

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Hela Schwarz GmbH

v.

People's Republic of China

(ICSID Case No. ARB/17/19)

PROCEDURAL ORDER NO. 2
DECISION ON THE CLAIMANT'S REQUEST FOR PROVISIONAL MEASURES

Members of the Tribunal

Sir Daniel Bethlehem QC, President of the Tribunal
Professor Campbell McLachlan QC, Arbitrator
Mr. Roland Ziadé, Arbitrator

Secretary of the Tribunal

Ms. Geraldine Fischer

Assistant to the Tribunal

Mr. Paolo Busco

10 August 2018

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I. INTRODUCTION

A. The Parties

1. The claimant in these proceedings is Hela Schwarz GmbH (“**Hela Schwarz**” or “**Claimant**”), a company established under the laws of the Federal Republic of Germany. The Claimant is represented in these proceedings by Dr. Philipp K. Wagner, Dr. Florian Dupuy, Dr. Joseph Schwartz and Dr. Felix Krumbiegel of Wagner Arbitration in Berlin.
2. The respondent is the People’s Republic of China (the “**PRC**” or “**Respondent**”). The Respondent is represented in these proceedings by Ms. Yongjie Li, Mr. Chenghua Jiang, Mr. Youyou Wang and Mr. Zhao Sun of the Department of Treaty and Law of the Ministry of Commerce; Prof. Emmanuel Gaillard, Dr. Nils Eliasson, Mr. Emmanuel Jacomy and Mr. Jeremy Sharpe of Shearman & Sterling LLP; and Mr. Xiusong Xing, Mr. Xin Zhang, and Mr. Qing Ren of Global Law Office in Beijing.

B. Submission of the Dispute to Arbitration

3. This dispute has been submitted to arbitration on the basis of (a) the Agreement between the Federal Republic of Germany and the People’s Republic of China on the Encouragement and Reciprocal Protection of Investments (the “**BIT**”) and Protocol, dated 1 December 2003, and (b) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**ICSID Convention**”).¹

C. The Issue Addressed in the Procedural Order

4. This Procedural Order addresses the Claimant’s Urgent Request for Provisional Measures dated 4 December 2017 (“**PM Request**”), which was submitted before the Tribunal was constituted. The Respondent opposes the Claimant’s PM Request.
5. As is set out more fully below, pursuant to a pleading schedule set by the ICSID Secretary-General, the Parties submitted the following written pleadings on the subject of the Claimant’s PM Request: the Respondent’s Observations on the Claimant’s Request for

¹ Request for Arbitration (“RfA”), ¶¶ 1, 20 *et seq.*

Provisional Measures dated 13 December 2017 (“**Observations**”); the Claimant’s Reply to the Respondent’s Observations on Provisional Measures dated 18 December 2017 (“**Reply**”); and the Respondent’s Rejoinder to the Claimant’s Reply on Provisional Measures dated 22 December 2017 (“**Rejoinder**”). These written submissions were supplemented by correspondence from the Parties and brief oral submissions by the Parties on provisional measures during the course of the first session on 1 February 2018.

6. The Tribunal has given careful consideration to the submissions of the Parties on the Claimant’s PM Request. For reasons that will become apparent, developments on the ground following the submission of the PM Request materially changed the circumstances pertaining to the Request. In light of, *inter alia*, these changed circumstances, the Tribunal has concluded that the Claimant’s PM Request must be denied. The Tribunal’s decision denying the PM Request, including the reasons therefore set out in summary form, was communicated to the Parties by correspondence from the Secretary of the Tribunal dated 10 April 2018. This Procedural Order reflects the operative parts of that correspondence and constitutes the fully reasoned and elaborated Decision of the Tribunal denying the Claimant’s PM Request.

II. PROCEDURAL BACKGROUND

7. On 2 May 2017, the Claimant filed a Request for Arbitration with ICSID (“**Request for Arbitration**”). On 4 May 2017, the ICSID Secretariat sent the Claimant a list of questions relating to the Request for Arbitration.
8. On 9 May 2017, the Claimant’s then counsel, Dentons LLP in Beijing, informed ICSID that it had withdrawn and would no longer represent Claimant in this matter. Two months later, on 6 June 2017, Dr. Florian Dupuy and Dr. Joseph Schwartz informed ICSID that the Claimant had retained their firm, Wagner Arbitration, to represent it in this proceeding. They also provided the corresponding power of attorney.

9. By letter of 19 June 2017, the Claimant provided its responses to the Secretariat's questions of 4 May 2017. On 21 June 2017, the Respondent offered comments on the Claimant's responses.
10. Later on 21 June 2017, the ICSID Secretary-General registered the Request for Arbitration and notified the Parties.
11. The Parties subsequently agreed on a method of constituting the Tribunal pursuant to Article 37(2)(a) of the ICSID Convention. In accordance with this method, the Claimant appointed Mr. Roland Ziadé (French/Lebanese/Ecuadorian) as arbitrator. He accepted his appointment on 27 September 2017. The Respondent thereafter appointed Professor Campbell McLachlan (New Zealand) as arbitrator. He accepted his appointment on 27 October 2017.
12. On 16 November 2017, the Claimant informed ICSID that the Parties had been unable to agree on the presiding arbitrator and requested, pursuant to the Parties' agreement, that the Secretary-General make the appointment. The Parties further agreed that the Secretary-General would conduct a ballot process for the appointment of the President, failing which the Secretary-General would make the appointment directly. ICSID provided the Parties will a ballot of candidates on 1 December 2017.
13. By letter of 1 December 2017, the Claimant informed the Respondent that the People's Government of Jinan Municipality ("**Jinan Municipal Government**") had issued a public announcement the day before ordering the Claimant's local subsidiary to evacuate its buildings within five days, and indicating that the buildings would be demolished. The Claimant asked the Respondent to instruct the local authorities not to demolish the company's buildings pending this arbitration and reserved its right to file an application for provisional measures and a temporary restraining order.
14. The Claimant wrote to the Respondent again on 4 December 2017, expressing concern that the local authorities appeared to be acting upon the Respondent's direct instructions. The

Claimant requested that the Respondent take immediate action to intervene and prevent further escalation.

15. Also on 4 December 2017, the Claimant submitted the PM Request, together with Exhibits C-9 to C-15. ICSID acknowledged receipt of the PM Request on the same day, stating:

In accordance with ICSID Arbitration Rule 39(2), the Tribunal, once constituted, will give priority to the consideration of the [PM Request]. In this regard, ICSID Arbitration Rule 39(5) provides that either Party may request the Secretary-General to fix time limits for the Parties to present observations on the [PM Request], so that the [PM Request] and observations may be considered by the Tribunal promptly upon its constitution. We ask the Claimant to confirm whether it makes such a request.

16. Later on 4 December 2017, the Respondent responded to the Claimant's correspondence of 1 and 4 December 2017. The Respondent rejected the Claimant's allegations and stated that it was not in a position to accede to the Claimant's request for intervention.
17. On 5 December 2017, the Respondent wrote to ICSID to object to certain of the Claimant's requests contained in the PM Request. In particular, the Respondent noted that provisional measures could not be ordered until the Tribunal was properly constituted.
18. On the same day, the Claimant wrote to ICSID to confirm that it was requesting the Secretary-General to fix time limits for the Respondent to present its observations on the PM Request. The Claimant further requested that a preliminary decision on the PM Request be made even before the Respondent provided its observations.
19. The Secretary-General responded to the Parties later on 5 December 2017. She confirmed that "Article 47 of the ICSID Convention and ICSID Arbitration Rule 39 confer the power to recommend provisional measures only upon the Tribunal." The PM Request would therefore "be considered by the Tribunal as a matter of priority upon its constitution." The Secretary-General also provided the Parties with a schedule for written submissions on the PM Request.

20. On 6 December 2017, the Claimant informed ICSID that local authorities had begun demolishing its local company's buildings. It submitted a number of photos and a video in support of its allegations.
21. The Parties filed their written submissions on the Application in accordance with the schedule set by the Secretary-General. On 13 December 2017, the Respondent submitted its Observations. On 18 December 2017, the Claimant submitted its Reply. On 22 December 2017, the Respondent submitted its Rejoinder.
22. In the meantime, by letter of 11 December 2017, ICSID had informed the Parties that the ballot process had not resulted in the selection of a mutually acceptable candidate for President of the Tribunal.
23. In accordance with the Parties' agreed method of appointment, the Secretary-General proceeded with the appointment of the President. By letter of 20 December 2017, she proposed the appointment of Sir Daniel Bethlehem QC (British). Neither Party objected to this appointment. Sir Daniel accepted appointment as President of the Tribunal on 8 January 2018.
24. On 8 January 2018, the Secretary-General informed the Parties that the Tribunal was constituted in accordance with Article 37(2)(a) of the ICSID Convention.
25. On 10 January 2018, the Tribunal (a) proposed that the first session be held by teleconference on either 1 or 2 February 2018, and (b) invited the Parties' views as to whether a hearing on provisional measures would be necessary. On 12 February 2018, the Tribunal circulated a draft Procedural Order No. 1 to help facilitate the Parties' discussion on procedural matters in advance of the first session. The Tribunal also proposed the appointment of Mr. Paolo Busco as Assistant to the Tribunal.
26. Based on the Parties' availability, the Tribunal confirmed that the first session would be held on 1 February 2018. Regarding the need for a hearing on provisional measures, the Respondent informed the Tribunal that it did not think a hearing would be necessary, but that it would not object to a hearing by teleconference. The Claimant requested an

extension of time to respond on this question, which the Tribunal granted. On 17 January 2018, the Claimant informed the Tribunal that it was “not in a position to justify the necessity” of a hearing on provisional measures and therefore would leave the question to the Tribunal.

27. In its letter of 17 January 2018, the Claimant also provided an update on the status of the demolition works. The Claimant noted that “most buildings belonging to [its local subsidiary]’s premises in Jinan have been demolished and that, for the most part, the machinery and stocks are now stored in a different location.”
28. On the basis of the Parties’ comments regarding the need for a hearing, the Tribunal informed the Parties on 19 January 2018 that it would consider whether there were any questions arising from the Parties’ written submissions that might helpfully be put to the Parties for response in writing, and that it would, thereafter, consider whether a telephone hearing would be appropriate.
29. On 26 and 27 January 2018, the Parties submitted their comments on the draft of Procedural Order No. 1. They also consented to the appointment of Mr. Busco as Assistant to the Tribunal.
30. On 29 January 2018, in preparation for the first session, the Tribunal provided the Parties with an updated draft of Procedural Order No.1. In addition, the Tribunal informed the Parties that it would hear, in the course of the first session, brief oral submissions on the issues of (a) the form, necessity and urgency of the provisional measures sought and resisted; and (b) whether it would be appropriate for the Tribunal to exercise its powers under ICSID Convention Article 47 and ICSID Arbitration Rule 39(3) to recommend provisional measures of its own initiative, and if interim provisional measures were warranted, the form they should take.
31. The first session was held as scheduled on 1 February 2018 by teleconference. Following the discussion of procedural matters, each Party was given the opportunity to address the issues relating to provisional measures which the Tribunal had indicated in its letter of

29 January 2018. The Parties also provided an update regarding the factual situation on the ground.

32. Following the first session, an audio recording and written transcript of the teleconference were provided to the Tribunal and the Parties.

III. FACTUAL BACKGROUND AND DEVELOPMENTS

33. The following summary is based on the Parties' submissions and is provided to contextualise the Parties' arguments on the PM Request. The Tribunal takes no position with respect to disputed facts and the Tribunal's decision on the PM Request does not constitute a finding of fact on any issue by the Tribunal.

A. The Underlying Dispute

34. The dispute set forth in the Request for Arbitration arises out of the Claimant's investment in the PRC through a wholly owned subsidiary, Ji'nan Hela Schwarz Food Co., Ltd. ("**JHSF**"), which was established in 1996.²
35. In 2001, JHSF was granted the legal right to use a parcel of state-owned industrial land in Shandong Province (the "**Land**") for 50 years, until 29 July 2051.³ After receiving this right, JHSF built a series of buildings on 4821.18 square meters of the Land (the "**Buildings**").⁴
36. On 11 September 2014, the Jinan Municipal Government issued a Housing Expropriation Decision to expropriate the Land and the Buildings (the "**Expropriation Decision**").⁵ According to the Respondent, this expropriation measure was implemented as part of the

² Request for Arbitration, ¶ 8.

³ Request for Arbitration, ¶ 9; **Exhibit C-1**, The People's Republic of China State-Owned Land Use Certificate, 2001.

⁴ Request for Arbitration, ¶ 10.

⁵ Request for Arbitration, ¶ 11; Observations, ¶ 11.

Huashan area renovation project, a program aimed at improving environmental and living conditions along the river Xiaoqing.⁶

37. In November 2014, JHSF challenged the Expropriation Decision through an administrative process of the Shandong Provincial Government,⁷ but its application was rejected in an Administrative Review Decision dated 15 April 2016.⁸
38. To challenge that decision, JHSF brought an administrative lawsuit against the Jinan Municipal Government at the Intermediate People's Court.⁹ According to Hela, the Court did not hold a hearing or issue a substantive judgment. Rather, it issued a procedural ruling dismissing JHSF's complaint.¹⁰ That ruling was upheld by the Shandong High Court in a decision dated 6 December 2016.¹¹
39. While this litigation was pending, on 29 August 2016, the Jinan Municipal Government issued a Housing Expropriation Compensation Decision (the "**Compensation Decision**"), in which it offered to pay compensation to JHSF in the amount of Rmb 32,954,380 (about USD 5 million).¹² According to the Claimant, this amount is wholly insufficient. The Respondent asserts that JHSF did not comply with the Compensation Decision or apply for administrative review.¹³

⁶ Observations, ¶ 9.

⁷ Request for Arbitration, ¶ 12; Observations, ¶ 12; **Exhibit C-2**, Application for Administrative Review, 7 November 2014.

⁸ Request for Arbitration, ¶ 12; **Exhibit C-3**, Administrative Reconsideration Decision, The People's Government of Shandong Province, 15 April 2016.

⁹ Request for Arbitration, ¶ 13; **Exhibit C-4**, Administrative Complaint, 3 May 2016.

¹⁰ Request for Arbitration, ¶ 13; **Exhibit C-5**, Administrative Ruling, Shandong Jinan Intermediate People's Court, 19 July 2016. Respondent states that the suit was "dismissed as meritless": Observations, ¶ 13.

¹¹ Request for Arbitration, ¶ 13; **Exhibit C-6**, Administrative Ruling, Shandong Higher People's Court, 6 December 2016.

¹² Request for Arbitration, ¶ 14; Respondent's Letter to Claimant of 4 December 2017; Observations, ¶ 18; **Exhibit C-7**, Expropriation Compensation Decision No. 5, Jinan Municipal Government, 29 August 2016.

¹³ Respondent's Letter to Claimant of 4 December 2017, p. 2; Observations, ¶ 23.

40. On 1 March 2017, the Jinan Municipal Government notified JHSF that it was required to collect its compensation and vacate the Buildings.¹⁴ In response, JHSF submitted observations to the Jinan Municipal Government, which in turn informed JHSF that it would seek a court order if the company did not comply with its obligations.¹⁵
41. On 2 May 2017, the Claimant filed the Request for Arbitration with ICSID.
42. On 22 May 2017, the Jinan Municipal Government applied for enforcement of the Compensation Decision at the Licheng People's Court of Jinan City. Following a hearing on 5 June 2017, the Court issued a decision on 12 June 2017 (the "**Enforcement Decision**"), granting the enforcement application and ordering JHSF to vacate the Buildings within ten days of service.¹⁶ The Enforcement Decision was served on JHSF through its attorneys on 16 June 2017.
43. JHSF did not vacate the Buildings, and the Municipal Government did not undertake any enforcement action for the following five months.
44. On 17 November 2017, JHSF was informed by an administrative ruling that compensation in the amount corresponding to the amount stated in the Compensation Decision had been placed in escrow at the Licheng District Court.¹⁷

B. Factual Basis of the Application

45. Throughout the events described above, JHSF remained in operation and occupied the Buildings.
46. On 30 November 2017, the Jinan Municipal Government issued a public announcement ordering JHSF to evacuate the Buildings within five days, failing which it would initiate

¹⁴ Observations, ¶ 24; **Exhibit C-9**, Exigent Notice for Implementing the Expropriation Compensation Decision, Jinan Municipal Government, 1 March 2017.

¹⁵ Observations, ¶ 24.

¹⁶ Respondent's Letter to Claimant of 4 December 2017, p. 2.

¹⁷ PM Request, ¶ 18; **Exhibit C-12**, Administrative Ruling of the Jinan Licheng District People's Court, 16 November 2017; *see* Observations, ¶ 32.

forced evacuation (the “**Eviction Notice**”).¹⁸ The Claimant understood this to mean that demolition of the Buildings could begin as soon as 5 December 2017. Photos submitted by the Claimant showed red signs drawn on the ground in front of the entrance to the Buildings, which according to the Claimant, were “understood as a further threat by the local authorities.”¹⁹

47. At that time, most of the buildings in the area surrounding JHSF’s premises had already been demolished, and the construction of new buildings had begun.²⁰
48. As noted above, the Claimant wrote to the Respondent on 1 and 4 December 2017, demanding that it take immediate action to prevent the demolition of the Buildings. After the Claimant filed its PM Request on 4 December 2017, the Respondent responded to the Claimant’s correspondence, stating that the Municipal Government’s actions were justified and that the Respondent was not therefore in a position to intervene.

C. Developments Subsequent to the PM Request

49. Demolition of the Buildings began on 6 December 2017, and production at JHSF’s facilities stopped completely in the second week of December 2017.²¹
50. The Parties agree that, as of 1 February 2018, the factual circumstances on the ground were as follows:²²
- (a) JHSF’s premises had been fully evacuated.
 - (b) All the Buildings had been demolished.

¹⁸ **Exhibit C-13**, Public Announcement by the Jinan Licheng District Municipal People’s Government, 30 November 2017.

¹⁹ PM Request, ¶ 21; **Exhibit C-14**, Photos of JHSF premises, 4 December 2017.

²⁰ PM Request, ¶ 22; **Exhibit C-15**, Satellite photos of the Land and surrounding area, various dates.

²¹ Letter from Claimant to ICSID of 6 December 2017 and attachments; Reply, ¶¶ 3 and 5.

²² First Session Tr. 68:1-69:10.

- (c) Machinery that had been located on JHSF's premises was stored and under the Claimant's control.

IV. APPLICABLE LEGAL FRAMEWORK

51. The Tribunal's power to grant provisional measures is embodied in Article 47 of the ICSID Convention and ICSID Arbitration Rule 39.

52. 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.

53. ICSID Arbitration Rule 39 states in relevant part:

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

(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

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

V. THE PARTIES' POSITIONS

54. In this section, the Tribunal summarises each Party's position on the PM Request, including their views on the applicable legal standard and whether the requested measures are warranted in this case. Since the PM Request was filed, the Parties' positions have evolved with the changing factual circumstances. For the sake of completeness, this section

includes the main arguments advanced by the Parties both before and after the demolition of the Buildings.

A. The Claimant's Position

(1) Applicable Legal Standard

55. The Claimant submits that ICSID tribunals have broad discretion to recommend provisional measures under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules.²³ According to the Claimant, it is well recognized that such interim relief can be ordered to ensure that a party does not “aggravate or extend the dispute or take justice into their own hands”.²⁴
56. The Claimant asserts that ICSID tribunals may order provisional measures when the following four requirements are met:
- (a) the arbitral tribunal must have *prima facie* jurisdiction;
 - (b) the measures must be necessary to protect the applicant's rights;
 - (c) the measures must be urgent; and
 - (d) the measures must be proportional.²⁵
57. In the Claimant's view, all four requirements are met in the present case, as discussed in the subsections below.

²³ PM Request, ¶ 25.

²⁴ PM Request, ¶ 25, quoting *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, ¶ 57.

²⁵ PM Request, ¶ 27.

(2) *Prima Facie Jurisdiction*

58. According to the Claimant, the first requirement—*prima facie* jurisdiction—has generally been uncontroversial in ICSID tribunals' decisions on provisional measures. It is met as long as there is not a “clear lack of jurisdiction”.²⁶
59. The Claimant submits the Tribunal has *prima facie* jurisdiction in this case. In this context, Claimant raises the following points:
- (a) The Claimant is constituted under the laws of Germany and therefore qualifies as an “investor” under Article 1(2)(a) of the BIT.²⁷ Both Germany and the PRC were ICSID Member States at all relevant times. Therefore, the Tribunal has jurisdiction *ratione personae*.
 - (b) The Claimant's assets in the PRC qualify as an “investment” under Article 1 of the BIT, and the present dispute arises out the Respondent's breaches of the BIT with respect to that investment. This establishes the Tribunal's jurisdiction *ratione materiae*.²⁸
 - (c) The Tribunal has jurisdiction *ratione temporis* because the dispute arose in 2014, long after the BIT entered into force.²⁹
 - (d) As regards jurisdiction *ratione voluntatis*, the Respondent consented in writing to ICSID arbitration by way of Article 9(3) of the BIT and the Claimant has expressed its consent by filing the Request for Arbitration.³⁰

²⁶ PM Request, ¶ 31, quoting *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, 25 September 2001, ¶ 11.

²⁷ PM Request, ¶ 32.

²⁸ PM Request, ¶ 33.

²⁹ PM Request, ¶ 34.

³⁰ PM Request, ¶ 35.

(3) Rights to be Protected

60. The Claimant seeks provisional measures to protect the following rights:
- (a) The right to preservation of the status quo and non-aggravation of the dispute; and
 - (b) The right to the procedural integrity of the arbitral proceedings, in particular with respect to the preservation of evidence and the preservation of its access to effective reparative relief.³¹
61. The Claimant argues that in the course of litigation, parties have “a general obligation to refrain from actions which could aggravate, exacerbate or extend the dispute.”³² According to the Claimant, provisional measures may be necessary to maintain a certain factual or legal situation when a party’s actions threaten substantive rights at the centre of the dispute.³³
62. Similarly, the Claimant asserts that the right to procedural integrity, including access to evidence and effective relief, is a right capable of protection by provisional measures.³⁴

³¹ PM Request, ¶ 29.

³² PM Request, ¶ 38, *citing, inter alia, Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Interim Measures of Protection of 5 December 1939, PCIJ Rep Series A/B No 79, 199 (“to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute ... The Court, indicates as an interim measure, that pending the final judgment of the Court ... the State of Bulgaria should ensure that no step of any kind is taken capable of prejudicing the rights claimed by the Belgian Government or of aggravating or extending the dispute submitted to the Court”).

³³ PM Request, ¶ 39.

³⁴ PM Request, ¶ 52, *citing, inter alia, C. Schreuer, The ICSID Convention, A Commentary* (2nd ed., Cambridge University Press, 2009), p. 779; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, 31 March 2006 (“*Biwater v. Tanzania*”), ¶¶ 84-88; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005 (“*Plama v. Bulgaria*”), ¶ 40 (“the rights to be preserved must relate to the requesting party’s ability to have its claims and requests for relief in the arbitration fairly considered and decided by the Arbitral Tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out”).

(4) Necessity

a. Meaning of Necessity

63. The Claimant acknowledges that international courts and tribunals have determined that interim measures are necessary when a party's actions could cause "irreparable harm", which the International Court of Justice ("ICJ") has interpreted as harm that cannot be remedied by monetary damages.³⁵
64. However, the Claimant argues that this reference to "irreparable harm" originates in ICJ jurisprudence, rather than in ICSID decisions. Given the commercial context of ICSID cases, most harm "could be considered compensable eventually."³⁶ Therefore, in the Claimant's view, adopting the "irreparable harm" standard in ICSID cases "may theoretically allow one party to aggravate the dispute, increasing the damages inflicted on the other party without redress, until the rendering of a final award."³⁷
65. The Claimant argues that in recent decisions, ICSID tribunals have interpreted "irreparable harm" to mean "serious harm", "serious prejudice", or "significant harm".³⁸ In addition, ICSID tribunals have held that provisional measures may be necessary where the alleged harm is capable of being addressed by monetary compensation, but such compensation would not adequately remedy the damage suffered.³⁹

³⁵ PM Request, ¶ 42, citing *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Order of 23 January 2007, ICJ Rep 11; *Passage through the Great Belt (Finland v. Denmark)*, Order of 29 July 1991, ICJ Rep 17, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007 ("*Occidental v. Ecuador*"), ¶ 59.

³⁶ PM Request, ¶ 43, quoting R. Bismuth, "Anatomy of the Law and Practice of Interim Protective Measures in International Investment Arbitration", *Journal of International Arbitration*, Kluwer Law International 2009, Volume 26, Issue 6, p. 18.

³⁷ PM Request, ¶ 44.

³⁸ PM Request, ¶ 45, quoting *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 11, 27 June 2012, ¶ 11; *PNG Sustainable Development Program Ltd. v. The Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures, 21 January 2015, ("*PNG v. Papua New Guinea*"), ¶ 109 (stating that the term "irreparable" 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").

³⁹ PM Request, ¶ 46, citing *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009 ("*Perenco v. Ecuador*"), ¶ 43; *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del*

b. Necessity in the Present Case

66. The Claimant states that “the necessity of a provisional measure must be assessed by reference to the specific right that the applicant seeks to protect”.⁴⁰ Therefore, the Claimant discusses the requirement of necessity with respect to each category of rights it seeks to protect.
67. First, the Claimant addresses the necessity of measures to preserve of the status quo and non-aggravation of the dispute. The Claimant’s position has evolved as the factual situation on the ground has changed.
68. In the PM Request, before the Buildings were demolished, the Claimant argued that a provisional measure suspending execution of the Expropriation Decision was necessary to “maintain the current legal and factual situation until a final decision is made as to the lawfulness of the expropriation.”⁴¹ In the Claimant’s view, execution of the Expropriation Decision would “destroy the going concern which constitutes the whole of the Claimant’s investment in China.”⁴² Such harm would not only be “serious” and “significant”; it would be “irreparable”.⁴³ Further, at that time, the threat was “not merely hypothetical, but tangible and fast-approaching”.⁴⁴ Therefore, the Claimant asserted that the necessity threshold would have been met even under the ICJ’s more restrictive interpretation.

Ecuador (Petroecuador), ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente’s Request for Provisional Measures, 29 June 2009, ¶ 83; *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on the Claimant’s Request for Provisional Measures, 3 March 2010 (“*CEMAX v. Venezuela*”), ¶¶ 47-58; *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, 3 March 2016 (“*Hydro v. Albania*”), ¶ 3.34.

⁴⁰ PM Request, ¶37, citing *Biwater v. Tanzania*, ¶ 59.

⁴¹ PM Request, ¶ 48.

⁴² PM Request, ¶ 49.

⁴³ PM Request, ¶ 49.

⁴⁴ PM Request, ¶ 51.

69. In this regard, the Claimant informed the Tribunal that it would seek not only monetary damages, but restitution in kind (in the form of restoration of its land use right).⁴⁵ The Claimant argued that restitution would be impossible if the Buildings were destroyed.⁴⁶
70. In the Reply, which was submitted while the demolition of the Buildings was ongoing, the Claimant alleged that the demolition works were “putting an end to” JHSF’s operations and, if completed, would “have the effect of totally destroying the Claimant’s investment in China.”⁴⁷
71. The first session was held after the Buildings had been demolished. In its oral submissions during the first session, the Claimant confirmed that it maintained its request for provisional measures, “especially with regards to [its] request that the Arbitral Tribunal order such measures that be deemed appropriate to order Respondent to refrain from taking [actions that aggravate the dispute].”⁴⁸
72. The Claimant explained that it was maintaining its request because the Respondent’s support for the demolition of the Buildings was an affront to the spirit of the BIT and a violation of its duty not to aggravate the dispute.⁴⁹ According to the Claimant, the timing of the Respondent’s actions was particularly suspect; after authorities took no action for several months, “all of a sudden things were extremely precipitated while we were trying to seek an agreement on how to constitute [the Tribunal]”.⁵⁰ Therefore, the Claimant expressed concern that the Respondent would take further actions of this kind before the conclusion of this arbitration.⁵¹ For Claimant, the danger of repetition was made clear by

⁴⁵ PM Request, ¶ 50. The Claimant did not request restitution in the Request for Arbitration.

⁴⁶ PM Request, ¶ 50.

⁴⁷ Reply, ¶ 5.

⁴⁸ First Session Tr. 71:19-72:1.

⁴⁹ First Session Tr. 71:3-7.

⁵⁰ First Session Tr. 70:13-71:2.

⁵¹ First Session Tr. 71:10-13.

the Respondent's willingness to take justice into its own hands while the PM Request was pending.⁵²

73. The Claimant also addressed the necessity of measures to protect procedural integrity. The Claimant argued in the PM Request that suspension of the Expropriation Decision was necessary for the following reasons:

(a) Destruction of the buildings would "make it significantly more difficult for the Claimant to gather and present evidence concerning the appropriate amount of reparative damages or compensation due by the Respondent, which is a central issue in this dispute."⁵³

(b) The destruction of JHSF's business would "have irreparable procedural consequences in terms of the remedies available to the Claimant".⁵⁴ In particular, reinstatement of the Claimant's land rights as restitution in kind would no longer be possible.

74. Following the demolition of the Buildings, the Claimant no longer seeks suspension of the Expropriation Decision in order to preserve the procedural integrity of the arbitration. However, the Tribunal understands that the Claimant is still requesting that the Tribunal order the Respondent to refrain from taking any action in the future that may prejudice the integrity of the proceedings.⁵⁵

(5) Urgency

a. Meaning of Urgency

75. With respect to the requirement of urgency, the Claimant submits that tribunals have broad discretion in determining whether a requested measure is urgent, and that they generally

⁵² First Session Tr. 71:13-18.

⁵³ PM Request, ¶ 54.

⁵⁴ PM Request, ¶ 57.

⁵⁵ Reply, ¶ 10; First Session Tr. 71:18-72:1.

base such a determination on an objective factual analysis.⁵⁶ The Claimant quotes Professor Schreuer's statement that the criterion of urgency is satisfied when "a question cannot await the outcome of the award on the merits".⁵⁷ According to the Claimant, this test has been adopted in several cases.⁵⁸ Further, the Claimant states that the threat to the applicant's interests must be "imminent and likely, rather than being a mere possibility".⁵⁹

b. Urgency in the Present Case

76. In the PM Request, the Claimant argued that the imminence of the threat to its investment, as demonstrated by the Eviction Notice and impending demolition works, made the Tribunal's intervention urgent.⁶⁰

77. As noted above, following the demolition of the Buildings, the Claimant's primary concern is that the Respondent will take further actions that aggravate or threaten the integrity of the dispute. During the first session, Claimant summarised its position as follows:

[W]e are perceiving Respondent as an unpredictable opponent, and we see that there's risk of further actions by Respondent that could harm us in the proceedings, be it any influence taken on the ground and to any efforts, people who are under our influence or be it the materials and the machinery where it is located now. And that is, I guess, our concern then is why we maintain our request.⁶¹

78. This notwithstanding, in response to a question from the President of the Tribunal as to whether the Claimant had "reason to think that there is some danger of a future action, and

⁵⁶ PM Request, ¶ 59, citing *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ¶ 175.

⁵⁷ PM Request, ¶ 59, quoting C. Schreuer, *The ICSID Convention, A Commentary* (2nd ed., Cambridge University Press, 2009), p. 775.

⁵⁸ *Biwater v. Tanzania*, ¶ 68; *Azurix Corp v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Provisional Measures, 6 August 2003, ¶ 33.

⁵⁹ PM Request, ¶ 59, citing *Occidental v. Ecuador*, ¶ 89.

⁶⁰ PM Request, ¶ 60.

⁶¹ First Session Tr. 83:17-84:2.

what kind of future action”,⁶² the Claimant’s counsel stated that “as of today, we have no clear indication of any further aggravation of whatever kind.”⁶³

(6) Proportionality

79. The Claimant notes that ICSID tribunals sometimes apply a proportionality test in assessing a request for provisional measures, to compare the harm the investor would suffer without the requested measure to the damage such a measure would inflict on the State.⁶⁴

80. The Claimant addressed the element of proportionality in the PM Request, arguing that the requested measures were proportional and would cause no harm to the Respondent. In the Claimant’s view, by granting the measures, “the Tribunal would not be altering the positions of the parties, rather, it would be safeguarding the continuation of the status quo that has been prevailing for the past 15 years, pending final resolution of the issues in dispute.”⁶⁵

(7) Request for Relief

81. In its PM Request, the Claimant requested that the Tribunal:

- (a) ORDER the Respondent to suspend the enforcement of the Expropriation Decision pending these arbitration proceedings;
- (b) ORDER the Respondent to refrain from taking any other action that may prevent Jinan Hela Schwarz from pursuing its business or otherwise aggravate the dispute or prejudice the integrity of the proceedings;
- (c) ORDER the Respondent to bear the costs of this Request;
- (d) ORDER any other relief that the Tribunal or, as the case may be, the ICSID Secretary General, considers just and appropriate.

⁶² First Session Tr. 84:8-13.

⁶³ First Session Tr. 84:17-19.

⁶⁴ PM Request, ¶ 62.

⁶⁵ PM Request, ¶ 63.

IN ADDITION, as per the extreme urgency of the matter, the Claimant respectfully requests points (a) and (b) above to be granted as a TEMPORARY RESTRAINING ORDER WITH IMMEDIATE EFFECT.⁶⁶

82. In view of the changed circumstances, in its Reply the Claimant amended its request for provisional measures, requesting of the Tribunal the following:

- (a) *If the demolition works have not been completed by the time of the Tribunal's decision*, ORDER the Respondent to suspend the enforcement of the Expropriation Decision pending these arbitration proceedings;
- (b) *Alternatively, if the demolition works have been completed by the time of the Tribunal's decision*, DECLARE that the Respondent has breached its procedural obligation to refrain from aggravating or extending the dispute pending these arbitration proceedings;
- (c) *In any event*, ORDER the Respondent to refrain from taking any other action that may aggravate the dispute or prejudice the integrity of the proceedings;
- (d) *In any event*, ORDER the Respondent to bear the costs of the Claimant's Request for Provisional Measures;
- (e) *In any event*, ORDER any other relief that the Tribunal or, as the case may be, the ICSID Secretary General, considers just and appropriate.⁶⁷

B. The Respondent's Position

(1) Applicable Legal Standard

83. The Respondent submits that ICSID tribunals may recommend provisional measures pursuant to Article 47 of the ICSID Convention and ICSID Arbitration Rule 39 "if the

⁶⁶ PM Request, ¶ 64.

⁶⁷ Reply, ¶ 10 (emphasis in original). See PM Request, ¶ 64 for Claimant's original request for relief. The Claimant amended its request for relief in the Reply in response to factual developments. In the PM Request, the Claimant also requested a temporary restraining order, but did not maintain this request in the Reply, in light of the same factual developments.

circumstances so require.”⁶⁸ In the Respondent’s view, such relief should be granted only in the extreme situation where the actions of a party could “render proceedings meaningless or frustrate a possible result.”⁶⁹

84. The Respondent highlights that the Claimant, as the applicant, bears the burden of proving that the requested measures are warranted in this case.⁷⁰ According to the Respondent, the Claimant faces a high bar. ICSID tribunals consider provisional measures “extraordinary” relief, “which should not be recommended lightly”.⁷¹ As commentators have noted,

applicants 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...⁷²

85. In the Respondent’s view, the exceptional nature of provisional measures is apparent from the fact that such relief is often requested before the parties have had the opportunity to present their full cases, and even before the Tribunal’s jurisdiction has been verified.⁷³
86. The Respondent largely agrees with the Claimant regarding the requirements that must be established to support a request for provisional measures. In particular, the Respondent states that the Claimant must “provide the Tribunal with the necessary information and evidence enabling it to establish a *prima facie* case on jurisdiction and the merits”.⁷⁴ In

⁶⁸ Observations, ¶ 35 (emphasis added by the Respondent).

⁶⁹ Observations, ¶ 41.

⁷⁰ Observations, ¶ 39.

⁷¹ Observations, ¶ 40, quoting *Occidental v. Ecuador*, ¶ 59, and citing *Hydro v. Albania*, ¶ 3.12; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures, 6 April 2007, ¶ 33; *Plama v. Bulgaria*, ¶ 38; *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999 (“*Maffezini v. Spain*”), ¶ 10.

⁷² Observations, ¶ 43, quoting G. Kaufmann-Kohler and A. Antonietti, “Interim Relief in International Investment Agreements” in Katia Yannaca-Small, *Arbitration under International Investment Agreement: A Guide to the Key Issues* (Oxford University Press, 2010), p. 550 (emphasis added by the Respondent).

⁷³ Observation, ¶ 42, citing *Perenco v. Ecuador*, ¶ 43 (“a Tribunal must be slow to grant to a party, before a full examination of the merits of the case, a remedy to which, on such examination, the party may be found to be not entitled. The Tribunal must be even slower where, as here, the jurisdiction of the tribunal to entertain the dispute has not been established. So the test laid down by the Article for the grant of provisional measures is a stringent one” (emphasis added by the Respondent)).

⁷⁴ Observations, ¶ 39.

addition, the Respondent refers to the following requirements: (a) the existence of a right requiring protection, (b) “urgent necessity to avoid imminent and irreparable harm”, and (c) the proportionality of the requested measures.⁷⁵

(2) Rights to be Protected

87. The Respondent contends that provisional measures can protect only rights that exist at the time of the request, not hypothetical rights.⁷⁶ In this context, the Respondent cites the following statement of the tribunal in *Maffezini v. Spain*:

Rule 39(1) specifies that a party may request “... provisional measures for the preservation of its rights ...” The use of the present tense implies that such rights must exist at the time of the request must not be hypothetical nor are ones to be created in the future.⁷⁷

88. According to the Respondent, tribunals must be cautious not to prejudge any aspect of the Parties’ dispute or recommend measures that could “render a final award irrelevant”.⁷⁸

89. The Respondent asserts that in the present case, the Claimant seeks measures that do not correspond to its existing rights. With respect to the Claimant’s request (subsequently withdrawn) that the Tribunal order suspension of the Expropriation Decision, the Respondent’s position in its Observations was that neither international law nor the BIT give foreign investors the right to obstruct Respondent’s sovereign power to expropriate property.⁷⁹ Indeed, the Respondent pointed out that in the Request for Arbitration, the Claimant had not sought to impede any expropriation—the Claimant merely alleged that the Respondent had failed to provide adequate compensation. Therefore, according to the

⁷⁵ Observations, ¶¶ 45-54, 111.

⁷⁶ Observations, ¶ 46.

⁷⁷ Observations, ¶ 46, quoting *Maffezini v. Spain*, ¶¶ 12-13 (emphasis added by the Respondent).

⁷⁸ Observations, ¶ 47, citing *PNG v. Papua New Guinea*, ¶ 121 (“Granting a request for provisional measures must not involve the tribunal prejudging the merits of the case. It is essential, in this regard, that a tribunal not prejudge, either consciously or unconsciously, the resolution of any aspect of the parties’ respective claims and defenses. The Respondent also correctly refers to this rule as ‘the principle that an arbitral tribunal cannot grant a decision on the merits under the guise of interim relief’ (emphasis added by the Respondent)).

⁷⁹ Observations, ¶ 58.

Respondent, the Claimant's request went beyond the Claimant's existing rights and also beyond the relief sought in the Request for Arbitration.⁸⁰

90. As set forth in its Rejoinder, the Respondent also considers the Claimant's alternative requests for relief contained in the Reply to be inappropriate. With respect to the Claimant's request that the Tribunal declare the Respondent in breach of its obligation to refrain from aggravating or extending the dispute, the Respondent states:

Provisional measures can only safeguard the parties' rights *pendente lite*. Declaratory relief, however, is a final conclusion on the merits. Accordingly, this request must fail.⁸¹

91. The Respondent further asserts that the Claimant's request for an order enjoining the Respondent from "taking any other action that may aggravate the dispute or prejudice the integrity of the proceedings" is "impermissibly broad and unspecific" and should be denied on that basis.⁸²
92. In any event, the Respondent's position is that the rights invoked by the Claimant have not been threatened. This argument is summarised further in the section below addressing the necessity and urgency of the requested measures.

(3) Necessity and Urgency

a. Meaning of Necessity and Urgency

93. The Respondent submits that provisional measures are not "necessary" if the applicant can be adequately compensated by damages, and are not "urgent" if the matter can await the final award.⁸³

⁸⁰ Observations, ¶¶ 58-60.

⁸¹ Rejoinder, ¶ 21. *See also* First Session Tr. 78:7-13 ("it is not within the power of the Arbitral Tribunal to issue such a declaration as part of a request for interim relief. It is, in our view, only within the power of the Tribunal to recommend interim measures, not issue a declaration of this nature that has been asked for by the Claimant").

⁸² Rejoinder, ¶ 22, citing Reply, ¶ 10(c).

⁸³ Observations, ¶¶ 49-53.

94. The Respondent is not concerned with the distinction between “irreparable harm” and other formulations of the standard, such as “serious harm”.⁸⁴ For the Respondent, the relevant point is that a request for provisional measures falls outside Article 47 of the ICSID Convention when the alleged harm can be made good by damages or otherwise at a later stage.⁸⁵ Thus, regardless of the formulation used, the power to grant provisional measures “is limited to the exceptionally rare situation where there is no alternative to protect the final relief sought by the claimant in the arbitration”.⁸⁶

b. Necessity and Urgency in the Present Case

95. The Respondent’s main argument is that none of the substantive or procedural rights invoked by the Claimant has been threatened in any way by the demolition of the Buildings. For the Respondent, it follows that the requested measures are neither necessary nor urgent.⁸⁷

96. *First*, the Respondent contends that implementation of the Expropriation Decision does not disrupt the status quo or aggravate the dispute.⁸⁸ In this regard, the Respondent cites the tribunal’s statement in *Churchill v. Indonesia* that “[a]n allegation that the *status quo* has been altered or that the dispute has been aggravated needs to be buttressed by concrete instances of intimidation or harassment.”⁸⁹

97. According to the Respondent, the Claimant has failed to show that any actions taken with respect to JHSF are being used to benefit Respondent in this arbitration.⁹⁰ In particular, there is no evidence that the Expropriation Decision was adopted or implemented arbitrarily or in bad faith, and there is not even a suggestion of intimidation or harassment. Rather, in the Respondent’s view, it is clear from the factual record (which is largely

⁸⁴ Observations, ¶¶ 51-53.

⁸⁵ Observations, ¶¶ 52-53, citing *CEMEX v. Venezuela*, ¶¶ 46-56.

⁸⁶ Observations, ¶ 54.

⁸⁷ Observations, ¶ 95.

⁸⁸ Observations, ¶¶ 63 *et seq.*

⁸⁹ Observations, ¶ 65, citing *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case Nos. ARB/12/14 and 12/40, Procedural Order No. 14, 22 December 2014, ¶ 72 (emphasis added by the Respondent).

⁹⁰ Observations, ¶ 66; First Session Tr. 73:1-7.

undisputed) that authorities carried out the expropriation following the normal procedure under Chinese law.⁹¹

98. *Second*, the Respondent argues that the Claimant's access to evidence is unaffected by the Expropriation Decision.⁹² According to the Respondent, the Claimant's allegation that demolition of the Buildings would destroy key evidence and make it difficult to collect evidence related to quantum is untenable for the following reasons:

(a) The Claimant has presented no evidence to support its allegation.⁹³

(b) With respect to the evidence allegedly contained within the Buildings, "one would expect a normal business acting in good faith and conducting litigation to have transferred, replicated or otherwise secured any such information before the evacuation measures were implemented".⁹⁴

(c) The Claimant should already have the necessary evidence on quantum. In the course of the expropriation proceedings, JHSF's land use rights and Buildings were the subject of several valuations, which the Claimant contested. Indeed, in the Request for Arbitration, Claimant included a price per square meter for its land use right.⁹⁵

99. *Third*, the Respondent contends that there is no threat to the Claimant's ability to have its case fairly decided.⁹⁶ For the Respondent, the only possible consequence of the demolition of the Buildings is financial loss, which can easily be compensated by monetary damages.⁹⁷ Indeed, the Claimant sought only monetary damages in the Request for Arbitration. In the Respondent's view, the Claimant's attempt to bolster the PM Request by adding a request for restitution in kind is futile, as a request for provisional measures "must relate to the

⁹¹ Observations, ¶¶ 70-76; First Session Tr. 73:8-22.

⁹² Observations, ¶¶ 78 *et seq.*

⁹³ Observations, ¶ 82.

⁹⁴ Observations, ¶ 83.

⁹⁵ Observations, ¶ 83, *citing* Request for Arbitration, ¶ 18.

⁹⁶ Observations, ¶¶ 85 *et seq.*

⁹⁷ Observations, ¶ 88.

Claimant's actual case, and not a hypothetical claim."⁹⁸ In any event, the Claimant seeks restitution as an *alternate* remedy, acknowledging that monetary compensation remains an option.⁹⁹ In the Respondent's view, this is consistent with the principle set forth in *Chorzów Factory* that when restitution in kind is materially impossible, full reparation can be achieved through monetary compensation.¹⁰⁰

100. *Fourth*, in the Rejoinder, the Respondent denies that, by permitting the demolition works to go forward, it interfered with the Tribunal's authority or took justice into its own hands.¹⁰¹
101. *Fifth*, the Respondent contends that the Claimant has failed to establish any issue that cannot await the outcome of the final award. In particular, the Respondent rejects the Claimant's allegation that the execution of the Expropriation Decision threatens to destroy the Claimant's investment in the PRC.¹⁰² It argues that the Claimant draws a connection between the demolition of the Buildings and the destruction of JHSF's business which is unsupported by evidence. For the Respondent, it appears that the Claimant's equity interest in JHSF would be unaffected.¹⁰³ Furthermore, the Respondent asserts that JHSF has been aware of the Expropriation Decision for years and had ample time to relocate its operations.¹⁰⁴ In any event, even if JHSF's business were destroyed, the Respondent's position is that the Claimant has failed to demonstrate that this loss could not be adequately compensated by damages.¹⁰⁵

⁹⁸ Observations, ¶ 90.

⁹⁹ Observations, ¶ 91, *citing* PM Request, ¶ 13.

¹⁰⁰ Observations, ¶ 92, *citing Factory at Chorzów (Germany v. Poland)*, Merits, Judgment, 13 September 1928, PCIJ Series A, No. 17, ¶ 181.

¹⁰¹ Rejoinder, ¶¶ 13-19.

¹⁰² Observations, ¶¶ 97-106; Rejoinder, ¶¶ 5-10.

¹⁰³ Observations, ¶ 100.

¹⁰⁴ Observations, ¶ 99; Rejoinder, ¶ 8.

¹⁰⁵ Observations, ¶¶ 102-106, *citing Hydro v. Albania*, ¶ 3.34 (finding that the destruction of the claimants' investment in the host State could be repaired by an award of damages, making provisional measures unnecessary).

102. During the first session, the Parties were given an opportunity to comment on the necessity and urgency of the requested measures in light of the completion of the demolition works. The Respondent maintained the arguments summarised above, and it added the following:

[E]ven on Claimant's own case, there should not be any urgency at this point in time with respect to any of the requests being made by the Claimant, including the more subsidiary request that deals with procedural rights and access to evidence.

To the extent that any evidence has been available on these premises, the Claimant has had ample time to secure such evidence. To the extent something existed at the premises at the time of demolition, it has been taken care of and stored, according to our understanding. There are no urgent risks that the Tribunal would need to assess at this point in time.¹⁰⁶

103. The Respondent further observed that provisional measures are not meant to protect against a potential hypothetical harm resulting from uncertain actions. Rather, they are meant to protect the applicant from imminent harm, which is not present in this case.¹⁰⁷

(4) Proportionality

104. The Respondent commented on the element of proportionality in its Observations, before the demolition works were completed.
105. At that time, the Respondent position was that suspension of the Expropriation Decision would constitute a disproportionate interference with Respondent's sovereign rights.¹⁰⁸ On the one hand, the Respondent saw no harm or prejudice to the Claimant if the measures were not granted. The Claimant was simply subject to a "*bona fide* expropriation and compensation procedure that is fully grounded in Chinese and international law".¹⁰⁹
106. On the other hand, the Respondent considered that granting the measures would have interfered with the public interest and sovereignty of the PRC. Specifically, the measures

¹⁰⁶ First Session Tr. 80:14-81:4.

¹⁰⁷ First Session Tr. 85:8-12, citing *Occidental v. Ecuador*, ¶ 89.

¹⁰⁸ Observations, ¶¶ 110-115.

¹⁰⁹ Observations, ¶ 112.

would have obstructed “an urban redevelopment project, which will provide public facilities (i.e. education, healthcare and cultural facilities), affordable housing and a cleaner environment.”¹¹⁰

(5) Request for Relief

107. In both its Observations and Rejoinder, the Respondent requests that the Tribunal:

- (1) REFUSE the Claimant’s Request in its entirety; and
- (2) ORDER the Claimant to bear all costs incurred in connection with its Request on a full indemnity basis, including but not limited to, legal fees and expenses.¹¹¹

VI. THE TRIBUNAL’S ANALYSIS

108. The Tribunal has given careful consideration to the submissions of the Parties, both written and oral. As noted above, the Tribunal’s decision on the Claimant’s PM Request, including the reasons therefore set out in summary form, was communicated to the Parties by correspondence from the Secretary of the Tribunal dated 10 April 2018. This Procedural Order reflects that correspondence and constitutes the fully reasoned and elaborated Decision of the Tribunal.

109. Given the developments on the ground since the PM Request and the written submissions of the Parties, the Tribunal is in a position to reach its decision on the PM Request with an economy of analysis. Principles of judicial economy, equally relevant in arbitral proceedings such as this, dictate that the Tribunal does not engage in analyses and conclusions of law where none is necessary. The Tribunal accordingly refrains from an analysis of the legal requirements of provisional measures or of other issues not strictly necessary for its decision. Further, as noted above, the Tribunal takes no position with

¹¹⁰ Observations, ¶ 114.

¹¹¹ Observations, ¶ 117; Rejoinder, ¶ 23.

respect to disputed facts and this decision does not constitute a finding of fact on any issue by the Tribunal.

110. Whether in ICSID proceedings or in proceedings before other international courts and tribunals, the recommendation (or indication, or other relevant term) of provisional measures is an exceptional measure of interim relief that is necessary to preserve the rights of a party in circumstances of urgency. Different language may be used in different circumstances or before different fora to describe the test for provisional measures and it may be that, in some circumstances, the decision will turn on the nuanced formulation. The Tribunal is satisfied, however, in the circumstances of the present case, that its decision does not turn on nuance and the Tribunal accordingly sees no need to engage in a jurisprudential review about the precise scope of the relief contemplated in Article 47 of the ICSID Convention and Article 39 of the ICSID Arbitration Rules. What is plain is that the fundamental requirement for provisional measures is that such measures can only ever be warranted in circumstances in which the need for such measures is urgent and the measures in contemplation are necessary, *inter alia*, to prevent imminent harm to a party. Although there is no uniformity of jurisprudence on this point, the Tribunal considers that the exceptional nature of provisional measures warrants consideration of whether the rights to be preserved are at real and imminent risk of irreparable harm, this being material to both the necessity and the urgency of the relief in contemplation.
111. In the present case, whatever may have been the situation when the Claimant submitted its PM Request, and without prejudice to whether a recommendation of provisional measures may or may not have been warranted at that stage, there is no longer anything onto which a recommendation of provisional measures could properly fasten. The Parties appear to agree that the buildings that were the subject of the PM Request were vacated and have since been destroyed, and that the related machinery and materials are now stored and under the Claimant's control. As recounted above, the Claimant submitted its urgent PM Request on 4 December 2017. Demolition of the buildings began on 6 December 2017, with production at JHSF's facilities having stopped completely in the second week of

December 2017. By all accounts, the demolition of the buildings was largely complete by around this time. The Tribunal was constituted on 8 January 2018.

112. Mindful of these developments, the Tribunal explored with the Parties, in the first session on 1 February 2018, the continuing basis of the request for provisional measures. The Respondent submitted that there was none. The Claimant maintained its request, however, expressing concern about the possibility of aggravation of the dispute in the future. When pressed by the Tribunal about the reality of the risk of aggravation, however, counsel for the Claimant very properly stated that “as of today, we have no clear indication of any further aggravation of whatever kind.”¹¹²
113. In the circumstances, the conclusion is unavoidable that a recommendation of provisional measures is not warranted in this case at this time. The Claimant’s PM Request must accordingly be denied. There is at present no right that requires interim protection pending a determination on the merits of this case. A recommendation of provisional measures cannot be used as a basis to restore the Claimant to the *status quo ante*, before the buildings that were the subject of the PM Request were demolished. If the Claimant can sustain its allegation on the merits, the Tribunal will determine the appropriate at that stage. Whatever may be the prejudice to the Claimant, it is prejudice that has already been suffered.
114. This conclusion is without prejudice to the right of the Claimant, or indeed of the Respondent, to request the recommendation of provisional measures for the preservation of its right in the future, or to the recommendation of any such measures by the Tribunal on its own initiative, should the circumstances so warrant, pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules.
115. Without prejudice to the preceding, having regard to the circumstances that gave rise to the PM Request, the Tribunal considers it appropriate to remind the Parties that it is incumbent upon them not to undertake any conduct that would aggravate the dispute or would otherwise cause prejudice to the arbitral process.

¹¹² First Session Tr. 84:17-19.

VII. DECISION

116. For the above reasons, the Tribunal decides as follows:

- (a) The Claimant's request for provisional measures is denied.
- (b) The Tribunal defers any question of costs in connection with the request for provisional measures for consideration at a later stage.

On behalf of the Tribunal,

[signed]

Sir Daniel Bethlehem QC
President of the Tribunal
Date: 10 August 2018