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

In the arbitration proceeding between

**INTEROCEAN OIL DEVELOPMENT COMPANY**

**and**

**INTEROCEAN OIL EXPLORATION COMPANY**

Claimants

v.

**FEDERAL REPUBLIC OF NIGERIA**

Respondent

**ICSID Case No. ARB/13/20**

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# PROCEDURAL ORDER NO. 6

## Decision on the Respondent's Application for Provisional Measures

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*Members of the Tribunal*
Professor William W. Park, President
Professor Julian Lew, Arbitrator
Justice Edward Torgbor, Arbitrator

*Secretary of the Tribunal*
Mr. Benjamin Garel

1 February 2017

## I. Procedural History

1. On 2 to 4 August 2016, the Tribunal held an evidentiary hearing in London.

2. On 4 August 2016, the Respondent submitted an "*application to the Tribunal to issue an order for provisional measures against Interocean Oil Development Company and Interocean Oil Exploration Company (the "Claimants")*" (the "**Application**"). The provisional measures sought by the Respondent consist in an order that the Claimants "*post security for the Respondent's costs in this arbitration*."[1]

3. On 5 August 2016, the Claimants submitted their Response to the Respondent's Application (the "**Response**").

4. On 14 October 2016, the Tribunal issued Procedural Order No. 5 ("**PO5**"), which contained its ruling on the Claimant's requests regarding the authority of Volterra Fietta lawyers to represent the Respondent and the source and terms of the funding of the Respondent's defence. The Tribunal's ruling read as follows:

> *a) The Respondent shall supply a letter from the Attorney General confirming that the Volterra Fietta law firm and Ms. Rameau are validly appearing in these proceedings on behalf of the Respondent.*
>
> *b) Assuming confirmation that the Volterra Fietta firm is appearing on behalf of the Respondent, the Attorney General shall confirm whether or not that engagement is at no cost to the Federal Republic of Nigeria.*
>
> *c) The Attorney General shall disclose the persons (whether or not qualifying as third party financial institutions in the narrow sense) who are underwriting the expenses of the legal teams in this arbitration, and who are paying the fees and expenses of the members of the legal team. The disclosure shall cover any person ultimately responsible for covering fees and out-of-pocket costs (including deposits with ICSID) of (i) the firm of Afe Babalola & Co, (ii) the firm of Volterra Fietta and/or (iii) Ms. Rameau. For the avoidance of doubt, the Tribunal expects disclosure in regard to any individual, entity, organisation association, government, or person of any sort, providing monies to undertake Respondent's defense, even if serving as a conduit for funding from another source, either directly or indirectly.*
>
> *d) For the sake of good order and parity, the Claimants shall confirm, in a letter issued jointly by both corporations (Interocean Oil Development Company and Interocean Oil Exploration Company) the identity of any persons (whether or not qualifying as third party*

[1] Respondent's Application, para. 1.

> *financial institutions in the narrow sense) who are underwriting the expenses of the Claimants' legal team in this arbitration, and who are paying the fees and expenses of the members of the legal team. The disclosure shall cover any person ultimately responsible for covering fees and out-of-pocket costs (including deposits with ICSID) of Mr. Olasupo Shasore and his firm Ajumogobia & Okeke, as well as for Professor Oba Nsugbe, Ms. Bimpe Nkontchou, and Mr. Bello Salihu. For the avoidance of doubt, the Tribunal expects disclosure in regard to any individual, entity, organisation association, government, or person of any sort, providing monies to support Claimants' representation, even if serving as a conduit for funding from another source, either directly or indirectly.*
>
> *e) All disclosures directed by this order shall be made a*[nd] *delivered to ICSID and the other party by no later than fourteen (14) days from the present ruling.*

5. By letter dated 27 October 2016, the Attorney-General of the Respondent (the "**A-G**") provided information in response to the Tribunal's ruling in PO5. The A-G stated:

> *[…] to date, the Respondent has not paid any money for fees and out of pocket costs in these proceedings.*
>
> *[…]. In the context of the long-standing relationship, Are Afe Babalola, SAN, and his firm Afe Babalola & Co offered their services to the Respondent in relation to this present proceedings at no cost for the Respondent.*
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> *[…]Are Afe Babalola of Afe Babalola & Co has also engaged the firm of Volterra Fietta and Ms Rameau at no cost to the Respondent.*
>
> *[…] The Respondent wishes to further state that Volterra Fietta and Ms Rameau are part of the legal team of the Respondent at no costs to the Respondent.*[2]

6. By letter dated 29 October 2016, Mr. Are Afe Babalola sought, with reference to the A-G's letter of 27 October 2016, to further comply with the Tribunal's directive in PO5. This letter read, in relevant parts, as follows:

> *[…] As confirmed in the letter of the Attorney General of 27th October, 2016 my firm's representation of the Federal Republic of Nigeria in these proceedings is at absolutely no cost to the Government. This is in keeping with my well established practice of offering such services to the government on pro bono basis.*

[2] Letter of the Attorney-General of the Federal Republic of Nigeria dated 27 October 2016.

> *[…] My decision was also actuated by the knowledge that whatever I may expend in putting up a defence might eventually be recoverable should cost be eventually awarded against the Claimants following the failure of its claims.*
>
> *[…] I have as a result of the above been responsible for all expenses incurred in the defence of the Respondent in these proceedings including the expenses of the law [sic] of Volterra Fietta and Ms Rose Rameau.*[3]

## II. Positions of the Parties

### A. The Respondent's Position

7. The Respondent relies on ICSID Arbitration Rule 39(1) and Article 47 of the ICSID Convention and requests an order for the preservation of its rights.[4] The Respondent submits that "*there is a serious risk of irreparable harm*" because the Claimants "*have no means to pay for the costs of this arbitration and all of their costs are being paid for by a third party funder that has a direct financial stake in the outcome of this arbitration and whose counsel is both a witness in the present case and counsel to a number of the entities or individuals who have a beneficial interest in the Claimants*."[5]

8. The Respondent submits that the Claimants' impecuniosity and inability to comply with a potential adverse costs order was established by the testimony of their own witness, Mr. Jacques Jones, who testified at the hearing that "*the Claimants are penniless companies*."[6]

9. The Respondent further underscores the fact, also revealed by Mr. Jones at the hearing, that the Claimants' claims are funded by a third party – Sigmoil Resources NV – and that Mr Jones himself, as counsel to Sigmoil Resources NV, gave opinions as to the strategy and tactics to pursue in the arbitration.[7]

10. For the Respondent, these facts establish that "*the real economic beneficiary […] is funding this arbitration and […] will not be susceptible to paying any costs order made against the Claimants*."[8], which "*places the Respondent in a highly vulnerable position in which it is at serious risk of irreparable harm*"[9], since "*the Respondent would have no recourse to seek payment of any costs order against the Claimants*."[10]

11. Relying on the tribunal's decision in *RSM v. Saint Lucia*, which considered it "*unjustified to burden the Respondent with the risk emanating from the uncertainty as*

[3] Letter of Mr. Are Aafe Babalola dated 29 October 2016.
[4] Application, para. 2.
[5] Application, para. 3.
[6] *Id.*, citing Mr. Jacques Jones, Hearing Transcript (uncorrected), Day 2, page 64, line 23.
[7] Application, paras. 4-6.
[8] Application, para. 7.
[9] Application, para. 8.
[10] Application, para. 9.

*to whether or not the unknown third party will be willing to comply with a potential costs award in Respondent's favor*"[11], the Respondent contends that:

> *It is obvious that Sigmoil Resources would not willingly pay any costs order made against the Claimants. It would be unreasonable to burden the Respondent with that risk.*[12]

12. The Respondent adds that "[a]*n order for security for costs is the only means of ensuring that the Respondent's rights are preserved*" and that "[w]*ithout that security, there is a virtual certainty that the Respondent will suffer irreparable harm, in the event that costs are ordered against the Claimants*."[13] For the Respondent, there are no risk of prejudice to the Claimants because "*it is evident that Sigmoil Resources has the necessary financial wherewithal to post security for costs*."[14]

13. On the basis of the foregoing, the Respondent requests that the Tribunal order the Claimants to post security for the Respondent's costs for a sum of no less than US$8 million.[15]

### B. **The Claimants' Position**

14. The Claimants submit that Mr. Jones voluntarily disclosed at the hearing on 3 August 2016 that Sigmoil Resources NV was funding their claims in this arbitration, and that they never sought to hide this fact.[16] The Claimants further submit that they have also disclosed the terms of the funding arrangement.[17]

15. The Claimants also contend that the mere existence of a third party funding arrangement is not sufficient justification for the grant of an order for security for costs.[18] In that respect, the Claimants allege that the decision of the Tribunal in the *RSM v. Saint Lucia* case is not applicable to the facts and circumstances of this case: the Claimants first note that the *Saint Lucia* tribunal affirmed the position of ICSID tribunals that provisional measures "*should only be granted in exceptional circumstances*[19]"; the Claimants then submit that the Respondent has not established that the circumstances that prompted the *Saint Lucia* tribunal to grant provisional measures exist in this case, including that relating to the Claimants' history of not complying with arbitral awards.[20] The

[11] *RSM Production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10), Decision on Saint Lucia's Request for Security for Costs of 13 August 2014 ("***RSM v. Saint Lucia***"), para. 83.
[12] Application, paras. 10-11.
[13] Application, para. 12.
[14] Application, para. 13.
[15] Application, para. 14.
[16] Response, para. 3.
[17] Response, para. 5.
[18] Response, para. 5.
[19] Response, para. 6.
[20] Response, para. 6.

Claimants, citing the decision in the *EuroGas* decision,[21] note that they have not defaulted on their payment obligations in this case and that "*financial difficulties and third-party funding – which has become a common practice – do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order of security for costs*."[22]

16. The Claimants further assert that the role of Mr. Jones in establishing the Claimants' strategy in this arbitration does not constitute sufficient grounds to justify an order for provisional measures.[23]

17. The Claimants finally note that the Respondent itself has acknowledged that "*Sigmoil clearly has the resources to pay for a security for costs order*" and that the Respondent's alleged risk of suffering an irreparable harm is unjustified.[24]

18. On the basis of the foregoing arguments, the Claimants request that the Tribunal dismiss the Respondent's request for provisional measures.[25]

## III. Tribunal's Analysis

### A. Legal Framework

19. ICSID tribunals derive their authority with respect to provisional measures from Article 47 of the ICSID Convention and ICSID Arbitration Rule 39.

20. Article 47 of the ICSID Convention provides:

> *Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.*

21. ICSID Arbitration Rule 39 provides that:

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

22. The ICSID Convention and Rules also contain specific provisions regarding the issue of costs. First, Article 61(2) of the ICSID Convention states that:

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[21] *EuroGas Inc and Belmont Resources Inc v Slovak Republic* (ICSID Case No. ARB/14/14), Decision on the Parties' Requests for Provisional Measures of 23 June 2015 ("***EuroGas v. Slovakia***").
[22] Response, para. 9, citing *EuroGas*, para. 123.
[23] Response, para. 7.
[24] Response, para. 11.
[25] Response, para. 12.

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the Award.*

23. Second, ICSID Arbitration Rule 47(1) provides:

> *The Award shall be in writing and shall contain:*
>
> *[...]*
>
> *(j) any decision of the Tribunal regarding the cost of the proceeding.*

24. Third, Administrative and Financial Regulation 14(3)(d) provides:

> *(d) in connection with …every arbitration proceeding unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, each party shall pay one half of each advance or supplemental charge, without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to Article 61(2) of the Convention […].*

25. Finally, it has been accepted by a number of tribunals that an order to post security for costs falls within the provisional measures within a tribunal's competence, even though the measure is not expressly mentioned in the ICSID Convention and Rules.[26] The Tribunal agrees with that approach. The fact that security for costs is not mentioned in Article 47 of the ICSID Convention or in ICSID Arbitration Rule 39 cannot exclude a tribunal's power or jurisdiction in that regard. These provisions do not list any specific type of provisional measure, but refer broadly to "*any provisional measures*." If tribunals could only order measures that are specifically listed in these provisions, they could not order any provisional measures.

### B. **The Requirements for Provisional Measures**

26. Provisional measures are "*extraordinary measures*", and as such should be recommended in limited circumstances.[27] An order for provisional measures requires the existence of a right that needs to be preserved, and the necessity to urgently avoid

[26] See e.g. *RSM v. Saint Lucia,* paras. 51-57, and the decisions cited therein.
[27] *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2 of 28 October 1999 ("***Maffezini v. Spain***"), para. 10. See also *Saipem S.p.A. v. People's Republic of Bangladesh* (ICSID Case No. ARB/05/7), Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 175; *Burimi S.R.L. and Eagle Games SH.A. v. Republic of Albania* (ICSID Case No. ARB/11/18), Procedural Order No. 2 of 3 May 2012 ("***Burimi v. Albania***"), para. 34; *EuroGas v. Slovakia,* para. 121.

imminent and irreparable harm.[28]

27. In the Tribunal's view, provisional measures must aim at protecting or preserving a party's right or interest that either actually exists, or will (or is at least likely to) materialize, and is susceptible of being harmed.

28. The right to be preserved can be either a substantive right, such as the right to reparation for a breach of contract or international wrongful act, or a procedural right, such as the right to ensure the integrity of the proceeding or the right to obtain reimbursement of costs.[29]

29. The question of whether provisional measures can only relate to existing rights or also to conditional or future rights has also been addressed in previous decisions.[30] For reasons specific to this case and discussed below,[31] the Tribunal does not need to address extensively the question here. It is sufficient to mention that an order for provisional measures requires that, at the very least, the right to be preserved is able to materialize at some point.

30. Tribunals assess the appropriateness of provisional measures by weighing the interests of both parties. If the harm threatening the applicant exceeds greatly the potential cost or detriment to the party affected by the measure, the measure can be considered necessary.[32] As a corollary, the harm must exist and be imminent.[33] Potential or hypothetical harm cannot, therefore, justify an order for provisional measure.[34]

31. Urgency exists when the adjudication of the issue underlying the measure requested cannot wait the outcome of the awards on the merits.[35]

32. The burden of proving that these requirements have been met falls upon the party requesting the provisional measures.[36]

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[28] See e.g., *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures of 17 August 2007 ("***Occidental v. Ecuador***"), para. 59; *Perenco Ecuador Ltd v. Republic of Ecuador* (ICSID Case No. ARB/08/6), Decision on Provisional Measures of 8 May 2009 ("***Perenco v. Ecuador***"), para. 43; *Burlington Resources Inc. and others v. Republic of Ecuador and Petróleos del Empresa Estatal del Ecuador (PetroEcuador)* (ICSID Case No. ARB/08/5), Procedural Order No. 1 of 29 June 2009 ("***Burlington v. Ecuador***"), para. 51; *Burimi v. Albania*, para. 34.

[29] *RSM v. Saint Lucia*, paras. 65-71.

[30] *RSM v. Saint Lucia*, paras. 72-73, and the decisions referred to therein. See also *Maffezini v. Spain*, paras. 11-21; *Valle Verde Sociedad Financiera S.I. v. Bolivarian Republic of Venezuela* (ARB/12/18), Procedural Order. No. 8 of 21 September 2016, paras. 20-22.

[31] See paras. 35 to 37 below.

[32] *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/06/21) Decision on Provisional Measures of 19 November 2007, para.72. See also *Burlington v. Ecuador*, para. 82; *Occidental v. Ecuador*, para.93; *Burimi v. Albania*, para. 35.

[33] *Occidental v. Ecuador*, para. 89. See also *Burimi v. Albania*, para. 35.

[34] *Id.*

[35] *Burlington v. Ecuador*, para. 73. See also *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 1 of 31 March 2006, para. 76.

[36] *Maffezini v. Spain*, para. 10. See also *Burimi v. Albania*, para. 37.

### C. **The Respondent's Request**

33. In the Tribunal's view, the measures requested by the Respondent are not justified under the present circumstances. The Tribunal is indeed not convinced that the Respondent has a right that is at risk of imminent and irreparable harm and which, as a consequence, would need to be urgently preserved.

#### *a. The existence of a right to be preserved*

34. The Respondent contends that:

> *[…] an immediate order is appropriate requiring the Claimants to post security for the Respondent's costs in this arbitration. This arbitration was initiated in July 2013. The costs are already significant. An order for security for costs is the only means of ensuring that the Respondent's rights are preserved. Without that security, there is a virtual certainty that the Respondent will suffer irreparable harm, in the event that costs are ordered against the Claimants.*[37]

35. The Respondent submits that it has a right to recover costs in this arbitration should the Tribunal decide to allocate costs against the Claimants, and that this right will be irreparably impaired if security for costs is not posted by the Claimants.

36. In this connection, the Respondent has also confirmed that the defence by Nigeria's counsel of the Claimants' claims was done "at no costs" for the Respondent, and that its counsel has "*been responsible for all expenses incurred in the defence of the Respondent in these proceedings including the expenses of the law [sic] of Volterra Fietta and Ms Rose Rameau*."[38]

37. Given that the Respondent is represented and advised in this proceeding at no costs, then the Respondent – on the basis of the facts and evidence currently before the Tribunal – cannot claim, at this stage of the proceeding, to have costs to recover. As a consequence, the Respondent cannot claim to have a right to recover costs that would need to be preserved by the ordering of a provisional measure.

38. In reaching this conclusion, the Tribunal considered it necessary to draw a distinction between a right that may already exist at the time the measure is sought and a right that cannot exist at the time the measure is sought. This is because provisional measures require that the relevant right be capable of being preserved, and as a matter of logic one can only preserve what already exists, will exist or has at least a chance or possibility to exist. In the present circumstances, the *pro bono* arrangement in place between the Respondent and its counsel makes it impossible, at the time the provisional measure is sought, for a right to recover costs to arise, since there are no costs for the Respondent.

[37] Application, para. 12.
[38] Letter of Mr. Are Aafe Babalola dated 29 October 2016.

39. The Tribunal's determination is based on the facts and evidence presented to it and could perhaps have been different if the *pro bono* arrangement described to the Tribunal provided that the Respondent would pay its counsel costs and expenses in case a costs order is ordered in its favour.

40. Further, in this case, the Respondent has no commitments or obligations in respect of the payment of the costs incurred in this Arbitration. This has been made clear by the Attorney General and Mr Are Afe Babalola in their correspondence quoted above (paragraphs 4-5). Accordingly, if Respondent is successful in this Arbitration it will not have any costs to seek to recover. The Tribunal has noted that Mr Are Afe Babalola states that "*if the Respondent Government is successful in this Arbitration whatever I may expend in putting up a defence might eventually be recoverable should costs be eventually awarded against the Claimants following the failure of its claims*".[39] Mr. Are Afe Babalola is not a party to this Arbitration and has no right to recover costs. He has undertaken to represent the Respondent at "*no cost to Respondent*"; whether it wins or loses there is no cost to the Respondent. Accordingly, Mr. Are Afe Babalola cannot recover his costs/his law firm's costs, nor can those incurred by other law firms and lawyers representing the Respondent in this Arbitration as they are not party to this Arbitration.

41. Should a change in the fee arrangement in place between the Respondent and its counsel be implemented and evidenced, the Tribunal cannot exclude the existence of a right to be preserved. This is a matter to be addressed if and when the situation changes.

42. The Tribunal is conscious of the fact that some pro bono arrangements accord different treatment to legal fees on the one hand and out-of-pocket arbitration costs and expenses on the other. For instance, under some arrangements legal advice and representation are provided at no costs but administrative fees advanced by counsel as well as expenses incurred in relation to the representation are invoiced to and paid by the party. Under such arrangements, a right to recover administrative costs and expenses might arguably exist. However, the Respondent has not contended that an arrangement of this kind was in place. To the contrary, the Respondent's A-G indicates in its letter dated 27 October 2016 that "*to date, the Respondent has not paid any money for fees and out of pocket costs in these proceedings*."[40] Moreover, the amount of the security requested by the Respondent, USD 8 million,[41] which the Respondent has not detailed or justified, strongly suggests that the measure requested aims at securing the entirety of any costs (though without any basis of calculation of such costs) rather than just expenses.

43. In light of the foregoing, the Tribunal considers that the provisional measures requested are not justified and must be rejected.

[39] Letter of Mr. Are Aafe Babalola dated 29 October 2016.
[40] Letter of the Attorney-General of the Federal Republic of Nigeria dated 27 October 2016.
[41] Application, para. 14.

*b. Necessity and urgency*

44. The Tribunal considers these two requirements for good order. While necessity and urgency are normally the points of focus of tribunals' analyses when deciding provisional measures, the confirmation by the Respondent that it has not incurred and will not incur costs renders such an analysis moot.

*i. The necessity of the provisional measure*

45. The measure requested is not necessary because there is no evidence of an imminent and irreparable harm threatening the Respondent's alleged right.

46. The fact that the Claimants are "*penniless companies*" funded by a third-party to pursue this arbitration is not evidence of their future unwillingness and/or inability to honor a costs award rendered against them. In other words, and as stated by the tribunal in the *Burimi* case, "[t]*he Tribunal is unwilling to find imminent danger of harm based on the Respondent's speculation about the Claimants' future conduct*."[42]

47. As indicated above, provisional measures are exceptional in nature, and therefore require exceptional circumstances. The Tribunal shares the views of the tribunal in the *Eurogas* case, which decided that "*financial difficulties and third-party funding […] do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order for security for costs.*"[43]

48. Ordering the Claimants to post security for costs in the present circumstances would impose on them an additional financial requirement, not provided for in the ICSID Administrative and Financial Regulations, for their case to proceed.[44] The Claimants have met, so far, the financial requirements prescribed by ICSID Administrative and Financial Regulation 14(3)(d) and the Tribunal sees no convincing reason to consider that the harm allegedly faced by the Respondent greatly exceeds the damage that would be caused to the Claimants by the provisional measure.

49. For this reason, the Tribunal considers that the provisional measures requested by the Respondent are not justified.

*ii. The urgency of the provisional measure*

50. By its own admission, the Respondent has not incurred any legal costs or expenses in these proceedings.[45] Beside the speculative nature of the Respondent's contention regarding the Claimants' future conduct vis-a-vis a potential costs order, the fact that no costs have been incurred to date by the Respondent, nor are any expected to be incurred in the future, suffices to disprove that the provisional measure requested is justified by urgency. In the Tribunal's view, it cannot, indeed, be urgent for the Respondent to secure

[42] *Burimi v. Albania*, para. 39.
[43] *EuroGas v. Slovakia*, para. 123.
[44] *Burimi v. Albania*, para. 41.
[45] See para. 37 above, and Letter of the Attorney-General of the Federal Republic of Nigeria dated 27 October 2016.

at this stage of the proceeding a right to recover costs that it has not spent.

51. For the above-elaborated reasons, the Tribunal considers that the provisional measures requested by the Respondent are not justified.

## IV. Decision

52. In light of the foregoing, the Tribunal concludes that the Respondent has failed to establish that the provisional measures requested are justified in the present circumstances.

53. The Tribunal therefore rejects the Respondent's Application for provisional measures.

For the Tribunal

[SIGNED]

William W. Park
President of the Tribunal
Date: 1 February 2017