

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Gerald International Limited**

**v.**

**Republic of Sierra Leone**

**(ICSID Case No. ARB/19/31)**

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**PROCEDURAL ORDER NO. 2**

**Decision on the Claimant's Request for Provisional Measures**

***Members of the Tribunal***

Prof. Dr. August Reinisch, President of the Tribunal

Ms. Olufunke Adekoya, SAN, Arbitrator

Prof. Dr. Guido Santiago Tawil, Arbitrator

***Secretary of the Tribunal***

Dr. Jonathan Chevry

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28 July 2020

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**I. INTRODUCTION AND PARTIES**

1. The present dispute has been submitted to arbitration under the auspices of the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Sierra Leone for the Promotion and Protection of Investments which entered into force on 20 November 2001 (the “**UK - Sierra Leone BIT**” or the “**BIT**”) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “**ICSID Convention**”).
2. The Claimant is Gerald International Limited (“**Gerald**” or the “**Claimant**”), a company incorporated under the laws of England and Wales. The Claimant is represented in this proceeding by Mr. John Savage QC, Mr. Kenneth R. Fleuriet, Mr. Giorgio Francesco Mandelli, Mr. Charles B. Rosenberg, Ms. Ema Vidak Gojkovic and Mr. Julian AG Ranetunge, of the law firm King & Spalding (London and Washington D.C. offices).
3. The Respondent is the Republic of Sierra Leone (“**Sierra Leone**” or the “**Respondent**”). The Respondent is represented in this proceeding by Mr. Osman Kanu, Legal Adviser within the Government of Sierra Leone,<sup>1</sup> and Mr. Charlie Lightfoot, Mr. Jason Yardley, Ms. Mélida Hodgson, Ms. Rachael Cresswell, Ms. Patricia Cruz Trabanino, Mr. Sebastian Canon Urrutia and Ms. Elizabeth Edmondson, of the law firm Jenner & Block (London, New York, and Washington D.C. offices).
4. The Claimant and the Respondent are collectively referred to as the “**Parties.**”
5. This order sets out the Tribunal’s analysis of and decision on the Claimant’s Request for Provisional Measures submitted on 19 May 2020 and modified in subsequent submissions.

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<sup>1</sup> Dr. Priscilla Schwartz, former Attorney General of Sierra Leone, represented the Respondent until 13 July 2020.

**II. THE RELEVANT PROCEDURAL STEPS**

6. On 18 October 2019, Gerald filed a Request for Arbitration against Sierra Leone (the “**Request for Arbitration**”), together with Factual Exhibits C-1 through C-33 and Legal Authorities CLA-1 through CLA-3.
7. On 1 November 2019, the Secretary General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration.
8. On 24 January 2020, the Claimant informed ICSID that it wished to appoint Prof. Dr. Guido Santiago Tawil, a national of Argentina, and the Respondent informed that it wished to appoint Ms. Funke Adekoya, SAN, a national of Nigeria and the United Kingdom, as arbitrators in this case.
9. As a result of an exchange of emails dated 21 and 27 of January 2020 on the method of constituting the Tribunal, on 27 January 2020, the Respondent informed that the Parties had not been able to reach an agreement on the procedure for the appointment of the President of the Tribunal.
10. By letter of 28 January 2020, the Centre informed that it “can take no action with respect to the appointment of an arbitrator before the method of constituting the whole Tribunal has been established, either pursuant to Article 37(2)(a) or pursuant to Article 37(2)(b) of the Convention.”
11. On 5 February 2020, the Claimant requested that the Tribunal be constituted pursuant to Article 37(2)(b) of the ICSID Convention and that the President of the Tribunal be appointed pursuant to Article 38 of the ICSID Convention and ICSID Arbitration Rule 4.
12. On 6 February 2020, the Centre informed the Parties that the Tribunal is to be constituted pursuant to Article 37(2)(b) of the ICSID Convention and it would proceed to seek Prof. Tawil’s and Ms. Adekoya’s acceptance of their respective appointments. The Centre also

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proposed to conduct a ballot to assist the Parties in selecting a mutually agreeable presiding arbitrator.

13. On 11 and 12 February 2020, Prof. Tawil and Ms. Adekoya, respectively, accepted their appointments as arbitrators in this case.
14. On 25 February 2020, following the Parties agreement on the ballot procedure, ICSID provided a list of candidates to serve as presiding arbitrator to the Parties.
15. On 5 March 2020, ICSID informed the Parties that the ballot did not result in the selection of a mutually acceptable candidate and that the appointment of the President would proceed pursuant to Articles 38 and 40(1) of the ICSID Convention.
16. On 20 March 2020, the Centre informed the Parties that it intended to propose the appointment of Prof. Dr. August Reinisch, a national of Austria, as the presiding arbitrator.
17. On 1 April 2020, the Centre informed that it would seek Prof. Reinisch’s acceptance of his appointment as President of the Tribunal and transmit the Respondent’s observations to Prof. Reinisch. On 3 April 2020, Prof. Reinisch accepted his appointment as President of the Tribunal in this case.
18. On 6 April 2020, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “**Arbitration Rules**”), the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Dr. Jonathan Chevry, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
19. The Tribunal is composed of Prof. Dr. August Reinisch, a national of Austria, President, appointed by the Chairman of the ICSID Administrative Council in accordance with Article 38 of the ICSID Convention; Prof. Dr. Guido Santiago Tawil, a national of Argentina, appointed by the Claimant; and Ms. Olufunke Adekoya, SAN, a national of the United Kingdom and Nigeria, appointed by the Respondent.

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20. By letter of 15 May 2020, the Claimant advised the Tribunal that it “imminently will be submitting an application for very urgent provisional measures in accordance with Article 47 of the ICSID Convention and Article 39 of the ICSID Arbitration Rules.” The Claimant also informed that it will request that a portion of the first session be set aside to deal with its future application.
21. By email of the same date, the Respondent informed that it was opposed to any discussion of the Claimant’s allegations during the first session and that it “strongly denies” the allegations contained in the Claimant’s letter. The Respondent also noted that if the Claimant seeks provisional measures on the basis of these allegations, it expects that “the Tribunal will proceed to set a procedure to determine whether to accept such a request, consistent with Sierra Leone’s due process rights.”
22. On 19 May 2002, the Centre circulated the Agenda for the first session, the List of participants and the Parties’ joint comments on the Draft Procedural Order No. 1.
23. By email of the same date, the Respondent informed that it would not agree to any adjustments to the Agenda previously agreed by the Parties and that only the Tribunal could decide on changes to the Agenda at this late stage.
24. Later that same day, the Claimant filed a Request for Provisional Measures dated 19 May 2020 (the “**Request for Provisional Measures**”), together with a cover letter, Factual Exhibits C-34 to C-76 and Legal Authorities CLA-4 to CLA-47. As further described below, the Claimant’s Request generally aimed to obtain the immediate release from detention of five employees of SL Mining, the alleged Claimant’s investment vehicle in Sierra Leone, to allow the employees to return to SL Mining’s operation site in Sierra Leone, to suspend the criminal investigation launched against the employees, and to obtain the release of SL Mining documents that were seized by Sierra Leone authorities. The Claimant further requested in its letter that “[g]iven the gravity of the situation and the serious dangers posed to the lives and health of its illegally arrested employees as well as those remaining on site” a portion of the first session, scheduled for the next day, “be set aside to hear argument from the Parties on the immediate issuance of the interim

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provisional measures, and that the Tribunal recommend the interim provisional measures detailed in the Request within 24 hours of the conclusion of the hearing.”<sup>2</sup>

25. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 20 May 2020 by telephone conference (the “**First Session**”). During the First Session, the Tribunal allowed time for the Parties to comment on the Claimant’s Request.
26. By letter of 21 May 2020, the Tribunal invited the Respondent to address four specific questions regarding the Claimant’s allegations within 48 hours from the issuance of its letter and file a response to the Claimant’s Request no later than 28 May 2020.
27. On 23 May 2020, the Respondent filed a letter in response to the Tribunal’s questions of 21 May 2020 (the Respondent’s “**Response to the Tribunal’s Questions**”).
28. Later that same day, the Tribunal invited the Claimant to provide its comments, if any, to the Respondent’s Response by 25 May 2020.
29. On 25 May 2020, the Claimant submitted its comments to the Respondent’s Response to the Tribunal’s Questions of 21 May 2020, together with Factual Exhibits C-77 through C-78 (the Claimant’s “**Comments**”). In its letter, the Claimant reiterated its request that the Tribunal “immediately recommend the interim provisional measures sought by Gerald at paragraph 144 of its Request for Provisional Measures and order that those measures remain in place until the Tribunal’s adjudication of the Request.” It also informed that “[t]he only modification to the interim relief sought by Gerald at paragraph 144 is that in sub-paragraph 144.1, the words ‘*immediately release from detention and to return*’ should be changed to ‘allow the return’.”
30. By letter dated 26 May 2020, the Tribunal reminded “both Parties of their obligations not to aggravate the dispute and not to threaten the integrity of the proceedings, including the duty to ensure that witnesses and documents remain available” and informed that it would

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<sup>2</sup> Letter from the Claimant to the Tribunal, dated 19 May 2020.



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appreciate if both Parties abstained from taking any steps that might aggravate the dispute before the Tribunal has decided on the Request.

31. On 28 May 2020, the Respondent filed a Response and Objection to the Claimant’s Request for Provisional Measures (the Respondent’s “**Respondent’s Response and Objection to Claimant’s Request for Provisional Measures**”), together with Factual Exhibits R-1 through R-11 and Legal Authorities RL-1 through RL-19.
32. On 29 May 2020, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties and the decision of the Tribunal on procedural matters.
33. On 31 May 2020, the Tribunal invited the Claimant to provide its comments, if any, on the Respondent’s Response and Objection by 8 June 2020, and the Respondent to address the Claimant’s possible comments by no later than 15 June 2020. The Tribunal also inquired whether the Parties would be available for a possible one-day hearing during the week of 29 June 2020, or at a later date.
34. On 9 June 2020, the Claimant submitted its Reply on Provisional Measures dated 8 June 2020 in response to the Respondent’s Response and Objection (the Claimant’s “**Reply**”), together with a witness statement, Factual Exhibits C-79 through C-80 and Legal Authorities CLA-48 through CLA-78.
35. By email of 11 June 2020, the Claimant “confirmed” that it requested an oral hearing on the Claimant’s Request and informed of its availability for a hearing during the week of 29 June 2020. The Claimant alleged that the Respondent continued to aggravate the dispute and that the situation “cannot wait for another three weeks for a hearing and longer for a decision without immediate, temporary intervention by the Tribunal.” It also informed that (i) certain documents the Claimant wished to use as exhibits were confidential and that before the Claimant put them on the record, the Claimant would seek to enter into a confidentiality agreement with the Respondent; and (ii) the Parties were discussing the terms of a confidentiality agreement.

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36. By email of that same day, the Respondent noted that (i) it would respond to the Claimant’s allegations that the Respondent had aggravated the dispute in its Rejoinder on the Claimant’s Request for Provisional Measures; (ii) the “Claimant appears to be seeking to expedite the schedule set by the Tribunal, which is not only procedurally inappropriate but a continuation of its efforts to curtail Sierra Leone’s due process rights in this arbitration”, and urged the Tribunal to reject the Claimant’s attempt; and (iii) while it was true that the Claimant approached the Respondent to seek to enter into a confidentiality agreement, “to date, other than a vague email, no such agreement has been proposed for [the Respondent’s] consideration.”
37. On 15 June 2020, the Respondent submitted its Rejoinder on the Claimant’s Request (the Respondent’s “**Rejoinder**”), together with a witness statement, Factual Exhibit R-12, and Legal Authority RL-20.
38. By letter of 17 June 2020 the Claimant requested that the Tribunal (i) instruct the Respondent to negotiate a confidentiality agreement with the Claimant “expeditiously and in good faith” to have it finalized by 19 June 2020; (ii) order, if the Parties were able to reach a confidentiality agreement by 19 June 2020, that the Respondent should be granted leave to file a submission on the content of the confidential documents and the Claimant be in turn granted leave to file a brief response; (iii) order, if the Parties were unable to reach a confidentiality agreement by 19 June 2020, that the confidential documents should be considered as confidential and treated as such, as of 20 June 2020, by order of the Tribunal, and grant leave to the Parties to file submissions; and (iv) instruct the Claimant to lodge the confidential documents with the Secretary of the Tribunal, which confidential documents should be transmitted to the Respondent or the Tribunal only once (i) or (iii) had crystallised. The Claimant’s letter was accompanied by Annexes A (including Parties’ email correspondence between 9 and 13 June 2020) and B (including the draft confidentiality agreement sent by the Claimant’s counsel to the Respondent’s counsel).

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39. On 18 June 2020, the Tribunal invited the Respondent to comment upon the Claimant’s letter of 17 June 2020 and urged the Parties to successfully conclude their negotiations on a confidentiality agreement.
40. On 19 June 2020, the Respondent sent a letter to the Tribunal requesting the Tribunal to reject the Claimant’s requests contained in its letter of 17 June 2020.
41. On 23 June 2020, the Tribunal sent a letter to the Parties, reiterating its invitation to the Parties to successfully conclude their negotiations on a confidentiality agreement, and (i) inviting the Claimant to produce the documents necessary to establish the Tribunal’s *prima facie* jurisdiction for purposes of ruling on the Request for Provisional Measures, (ii) ordering that these documents be considered confidential by both Parties, and (iii) inviting the Respondent to comment on the content of the confidential documents.
42. On 25 June 2020, the Claimant sent a letter to the Tribunal together with Factual Exhibits C-81 through C-92, which the Claimant indicated to be confidential corporate documents necessary to establish Gerald’s ownership of SL Mining and the Tribunal’s *prima facie* jurisdiction.
43. By email of the same date, the Respondent communicated a note reflecting its understanding of the Tribunal’s decision of 23 June 2020 on the confidential documents and requested that the Tribunal clarify its instructions if the Respondent’s understanding was not correct. The Respondent understanding was that the Respondent should be allowed to print the confidential documents submitted by the Claimant, as may be necessary to prepare its response.
44. Later the same date, the Claimant clarified that a confidentiality agreement was no longer required as the Claimant’s need for a confidentiality agreement was superseded by the Tribunal’s decision of 23 June 2020.
45. On 26 June 2020, the Tribunal confirmed that it did not require the Parties to continue to seek a confidentiality agreement, although they would be free to do so and “that its decision that the documents to be filed by [the] Claimant ‘shall be considered confidential by both

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Parties’ implies that they shall not be made available to any third party and shall not be used for any other purpose than the present proceedings. Such confidentiality does not restrict the normal and reasonable use of such documents in the current proceedings by the Parties and their counsel for the purpose of presenting their case. This includes, in particular, accessing and reading the documents online as well as printing them in order to study them. Of course, the Parties’ obligation to consider the documents confidential implies that they have to ensure that the documents remain outside the reach of any third party.”

46. On 30 June 2020, the Respondent sent a letter in response to the Claimant’s letter of 25 June 2020 to the Tribunal, together with Factual Exhibits R-13 through R-15
47. By email of 6 July 2020, the Claimant noted that it remained troubled by the critical situation on the ground and by the Respondent’s continuing aggravation of the dispute. It also informed the Tribunal that another SL Mining employee from the security department was arrested on 28 June 2020, interviewed without the presence of counsel and remained in jail.
48. On 8 July 2020, the Tribunal informed the Parties that it did not consider, at this stage, that it would be necessary to hold a hearing on the Claimant’s Request for Provisional Measures. In addition, the Tribunal invited the Parties to address three specific questions regarding the Claimant’s allegations concerning criminal investigations and bail conditions of the SL Mining employees.
49. On 13 July 2020, the Parties submitted their respective responses to the Tribunal’s questions of 8 July 2020. The Claimant’s response was accompanied by Factual Exhibits C-94 through C-95 and Legal Authority C-95 and the Respondent’s response was accompanied by a witness statement and Factual Exhibits R-16 through R-17.
50. On 16 July 2020, the Respondent submitted a letter supplementing its responses to the Tribunal’s questions of 8 July 2020, together with a witness statement.

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51. On 20 July 2020, via email to the Tribunal, the Claimant sought permission to respond to the Respondent’s letter of 16 July 2020 by 23 July 2020, should it consider it necessary to do so.
52. On 21 July 2020, the Tribunal informed the Parties that while it considered that the Respondent’s letter of 16 July 2020 did not require further comment, the Claimant could submit a brief response if it wished to do so.
53. By email of 23 July 2020, the Claimant indicated that it disagreed with the Respondent’s submission of 16 July 2020 and referred to its position set out in its letter of 13 July 2020.

### **III. BACKGROUND ON THE CLAIMANT’S REQUEST**

54. To the extent required for the Tribunal to address the Claimant’s Applications for provisional measures, and for this limited purpose only, **Section A** below briefly summarizes the factual background to the Parties’ underlying dispute in this Arbitration as pleaded in the Request for Arbitration and in the Parties’ subsequent submissions on the Claimant’s Request. This summary does not constitute any finding by the Tribunal on any facts disputed by the Parties. **Section B** provides a short overview of the factual background specific to the Claimant’s Request for Provisional Measures. This overview is not intended to be an exhaustive description of all facts considered relevant by the Tribunal. Further factual material will be addressed in the context of the Tribunal’s analysis below.

#### **A. THE PARTIES’ UNDERLYING DISPUTE**

55. The dispute, as described in the Claimant’s Request for Arbitration, relates to SL Mining Limited (“**SL Mining**”), a Sierra Leone company allegedly owned by Gerald, and its iron ore project at the Marampa mine, in Port Loko District, Sierra Leone (the “**Marampa Project**”).
56. In short, Gerald contends that the Sierra Leone Government took a series of unlawful measures in order to coerce SL Mining into renegotiating the mining license agreement

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concluded between SL Mining and the Government of Sierra Leone for the operation of the Marampa Project. These measures included, among others, threats of suspension of SL Mining’s mining duties and tax waivers agreed upon under the license agreement, and a temporary suspension of SL Mining’s concession. According to the Request, the dispute escalated when Gerald and SL Mining served a Notice of Dispute under the UK - Sierra Leone BIT.<sup>3</sup> Sierra Leone allegedly retaliated by launching police investigations against SL Mining’s management, and by imposing an indefinite shipping prohibition on SL Mining that prevented SL Mining to export and sell Marampa ore.<sup>4</sup>

57. Due to this shipping prohibition, SL Mining faced a threat of having to place the Marampa mine into “care and maintenance” (meaning that the mining operations must be put on pause, hereby causing potentially serious economic consequences). SL Mining then initiated an ICC emergency arbitrator proceeding under the mining license agreement.<sup>5</sup> The ICC-appointed emergency arbitrator issued a series of interim orders requesting Sierra Leone to, *inter alia*, lift the shipping prohibition and abide by the terms and conditions of the mining license agreement.<sup>6</sup> According to Gerald, Sierra Leone refused to comply with the orders and instead cancelled SL Mining’s license for the Marampa Project.<sup>7</sup>
58. An ICC Tribunal has since then been constituted and has confirmed the orders of the Emergency Arbitrator.<sup>8</sup>
59. The Claimant’s Request for Arbitration relies upon several provisions of the UK - Sierra Leone BIT. According to the Claimant, Sierra Leone’s alleged actions towards SL Mining and Gerald constitute breaches of the protections accorded to Gerald’s investment under

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<sup>3</sup> Claimant’s Request for Arbitration, ¶¶ 24-26.

<sup>4</sup> Claimant’s Request for Arbitration, ¶ 26.

<sup>5</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 20.

<sup>6</sup> Claimant’s Request for Arbitration, ¶¶ 32-34.

<sup>7</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 23.

<sup>8</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 24.

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Article 2 (fair and equitable treatment), Article 3 (national treatment and most-favored-nation), and Article 5 (expropriation) of the BIT.<sup>9</sup>

**B. RECENT EVENTS AND THE CLAIMANT’S REQUEST FOR PROVISIONAL MEASURES**

60. The present section aims to summarize the factual events underlying the Claimants’ Request for Provisional Measures. The present section does not comment on these events. It only lists them in chronological order.
61. **29 April 2020:** A riot erupts at the Pademba Road Prison in Freetown. Seven people are killed in the riot.<sup>10</sup>
62. **29 April 2020:** One SL Mining employee forwards to the Senior District Officer of the Port Loko District audio recordings critical of the local Paramount Chief. The same day, he travels with the Senior District Officer to Lunsar to meet with the local leader in Lunsar, who has released the audios, and the Paramount Chief.<sup>11</sup>
63. **30 April 2020:** Another riot breaks out in Lunsar.<sup>12</sup>
64. **30 April 2020:** The Sierra Leone police Local Unit Commander (“LUC”) invites SL Mining’s employees to the police station to discuss ways to restore calm.<sup>13</sup>

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<sup>9</sup> Claimant’s Request for Arbitration, ¶ 76.2.

<sup>10</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 30; Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 21. *See also*, “Seven killed in Sierra Leone prison riot on Wednesday – police,” Reuters (C-52).

<sup>11</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶¶ 23-25; Claimant’s Reply on Provisional Measures, 8 June 2020, ¶¶ 58-59; SL Mining Internal Report on the Lunsar Riot (C-56).

<sup>12</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 22; Claimant’s Request for Provisional Measures, ¶ 44.

<sup>13</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶¶ 23-25; Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 60; SL Mining Internal Report on the Lunsar Riot (C-56).

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65. **1 May 2020:** SL Mining conducts an internal investigation in relation to the riots of 29-30 April 2020.<sup>14</sup>
66. **Early May 2020:** Other riots and acts of violence occur in Sierra-Leone.<sup>15</sup>
67. **8 May 2020:** President Julius Maada Bio makes a statement about the riots.<sup>16</sup>
68. **13 May 2020:** The Sierra Leone police arrests five SL Mining employees, (i) [REDACTED]; (ii) Security Superintendent [REDACTED]; (iii) Security Supervisor [REDACTED]; (iv) [REDACTED]; and (v) Community Relations Superintendent [REDACTED], to investigate them on suspicions of inciting the 30 April 2020 riot in Lunsar.<sup>17</sup>
69. **13 May 2020, 3:25 PM (local time):** Police officers arrive at the Marampa mine site.<sup>18</sup>
70. **13 May 2020, 4:24 PM (local time):** Police officers proceed to the Marampa Project’s administration building where it searched for documents. The police then goes to the Security Control Centre.<sup>19</sup>
71. **13 May 2020, 6:04 PM (local time):** The police goes again to the work camp.<sup>20</sup>

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<sup>14</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶¶ 45-46; Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 23.

<sup>15</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 30 Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 17, ¶ 29. *See also*, “Seven killed in Sierra Leone prison riot on Wednesday – police,” Reuters (C-52); “Prisoners riot in Sierra Leone”, Mail & Guardian, 14 May 2020 (C-68); Riot at Tombo Fishing Village,” CocoRioko, 6 May 2020 (R-7).

<sup>16</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 32; Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 30.

<sup>17</sup> According to the Claimant “a large number of Sierra Leone military and police officers” arrested Gerald’s employees. *See* the Claimant’s Request for Provisional Measures, 19 May 2020, ¶¶ 34-35. According to the Respondent, only “the Sierra Leone police arrested [the] five SL Mining employees.” *See* Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, ¶ 31.

<sup>18</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 35.

<sup>19</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 36.

<sup>20</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 36.



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72. **13 May 2020, 6:40 PM (local time):** The police goes back to the administration building where they search for documents.<sup>21</sup>
73. **13 May 2020, 8:04 PM (local time):** The police goes again to the work camp.<sup>22</sup>
74. **13 May 2020, 8:13 PM (local time):** ██████████, SL Mining’s ██████, speaks on the phone with ██████████ ██████ about the arrests.<sup>23</sup>
75. **13 May 2020, 9:05 PM (local time):** The police arrests the five SL Mining employees.<sup>24</sup>
76. **13 May 2020, during the night:** The five SL Mining employees are transported to the city of Bo.<sup>25</sup>
77. **13 May 2020:** The police seizes the following documents:
- Petition documents of the Land Owners Association along with signatories;
  - Schedule of land lease payment;
  - Mining Lease Agreement;
  - Fuel concession document;
  - Quarterly Submission form for safety;
  - Receipts of payment of Land lease No. 95, 103 and 104; and
  - Time sheet from CR&D Department.<sup>26</sup>

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<sup>21</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 36.

<sup>22</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 36.

<sup>23</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 42; Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 35.

<sup>24</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 41.

<sup>25</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 50; Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 36.

<sup>26</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 31; Claimant’s Request for Provisional Measures, 19 May 2020, ¶¶ 37-38. List of seized documents sent via WhatsApp to Alejandro Skidelsky (13 May 2020) (C-62). Letter from the Landowners Association of the Marampa Iron Ore Mining Concession Area to the President of Sierra Leone (C-45).

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78. **14 May 2020:** The Sierra Leone police interrogates each of the detained employees.<sup>27</sup>
79. **15 May 2020:** Gerald notifies the Tribunal of the arrests of the five SL Mining employees.<sup>28</sup>
80. **20 May 2020:** The five SL Mining employees are released from police custody.<sup>29</sup>
81. **2 June 2020:** Sierra Leone issues a wanted notice for ██████████, SL Mining’s Community Relations and Development ██████████, to investigate him on suspicions of inciting the 30 April 2020 riot in Lunsar.<sup>30</sup>
82. **3 June 2020:** ██████████ turns himself in to Criminal Investigations Department headquarters in Freetown for an interrogation.<sup>31</sup>
83. **3 June 2020 – 15 June 2020:** ██████████ is detained.<sup>32</sup>
84. **15 June 2020:** ██████████ is released.<sup>33</sup>
85. **28 June 2020:** ██████████, also known as ██████████,”<sup>34</sup> an employee in SL Mining’s security department and the Secretary of the Landowners Association, is arrested by the Sierra Leone Police.<sup>35</sup>

<sup>27</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 58.

<sup>28</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 1. Letter from King & Spalding to the ICSID Tribunal dated 15 May 2020 (C-73).

<sup>29</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 39; Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 105.1.

<sup>30</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 7.

<sup>31</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 7.

<sup>32</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 7. Second Witness Statement of Adrian Fisher, 13 July 2020, ¶¶ 20-21.

<sup>33</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 15 June 2020, ¶ 83.

<sup>34</sup> Respondent’s Letter to the Tribunal, dated 16 July 2020.

<sup>35</sup> Claimant’s Letter to the Tribunal, dated 13 July 2020, ¶ 22.

86. **29 June 2020:** [REDACTED] is interviewed by the Criminal Investigations Department of the Sierra Leone Police.<sup>36</sup>

87. **7 July 2020:** [REDACTED] is released.<sup>37</sup>

#### **IV. THE PARTIES’ POSITIONS**

88. The presentations of the Parties’ positions in the sections below are not meant to serve as exhaustive reviews of the Parties’ submissions on the Claimant’s Request on Provisional Measures, but as summaries of the arguments that are relevant to the Tribunal’s analysis and findings. Regardless and as further indicated below,<sup>38</sup> the Tribunal has carefully considered all the submissions made by the Parties.

##### **A. THE CLAIMANT’S POSITION**

###### **(1) The Tribunal’s Power to Grant the Provisional Measures Requested by the Claimant and the Standard for Intervention by the Tribunal**

89. According to the Claimant, Articles 47 of the ICSID Convention and Rule 39 grant ICSID tribunals “broad discretion to ‘recommend’ ... provisional measures” which they consider appropriate to preserve the rights of a given party in an ICSID arbitration based on the circumstances of the case.<sup>39</sup> The Claimant further explains that “traditionally, tribunals have held that it is appropriate to issue an order of provisional measures where – as here – a party’s right to the preservation of the *status quo*, the non-aggravation of dispute, and the integrity of the proceedings is threatened.”<sup>40</sup>

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<sup>36</sup> Claimant’s Letter to the Tribunal, dated 13 July 2020, ¶ 22.

<sup>37</sup> Claimant’s Letter to the Tribunal, dated 13 July 2020, ¶ 24. Respondent’s Letter to the Tribunal, dated 16 July 2020, p. 2.

<sup>38</sup> See below, Section V.A on the Tribunal’s Analysis.

<sup>39</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 81.

<sup>40</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 81.

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90. The Claimant contends that it is also settled that ICSID tribunals may order provisional measures prior to rulings on jurisdiction, and that ICSID tribunals need only to satisfy that they have *prima facie* jurisdiction to issue provisional measures.<sup>41</sup>
91. Further, the Claimant argues that provisional measures are usually issued in ICSID cases when there is a need to prevent the aggravation of disputes. In the Claimant’s words, “the past practice of tribunals establishes that parties have a duty not to take any action that might aggravate the dispute, disrupt a party’s right to the *status quo*, or affect the integrity of the arbitration.”<sup>42</sup> According to the Claimant, this practice is based on the principle of good faith in the conduct of proceedings<sup>43</sup> and the principle of integrity of the proceedings.<sup>44</sup>
92. The Claimant elaborates on ICSID tribunals’ power to grant provisional measures, arguing that:
- “the right to the integrity of ICSID proceedings includes a party’s right to evidence its case through witness testimony”, and “the right to protect witnesses (including potential witnesses) from interference and harassment.”<sup>45</sup>

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<sup>41</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 84.

<sup>42</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 86.

<sup>43</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶¶ 87-89 (referring to, *inter alia*, *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures, 9 December 1983, at ¶ 368 (CLA-5), where the tribunal noted that “the good and fair practical rule, according to which both parties to a legal dispute should refrain, in their own interest, to do anything that could aggravate or exacerbate the same, thus rendering the solution possibly more difficult.”).

<sup>44</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶¶ 90-92 (referring to, *inter alia*, *Caratube International Oil Company LLP v The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant’s Application for Provisional Measures, 31 July 2009, ¶ 120 (CLA-12), where the tribunal found that the obligation to conduct proceedings in good faith included the duty “to avoid any unnecessary aggravation of the dispute and harassment of the other party.”).

<sup>45</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 91 (citing, *inter alia*, Anthony C. Sinclair & Odysseas G. Repousis, An Overview of Provisional Measures in ICSID Proceedings, 32(2) ICSID Review 444-445 (CLA-6)).

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- “the right to the integrity of ICSID proceedings incorporates the right to preserve and protect documentary evidence, including from unlawful seizure and destruction,”<sup>46</sup> and
  - “tribunals have confirmed that the removal of management personnel from their offices and the seizure of an investor’s premises, or the like, is a breach of a bilateral investment treaty’s full protection and security (“FPS”) standard.”<sup>47</sup>
93. On the standard for intervention by the Tribunal, the Claimant explains that, contrary to what Sierra Leone asserts, the Tribunal has the authority to recommend provisional measures in relation to domestic criminal proceedings.<sup>48</sup>
94. In particular, the Claimant argues that not only ICSID tribunals have found that they have the power to order interim and provisional measures that seek to limit or even discontinue domestic criminal proceedings,<sup>49</sup> the provisional measures may be issued even when domestic criminal proceedings are being conducted in an “ordinary”, “reasonable”, and “good faith” manner.<sup>50</sup> Accordingly, the Claimant contends that Sierra Leone is wrong when it argues that there is a “very high threshold” which has to be demonstrated and “exceptional circumstances” have to exist for an ICSID tribunal to order a provisional measure relating to criminal investigations.<sup>51</sup> Finally, the Claimant argues that it is further

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<sup>46</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 96 (citing, *inter alia*, Anthony C. Sinclair & Odysseas G. Repousis, An Overview of Provisional Measures in ICSID Proceedings, 32(2) ICSID Review 440 (2017) (**CLA-6**), and Gabrielle Kaufmann-Kohler, Aurélie Antonietti, Michele Potestà, Arbitration Under International Investment Agreements: A Guide to the Key Issues (2nd Edition), Part V Remedies and Costs, Chapter 24 Interim Relief in Investment Treaty Arbitration at ¶ 24.65 (**CLA-22**)).

<sup>47</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 98 (referring to, *inter alia*, *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶ 730-731 (**CLA-9**)).

<sup>48</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶¶ 12-15.

<sup>49</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶¶ 11.1, 16-23 (relying on, *inter alia*, *Tokios Tokelés v Ukraine*, ICSID Case No. ARB/02/18, Order No. 3, 18 January 2005 (**RL-2**); *Libananco Holdings Co. v Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, ¶ 75 (**CLA-73**); *Ipek Investment Limited v Republic of Turkey*, ICSID Case No. ARB/18/18, Procedural Order No. 5 (Claimant’s Request for Provisional Measures), 19 September 2019, ¶ 53 (**CLA-28**); *Caratube International Oil Company LLP and Devinci Salah Hourani v Republic of Kazakhstan (II)*, ICSID Case No. ARB/13/13, Decision on the Claimants’ Request for Provisional Measures, 4 December 2014 (**CLA-51**); *Nova Group Investments, B.V. v Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7, 29 March 2017, ¶¶ 247-248 (**RL-16**)).

<sup>50</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 33.

<sup>51</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 26.

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established in ICSID case-law that provisional measures are particularly warranted “if criminal investigations or proceedings are being conducted in bad faith and unlawfully, to the investor’s detriment.”<sup>52</sup>

95. Based on these general considerations, the Claimant argues that because the Respondent has and continues to breach the Claimant’s procedural rights (as further explained below in Section IV.A.(3)), provisional measures are warranted in this case regardless of the fact that these breaches are allegedly connected to on-going criminal proceedings in Sierra Leone.

**(2) The Issue of Burden of Proof**

96. In its Response on Provisional Measures, the Respondent argues that ICSID tribunals have accepted to issue “provisional orders affecting criminal proceedings only in extraordinary cases where the requesting party meets a very high evidentiary threshold”<sup>53</sup> and that the Claimant in the present case fails to meet such evidentiary threshold.<sup>54</sup>
97. In its Reply, the Claimant refutes this argument. According to the Claimant, “[t]here is no ‘heightened’ standard of proof in ICSID provisional measures practice”,<sup>55</sup> the standard of proof for establishing facts in provisional measures practice is “balance of probabilities” or “sufficient likelihood.”<sup>56</sup>
98. Further, the Claimant explains the standard of proof to support a request for provisional measures should not be influenced by the nature of the allegations made in support of such

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<sup>52</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶¶ 11.2, 35-44.

<sup>53</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 51. *See also, ibid*, ¶ 121 (nothing that “If Claimant wishes to support its implied allegation that there is a real, imminent risk of malicious and illegal conduct on the part of the Sierra Leone police, then it must provide solid and credible proof for such a serious accusation”).

<sup>54</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶¶ 56, 94, 97, 103, 121 and 136.

<sup>55</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 81.

<sup>56</sup> Claimant’s Reply on Provisional Measures, ¶¶ 82-83 (referring to, *inter alia*, *Caratube International Oil Company LLP and Devinci Salah Hourani v Republic of Kazakhstan (II)*, ICSID Case No. ARB/13/13, Decision on the Claimants’ Request for Provisional Measures, 4 December 2014, ¶ 103 (CLA-51)).

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request.<sup>57</sup> In the Claimant’s own words, “the seriousness of the allegation does not automatically mean, as Sierra Leone suggests, that the moving party must submit some ‘extraordinary’ evidence that satisfies a ‘heightened’ standard. ... [t]he standard of proof remains at the standard level of likelihood and balance of probabilities, without requiring proof that is impossible to obtain, and may include ‘indirect’ evidence or reasonable inferences.”<sup>58</sup>

99. Finally, the Claimant argues that the evidentiary burden shifts once a *prima facie* case for provisional measures has been made by the requesting party,<sup>59</sup> and that the Claimant has discharged its *prima facie* burden by showing that the criminal proceedings against Gerald’s employees and the document seizures “are improper and illegal and present a real, immediate danger to the integrity of this proceeding and Gerald’s right to advance its case in an unobstructed manner.”<sup>60</sup> As a result, according to the Claimant, the burden of disproving these contentions shift to Sierra Leone.<sup>61</sup>

**(3) The Claimant’s Request Satisfies the Legal Standard for the Recommendation of Provisional Measures**

100. According to the Claimant, its request satisfies each of the criteria required to recommend provisional measures, namely:
- The Tribunal has *prima facie* jurisdiction.<sup>62</sup>

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<sup>57</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 84 (referring to Gary B. Born, ‘Chapter 4: On Burden and Standard of Proof’, in Meg Kinnear, Geraldine R. Fischer, et al. (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015), p. 52 (CLA-49)).

<sup>58</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 90.

<sup>59</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶¶ 91-103.

<sup>60</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 105.

<sup>61</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 107.

<sup>62</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶¶ 104-107.

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101. The Claimant refers to ICSID case law based on which, according to the Claimant,<sup>63</sup> the Tribunal does not need to “examine in depth the claims and arguments submitted on the merits of the case,” but rather limit itself to “an initial analysis, *i.e.* ‘at first sight’.”<sup>64</sup>
102. The Claimant then argues that, as demonstrated in its Request for Arbitration, and further in its Request for Provisional Measures and in its letter dated 25 June 2020 relating to the Claimant’s investment ownership structure,<sup>65</sup> there shall be no doubt that:
- i. “Gerald is an ‘investor’, with a qualifying ‘investment’” pursuant to Article 1 of the BIT and Article 25 of the Convention,<sup>66</sup> and that the Tribunal therefore has *prima facie* jurisdiction *ratione personae*,<sup>67</sup>
  - ii. there is a “legal” dispute arising out of an “investment”, and that the Tribunal therefore has *prima facie* jurisdiction *ratione materiae*,<sup>68</sup>
  - iii. the dispute lies within the temporal scope of the BIT and the Tribunal therefore has *prima facie* jurisdiction *ratione temporis*,<sup>69</sup> and
  - iv. finally, the Parties have consented to ICSID arbitration and the Tribunal therefore has *prima facie* jurisdiction *ratione voluntatis*.<sup>70</sup>
103. Specifically on the issue of the Claimant’s ownership of its alleged investment in Sierra Leone, the Claimant argues that the exhibits submitted with its letter of 25 June 2020 demonstrate that, contrary to the Respondent’s contentions, “Gerald indirectly owns 100% of the shares in SL Mining, a company registered and incorporated in Sierra Leone.”<sup>71</sup>

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<sup>63</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶¶ 104-105.

<sup>64</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 105 (quoting from *Millicom v Senegal*, ICSID Case No. ARB/08/20, Decision on the Application for Provisional Measures, 9 December 2009, ¶ 42 (CLA-33).

<sup>65</sup> Claimant’s Letter to the Tribunal dated 25 June 2020, on the Submission of Confidential Documents.

<sup>66</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 106.1

<sup>67</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 106.1.

<sup>68</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 106.2.

<sup>69</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 106.3.

<sup>70</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 106.4.

<sup>71</sup> Claimant’s Letter to the Tribunal dated 25 June 2020, on the Submission of Confidential Documents.



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- The requested measures are necessary.<sup>72</sup>

104. According to the Claimant, “[a] tribunal’s ‘necessity’ inquiry focuses on the nature and extent of the harm which is likely to occur to the applicant in the event that the provisional measures sought are not granted.”<sup>73</sup> The Claimant argues that in the present case, there is “a material risk of serious or significant harm to Gerald’s procedural rights stemming directly from Sierra Leone’s actions on 13-14 May 2020, including in particular with respect to Gerald’s right to protect the *status quo*, prevent the aggravation of the dispute, and safeguard the integrity of the proceedings by protecting access to witness and documentary evidence,”<sup>74</sup> and that “[o]n that basis alone, the requested measures are necessary.”<sup>75</sup>

- The requested measures are urgent.<sup>76</sup>

105. On the issue of urgency, the Claimant observes that “ICSID tribunals have considered the urgency criterion to be satisfied if ‘a question cannot await the outcome of the award on the merits.’”<sup>77</sup> According to the Claimant, “Gerald’s Request rests on its right to the non-aggravation of the dispute, and the preservation of the integrity of the proceedings and the *status quo*. By its very nature, the facts informing Gerald’s Request satisfy the urgency requirement.”<sup>78</sup>

- The requested measures are proportional, because requiring Sierra Leone to respect its legal obligations and to refrain from aggravating the dispute is not inconvenient.<sup>79</sup>

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<sup>72</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶¶ 108-127.

<sup>73</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 108 (referring to *United Utilities (Tallinn) B.V. et al. v Republic of Estonia*, ICSID Case No. ARB/14/24, Decision on Provisional Measures, 12 May 2016, ¶ 100 (CLA-46)).

<sup>74</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 108.

<sup>75</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 108.

<sup>76</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶¶ 128-134.

<sup>77</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 128 (referring to *Burlington Resources Oriente Ltd v. Ecuador*, ICSID Case No ARB/08/5, Procedural Order No 1, 29 June 2009, ¶ 73 (CLA-11)).

<sup>78</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 134.

<sup>79</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶¶ 135-142.

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106. Finally, the Claimant explains that in applying the criterion of proportionality and of the balance of (in)convenience, the Tribunal has “to take into account the degree and the nature of the harm that would be suffered by each Party to ensure that the provisional measure ordered would be proportional in all the circumstances of the case.”<sup>80</sup>
107. The Claimant submits that, in the present case, the measures requested do not cause any inconvenience to Sierra Leone, as there were and are no reasons to criminally investigate the SL Mining employees.<sup>81</sup> According to the Claimant, “the same cannot be said for the effect on Gerald of Sierra Leone’s continued detention.”<sup>82</sup> Should the Tribunal decline to issue the measures requested by the Claimant, the Claimant faces significant risk that the Detained Employees (as well as other SL Mining employees and local suppliers) will be discouraged from participating in the arbitration, thereby seriously and significantly harming the Claimant’s right to fully present its case.<sup>83</sup> Hence, the Claimant concludes that “[t]he test for proportionality is met and the balance of (in)convenience falls squarely in Gerald’s favour.”<sup>84</sup>
108. In further support to its demonstration that the Claimant’s request satisfies the standard for the recommendation of provisional measures, the Claimant argues that the riots in Lunsar which preceded the arrests of the SL Mining employees and the seizure of the SL Mining documents had “nothing to do” with SL Mining,<sup>85</sup> and that the criminal proceedings started against SL Mining employees were not only unjustified but also “illegal”, “improper”, and “groundless” as a matter of international and domestic law.<sup>86</sup> According to the Claimant, this is demonstrated by the alleged lack of explanation by the Respondent for the arrests of SL Mining’s employees and by the impossibility for the Respondent to show a “reasonable

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<sup>80</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 137.

<sup>81</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 139.

<sup>82</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 140.

<sup>83</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 140.

<sup>84</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 140.

<sup>85</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 61.

<sup>86</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 55.

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suspicion,” the standard required by the provision in Sierra Leone’s Constitution on the Protection from arbitrary arrest and detention,<sup>87</sup> justifying the arrests of the SL Mining employees, and the criminal investigations more generally.<sup>88</sup>

109. The Claimant concludes that “[i]t is obviously striking that all of SL Mining’s senior management would suddenly be investigated for the same nebulous crime. And then when five of them are released on bail, for completely unexplained reasons they are still prohibited from returning to the Marampa mine site.”<sup>89</sup> Hence, according to the Claimant, the Respondent’s conduct was “extraordinary, in bad faith, and in violation of fundamental protections contained in its constitution,”<sup>90</sup> and the provisional measures requested are therefore warranted.

**(4) The Claimant’s Responses to the Tribunal’s Questions of 8 July 2020**

110. As indicated above, on 8 July 2020 the Tribunal invited the Parties to address three questions regarding the Claimant’s allegations on the SL mining employees, namely:
- Do the SL Mining employees subjected to criminal investigations have a legal possibility to challenge their imprisonment/bail conditions and, if so, have they made use of it, and, if not, why not?
  - What is the reason for not permitting those SL Mining employees who have been released on bail to return to the Marampa site?
  - What is the present status of the seventh SL Mining employee arrested on 28 June 2020?
111. In response to the Tribunal’s first question,<sup>91</sup> the Claimant indicates that there are no viable options for the SL Mining’s employees to challenge their imprisonment/bail conditions by way of local proceedings, given that:

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<sup>87</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 68 (referring to Constitution of Sierra Leone, Article 17 (R-2)).

<sup>88</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶¶ 68-78.

<sup>89</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 80.

<sup>90</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, Section IV.

<sup>91</sup> Claimant’s Letter to the Tribunal, dated 13 July 2020, ¶¶ 4-14.

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- Sierra Leone has not applied a procedure provided for in the Sierra Leone criminal procedural law, and there is therefore no legal basis for the review of challenge of this procedure;
  - There is a risk of retaliation against the employees should they initiate any action before domestic courts in Sierra Leone; and
  - Even if there was a possibility of legal challenge, the proceedings would take at least several months and would be of no immediate assistance to the employees.
112. As to the reason for not permitting the employees to return to the Marampa site, the Claimant affirms that the SL Mining employees have only been told by Sierra Leone’s authorities that SL Mining does not have a valid mining licence. According to the Claimant, this reason is unsatisfactory given that the validity of the mining license does not have any bearing on the right for SL Mining to legally remain on site.<sup>92</sup>
113. Finally, the Claimant indicates that [REDACTED], the seventh SL Mining employee subject to criminal investigation was arrested on 28 June 2020 and released on bail on 6 July 2020.<sup>93</sup> The Claimant argues that, like for the other previously arrested employees, the arrest lacks any factual justification and legal ground.<sup>94</sup>

**(5) The Claimant’s Request for Relief**

114. The Claimant’s request for relief, as updated in its Reply, contains two categories of requests.
115. *First*, the Claimant requests “interim provisional measures” including:
- **“Ordering** Sierra Leone to take all actions necessary to immediately, and within 8 hours of the Tribunal’s interim order, change the bail conditions for [the five Gerald employees], so that they are allowed to return to the Marampa mine site, and further ordering Sierra Leone to update the Tribunal and Gerald on all steps it has taken in those respects within 4 hours of the Tribunal’s interim order;
  - **Ordering** Sierra Leone to take all actions necessary to immediately, and within 8 hours of the Tribunal’s interim order, release [REDACTED] from detention and

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<sup>92</sup> Claimant’s Letter to the Tribunal, dated 13 July 2020, ¶¶ 16-20.

<sup>93</sup> Claimant’s Letter to the Tribunal, dated 13 July 2020, ¶¶ 21-26.

<sup>94</sup> Claimant’s Letter to the Tribunal, dated 13 July 2020, ¶¶ 21-26.

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police custody and allow him to return to the Marampa mine site, and further ordering Sierra Leone to update the Tribunal and Gerald on all steps it has taken in those respects within 4 hours of the Tribunal’s interim order;

- **Ordering** Sierra Leone to take all actions necessary to immediately suspend the criminal investigations and/or proceedings initiated against [the five Gerald employees and ██████████] in Sierra Leone, and further ordering Sierra Leone to update the Tribunal and Gerald on all steps it has taken in that respect within 12 hours of the Tribunal’s interim order; [and]
- **Ordering** Sierra Leone to return to SL Mining all documents seized on 13 May 2020 from the Marampa mine site, within 24 hours of the Tribunal’s interim order, and further ordering Sierra Leone to update the Tribunal and Gerald on all steps it has taken in that respect within 12 hours of the Tribunal’s interim order.”<sup>95</sup>

116. Second, the Claimant further requests the Tribunal to urgently order measures for the entire duration of the proceedings, including:

- **“Ordering** Sierra Leone to immediately comply with any aspect of the Tribunal’s interim order with which it has not complied as of the date of the Tribunal’s final order;
- **Ordering** Sierra Leone to refrain from engaging in any conduct that may directly or indirectly affect (or otherwise jeopardise) the legal or physical integrity of any directors, shareholders, representatives, or employees of Gerald or SL Mining, including but not limited to [the five Gerald employees and ██████████];
- **Ordering** Sierra Leone to refrain from any further seizure or interference with Gerald’s or SL Mining’s assets (including its equipment, stockpiles of iron ore or documents, whether at the Marampa mine site or elsewhere), or its legal rights in Sierra Leone, including with respect to the Marampa mine and the land on which it is situated, and to allow SL Mining’s employees (including all security staff) to operate from and base themselves at the Marampa mine site;
- For the avoidance of doubt, **ordering** Sierra Leone to refrain from taking any step, action (judicial or otherwise) or other measures that would interfere with Gerald’s investments, alter the *status quo ante*, aggravate the dispute or threaten the integrity of the proceeding, or render ineffective any relief that this Tribunal ultimately may award;

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<sup>95</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 108 (emphases in the original submission).

- **Ordering** Sierra Leone to pay the entirety of the costs, fees, and expenses incurred by Gerald in prosecuting its requests for provisional measures; and
- **Ordering** any other relief that the Tribunal deems appropriate.”<sup>96</sup>

**B. THE RESPONDENT’S POSITION**

**(1) The Tribunal’s Power to Order Interim and Provisional Measures and the Legal Test for the Issuance of Provisional Measures**

117. The Respondent accepts that, pursuant to Rule 39 of the Arbitration Rules, ICSID tribunals have the authority to recommend provisional measures, but observes nonetheless that “that authority is not unlimited,”<sup>97</sup> and that ICSID practice shows that tribunals consider that they lack the power to grant measures interfering with a State’s sovereign right to conduct criminal proceedings.<sup>98</sup>
118. Based on these observations, the Respondent argues that the Tribunal in the present case “does not have the power to prohibit Sierra Leone from exercising one of its most fundamental and quintessentially sovereign rights: to enforce its criminal laws by investigating the commission of serious offenses within its territory,” and that should the Tribunal have and decide to exercise this power, it would “in effect, put Sierra Leone’s good faith criminal investigations under foreign scrutiny merely because the subjects of investigation are employees of a company whose alleged shareholder happens to have filed a claim against the State.”<sup>99</sup>
119. Further, the Respondent argues that even if the Tribunal had the power to order the requested measures, it could only do so if the Claimant demonstrated, through concrete evidence, the existence of bad faith or a violation of rights. In particular, the Respondent submits that ICSID tribunals are generally reluctant to interfere with State prerogatives

<sup>96</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 110 (emphases in the original submission).

<sup>97</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 43.

<sup>98</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 43.

<sup>99</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶¶ 48-49.

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such as criminal law enforcement and do so only in exceptional circumstances, in which the requesting party bears the burden of proving.<sup>100</sup> According to the Respondent, “that burden can only be met through the presentation of ‘concrete evidence’ showing that the conduct of the State went beyond a legitimate exercise of this sovereign right,”<sup>101</sup> and the “exceptional circumstances that justify these kinds of provisional measures are bad faith or a violation of rights.”<sup>102</sup>

120. With respect to the legal test for the issuance of provisional measures in an ICSID proceeding, the Respondent agrees with the Claimant that there are five criteria to be considered by an ICSID tribunal in deciding whether a provisional measure should be granted, namely (i) the necessity for the tribunal to establish *prima facie* jurisdiction to hear the dispute, (ii) the existence of a right, (iii) the existence of an irreparable impairment of this right, (iv) the urgency of the remedial measure, and (v) proportionality.<sup>103</sup>

**(2) The Respondent’s Arguments on the Claimant’s Failure to Meet its Burden of Proof**

121. As indicated above, the Respondent argues that ICSID tribunals accept to issue provisional measures interfering with criminal investigations only when the requesting party discharges its burden of proof and satisfies a demanding evidentiary threshold.<sup>104</sup>

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<sup>100</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶¶ 52-56 (referring to, *inter alia*, *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision regarding Claimant’s Application for Provisional Measures, 31 July 2009, ¶ 137 (**CLA-12**); *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 – Decision on the Parties’ Requests for Provisional Measures, 23 June 2015, ¶ 82 (**RL-14**); *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Claimants’ Request for Provisional Measures, 30 April 2015, ¶ 191 (**RL-13**)).

<sup>101</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 56 (citing from *OOO Manolium-Processing v. The Republic of Belarus*, PCA Case No. 2018-06, Decision on Claimant’s Interim Measures Request, 7 December 2018, ¶ 121 (**RL-18**)).

<sup>102</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 56 (referring to *OOO Manolium-Processing v. The Republic of Belarus*, PCA Case No. 2018-06, Decision on Claimant’s Interim Measures Request, 7 December 2018, ¶ 144 (**RL-18**)).

<sup>103</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 57.

<sup>104</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶¶ 51-56; Respondent’s Rejoinder on Provisional Measures, 15 June 2020, ¶ 20.



122. On the issue of burden of proof, the Respondent refutes the Claimant’s argument on the doctrine of burden shifting.<sup>105</sup> According to the Respondent, the law is clear with respect to the issue of the burden of proof in the case of provisional measures: it is the requesting party who “has the burden of showing why the measures should be recommended,”<sup>106</sup> and none of the authorities cited by the Claimant shows that in the context of provisional measures relating to criminal proceedings, burden shifting is either appropriate or permissible.<sup>107</sup>

**(3) The Respondent’s Arguments on the Five Criteria for the Imposition of Provisional Measure**

123. According to the Respondent, the Claimant has failed to meet the five criteria for the imposition of provisional measures, that is (i) *prima facie* jurisdiction, (ii) the existence of rights to be protected, (iii) necessity, (iv) urgency, and (v) proportionality.

124. In its Response and Objection, the Respondent examines separately these five criteria and demonstrates how, in its view, the Claimant fails to satisfy each criterion.<sup>108</sup> In its Rejoinder, the Respondent addresses first the issue of the jurisdiction *prima facie* and explains, for the remaining criteria that, “because the substantive elements of the legal test for provisional measures (existence of a right in need of protection, necessity, urgency and proportionality) are all closely related,” the Respondent elected to address them jointly in its second submission.<sup>109</sup> The summary below follows the structure of the Respondent’s latest submission.

- *Prima Facie* Jurisdiction.

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<sup>105</sup> Respondent’s Rejoinder on Provisional Measures, 15 June 2020, ¶¶ 20-41.

<sup>106</sup> Respondent’s Rejoinder on Provisional Measures, 15 June 2020, ¶ 22 (quoting from C. Schreuer *et al.*, THE ICSID CONVENTION: A COMMENTARY, “Article 47” (2009), p. 776 (RL-6)).

<sup>107</sup> Respondent’s Rejoinder on Provisional Measures, 15 June 2020, ¶¶ 25-28.

<sup>108</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶¶ 72 *et seq.*

<sup>109</sup> Respondent’s Rejoinder on Provisional Measures, 15 June 2020, ¶ 67, fn. 73.



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125. In particular, the Respondent argues that the Claimant fails to make a *prima facie* showing of jurisdiction, given that Claimant presents no evidence of its ownership interest in SL Mining.<sup>110</sup>
126. According to the Respondent, the documents submitted by the Claimant “lack the evidentiary value required to demonstrate that SL Mining is indirectly and wholly owned by Claimant,”<sup>111</sup> especially because they do not establish, accurately, correctly and completely Claimant’s indirect ownership through all the corporate links within Gerald’s alleged corporate structure.<sup>112</sup>
- The Claimant’s failure to prove that its rights are in urgent need of protection (the existence of a right, urgency, necessity and proportionality).
127. The Respondent further explains that the Claimant has failed to meet its burden of demonstrating that it has a right that is threatened with irreparable impairment by Sierra Leone’s legitimate criminal investigations, and that it is in urgent need of protection.
128. In particular, the Respondent argues that the Claimant’s request is based on unsupported premise and baseless allegations. The Respondent refers notably to the failure of the Claimant to prove that (i) the arrests of the employees are based on anything other than “reasonable suspicion”,<sup>113</sup> (ii) the arrested employees were not informed of the “facts and grounds for the arrests”,<sup>114</sup> (iii) the employees’ arrests and detentions are otherwise illegal,<sup>115</sup> (iv) the conditions of the employees’ bail are arbitrary,<sup>116</sup> (v) the arrests of the employees have caused “irreparable harm”,<sup>117</sup> (vi) the arrest of [REDACTED] has

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<sup>110</sup> Respondent’s Rejoinder on Provisional Measures, 15 June 2020, ¶ 62.

<sup>111</sup> Respondent’s Letter to the Tribunal, dated 30 June 2020, p. 1.

<sup>112</sup> Respondent’s Letter to the Tribunal, dated 30 June 2020, p. 2.

<sup>113</sup> Respondent’s Rejoinder on Provisional Measures, 15 June 2020, ¶¶ 70-72.

<sup>114</sup> Respondent’s Rejoinder on Provisional Measures, 15 June 2020, ¶¶ 73-76.

<sup>115</sup> Respondent’s Rejoinder on Provisional Measures, 15 June 2020, ¶¶ 77-80.

<sup>116</sup> Respondent’s Rejoinder on Provisional Measures, 15 June 2020, ¶¶ 81-83.

<sup>117</sup> Respondent’s Rejoinder on Provisional Measures, 15 June 2020, ¶ 84.

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aggravated the dispute,<sup>118</sup> (vii) the criminal investigation has discouraged SL Mining employees and others from assisting the Claimant in this arbitration,<sup>119</sup> and (viii) the document seizure was conducted without a proper legal basis.<sup>120</sup>

129. The Respondent concludes that based on these failures, the Claimant’s request for provisional measures should be rejected.

**(4) The Respondent’s Responses to the Tribunal’s Questions of 8 July 2020**

130. The Respondent addressed the three questions pertaining to the status of SL Mining Employees in its Letter to the Tribunal dated 13 July 2020.

131. *First*, relying on Mr. Fisher’s witness statements the Respondent argues that several legal actions are available to the SL Mining employees, including the request for a writ of *habeas corpus*, the filing of a complaint before “the Criminal Investigation Department [...], the Inspector General of the Police, the Independent Police Complaints Board, the Local Unit Commander (LUC), Human Rights Commission, or the Attorney-General’s office,” or an action before domestic courts.<sup>121</sup> According to the Respondent, none of the SL Mining employees has challenged his detention through any of the above-mentioned mechanisms, nor have they challenged the conditions of their bail.<sup>122</sup>

132. *Second*, while the Respondent notes that it cannot speak on behalf of the Sierra Leone police authorities regarding the reasons for not permitting the SL Mining employees’ return to the Marampa site, given that the criminal investigation is still on-going, the Respondent notes that “in the case of a person suspected of having committed the offense of incitement,

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<sup>118</sup> Respondent’s Rejoinder on Provisional Measures, 15 June 2020, ¶¶ 85-92.

<sup>119</sup> Respondent’s Rejoinder on Provisional Measures, 15 June 2020, ¶¶ 93-97.

<sup>120</sup> Respondent’s Rejoinder on Provisional Measures, 15 June 2020, ¶¶ 98-104.

<sup>121</sup> Respondent’s Letter to the Tribunal, dated 13 July 2020, pp. 1-2; Second Witness Statement of Adrian Fisher, 13 July 2020, ¶ 4.

<sup>122</sup> Respondent’s Letter to the Tribunal, dated 13 July 2020, p. 2.

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it is not uncommon to restrict, as a condition on bail, that person’s ability to return to the location where the incitement activities allegedly took place.”<sup>123</sup>

133. *Finally*, the Respondent explains that it was not possible for Sierra Leone’s international counsel and the Office of the Attorney-General “to determine whether a seventh employee of SL Mining was arrested, and if so, the employee’s identity and status,”<sup>124</sup> but that it will “nonetheless continue to investigate the matter after this submission [...] and provide the Tribunal with any information about the individual’s status as soon as possible.”<sup>125</sup>
134. In its letter dated 16 July 2020,<sup>126</sup> the Respondent supplemented its responses of 13 July, confirming that the seventh SL Mining employee who was arrested was [REDACTED] and that he had been released on bail on 7 July 2020 and exceptionally been permitted to visit a sick child in Lunsar on 9 July 2020.

**(5) The Respondent’s Request for Relief**

135. In its Rejoinder, the Respondent identifies the changes that the Claimant made in its requests to the Tribunal between the Claimant’s Request on Provisional Measures and the Claimant’s Reply on Provisional Measures and argues that some of these changes demonstrate either a lack of proportionality in the Claimant’s requests,<sup>127</sup> or a “pattern of disregard for this arbitral process.”<sup>128</sup>
136. The Respondent further requests that the Tribunal (i) deny all the Claimant’s requests in their entirety, and (ii) order the Claimant to immediately reimburse the Respondent for its costs and fees in relation with the Claimant’s Request for Provisional Measures.<sup>129</sup>

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<sup>123</sup> Respondent’s Letter to the Tribunal, dated 13 July 2020, p. 3; Second Witness Statement of Adrian Fisher, 13 July 2020, ¶ 8.

<sup>124</sup> Respondent’s Letter to the Tribunal, dated 13 July 2020, p. 4.

<sup>125</sup> Respondent’s Letter to the Tribunal, dated 13 July 2020, p. 4.

<sup>126</sup> Respondent’s Letter to the Tribunal, dated 16 July 2020.

<sup>127</sup> Respondent’s Rejoinder on Provisional Measures, 15 June 2020, ¶¶ 109-113.

<sup>128</sup> Respondent’s Rejoinder on Provisional Measures, 15 June 2020, ¶ 123.

<sup>129</sup> Respondent’s Rejoinder on Provisional Measures, 15 June 2020, ¶¶ 125-126.

**V. THE TRIBUNAL’S CONSIDERATIONS**

**A. THE TRIBUNAL’S ANALYSIS**

137. In order to arrive at its decision, the Tribunal reviewed and considered all the arguments of the Parties and the documents submitted by them in this phase of the proceedings. The fact that the Tribunal does not specifically mention a given argument or reasoning does not mean that it has not considered it. In their submissions, the Parties produced and cited numerous awards and decisions dealing with matters that they consider relevant to the presently sought provisional measures. The Tribunal has considered these documents carefully and may take into account the reasoning and findings of these and other tribunals. However, in coming to a decision on the matter of provisional measures requested by the Claimant, the Tribunal must perform, and in fact has performed, an independent analysis of the ICSID Convention, the Arbitration Rules, and the particular facts of this case.

**B. THE LEGAL FRAMEWORK**

138. For the decision on provisional measures, Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules are applicable.

139. Article 47 of the ICSID Convention provides as follows:

“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.”

140. Rule 39 of the ICSID Arbitration Rules reads in relevant part as follows:

“(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).

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(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.”

141. The BIT is silent on the matter and thus in no way restricts or conditions the Tribunal’s power to recommend provisional measures.
142. It is generally accepted and also common ground between the Parties that before issuing provisional measures, an ICSID tribunal should first be satisfied that it has *prima facie* jurisdiction to decide the merits of the case.
143. It is also common ground between the Parties that provisional measures must (i) serve to protect certain rights of the applicant and (ii) meet the requirements of necessity and (iii) urgency, as well as (iv) proportionality.
144. Before addressing these specific conditions for the issuance of provisional measures, the Tribunal feels compelled to address a possibly more fundamental point of disagreement between the Parties. That is the question whether an arbitral tribunal has the authority to grant interim relief affecting the power of a State to conduct criminal proceedings.

**C. THE POWER TO GRANT THE REQUESTED RELIEF CONCERNING THE CONDUCT OF CRIMINAL PROCEEDINGS**

145. The Claimant maintains that ICSID tribunals have the power to order provisional measures also in cases where they would be aimed at the way how host States conduct criminal

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proceedings,<sup>130</sup> whereas the Respondent seems to insist that such power does not extend to measures that interfere with criminal proceedings.<sup>131</sup>

146. While the Parties refer to a number of ICSID cases where tribunals have taken diverging approaches to the matter, it appears to the Tribunal that even the Respondent does not question the fundamental premise that investment tribunals may exceptionally order preliminary measures if they have sufficient ground to be concerned that criminal proceedings are not conducted in good faith.<sup>132</sup>
147. The Tribunal shares the view expressed by other ICSID tribunals that provisional measures that concern the sovereign right to conduct criminal proceedings must be issued with caution.
148. It specifically concurs with the views of the tribunals in *Caratube v. Kazakhstan* and *PNG v. Papua New Guinea* having stated that:

“[t]he State’s investigative powers, including in criminal matters, are ‘a most obvious and undisputed part of [its] sovereign right ... to implement and enforce its national law on its territory’ and ‘a particularly high threshold must be over-come before an ICSID Tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a state.’”<sup>133</sup>

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<sup>130</sup> See Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 11.1 (“ICSID tribunals do have the power to order interim and provisional measures that seek to limit or even discontinue domestic criminal proceedings.”).

<sup>131</sup> See Respondent’s Response and Objections to Claimant’s Request for Provisional Measures, 15 June 2020, ¶ 48 (“[...] the Tribunal does not have the power to prohibit Sierra Leone from exercising one of its most fundamental and quintessentially sovereign rights: to enforce its criminal laws by investigating the commission of serious offenses within its territory [...].”).

<sup>132</sup> Respondent’s Rejoinder on Provisional Measures, 15 June 2020, ¶ 15 (“Sierra Leone’s position is that the *SGS v. Pakistan* tribunal’s determination that an ICSID tribunal may not interfere with a State’s sovereign right to conduct good faith criminal investigations is correct.”); *ibid*, ¶ 19 (“Thus, Sierra Leone’s position, reflected in ICSID practice, remains valid and un rebutted: a tribunal’s power to issue interim and provisional measures does not extend to measures that would interfere with a State’s sovereign right and duty to conduct good faith criminal investigations.”).

<sup>133</sup> *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant’s Request for Provisional Measures, 21 January 2015, ¶ 145 (CLA-38); *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12,

149. It is further in agreement with the tribunal in *Churchill Mining v. Indonesia* stressing that:

“[...] the right, even the duty, to conduct criminal investigations and prosecutions is a prerogative of any sovereign State. By way of consequence, ICSID tribunals have rightly held that when it comes to criminal proceedings “a particularly high threshold must be overcome” before an ICSID tribunal can recommend provisional measures.”<sup>134</sup>

150. However, the Tribunal also agrees with the tribunals in *Burlington v. Ecuador*<sup>135</sup> and *Ipek v. Turkey* that an ICSID tribunal’s power to adopt provisional measures may in appropriate cases even entail “some interference with a State’s sovereign powers and enforcement duties.”<sup>136</sup> Thus, the latter tribunal did not hesitate to eventually order the suspension of criminal proceedings in the respondent state.<sup>137</sup> In a similar vein, the tribunal in *Nova Group v. Romania* concluded that “domestic criminal proceedings are not *per se* immune from potential recommendation of provisional measures under Article 47.”<sup>138</sup>

151. Thus, the Tribunal is not prevented from ordering provisional measures in the context of criminal proceedings, as a matter of principle. However, it considers that resort to such

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Decision regarding Claimant’s Application for Provisional Measures, 31 July 2009, ¶ 135 (CLA-12) (“They [criminal investigations and measures taken by a State in that context] are a most obvious and undisputed part of the sovereign right of a State to implement and enforce its national law on its territory.”); ¶ 137 (“[...] a particularly high threshold must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a State.”).

<sup>134</sup> *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 14, 22 December 2014, ¶ 72 (CLA-17).

<sup>135</sup> *Burlington Resources Oriente Ltd v. Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 66 (CLA-11) (“[...] the ICSID Convention allows an ICSID tribunal to issue provisional measures under the conditions of Article 47. Hence, by ratifying the ICSID Convention, Ecuador has accepted that an ICSID tribunal may order measures on a provisional basis, even in a situation which may entail some interference with sovereign powers and enforcement duties.”).

<sup>136</sup> *Ipek Investment Limited v. Republic of Turkey*, ICSID Case No. ARB/18/18, Procedural Order No. 5 (Claimant’s Request for Provisional Measures), 19 September 2019, ¶ 3 (CLA-28) (“By ratifying the Convention, a State accepts that a tribunal may grant provisional measures in an appropriate case even if that may entail some interference with a State’s sovereign powers and enforcement duties.”).

<sup>137</sup> *Ipek Investment Limited v. Republic of Turkey*, ICSID Case No. ARB/18/18, Procedural Order No. 5 (Claimant’s Request for Provisional Measures), 19 September 2019, ¶ 3 (CLA-28), ¶ 121(2).

<sup>138</sup> *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7, 29 March 2017, ¶ 248 (RL-16).

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measures is only justified in exceptional situations, such as where they are not instituted or conducted in good faith.<sup>139</sup>

**D. BURDEN AND STANDARD OF PROOF**

152. The Parties apparently also disagree on both the burden and the standard of proof required for the issuance of provisional measures.
153. The Claimant suggests that it merely needs to make a *prima facie* case for provisional measures upon which Respondent would bear the burden of disproving them.<sup>140</sup> Additionally, the Claimant asserts that even if it had to prove the case for provisional measures, the applicable standard would not be a heightened or extraordinary standard of proof, but rather a mere sufficient likelihood.<sup>141</sup>
154. The Respondent objects and maintains that the burden of proof must rest with the party seeking to establish that provisional measures are warranted<sup>142</sup> and that provisional measures aimed at restricting criminal investigations do not merely require a lenient standard, but rather a particularly high threshold.<sup>143</sup>
155. The Tribunal sees no reason why it should depart from the established rule that the requesting party has the burden of showing that provisional measures should be recommended.<sup>144</sup> In this context, the Tribunal notes that the examples provided by the Claimant for a shifting of the burden of proof practically all stem from cases not addressing provisional measures. The well-known principle *actori incumbit probatio*, according to

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<sup>139</sup> *Italba Corporation v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9, Decision on Claimant’s Application for Provisional Measures and Temporary Relief, 15 February 2017, ¶ 116 (**RL-15**).

<sup>140</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶¶ 91 *et seq.*

<sup>141</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶¶ 81 *et seq.*

<sup>142</sup> Respondent’s Rejoinder on Provisional Measures, 15 June 2020, ¶¶ 22 *et seq.*

<sup>143</sup> Respondent’s Rejoinder on Provisional Measures, 15 June 2020, ¶¶ 44 *et seq.*

<sup>144</sup> See C. Schreuer *et al.*, THE ICSID CONVENTION: A COMMENTARY, “Article 47” (2009), p. 776 (**RL-6**).



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which the burden of proof is upon the claimant or the party making an assertion, also applies to provisional measures.<sup>145</sup>

156. The Tribunal does not see that an extraordinary situation that may exceptionally justify a shifting of the burden of proof in regard to the prerequisites for provisional measures, such as a loss or inaccessibility of documents, is present. Therefore, it is upon the Claimant to demonstrate that the requirements for ordering provisional measures are fulfilled.
157. In regard to the standard of proof, the Tribunal is not convinced that any abstract standard of proof, ranging from “lenient” to “heightened” would be particularly helpful. It concurs with other tribunals that provisional measures constitute extraordinary remedies aimed at preserving the rights of parties litigating their cases in arbitral proceedings and at ensuring that they will both receive a fair process. Interim procedures are not meant to interfere with the final adjudication of the dispute but, to the contrary, to ensure that such adjudication can take place.
158. The Tribunal agrees that provisional measures are “exceptional” remedies in particular where they concern the exercise of sovereign powers, such as the enforcement of criminal law.<sup>146</sup> Whether such exceptionality should be regarded as an evidentiary rule may be questioned though. It rather appears that investment tribunals should resort to indicating

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<sup>145</sup> See, e.g., *Maffezini v. Spain*, Decision on Provisional Measures, Procedural Order No. 2, 28 October 1999, ¶10 (“There is no doubt that the applicant, in this case the Respondent, has the burden to demonstrate why the Tribunal should grant its application.”); *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant’s Request for Provisional Measures, 21 January 2015, ¶ 108 (RL-11) (“It is well-established that the requesting party has the burden of showing why the requested provisional measures are necessary and should be ordered by the Tribunal.”); *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision regarding Claimant’s Application for Provisional Measures, 31 July 2009, ¶ 75 (CLA-12) (“While the Tribunal has a certain discretion whether it considers that it should recommend provisional measures, the party requesting provisional measures must be considered to have the burden of proof regarding its request.”).

<sup>146</sup> *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7 - Decision on Claimant’s Request for Provisional Measures, 29 March 2017, ¶ 250 (RL-16) (“The Tribunal [...] certainly agrees that provisional measures are an “exceptional” remedy in any case, and that tribunals should be particularly cautious about granting such remedies where the context involves potential future State action in quintessentially sovereign areas, such as the enforcement of domestic criminal law.”).

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provisional measures potentially affecting criminal investigations only reluctantly and where there is an urgent need.

159. Such urgency and necessity as well as the other prerequisites can be proved by a preponderance of evidence, however.
160. In this regard, the Tribunal concurs with the standard expressed in *Caratube II* according to which “[...] the applicant’s burden of proof is that it must establish the requirements with sufficient likelihood, without however having to actually prove the facts underlying them.”<sup>147</sup>
161. Although the Tribunal has decided that the present situation does not warrant any shifting of the burden of proof and that the existence of the requirements for the grant of provisional measures must be proved with sufficient likelihood, it needs to point out that in regard to jurisdiction only *prima facie* proof is required since the question of jurisdiction will be decided by the Tribunal in detail at a later stage of this arbitration.

**E. PRIMA FACIE JURISDICTION**

162. The Respondent takes issue that the Claimant’s alleged ownership link with SL Mining in the form of 100% shareholding lacks any supportive evidence. Indeed, this is forcefully argued by Respondent, stating that “[d]espite the centrality of the issue, the Claimant has provided nothing beyond naked assertions to substantiate its alleged ownership”<sup>148</sup> and it was initially surprising to the Tribunal that the Claimant did not respond to these jurisdictional arguments in its Reply,<sup>149</sup> a fact which was also stressed by the Respondent in its Rejoinder.<sup>150</sup>

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<sup>147</sup> *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (II)*, ICSID Case No. ARB/13/13, Decision on the Claimants’ Request for Provisional Measures, 4 December 2014, ¶ 103 (CLA-51).

<sup>148</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 76.

<sup>149</sup> Claimant’s Reply on Provisional Measures, 8 June 2020.

<sup>150</sup> Respondent’s Rejoinder to Claimant’s Request for Provisional Measures, 15 June 2020, ¶¶ 59 *et seq.*

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163. Only in the Claimant’s letter dated 17 June 2020,<sup>151</sup> it was revealed that the Claimant’s silence on the matter was motivated by its seeking a confidentiality agreement with the Respondent on documents exchanged in the course of this arbitration which would include the documentation evidencing the Claimant’s ownership relationship to SL Mining. In this letter, the Claimant alleged a lack of cooperation on the part of the Respondent in reaching such a confidentiality agreement.
164. In its letter dated 19 June 2020,<sup>152</sup> the Respondent rejected this latter allegation and pointed out that the usual proof for corporate ownership would ordinarily be available even publicly, rendering a confidentiality agreement unnecessary. In any case, in the Respondent’s view such a confidentiality agreement could have been negotiated since the Claimant’s Notice of Intent, dated 14 July 2019, instead of in the middle of the provisional measures debate.
165. Following the Tribunal’s 23 June 2020 letter to the Parties, inviting the Claimant to produce the documents necessary to establish the Tribunal’s *prima facie* jurisdiction for purposes of ruling on the Request for Provisional Measures and ordering that these documents be considered as confidential by both Parties, the Claimant produced a number of corporate documents, aimed to demonstrate that “Gerald indirectly owns 100% of the shares in SL Mining, a company registered and incorporated in Sierra Leone.”<sup>153</sup>
166. On 30 June 2020, the Respondent commented on these documents, questioning their evidentiary value to demonstrate “that SL Mining is indirectly and wholly owned by Claimant”<sup>154</sup> since the documents purporting to show multiple corporate links between the

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<sup>151</sup> Claimant’s letter to the Tribunal, dated 17 June 2020.

<sup>152</sup> Respondent’s letter to the Tribunal, dated 19 June 2020.

<sup>153</sup> Claimant’s Letter to the Tribunal dated 25 June 2020, on the Submission of Confidential Documents, together with Factual Exhibits C-81 through C-92.

<sup>154</sup> Respondent’s Letter to the Tribunal, dated 30 June 2020, p. 1.

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Claimant and SL Mining were “[...] not crosschecked against the official Registry of Corporate Affairs to ensure their accuracy, correctness, and completeness.”<sup>155</sup>

167. The Parties are in agreement that in order to recommend provisional measures an ICSID tribunal must be satisfied that it has *prima facie* jurisdiction.<sup>156</sup>
168. The Tribunal considers that a determination whether or not *prima facie* jurisdiction exists should not anticipate a thorough analysis of potentially ensuing jurisdictional challenges by either Party. Rather, the Tribunal should satisfy itself that upon an initial analysis, *i.e.* “at first sight”/*prima facie*, it has jurisdiction. For this, it is necessary and sufficient that the facts alleged by the Claimant establish this jurisdiction without it being necessary or possible at this stage to verify them and analyse them in depth.<sup>157</sup>
169. The Tribunal agrees with the tribunal in *PNG v. Papua New Guinea* that “[t]he determination of the *prima facie* jurisdiction for provisional measures is a somewhat higher threshold than that to be applied at the registration stage, although it of course also falls short of a final decision on jurisdiction.”<sup>158</sup>
170. The exchange of submissions by the Parties demonstrates that among the jurisdictional requirements it is primarily the alleged ownership link between the Claimant and SL

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<sup>155</sup> Respondent’s Letter to the Tribunal, dated 30 June 2020, p. 2.

<sup>156</sup> Claimant’s Request for Provisional Measures, ¶ 84; Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 57; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶ 55 (CLA-34) (“Whilst the Tribunal need not definitely satisfy itself that it has jurisdiction in respect of the merits of the case at issue for purposes of ruling upon the requested provisional measures, it will not order such measures unless there is, *prima facie*, a basis upon which the Tribunal’s jurisdiction might be established.”). See also *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, ¶ 39 (CLA-36).

<sup>157</sup> *Millicom v. Senegal*, ICSID Case No. ARB/08/20, Decision on the Application for Provisional Measures, 9 December 2009, ¶ 42 (CLA-33).

<sup>158</sup> *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant’s Request for Provisional Measures, 21 January 2015, ¶ 119 (CLA-38).

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Mining that is questioned by the Respondent.<sup>159</sup> Since at this stage of the proceedings, the Respondent has not questioned other jurisdictional requirements, the Tribunal will focus on the question of the ownership link.

171. In the present case, the Claimant, a UK company, asserts that it indirectly wholly owns SL Mining, the company which allegedly suffered harm by the Respondent in violation of the BIT. The documents conveyed to the Tribunal by the Claimant indicate that through a chain of corporate entities SL Mining is indirectly owned by the Claimant.<sup>160</sup> While the Parties are in disagreement as to the evidentiary value of these documents,<sup>161</sup> they, at first sight, appear to confirm the ownership relations between the Claimant and SL Mining. Both the UK and Sierra Leone have been parties to the ICSID Convention since the mid-1960s.
172. On this basis, the jurisdictional requirements *ratione personae*, that the Claimant be a national of a party to the ICSID Convention and the Respondent also be a party to the ICSID Convention are *prima facie* equally fulfilled as is the *ratione materiae* requirement that the dispute concerns an investment. Similarly, the required consent to ICSID arbitration appears to be given on the basis of Article 8 of the UK - Sierra Leone BIT which entered into force in 2001.
173. This *prima facie* conclusion is without prejudice to a full review of the jurisdictional arguments of the Parties at the appropriate stage of this arbitration.

**F. NECESSITY, URGENCY AND PROPORTIONALITY**

174. Although not expressly laid down in Article 47 ICSID Convention or Rule 39 on provisional measures, ICSID tribunals generally accept that the circumstances that require such measures are necessity and urgency and that they have to pass a proportionality test.

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<sup>159</sup> Respondent’s Rejoinder to Claimant’s Request for Provisional Measures, 15 June 2020, ¶ 61 (“Claimant further admitted that to satisfy this jurisdictional requirement it must prove that it is the owner of SL Mining, as jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis* all hinge on the claimed ownership link between Gerald and SL Mining.”)

<sup>160</sup> Claimant’s Letter to the Tribunal, dated 25 June 2020.

<sup>161</sup> Respondent’s Letter to the Tribunal, dated 30 June 2020.

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It is also evident from the Parties’ submissions that they accept these requirements as a matter of principle,<sup>162</sup> although they disagree on whether they are fulfilled in the present case.

175. As stated by the tribunal in *Occidental v. Ecuador*, “in order for an international tribunal to grant provisional measures, there must exist both a right to be preserved and circumstances of necessity and urgency to avoid irreparable harm.”<sup>163</sup> And according to the tribunal in *Plama v. Bulgaria*, “[t]he need for provisional measures must be urgent and necessary to preserve the *status quo* or avoid the occurrence of irreparable harm or damage.”<sup>164</sup>
176. That provisional measures must be necessary follows from the wording of Article 47 which requires that a tribunal considers that “the circumstances so require.”<sup>165</sup> A provisional measure is “necessary” where the actions of a party “are capable of causing or of threatening irreparable prejudice to the rights invoked.”<sup>166</sup> While many tribunals determine necessity by ascertaining whether otherwise “irreparable harm” would be caused,<sup>167</sup> some

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<sup>162</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶¶ 108 *et seq.*; Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 3.

<sup>163</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, Decision on Provisional Measures, 17 August 2007, ¶ 61 (CLA-34); see also *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures, 6 April 2007, ¶ 32 (RL-4) (“It is common understanding that provisional measures should only be granted in situations of absolute necessity and urgency, in order to protect rights that could, absent these measures, be definitely lost.”).

<sup>164</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005, ¶ 38 (RL-3).

<sup>165</sup> *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7, 29 March 2017, ¶ 238 (RL-16).

<sup>166</sup> *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 3, 18 January 2005, ¶ 8 (RL-2) (“The international jurisprudence on provisional measures indicates that a provisional measure is necessary where the actions of a party “are capable of causing or of threatening irreparable prejudice to the rights invoked.”); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005, ¶ 33 (RL-3) (both citing *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Request for the Indication of Interim Measures of Protection, Order, 11 September 1976, 15 ILM 985, 997 (1976) (Separate Opinion of President Jiménez de Aréchaga)).

<sup>167</sup> See *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters, 13 May 2008, ¶ 72 (CLA-19); *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures, 6 April 2007, ¶ 33 (RL-4); *Plama Consortium Limited v.*

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are content with “serious or significant harm.”<sup>168</sup> In this respect, this Tribunal concurs with the tribunal in *PNG v. Papua New Guinea* that found that “[t]he proper requirement is that the requesting party must establish the existence of a sufficient risk or threat that grave or serious harm will occur if provisional measures are not granted.”<sup>169</sup>

177. In any event, the measures must be capable of averting the harm expected which would otherwise materialize with a high likelihood.<sup>170</sup>
178. Provisional measures are “urgent” when the party requesting the measures would otherwise suffer imminent harm<sup>171</sup> or at least harm that would arise before the award is rendered.<sup>172</sup>
179. The Tribunal also agrees that the urgency of a request may depend, among others, on the type of measures requested<sup>173</sup> which, in turn, implies that measures aimed at the procedural

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*Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005, ¶ 38 (**RL-3**); *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, ¶ 59 (**CLA-34**).

<sup>168</sup> *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant’s Request for Provisional Measures, 21 January 2015, ¶ 109 (**CLA-38**) (“In the Tribunal’s view, the term ‘irreparable’ harm is properly understood as requiring a showing of a material risk of serious or grave damage to the requesting party, and not harm that is literally ‘irreparable’ in what is sometimes regarded as the narrow common law sense of the term.”).

<sup>169</sup> *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant’s Request for Provisional Measures, 21 January 2015, ¶ 111 (**CLA-38**).

<sup>170</sup> Claimant’s Request on Provisional Measures, ¶ 108 (referring to *United Utilities (Tallinn) B.V. et al. v. Republic of Estonia*, ICSID Case No. ARB/14/24, Decision on Provisional Measures, 12 May 2016, ¶ 100 (**CLA-46**) (noting that “[a] tribunal’s ‘necessity’ inquiry focuses on the nature and extent of the harm which is likely to occur to the applicant in the event that the provisional measures sought are not granted.”).

<sup>171</sup> *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, ¶ 89 (**CLA-34**) (“Provisional measures are not meant to protect against any potential or hypothetical harm susceptible to result from uncertain actions. Rather they are meant to protect the requesting party from imminent harm.”).

<sup>172</sup> *Azurix v. Argentina*, Decision on Provisional Measures, 6 August 2003, ¶ 33 (“Given that the purpose of the measures is to preserve the rights of the parties, the urgency is related to the imminent possibility that the rights of a party be prejudiced before the tribunal has rendered its award.”); *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 3, 18 January 2005, ¶ 8 (**RL-2**) (“A measure is urgent where ‘action prejudicial to the rights of either party is likely to be taken before such final decision is taken.’”).

<sup>173</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Procedural Order No. 1, 31 March 2006, ¶ 76 (“[...] the degree of ‘urgency’ which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measure at a certain point in the procedure before the issuance of an award. In most situations, this will equate to ‘urgency’ in the traditional sense (*i.e.* a need for a measure in a short space of time). In some cases,



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integrity of ICSID proceedings are particularly likely to be urgent since they need to be preserved during the pendency of a claim.<sup>174</sup>

180. The Parties agree on the requirements of necessity and urgency as a matter of principle. However, they interpret the specific levels of necessity and urgency differently and they disagree on whether they are fulfilled in the present case. Since these questions are directly related to the issue of the specific rights sought to be protected the Tribunal will address these issues below.
181. The Parties are also in agreement that the requested measures need to be proportional,<sup>175</sup> a requirement that is sometimes considered to be inherent in “necessity”<sup>176</sup> and sometimes considered to be closely linked to “urgency.”<sup>177</sup>
182. In the context of provisional measures aimed at domestic criminal proceedings, the tribunal in *Quiborax v. Bolivia* aptly stated that proportionality requires that an arbitral tribunal “must thus balance the harm caused to Claimants by the criminal proceedings and the harm

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however, the only time constraint is that the measure be granted before an award – even if the grant is to be some time hence. The Arbitral Tribunal also considers that the level of urgency required depends on the type of measure which is requested.”).

<sup>174</sup> *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplan v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 153 (**CLA-39**) (“[...] if measures are intended to protect the procedural integrity of the arbitration, in particular with respect to access to or integrity of the evidence, they are urgent by definition. Indeed, the question of whether a Party has the opportunity to present its case or rely on the integrity of specific evidence is essential to (and therefore cannot await) the rendering of an award on the merits.”); *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7, 29 March 2017, ¶ 241 (**RL-16**) (“[...] the requirement of urgency inherently is met where relief is needed to preserve the integrity of the arbitration.”).

<sup>175</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶¶ 135 *et seq.*; Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶¶ 130 *et seq.*

<sup>176</sup> *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplan v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 158 (**CLA-39**) (“[...] the necessity requirement requires the Tribunal to consider the proportionality of the requested provisional measures.”).

<sup>177</sup> *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant’s Request for Provisional Measures, 21 January 2015, ¶ 117 (**RL-11**) (“The Tribunal will assess urgency taking into account the entirety of the circumstances of the case, and will take into account both the seriousness of the harm and the balance of injuries that would be suffered by both parties if provisional measures are (or are not) ordered.”).



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that would be caused to Respondent if the proceedings were stayed or terminated.”<sup>178</sup> Such a balancing exercise takes into account, among others, the relative importance of the respective rights and interests affected, the existence of exceptional circumstances, the good faith of the parties, the specificity of the requests, etc.

183. These questions are also related to the specific rights sought to be protected by the request for provisional measures. Thus, the Tribunal will address them below as well.

**G. RIGHTS TO BE PROTECTED**

184. According to Article 47 ICSID Convention, the main explicit purpose of provisional measures is the preservation of “the respective rights of either party.”<sup>179</sup> Thus, such measures must be necessary in order to preserve rights the protection of which is being sought in proceedings brought on the merits.

185. As already noted, however, the Parties do not disagree that provisional measures may also serve to protect certain procedural rights of the Parties, such as the right to ensure that a fair procedure before this Tribunal is not made impossible. This entails, in particular, the applicant’s “right to freely present its case before this Tribunal [...] the right to gather and present documents, and to identify and present witnesses.”<sup>180</sup>

186. The Respondent disputes, however, that the police investigations and any eventual criminal proceedings threaten any procedural rights of the Claimant or would aggravate the dispute.<sup>181</sup>

187. The Claimant’s requests for interim relief focus on measures securing its procedural rights in the present ICSID proceedings, not rights the protection of which are being sought in these proceedings on the merits.

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<sup>178</sup> *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplan v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 158 (CLA-39).

<sup>179</sup> Article 47 ICSID Convention.

<sup>180</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 80.

<sup>181</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 82.

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188. The Tribunal thus has to assess whether the specific orders requested by the Claimant serve the protection of its procedural rights.
189. In its 19 May 2020 Request, The Claimant asked the Tribunal, as interim provisional measures, to order “Sierra Leone to take all actions necessary to immediately release from detention and to return to the Marampa mine site” its five employees then held in custody by the Respondent’s police, as well as the suspension of criminal investigations and/or proceedings against them, and to “return to SL Mining all documents, data and equipment seized on 13 May 2020 from the Marampa mine site.”<sup>182</sup>
190. The Claimant further requested the Tribunal to recommend, among others, the following provisional measures “for the duration of the proceeding”: to order “Sierra Leone to refrain from engaging in any conduct that may directly or indirectly affect (or otherwise jeopardise) the legal or physical integrity of any directors, shareholders, representatives, or employees of Gerald or SL Mining,” and “to refrain from any further seizure or interference with Gerald’s or SL Mining’s assets (including its equipment, stockpiles of iron ore or documents, whether at the Marampa mine site or elsewhere), or its legal rights in Sierra Leone, including with respect to the Marampa mine and the land on which it is situated, and to allow SL Mining’s employees (including all security staff) to operate from and base themselves at the Marampa mine site;” as well as “to refrain from taking any step, action (judicial or otherwise) or other measures that would interfere with Gerald’s investments, alter the *status quo ante*, aggravate the dispute or threaten the integrity of the proceeding, or render ineffective any relief that this Tribunal ultimately may award.”<sup>183</sup>
191. In its 8 June 2020 Reply, after the release on bail of the five SL Mining employees arrested in May 2020, the Claimant further requested that the Respondent be ordered to change their bail conditions<sup>184</sup> and to release a sixth SL Mining employee from detention and police

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<sup>182</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 144.3.

<sup>183</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 146.

<sup>184</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 108.1.

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custody in order to allow all SL Mining employees to return to the Marampa mine site.<sup>185</sup> In its Reply the Claimant no longer requested the return of “data and equipment”, but confined itself to requesting the return of “documents” seized on 13 May 2020.<sup>186</sup>

192. Following the release from detention and police custody of the sixth SL Mining employee on 15 June 2020, as well as of a seventh one (subsequently detained) in early July 2020, the Claimant focused its request on ordering a change to their bail conditions which prevented them all from returning to the Marampa mine site.
193. These requests broadly fall into three categories: first, those that relate to the criminal investigations/proceedings directed against SL Mining employees, second, those that relate to documents seized in the course of such investigations, though initially also including mining equipment and proceeds, and, third, those that concern general duties of the parties not to aggravate a dispute.

**(1) Criminal Investigations against and Treatment of SL Mining Personnel**

194. The Claimant’s request to order “Sierra Leone to take all actions necessary to immediately release from detention and to return to the Marampa mine site” its employees primarily seeks to ensure their physical integrity. It is not directly related to preserve the Claimant’s rights except to the extent that it is argued that the criminal investigations hamper its right to present its case before this Tribunal and that the presence of the personnel at the mine site is required in order to protect the latter.
195. Criminal investigations as such do not render the Claimant’s right to freely present its case impossible.

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<sup>185</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 108.2.

<sup>186</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 108.4.

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196. However, it is also clear that criminal investigations initiated as a retaliation for bringing an investment case, or with a view to intimidating and harassing potential witnesses of a Party may give rise to a situation where provisional measures are exceptionally warranted.
197. Indeed, investment tribunals have found that host State criminal proceedings initiated because of the institution of investment proceedings,<sup>187</sup> or in bad faith or maliciously,<sup>188</sup> or for the purpose of obtaining an unfair advantage in the arbitration, *e.g.* by obtaining evidence<sup>189</sup> or by intimidating and harassing potential witnesses,<sup>190</sup> may constitute such exceptional situations.
198. This is also acknowledged by the Respondent, arguing that “[t]he requesting party bears the burden of proving the existence of exceptional circumstances that would justify the relief it seeks” and “that the exceptional circumstances that justify these kinds of provisional measures are bad faith or a violation of rights.”<sup>191</sup> The Respondent also does not dispute that criminal proceedings in Sierra Leone might discourage potential witnesses from giving evidence. It expressly “acknowledges that Claimant has a right to freely present its case before this Tribunal [which] includes the right [...] to identify and present

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<sup>187</sup> *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplan v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 121 (**CLA-39**) (“[T]he evidence in the record suggests that the criminal proceedings were initiated as a result of a corporate audit that targeted Claimants because they had initiated this arbitration. [...]”).

<sup>188</sup> *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Claimants’ Request for Provisional Measures, 30 April 2015, ¶ 209 (**RL-13**) (“What is required is, however many inspections have occurred, that there is some malicious intent on the part of the Respondent (namely, that the inspections are used to put improper pressure on the Claimants).”).

<sup>189</sup> *Ipek Investment Limited v. Republic of Turkey*, ICSID Case No. ARB/18/18, Procedural Order No. 5 (Claimant’s Request for Provisional Measures), 19 September 2019, ¶ 67 (**CLA-28**) (“the Tribunal is concerned that the continued pursuit of the criminal process against the Targeted Individuals hereafter will prejudice the equality of the Parties by enabling the Respondent to obtain testimony and other evidence from the Claimant’s witnesses under compulsion of internal law.”).

<sup>190</sup> *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No ARB/12/14 and 12/40, Procedural Order No. 14, 22 December 2014, ¶ 72 (**CLA-17**) (“[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.”).

<sup>191</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 56; Respondent’s Rejoinder to Claimant’s Request for Provisional Measures, 15 June 2020, ¶ 55.

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witnesses.”<sup>192</sup> Rather, the Respondent maintains that “the allegation that other potential witnesses could be discouraged by the ongoing criminal investigation is highly speculative.”<sup>193</sup>

199. The Tribunal notes that the Claimant repeatedly insinuates that the criminal investigations have been instituted on spurious grounds and were meant to target and intimidate SL Mining employees.<sup>194</sup>
200. The Tribunal is seriously concerned about the temporal coincidence of the criminal investigations with the beginning of the present ICSID proceedings. It is further troubled by the unclear connection between the youth riots in Lunsar, a village near the SL Mining complex at the Marampa mine site, in late April 2020 and the role of the SL Mining employees arrested on 13 May 2020 as well as on subsequent dates “on suspicion of inciting riots that have resulted in the deaths of a number of people.”<sup>195</sup>
201. The Tribunal also notes, however, that it appears that no formal challenge in regard to the arrests’ and the investigations’ legality has been made by any of the SL Mining employees. The Tribunal is aware of the Claimant’s argument that the police investigations including the arrests had been unlawful for failure to show a “reasonable suspicion”<sup>196</sup> and that because the SL Mining employees were concerned about retaliatory action they considered challenging their imprisonment/bail conditions “not a viable option.”<sup>197</sup> Nevertheless, it is not for this arbitral tribunal to provide relief for allegedly unlawful investigations, arrests and bail conditions. This is a matter that must be pursued in the national legal system of the Respondent state. The Tribunal notes in this context that the credible witness testimony

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<sup>192</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 80.

<sup>193</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 86.

<sup>194</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 94; Claimant’s Reply on Provisional Measures, 8 June 2020, ¶¶ 55 *et seq.*

<sup>195</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 31.

<sup>196</sup> Claimant’s Letter to the Tribunal, dated 13 July 2020, p. 2.

<sup>197</sup> Claimant’s Letter to the Tribunal dated 13 July 2020, p. 3

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by the Respondent’s witness, Mr. Fisher, to the effect that the law of Sierra Leone provides legal remedies,<sup>198</sup> has not been challenged by the Claimant.

202. The Arbitral Tribunal also notes that there is no evidence at this time that the investigations were initiated in bad faith or by way of retaliation. Although the timing as well as the cause of the investigations may raise questions, it is clear that a State must be able to resort to its criminal justice system in order to investigate occurrences of violent crimes.
203. Balancing the interests of the Respondent in exercising its sovereign right to conduct criminal investigations aimed at examining the causes of and identifying those responsible for the unrest in late April/early May 2020 and those of the Claimant in seeking to shield its employees from the potential abuse of such investigations shows that ordering “Sierra Leone to take all actions necessary to immediately suspend the criminal investigations and/or proceedings” would intrude too far into the rights of a State to enforce its criminal law.
204. It is clear that States have to conduct criminal investigations in accordance with their own law and respecting fundamental rights of the accused. It is also clear that in regard to potential witnesses in ICSID proceedings, “[t]he immunity granted by Art. 21 and 22 [ICSID Convention] is applicable without a specific order of an ICSID Tribunal.”<sup>199</sup> An additional and even broader immunization of persons “from the normal operation of the criminal law”<sup>200</sup> would in the current circumstances be too broad and thus disproportionately interfere with the Respondent’s sovereign rights.

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<sup>198</sup> Witness Statement of Adrian J. Fisher, dated 15 June 2020.

<sup>199</sup> *Caratube International Oil Company LLP v Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012, ¶ 62 (quoting an Order of 19 October 2010, ¶ 5.1).

<sup>200</sup> *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, ¶ 152 (RL-9). (“[...] association with the management of a foreign investor or a foreign investment cannot serve to immunize individuals from the normal operation of the criminal law.”).

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205. The Claimant also requests the Tribunal to order the Respondent “to take all actions necessary to immediately [...] change the bail conditions for [its employees], so that they are allowed to return to the Marampa mine site [...].”<sup>201</sup>
206. This is a more focused request that arguably links the criminal proceedings to the investment, its protection and ultimately the current ICSID proceedings. Thus, the Tribunal asked the Parties why those SL Mining employees who had been released on bail were not permitted to return to the Marampa site.<sup>202</sup>
207. The Claimant repeatedly stressed that the presence of the SL Mining employees would contribute to the security of the mine, since a number of them were security staff, as well as to reducing their own health risk in the exceptional Covid-19 pandemic situation.<sup>203</sup>
208. While not directly responding to this question because of the pending investigations, the Respondent suggests that persons suspected of having committed offenses of incitement, are often restricted in their ability to return to places where the incitement activities allegedly took place.<sup>204</sup>
209. While this is an understandable policy, it also appears that it could be equally well pursued by fashioning the bail conditions in a way that allowed the SL Mining employees to return to the Marampa mine in order to ensure the safety of the investment, while at the same time restricting their abode to the mine which is located a few miles away from the village where the investigated crimes took place.
210. Therefore, the Tribunal urges Sierra Leone to convey its considerations to the competent authorities which have to decide on the bail conditions so that they can seriously consider adapting the current bail conditions with a view to allowing the Claimant’s employees to

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<sup>201</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 108.1.

<sup>202</sup> Tribunal Letter to the Parties, dated 8 July 2020.

<sup>203</sup> Claimant’s Letter to the Tribunal, dated 25 May 2020; Claimant’s Request for Provisional Measures, 19 May 2020, ¶¶ 52-53.

<sup>204</sup> Respondent’s Letter to the Tribunal, dated 13 July 2020, p. 3. (“[...] as a general matter, in the case of a person suspected of having committed the offense of incitement, it is not uncommon to restrict, as a condition on bail, that person’s ability to return to the location where the incitement activities allegedly took place.”).

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return to the Marampa mine site. It would appear to the Tribunal that such a course of action would not interfere with Sierra Leone’s sovereign rights to pursue its criminal investigations, while taking into account the legitimate concerns of the Claimant for the safety and security of its employees and its investment.

**(2) Documents seized**

211. The Claimant further requests the Tribunal to order “Sierra Leone to return to SL Mining all documents seized on 13 May 2020.”<sup>205</sup> The potential impairment of the Claimant’s procedural rights appears evident in the case of documents that might have been removed or destroyed as a result of the seizure. In fact, the Claimant specifically invokes “the right to preserve and protect documentary evidence, including from unlawful seizure and destruction”<sup>206</sup> and the Respondent expressly “acknowledges that the Claimant has a right to freely present its case before this Tribunal. This includes the right to gather and present documents [...]”<sup>207</sup>
212. As the tribunal in *Biwater Gauff v. Tanzania* put it, “necessity and urgency are present where a Respondent fails to take steps to preserve or to provide documentation relevant to a Claimant’s case, or in circumstances where there is a risk of loss or destruction of such documentation.”<sup>208</sup>
213. There is no evidence at this time that the documents allegedly seized by police forces are in danger of being lost or destroyed or would otherwise not be available to the Claimant. The Respondent does not deny that some documents have been seized, but confirms that they will remain intact and available in the present proceedings.<sup>209</sup> In the face of such an

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<sup>205</sup> Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 108.4.

<sup>206</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 96.

<sup>207</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 80.

<sup>208</sup> *Biwater Gauff (Tanzania) v. Ltd. v. United Republic of Tanzania*, Procedural Order No. 1, 31 March 2006, ¶ 30.

<sup>209</sup> Respondent’s Response and Objection to Claimant’s Request for Provisional Measures, 28 May 2020, ¶ 112 (“For the avoidance of doubt, Sierra Leone reiterates that it will not engage in the destruction of documents in contravention of its obligations as a Party in these proceedings.”).



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explicit commitment, the Tribunal sees no need for ordering the return of the documents. Rather, the Claimant can rely on this specific undertaking by the Respondent.

214. In addition, it remains unclear to what extent the allegedly seized documents are relevant to the proceedings. Some of the documents mentioned by the Claimant do not evidently demonstrate such relevance. In order to remove such doubts the Tribunal will order the Respondent to detail the documents seized, to make a full copy of them, to preserve the originals and to make the copies available to the Claimant and the Tribunal.
215. In case the seized documents were no longer available in the course of these ICSID proceedings, the Tribunal would be entitled to eventually draw adverse inferences.

**(3) Aggravation of the Dispute**

216. The Parties do not dispute that the non-aggravation of a dispute is a general duty of parties to any ICSID proceedings<sup>210</sup> and that such end may be supported by ordering interim measures.
217. A dispute may escalate in various forms. As mentioned above, this could also arise from intimidating and harassing potential witnesses.
218. However, it is also clear that the institution of criminal investigations that relate to an investment, even during the pendency of an investment dispute do not automatically aggravate such dispute.<sup>211</sup>

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<sup>210</sup> *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision regarding Claimant’s Application for Provisional Measures, 31 July 2009, ¶ 120 (**CLA-12**) (“[...] the Tribunal confirms that the Parties have an obligation to conduct the procedure in good faith and that this obligation includes a duty to avoid any unnecessary aggravation of the dispute and harassment of the other party.”).

<sup>211</sup> *Lao Holdings N.V. v. The Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order, 30 May 2014, ¶ 30 (**RL-10**) (“a criminal proceeding does not *per se* [...] aggravate the dispute. Something more has to be at stake to justify a tribunal enjoining a State to suspend or defer a criminal investigation.”).

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219. The Tribunal is further concerned about the breadth of the Claimant’s request which generally seeks interim relief ordering the Respondent “to refrain from taking any step, action (judicial or otherwise) or other measures that would interfere with Gerald’s investments, alter the *status quo ante*, aggravate the dispute or threaten the integrity of the proceeding, or render ineffective any relief that this Tribunal ultimately may award,”<sup>212</sup> and “to refrain from engaging in any conduct that may directly or indirectly affect (or otherwise jeopardise) the legal or physical integrity of any directors, shareholders, representatives, or employees of Gerald or SL Mining”,<sup>213</sup> beyond the more specific requests concerning specific SL Mining employees addressed above.<sup>214</sup>
220. The Tribunal considers that such requests are too broad to permit the Tribunal to assess the risk of serious harm that could materialize absent the Tribunal’s order or to establish whether there is necessity and urgency for such an order in light of that risk.<sup>215</sup>
221. Nevertheless, the Tribunal considers it pertinent to remind the Parties of their continuing obligation to act in good faith during these proceedings and to refrain from taking any action that could affect the integrity of the arbitration or aggravate the dispute.<sup>216</sup>

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<sup>212</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 146; Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 110.

<sup>213</sup> Claimant’s Request for Provisional Measures, 19 May 2020, ¶ 146; Claimant’s Reply on Provisional Measures, 8 June 2020, ¶ 110.

<sup>214</sup> See above ¶¶ 187 *et seq.*

<sup>215</sup> See also *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant’s Request for Provisional Measures, 21 January 2015, ¶ 151 (**RL-11**).

<sup>216</sup> See also *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (II)*, ICSID Case No. ARB/13/13, Decision on the Claimants’ Request for Provisional Measures, 4 December 2014, ¶ 121 (**CLA-51**) (“[The] Tribunal nevertheless stresses, as a general and abstract advice to all Parties, that they have a general duty, arising from the principle of good faith, not to take any action that may aggravate the dispute or affect the integrity of the arbitration.”); *OOO Manolium-Processing v. The Republic of Belarus*, PCA Case No. 2018-06, Decision on Claimant’s Interim Measures Request, 7 December 2018, ¶ 152 (**RL-18**) (“Considering that the duty to not aggravate the dispute is a general duty implicit in the arbitral process, the Tribunal does not consider it necessary to make a specific order in this regard.”).

**H. CONCLUDING OBSERVATIONS**

222. The Tribunal wishes to stress that its decision on Claimant’s requests is based on an assessment of the facts at present. If circumstances arise which the Claimant considers impede the arbitration in any way or prevent the Claimant from presenting its case, the Claimant may submit a new application for provisional measures.<sup>217</sup>
223. At the same time, the Claimant is reminded of the Tribunal’s view that legal remedies in regard to criminal investigations and bail conditions are primarily to be sought in the domestic legal order.
224. This does, of course, not absolve the Parties from their duty to act in good faith and to refrain from taking any measures that could affect the integrity of this arbitration or aggravate the dispute.
225. Therefore, the Tribunal reaffirms its readiness to reassess the situation if warranted.

**VI. DECISION**

226. Based on the above analysis, the Tribunal decides as follows:
- 1) The Claimant’s request to order “Sierra Leone to take all actions necessary to immediately suspend the criminal investigations and/or proceedings” is rejected.
  - 2) The Claimant’s request to order Sierra Leone “to take all actions necessary to immediately [...] change the bail conditions for [its employees], so that they are allowed to return to the Marampa mine site” is equally rejected.
  - 3) However, given the legitimate concerns of the Claimant for the safety and security of its employees and its investment, the Tribunal urges Sierra Leone to convey to the authorities competent to decide on the bail conditions the Tribunal’s views in

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<sup>217</sup> See also *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Claimants’ Request for Provisional Measures, 30 April 2015, ¶ 230 (RL-13).

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order to consider adapting the current bail conditions so as to allow the Claimant’s employees to return to the Marampa mine site.

- 4) The Claimant’s request to order “Sierra Leone to return to SL Mining all documents seized on 13 May 2020” is rejected.
- 5) However, the Tribunal specifically notes the Respondent’s confirmation that the seized documents will remain intact and available in the present proceedings.
- 6) Furthermore, the Tribunal requests the Respondent to detail the documents seized, to make a full copy of them, to preserve the originals and to make the copies available to the Claimant and the Tribunal by 15 August 2020.
- 7) The Claimant’s requests to order Respondent “to refrain from engaging in any conduct that may directly or indirectly affect (or otherwise jeopardise) the legal or physical integrity of any directors, shareholders, representatives, or employees of Gerald or SL Mining” as well as “to refrain from taking any step, action (judicial or otherwise) or other measures that would interfere with Gerald’s investments, alter the *status quo ante*, aggravate the dispute or threaten the integrity of the proceeding, or render ineffective any relief that this Tribunal ultimately may award” are rejected.
- 8) The Parties are reminded of their continuing duty to act in good faith during these proceedings and to refrain from taking any action that could affect the integrity of the arbitration or aggravate the dispute.
- 9) The Tribunal reserves its decision on the costs of the procedure relating to the Claimant’s Request for Provisional Measures to a later stage of this arbitration.

On behalf of the Tribunal

[*Signed*]

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Prof. Dr. August Reinisch  
President of the Tribunal  
Date: 28 July 2020