 See, eg, the decisions cited by the Claimants at §15959(b) above, especially *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Claimants' Request for Provisional Measures (4 December 2014), §108.

that such measures are necessary to protect the applicant's rights, are urgent and are proportional, the schism appears when one considers where the threshold is to lie.

186. The Claimants, on the one hand, contend that the standard is one of "material risk". The Respondent, on the other hand, contends that the appropriate standard is one of "irreparable harm".

187. It is again correct, as the Claimants note, that some ICSID tribunals have utilised terminology suggestive of a lower standard. Indeed, the Claimants place significant reliance on the recent decision of *PNG v Papua New Guinea*, where the tribunal used language suggestive of a distinction between a higher threshold of "irreparable" harm and a lower, and preferable one, in their view, of some "serious harm".[124] More fully, the tribunal explained that, as will be recalled, "the term 'irreparable' harm is properly understood as requiring a showing of a material risk of serious or grave damage to the requesting party, and not harm that is literally 'irreparable' in what is sometimes regarded as the narrow common law sense of the term. The degree of 'gravity' or 'seriousness' of harm that is necessary for an order of provisional relief cannot be specified with precision, and depends in part on the circumstances of the case, the nature of the relief requested and the relative harm to be suffered by each party". The tribunal continued, "suffice it to say that substantial, serious harm, even if not irreparable, is generally sufficient to satisfy this element of the standard for granting provisional measures".[125]

188. The Respondent contends that this threshold is insufficiently discerning.

189. It is not necessary in this case to set out the test that would apply in all cases of requests for provisional measures. One must ascertain what test is appropriate in the circumstances of

---

124 *PNG Sustainable Development Program Ltd v Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures (21 January 2015), §109.

125 Id.

a case, such as this, where the relief sought would interfere with the exercise of a sovereign State's rights and duties to investigate and prosecute crime.

190. No doubt, it was this concern which underlay the approach of the tribunal in *Caratube v Kazakhstan*, where it explained:

> This Tribunal feels that a particularly high threshold must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a state.[126]

191. It is trite to say that criminal law and procedure are a most obvious and undisputed part of a State's sovereignty. That (trite) fact supports the approach adopted here by the Tribunal, namely that any obstruction of the investigation or prosecution of conduct that is reasonably suspected to be criminal in nature should only be ordered where that is absolutely necessary. As will be seen, this is not such a case.

(C) Findings

192. The Claimants identify four rights as the basis for their Request, namely: (i) the procedural integrity of the arbitration; (ii) the preservation of the *status quo* and the non-aggravation of the dispute; (iii) equality of arms; and (iv) the exclusivity of the ICSID proceedings under Article 26 of the ICSID Convention. The Respondent accepts that these rights, if relevantly infringed, are rights capable of protection by provisional measures.

193. Before turning to those rights, it is necessary to return to the factual background in some more detail, so as to expound upon the underlying basis for the Claimants' Request. In so doing, the Tribunal will make some findings which support its conclusions.

126 *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Claimants' Request for Provisional Measures (4 December 2014), §137.

194. As is apparent from the submissions summarised above, the factual sub-stratum encompasses two distinct aspects: (a) the criminal investigation of Mr Gavrilović; and (b) the health and safety inspections of Gavrilović d.o.o. Each is dealt with in turn now.

(i) The Criminal Investigation of Mr Gavrilović

195. As noted at the outset of the Parties' respective submissions, the gravamen of the Claimants' case for provisional measures rests on their allegation that this investigation, and the initiation of criminal proceedings through the Investigation Order, is intended to advantage Respondent in this arbitration and deprive Claimants of their right to a fair hearing. The Claimants' submission is not supported by the evidence.

196. True it is that the Claimants point to a number of facts which suggest that there is more than coincidence between the initiation of this arbitration and the commencement of the investigation, or at least the time when substantive actions were taken, but, even taking these matters together, the Tribunal cannot reach the conclusion that the criminal investigation is being used as a vehicle through which to assist it in this arbitration.

197. Taking the Claimants' case at its highest, and assuming that the criminal investigation did commence after the Claimants initiated this arbitration, the Tribunal considers that this fact would still have to be seen against the backdrop of the serious criminal allegations made against Mr Gavrilović. Trite though it is to say that States have the power, indeed duty, to investigate criminal conduct, this is an important contextual factor.

198. In May 2011, when the War Profiteering Act enabled the prosecution of persons who had committed crimes as early as the 1990s by extending the limitation period, the Croatian State was empowered to investigate crimes which form part of that State's law. It was not required to have regard to the fact that an alleged perpetrator was in dispute with the State about commercial matters which are related to those alleged crimes. While, of course, the investigation could not be *used* for the sole or predominant purpose of advantaging Croatia

in this arbitration, a fact which, if found, would satisfy the high threshold of an application of this type, this Tribunal should be slow to interfere with the Respondent's rights (and duties) to enforce its own criminal law.

199. A further prong to the Claimants' argument is that the Investigation Order itself is invalid. In this regard, it will be recalled that the Claimants rely on the evidence of Professor Derenčinović to establish that the Investigation Order does not meet the standard for issuing an investigation order under Croatian law on the basis that it does not show the existence of reasonable suspicion that Mr Gavrilović committed the alleged crimes.[127]

200. Professor Novoselec, the Respondent's expert on Croatian law, opines to the contrary, concluding that the Investigation Order is, in fact, valid.

201. The Tribunal considers it unnecessary, for the purposes of this application, to opine on this dispute in the evidence. This is so because it is satisfied that, where the Croatian courts have decided on the validity of the Investigation Order, it would be inappropriate, absent manifest error, to conclude that the judicial determination of the validity of the Investigation Order should be ignored, as the Claimants would have it.

202. According to the Claimants, the fact that an appeal by Mr Gavrilović against the validity of the Investigation Order failed does not necessarily mean that the order was properly issued under Croatian law standards. This may be so. However, where, as here, there is a conflict in the evidence of two experts, and no manifest error in the decision itself, the Tribunal cannot be satisfied of the allegation of invalidity. The submission, premised on the evidence of Professor Derenčinović's evidence that there is a "well-established, yet extremely questionable, practice of almost unconditional judicial granting of the investigation orders issued by the USKOK",[128] does not assist the Tribunal. Indeed, the

127 See §§46-50 above.

128 First Derenčinović Opinion, §50.

Claimants appear, on one hand, to criticise the Croatian judicial system (as here) but, where the decision is favourable (as is the case with respect to the recent dismissal of one of the two misdemeanour charges), to embrace that same system.

203. Leaving the issue of the validity aside, the Tribunal accepts that even if a valid Investigation Order were in place, it could, albeit only in narrow circumstances, support an application for provisional measures. The Claimants allege that it was issued to harass the Claimants, their witnesses and otherwise unbalance the equality of arms in this arbitration. But this Tribunal cannot be satisfied that the harassment and inequality of arms alleged is established by the evidence.

204. The Claimants' evidence on such matters is insufficient. While the submissions allege instances supporting such a conclusion, the Claimants suggest, implicitly in places and explicitly in others, that the reason for that absence of evidence is the fear preventing people from speaking to the Claimants and their representatives. But that leaves the Tribunal in a difficult position. It can, indeed must, act on evidence, and not on speculation or conjecture. Perhaps it would be unsurprising that no witnesses would come forward if the Claimants' (unfounded) allegations are true, but there must be sufficient evidential foundation to support the relief sought, which is not the case here.

205. Accordingly, the Tribunal is not satisfied of the factual findings the Claimants wish it to make in relation to the criminal investigation of Mr Gavrilović.

(ii) The Health and Safety Inspection of Gavrilović d.o.o.

206. The second factual basis for the Claimants' Request is the pressures placed on Gavrilović d.o.o. and, by necessity, also Mr Gavrilović, in the form of health and safety inspections, particularly the "raid" on its factory on 21 October 2014. The Claimants contend that such inspections are intended to place pressure on the Claimants, and, again, to benefit the Respondent in this arbitration.

207. The Claimants point to the evidence of various employees of Gavrilović d.o.o. in relation to, particularly, the "raid" on 21 October 2014. Indeed, Ms Lužaić refers, in the evidence summarised at §42 above, to her treatment at the hands of the relevant officers on that occasion. Taking her evidence at its face value, however, the Tribunal remains unsatisfied of that which the Claimants must establish, namely that that raid was directed at infringing the rights of the Claimants in respect of this arbitration. Such a finding is a metaphorical bridge too far, and would require giving more weight to the evidence of those called on behalf of the Claimants than is warranted.

208. As to the number of health and safety inspections since the Claimant has filed its Request for Arbitration, the Parties present differing pictures. The Claimants claim that there has been a marked increase, particularly in 2014. The Respondent, on the other hand, says that the number of inspections has decreased, rather than increased, and that inspections have uncovered serious violations of EU health and safety laws. Interestingly, for the first time, in their Rejoinder, the Claimants seek to explain the decrease identified by the Respondent as being based on a distinction between "ordinary" and "extraordinary" inspections.

209. Be that as it may, the Tribunal considers it unnecessary to decide between the two versions. What is required is, however many inspections have occurred, that there is some malicious intent on the part of the Respondent (namely, that the inspections are used to put improper pressure on the Claimants). The Tribunal cannot be satisfied of that intent.

210. The Claimants also rely on the publicity generated by the inspections, and its consequent effect on the reputation of Gavrilović d.o.o. But the Respondent, not unreasonably, points to the fact that it has no control of what is publicised by media outlets in Croatia. Absent some link between the conduct of the Respondent and that publicity, by way of some illegal disclosure of information, of which there is none, this additional basis provides no assistance to the Claimants.

(iii) Conclusion

211. In conclusion, therefore, having regard to the evidential material provided by the Claimants to support their Request, the Tribunal simply cannot be satisfied that the high threshold necessary to found the relief sought has been met.

212. That conclusion is fatal to the Claimants' Request. That is, having so concluded, the Tribunal must dismiss the Claimants' Request.

213. It may nevertheless be useful to the Parties, especially the Claimants, to understand why, having regard to these findings, the Claimants' allegation that the provisional measures are urgent and necessary to safeguard the Claimants' rights must be rejected. It is to that question to which attention now turns.

(D) Are the Provisional Measures Urgent and Necessary to Safeguard the Claimants' Rights?

(i) Request No. 1: Stay of the Criminal Investigation of Mr Gavrilović

214. By Request No. 1, the Claimants seek the following order:

> Respondent shall take all appropriate measures to suspend the [Investigation Order] and any other criminal proceedings initiated against Mr. Georg Gavrilović, and to suspend any other criminal proceedings or investigation related in any way to the present arbitration, until the arbitration is completed or upon a further decision of the Tribunal.

215. Having concluded that the Claimants have failed to convince the Tribunal that the criminal investigation of Mr Gavrilović is improper, or being conducted improperly, there is no basis for this relief.

216. It bears emphasis, again, that what is being sought is a restraint on the sovereign power of Croatia to investigate crimes against its law within its territory. To meet the threshold, the Tribunal would need to be satisfied that the conduct of a government agency, charged with

investigating criminal offences, was improper. It should be slow to come to that conclusion. The Tribunal cannot here.

(ii) Request No. 2: Injunction to Protect Integrity of the Arbitration and Equality of Arms

217. By Request No. 2, the Claimants seek the following order:

> Respondent shall refrain from engaging in any other course of action which may directly or indirectly jeopardize the procedural integrity of this arbitration, aggravate or extend the dispute, alter the *status quo*, destroy the equality of arms between the parties or threaten the exclusivity of this ICSID arbitration, including, but not limited to:
>
> (a) conducting health or safety inspections of Gavrilović d.o.o. in a manner and frequency that is inconsistent with the manner and frequency in which such inspections were conducted prior to the date this arbitration was commenced; and
>
> (b) publicizing any allegations of health and safety violations of Gavrilović d.o.o. until such allegations are proven.

218. Request No. 2 depends on a finding that the health and safety inspections and/or impugned publicity are such as to have an effect on this arbitration. The Tribunal, for the reasons already explained, cannot be so satisfied.

219. While the rationale for respect for the sovereignty of a State's criminal jurisdiction is perhaps not as strong with respect to the issue of health and safety inspections, it is nevertheless relevant to consider that those governmental agencies charged with regulating this field perform a very important function. For the Tribunal to interfere with that function would need clear evidence of the use of that vehicle in such a way to achieve an ulterior, and improper, purpose.

(iii) Request No. 3: Injunction in Relation to Contact with Witnesses

220. By Request No. 3, the Claimants seek the following order:

> Respondent shall refrain from providing any instructions or warning to potential witnesses not to communicate with Claimants or their counsel, and shall provide Claimants with written notices, in a form to be approved by the Tribunal, ensuring witnesses and potential witness that they may speak with the Claimants and Claimants' representatives, and appear as witnesses in this arbitration, without fear of reprisal from the Respondent.

221. The Claimants here seek careful regulation of the criminal investigation by the Tribunal. Even assuming that the Tribunal were willing to assume the obligations the Claimants wish to confer upon it by this (mandatory) order, there would be a risk that such an order would interfere with what is otherwise a valid criminal investigation. As such, the Tribunal considers that the appropriate arbiter of the form of notices, if any, to be given to particular witnesses is a matter for Croatian officials. It would be inappropriate to grant an injunction ordering the Respondent, or indeed any party, to comply with the law.

222. Insofar as threats are said to be made to prospective witnesses, the Tribunal is not satisfied on the evidence that such threats have been, or will, be made. As explained above, there is not a proper evidential basis for such a conclusion.

(iv) Request No. 4: Access to Documents Related to the Criminal File

223. By Request No. 4, the Claimants seek an order that:

> Respondent shall provide to Claimants copies of all evidence collected during the course of the criminal investigation to date, and any such evidence collected in the future.

224. The Tribunal considers that it is unnecessary for the safeguard of the Claimants' rights to ensure that such documents, insofar as they are relevant to this arbitration, be provided by way of a provisional measure.

225. The Tribunal makes two observations in this regard:

(a) first, insofar as the criminal file contains documents that are relevant to this arbitration and are within the scope of any disclosure ordered, the Tribunal would expect that the Respondent would, of course, disclose those documents; and

(b) insofar as the Respondent comes under an obligation under *Croatian criminal law and procedure* to disclose the documents related to the criminal file, that is a matter for the Croatian authorities in whom that duty vests. Of course, the Tribunal would expect that the Respondent's agencies would comply with Croatian law in this regard and, in any case, insofar as there was some failure to so comply, the Claimants have redress as a matter of Croatian law.

226. One specific matter in this regard must be mentioned. It will be recalled that, in their letter dated 2 April 2015, the Claimants indicated that a potentially important witness had been interviewed as part of the investigation, yet the statement was not in the criminal file. The Tribunal makes no order in relation to this allegation, it not being sought, nor being supported by any specific request for relief in the nature of discovery.[129] If the Claimants' characterisation of Croatian criminal law and procedure is correct, presumably they will be able to rely on their rights thereunder to seek access to this document. It would be inappropriate for this Tribunal to say any more.

(E) Costs

227. The Respondent has been successful in its opposition to the Claimants' Request. In those circumstances, it seeks an order that the Claimants bear all costs incurred in connection with the Claimants' Request on an indemnity basis, including, but not limited to, legal fees and expenses.

[129] cf. §(iv) of the relief sought refers generally to documents in the criminal file, not identifying this statement specifically.

228. No submissions have been made by any of the Parties on the issue of costs. The Tribunal considers it unnecessary to decide this issue at this point in time. In those circumstances, it is appropriate that the issue of the costs of, and incidental to, the Claimants' Request, be reserved.

229. The Parties will be invited, if they so wish, to make submissions regarding the costs of the Claimants' Request at a later stage, before the Tribunal decides the question of the costs of the arbitration.

(F) Concluding Remarks

230. If circumstances arise which the Claimants consider impede the arbitration in any way or prevent the Claimants from presenting their case, the Claimants may renew their application for provisional measures.

231. It is noteworthy, however, in the Tribunal's view, that, in the course of its submissions, the Respondent has acknowledged a number of matters of Croatian criminal law and procedure, which will govern the future conduct of the Respondent in the course of its investigation. Indeed, further, it has specifically relied upon Croatia's status as a member of the European Union in seeking to defeat the Claimants' Request. That contention should be set out here in full:

> The Republic of Croatia is an EU member State which, as required for EU membership, has achieved stability of institutions guaranteeing democracy, the rule of law, and human rights. The independence of the Croatian judiciary is guaranteed by the Constitution, as are the protection of fundamental rights. These rights are further underpinned by the international conventions to which the Republic of Croatia is a signatory, not least of which is the European Convention for the Protection of Human Rights and Fundamental Freedoms.[130]

[130] Respondent's Surrejoinder, §12.

232. In this regard, the Tribunal points especially to the following assertions set forth in the Respondent's submissions:[131]

(a) the Respondent will continue to respect Mr Gavrilović's due process rights;

(b) under the Criminal Procedure Act, during any questioning of Mr Gavrilović, his basic rights will be respected, including, but not limited to, the respective authority confirming that Mr Gavrilović has received and understood the list of basic rights provided with the Investigation Decision, his lawyer being present at the questioning, the questioning being filmed, his entitlement to use notes and to present all the facts supporting his defence and, following the questioning, he must be given the opportunity to fill any gaps and remove any contradictions or ambiguities in his statement;

(c) the present circumstances are such that "precautionary measures" or investigative detention will not and could not be applied;

(d) the criminal investigation does not prevent any witnesses from testifying or sharing information with the Claimants or their lawyers (save that those individuals are unable to discuss information *revealed* to them by the public prosecution service); and

(e) the public prosecution service has not (and the Tribunal assumes will not) collect any evidence beyond that which is strictly necessary for the inquiry.

233. No undertakings have been given in this regard by the Respondent (a point noted by the Claimants), but the Tribunal is confident that, as a nation State and a member of the European Union, the Respondent will comply with its obligations under Croatian, European and other law.

[131] See further, §§ 100, 103 and 104 above.

234. The Claimants, of course, have liberty to apply to this Tribunal if they consider that the confidence so reposed in the Respondent by the Tribunal is not met by appropriate conduct on the Respondent's part (whether as part of the criminal investigation of Mr Gavrilović, the health and safety inspections of Gavrilović d.o.o or otherwise). In such circumstances, the Claimants may, of course, return to this Tribunal to seek further relief.

V. DECISION

235. For the foregoing reasons, the Tribunal refuses the Claimants' Request for Provisional Measures.

236. Therefore, the Tribunal decides:

(1) The Claimants' Request for Provisional Measures dated 15 December 2014 is refused.

(2) Any decision regarding the costs incurred during this procedure on provisional measures is reserved.

For and on behalf of the Tribunal,

[signed]

Michael Pryles
President of the Tribunal
Date: 30 April 2015