INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Bernhard von Pezold and others v. Republic of Zimbabwe
(ICSID Case No. ARB/10/15) – Annulment Proceeding

- AND -

Border Timbers Limited and others v. Republic of Zimbabwe
(ICSID Case No. ARB/10/25) – Annulment Proceeding

DECISION ON THE APPLICANT'S APPLICATION FOR PROVISIONAL MEASURES TO EXCLUDE CONSIDERATION OF THE MERITS IN PART I

Members of the *ad hoc* Committees
Dr Veijo Heiskanen, President
Ms Jean Kalicki
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Secretary of the *ad hoc* Committees
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I. PROCEDURE

1. On 21 October 2015, the Republic of Zimbabwe (the "**Applicant**") filed applications for annulment (the "**Annulment Applications**") and requests for stay of enforcement in respect of the awards in the conjoined cases *Bernhard von Pezold and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15) and *Border Timbers Limited and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/25) (the "**von Pezold Award**" and the "**Border Timbers Award**," respectively, and together the "**Awards**") pursuant to Article 52 of the ICSID Convention.

2. The *ad hoc* Committees (the "**Committees**") in these matters were constituted on 21 December 2015. The Committees conducted a joint first session with the Parties on 1 February 2016 and issued Procedural Order No. 1 on 11 February 2016, setting out the procedural framework and the timetable for the present annulment proceedings. In particular, Section 15.1 of Procedural Order No. 1 provides:

> "The proceedings shall consist of two parts. The first part ('Part I') shall deal with the Applicant's request that the enforcement of the Awards be stayed for the duration of the annulment proceedings. The second part ('Part II') shall deal with the Applicant's applications to annul the Awards. Each part of the proceedings shall consist of a written phase followed by an oral hearing before the Committees."

3. On 23 February 2016, the Applicant filed an application requesting an order of provisional measures under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules. Apart from a request for provisional measures, the Applicant also sought an interim order to preserve the *status quo* pending the Parties' filing of further observations on the matter.

4. By a letter dated 24 February 2016, the ICSID Secretariat wrote to the Parties on behalf of the Committees, informing the Parties of the Committees' decision to deny the Applicant's request for an interim order and inviting Bernhard von Pezold and others and Border Timbers Limited and others (the "**Respondents**" or "**VPBs**") to submit their response to the application by 2 March 2016.

5. On 2 March 2016, the Respondents filed their response to the Applicant's application.

6. On 17 March 2016, the Committees issued a Decision on the Applicant's Application for Provisional Measures. The Committees dismissed the application, while reminding the Parties of their general obligation to refrain from any conduct that may aggravate the dispute during the pendency of the annulment proceedings.

7. Pursuant to Procedural Order No. 1, on 4 April 2016, the Applicant filed its Memorial in Support of Continuing the Stay of Enforcement of the Awards (the "**Memorial on Stay**"), together with Exhibits ZA-072 to ZA-113 and Legal Authorities ZALEX-061 to ZALEX-072.

8. On 11 June 2016, the Respondents filed a Counter-Memorial on Stay (the "**Counter-Memorial on Stay**"), together with Exhibits VPB-10 to VPB-26 and Legal Authorities VPBLEX-18 to VPBLEX-57.

9. On 1 July 2016, the Applicant filed a Reply to VPB's Counter-Memorial on Stay of Enforcement (the "**Reply on Stay**"). On 7 July 2016, the Applicant submitted a revised version of its Reply, together with Exhibits ZA-114 to ZA-151, including witness statements by Dr J.P. Mangudya, Attorney General Prince Machaya and Mr Zvinechimwe Churu (ZA-121, ZA-137 and ZA-144, respectively) and Legal Authorities ZALEX-073 to ZALEX-077.

10. On 31 July 2016, the Respondents filed a Rejoinder on Stay (the "**Rejoinder on Stay**"), together with Exhibits VPB-027 to VPB-043, including a witness statement by Mr Heinrich Bernd Alexander Josef von Pezold (VPB-32), and Legal Authorities VPBLEX-058 to VPBLEX-068.

11. On 12 September 2016, pursuant to Articles 44 and 52(4) of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, the Applicant filed an Application for Provisional Measures to Exclude Consideration of the Merits in Part I (the "**Application**").

12. In accordance with an invitation from the Committees, on 23 September 2016, the Respondents filed a Response to Zimbabwe's Application for Provisional Measures (References to the Merits) (the "**Response**").

13. By letter dated 26 September 2016, the ICSID Secretariat wrote to the Parties advising them that the Committees would rule on the Application on the basis of the record before them.

II. SUMMARY OF THE PARTIES' POSITIONS

A. The Applicant's Application

14. The Application arises out of references made in the Respondents' Counter-Memorial on Stay and Rejoinder on Stay to the merits of the Applicant's Annulment Applications, in the context of whether or not the applications should be considered dilatory or otherwise *prima facie* without any merit. The Applicant requests that the Committees "order and declare that the consideration of the merits of the Annulment Applications is excluded from

Part I of these Annulment proceedings and thus fully reserved for Part II of these Proceedings," in accordance with Section 15.1 of Procedural Order No. 1.[1]

15. In support of its Application, the Applicant relies on Articles 44 and 52(4) of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules.[2] The Applicant also refers to the Parties' earlier submissions in which they addressed the issue that gives rise to the Applicant's Application and requested that the Committees resolve the matter.[3]

16. The Applicant argues that the Application is urgent as there is an "urgent need to protect the serenity of the proceedings," the Respondents having confirmed in their Rejoinder on Stay their "intent … to debate the merits of the Annulment Applications" in Part I of these proceedings, contrary to Procedural Order No. 1.[4] The Applicant argues that, unless the Committees grant the requested relief, the remaining steps in this Part I of the proceedings "promise to be unnecessarily chaotic and disorderly and to prejudice Applicant's right to due process."[5]

17. The Applicant adds that the Application is timely, as Procedural Order No. 1 "suspended the calendar during the month of August."[6]

18. As to the rights to be preserved, the Applicant argues that it seeks to protect its "full right to present the merits concerning the Annulment Applications … in the manner stipulated in [Procedural Order No. 1]."[7] In the alternative, "were the Committees to instruct the Parties to discuss any part of the merits in Part I of these proceedings," the Applicant's rights to be preserved also include "to know the scope of any such discussion of the merits in Part I."[8] This is necessary in order for the Applicant to be able to prepare its written and oral submissions for the remaining steps of Part I of these annulment proceedings.[9]

19. The Applicant argues that its Application also meets the requirement of necessity, "as irreparable harm would result" if the scope of the remaining steps in Part I are not clarified.[10] According to the Applicant, "[i]n view of VPB's decision to argue the merits" in Part I, if the requested provisional measures are not granted, the Applicant's right to due process would be harmed as it would not be in a position to respond before a final decision is given.[11] This harm would be irreparable as the "Applicant's right to know the scope of

[1] Application, para. 1.
[2] Application, para. 2.
[3] Application, para. 3 (referring to the Reply on Stay, para. 321, and to the Rejoinder on Stay, para. 49).
[4] Application, paras. 5 and 6.
[5] Application, para. 9.
[6] Application, para. 10.
[7] Application, paras. 11 and 12.
[8] Application, para. 13.
[9] Application, para. 13.
[10] Application, para. 15.
[11] Application, para. 16.

Skeleton Arguments and Oral Arguments on Stay in due time during the course of these proceedings, can never be fully remedied by compensation."[12]

20. The Applicant also addresses in detail the Respondents' submissions that give rise to the Application. It contends that the Respondents should have raised their argument that the Annulment Applications are manifestly unfounded under ICSID Arbitration Rule 41(5), which requires such arguments to be raised within 30 days of the constitution of the Committees. As they did not do so, the Respondents are "now foreclosed from doing so."[13] In any event, the Respondents' own lengthy submissions demonstrate that the Annulment Applications are not manifestly unfounded or dilatory.[14] In the circumstances, the Respondents' decision to argue the merits of the case in this Part I of the proceedings "severely prejudges the merits to an extent that deprives Applicant of its due process right to serenely present its case on the merits in Part II of these proceedings as stipulated by [Procedural Order No. 1]."[15]

21. The Applicant contends that the issues raised by its Annulment Applications are "heavy and substantive" and therefore not suitable for "summary disposition on a *prima facie* basis."[16] Citing the decision of the *ad hoc* Committee in *Libananco v. Turkey*, the Applicant submits that the Respondents' "dilatory test" is not sound; it applies only if a stay application has been brought without any basis under the Convention.[17] According to the Applicant, "given the universal nature of VPB's arguments on the merits any *prima facie* decision on a less than complete presentation of Applicant's full case …, gravely impinges upon its right to present the merits and would unduly and severely prejudge the case and its rights, as the issues involved are too heavy a topic to be addressed in a summary fashion."[18] Citing *Amoco Iran International Finance Corporation v. Iran* and *AAP v. Sri Lanka*, the Applicant argues that it is not possible to rely on a *prima facie* test "when a legal matter should be proven in a conclusive manner."[19]

22. Subsidiarily, were the Committees nevertheless to rely on a *prima facie* test, the Applicant argues that in its Annulment Applications it has made "a *prima facie* showing that establish

[12] Application, paras. 17 and 18.
[13] Application, para. 21.
[14] Application, paras. 24 and25.
[15] Application, para. 22.
[16] Application, paras. 29-43.
[17] Application, para. 32 (citing *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Applicant's Request for a Continued Stay of Enforcement of the Award, 7 May 2012), VBLEX-61. (Emphasis omitted.)
[18] Application, para. 38.
[19] Application, paras. 41 and 42 (citing *Amoco Iran International Finance Corporation v. The Government of the Islamic Republic of Iran*, 15 Iran-US CTR 189, ZALEX-083 and *Asian Agricultural Products Limited v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award (27 June 1990), p. 274, ZALEX-084).

proper basis for annulment were the factual allegations and legal analysis to be proven on the merits."[20] Accordingly, the "evidentiary burden shifts to VPB."[21]

23. In conclusion, the Applicant requests that the Committees "order and declare" that:

(a) "Procedural Order N° 1 is confirmed as written;

(b) VPB's discussion of the merits of Applicant's Annulment Applications from pages 14 to 33 of its Counter-Memorial on Stay:

a. is out of sequence,

b. is deemed not written and

c. shall not be discussed in Part I.

(c) The merits shall not be discussed in Part I but shall be addressed only in Part II on the dates mentioned in PO N° 1. Consequently:

a. The parties are not to brief, submit factual exhibits / legal authorities or argue the merits in Part I but will be free to brief, submit factual exhibits / legal authorities and argue these issues in Part II and

b. The Committees will not consider and / or deliberate on any arguments and / or factual evidence or legal authorities regarding the merits during Part I.

(d) VPB's invitation in Paragraph 28 of its Rejoinder, 'Before reviewing the following sub-sections, the Committees may wish to re-read paras 33-69 of the VPBs' Counter-Memorial on Stay. That is where the VPBs' arguments that the annulment applications do not meet the Non-Dilatory Requirement are set out in full' again constitutes discussion of the merits of Applicant's annulment applications from pages 16 to 21 of its Rejoinder on Stay and consequently:

a. out of sequence,

b. deemed not written and

c. shall not be discussed in Part I.

(e) VPB's defense in its Rejoinder on Stay of its discussion of the merits in Part I under the guise of 'dilatory' will not be considered in Part I as it is based on the merits of heavy issues that are to be addressed only in Part II, particularly not in a cursory manner in Part I.

[20] Application, para. 44.
[21] Application, paras. 45-47.

(f) The 30 November 2016 Organizational conference call, the Parties Skeleton Arguments and the December 2016 Oral Argument shall not address the merits."[22]

24. The Applicant further requests "clarification and confirmation of the scope" of Procedural Order No. 1 as to "(i) the number, sequence and calendar of pleadings specified in Art. 15 of [Procedural Order No. 1], [and] (ii) the right to accompany pleadings with documentary evidence and legal authorities."[23]

25. "Subsidiarily and in the alternative, were the Committees to refuse to grant Applicant's requests set out … above," the Applicant requests:

(a) "that the question of Stay be joined to the Merits and decided after the close of the agreed procedural steps relating to the merits listed in Procedural order N° 1, or

(b) in the extremely unlikely event that the Committees were to wish to consider certain issues regarding the merits in connection with Part I of these annulment proceedings, that the Committees:

a. clearly indicate what circumscribed issues the Committees wish the Parties to address in the Skeleton Arguments and at the Oral Hearing, so as to:

b. allow 30 days from PO N° 2 for Applicant to make written submission regarding any issues on the merits that the Committees consider relevant for determination in Part I and

c. allow 15 days to VPB to further rebut Applicant's position on any issues on the merits that the Committees consider relevant for determination in Part 1."[24]

B. The Respondents' Response

26. The Respondents state that they agree with the Applicant that the Committees have the power to order provisional measures under Article 44 of the ICSID Convention, which is applicable pursuant to Article 52(4) of the Convention, and under ICSID Arbitration Rule 39.[25]

27. The Respondents further accept that, in order for the Committees to order interim relief, the Applicant must:

(a) "identify the substantive and procedural right that requires protection;

[22] Application, para. 55 (footnotes omitted).
[23] Application, para. 56 (footnotes omitted).
[24] Application, para. 57.
[25] Response, para. 6.

(b) establish that the measures proposed are urgent; and

(c) show that there is necessity, i.e., that if the provisional measures are not ordered there will be irreparable damage to the rights that Zimbabwe seeks to protect."[26]

28. Furthermore, according to the Respondents, the Committees must have *prima facie* jurisdiction over the Applicant's Annulment Applications. For the purpose of the present Application, the Respondents accept that this is the case here, while reserving their right to argue at a later stage of the proceedings that the Applicant's Annulment Applications "are not within the confines of Article 52(1) of the ICSID Convention."[27]

29. As to the rights to be preserved, the Respondents also agree that the Parties' procedural rights arising under Procedural Order No. 1, specifically the rights arising under Section 15 which provides that the proceedings shall consist of two phases, "are rights that may be protected by an order for provisional measures."[28] However, the Respondents deny that they have breached Procedural Order No. 1 and therefore request that the Application be denied.[29]

30. The Respondents recall that the Applicant in its Memorial on Stay and Reply on Stay argued that the Annulment Applications are not dilatory in nature and that this is relevant in deciding whether or not the stays should be lifted. The Respondents conclude from this that the Parties in fact agree that the requests for stay should not be granted if the Committees find that the Annulment Applications are dilatory. According to the Respondents, under Section 15 of Procedural Order No. 1 neither Party was prevented from arguing and applying the legal test which determines whether or not an annulment application is dilatory (the "**Dilatory Test**"), as "such a test does not prejudge the merits."[30] The Respondents add that, "[t]o the extent that the VPBs refer to the merits of [the Annulment Applications]," they do so "only for the purpose of and in accordance with the Dilatory Test; they do not seek a final determination of the merits as the Dilatory Test neither requires nor permits such a determination."[31] The Respondents argue that they have therefore not breached the Applicant's procedural rights, as they "have merely responded to the legal argument raised by Zimbabwe as to the application of the Dilatory Test." [32]

31. The Respondents argue that the Applicant appears to have misunderstood the Dilatory Test. The Respondents are not seeking a disposal of the Applicant's Annulment Applications pursuant to ICSID Arbitration Rule 41(5), as a successful application of Rule 41(5) would

[26] Response, para. 7.
[27] Response, para. 8.
[28] Response, para. 10.
[29] Response, paras. 9-12.
[30] Response, para. 13.
[31] Response, para. 14.
[32] Response, para. 14.

bring the proceedings to an end, whereas "a finding by the Committees that the Annulment Applications are dilatory does not."[33]

32. As to the urgency requirement, the Respondents agree that the Application is urgent as it seeks protection of a procedural right. However, the Respondents argue that the Applicant has waived its right to seek protection pursuant to ICSID Arbitration Rule 27. The Respondents note that they had first addressed the Dilatory Test in their Counter-Memorial on Stay, which was filed on 11 June 2016. However, the Applicant waited over three months before filing the Application and thus "has waived its right to object to the manner in which the VPBs have referred to the merits in their pleadings."[34] In this connection, the Respondents refer to ICSID Arbitration Rule 27, which provides that "[a] party which knows or should have known" that any applicable procedural rule has not been complied with, but "which fails to state promptly its objections thereto, shall be deemed … to have waived its right to object."[35]

33. As to the requirement of necessity, the Respondents accept that "to the extent that Zimbabwe has the right which it has pleaded (which is denied), … the breach of that right could not be remedied by the payment of damages."[36]

34. Finally, in response to the further relief requested by the Applicant, the Respondents argue that:

    (a) The Applicant's request for "clarification and confirmation of the scope" of Procedural Order No. 1 is not a procedural or substantive right and therefore "not amenable to an order on provisional measures;"[37]

    (b) The Applicant's alternative request to join Part I to Part II is also not a procedural or substantive right of the Applicant. The Parties must comply with the procedural calendar set by the Committees, "unless there are reasonable grounds for not being able to do so." According to the Respondents, no such grounds have been argued by the Applicant;[38] and

    (c) Finally, should the Committees decide that the Respondents have not breached Procedural Order No. 1 by addressing the Dilatory Test, there is no need for further submissions on the merits of the Annulment Applications or guidance from the Committees as the matters would have been dealt with appropriately in the

[33] Response, para. 17.
[34] Response, paras. 18-20.
[35] Response, para. 18.
[36] Response, para. 21.
[37] Response, para. 23.
[38] Response, para. 24.

pleadings to date. Further pleadings in Part I would also jeopardize the procedural timetable set by the Committees in Procedural Order No. 1.[39]

35. On this basis, the Respondents request that "the Committees deny the Application."[40]

III. THE *AD HOC* COMMITTEES' ANALYSIS

36. In their Decision on the Applicant's Application for Provisional Measures dated 17 March 2016, the Committees noted that the Applicant's application "raised an issue that has also arisen before other *ad hoc* committees, but which has not yet been decided, as to whether an ICSID *ad hoc* committee is competent to recommend provisional measures in the first place."[41] Having further considered the issue, the Committees noted that, while the Parties agreed that the Committees "would have, at the very least, an inherent power to recommend provisional measures necessary to protect the integrity of the present proceedings," in view of the conclusions reached in the Decision, the Committees did not consider it necessary to rule on the issue.[42]

37. As summarized above, the Parties continue to agree in the context of the Applicant's present Application that the Committees have the power to order provisional measures under Article 44 of the ICSID Convention, which is applicable pursuant to Article 52(4) of the Convention, and under ICSID Arbitration Rule 39. For the reasons set out below, the Committees do not consider it necessary to take a view on this issue at this time.

38. The Committees have carefully considered the Parties' submissions and the supporting evidence and legal authorities and, for the reasons set out below, have reached the conclusion that there is no basis to recommend provisional measures, even assuming the Committees had the power to recommend such measures.

39. The Applicant in its Application argues that the Respondents in their Counter-Memorial on Stay and Rejoinder on Stay have improperly attempted to argue the merits of the Applicant's Annulment Applications, in breach of the Committees' decision in Procedural Order No. 1 to bifurcate the present annulment proceedings and to deal with the Applicant's requests for continuation of the stay in Part I of the proceedings.[43] The Applicant in particular objects to the way in which, or the extent to which, the Respondents have argued the issue as to whether or not the Annulment Applications should be considered "dilatory, trivial, frivolous and/or abusive."

40. The Respondents argue, in response, that they have merely replied to the Applicant's own argument in its Counter-Memorial on Stay and Reply on Stay, to the effect that its

[39] Response, para. 25.
[40] Response, para. 26.
[41] Decision on the Applicant's Application for Provisional Measures, 17 March 2016, para. 30.
[42] Decision on the Applicant's Application for Provisional Measures, 17 March 2016, para. 32.
[43] The Applicant refers, specifically, to Counter-Memorial on Stay, paras. 28-69 and Reply on Stay, paras. 28-44.

Annulment Applications are not dilatory, trivial or frivolous, and do not constitute an abuse of process.[44]

41. The Committees note that the Applicant raised in its Memorial on Stay the issue of whether its Annulment Applications meet what it referred to as "threshold criteria" of not being dilatory, trivial or frivolous, or an abuse of process.[45] The Applicant argued that these criteria were met in this case. The Respondents then responded to these arguments in the Counter-Memorial on Stay, agreeing that these were the "threshold criteria" for the continuation of a stay.[46] The Respondents then went on to argue that the Annulment Applications indeed were, in their view, "dilatory, trivial, frivolous and/or abusive."[47] The Applicant presented further argument on the issue in its Reply on Stay,[48] and the Respondents replied in the Rejoinder on Stay.[49]

42. More specifically, the Respondents argued in their Rejoinder on Stay that the Applicant "appear[ed] to acknowledge that an application will be dilatory if it is 'manifestly abusive,' 'baseless' (i.e. no *prima facie* case) or 'an abuse of process.'"[50] The Respondents indicated that, "to the extent that the additional two criteria ('trivial' and 'frivolous') are not covered by the Non-Dilatory Requirement," they "take no position on whether or not the jurisprudence on stays of enforcement supports them or as to whether or not they have been met in the present circumstances."[51] Consequently, in the Respondents' view, the sole "threshold criterion" issue that remains before the Committees "is whether or not the Non-Dilatory Requirement has been met."[52]

43. The Committees note that both Parties have taken in their submissions the view that, in order for the Committees to be able to grant the Applicant's requests for continuation of the stay, the Annulment Applications must meet certain "threshold criteria." While the Parties do not agree on whether these criteria have been met, they appear to agree that the application of these criteria will require the Committees to make a preliminary or *prima facie* determination as to whether or not the Annulment Applications meet these "threshold criteria." Thus, the Applicant in its Memorial on Stay argues:

> "Applicant has established in its Annulment Applications that there is *prima facie* a reasonable case for seeking annulment, as the grounds and facts on which Applicant relies in the Annulment Application, if proved, lead to annulment. Although Applicant does not request and the *ad hoc* Committees are not in a

[44] Response, para. 13 (referring to the Applicant's Memorial on Stay, paras. 2-12 and Reply on Stay, paras. 279, 295, 298-299, 301 and 359).
[45] Memorial on Stay, paras. 2-12.
[46] Counter-Memorial on Stay, para. 28.
[47] Counter-Memorial on Stay, paras. 33-69.
[48] Reply on Stay, in particular paras. 292-301.
[49] Rejoinder on Stay, paras. 6-44.
[50] Rejoinder on Stay, para. 6 (footnotes omitted).
[51] Rejoinder on Stay, para. 7.
[52] Rejoinder on Stay, para. 8.

position during this preliminary phase of proceedings to decide on the merits of the Applicants Annulment Applications, on their face, *prima facie*, were the facts and law Applicant presented to be proven, one can reasonably envisage the possibility that the Awards be overturned."[53]

44. Similarly, the Respondents state in their Counter-Memorial on Stay:

> "In its Memorial on Stay, Zimbabwe argues that the Annulment Application are not dilatory in nature, trivial, frivolous or an abuse of process. It groups these matters under the notion of 'threshold criteria' for the continuation of a stay on enforcement, as indeed they are.
>
> ...
>
> [W]here an annulment application is dilatory, trivial, frivolous and/or abusive, a stay of enforcement will not be ordered; but meeting these low hurdles is not a factor in favour of ordering such a stay."[54]

45. Therefore, the issue on which the Parties disagree is not whether an annulment application must meet certain "threshold criteria" for a request for continuation of a stay to be granted, but whether the Respondents, when responding to the Applicant's argument on this issue, have strayed beyond addressing the "threshold criteria" and have argued the merits of the Annulment Applications. That this is the subject matter of the dispute between the Parties is evident from the Applicant's Reply on Stay, where the Applicant contends that "[the Respondents'] arguments [in the Counter-Memorial on Stay] focus on issues totally outside the 'threshold' tests regarding the stay" and are "directly pertinent to the merits of its case to be addressed in these proceedings during Phase II."[55] According to the Applicant, "VPB simply could not resist its urge to counter Applicant's reasoning in its Annulment Applications until the time it agreed to do so, as reflected in Procedural Order No. 1."[56]

46. The dispute between the Parties therefore concerns the legal criteria to be applied by the Committees in determining whether or not to grant the Applicant's requests that the stay of enforcement of the Awards be continued. While the Committees cannot make any determination on this issue at this stage of the proceedings, they note that, even assuming the Committees were to conclude that, for the Applicant to be able to prevail on its requests for the continuation of the stay, its Annulment Applications must meet certain substantive threshold criteria (and the Committees take no view at this stage on the content or indeed the existence of any such threshold criteria), the Committees' decision on any such threshold criteria would merely be relevant in determining whether the Applicant's requests for continuation of the stay may or may not be granted; as a determination on this

[53] Memorial on Stay, para. 3. See also paras. 5, 12.
[54] Counter-Memorial on Stay, paras. 28, 30 (footnotes omitted).
[55] Reply on Stay, para. 296.
[56] Reply on Stay, para. 296.

preliminary issue it would not, and indeed could not, prejudge the Committees' decision on the merits of the Annulment Applications, which will be briefed by the Parties and resolved by the Committees in Part II of these annulment proceedings. In these circumstances, there cannot be any risk that the Committees' decision could cause irreparable harm on the Applicant's right to present its case on the merits, which is the right that the Applicant seeks to protect by its Application.

47. Consequently, the Applicant's Application for Provisional Measures to Exclude Consideration of Merits in Part I stands to be dismissed.

IV. DECISION

48. For the reasons set out above, the Committees decide that the Applicant's Application for Provisional Measures to Exclude Consideration of the Merits in Part I is dismissed.

On behalf of the *ad hoc* Committees

Dr Veijo Heiskanen
President of the *ad hoc* Committees
Date: 13 October 2016