

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**Churchill Mining PLC v. Republic of Indonesia
(ICSID Case No. ARB/12/14)**

PROCEDURAL ORDER NO. 3

Provisional Measures

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Mr. Michael Hwang S.C., Arbitrator
Professor Albert Jan van den Berg, Arbitrator

Secretary of the Tribunal

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I. Factual and Procedural Background

1. The present order deals with a Request for Provisional Measures (the “Request”) filed by the Republic of Indonesia (the “Respondent”) on 22 November 2012, by which the Respondent requested that the Tribunal:
 - a. Order the Claimant to refrain from making false, unfounded and misleading statements in the media regarding the case at hand; and
 - b. Order the Claimant to refrain from approaching and/or persuading and/or inducing any officials [of] the Government of the Republic of Indonesia [to enter into] any “amicable” settlement outside the present arbitration proceedings.¹
2. In its Reply to Claimant’s Response to Request for Provisional Measures (the “Reply”), which was dispatched to the Tribunal on 7 January 2013, the Respondent reiterated its request for the same measures to be ordered by the Tribunal.²
3. Churchill Mining PLC (the “Claimant”) has objected to the Request and has asked the Tribunal to:
 - a. Reject the Respondent’s Request for Provisional Measures; and
 - b. Direct the Respondent to pay all the Claimant’s costs and expenses of responding to this Request.³
4. The dispute giving rise to this arbitration originates from the alleged revocation on 4 May 2010 of four mining licenses by the Respondent. After various unsuccessful attempts to settle the dispute, the Claimant filed a Request for Arbitration with the International Centre for Investment Disputes (the “Centre” or “ICSID”) on 22 May 2012.
5. In the Request, the Respondent asked for two distinct orders. Regarding the first order, the Respondent claims that the Claimant has uttered in the press on various occasions false statements that could antagonize potential investors and jeopardize the

¹ Respondent’s Request, pp. 7-8.

² Respondent’s Reply, p. 10.

³ Claimant’s Response, ¶ 32; Claimant’s Rejoinder, ¶ 24.

Respondent's "right to welcome foreign investors to invest in its territory".⁴ In connection with the second order requested, the Respondent claims that it has a right to be free from pressure in handling the present dispute and asks the Tribunal to recommend that the Claimant "refrain from approaching and/or persuading and/or inducing any officials of the Government of the Republic of Indonesia to settle this dispute outside the present arbitration proceedings".⁵

6. The Tribunal held its first session on 27 November 2012 by video link. During that session, the Tribunal and the Parties discussed the briefing schedule for the Request which was later reflected in Procedural Order No. 1 as follows:

(1) The Claimant shall file a Response to the Request for Provisional Measures by 17 December 2012;

(2) The Respondent shall file a Reply by 7 January 2013; and

(3) The Claimant shall file a Rejoinder by 21 January 2013.

7. In accordance with this schedule, on 17 December 2012, the Claimant filed its Response to the Request. On 7 January 2013, the Respondent filed its Reply and on 21 January 2013, the Claimant submitted its Rejoinder.

II. Position of the Parties

1. Position of the Respondent

8. In its Request, the Respondent starts by indicating that Article 47 of the ICSID Convention and Article 39 of the ICSID Arbitration Rules grant the Tribunal the authority to recommend provisional measures, with or without the consent of the parties, if the Tribunal deems it necessary to preserve either party's rights.⁶

9. With respect to the order requested, the Respondent asserts that the "Claimant must be estopped from making false, unfounded, and misleading statements to the media".⁷

⁴ Respondent's Request, ¶ 13.

⁵ Respondent's Request, ¶ 17.

⁶ Respondent's Request, ¶ 1.

⁷ Respondent's Request, ¶ 4.

According to the Respondent, Churchill Mining PLC consistently made false publications through several media agencies with regard to the facts that form the basis of the present proceedings.

10. First, the Respondent contends that the Claimant has consistently tried to convey the impression that it was the owner of shares in the Ridlatama Companies,⁸ notwithstanding the fact that the Ridlatama Companies are disputing this allegation. The Respondent cites as example an excerpt of an article published by Reuters on 12 April 2012.⁹ According to the Respondent, “the Claimant took a vigorous act in the media in its effort to gain a public opinion that it had indeed (*quod non*) purchased and became the legitimate owner of a portion of shares in Ridlatama Companies”.¹⁰
11. Second, the Respondent complains that on various occasions the Claimant has made statements in the press that may create the impression that the investment climate in Indonesia is deteriorating. The Respondent cites six excerpts from press releases, in which the chairman of Churchill Mining PLC, Mr. David Quinlivan, is quoted making statements which “may jeopardize the Respondent’s right to foreign investment”.
12. As a first example, the Respondent quotes an excerpt from the Reuters publication of 12 April 2012 referred to above, in which Mr. Quinlivan states that the ICSID case is directed against the Republic of Indonesia “which allowed our licenses to be revoked in what we say is an unfair and improper manner”.¹¹ In its second example, the Respondent cites another excerpt from the same press release where Mr. Quinlivan expresses the opinion that “[w]hat’s happened to Churchill would be akin to somebody in the UK coming along and taking the title-deeds to all the houses that all the Indonesians have invested in London”.¹² In the third excerpt, from the same Reuters publication, Mr. Quinlivan advises foreign investors to “tread very carefully” when

⁸ The Ridlatama Companies are comprised of PT Ridlatama Trade Powerindo (“PT RTP”), PT Ridlatama Tambang Mineral (“PT RTM”), PT Investmine Nusa Persada (“PT INP”), and PT Investama Resources (“PT IR”).

⁹ Respondent’s Request, ¶ 5, Excerpt No. 1; **Exh. R-RPM-1**.

¹⁰ Respondent’s Request, ¶ 8.

¹¹ Respondent’s Request, ¶ 9, Excerpt No. 2; **Exh. R-RPM-1**.

¹² Respondent’s Request, ¶ 9, Excerpt No. 3; **Exh. R-RPM-1**.

investing in Indonesia, and indicates that he would “probably say no” to investing there “given recent developments”.¹³

13. As a fourth example, the Respondent refers to a press release published by Stockmarketwire.com on 23 May 2012, in which Mr. Quinlivan asserts that “[a]t all levels there seems to be a lack of support from Indonesia with regard to our contentions”.¹⁴ In its fifth example, the Respondent relies on a press release from Minesite.com published on 15 June 2012, which quotes Mr. Quinlivan saying that “[a]s long as you are spending money and finding nothing, the attitude is very good [...] but, once you find something, well-connected people decide they want a share”.¹⁵ Finally, the Respondent mentions an article published on 6 June 2012 in the New York Times, which quotes Mr. Quinlivan asserting that the “Indonesian business people have seen the huge amount of money foreign owners of mining projects have made and stand to make in the future, and they’d like to take it away from them”.¹⁶
14. According to the Respondent, the fact that such statements have been made through international media agencies “only exacerbates” the Respondent’s situation because prospective foreign investors could be unduly influenced by such statements. Besides qualifying such statements as “a mere expression of angst”, the Respondent claims that such false statements go beyond stating facts “all the way to condemning the Republic of Indonesia”.¹⁷
15. Finally, the Respondent submits that it has a “right to welcome foreign investors to invest in its territory”, and that such press statements could “jeopardize the Respondent’s right to foreign investment” and thus potentially severely impact its economy.¹⁸

¹³ Respondent’s Request, ¶ 9, Excerpt No. 4; **Exh. R-RPM-1**.

¹⁴ Respondent’s Request, ¶ 9, Excerpt No. 5; **Exh. R-RPM-3**.

¹⁵ Respondent’s Request, ¶ 9, Excerpt No. 6; **Exh. R-RPM-4**.

¹⁶ Respondent’s Request, ¶ 9, Excerpt No. 7; **Exh. R-RPM-5**.

¹⁷ Respondent’s Request, ¶ 10.

¹⁸ Respondent’s Request, ¶ 13.

16. For all these reasons, Indonesia asks the Tribunal to recommend provisional measures “prohibiting the Claimant to make any further false, unfounded and misleading statement to the media”.¹⁹
17. With respect to the second order which it seeks, the Respondent complains of the Claimant’s attempts to approach government officials in order to settle the present dispute. It explains that these attempts have “caused a lot of disturbances to the authorized representatives of the Respondent” due to pressures coming from fellow officials that have been approached by the Claimant.²⁰
18. Because it considers that it has a right to handle this case in an orderly manner free from any external pressure,²¹ the Respondent asks the Tribunal “to render a procedural recommendation for the Claimant to refrain from approaching and/or persuading and/or inducing any officials of the Government of the Republic of Indonesia to settle this dispute outside the present arbitration proceedings”.²²
19. In its Reply to the Claimant’s Response, the Respondent starts by noting that, although the ICSID Convention and the ICSID Arbitration Rules do not specify which rights deserve protection by way of provisional measures, the objective of such measures is to (i) preserve the parties’ rights; (ii) prevent self-help; and (iii) keep the peace as a general matter.²³ By engaging in “false, unfounded and misleading campaigns” and approaching officials of the Indonesian government in order to exert pressure to settle the dispute outside of the present proceedings, the Claimant engages – so the Respondent says – in self-help which justifies the provisional measures sought by the Respondent.²⁴
20. Regarding the first order sought, the Respondent reiterates that the Claimant has made “false, unfounded and misleading statements” in the press, and cites an article published on 1 November 2012 in the Wall Street Journal,²⁵ which allegedly confirms

¹⁹ Respondent’s Request, ¶ 14.

²⁰ Respondent’s Request, ¶ 15.

²¹ Respondent’s Request, ¶ 16.

²² Respondent’s Request, ¶ 17.

²³ Reply, ¶ 4.

²⁴ Reply, ¶ 7.

²⁵ Reply, ¶¶ 8-9. The Wall Street Journal article is entitled “Clouds Gather Over Indonesia – Investors Fear That Contract Disputes, Nationalism Will Curb Access to Natural Resources”, 1 November 2012, Wall Street Journal, Business & Finance Section, p. 17; **Exh. R-RPM-7**.

the Respondent's fears that such statements jeopardize the Respondent's "rights to regulate and promote investments in its natural resources, and to enforce regulations on investments in its natural resources".²⁶

21. In particular, the Respondent repeats that the Claimant cannot be the holder of mining licenses, because such licenses can only be held by Indonesian nationals.²⁷ It also rebuts the accusation that its actions represent "a wholesale, blatant land grab" as could be read in some press releases.²⁸
22. Finally, Indonesia asserts that these false, unfounded and misleading statements "are harmful and the damages caused by them are irreparable".²⁹
23. Regarding the second order sought, the Respondent submits that the Claimant has sent copies of its Request for Arbitration to eight officials. It also informs that Mr. Quinlivan has publicly stated that "[t]he lobbying will continue", which the Respondent qualifies as the "classic strategy of *divide et impera*".³⁰ On that basis, the Respondent claims that "out-of-court" settlement proposals should exclusively be addressed to the authorized representative of the Respondent, i.e., the Minister of Law and Human Rights of the Republic of Indonesia, and that the Claimant should refrain from contacting other agencies of the government in order to seek an amicable outcome of this dispute.

2. Position of the Claimant

24. In its Response, the Claimant agrees that the Tribunal has the power to recommend provisional measures under Article 47 of the ICSID Convention. However, relying on *Maffezini*,³¹ the Claimant states first that such measures have only been recommended by ICSID tribunals in exceptional circumstances.³² The Claimant further submits that the burden rests on the party requesting provisional measures to demonstrate that the conditions of urgency and necessity are fulfilled. In the opinion of the Claimant, the

²⁶ Reply, ¶ 6.

²⁷ Reply, ¶¶ 11-12.

²⁸ Reply, ¶¶ 20-21.

²⁹ Reply, ¶ 24.

³⁰ Reply, ¶ 27.

³¹ *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/17), Procedural Order No. 2 of 28 October 1999, ¶ 10.

³² Claimant's Response, ¶ 4.

Respondent has failed to discharge such burden.³³ Finally, the Claimant asserts that provisional measures can only be recommended to preserve the rights of the parties to a dispute, and that the Respondent has failed to identify the rights in need of protection.³⁴

25. With regard to the first order sought, the Claimant argues that none of its statements are false, unfounded or misleading. In any event, the provisional measure stage is not the appropriate juncture to decide on such matters, which should be dealt with during the jurisdictional or merits phase.³⁵ Relying on *Amco v. Indonesia*³⁶ and *World Duty Free v. Kenya*,³⁷ the Claimant also argues that, in general, parties are entitled to discuss proceedings in public.³⁸ The Claimant also cites *EDF v. Romania*,³⁹ in support of the absence of a confidentiality duty in the ICSID framework.⁴⁰
26. With respect to the statements about which the Respondent complains, the Claimant states that none of them have transgressed “the bounds of appropriate comment in ICSID proceedings”.⁴¹ It calls the attention of the Tribunal to the fact that the Respondent has also made public statements concerning the present proceedings which include “unfounded allegations” concerning Churchill’s conduct.⁴²
27. Finally, the Claimant asserts that the Respondent has identified no rights capable of protection through provisional measures, and has failed to substantiate any necessity and urgency.⁴³
28. With regard to the second order sought, the Claimant argues first that the Respondent has again failed to identify any rights that may be the subject of provisional measures.⁴⁴ Second, it contends that nothing prevents disputing parties to seek an amicable settlement even after the initiation of arbitration proceedings. Although Article 26 of

³³ Claimant’s Response, ¶ 5.

³⁴ Claimant’s Response, ¶ 6.

³⁵ Claimant’s Response, ¶ 9.

³⁶ *Amco Asia Corporation v. Republic of Indonesia* (ICSID Case No. ARB/81/1) (hereinafter “*Amco v. Indonesia*”), Decision on Request for Provisional Measures of 9 December 1983, p. 412.

³⁷ *World Duty Free Company Limited v. Kenya* (ICSID Case No. ARB/00/7), Award of 4 October 2006, ¶ 16.

³⁸ Claimant’s Response, ¶ 12.

³⁹ *EDF (Services) Ltd v. Romania* (ICSID Case No. ARB/05/13, Procedural Order No. 2 of 30 May 2008, ¶ 43.

⁴⁰ Claimant’s Response, ¶ 13.

⁴¹ Claimants’ Response, ¶ 18.

⁴² Claimant’s Response, ¶ 19, with a list of six public statements of Indonesian officials alluding to the present proceedings.

⁴³ Claimant’s Response, ¶ 24.

⁴⁴ Claimant’s Response, ¶ 26.

the ICSID Convention excludes other remedies, it does not affect the possibility of reaching an amicable settlement.⁴⁵

29. In its Rejoinder, the Claimant repeats that the Respondent has failed to identify rights in need of protection and such rights must be those in dispute to deserve protection through provisional remedies.⁴⁶ Relying on *Plama Consortium Limited v. Republic of Bulgaria*,⁴⁷ the Claimant argues that the rights for which the Respondent seeks protection, i.e. the right to regulate and promote investments in its natural resources and the right to enforce regulations on investments in natural resources, “are not rights which might be the object of a recommendation for provisional measures”.⁴⁸
30. The Claimant also rejects the proposition that by making statements in press articles or by seeking an out-of-court settlement it may be engaging in self-help.⁴⁹
31. Regarding the first order sought, the Claimant reaffirms its position according to which “it is permissible for a party in ICSID proceedings to state its case in public in general terms”,⁵⁰ and there is no press campaign on the part of the Claimant which might warrant a recommendation for provisional measures.⁵¹ Churchill also reiterates that the Respondent has failed to identify the necessity and urgency that would justify recommending provisional measures.⁵²
32. Finally, the Claimant notes that Mr. Quinlivan’s statement, which was quoted by the Respondent in its Reply and according to which “[t]he lobbying will continue”, pre-dates the institution of proceedings.⁵³ It adds that the Respondent has failed to identify the author of other statements, thus hindering it to respond to such unsubstantiated assertions. In any case, such statements would not justify the recommendation of provisional measures.⁵⁴

⁴⁵ Claimant’s Response, ¶ 29.

⁴⁶ Claimant’s Rejoinder, ¶ 4.

⁴⁷ *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24) (hereinafter “Plama v. Bulgaria”), Order on Provisional Measures of 6 September 2005, ¶ 40.

⁴⁸ Claimant’s Rejoinder, ¶ 5.

⁴⁹ Claimant’s Rejoinder, ¶ 8.

⁵⁰ Claimant’s Rejoinder, ¶ 14.

⁵¹ Claimant’s Rejoinder, ¶ 13.

⁵² Claimant’s Rejoinder, ¶ 17, and in respect of the second order sought, ¶ 23.

⁵³ Claimant’s Rejoinder, ¶ 19.

⁵⁴ Claimant’s Rejoinder, ¶ 21.

III. Analysis

1. Legal Framework

33. The relevant rules regarding the power of the Tribunal to recommend provisional measures are to be found in the ICSID Convention and the ICSID Arbitration Rules (2006).

34. Article 47 of the ICSID Convention provides that:

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.

35. Rule 39 of the ICSID Arbitration Rules provides in relevant parts:

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

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

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

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

[...]

2. Prima Facie Jurisdiction

36. It is undisputed that the Tribunal has the power to recommend provisional measures prior to ruling on its jurisdiction. However, the Tribunal will not exercise such power

unless it has *prima facie* jurisdiction. The Tribunal will therefore assess whether there is a *prima facie* basis for jurisdiction *ratione personae*, *ratione materiae*, *ratione temporis*, and *ratione voluntatis*.

37. The Respondent is a signatory to the ICSID Convention. The Claimant claims to be a United Kingdom national, and the United Kingdom is also a signatory to the ICSID Convention. Thus, the Tribunal has *prima facie* jurisdiction *ratione personae*.
38. The Claimant alleges that the present dispute arises from breaches by the Respondent of its obligations under the UK-Indonesia BIT. The Tribunal is aware that, in its answers to the Request for Arbitration dated 11 June 2012 and 14 June 2012, the Respondent submitted that there was no dispute arising directly out of an investment. In light of the fact that it is the Respondent who presented the Request and that the Respondent argues therein that it has a right to seek an orderly resolution of the dispute in the framework of this arbitration, the Tribunal finds that for present purposes it has *prima facie* jurisdiction *ratione materiae*.
39. Further, the Claimant alleges in its Request for Arbitration that the dispute arose in May 2010, long after the entry into force of the UK-Indonesia BIT in 1977. The Respondent has not contested this allegation so far. Thus, the Tribunal finds that it has *prima facie* jurisdiction *ratione temporis*.
40. Finally, at least at first sight, by ratifying the UK-Indonesia BIT, the Respondent consented in writing to the jurisdiction of the Centre over disputes such as those submitted by the Claimant. For its part, the Claimant consented in writing to the jurisdiction of the Centre by filing its Request for Arbitration. Accordingly, the Tribunal has *prima facie* jurisdiction *ratione voluntatis*.
41. In conclusion, the Tribunal considers that it has *prima facie* jurisdiction for purposes of issuing this order. It adds that this finding in no way preempts its later decision on jurisdiction.

3. Requirements for Provisional Measures

42. There seems to be no disagreement between the Parties on the requirements for provisional measures. According to Rule 39 of the ICSID Arbitration Rules, the request must specify “the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures”. Various ICSID tribunals have interpreted these requirements to mean that provisional measures must (i) serve to protect certain rights of the applicant, (ii) meet the requirement of urgency; and (iii) the requirement of necessity, which implies the existence of a risk of irreparable or substantial harm.⁵⁵
43. By contrast, the Parties disagree on the type and existence of the rights to be protected. They also disagree on whether the measures are urgent and necessary.

a. Existence of Rights Requiring Preservation

i. First order sought

44. The Respondent alleges that the following rights need preservation by way of provisional measures: (i) the right to welcome foreign investors to invest in its territory, i.e. the Respondent’s right to host foreign investments;⁵⁶ (ii) the right to regulate and promote investments in its natural resources;⁵⁷ (iii) the right to enforce regulations on investments in its natural resources;⁵⁸ (iv) the right to the protection of the law against attacks upon its honor and reputation;⁵⁹ and (v) the right to justice based on factual truth.⁶⁰
45. For its part, the Claimant denies that the right to foreign investment deserves protection by way of provisional measures because “[i]t is not a right in dispute, nor a right

⁵⁵ See *Plama v. Bulgaria*, Order on Provisional Measures of 6 September 2005, ¶ 38 ; *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)* (ICSID Case No. ARB/08/5), Procedural Order No. 1 on Burlington Oriente’s Request for Provisional Measures of 29 June 2009, ¶ 51 ; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/02), Decision on Provisional Measures of 26 February 2010, ¶ 113 ; *Iona Micula and others v. Romania* (ICSID Case No. ARB/05/20), Decision on Claimants’ Application for Provisional Measures of 2 March 2011, ¶ 12.

⁵⁶ Respondent’s Request, ¶ 13.

⁵⁷ Respondent’s Reply, ¶¶ 6 and 19.

⁵⁸ Respondent’s Reply, ¶¶ 6 and 19.

⁵⁹ Respondent’s Reply, ¶¶ 6 and 23.

⁶⁰ Respondent’s Reply, ¶¶ 6 and 23.

relating to the procedural integrity of the proceedings”.⁶¹ It also asserts that the Respondent has failed to identify rights that may be the subject of provisional measures, as “[a]ny provisional measure must relate to rights which are in dispute in the proceedings”.⁶² Relying on *Plama Consortium Limited v. Republic of Bulgaria*, the Claimant stresses that the rights that may find protection by way of provisional measures are essentially defined by the claims. This said, it acknowledges that Indonesia may also seek protection for procedural rights in order to maintain the integrity of the arbitration proceedings.⁶³

46. As a threshold matter, the Tribunal notes that the ICSID Convention and the Arbitration Rules contain no general rule imposing a duty of confidentiality on the parties and prohibiting them from disclosing their case in public, as was already stated 30 years ago in *Amco v. Indonesia*.⁶⁴ At the same time, it is true that the parties are bound by a good faith duty not to exacerbate the dispute or affect the integrity of the arbitration proceedings.
47. Under certain circumstances, public statements uttered by a party to ICSID proceedings could violate this duty of good faith. However, the Tribunal sees no indication of such a violation in the present case. The fact that one party states in public that it contests the claims of another does not in and of itself warrant the recommendation of provisional measures, and the Tribunal agrees with the Claimant that it is permissible for a party in ICSID proceedings to state its case in public in general terms.⁶⁵
48. The Tribunal further agrees with the Claimant’s position in that the rights to be preserved need to bear a relation with the dispute. As stated by the tribunal in *Plama v. Bulgaria*:

The rights to be preserved must relate to the requesting party’s ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out. Thus the rights to be preserved by

⁶¹ Claimant’s Response, ¶ 16.

⁶² Claimant’s Rejoinder, ¶ 4.

⁶³ Claimant’s Rejoinder, ¶ 5.

⁶⁴ *Amco v. Indonesia*, Decision on Request for Provisional Measures of 9 December 1983, p. 412.

⁶⁵ Claimant’s Rejoinder, ¶ 14.

provisional measures are circumscribed by the requesting party's claims and requests for relief. They may be general rights, such as the rights to due process or the right not to have the dispute aggravated, but those general rights must be related to the specific disputes in arbitration, which, in turn, are defined by the Claimant's claims and requests for relief to date.⁶⁶

49. In *Amco v. Indonesia*, where the arbitral tribunal was faced with a request for provisional measures concerning a similar scenario, Indonesia complained of various newspaper articles that it deemed prejudicial as they could potentially have a negative impact on its economy. While the tribunal acknowledged that public statements by a foreign investor could potentially have a negative effect on the economy of a host State, the tribunal found that no right in dispute was at stake. The arbitral tribunal held as follows:

It might possibly be that a large press campaign could have such an influence. However, even so, it would not be an influence on rights in dispute.⁶⁷

The Tribunal fails to see how the rights alleged by the Respondent requiring preservation are related to the dispute at hand, or could be jeopardized by the controversial statements.

50. In the Tribunal's understanding, the rights invoked by the Respondent, i.e. the right to attract foreign investment, the right to regulate and promote foreign investment in its natural resources, the right to enforce the regulations on investments in its natural resources, the right to the protection of its honor and reputation, and the right to justice based on factual truth, are not rights in dispute that could warrant the recommendation of provisional measures. While the Tribunal has full respect for the Respondent's right to promote foreign investment in its natural resources and its sovereign right to regulate such activities on its territory in accordance with its international law obligations, it is of the opinion that none of the public statements made by the Claimant reach a level that could jeopardize the Respondent's rights in dispute.

⁶⁶ *Plama v. Bulgaria*, Order of 6 September 2005, ¶ 40.

⁶⁷ *Amco v. Indonesia*, Decision on Request for Provisional Measures of 9 December 1983, p. 411.

ii. Second order sought

51. The Respondent claims that its right to be free from any pressure in handling the present case needs preservation by way of provisional measures.⁶⁸ In contrast, the Claimant asserts that the Respondent has failed to substantiate its allegations that the Claimant has pressured various government officials to engage in settlement negotiations and that it carries the burden of proof.
52. The Tribunal takes note that, in support of its request, the Respondent has only mentioned the statement by Mr. Quinlivan that the “lobbying will continue”, which predates the initiation of the present proceedings. The Respondent has also referred to the fact that the Request for Arbitration was dispatched to eight different government agencies. These allegations are insufficient to constitute proof of any wrongful conduct.
53. On a more general note, the Tribunal stresses that parties to arbitration proceedings are free to engage in settlement negotiations. Article 26 of the ICSID Convention, which provides that consent given to the jurisdiction of an ICSID tribunal is “deemed consent to such arbitration to the exclusion of any other remedy”, applies to parallel judicial or arbitral proceedings, not to negotiations.
54. For these reasons, the Tribunal finds that the Respondent has failed to identify any right that may justify provisional measures.

b. Urgency

55. For the sake of completeness, the Tribunal also notes that the Respondent has made no representation regarding the urgency.

c. Necessity

56. Similarly, the Tribunal notes that Indonesia has made insufficient representations regarding the risk of irreparable or serious damage.

⁶⁸ Respondent’s Request, ¶ 16.

d. Final Observations

57. While the request for provisional measures must be denied, the Tribunal reminds the Parties of their general duty, which arises from the principle of good faith, not to take any action that may aggravate the dispute or affect the integrity of the arbitration.

IV. Order

58. On this basis, the Arbitral Tribunal issues the following order:

- (1) The provisional measures sought by the Respondent are denied;
- (2) Costs are reserved for a later decision or award.

On behalf of the Tribunal

[*Signed*]

Gabrielle Kaufmann-Kohler
President of the Tribunal
Date: 4 March 2013