IN THE MATTER OF AN ARBITRATION UNDER THE 1976 RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

SERGEI VIKTOROVICH PUGACHEV

Claimant

v.

THE RUSSIAN FEDERATION

Respondent

RESPONSE TO REQUEST FOR INTERIM MEASURES

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10 February 2017

White & Case LLP

Counsel for the Respondent

I. INTRODUCTION

1. In response to the Claimant's Request for Interim Measures (the "**Request**") dated 19 December 2016, the Respondent submits this Response to the Request (the "**Response**").

2. As part of its Request, the Claimant sought an immediate order (the "**Immediate Order**"). The Respondent submitted its Response to the Claimant's Request for a Preliminary Order to preserve the status quo and the integrity of the arbitration proceedings (the "**Response to the Request for a Preliminary Order**") on 27 December 2016. The Tribunal issued its Decision on the Request for an Immediate Interim Preliminary Order on 4 January 2017, rejecting the Claimant's request for an Immediate Order.

3. The Claimant submitted a Second Application for a Preliminary Order (the "**Second Preliminary Application**") dated 8 January 2017. The Respondent replied to this Second Preliminary Application (the "**Response to the Second Preliminary Application**") on 10 January 2017. The Respondent submitted further information regarding the Second Preliminary Application in a letter dated 12 January 2017, to which the Claimant replied on 14 January 2017 (the "**Reply to Respondent's Second Answer**"). The Tribunal issued its Decision on the Second Request for an Immediate Interim Order on 20 January 2017, rejecting (i) the Claimant's second request for an immediate order, and (ii) the Claimant's proposal to revisit the Tribunal's Decision on the Request for an Immediate Interim Preliminary Order issued on 4 January 2017.

4. For the avoidance of doubt, nothing in the Request to which the Respondent does not currently respond in this Response should be taken as accepted.

5. This submission is set out as follows:

> **Section I**: Introduction (paragraphs 1 to 5);
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> **Section II**: Executive Summary (paragraphs 6 to 12);
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> **Section III**: the Claimant's application is made in bad faith. Such an application is an abuse of process and the Claimant has misrepresented facts and failed to substantiate fundamental allegations (paragraphs 13 to 58);
>
> **Section IV**: the Claimant has failed to satisfy the tests for granting interim measures for any of the measures sought in his Request (paragraphs 59 to 97);

Section V: the Claimant has failed to satisfy the requirements for requesting a suspension of civil and criminal proceedings (paragraphs 98 to 158);

Section VI: the Claimant has failed to satisfy the requirements for requesting the protection of witnesses and other individuals (paragraphs 159 to 187);

Section VII: the Claimant has failed to establish the necessary conditions for granting security for claim or security for costs (paragraphs 188 to 194); and

Section VIII: Request for Relief (paragraphs 195 to 201).

II. EXECUTIVE SUMMARY

6. The Request seeks relief in the form of an interim award, relating to measures regarding:

(1) the suspension of proceedings worldwide, both civil and criminal;

(2) the protection of witnesses, the Claimant and other individuals;

(3) security for the claim; and

(4) security for costs.

7. As further developed in **Sections III** to **VII** below, the Claimant has failed to satisfy the requirements for the imposition of such interim measures for each of items (1) to (4) in paragraph 6 above. The Claimant's application has been made in bad faith, as it (i) constitutes an abuse of process by seeking to create artificial jurisdiction over pre-existing domestic disputes; (ii) relies on several fundamental arguments so far only set out in the Notice of Arbitration, which have not been substantiated or been subject to examination by the Tribunal or the Respondent, and should not be decided at an interim stage, (iii) fails to establish any specific acts suggesting imminent harm, and (iv) contains numerous vague factual allegations which are unsupported by any evidence. These allegations cannot form the basis of a claim for an interim award, as the Claimant has not established his claim. Due to this approach by the Claimant in his Request, the Respondent has been forced to comment on what the Claimant has not said, just as much as responding to what he has said.

8. Further, the Claimant seeks relief in respect of proceedings worldwide to which the Respondent is not a party. The Claimant has also failed to establish circumstances that would warrant a grant of security for claims or costs in his favour.

9. As an overview of its weaknesses, the Claimant's Request is based upon precarious and contradictory foundations, with little or no evidence to support the Claimant's factual allegations. This is developed further in **Section IV(B)** below. In this regard, the Claimant has

failed to *prima facie* establish his case and presents no evidence that there is any urgency or necessity in the measures requested. There is no specific action "*in the works*" suggesting that "*immediate (or at least prompt) action is necessary in order to prevent serious damage*" to the Claimant.[1] Imposing any interim measures would be a disproportionate burden on the Respondent, due, inter alia, to the vague nature of the relief requested. The onus to prove otherwise lies with the Claimant, and he has failed to do so.

10. The Claimant further makes several attempts at false logic throughout the Request, drawing incorrect conclusions from faulty assumptions. For example, the Claimant alleges that "*since the Tribunal has the power to order such* [interim] *measures, these measures must be granted to preserve Claimant's right in the present procedure*."[2] It simply does not follow that if the Tribunal has such a power, it is under a duty to grant the requested measures. The Claimant cites further Appendix B in support of this assertion, even though Appendix B does not, in any way, demonstrate a risk to the Claimant's rights in this Arbitration. Purely by the fact that the Tribunal may possess the power to order interim measures, which the Respondent submits would not be justified in this case, does not mean that they therefore must do so.

11. The basis upon which this claim has been brought is more generally flawed. For example, the Claimant has failed to support his claims that he had "*tried to settle the dispute amicably*"[3] before submitting it to arbitration. The circumstances surrounding the Claimant's alleged delivery of the trigger letter by hand to President Putin have been questioned by the Respondent in correspondence of 20 December 2016,[4] and the Claimant has yet to provide a response. It is not accepted that the Claimant has made "*repeated attempts*"[5] to settle the dispute amicably. There has been no previous reference to these attempts, nor any proof of them. It is therefore not clear whether there has even been one attempt to settle the dispute as required under the France-USSR BIT, let alone repeated attempts.

12. It is indeed a recurring theme throughout the Claimant's Request that it contains broad, unsubstantiated statements, unsupported by specific or concrete evidence. It is near impossible for the Respondent to reply to many of these allegations due to the lack of information and proof put forward by the Claimant.

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1 **Exhibit CL-33**. G. Born, "Chapter 11: Provisional Measures in International Arbitration", International Arbitration: Law and Practice, Second Edition, (2015) at 13.

2 **Request**, paragraphs 63 and 70.

3 **Request**, paragraph 123.

4 **Exhibit R-1**. Letter from White & Case to Betto Seraglini, dated 20 December 2016.

5 **Request**, paragraph 123.

III. THE CLAIMANT'S APPLICATION SHOULD BE REJECTED AS IT IS MADE IN BAD FAITH AND IS AN ABUSE OF PROCESS

13. As detailed in **Sections IV** to **VII** below, there are multiple reasons why the Claimant's Request should fail as a consequence of the requirements for interim measures not being satisfied. However, it is significant that the Claimant's application has also been made in bad faith and is an attempt to abuse the arbitral process. The Tribunal should take this into consideration on the following grounds, expanded more fully below:

i) The Claimant's Request is an improper attempt to internationalize a domestic dispute, and the Tribunal is not the appropriate forum to decide this Request;

ii) The Claimant seeks to rely on unsubstantiated allegations made in the Notice of Arbitration, which are not appropriate to be considered at this preliminary stage; and

iii) The Claimant's account of the Russian bankruptcy proceedings is inaccurate and misleading.

A. THE CLAIMANT'S APPLICATION IS AN IMPROPER ATTEMPT TO INTERNATIONALIZE A DOMESTIC DISPUTE

14. By his Request, the Claimant seeks to create artificial jurisdiction over pre-existing domestic disputes, and the Tribunal is not the appropriate forum to decide this Request. The Tribunal should not grant relief where the Claimant is attempting to use the Arbitration, in effect, to challenge the legitimacy of the judgments of domestic courts of various countries in an international forum. The Request itself is not only completely unsupported by evidence, as detailed throughout this Response, but also reflects contradictions in respect of the relief the Claimant is seeking.[6]

15. The doctrine of abuse of process (or abuse of right) is recognized in international law. As one commentator observes, abuse of process:

> "*relates to the good order of judicial proceedings.* [It] *is common to all the major legal systems, and may be properly applied by a tribunal in any legal system,*

[6] *See* paragraphs 39, 41 and 141 below in particular.

including the international legal system, in the exercise of the tribunal's competence to regulate its own proceedings."[7]

16. The doctrine of abuse of process is considered to be "*overwhelmingly accepted, by scholarship and international jurisprudence, as a general principle of law or as part of customary international law*."[8] The right of a court or tribunal to dismiss a claim as an abuse of process finds positive authority in the case law of international courts and tribunals as well as in investment arbitration case law.[9] A recent ICSID tribunal considered a respondent's abuse of process objection before considering whether or not the tribunal even had jurisdiction.[10] The tribunal specifically explained that it "*has chosen to consider this objection first, because the existence of abuse of process is a threshold issue that would bar the exercise of the Tribunal's jurisdiction even if jurisdiction existed*."[11]

17. The notion of an abuse of process "*consists of the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights were established*." These principles have frequently been recognized by the International Court of Justice.[12] Bringing claims in an international arena and requesting provisional measures from the Tribunal for the sole purpose of blocking on-going domestic proceedings equates to such an abuse. In particular, and as detailed further below, by his Request the Claimant seeks to suspend legitimate legal proceedings in numerous jurisdictions under the guise of a right seemingly conferred under the France-USSR BIT. There is simply no basis for such relief under the France-USSR BIT, and the Claimant does not even attempt to address this point in the Request.[13]

18. In *ST-AD v. Bulgaria*, the tribunal held that a Bulgarian investor who did not have a right to international arbitration against his own State of nationality "*could not transfer such right*

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7 **Exhibit RL-20**, V. Lowe, "Overlapping Jurisdiction in International Tribunals", Australian Year Book of International Law (1999), p. 203. See also, **Exhibit RL-21**, J. P. Gaffney, "'Abuse of Process' in Investment Treaty Arbitration", The Journal of World Investment and Trade (2010), p. 517.

8 **Exhibit RL-22**, J. Baumgartner, Treaty Shopping in International Investment Law (2016), p. 202.

9 **Exhibit RL-21**, P. Gaffney, "'Abuse of Process' in Investment Treaty Arbitration", The Journal of World Investment and Trade (2010), pp. 519-521. See also, **Exhibit RL-23** *Venezuela Holdings B.V. and others (Case formerly known as Mobil Corporation and others) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, paras. 169-175 (discussing the application of the "abuse of right" doctrine in the case law of the ICJ, the Court of Justice of the European Union and the Appellate Body of the World Trade Organization).

10 *See* **Exhibit RL-24**, *Transglobal Green Energy, LLC and Transglobal Green Energy de Panama, S.A. v. The Republic of Panama*, ICSID Case No. ARB/13/28, Award, 2 June 2016, paragraph 100 ("*The Tribunal may choose to consider the objections to its jurisdiction in any particular order. The Tribunal will start by considering the objection based on abuse of the international investment treaty system by Claimants' allegedly wrongful attempt to create artificial international jurisdiction over a pre-existing domestic dispute*.").

11 **Exhibit RL-24**, *Transglobal Green Energy, LLC and Transglobal Green Energy de Panama, S.A. v. The Republic of Panama*, ICSID Case No. ARB/13/28, Award, 2 June 2016, paragraph 100.

12 *See*, for example, **Exhibit RL-25**, *Fisheries Case (United Kingdom v Norway)* [1951] ICJ 3

13 This is discussed further below, in **Section III(A)**.

(that he did not have)" to a German company (the claimant in the case) for purposes of accessing investment arbitration.[14] The tribunal also considered whether the German claimant could invoke a right of action on its own behalf and found that the claimant "*sought to manufacture jurisdiction by introducing a German investor[…] once all of its domestic legal options had failed*"[15] and thus the "*initiation and pursuit of this arbitration* [was] *an abuse of the system of international investment arbitration*".[16] The tribunal emphasized that it has a duty "*to ensure that the BIT mechanism does not protect investments that it was not designed to protect, that is, domestic investments disguised as international investments or domestic disputes repackaged as international disputes for the sole purpose of gaining access to international arbitration*."[17]

19. The Claimant's requests for interim measures would result in him gaining a benefit to which he is not entitled, and is inconsistent with the purpose of international arbitration. Indeed, both the Claimant's Request and his claims more broadly constitute clear examples of various domestic disputes repeated as investment disputes.

20. Arbitral tribunals considering abuse of process claims also consider whether a dispute was foreseeable at the time of any change in nationality or restructuring of an investment. As the *Lao Holdings v Lao (I)* tribunal explained:

> "*More precisely, if a company changes its nationality in order to gain ICSID jurisdiction at a moment when things have started to deteriorate so that a dispute is highly probable, it can be considered an abuse of process, but for an objection based on ratione temporis to be upheld, the dispute has to have actually arisen before the critical date to conform to the general principle of nonretroactivity in the interpretation and application of international treaties*."[18]

21. Distinguishing abuse of process from jurisdiction *ratione temporis*, the *Pac Rim v El Salvador* tribunal explained the critical date for assessing a claim for abuse of process as follows:

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14 **Exhibit RL-26**, *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction, 18 July 2013, paragraph 411.

15 **Exhibit RL-26**, *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction, 18 July 2013, paragraph 421.

16 **Exhibit RL-26**, *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction, 18 July 2013, paragraph 423.

17 **Exhibit RL-26**, *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction, 18 July 2013, paragraph 423.

18 **Exhibit RL-27**, *Lao Holdings N.V. v. Lao People's Democratic Republic [I]*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014, paragraph 76. **Exhibit RL-28**, *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, paragraph 527 "*In view of the arguments submitted by the Parties, the starting point for the Tribunal is to distinguish between the ratione temporis objection and the abuse of rights objection. This is now clear from the jurisprudence…*").

> "*In the Tribunal's view, the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy. In the Tribunal's view, before that dividing-line is reached, there will be ordinarily no abuse of process; but after that dividing-line is passed, there ordinarily will be. The answer in each case will, however, depend upon its particular facts and circumstances, as in this case.*"[19]

22. In *Renée Rose Levy v Peru*, the tribunal noted that the claimant had "*acquired her investment prior to the challenged measures, even if it was just slightly before*" and that as a result the tribunal had jurisdiction *ratione temporis*; however, the tribunal noted that the tribunal "*may be precluded from exercising its jurisdiction if the acquisition is abuse*".[20]

23. Therefore, even if a change in nationality may occur lawfully, a tribunal would still be barred from exercising jurisdiction if the change in nationality was abusive.

24. In this context, there are further doubts as to whether a dispute arose, or the Claimant foresaw that it would arise, prior to his alleged acquisition of French nationality. For example, there is evidence of a dissipation of the Claimant's assets in December 2008 and the first quarter of 2009, well before the Claimant allegedly obtained French nationality. The English High Court judgment of Mrs Justice Rose details how IIB (when still under the Claimant's control) transferred over USD 500 million in late 2008 and early 2009 to the Swiss bank account of Safelight Enterprises Ltd ("**Safelight**").[21]

25. These actions suggest that the Claimant had foresight of his dispute with the Respondent well before he allegedly became a French national. Even if the Tribunal were to determine that the Claimant has established *prima facie* jurisdiction (which the Respondent disputes), the Tribunal should refuse to grant the Claimant relief on the basis that his acquisition of French nationality was an abuse of process in an attempt to improperly attract the protection of the France-USSR BIT. Further related points are considered below, particularly in **Sections IV(A) and (B)**.

26. Furthermore, the Claimant seeks to bring his claims under the Request without clarifying whether, as an initial point, the Arbitration process was commenced in accordance with the requirements under Article 7 of the France-USSR BIT.[22] As noted above in paragraph 11, the

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19 **Exhibit RL-29**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, paragraph 2.99.

20 **Exhibit RL-30**, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, paragraph 182.

21 **Exhibit RL-17**, Judgment of Mrs Justice Rose, [2016] EWHC 192 (Ch), paragraph 186.

22 *See* **Exhibit CL-1**, France-USSR BIT, Article 7. This provides for a six month period to attempt amicable settlement between the parties.

circumstances surrounding the alleged delivery of the trigger letter by hand have been questioned by the Respondent in correspondence of 20 December 2016,[23] and the Claimant has yet to provide a response. In the Respondent's letter, it was noted that the purported trigger letter (i) was written in English, despite being from a Russian national to the President of the Russian Federation, (ii) had no indication as to when or where it was written, and (iii) contained sections highlighted in yellow, which appears unusual considering it was allegedly a formal letter to the President. In this context, it is also suspicious that the structure of the trigger letter appears to be very similar to the Notice of Arbitration, despite being allegedly written nearly a year before the Notice of Arbitration was filed. The Claimant's failure to address this basic preliminary issue, inter alia, raises serious doubts as to his very right to bring the present proceedings.

27. The Claimant has also failed to respond to other correspondence from the Respondent, (in respect of financial information, as noted in **Section VIII** below). The Tribunal should not grant relief in the name of protecting "*the sanctity and integrity of the arbitral proceedings*" [24] when the Claimant himself has openly abused such processes, including by multiple breaches of the Tribunal's order.

B. THE CLAIMANT SEEKS TO RELY ON UNSUBSTANTIATED ALLEGATIONS MADE IN THE NOTICE OF ARBITRATION

28. In his Request the Claimant raises substantive points relating, in particular, to the Shipyards.[25] The allegations made by the Claimant in relation to this investment are clearly fundamental to this Arbitration, as also outlined in the Notice of Arbitration.[26]

29. The crux of the Claimant's Request therefore hinges on background facts which go to the merits of the Arbitration claim itself. As set out by the Claimant: "[T]*his concise factual background* [detailing the Shipyard interests and the following bankruptcy of IIB]*, which will be expanded during the merits phase of the present arbitration, perfectly explains the reasons leading to the utmost urgency to issue interim measures to protect the integrity of the arbitration proceedings during its whole duration*."[27] These arguments need to be presented through full submissions. They consist of substantive and complex points, which also relate to

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23 **Exhibit R-1.** Letter from White & Case to Betto Seraglini, dated 20 December 2016.

24 **Request**, paragraph 231.

25 **Request**, Section IV(A) from paragraphs 126 to 156. The Claimant also refers to the Red Square Investment, the Investment in EPC and the Gribanovo Real Estate Project in this section.

26 **Notice of Arbitration**, paragraphs 35 to 78.

27 **Request**, paragraph 169 and **Notice of Arbitration**, paragraphs 35 to 78. *See* also **Request**, Section IV(A) from paragraphs 126 to 156. The Claimant also refers to the Red Square Investment, the Investment in EPC and the Gribanovo Real Estate Project in this section.

the Tribunal's jurisdiction, and are not for interim judgment. In any event, many of the issues in respect of which the Claimant seeks relief have already been litigated in the English courts.[28] For example, the Claimant alleges that "*the Shipyard Interests were transferred to USC through secret tenders*"[29] However, the Claimant had raised this argument in the English proceedings, and Mr Justice Mann plainly refuted it: "*The auctions were not held in secret. They were advertised in what I am told is the Moscow equivalent of the London Gazette. So the secrecy point as such goes*."[30] There are further instances of points which the Claimant has already litigated, including regarding the alleged illegality of the Russian proceedings and their alleged political motivation which were decided against him.[31] The Claimant's Request is therefore an illegitimate attempt at a 'second bite at the cherry', particularly in circumstances where the Claimant has so far failed to substantiate his claims.

C. THE CLAIMANT'S ACCOUNT OF THE RUSSIAN BANKRUPTCY PROCEEDINGS IS INACCURATE AND MISLEADING

30. In the Request, the Claimant makes several assertions concerning alleged irregularities of the bankruptcy proceedings in respect of IIB and the Subsidiary Liability Proceedings (which are part of the bankruptcy proceedings). These assertions are vague, unparticularised and unsubstantiated. The Claimant attempts to undermine the legality of those proceedings, without making detailed submissions on Russian law or even referring to rules which, in his view, might have been violated. This makes it extremely difficult, if not impossible, for the Respondent to provide meaningful responses.

31. By way of example, in the section discussing the alleged problems with the Subsidiary Liability Judgment, the Claimant alleges "*improper use of evidence from UK proceedings*".[32] Instead of explaining what evidence was used in the Subsidiary Liability Judgment and why its use could be improper, with references to relevant provisions of Russian law, the Claimant refers to paragraphs 201-202 of his Request. These paragraphs, in turn, do not provide any further clarification either: they discuss the extra-territorial effect of the worldwide freezing order (the "**Freezing Order**") and preliminary measures "*regarding assets that Mr Pugachev had disclosed in the UK Court proceedings*" in the Cayman Islands, France and Luxembourg requested in April 2016 or thereafter (whereas the Subsidiary Liability Judgment is dated 30

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28 *See* **Exhibit RL-31**, Judgment of Mr Justice Mann [2014] EWHC 4336 (Ch), paragraphs 10 to 188.

29 **Request**, paragraph 149.

30 **Exhibit RL-31**, Judgment of Mr Justice Mann, [2014] EWHC 4336 (Ch), paragraphs 161 to 162.

31 **Exhibit RL-31**, Judgment of Mr Justice Mann, [2014] EWHC 4336 (Ch), paragraphs 150, 170 and 193.

32 **Request**, paragraph 166, bullet point three.

April 2015), and contain no submissions on issues of Russian law. This is yet another circumstance where the Claimant makes a wholly unsubstantiated allegation.

32. By way of a further example, the Claimant states that:

> "[a]*s will be further explained in the pleadings on the merits, the bankruptcy proceedings were tainted with innumerable irregularities*";[33] and
>
> "[a]*s will be demonstrated during the present proceedings, the judgement against Mr Pugachev was based on false testimonies provided by Mr Didenko, while being imprisoned and under duress*."[34]

33. Neither of these points are demonstrated in the Request. The Claimant provides a number of examples of the alleged irregularities, which themselves turn out to be vague and unsupported allegations. The Claimant also does not even state in the Request what statements in Mr Didenko's testimonies are false. This is another example of the evidential void, a which recurrs throughout the Claimant's Request.

34. Nevertheless, as the Russian bankruptcy proceedings and enforcement of the Subsidiary Liability Judgment form the underlying basis of the Claimant's claim, certain inaccuracies in the Request must be addressed at this preliminary stage. These inaccuracies represent statements made in bad faith as the Claimant seeks to mislead the Tribunal.

35. The Claimant claims that IIB's bankruptcy was "*orchestrated by Respondent*".[35] On the Claimant's own account, IIB had become insolvent on its own, and well before the revocation of its banking license in October 2010. By way of example, in the Claimant's appeal in the bankruptcy proceedings and in an attempt to persuade the Russian court that he had no involvement in IIB's bankruptcy, the Claimant stated:

> "*at the date that the pledge agreements were cancelled* [6 August 2010] *the Bank* [IIB] *already had the factual indications of being bankrupt, which is confirmed by the case files … :*
>
> *1) … it can be seen that already at 01 July 2009 the Bank's assets were insufficient to settle the demands of its creditors…*
>
> *2) As can be seen from the temporary administrator's* [bankruptcy receiver's] *rebuttal the Bank's insolvency was caused by a risky lending policy – operations to issue loans to organisations with doubtful solvency.*
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> *3) The Central Bank of Russia Audit Certificate came to the conclusion that there had been a significant and progressive lack of liquid assets since the middle of May 2009. The Central Bank of Russia Working Group also noted that the Bank did not have at*

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33 **Request**, paragraph 155.

34 **Request**, paragraph 166, bullet point two.

35 **Request**, paragraphs 132 to 156.

its disposal sufficient liquid assets to settle its loans received from the Central Bank, particularly taking into account the poor quality of the Bank's loan portfolio…"[36]

36. It is clear from the above that even on the Claimant's account it was the actions of IIB (or the Claimant, as demonstrated by the resulting Subsidiary Liability Judgment) that resulted in the bankruptcy of IIB, and not actions of the Respondent.

37. The Claimant further states that the "*appointment of the DIA as IIB's receiver* [of IIB] *was surprising and not necessary in this case. Indeed, under Russian law, the DIA is to be appointed as receiver of a bank which possesses individuals' deposit license. This was not the case of IIB but nevertheless the Central Bank insisted on the appointment of the DIA as receiver of IIB*".[37] The Claimant's position on this issue is incorrect, and the appointment of the DIA was in fact triggered by the fact that IIB had a license in the past.[38]

38. Pursuant to Russian law (applicable at the time), the DIA was to be appointed as a receiver of the bank if the latter "*had a licence from the Bank of Russia for placement of individuals' funds into deposits*."[39] This was the case of IIB: prior to 2005, IIB had a license for individuals' deposits (i.e. a retail banking license)[40] and by 2010 had retained some of the deposits previously placed by individuals.[41] Accordingly, the DIA was appointed as the receiver in accordance with applicable Russian law, and also consistently with one of the key purposes of a deposit insurance agency or corporation: to protect the rights of individuals in case of bank failures. Indeed, IIB even foresaw the appointment of the DIA as a receiver. A prospectus for notes issued by IIB Luxemburg S.A., an affiliate of IIB,[42] for the purpose of financing a loan to IIB dated 12 February 2010 and approved by the Irish Financial Services Regulatory Authority (the "**Prospectus**"), stated:

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36 *See* **Exhibit C-13**, pages 30 to 31. Where exhibits are translated into English and do not have continuous numbering, references to page numbers are hereinafter provided for English translations.

37 **Request**, paragraph 148.

38 **Exhibit C-3**, Decision of the Moscow City Commercial Court dated 7 December 2010 introducing the receivership in respect of IIB.

39 **Exhibit RL-32**, Article 50.11(2) of the Federal Law "On Insolvency of Credit Organisations" dated 25 February 1999 No. 40-FZ, as amended (the "**Credit Organisations Insolvency Law**").

40 **Exhibit R-2**, Prospectus for notes issued by IIB Luxemburg S.A., an affiliate of IIB, for the purpose of financing a loan to IIB dated 12 February 2010 and approved by the Irish Financial Services Regulatory Authority, page 46. As can be seen from section entitled "Important information about this Prospectus" on page i, IIB "*accepts responsibility for the information contained in this Prospectus" and* "*each of IIB and the Issuer* [IIB Luxemburg S.A.] *declares that the information given in this Prospectus is, to the best of its knowledge, in accordance with the facts and does not omit anything likely to affect its import*."

41 **Exhibit R-3**, the DIA notice on the progress of receivership dated 15 February 2011, page 1.

42 IIB Luxemburg S.A. is described as IIB's special purpose vehicle under IIB's 100% "*effective control*" – *See* **Exhibit R-2**, Prospectus for notes issued by IIB Luxemburg S.A. dated 12 February 2010, page F-44.

> "…*if the credit organisation did not hold a retail banking licence, the court appoints a CBR* [Central Bank of Russia] *accredited receiver… if the credit organisation held a retail banking licence, the DIA acts as the receiver*."[43]

39. IIB confirmed the information in the Prospectus was correct.[44] The Claimant's allegations in respect of the DIA's appointment are simply contradicted by the IIB's own statements.

40. The Request vaguely addresses other issues relating to the merits of the Claimant's claims, such as the alleged illegality of the Subsidiary Liability Judgment, whereby the Claimant was declared liable for IIB's obligations as a controlling person. Whilst the Respondent considers this is not the appropriate time for the Tribunal to consider these issues and reserves its right to submit more detailed responses at appropriate stages of these proceedings, it briefly addresses below some of the inaccuracies in the Claimant's account of the relevant Russian proceedings:

41. Firstly, the Claimant alleges that "[o]*n 8 September 2016, the Ninth Commercial Court of Appeal ruled that all decisions taken by one judge were illegal. Thus, the Subsidiary Liability Judgment against Mr Pugachev has no legal effect, as well as hundreds of decisions on the merits that have been made by this illegally constituted Court. By way of consequence, all the decisions taken on the basis of the Subsidiary Liability Judgment, such as all the UK decisions* […] *are illegal.*"[45] This position is incorrect.

42. It is correct that the Ninth Commercial Court of Appeal, which, on the Claimant's account, must have been involved in the "*concerted actions of the Executive and Judicial branch of Respondent to deprive Claimant of all his assets*",[46] reversed the ruling dated 15 July 2016 whereby the court of the first instance extended the receivership of IIB for another six months. However, the resolution of the Ninth Commercial Court of Appeal concerned only that particular ruling dated 15 July 2016. As can be seen from the publicly available full text of the Resolution of the Ninth Commercial Court of Appeal, which the Claimant failed to exhibit to his Request,[47] the Ninth Commercial Court of Appeal did not make any findings as to the legality of any other court decisions rendered in the course of IIB's bankruptcy. These decisions, including the Subsidiary Liability Judgment, remain in full force and effect.

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43 **Exhibit R-2**, Prospectus for notes issued by IIB Luxemburg S.A. dated 12 February 2010, page 117.

44 **Exhibit R-2**, Prospectus for notes issued by IIB Luxemburg S.A. dated 12 February 2010, page i.

45 **Request**, paragraph 155, bullet point two.

46 **Request**, paragraph 164.

47 For unknown reasons, the Claimant exhibited only the operative part of the Resolution of the Court of Appeal (which he apparently considers to be of paramount importance), which does not set out the reasons for the Court of Appeal's decision (**Exhibit C-9**). A full version of the Resolution of the Ninth Commercial Court of Appeal in Case No. A40-119763/10 dated 15 September 2016 is attached as **Exhibit R-4.**

43. Secondly, the Claimant seeks to downplay his responsibility regarding ownership and/or lack of control with regard to IIB. He states:

> "*According to Russian civil law, a person who owns or controls an insolvent enterprise may be held liable for its bankruptcy, if the bankruptcy was caused by the individual's illegitimate actions. The conditions for finding Mr Pugachev subsidiary liable were not met, as he neither controlled nor owned IIB at the time of its bankruptcy*."[48]

44. The Claimant, yet again, provides no references to Russian law to support his view. Remarkably, he also makes no attempt to argue that his actions were anything other than "illegitimate". In any event, the assertion that "*the conditions… were not met, as* [Mr Pugachev] *neither controlled nor owned IIB*" is incorrect as a matter of fact, and contradicts statements which have been confirmed by IIB as correct. By way of example, the Prospectus stated: "*The Group* [IIB, IIB and its subsidiaries taken as a whole]*'s principal controlling person is Mr Sergei V. Pugachev, a Russian citizen... he reviews and approves the Group's critical decisions. In addition, in practice, he decides shareholder matters through other companies controlled by him including, but not limited to, approving major transactions and setting the Group's strategy*."[49]

45. In any event, the law which was applied in the relevant proceedings employed broad wording and provided that a person can be declared subsidiary liable if he or she is a controlling person, who was in turn defined as a person who had the right to give mandatory instructions or "*the ability to otherwise determine* [the debtor's] *actions*."[50] As demonstrated by the Subsidiary Liability Judgment and as follows, in particular, from the Prospectus cited above, the Claimant definitely fell within the scope of this definition.

46. Thirdly, the Claimant alleges that "*in the Subsidiary Liability Judgment, the Commercial Court based its decision almost exclusively on witness testimonies given in parallel criminal proceedings that Russia had initiated opportunistically*."[51] This is an incorrect statement, as the Subsidiary Liability Judgment is quite detailed and contains references to different types of evidence. As is clear from the Claimant's own evidence, in addition to witness evidence,

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48 **Request**, paragraph 161.

49 **Exhibit R-2**, Prospectus for notes issued by IIB Luxemburg S.A. dated 12 February 2010, page 15.

50 **Exhibit RL-32**, Article 14 of the Credit Organisations Insolvency Law. In the Subsidiary Liability Judgment the court relied on the Credit Organisations Insolvency Law, applicable at the time. This law was repealed in December 2014, however similar provisions regarding the issue in question were included in Articles 2 and 10 of the Federal Law "On Insolvency (Bankruptcy)" dated 26 October 2002 No. 127-FZ, as amended (the "**Insolvency Law**") (**Exhibit RL-33)**.

51 **Request**, paragraph 166, bullet point two.

the Russian courts relied on public disclosures, including prospectuses, IIB's letters to the Central Bank and information from IIB's website.[52]

47. In any event, there were no specific rules regarding the type of evidence to be used in determining whether an individual should be liable. In this regard, the Claimant's apparent complaint about the alleged "*lack of any direct evidence concerning ownership or control of IIB by Mr Pugachev*"[53] is baseless. Russian law does not (and did not at the time) require the evidence to be "*direct*".[54] Accordingly, the Claimant's complaints concerning the type of evidence used in the Subsidiary Liability Proceedings are unsubstantiated and baseless.

48. Fourthly, the Claimant states that "*all of Mr Pugachev's recourses against the Subsidiary Liability Judgment were immediately denied*".[55] Once again, this statement is incorrect and is made in bad faith. The Claimant's recourses against the Subsidiary Liability Judgment were not "*immediately denied*." The Claimant challenged the Subsidiary Liability Judgement dated 30 April 2015 in appellate and cassation proceedings, which lasted until October 2015.[56]

49. The only appeal that was not admitted for consideration was the Claimant's second cassation appeal. The judge of the Supreme Court refused to accept it for consideration in January 2016 because he decided that there were no grounds for doing otherwise,[57] and this was within his discretion. By way of illustration, in the first half of 2016 the judges of the Supreme Court admitted for consideration only 2.21% of second cassation appeals addressed to it (a slight decrease compared to 2.25% in 2015).[58]

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52 **Exhibit C-12**, pages 63 to 65.

53 **Request**, paragraph 163.

54 There is no express provision to this effect, but this conclusion follows from a number of provisions taken together, which are explained below and provided in **Exhibit RL-34**, Articles 64(1), 68, 71(1) of the Commercial Procedure Code of the Russian Federation (dated 24 July 2002 No. 95-FZ, as amended) (the "**Commercial Procedure Code**"). Applicable procedural law does not distinguish between direct and indirect evidence. By contrast, Russian law broadly defines evidence as "*information, obtained in accordance with this Code* [Commercial Procedure Code] *and other federal laws about facts, on the basis of which the court establishes the presence or absence of circumstances supporting the claims and objections of the parties and other circumstances relevant to due consideration of the case.*" (Article 64(1) of the Commercial Procedure Code). Further, the court assesses evidence in accordance with his or her internal conviction (Article 71(1) of the Commercial Procedure Code). There are a number of statutory exceptions where certain facts need to be proved by specific type of evidence (Article 68 of the Commercial Procedure Code), however none of them was applicable in the event.

55 **Request**, paragraph 166, bullet point five.

56 **Exhibit C-16**, Ruling of the Supreme Court of the Russian Federation in Case No. A40-119763/10 dated 29 January 2016, page 1.

57 **Exhibit C-16**, Ruling of the Supreme Court of the Russian Federation in Case No. A40-119763/10 dated 29 January 2016, page 2.

58 **Exhibit R-5**, Extracts from the overview of statistics published by the Supreme Court of the Russian Federation for 2015. **Exhibit R-6**, Extracts from the overview of statistics published by the Supreme Court of the Russian Federation for the first half of 2016.

50. The Claimant appears to allege[59] that his appeals against the Subsidiary Liability Judgment were considered too quickly, stating that the Ninth Commercial Court of Appeal rendered its resolution in two months (after the Subsidiary Liability Judgment was issued), the Court of Cassation (the Commercial Court of the Moscow District) rendered its resolution in three months and the judge of the Supreme Court refused to consider the Claimant's second cassation appeal in four months.[60] The Claimant, however, has failed (yet again) to submit any evidence which would suggest these timings are unusual for the Russian courts. It also follows from the publicly available database of the Russian courts that the Claimant filed another appeal (complaint) in February 2016, this time in respect of the Supreme Court's judge's refusal to accept the Claimant's second cassation appeal for consideration.[61] According to the database, this appeal is still pending, which the Claimant has tellingly failed to mention in the Request. Accordingly, the Claimant's assertions that "*all of Mr Pugachev's recourses against the Subsidiary Liability Judgment were immediately denied*" fails.

51. Fifthly, the Claimant alleges that he was "*never granted sufficient time to prepare his case*"[62] and that there had been "*improper admission of evidence and violation of the equality of arms principle: the DIA changed the grounds and the amount claimed and filed new evidence on 23 April 2015, i.e. the day on which the decision of the Court was announced to the Parties. The Court refused Mr Pugachev's request for a postponement of the proceedings*."[63]

52. It is incorrect and misleading to state to the Tribunal that the Claimant "*was never granted sufficient time to prepare his case*": on the basis of publicly available information, it is clear that the proceedings against the Claimant started in December 2013, the hearing on the merits was postponed eight times, including two times at the request of the Claimant's representatives,[64] such that there were nine hearings in total and the final hearing was held on 23 April 2015. The appellate hearing was held in June 2015, and the hearings on the (first) cassation appeal were held in August and September 2015. The Claimant's counsel participated in the proceedings starting from at least September 2014[65] and made

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59 **Request**, paragraph 166, bullet point five starting on page 47, and footnote 122.

60 There appears to be a type in footnote 122 as the Claimant's appeal could not have been filed on 24 June 2015, which is the date when the decision of the Ninth Commercial Court of Appeal on the Claimant's appeal was rendered.

61 **Exhibit R-7**, Screenshot of the case record for Case No. A40-119763/10 in the public database of the Russian Commercial Courts.

62 **Request**, paragraph 166, bullet point five.

63 **Request**, paragraph 166, bullet point four.

64 **Exhibit R-8**, Ruling of the Moscow City Commercial Court in Case No. A40-119763/10 dated 18 September 2014, page 2, **Exhibit R-9**, the Ruling of the Moscow City Commercial Court in Case No. A40-119763/10 dated 27 October 2014, page 2.

65 **Exhibit R-8**, Ruling of the Moscow City Commercial Court in Case No. A40-119763/10 dated 18 September 2014, page 1.

submissions.[66] In any event, the Court of Appeal, in accordance with Russian procedural law, considered the case anew following the Claimant's appeal with respect to the Subsidiary Liability Judgment[67] – any allegations that the Claimant was prejudiced by the refusal of his request for adjournment of the hearing of 23 April 2015 therefore fail for this reason alone.

53. Likewise, the Claimant's assertion that he "*had no opportunity to rebut*" the calculation of the amount of the subsidiary liability[68] is wrong: as can be seen from the text of the Subsidiary Liability Judgement, the Claimant did rebut it, albeit unsuccessfully.[69] The Russian court rejected the Claimant's arguments because they were too vague, which appears to be a recurring theme throughout the Claimant's submissions not just in this Arbitration.[70]

54. The Claimant makes a number of other vague assertions in the Request, including that:

a) "*companies owned by Mr Pugachev* [were excluded] *from the list of IIB's creditors, without reasonable ground and in violation of Russian law*";[71] and

b) "*Mr Pugachev and the other defendants in the Subsidiary Liability Proceedings did not have access to all or relevant portions of* [the] *testimonies*" on which the Subsidiary Liability Judgment was based.[72]

55. These assertions are unsupported by evidence and are far too vague for the Respondent to address them. The Respondent reserves the right to provide its comments in due course at appropriate stages of these proceedings if the Claimant sufficiently particularises his assertions.

56. As a final point, and as the Claimant appears to recognise, the correct forum for defending the Subsidiary Liability Judgment is the Russian state courts. In the judgment of Mr Justice Mann on 19 December 2014 in the English proceedings, it is clearly stated that:

> "*There has been a form of dispute as to whether or not, and the extent to which, Mr Pugachev has participated in [the insolvency] proceedings. However, any doubt as to what his intentions are in that respect were removed at the hearing before me when Mr Pugachev effectively undertook to submit to the jurisdiction of the Russian court in [the insolvency] proceedings. It is therefore to be anticipated that he will actively seek to defend them. He has not sought to make any point to the effect that he*

66 *See*, *e.g.*, **Exhibit C-12***,* Subsidiary Liability Judgment, dated 30 April 2015, page 63.

67 **Exhibit RL-31**, Article 268(1) of the Commercial Procedure Code, *see* also **Exhibit C-14**, page 3.

68 **Request**, paragraph 166, bullet point six.

69 **Exhibit C-12**, Subsidiary Liability Judgment, dated 30 April 2015, pages 101.

70 **Exhibit C-12**, Subsidiary Liability Judgment, dated 30 April 2015, pages 101 to 102.

71 **Request**, paragraph 155, bullet point one.

72 **Request**, paragraph 166, bullet point two.

will not receive a fair trial in those proceedings, or that those proceedings are politically motivated and will be politically conducted against his interests".[73]

57. It is difficult to see how the Claimant's claim (including any claim of political motivation or denial of justice) can be maintained in light of the Claimant's acceptance of the jurisdiction of the Russian courts.[74]

58. Despite asserting that there is "*compelling evidence that the Subsidiary Liability Judgment is the result of a series of extremely grave violations of due process*",[75] the Claimant has failed to provide in the Request any evidence of such violations. The Claimant has acted in bad faith by misrepresenting or stating incorrect facts regarding the Russian bankruptcy proceedings. The Respondent respectfully submits that the Tribunal should take this, and the examples of the Claimant's bad faith behaviour, into account when deciding whether to grant the relief requested by the Claimant.

IV. STANDARD FOR GRANTING INTERIM MEASURES

59. The Claimant seeks interim measures pursuant to Article 26 of the 1976 UNCITRAL Arbitration Rules,[76] and thus has the burden of demonstrating that its request meets "*the standards internationally recognized as pre-conditions for such measures*."[77]

60. Unlike the 2010 UNCITRAL Arbitration Rules, the 1976 version does not identify the conditions that must be satisfied to obtain interim measures.[78] Nevertheless, as the Claimant recognizes in its Request,[79] arbitral tribunals generally rely on five criteria for granting interim measures.[80] An order by the *Tallin v Estonia* tribunal, one of the most recent

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73 *See* **Exhibit RL-31**, Judgment of Mr Justice Mann [2014] EWHC 4336 (Ch), paragraph 31.

74 **Request**, paragraphs 155, 167 and 221.

75 **Request**, paragraph 166.

76 **Request**, paragraph 33. *See* also **Exhibit CL-22**, 1976 UNCITRAL Arbitration Rules, Article 26(1) ("*At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods*.").

77 **Exhibit CL-4**. *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, Order on Interim Measures, 2 September 2008, paragraph 40.

78 *See* **Exhibit RL-35**, 2010 UNCITRAL Arbitration Rules, Article 26(3) ("*The party requesting an interim measure under paragraphs 2(a) to (c) shall satisfy the arbitral tribunal that: (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is grated; and (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination*.").

79 **Request**, paragraph 86.

80 *See* e.g., **Exhibit RL-36**, *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Decision on Respondent Application for Provisional Measures, 12 May 2016, paragraph 78; **Exhibit RL-37**, *Lao Holdings N.V. v. Lao People's Democratic Republic [I]*, ICSID Case No. ARB(AF)/12/6, Decision on the Merits, 10 June 2015, paragraph 109; **Exhibit CL-4**. *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, Order on Interim Measures, 2 September 2008, paragraph 45.

decisions on interim measures, summarizes the five requirements as: "*i. prima facie jurisdiction of the tribunal; ii. prima facie existence of a right susceptible of protection / prima facie case on the merits; iii. necessity of the measure requested; iv. urgency of the measure requested; v. proportionality of the measure requested (balance of inconvenience)*."[81]

61. The Claimant, relying on *EnCana v Ecuador*, notes that some tribunals have not retained all of these requirements.[82] More recent investment arbitration tribunals, however, confirm that these five elements must be met for a grant of interim measures. As the *Tallinn v Estonia* tribunal confirms, *"[a]lthough formulated in different ways by different tribunals . . . five criteria apply*." Even the *Paushok v Mongolia* decision, upon which Claimant relies, confirms that all five requirements "*have to be met before a tribunal will issue an order in support of interim measures*."[83] In *Lao Holdings v Lao*, for example, the tribunal dismissed a request for interim measures even though "[e]*ach of these components except for (2) was met*".[84]

62. This strict application by arbitral tribunals of the five criteria reinforces the nature of interim measures as "*extraordinary measures not to be granted lightly*."[85] The most recent UNCITRAL tribunal to decide on a request for interim measures, *Dawood Rawat v The Republic of Mauritius*, confirms that "*a grant of interim measures requires exceptional circumstances*."[86] In this context, the party seeking provisional measures thus has a high burden to meet. As the *Hydro v Albania* tribunal acknowledged, "*there is a high threshold to*

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81 **Exhibit RL-36**, *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia,* ICSID Case No. ARB/14/24, Decision on Respondent Application for Provisional Measures, 12 May 2016, paragraph 78.

82 **Request**, paragraph 87. The *Encana v Ecuador* case pre-dates *Paushok v Mongolia*, and *Paushok* confirms that the five elements must be met. Even if it were to rely on the criteria in *Encana*, the Claimant's request would still fail. The *Encana* tribunal required that the Claimant had to establish (i) an apparent basis of jurisdiction; (ii) urgency; and (iii) irreparable damage. As discussed below, the Claimant has failed to meet these requirements.

83 **Exhibit CL-4**. *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, Order on Interim Measures, 2 September 2008, paragraph 45 (emphasis added). *See also* **Exhibit RL-16**, B. Stern, Chapter 45: Interim/Provisional Measures in Meg N. Kinnear , Geraldine R. Fischer , et al. (eds), Building International Investment Law: The First 50 Years of ICSID, Kluwer Law International; Kluwer Law International (2015), p 627-628 ("*If one were to try to summarize the conditions most often considered as necessary by international arbitral tribunals in order to grant provisional measures, a reference could be made to a decision on provisional measures of 2 September 2008*").

84 **Exhibit RL-37**, *Lao Holdings N.V. v. Lao People's Democratic Republic [I]*, ICSID Case No. ARB(AF)/12/6, Decision on the Merits, 10 June 2015, paragraph 109 (referring to the requirement of establishing a right to the relief sought).

85 **Exhibit CL-4**. *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, Order on Interim Measures, 2 September 2008, paragraph 39. *See* also **Exhibit RL-38**, *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*, ICSID Case No. ARB/15/21, Procedural Order No. 2, 2 December 2015, paragraph 108 (noting the extraordinary nature of provisional measures, which can only be granted in special circumstances); **Exhibit CL-24**, *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, 3 May 2012, paragraph 34 ("*Provisional measures are 'extraordinary measures' which should be recommended only in limited circumstances*.").

86 **Exhibit RL-39**, *Dawood Rawat v. The Republic of Mauritius*, PCS Case 2016-20, Order Regarding Claimant's and Respondent's Requests for Interim Measures, 11 January 2017, paragraph 44.

recommend the making of provisional measures."[87] The Claimant has failed to meet this high threshold.

63. The standards that must be met in respect of each of the criteria for granting interim measures are as set out below.

A. *PRIMA FACIE* JURISDICTION OF THE TRIBUNAL

64. The Claimant has the burden of establishing that the Tribunal has *prima facie* jurisdiction over the dispute. Moreover, the Tribunal has discretion in deciding whether to exercise its jurisdiction in light of other factors such as the applicant's bad faith or the existence of objections to jurisdiction.[88] The Respondent accepts that a Tribunal may order interim measures, even while jurisdiction is being challenged.[89]

65. It is undisputed that an arbitral tribunal "*may not order interim measures in the absence of jurisdiction over the merits of the case*".[90] As the tribunal in *Occidental Petroleum v Ecuador* explained, even though a 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*."[91]

66. Even if *prima facie* jurisdiction is found, arbitral tribunals have discretion to refrain from exercising their jurisdiction to issue interim measures. For example, a request for interim measures could be "*made in bad faith to delay proceedings or harass the opposing party*."[92] Such a "*manifestly abusive request should be rejected quickly*" despite a finding of jurisdiction.[93] See **Section III** above.

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87 **Exhibit CL-15**, *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, 3 March 2016, paragraph 3.12.

88 *See e.g.* **Exhibit CL-34**, D. Caron and L. Caplan, The UNCITRAL Arbitration Rules: A Commentary, Second Edition, at 523; **Exhibit CL-2**, C. Mouawad & E. Silbert, "A Guide to Interim Measures in Investor-State Arbitration", Arbitration International, Vol. 29, No. 3 (2013), at 399.

89 Indeed, as it has already indicated, the Respondent will raise a number of jurisdictional objections in respect of the Claimant's claim.

90 **Exhibit CL-34**, D. Caron and L. Caplan, The UNCITRAL Arbitration Rules: A Commentary, Second Edition, at 523.

91 **Exhibit RL-14**, *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, paragraph 55 (emphasis added).

92 **Exhibit CL-34**, D. Caron and L. Caplan, The UNCITRAL Arbitration Rules: A Commentary, Second Edition, at 523.

93 **Exhibit CL-34**, D. Caron and L. Caplan, The UNCITRAL Arbitration Rules: A Commentary, Second Edition, at 523.

67. Moreover, as discussed in **Section V** below, the Respondent is not the applicant in the civil proceedings the Claimant seeks to suspend. It is therefore not within the Tribunal's powers to order such a suspension, when the applicant in the proceedings is not a party to this Arbitration. Such an objection to jurisdiction "*might be a 'relevant factor' in a tribunal's exercise of its discretion to issue interim measures, particularly where evidence of urgency or necessity is lacking*."[94]

68. The Claimant's claim also gives rise to several serious jurisdictional questions, including some which arise from the Request itself. As an example, and without prejudice to any of the Respondent's future submissions, the Claimant clearly states that "*he applied for the French nationality and became a French national, for purposes of Article 1.2 of the BIT, on 30 November 2009, prior to any breaches of the BIT*."[95] In the Notice of Arbitration, however, several measures relating to the Red Square Project[96] and the Shipyards[97] are alleged to have taken place prior to 30 November 2009, so are *prima facie* not within the Tribunal's jurisdiction.

69. In respect of the Red Square Project, the Claimant states that "[w]*ithout any prior notice to STR* [the Claimant's company]*, on April 13, 2009, President Medvedev issued Decree No. 226-r […] This Decree was later modified, on October 23, 2009, to expressly call for the annulment of the Red Square Investment Agreement with STR*."[98] This statement is made under the subheading "*2. Respondent Expropriated Mr. Pugachev's Investment in the Red Square Project*". By the Claimant's own admission this alleged measure took place before he became a French national.

70. In respect of the Shipyards, the Claimant contends in the Notice of Arbitration that he had a meeting with President Putin in November 2009, who purportedly "*told Mr. Pugachev in no uncertain terms that he should "agree" to the sale* [of the Shipyard Interests to the United Shipbuilding Corporation]" and that he did agree to the sale.[99] The Claimant goes on to detail how he asked Mr A V Gnusarev, the Chairman of the Board of Directors of OPK (the Claimant's holding company) to send a letter to President Putin proposing that USC should increase its stake in the Shipyards, in line with what President Putin had allegedly instructed. The Claimant then states that "[o]*n November 23, 2009, Mr. Gnusarev sent the requested*

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94 **Exhibit CL-2**, C. Mouawad & E. Silbert, "A Guide to Interim Measures in Investor-State Arbitration", Arbitration International, Vol. 29, No. 3 (2013), at 399.

95 **Request**, paragraph 121.

96 **Notice of Arbitration**, paragraphs 26 to 28.

97 **Notice of Arbitration**, paragraphs 41 to 44.

98 **Notice of Arbitration**, paragraph 26.

99 **Notice of Arbitration**, paragraph 42.

letter to President Putin".[100] Once again, on the Claimant's own case, these events occurred before the Claimant obtained French nationality. Further, the Claimant admits that in 2008 and 2009 he participated in an illegal scheme involving his interests in the Shipyards.[101] There are therefore serious doubts as to whether the Claimant's claims are within the *prima facie* jurisdiction of the Tribunal.

71. The points reflected above are simply the most obvious jurisdictional issues which arise from the Claimant's own case so far. The Respondent has identified other significant jurisdictional issues, such as the impact of his apparent status as a Russian-French dual national on any alleged right to protection under the France-USSR BIT. These will be developed at the appropriate time.

72. It is again notable that even on the Claimant's own case, Appendix B of the Request clearly shows that the following events took place before the Notice of Arbitration on 21 September 2015, posing serious questions as to whether the relief sought in the Request qualifies for protection under the France-USSR BIT:

- 2 September 2013: the Swiss Public Prosecutor froze several assets and bank accounts belonging to the Claimant;
- 28 November 2013: the Claimant was named as an accused person in a Russian criminal file;
- 2 December 2013: the Subsidiary Liability claim was filed by the DIA to the Moscow Commercial Court;
- 11 July 2014: the UK Worldwide Freezing Order was made;
- 30 April 2015: the Claimant was found liable under the Subsidiary Liability Judgment;
- 1 June 2015: there was a "*new indictment of Mr Pugachev within Russian criminal investigation*"; and
- 27 August 2015: the Trust Freezing Order was issued in the English High Court against nine of the Claimant's trusts.[102]

73. As the events complained of by the Claimant therefore took place well before these proceedings, it is not credible for the Claimant to argue that they prejudice the integrity of the Arbitration or aggravate the dispute, let alone that their purpose is to "*prevent the Claimant from being able to properly defend himself in the arbitration*."[103] Once again, the Tribunal should not grant relief where the Claimant is attempting to create artificial jurisdiction over pre-existing domestic disputes. The jurisdictional questions detailed above are merely several

100 **Notice of Arbitration**, paragraph 44.

101 **Notice of Arbitration**, paragraph 47.

102 **Request**, Appendix B.

103 **Request**, paragraphs 20 and 22.

obvious points which arise from the Claimant's own case, but it is clear that the Claimant's claims give rise to further jurisdictional issues.[104]

B. *PRIMA FACIE* EXISTENCE OF A RIGHT SUSCEPTIBLE TO PROTECTION AND CASE ON THE MERITS

74. The Claimant also has the burden of establishing that he has a right susceptible to protection and a reasonable possibility of success on the merits.

75. A tribunal "*cannot grant to the requesting party more rights than it ever possessed*."[105] As explained further below, the Claimant seeks the suspension of enforcement proceedings that have been brought by entities other than the Respondent and in jurisdictions outside of Respondent's control. The Tribunal should not grant a suspension of these proceedings in an investment arbitration governed by a bilateral investment treaty between France and Russia. The Claimant has failed to establish a *prima facie* existence of a right susceptible to protection under the France-USSR BIT; the appropriate forum for such claims is the national courts before which these enforcement proceedings have been brought.

76. In considering what rights are susceptible to protection under the France-USSR BIT, the Respondent recalls that the Claimant sought to block candidates from the UK from consideration for President of the Tribunal in this Arbitration on the basis of a 'bias' argument. The Claimant argued in its letter dated 19 September 2016 that as the Arbitration claims "*specifically include a violation of FET provisions of the French-Russia Treaty related to certain proceedings in UK High Court that all UK nationals, UK trained practitioners and UK-based arbitrators are also excluded to avoid a risk of bias*."[106] The Respondent noted that this argument was nonsense, because, inter alia, the UK is not a party to the France-USSR BIT. The Permanent Court of Arbitration did not accept the Claimant's argument, and included in its list a UK candidate for President. The Tribunal should equally refuse to grant the Claimant relief over rights in relation to the suspension of the English court proceedings, which are not susceptible to protection under the France-USSR BIT. Furthermore, the only jurisdiction in respect of which the Claimant's request to suspend civil and criminal

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104 *See* e.g. **Exhibit R-15**, Letter from White & Case to Lazareff Le Bars, dated 17 November 2016, requesting further information regarding the Claimant's alleged compliance with Article 7 of the France-USSR BIT and any attempts to settle the dispute amicably.

105 **Exhibit RL-16**, B. Stern, Chapter 45: Interim/Provisional Measures in Meg N. Kinnear , Geraldine R. Fischer , et al. (eds), Building International Investment Law: The First 50 Years of ICSID, Kluwer Law International; Kluwer Law International (2015), p 629 citing **Exhibit RL-40**, *Phoenix Action v The Czech Republic*, ICSID Case No. ARB/06/5, Decision on provisional Measures, 6 April 2007, paragraph 37.

106 **Exhibit R-10**, Letter from Benoit Le Bars to Mr Hans Siblesz, dated 19 September 2016.

proceedings could theoretically be considered would be in Russia, but even then he has already agreed to submit to the jurisdiction of the Russian courts.[107]

77. As the *Paushok v Mongolia* tribunal explained, the tribunal must address whether the claims made are "*on their face, frivolous or obviously outside the competence of the Tribunal*."[108] Article 26 of the 2010 UNCITRAL Arbitration Rules expressly provides that a party seeking interim measures must demonstrate that there "*is a reasonable possibility that the requesting party will succeed on the merits of the claim*."[109] Although the 1976 UNCITRAL Arbitration Rules do not provide the criteria for granting interim measures, the same inquiry must be undertaken when applying the 1976 UNCITRAL Arbitration Rules. Furthermore, the *Dawood Rawat v The Republic of Mauritius* tribunal, deciding on an application for provisional measures under the 1976 UNCITRAL Arbitration Rules, confirms that "*tribunals avoid granting interim measures if to do so would involve prejudgment of the merits of the dispute*."[110]

78. The lack of substantiation of the Claimant's case, as detailed throughout this Response, fails to *prima facie* establish the merits of his case. The type of relief the Claimant seeks does not fall within the protections offered under the France-USSR BIT, and the Claimant has therefore failed to establish the existence of a right susceptible to protection. This is discussed in more detail below.[111]

79. The Claimant is not entitled to interim measures when his case has been built on such precarious foundations, consisting of unsupported allegations and an evidential void. As discussed in **Section II** above, the Claimant's case consists of weaknesses and contradictions.[112]

C. NECESSITY OF THE MEASURES REQUESTED

80. One of the most important requirements for granting provisional measures is necessity, which focuses upon the nature and the extent of the harm which is likely to occur.[113] The *Tokios Tokelés* tribunal noted that "*international jurisprudence on provisional measures indicates*

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107 *See* paragraph 56, above.

108 **Exhibit CL-4**. *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, Order on Interim Measures, 2 September 2008, paragraph 50.

109 **Exhibit RL-35**, 2010 UNCITRAL Arbitration Rules, Article 26(3)(b).

110 **Exhibit RL-39**, *Dawood Rawat v. The Republic of Mauritius*, PCS Case 2016-20, Order Regarding Claimant's and Respondent's Requests for Interim Measures, 11 January 2017, paragraph 46.

111 *See* paragraphs 74 to 78 and 102 of this Response.

112 *See* also paragraph 141 below.

113 **Exhibit RL-36**, *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia,* ICSID Case No. ARB/14/24, Decision on Respondent Application for Provisional Measures, paragraph 100.

that a provisional measure is necessary where the actions of a party 'are capable of causing or threatening irreparable prejudice to the rights invoked'."[114]

81. Under Article 26.1 of the 1976 UNCITRAL Rules, the tribunal may take "*any interim measures it deems necessary in respect of the subject-matter of the dispute*". As expanded upon by the tribunal in *Dawood Rawat v The Republic of Mauritius*, one element of necessity under this article is that "*the applicant must have a recognizable right to be preserved* […] *for an interim measure to be necessary, the requesting party must demonstrate that the measure is both (a) urgent, and (b) essential to prevent irreparable harm to its rights*."[115] Likewise, the tribunal in *Dawood Rawat v The Republic of Mauritius* found that "*it is well-established that harm claimed is not irreparable if it can be compensated by monetary damages*."[116] In *Occidental Petroleum v. Ecuador*, for example, the tribunal found that there was no necessity or urgency to grant the claimant's request for interim measures, because the "*harm in this case is only 'more damages', and this is harm of a type that can be compensated by monetary compensation*."[117]

82. Most tribunals have adopted the position that harm or prejudice is not irreparable if, as the *Plama v Bulgaria* tribunal found, "*it can be compensated for by damages*".[118] The *Occidental Petroleum v Ecuador* tribunal, for example, noted that purely economic loss is not irreparable if the injured party could be made whole by monetary damages.[119] The tribunal thus rejected the provisional measures requested by the claimant, on the basis that the harm was not irreparable as it could be compensated by a damages award.[120]

83. In both *Burlington v Ecuador* and *Perenco v Ecuador*, the tribunals acknowledged that irreparable harm cannot be remedied by monetary damages, but took into consideration the fact that the respondent-States measures resulted in the ongoing destruction of an investment

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114 **Exhibit CL-11**, *Tokios Tokelés v. Ukraine*, ARB/02/18, Procedural Order No. 3, 18 January 2005 [hereinafter "*Tokios Tokelés v. Ukraine*"] paragraph 8.

115 **Exhibit RL-39**, *Dawood Rawat v The Republic of Mauritius*, Order Regarding Claimant's and Respondent's Requests for Interim Measures, 11 January 2017, paragraph 45.

116 **Exhibit RL-39**, *Dawood Rawat v The Republic of Mauritius*, Order Regarding Claimant's and Respondent's Requests for Interim Measures, 11 January 2017, paragraph 45.

117 **Exhibit RL-14**, *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, paragraph 99.

118 **Exhibit RL-3**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order [on Provisional Measures], 06 September 2005, paragraph 46; *see also* **Exhibit CL-7**, *Quiborax v. Bolivia* paragraph 156 ("*The Tribunal considers that an irreparable harm is a harm that cannot be repaired by an award of damages*.").

119 **Exhibit RL-14**, *Occidental Petroleum v. Ecuador* paragraphs 86, 92 (finding that any prejudice "*if subsequently found illegal by the tribunal, can be readily compensated by a monetary award*").

120 **Exhibit RL-3**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order [on Provisional Measures], 06 September 2005, paragraph 46.

and its revenue-producing potential.[121] Under the exceptional circumstances, both tribunals were willing to grant provisional measures to prevent the serious destruction of the investments.[122]

84. The facts of *EnCana v. Ecuador*, constituted under the UNCITRAL Rules, however, are more akin to the facts of this dispute insofar as the Claimant requests suspension of various enforcement proceedings and the only remedies sought are monetary (in the underlying claim). In *EnCana v. Ecuador*, the claimant sought interim measures to prevent Ecuador's internal revenue services from freezing accounts and recovering monies allegedly paid out by way of VAT refunds incorrectly.[123] The tribunal rejected the request on the basis that the enforcement measure could be challenged in Ecuadorean tax courts or within the IRS's administrative processes.[124] The tribunal also found that:

> "*Eventually, if jurisdiction is upheld, it would be open to this Tribunal to provide redress to the Claimant for any losses suffered by enforcement action taken in breach of the BIT, including by payment of interest on sums refunded. In these circumstances there is no necessity to order the withdrawal of IRS's measures against AEC* [claimant's subsidiary] *in order to protect the rights at stake in this arbitration from irreparable harm.*"[125]

85. Likewise, in *Plama v. Bulgaria*, the tribunal refused to order the respondent to discontinue all pending proceedings in respect of insolvency proceedings against the claimant and any execution actions.[126] Like the Claimant in the present dispute, under its main claim Plama only sought monetary damages for Bulgaria's alleged breaches of the Energy Charter Treaty under its main claim.[127] The *Plama* tribunal considered that neither urgency nor necessity were met, because "*[w]hatever the outcome of the bankruptcy proceedings … Claimant's right to pursue its claims for damages in this arbitration and the Arbitral Tribunal's ability to*

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121 **Exhibit CL-19**, *Perenco v. Ecuador*, paragraphs 43, 53, 60.

122 *See* **Exhibit RL-41**, *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on the Claimant's Request for Provisional Measures, 3 March 2010 [hereinafter "*CEMEX v. Venezuela*"] paragraphs 52, 53, 55 (citing *Plama v. Bulgaria* and *Perenco v. Ecuador* as examples of ICSID cases which have distinguished between situations where the alleged prejudice is readily compensated by awarding damages and those where there is a serious risk of destruction of the investment).

123 **Exhibit CL-27**, *EnCana Corporation v. Republic of Ecuador,* LCIA Case No. UN 3481, Interim Award - Request for Interim Measures of Protection, 31 January 2004, paragraph 16.

124 **Exhibit CL-27**, *EnCana Corporation v. Republic of Ecuador,* LCIA Case No. UN 3481, Interim Award - Request for Interim Measures of Protection, 31 January 2004, paragraph 16.

125 **Exhibit CL-27**, *EnCana Corporation v. Republic of Ecuador,* LCIA Case No. UN 3481, Interim Award - Request for Interim Measures of Protection, 31 January 2004, paragraph 17.

126 **Exhibit RL-3**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order [on Provisional Measures], 06 September 2005, paragraph 2.

127 **Exhibit RL-3**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order [on Provisional Measures], 06 September 2005, paragraph 46.

decide these claims will not be affected."[128] The tribunal further concluded that "*harm is not irreparable if it can be compensated for by damages, which is the case in the present arbitration and which, moreover, is the only remedy Claimant seeks*."[129]

86. Therefore, the Claimant must demonstrate that the interim measures are urgent and necessary to prevent irreparable harm and that the alleged harm is in respect of a protectable right. To the extent that the Tribunal considers that a harm that can be remedied by monetary damages could still justify interim measures, the Claimant will have to establish that specific characteristics in this case warrant such a finding.

87. The Respondent has addressed the point of imminent harm in its previous responses with regard to preliminary orders.[130] Those reasons are reiterated. The Claimant has failed to meet the factual burden to establish irreparable harm.

D. URGENCY OF THE MEASURES REQUESTED

88. As the Claimant acknowledges in its Request, urgency is a key element for determining whether interim measures should be ordered.[131] The Claimant thus has the burden of establishing that sufficient urgency exists to justify issuing the interim measures sought.

89. The threshold for determining urgency is whether "*immediate (or at least prompt) action is necessary in order to prevent serious damage to the claimant*."[132] Generally, arbitral tribunals have interpreted urgency to mean actions prejudicial to the rights of the applicant are likely to occur before an award on the merits.[133] In *Tokios Tokelés v Ukraine*, for example, the tribunal noted that "*a measure is urgent where 'action prejudicial to the rights of either party is likely to be taken before such decision is taken'*."[134] The *Quiborax v Bolivia* tribunal also found that urgency exists when "*a question cannot await the outcome of the award on the merits*."[135]

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128 **Exhibit RL-3**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order [on Provisional Measures], 06 September 2005, paragraph 46.

129 **Exhibit RL-3**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order [on Provisional Measures], 06 September 2005, paragraph 46.

130 **Response to the Request for a Preliminary Order**, paragraphs 27 to 29; **Response to the Second Preliminary Application**, paragraphs 37 to 38.

131 **Request**, paragraph 97.

132 **Exhibit CL-33**, G. Born, "Chapter 11: Provisional Measures in International Arbitration", International Arbitration: Law and Practice, Second Edition,(2015) at 13.

133 **Exhibit CL-33**, G. Born, "Chapter 11: Provisional Measures in International Arbitration", International Arbitration: Law and Practice, Second Edition,(2015) at 13.

134 **Exhibit CL-11**, *Tokios Tokelés v. Ukraine*, paragraph 8.

135 **Exhibit CL-7**, *Quiborax v. Bolivia*, paragraph 66.

90. The Claimant seeks to argue that the Tribunal should adopt a "*less restrictive*" approach to the requirement that harm must be immediately likely.[136] The applicant nevertheless "*must show that the complained-of act is actually in the works and likely to take place during the course of the arbitration*"[137] In *Occidental Petroleum v Ecuador*, for example, the tribunal did not grant interim measures when the claimant failed to provide evidence that Ecuador's actions were imminent and highly likely, explaining that "*provisional measures are not meant to protect against any potential or hypothetical harm to result from uncertain actions*."[138]

91. Thus, despite the Claimant's argument that the Tribunal should adopt a less restrictive approach (which the Respondent does not consider to be justified here in any event), the threshold for establishing urgency remains high and the Claimant cannot rely on hypothetical or potential measures that may not even arise before the issuance of an award on the merits.

92. The Claimant has failed to provide specific examples of actions of the Respondent which will cause imminent harm, and there are no actions suggesting that "*immediate (or at least prompt) action is necessary in order to prevent serious damage*" to the Claimant.[139] The Tribunal dismissed both of the Claimant's preliminary requests, partly due to the requirement of urgency not being satisfied, albeit without prejudice.[140] The Claimant has not shown any reason (supported by any evidence) satisfying this requirement for any of the measures sought in his Request. The Claimant does not even attempt to address the issue of how the acts of the DIA could be attributed to the Respondent; he merely asserts such equivalence as an alleged fact.[141] Even if the Claimant were to demonstrate that such attribution was correct, the actions complained of do not meet the requirement of urgency (or the other requirements set out above).

93. It is further clear that contrary to the Claimant's assertions,[142] time is not of the essence. Many of the existing proceedings mentioned appear to have been initiated before the commencement of this Arbitration, as detailed in paragraph 72 above, and the Claimant has failed to establish that the Request is sufficiently urgent. In any event, the logical time to

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136 **Request**, paragraphs 101 to 102.

137 **Exhibit CL-2**, C. Mouawad & E. Silbert, "A Guide to Interim Measures in Investor-State Arbitration", Arbitration International, Vol. 29, No. 3 (2013), at 389.

138 **Exhibit RL-14**, *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, paragraph 89.

139 **Exhibit CL-33**, G. Born, "Chapter 11: Provisional Measures in International Arbitration", International Arbitration: Law and Practice, Second Edition, (2015) at 13.

140 **Decision on Request for Immediate Interim Preliminary Order**, paragraphs 30 to 38 and 50; **Decision on Second Request for an Immediate Interim Order**, paragraphs 39 to 42 and 46.

141 *See* **Section IV**.

142 *See* **Request**, paragraphs 18 and 170.

bring these proceedings to the attention of the Tribunal would have been upon its constitution, in October 2016, taking into account that the Notice of Arbitration was filed on 21 September 2015, nearly one and a half years ago.

E. PROPORTIONALITY

94. Tribunals must also balance the need to prevent imminent or irreparable harm to a claimant's rights with the State's exercise of its sovereignty and right to pursue activities in the public interest.[143] As the *Quiborax v Bolivia* tribunal held, the tribunal must consider the proportionality of the requested provisional measures and balance the harm caused to claimants and the harm that would be caused to respondent.[144]

95. Commentators have noted "*the threat of possible harm from not granting the measures must not only outweigh, but substantially outweigh, the harm that the party against whom the measure is being sought will suffer from its issuance*."[145] This principle was reaffirmed in Article 26(3)(a) of the 2010 UNCITRAL Arbitration Rules which provides that: "*Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted*."[146]

96. In order for his requests to be granted, the Claimant therefore must establish that the possible harm from not granting the interim measures substantially outweighs the harm that the Respondent will suffer from the interim measures.[147] This is discussed in **Section V** below.

97. The Claimant has failed to establish that all five requirements for granting interim measures "*are fulfilled in the present case*"[148] in respect of each of the measures he seeks. The Claimant's Request is far from a "*textbook case*"[149] for granting interim measures.

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143 **Exhibit RL-42**, *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Claimants Request for Provision Measures, 4 December 2014 paragraph 121; **Exhibit CL-7**, *Quiborax v. Bolivia* paragraph 164; **Exhibit CL-23**, *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, Decision on provisional measures paragraph 62.

144 **Exhibit CL-7**, *Quiborax v. Bolivia*, paragraph 166; *see* also **Exhibit RL-43**, *Valle Verde v. Venezuela* Decision on Provisional Measures, dated 25 January 2016 (noting that "*an order recommending provisional measures must be motivated by exceptional circumstances that the applicant cannot await the outcome of the decision on the merits*").

145 **Exhibit CL-34**, D. Caron and L. Caplan, The UNCITRAL Arbitration Rules: A Commentary, Second Edition, at 522 (emphasis added).

146 **Exhibit RL-35**, 2010 UNCITRAL Arbitration Rules, Article 26(3).

147 *See* also paragraph 88 below.

148 **Request**, paragraph 87.

149 **Request**, paragraph 3.

V. THE CLAIMANT HAS FAILED TO SATISFY THE REQUIREMENTS FOR REQUESTING A SUSPENSION OF PROCEEDINGS

98. The Claimant seeks an interim award from the Tribunal consisting of "*measures related to civil proceedings which aim at ensuring that Russia will not aggravate the dispute and will not prevent Mr Pugachev from financing his claim in the arbitration*."[150] The Claimant requests that the Tribunal order a suspension of the pending proceedings for the enforcement of the Subsidiary Liability Judgment, the default judgment granted in the English courts, and the proceedings for the taking of interim measures in the same context, as well as to release the interim measures taken in this respect.[151]

99. The Claimant also seeks an interim award from the Tribunal consisting of "*measures related to criminal proceedings which aim at ensuring that Russia will not prevent Mr Pugachev from participating and presenting his case in the present arbitration*."[152]

100. The Tribunal should reject the suspensions requested as the Claimant has not satisfied the requirements predicating the issuance of interim measures for the following reasons, set out more fully below:

i) **Section A**: suspending proceedings by granting interim measures would not be appropriate or proportionate;

ii) **Section B**: the Respondent is not the applicant in the civil proceedings, in particular in relation to (1) the Subsidiary Liability Judgment, (2) the English court proceedings, (3) the Luxembourg proceedings, and (4) the enforcement proceedings worldwide. The relief requested is therefore not within the Tribunal's jurisdiction; and

iii) **Section C**: the Claimant has failed to substantiate his allegations regarding his request for the suspension of criminal proceedings. The measures requested therefore do not *prima facie* establish a case on the merits.

101. Interim measures are "*extraordinary measures not to be granted lightly*."[153] As the *Hydro v Albania* tribunal acknowledged, "*there is a high threshold to recommend the making of*

150 **Request**, paragraph 347(2).

151 **Request**, paragraph 347(2)(i).

152 **Request**, paragraph 347(3).

153 **Exhibit CL-4**. *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, Order on Interim Measures, 2 September 2008, paragraph 39. *See* also **Exhibit RL-38**, *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*, ICSID Case No. ARB/15/21, Procedural Order No. 2, 2 December 2015, paragraph 108 (noting the extraordinary nature of

provisional measures."[154] Requesting an interim award to suspend proceedings worldwide is not a minor request, and the Claimant has not met the high threshold for requiring the imposition of any such interim award.

102. The civil proceedings which the Claimant wishes to suspend are not between the Claimant and the Respondent, and therefore are not within the jurisdiction of the Tribunal. The Respondent has previously addressed the fact that the applicants in the proceedings referred to are the DIA and IIB, not the Respondent.[155] The burden of proving that the DIA and/or IIB are the same as and/or synonymous with the Respondent lies with the Claimant, and the Claimant has failed to discharge this burden.

103. The Claimant cannot in good faith breach domestic law and local court orders, and at the same time claim that the consequences of his breaches (which have resulted in various enforcement proceedings) constitute an aggravation of the dispute. Granting interim measures in this respect would be disproportionate and unnecessary.

104. Finally, the Claimant has offered no compelling factors which illustrate the urgency of the suspension of proceedings, many of which are already complete. The threshold for establishing urgency is high and cannot rely on hypothetical or potential measures that may not even arise before the issuance of an award on the merits. There is no specific action suggesting that "*immediate (or at least prompt) action is necessary in order to prevent serious damage*" to the Claimant.[156]

A. SUSPENDING PROCEEDINGS BY GRANTING INTERIM MEASURES WOULD NOT BE APPROPRIATE OR PROPORTIONATE

105. The Tribunal should not grant the relief requested in relation to a suspension of civil and criminal proceedings as the standard for granting interim measures has not been met. This is evident for the following reasons, which the Respondent summarizes below as they are also discussed elsewhere:

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provisional measures, which can only be granted in special circumstances); **Exhibit CL-24**, *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, 3 May 2012, paragraph 34 ("*Provisional measures are 'extraordinary measures' which should be recommended only in limited circumstances*.").

154 **Exhibit CL-15**, *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, 3 March 2016, paragraph 3.12.

155 **Response to the Request for Preliminary Order**, paragraphs 15 to 18; **Response to the Second Preliminary Application**, paragraphs 11 to 14.

156 **Exhibit CL-33**, G. Born, "Chapter 11: Provisional Measures in International Arbitration", International Arbitration: Law and Practice, Second Edition, (2015) at 13.

i) Interim measures are disproportionate, unnecessary and not within the Tribunal's jurisdiction;

ii) The request to suspend proceedings is made in bad faith;

iii) Issues regarding the suspension of proceedings have been decided upon after the request for an Immediate Order and the Claimant has presented no new facts to support his Request; and

iv) The Claimant has not demonstrated sufficient urgency.

The requested interim measures are disproportionate, unnecessary and not within the Tribunal's jurisdiction

106. The Claimant cannot have it both ways. The Claimant has breached domestic law and local court orders, and at the same time claims that the consequences of his breaches constitute an aggravation of the dispute. It is clear that the Claimant should be seeking, if he is not currently doing so, the type of relief he aims to achieve from the relevant local courts. The Claimant's alleged difficulties with the respected courts of several countries are evidently of his own making; he would not be prevented from pursuing his legitimate interests by way of this Arbitration were he in compliance with relevant court orders. Indeed, rather than complying with court orders or procedure, the Claimant appears to be more interested in making submissions to the press.[157]

107. Ultimately any inconvenience caused can be addressed by the Claimant complying with his obligations (or at least making submissions) before various national courts.

108. Imposing interim measures and suspending proceedings as requested by the Claimant would be a disproportionate burden to the Respondent, and impossible to achieve within the jurisdiction of the Tribunal given the fact that the Respondent is not a party in the civil proceedings. There is a potentially unlimited scope for the Claimant to allege breaches of any interim award should one be granted. The Tribunal should not decide to grant interim measures where the subject matter of the request is not within the jurisdiction of the Tribunal. The Claimant is not seeking relief in relation to the investments under the France-USSR BIT, and the alleged harm does not relate to the underlying investments.[158]

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157 *See* **Exhibit R-11**, Interview with TV5Monde on 1 December 2016; and **Exhibit R-12**, Interview with France 2 on 15 December 2016.

158 *See* **Section IV(B)** above, detailing how the relief sought cannot be granted, as the Claimant does not demonstrate a *prima facie* existence of a right susceptible to protection.

The request to suspend proceedings is made in bad faith

109. The Claimant's Request is not made in good faith: as set out in **Section III(A)**, it is an abuse of process as the Claimant is refusing to accept legitimate decisions against him. The Tribunal should not grant relief where the Claimant is seeking to improperly internationalize a domestic dispute between himself and his home country.[159]

110. The Claimant cannot use the Tribunal to circumvent decisions and the legitimate process of respected national courts, and in any event many of the court actions are already complete and do not involve the Respondent.

The issues regarding the suspension of proceedings have been decided upon after the request for an Immediate Order and the Claimant has presented no new facts to support his Request

111. The Tribunal has already rejected both the Claimant's Request for a Preliminary Order and the Claimant's Second Preliminary Application. Nothing in the Claimant's Request as a whole brings to light any additional information or factors that would justify granting any interim measures, as put forward in this Response. The measures requested are not necessary, urgent or proportionate.

The Claimant has not demonstrated sufficient urgency

112. Indeed, the Claimant has failed to prove there is any urgency regarding this Request, and it is clear that time is not of the essence. Many of the existing proceedings mentioned seem to have been initiated well before (indeed, many years before, in some instances) the commencement of this Arbitration; the Claimant has therefore failed to establish that the Request is sufficiently urgent.

113. The threshold for establishing urgency is high, and cannot rely on hypothetical or potential measures that may not even arise before the issuance of an award on the merits. The Claimant has not demonstrated a sufficient reason why the issues cannot be heard substantively through full submissions and a final hearing. It is not necessary for interim measures to be awarded in this respect, and the Claimant has failed to prove otherwise.

114. The Claimant states that the "*full effects and consequences* [of the alleged events] *have only become extremely urgent and preoccupying since very recently*."[160] Furthermore, the Claimant cites Appendix B to his Request in support of this, stating that its impact is "*hardly*

159 *See*, for example, **Exhibit RL-31**, Judgment of Mr Justice Mann, [2014] EWHC 4336 (Ch), and **Section III(A)** above.

160 *See* **Request**, paragraph 15.

debatable". Appendix B does indeed provide a list of pending measures and proceedings. However, one of the upcoming deadlines listed (of which there are two) is a submission of the Claimant's brief and response brief in the French proceedings, and the second is a hearing in the French proceedings.

115. The Claimant currently presents a very one-sided view of the proceedings, and the Respondent does not have access to the submissions as it is not a party to the proceedings. As Appendix B is wholly unsupportive of the Claimant's assertion and there is nothing in Appendix B or the Claimant's submission that identifies any imminent act of the Respondent or any situation that would harm the Claimant, the Respondent invites the Claimant to provide the relevant submissions in the French proceedings, and all further submissions on an on-going basis.[161]

116. The upcoming events listed in Appendix B do not harm the Claimant's interest, but rather provide opportunities for the Claimant to present his defense in the pending civil proceedings. There is nothing that suggests that events have only become "*extremely urgent and preoccupying since very recently*" and that "*time is of the essence*",[162] contrary to the Claimant's statement that "*Appendix B is very telling in that respect*".[163] The Request presents no factors which indicate urgency or an imminent danger of serious prejudice. There is nothing suggesting that "*immediate (or at least prompt) action is necessary in order to prevent serious damage*" to the Claimant.[164] In fact, the Claimant has still failed to explain why his Request was submitted two months after the Tribunal was constituted, and more than a year after submitting the Notice of Arbitration.

117. Therefore, for the multiple reasons set out above, interim measures suspending the proceedings worldwide should not be granted. The scope of measures requested by the Claimant is extremely broad, spanning several jurisdictions and encompassing multiple disputes which do not involve the Respondent.

B. THE RESPONDENT IS NOT THE APPLICANT IN THE CIVIL PROCEEDINGS

118. The Claimant does not substantiate his claim that the Respondent is the same as and/or synonymous with the DIA and/or IIB. In the Reply to Respondent's Second Answer, the

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161 This request forms part of the Respondent's Request for Relief, as the Claimant should submit all the information on both sides of the pending civil proceedings if he requests the Tribunal to determine these issues.

162 *See* **Request**, paragraph 18.

163 **Request**, paragraph 227.

164 **Exhibit CL-33**, G. Born, "Chapter 11: Provisional Measures in International Arbitration", International Arbitration: Law and Practice, Second Edition, (2015), at 13.

Claimant asserts that the DIA is "*no more than a hired gun of the Russian Federation*"[165] and attempts to equate the fact that any governmental links the DIA has, such as contributions towards the DIA's assets, therefore mean it is a "*hired gun*". In particular, by his reference to the RUB 3 billion contribution by the Russian state to the DIA,[166] the Claimant apparently attempts to create an impression that the Russian state is the DIA's only source of funds. This is incorrect: whereas the RUB 3 billion contribution was a one-off contribution made by the Russian state at the time of the DIA's establishment, the DIA's activities are funded from different sources, such as via payments from banks that are members of the Deposit Insurance System, as is clear from the Claimant's own exhibit.[167] As is also clear from the Claimant's exhibit, in 2014, 860 banks were members of the Deposit Insurance System[168] and presumably contributed to the DIA as part of such membership.

119. The DIA acts as a liquidator (or bankruptcy receiver) in the proceedings, and acts for the entity over which it is appointed rather than on behalf of the government.[169] The DIA's role is to act in the best interest of all creditors,[170] which may include both private companies and state-owned entities. Institutions such as the DIA exist in numerous jurisdictions, such as the Federal Deposit Insurance Corporation in the United States of America.

120. By way of further background illustrating the scope of the DIA's activities, by 1 July 2016, the DIA had completed 156 proceedings as a bankruptcy receiver of credit organizations and had another 239 proceedings pending.[171] The amount of the claims of registered creditors in

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165 **Reply to Respondent's Second Answer**, paragraph 7.

166 **Reply to the Respondent's Second Answer**, paragraph 7.

167 **Exhibit C-8**, Annual Report of the Deposit Insurance Agency for 2014, page 28: "*During the year the* [Mandatory Deposit Insurance] *Fund received 145.1 billion rubles, including: DIS* [Deposit Insurance System] *member bank's insurance premiums — 65.9 billion rubles (14 % increase as compared to the previous year); recoveries from the bankruptcy estate of liquidated banks to redeem the claims of the Agency subrogated as the result of payment of deposit insurance indemnity — 15.3 billion rubles; increase in the property contribution of the Russian Federation — 60.0 billion rubles; crediting of returns on investment of temporary idle resources of the Fund — 3.7 billion rubles; other proceeds — 0.2 billion rubles*."

168 **Exhibit C-8**, Annual Report of the Deposit Insurance Agency for 2014, page 23.

169 *See* **Response to the Request for Preliminary Order**, paragraphs 16 and 17. Article 129(1) of the Insolvency Law (**Exhibit RL-33**) states as follows: "… *the bankruptcy receiver shall exercise powers of head of the debtor and other managerial bodies of the debtor, as well as those of the owner of the property of the debtor being a unitary enterprise, within the limits, in the manner and on the terms established by the present Federal Law*" (emphasis added). Likewise, Article 189.78(1) of the Insolvency Law, applicable to the bankruptcy proceedings with respect to credit organisations, such as banks, states: "*The bankruptcy receiver shall exercise the authority of the head of a credit organisation and of other managerial bodies of a credit organisation within the limits, in the procedure and under the terms which are established by this paragraph*" (emphasis added). Article 50.21(1) of the Credit Organisations Insolvency Law (**Exhibit RL-32**, now repealed) contained a nearly identical provision.

170 *See* **Response to the Request for Preliminary Order**, paragraphs 16 and 17. This rule is set out in the Insolvency Law (**Exhibit RL-33**) and applies both to insolvency proceedings in general (Articles 20.3(4) and 129(1) of the Insolvency Law) and to insolvency proceedings in respect of credit organisations, such as banks (Article 189.78 of the Insolvency Law). Article 20.3(4) of the Insolvency Law states that a "*receiver must act in good faith and reasonably, in the interests of the debtor, creditors and the society.*" Similar rules were provided in Articles 50.21(1) and 50.21(2) of the Credit Organisations Insolvency Law, repealed in 2014 (**Exhibit RL-32)**.

171 **Exhibit R-13**, DIA's statistics on its involvement in the bankruptcy proceedings of credit organisations, page 1.

those pending proceedings was RUB 1,697.5 billion.[172] Also as at 1 July 2016, the DIA had filed 128 claims against persons responsible for bankruptcy of credit organizations or damages to them; 66 of the claims had been satisfied.[173] The proceedings which the Claimant seeks to present as extraordinary are in fact part of the DIA's routine activities.

121. The Respondent has detailed its position on this point in both the Response to the Request for a Preliminary Order, and the Response to the Second Preliminary Application.[174]

Subsidiary Liability Judgment

122. The Subsidiary Liability Judgment handed down by the Moscow City Commercial Court within the bankruptcy proceedings in respect of IIB (Case A40-119763/10), is not a judgment relating to proceedings between the Claimant and the Respondent. The Claimant exhibits this judgment as **Exhibit C-12**, namely the Decision of the Moscow City Commercial Court rendered upon an application of the bankruptcy receiver of IIB (i.e. DIA) to declare M E Illarionova, S V Pugachev (the Claimant), A A Didenko and A S Zlobin liable in respect of IIB's obligations.[175] Once again, it is clear that the Respondent is not the applicant in this case or related enforcement proceedings. The Claimant's submissions in respect of the Subsidiary Liability Judgment erroneously treat the Respondent and the DIA and/or the IIB as the same entity, which it is not. There are also other defendants who were declared liable by the Subsidiary Liability Judgment; presumably the Claimant has no ground to act on their behalf.

123. In any event, the Claimant has submitted to the jurisdiction of the Russian courts (as detailed in paragraph 56 above).

124. The Claimant has further failed to identify any legal means whereby the Respondent could "suspend" the Russian court proceedings. Indeed, they must proceed according to Russian procedural rules. It is clear that the Claimant agreed that the Russian court properly had jurisdiction and the recourse available to the Claimant was to defend the Subsidiary Liability Judgment in the Russian courts. He has instead opted to improperly pursue a resolution regarding its enforcement via this Tribunal.

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172 **Exhibit R-13**, DIA's statistics on its involvement in the bankruptcy proceedings of credit organisations, page 1.

173 **Exhibit R-13**, DIA's statistics on its involvement in the bankruptcy proceedings of credit organisations, page 2.

174 *See* in particular, **Response to the Request for Preliminary Order**, paragraphs 15 to 18; **Response to the Second Preliminary Application**, paragraphs 11 to 14.

175 *See* **Exhibit C-12**, Subsidiary Liability Judgment dated 30 April 2015.

English Court proceedings

125. As previously submitted, the Respondent is not the applicant in the English proceedings.[176] This position is reiterated. It is therefore not within the Tribunal's jurisdiction to grant a suspension of such proceedings.

126. The Claimant repeatedly mischaracterizes information regarding the Freezing Order made by Mr Justice Henderson on 11 July 2014. The Claimant states that there is a "*low standard of proof necessary to issue such an order*".[177] This is undoubtedly incorrect. For a freezing order to be granted, the applicant must prove that: (i) it has an underlying legal or equitable right (cause of action); (ii) it has a good arguable case; and (iii) there is a real risk of the respondent's assets being dissipated.[178] The test is therefore an objective one - an assessment of the risk that a judgment may not be satisfied, because of a risk of an unjustified dealing with assets.[179] An applicant must adduce "solid evidence" to support this assertion,[180] and as such there is clearly a high standard of proof to be met by the applicant.

127. Accordingly, the English courts will have considered, in detail, whether such a risk of dissipation is real and substantial;[181] an application for a freezing order will be refused if the injustice that would be caused to the respondent outweighs the benefit that would be gained by the applicant. Indeed, Mr Justice Mann in his judgment rejecting the Claimant's appeal of the Freezing Order in the English courts stated that:

> "[w]*hat one has to do is to acknowledge the seriousness of the consequences of a freezing order, and the invasion of liberty that it involves* […] *and to reflect that in requiring proof to an appropriately high standard. Orders are not to be lightly sought and will not be granted on flimsy evidence. The requirement to demonstrate a risk of dissipation is a lot more than formal*."[182]

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176 This includes the Trust Freezing Order proceedings, as referenced in **Exhibit C-34**: *JSC Mezhdunarodniy Promyshlenniy Bank, State Corporation "Deposit Insurance Agency" v S V Pugachev et al*, Claim No HC-2014-000262, Trust Freezing Order, 11 August 2015 (final order – 27 August 2015).

177 **Request**, paragraph 185.

178 **Exhibit 44**, S. Gee on Commercial Injunctions (2016), section 12-025.

179 **Exhibit 44**, S. Gee on Commercial Injunctions (2016), section 12-028.

180 **Exhibit 44**, S. Gee on Commercial Injunctions (2016), 12-033 referring to **Exhibit RL-45**, *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH (The Niedersachsen)* [1983] 2 Lloyd's Rep. 600 at 606-607, per Mustill J.

181 This risk was considered in detail upon the Claimant's application to discharge the freezing order, in **Exhibit RL-31**, Judgment of Mr Justice Mann [2014] EWHC 4336 (Ch), paragraphs 218 to 238. Mr Justice Mann came to the conclusion that there was "*a sufficient case in favour of a risk of dissipation to justify the grant of a freezing order*."

182 *See* **Exhibit RL-31**, Judgment of Mr Justice Mann [2014] EWHC 4336 (Ch), paragraph 221.

128. It is therefore thoroughly misleading for the Claimant to allege that the standard of proof is low for granting such orders, and in any case he has proved the risk of dissipation of assets was indeed real, due to his multiple breaches of the Freezing Order since it was issued.[183]

129. The Claimant states that the DIA's solicitors (the international law firm Hogan Lovells) confirmed before the High Court that the Freezing Order had been properly served on the Claimant. However, the Claimant claims that he "*never admitted that the UK Worldwide Freezing Order was ever served on him*."[184] This is, once again, a statement designed to mislead the Tribunal. The Claimant does not explain the relevance of this statement, as in the normal course no such admission is necessary for valid service to take place. Due to the possibility for penal sanctions, UK courts ascribe particular gravity to service in respect of a freezing order.[185] The Claimant should have raised any objections in respect of service before the English court, and the Claimant has not indicated that any such objection was raised. In any event, his participation in subsequent High Court proceedings regarding breaches of the Freezing Order undermines this assertion. The Claimant is also in any case still bound by the order.

130. The Claimant continues to misrepresent certain facts with regard to the English proceedings throughout the Request. The Claimant refers to his "*forced absence*"[186] in the English proceedings affecting his ability to "*put forward specific grounds for non-enforcement*" of the default judgment issued by the English High Court.[187] As previously submitted, these difficulties are entirely of the Claimant's own making.[188] The Claimant has chosen, alternatively, to participate or not participate in the proceedings.

131. Moreover, the Claimant alleges that the worldwide enforcement proceedings impact on his "*ability to finance his legal representation in the current arbitration proceedings, which prevents him from having access to a fair trial and adequately presenting his claims*."[189] The Respondent has already repeatedly addressed the fact that the Freezing Order granted by the

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183 *See*, for example, **Exhibit RL-17**, **Exhibit RL-18**. The Claimant also refers to "*pernicious judicial orders*" of the English courts in paragraph 190 of the Request, requiring him to "*surrender his French passport*" (which he initially failed to do upon the order, *see* **Exhibit RL-17**, paragraphs 17 to 19), and "*restraining him from leaving England and Wales, including travelling to France*" (he left the jurisdiction anyway, *see* **Exhibit RL-17**, paragraph 74). Once again the Claimant shows little regard for orders made by a highly respected court, and only serves to illustrate his own breach of such orders.

184 **Request**, paragraph 186.

185 **Exhibit R-14**, Civil Procedure Rules, Part 25, Practice Direction 25A section 25.1.25.8.

186 **Request**, paragraph 198.

187 **Request**, paragraph 197.

188 **Response to the Request for a Preliminary Order**, paragraph 30 to 33; **Response to the Second Preliminary Application**, paragraphs 15 to 29.

189 **Request**, paragraph 218.

English courts provide for a reasonable amount to be spent on legal proceedings,[190] and the Claimant has clearly instructed counsel in this Arbitration to present his claims. However, it remains unclear whether the Claimant has complied with his disclosure obligations under the Freezing Order, as discussed below in **Section VIII**.

Proceedings in Luxembourg

132. The Claimant alleges that the measures taken in Luxembourg had the aim of enforcing the Subsidiary Liability Judgment and preventing him from paying legal fees. [191] The Claimant alleges that the measure refers to one of the Claimant's legal advisors, Mr Lex Thielen, and the Claimant contends that this "*clearly indicates Russia's aim to deprive Mr Pugachev of proper representation in various court proceedings, which constitutes an evident attempt to deny Claimant's fundamental right to a fair trial*."[192] This is not accepted. As the Respondent understands from **Exhibit C-39** cited by the Claimant, the measure refers to Mr Thielen by virtue of him being "*custodian of the bearer shares*" of three of the Claimant's companies, [193] rather than simply because he was the Claimant's legal advisor. He is therefore impacted by the measure by virtue of his role in the Claimant's commercial affairs, rather than in any capacity as a legal representative for the Claimant in any court proceedings.

133. As is clear from the Claimant's own exhibit, IIB and the DIA formally oppose Mr Thielen (and the three named companies, Centex Immo SA, Luxury Investments SA, and Sablon International SA) "*relinquishing, paying or releasing to anyone else; any amount, coin, object, or valuable whatsoever that it has or will have, or owes or will owe, to: Mr Sergei Viktorovich Pugachev […] on any basis and for any reason*". [194] The opposition is made to secure the amount of the Subsidiary Liability Judgment, and the obligation restricts amounts being paid to the Claimant, not from the Claimant. This does not prevent the Claimant from paying his legal fees nor having the right to a fair trial.

134. This is again an attempt by the Claimant to mislead the Tribunal and misrepresent the position in bad faith.

Enforcement proceedings worldwide

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190 **Response to the Request for a Preliminary Order**, paragraphs 31 to 32; **Response to the Second Preliminary Application**, paragraphs 21 and 33 to 36; also *see* below at paragraph 138.

191 **Request**, paragraph 206.

192 **Request**, paragraph 206.

193 **Exhibit C-39**. Notice of an Attachment Order in Luxembourg ("*saisie-arrêt*") delivered by Bailiff to Attorney Lex Thielen, Centex Immo SA, Luxury Investments SA, Sablon International SA, 4 May 2016.

194 **Exhibit C-39**. Notice of an Attachment Order in Luxembourg ("*saisie-arrêt*") delivered by Bailiff to Attorney Lex Thielen, Centex Immo SA, Luxury Investments SA, Sablon International SA, 4 May 2016.

135. The Claimant appears to suggest that the Respondent has used information gained through the worldwide Freezing Order to "*pursue Mr Pugachev worldwide*".[195] He claims that the *"order could not have had any extra-territorial effect, as UK Courts' jurisdiction is exclusively restricted to the UK*."[196] As noted previously, from reviewing the exhibits provided by the Claimant and publically available information, the enforcement proceedings detailed have been instigated by IIB and DIA, not the Respondent. It is therefore not within the Tribunal's jurisdiction to grant a suspension of such proceedings.

136. Furthermore, it is clearly incorrect to state that the order "*could not have had any extra-territorial effect*". The aim of a worldwide freezing order is to have the potential to extend beyond the UK to prevent the dissipation of assets. An applicant benefitting from a freezing order made in England can apply to the English courts for permission to seek to enforce the freezing order in other jurisdictions where assets are located.[197] Once permission has been given, courts in the relevant jurisdictions will then choose whether to enforce such an order. As previously submitted, the Claimant should be seeking recourse from the relevant national courts if he does not agree with their decisions, rather than from the Tribunal.

137. The Claimant asserts that defending the worldwide enforcement proceedings in parallel with these proceedings is "*highly detrimental […] as it prevents him from focusing on his claim in this arbitration.*"[198] This statement is rejected by the Respondent, as the Claimant has not provided any specific proof of how being a defendant in domestic proceedings can impact this arbitration. This unsubstantiated statement only serves to illustrate the cavalier attitude of the Claimant in these proceedings.

138. The Claimant further alleges that "*Russia is using the UK Worldwide Freezing Order to prevent Mr Pugachev to defend himself in the course of this arbitration*."[199] The Claimant attempts to support this statement by referring to the letter sent by the Respondent's counsel on 17 November 2016[200] requesting financial information from the Claimant and querying whether a third party funder was involved in these proceedings. The Respondent has had no reply to this letter to date, some three months later, and the Claimant has mischaracterised its purpose. It is acknowledged in the letter that the Claimant is permitted to spend a reasonable amount on legal fees under the Freezing Order, subject to certain notification obligations. The Respondent sought to determine whether an application for security for costs would be

195 **Request**, paragraph 201.

196 **Request**, paragraph 201.

197 **Exhibit RL-44**, S. Gee on Commercial Injunctions (2016), section 1-032.

198 **Request**, paragraph 212.

199 **Request**, paragraph 219.

200 **Exhibit R-15**, Letter from White & Case to Lazareff Le Bars, dated 17 November 2016.

necessary, taking into account the Claimant's financial situation, and whether the Claimant was (once again) failing to comply with the Freezing Order by using frozen funds and failing to notify the DIA's solicitors of any use of such funds.[201]

139. The Claimant repeatedly attempts to distort the facts by stating that previous counsel for the Claimant were forced to give up the majority of the amounts paid as legal fees, notably in the present arbitration.[202] This mischaracterisation of the situation by the Claimant is long-running, and has been addressed by the Respondent in its Response to the Second Preliminary Application.[203] The Claimant is fully entitled to spend a reasonable sum on legal advice and representation, as long as he discloses the source of the funds pursuant to the Freezing Order.[204] Fees have only been repaid where the transfer of funds constituted a breach of the Freezing Order.[205]

140. The Claimant further makes several broad and unsupported statements with regard to the enforcement proceedings. As an example, he claims that "*many of the properties*" subject to the enforcement proceedings worldwide do not belong to him, and in all likelihood the national courts will reject the measures requested.[206] This is an incorrect statement, as from what the Respondent understands, the properties are in fact held through various holding structures. Therefore, even if the Claimant is not the named owner, he may still be a beneficiary.

141. The Claimant has also failed to specify which properties and assets he does believe he holds. In any case, if the properties do not belong to him then it is unclear on what basis the Claimant has asked for relief in respect of these properties, both as a matter of logic and jurisdiction. It is illustrative of the contradictory nature of the Claimant's Request that such relief is requested and it is inexplicable why he would need an order suspending enforcement proceedings against properties that do not belong to him, and which would therefore not fall within the jurisdiction of this Tribunal.

142. Moreover, if the Claimant truly believes that the national courts "*will in all likelihood reject the measures requested*"[207] then there is clearly no risk of imminent harm to the Claimant.

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201 Having received no response to its reasonable enquiries, the Respondent will therefore make such an application.

202 **Request**, paragraph 220.

203 **Response to the Claimant's Second Preliminary Application**, paragraphs 34 to 36.

204 **Exhibit RL-17**, paragraph 16.

205 **Exhibit RL-17**, paragraph 167; *see* also **Exhibit C-48**, in particular paragraphs 9 and 15 of the Skeleton Argument on Behalf of the Claimant; and paragraphs 16 to 28 of the Forty-First Witness Statement of Michael Gordon Roberts.

206 **Request**, paragraph 212.

207 **Request**, paragraph 212.

The Tribunal has already rejected the Claimant's Second Preliminary Application on these issues, in addition to rejecting the Claimant's Request for the Preliminary Order.

143. The Claimant further appears to suggest that the "*enforcement of the Subsidiary Liability Judgment and the UK judgments may result in the confiscation of the house where Mr Pugachev currently resides*", which will "*compromise Mr Pugachev's safety and security*."[208] He continues to list threats allegedly received by him and his family, but does not specify who these threats were made by (or link any such threats to the Respondent), with the exception of the unsubstantiated allegations of the Claimant that he was "*effectively kidnapped*"[209] some years ago. The Claimant's claims are not supported by any evidence, and do not demonstrate any need for urgency. Indeed, the Claimant himself continues to aggravate the dispute by casting unsubstantiated assertions in bad faith.

144. It would be disproportionate to expect the Respondent to implement and comply with a vague order suspending worldwide enforcement proceedings, to which it is not a party. It is also not within the jurisdiction of the Tribunal to grant such an order. There would be potentially unlimited scope for the Claimant to allege breaches should the Respondent, or third parties other than the Respondent, take any action pursuing legitimate legal rights before national courts.

C. THE CLAIMANT HAS FAILED TO SUBSTANTIATE HIS CLAIMS REGARDING THE SUSPENSION OF CRIMINAL PROCEEDINGS

145. Arbitral tribunals generally exercise self-restraint in respect of requests for a stay of criminal proceedings, emphasizing that "*a particularly high threshold must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a state*."[210] Indeed, it would take "*proof of exceptional circumstances*." Although this case is not before an ICSID tribunal, the same principle applies in the UNCITRAL context as the Claimant recognizes in its Request for Interim Measures.[211] It is "*not for an investment tribunal to set itself up as a court of final review over the criminal*

208 **Request**, paragraph 225.

209 **Request**, paragraph 281.

210 *See* **Exhibit RL-16**, B. Stern, Chapter 45: Interim/Provisional Measures in Meg N. Kinnear , Geraldine R. Fischer, et al. (eds), Building International Investment Law: The First 50 Years of ICSID, Kluwer Law International; Kluwer Law International (2015), p 632, *citing* **Exhibit RL-42**, *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Claimants Request for Provision Measures, 4 December 2014 paragraph 137; **Exhibit CL-11**, *Tokios Tokelės v.Ukraine*, Order No. 3, 18 January 2005,paragraphs 12-13.

211 **Request**, paragraph 37.

justice systems of host States."[212] The Claimant is effectively asking the Tribunal to override the Russian criminal justice system.

146. Further and in any event, the Claimant's request for interim measures ordering the "*suspension of all the criminal proceedings initiated in Russia […] and all related requests for international cooperation […] such as extradition requests*"[213] is a disproportionate request for the Claimant to make. Proceedings should not be suspended without any substantiation or viable proof if there are real issues to be tried, and in any event the Claimant's proper recourse would be through the national courts.[214]

147. The tribunal in *Hamester v Ghana* found that a State may obviously exercise its sovereign powers to investigate and prosecute criminal actions. In that case, there was "*no evidence that this investigation was contrary to any international duty* [of the State]", and "*considering certain documents submitted to the Tribunal which were at best ambiguous, the criminal proceedings do not appear, prima facie, to have lacked a foundation*."[215] The criminal proceedings in Russia are based on objective facts, and the Claimant has not given the Tribunal any reason to doubt that the criminal proceedings lack a foundation, or that they were contrary to any international duty.

148. In his inappropriately vague and broad request for a suspension of the criminal proceedings in Russia, the Claimant has further failed to identify legal means by which the Respondent could "suspend" those proceedings.

149. The Claimant's account of the alleged "*serious irregularities*"[216] in the Russian criminal proceedings against him is flawed and unsubstantiated. By way of example, on the Claimant's own account, his counsel requested access to the case files in "*early December 2015*" and was granted access by 20 January 2016.[217] The Claimant notes that by this time "*the Subsidiary Liability Judgment had already been confirmed and could no longer be appealed*"[218] (although, as stated in paragraph 50 above, the Claimant appears to have filed another appeal in February 2016). This is described by the Claimant as an example of violation of the

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212 **Exhibit RL-46**, *The Rompetrol Group v Romania*, ICSID Case No. ARB/06/3, Award dated 6 May 2013, paragraph 238.

213 **Request**, paragraph 173.

214 For example, the Swiss proceedings referred to in the Request, paragraphs 235 and 236, relate to accounts frozen in Switzerland by the Swiss Public Prosecutor (*see* **Exhibit C-56**) and an investigation opened by the Swiss authorities.

215 **Exhibit RL-47**, *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No. ARB/07/24, Award dated 18 June 2010, paragraphs 297 and 298.

216 **Request**, paragraph 249.

217 **Request**, paragraph 249, bullet point two, and footnote 188.

218 **Request**, paragraph 249, bullet point two.

"*principle of due process and the right to be heard*."[219] However, this complaint, which the Claimant purports to present as relevant to his ability to properly appeal the Subsidiary Liability Judgment, falls apart when viewed against the chronology of the Claimant's appeals against the Subsidiary Liability Judgment:

a) The Subsidiary Liability Judgment was rendered on 30 April 2015;

b) The Claimant's appeal against the Subsidiary Liability Judgment was dismissed on 24 June 2015;[220]

c) The Claimant's first cassation appeal was dismissed on 1 October 2015;[221]

d) The Claimant's second cassation appeal, addressed to the Russian Supreme Court, was registered in the public database on 30 November 2015;[222]

e) It was at this stage, after all the Claimant's appeals, that his counsel made the request to access the criminal case files as described by the Claimant, whereas the criminal proceedings were pending against him since November 2013.[223]

150. Another alleged example of the violation of the "*principle of due process and the right to be heard*" is "[f]*ailure to summon key members of IIB's management*".[224] This assertion is yet again unsupported by evidence and is far too vague for the Respondent to address it.

151. The Claimant also fails to explain why the issue of the second international wanted notice on 29 January 2014, another example cited by the Claimant, was "*illegal*" or how its alleged illegality is related to the "*principle of due process and the right to be heard*".[225]

152. Accordingly, the Claimant's assertions concerning the alleged irregularities in the criminal proceedings against him are wholly unsubstantiated. Remarkably, despite labelling the proceedings as "*politically motivated and groundless*"[226] the Claimant does not even attempt to assert his innocence.

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219 **Request**, paragraph 249.

220 **Request**, footnote 122.

221 **Request**, footnote 122.

222 **Exhibit R-7**, Screenshot of the case record for Case No. A40-119763/10 in the public database of the Russian Commercial Courts.

223 **Request**, paragraph 238.

224 **Request**, paragraph 249, bullet point one.

225 **Request**, paragraph 249 and paragraph 249, bullet point three.

226 **Request**, paragraph 168, bullet point one.

153. Further and in any event, criminal proceedings in Russia cannot be suspended when the Claimant has failed to establish how the proceedings could aggravate the dispute, and when he has only broadly described the nature of such proceedings. As the tribunal in *Lao Holdings N.V v Lao People's Democratic Republic* held, "*a criminal proceeding does not per se […] aggravate the dispute*."[227] Arbitral tribunals thus must consider that "[s]*omething more has to be at stake in order to allow an arbitral tribunal to conclude that there is a threat of aggravation of the dispute*."[228]

154. The Claimant further states that it would be "*impossible for him to defend his rights in this arbitration*"[229] if he were to be extradited. The Claimant also alleges that this risk of extradition is "*aggravating the dispute*."[230] However, the Claimant's physical presence in a certain place does not affect his ability or right to pursue an arbitration claim. He has not sufficiently explained how or why the criminal proceedings would prevent him from further pursuing his claims in this Arbitration. Further, the Claimant claims he had "*no choice but to leave the UK despite the restraining order*", due to an extradition request by the Respondent to the UK authorities.[231] In this regard, the Respondent notes that since the collapse of the USSR in 1991, the UK authorities have not acceded to a single extradition request by the Respondent.

155. Even if the Claimant were to be extradited, which is unlikely (indeed, the Claimant contends that "*France should normally refuse to extradite Mr Pugachev, as he is a French citizen*"),[232] his ability to defend his rights in this Arbitration would not be "*impossible*".[233] A claimant can still appear in hearings and instruct counsel via videoconference, wherever their location. It is also unclear as to how this alleged risk of extradition consists of an aggravation of the dispute.

156. The Claimant continues to make unsubstantiated allegations regarding the purported actions of the Respondent. He claims that Galina Pugacheva was supposedly harassed by Russian authorities, which forced her to leave Russia.[234] No further evidence is given, and there does not appear to be any proof of the reason why the threats were made, where they were made, or who exactly made them. The Tribunal cannot grant interim measures on the basis of such

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227 **Exhibit CL-14**. *Lao Holdings N.V. v. Lao People's Democratic Republic,* ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measure Order, 30 May 2014, paragraph 30; *see* also **Response to the Request for a Preliminary Order**, paragraph 29.

228 **Exhibit RL-13**. *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 - Decision on Requests for Provisional Measures, 23 June 2015, paragraph 89.

229 **Request**, paragraph 51 and 192.

230 **Request**, paragraph 255.

231 **Request**, paragraph 192.

232 **Request**, paragraph 255.

233 **Request**, paragraph 192.

234 **Request**, paragraph 248.

unsubstantiated, vague allegations. Once again, the Claimant fails to provide specific and concrete evidence.

157. Moreover, the measure requested by the Claimant is indeterminately far-reaching. He requests a "*suspension of the criminal proceedings in Russia and all related international assistance measures (Switzerland, USA, France, Cyprus and others, if they exist)*".[235] The fact that the Claimant does not even know the exact proceedings he is requesting to be suspended is illustrative of his attitude towards this ill-considered request, and the impossibility of granting the measure requested.[236] The national courts involved are clearly the appropriate forum for the relief that the Claimant is seeking, if any.

158. For the reasons detailed above, the Tribunal should reject the Claimant's request for interim measures suspending the proceedings worldwide.

VI. THE CLAIMANT HAS FAILED TO SATISFY THE REQUIREMENTS FOR REQUESTING THE PROTECTION OF WITNESSES AND OTHER INDIVIDUALS

159. The Claimant seeks interim measures related to (i) the "*protection of witnesses which aim at protecting the integrity of the proceedings*", and (ii) the *"safety of Mr Pugachev and other individuals which aim at ensuring that Russia will not prevent Mr Pugachev from participating and presenting his case in the present arbitration*".[237]

160. The Respondent agrees that witness intimidation is inappropriate. However, the Claimant has failed to demonstrate that his request for protection of witnesses and other individuals satisfies the test for interim measures. These measures should not be granted on the following grounds, expanded upon more fully below:

i) **Section A**: the Claimant's requests should be denied in principle and in substance. They are not within the jurisdiction of the Tribunal;

ii) **Section B**: the Claimant's allegations that the Respondent has threatened potential witnesses are unsubstantiated. It would be disproportionate to grant interim measures in this regard; and

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235 **Request**, paragraph 250.

236 The Claimant requests the suspension of the criminal prosecution against Mr Pugachev, and "*in any similar case […] including against members of his family and individuals related to him*" (Request, paragraph 260). Again this is incredibly wide-reaching, and the Claimant does not even list those specific individuals who he believes should be covered by this measure.

237 **Request**, paragraph 347(4) and 347(5).

iii) **Section C**: the Claimant's allegations that the Respondent has threatened Mr Pugachev, his family, his counsel and his advisors are unsubstantiated.

161. The lack of substantiation of the Claimant's case, as detailed below, fails to establish the *prima facie* case for granting such measures. Interim measures cannot be imposed when a case consists of unsupported allegations with no evidence. Furthermore, it is clear that the Claimant has not demonstrated sufficient urgency or necessity; no specific or imminent acts of the Respondent have been identified suggesting that "*immediate (or at least prompt) action is necessary in order to prevent serious damage*" to the Claimant.[238] Hypothetical measures cannot be relied upon when they may not even arise before the issuance of an award on the merits.

162. It would clearly be disproportionate to grant the interim measures requested. As will be expanded upon below, the Claimant fails to provide any level of detail regarding the relief requested (or even attempting to detail the specifics of any order to be made), resulting in a near impossibility of achieving compliance even if the Tribunal were to find that it had jurisdiction to make such an order. The Claimant's requests must fail as they are extremely vague and overly broad in scope.

A. THE CLAIMANT'S REQUESTS SHOULD BE DENIED IN PRINCIPLE AND ON SUBSTANCE

163. On the basis of the unsubstantiated allegations outlined in **Sections VI(B)** and **(C)** below, the Claimant requests the Tribunal act to (i) preserve the procedural integrity of the proceedings and (ii) ensure that Respondent will not prevent Claimant from participating and presenting his case.[239]

164. The Claimant's first request must fail in principle since the Claimant has not provided any evidence that the Respondent has in any way compromised the integrity of the proceedings. Specifically, the Claimant has not provided any evidence to show that the Respondent has prevented the Claimant from obtaining testimonies from potential witnesses, or has obtained false testimonies in bad faith or under duress. Indeed, it is the Claimant who is attempting to undermine the integrity of these proceedings by continuing to publish false information in the press and make public statements in breach of an order by the Tribunal prohibiting public statements and disclosure of information relating to this Arbitration.[240] The Claimant has

238 **Exhibit CL-33**, G. Born, "Chapter 11: Provisional Measures in International Arbitration", International Arbitration: Law and Practice, Second Edition, (2015) at 13.

239 **Request**, paragraph 347(4) and (5).

240 **Exhibit R-16**, Letter from White & Case to Lazareff Le Bars dated 14 December 2016.

already given at least two television interviews regarding this Arbitration, even giving a second such interview on 15 December 2016 after the Tribunal's email of 9 November 2016 requesting the parties to refrain from making public statements or disclosing information about the proceedings.[241]

165. The Claimant's second request must fail in principle as the Claimant has not provided any evidence to substantiate his allegations that the Respondent has taken or intends to take any action which will prevent the Claimant from fully participating and presenting his case. Once again, the Claimant has not *prima facie* established his case, nor demonstrated any sense of urgency or necessity with regard to specific or imminent acts of the Respondent.

166. In addition, the Claimant's requests must fail on substance as the requests are extremely vague and overly broad in scope. The Claimant requests that measures are taken to ensure 'individuals' will be able to testify, including any witnesses "*already or later identified as such*".[242] This is a potentially limitless category, particularly given the Claimant's view of potential witnesses is so expansive that the Claimant expresses a desire to call witnesses who have recently testified against the Claimant in criminal proceedings.[243] It would be a disproportionate burden on the Respondent to grant the interim measures requested.

167. Even if the Claimant's request did not fail for the reasons above, the request that the Respondent "*stay any criminal proceedings against potential witnesses*" is too broad in scope to be actionable.[244]

168. The Subsidiary Liability Judgment in itself relates to the enforcement of a debt incurred by IIB as a bank largely controlled by the Claimant. As the name suggests, the judgment imposes a 'subsidiary liability' upon the Claimant as a person who controls the institution where that person 'causes' the bankruptcy. The related criminal proceedings against potential witnesses are principally connected to the Subsidiary Liability Judgment, so the content of such proceedings is significant. The Claimant cannot credibly ask for a stay of criminal proceedings allegedly 'impacting the proceedings' without discussing the issues they involve.

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241 **Exhibit R-12**, Interview with France 2 on 15 December 2016, from www.france2.fr/emission/20h55-le-jeudi, including unofficial translation of the interview transcript: "*Interviewer: You have sued, effectively, the Russian State and therefore Vladimir Putin claiming 12 billion of euros, is that right? Pugachev: (nodding). Interviewer: Do you consider that the Russian State and therefore that Vladimir Putin robbed you of 12 billion of euros? Pugachev: So, did Putin harm me directly? I would not say it that way. But let's say that because of his actions or, rather his inactions, like the non-respect of basic rules with regard to the protection of investments, he generated complex situations.*" *See* also **Exhibit R-11**, Interview with TV5 Monde on 1 December 2016.

242 **Request**, paragraph 347(4)(i).

243 **Request**, paragraph 273.

244 **Request**, paragraph 347(4)(ii).

169. As the Claimant has (i) failed to substantiate the allegations detailed above, and (ii) requested relief in the form of an interim award on subject matter not within the scope of the protection provided by the France-USSR BIT, it would be both disproportionate and outside the Tribunal's jurisdiction if interim measures were granted. The Claimant's requests in this regard should be rejected for the reasons above.

B. THE CLAIMANT'S ALLEGATIONS THAT THE RESPONDENT HAS THREATENED CLAIMANT'S POTENTIAL WITNESSES ARE UNSUBSTANTIATED

170. The Claimant alleges (i) the Respondent has intimidated, indicted and arrested various individuals,[245] and (ii) but for the action of the Respondent, these individuals would testify on behalf of the Claimant in these proceedings. On the basis of these allegations, the Claimant concludes that the procedural integrity of the proceedings may be compromised due to an inequality of arms.[246] However, the Claimant has failed to provide any evidence to substantiate these allegations, and the conclusion that the Claimant draws is therefore unconvincing.

171. First, the Claimant alleges the 'dismissal' from office of seven individuals.[247] However, the Claimant does not make any attempt to (i) provide evidence of such dismissals from office, (ii) provide evidence of any link between such dismissals and the Respondent, or (iii) allege, let alone provide any evidence, that any actions of the Respondent have or will prevent the individuals from appearing as supporting witnesses for the Claimant. As the *Churchill Mining v. Indonesia* tribunal explained, *"[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.*"[248] While the tribunal recognizes that "*fears and concerns deriving from an ongoing criminal investigation may be understandable, it is not sufficient to allege, without more, that the possibility of being the target of a criminal investigation is intimidatory to obtain protection through provisional measures*."[249] Indeed, the Claimant has not even sought to demonstrate a willingness on the part of any of these individuals to provide testimony in support of the Claimant's position in this arbitration. In the absence of evidence supporting these points (i) to (iii), the Claimant has failed show the relevance of any such alleged dismissals to this Arbitration. There also should be an "*element on record showing any*

245 **Request**, paragraph 262.

246 **Request**, paragraph 263.

247 **Request**, paragraph 264. These individuals are listed as: Mr Alexei Kudrin, Mr Igor Sechin, Mr Vladimir Lisin, Mr Roman Trotsenko, Mr Sergey Ignatyev, Mr Vladimir Kozhin and Mr Alexey Ulyukaev.

248 **Exhibit RL-48**, *Churchill Mining 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, paragraph 72 [emphasis added].

249 **Exhibit RL-48**, *Churchill Mining 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, paragraph 77.

pressure or intimidation against the Claimants and their witnesses",[250] which it is clear in this case that there is not.

172. Second, the Claimant alleges the launch of criminal proceedings in the Russian Federation against seven individuals.[251] However, the Claimant does not make any attempt to discuss the content of these criminal proceedings, (indeed, he seeks to actively avoid this)[252] nor (i) provide evidence to support these allegations, or (ii) allege, let alone provide any evidence, that actions of the Respondent have prevented or will prevent the individuals from testifying in support of the Claimant in these proceedings. Again, the Claimant has failed to demonstrate a willingness on the part of any of these individuals to provide testimony supportive of the Claimant's position in this arbitration. The Claimant mentions a number of high-profile individuals as witnesses, such as Alexei Kudrin, Roman Trotsenko, Sergey Ignatyev, and Alexander Dunayev for example, but does not demonstrate they have any connection to the Claimant's claim.[253] Indeed, there are no mentions of these individuals in the Notice of Arbitration. This undermines the Claimant's attempt to assert they are key to his case, and appear to have no relation to the Claimant's claim.

173. In particular, while asserting "*Claimant considers* [Mr Ulyukaev] *his most valuable witness*",[254] the Claimant does not provide any evidence of an attempt to make contact with Mr Ulyukaev and it appears no attempt has been made: instead the Claimant "*fears*", without providing any evidence, that Mr Ulyukaev will not be able to testify on behalf of the Claimant. Again, it is surprising that Mr Ulyukaev, despite allegedly being the Claimant's most valuable witness, does not make an appearance in the Notice of Arbitration whilst other potential witnesses do.[255] In the absence of any evidence supporting these points (i) and (ii), the Claimant has again failed to substantiate or show the relevance of such criminal proceedings to this arbitration.

174. Third, the Claimant alleges that three witnesses who have previously testified against him in criminal proceedings provided forced testimonies,[256] and that the Respondent is "*currently trying to force the testimonies of other potential key witnesses*".[257] The Claimant fails to (i)

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250 **Exhibit RL-48**, *Churchill and Planet v Indonesia*, Procedural Order No. 9, paragraph 93.

251 **Request**, paragraphs 264 and 268. These individuals are listed as: Mr Roman Trotsenko, Mr Alexander Dunayev, Mr Mikhail Bashmakov, Mr Andrey Fomichev, Mr Vladimir Yevtushenkov, Mr Alexey Ulyukaev and Mr Dmitry Amunts.

252 *See* **Request**, paragraph 275: "*What is most important for the Arbitral Tribunal is not the content of the actual criminal proceedings but rather the impact on the pending arbitration*".

253 **Request**, paragraph 264.

254 **Request**, paragraph 264.

255 *See* for example, **Notice of Arbitration**, paragraph 63.

256 **Request**, paragraph 265. These witnesses are listed as: Mr Didenko, Ms Illarionova and Mr Zlobin

257 **Request**, paragraph 267.

provide any substantiation for any of these allegations, or (ii) make any connection attributing alleged actions to the Respondent.

175. Fourth, the Claimant opaquely alleges that as witnesses were called to testify against Mr Amunts in the Basmanny District Court in April 2016, this "*prevents Mr Pugachev from further unravelling the truth, as those witnesses will not be able to testify against their own confession*".[258] It is not clear what the Claimant means by this allegation. Again, the Claimant does not provide any evidence to suggest (i) why any of these witnesses would testify for the Claimant or (ii) that actions of the Respondent have or will prevent the individuals from appearing as supporting witnesses for the Claimant in this Arbitration.

176. The Claimant also alleges that "*Russia has obtained the allegedly incriminating but false testimonies, in bad faith and/or under duress*".[259] This vague allegation fails to clarify the testimonies to which this statement purports to refer. The Claimant once again fails to provide any evidence to support this assertion.

177. As the Claimant has failed to provide evidence to substantiate any of these allegations, the Tribunal should not grant the relief requested; the basis for such a request for interim relief has not been established, and it would be disproportionate to do so.

C. THE CLAIMANT'S ALLEGATIONS THAT THE RESPONDENT HAS THREATENED MR PUGACHEV, HIS FAMILY, HIS COUNSEL AND HIS ADVISORS ARE UNSUBSTANTIATED

178. The Claimant alleges that he and his family have been "*threatened and frightened*" on several occasions by persons connected to the Respondent, in a series of elaborate allegations which are presented entirely without substantiation.[260] On the basis of these claims, the Claimant concludes that the Respondent is taking or has taken actions that prevent the Claimant from participating and presenting his case in the present Arbitration. However, the Claimant's allegations with respect to these issues are so lacking in evidence that they border on the fanciful. In addition, the Claimant has failed to provide any explanation linking the Respondent to these allegations. The conclusions that the Claimant draws are therefore wholly unconvincing.

179. In this context, it may be helpful to recall that the Claimant previously characterized the Respondent's request for further information regarding the alleged trigger letter (and proof of

258 **Request**, paragraph 273.

259 **Request**, paragraph 273.

260 **Request**, paragraph 280 onwards.

an attempt to settle the dispute amicably, pursuant to Article 7 of the France-USSR BIT) as having a "*repeated threatening tone*".[261] The Claimant's offhand use of 'threatening', when the correspondence was clearly a reasonable request for further information, suggests the Claimant has a propensity to overstate such circumstances. The Claimant's repeated references to an alleged "*explosive device*" underneath his car further illustrates his paranoia, as this has been proven to be a tracking device installed at the DIA's instruction, and the Claimant himself admits as much.[262]

180. First, the Claimant alleges that he was "*effectively kidnapped by two officials of the DIA*".[263] It is difficult to comprehend what the Claimant means by this peculiar statement. The Claimant fails to provide (i) any evidence related to any alleged kidnapping or (ii) an explanation of how the DIA is the same as the Respondent. It has already been submitted that the Respondent and the DIA are separate entities. Any claim arising out of this alleged incident may be more appropriately directed towards the DIA, the alleged actor in this incident, not the Respondent.

181. Second, the Claimant alleges that he, members of his family and members of his legal team have been "*under the surveillance of Diligence LLC*", a private investigation company the Claimant alleges was "*hired by the Russian authorities*".[264] However, the Claimant once again fails to provide any evidence to substantiate the claim that Diligence LLC was employed by the Respondent. Rather, the Claimant provides evidence which shows that the Claimant is or has been of the opinion that Diligence LLC was working under the instruction of the DIA and/or international law firm Hogan Lovells.[265] There is also nothing to suggest that the police in the UK took any action in respect of the claims alleged by the Claimant.

182. In the Claimant's **Exhibit C-33**, he also states that his international arbitration claim "*includes accusations against […] Igor Altoushkin […] who resides in London and is implicated in the French proceedings*." The suggestion made by the Claimant is that Mr Altoushkin may be responsible for threats against the Claimant as he possesses "*the financial and technical means to hire such a contractor*." The Claimant also refers to Mr Altoushkin in the Notice of Arbitration as being the buyer for EPC (at an alleged undervalue), and appears to direct certain allegations relating to the payments for EPC under the Share Purchase

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261 *See* **Exhibit R-17**, Letter from White & Case to Lazareff Le Bars dated 6 December 2016, and the reply at **Exhibit R-18**, Letter from Lazareff Le Bars to White & Case dated 9 December 2016.

262 **Request**, paragraph 282.

263 **Request**, paragraph 281.

264 **Request**, paragraph 282.

265 **Exhibit C-32**, Letter from Peters & Peters to Detective Constable Rhodri Gardner, dated 9 September 2015.

Agreement towards Mr Altoushkin.[266] The Claimant goes on to state that "[A]*s a result of the Government's scheme, in cooperation with Mr Altushkin and his Chechen business partner Mr Baysarov, the Russian Government expropriated EPC's license without paying any compensation to Basterre to Mr Pugachev directly*".[267] It appears that the Claimant believes other individuals, such as Mr Altoushkin, bear responsibility for the situation the Claimant finds himself in. It is notable that the Claimant has now asked the Tribunal to order relief against the Respondent in this regard.

183. Third, the Claimant alleges that he lodged a complaint in France in relation to undefined "*surveillance*" which was taken "*very seriously*" by the French authorities.[268] However, the Claimant provides no such evidence of (i) any such surveillance, (ii) any link between the alleged surveillance and the Respondent, or (iii) any such claim and any response (let alone a 'serious' response) by the French authorities.

184. Fourth, the Claimant alleges that he was informed by a security analyst of an attempt on his life.[269] The exhibit provided by the Claimant, however, gives no proof that (i) he indeed received such a warning, or (ii) there was any link between this alleged warning and the Respondent.

185. Fifth, the Claimant alleges that he was "*clearly threatened*" by Respondent via an opinion piece published in a Russian language website.[270] The Claimant states that this piece was "*commissioned by*" the Respondent, but does not (i) provide any evidence to substantiate a link between the opinion piece and the Respondent or (ii) establish that the piece in question presents either a 'real' or 'clear' threat.

186. The Claimant also alleges that members of his legal team have been threatened.[271] However, the Claimant does not elaborate on this with any evidence or examples.

187. As the Claimant has failed to provide evidence to substantiate any of these allegations, the Tribunal should not grant the relief requested. Where the basis for granting interim measures has not been established, and the foundation of the claim is wholly unsupported, it would be disproportionate for the Tribunal to grant the relief requested by the Claimant.

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266 **Notice of Arbitration**, paragraphs 86 to 94.

267 **Notice of Arbitration**, paragraph 94.

268 **Request**, paragraphs 283 and 284.

269 **Request**, paragraph 285; **Exhibit C-33**: Email from Mr Pugachev to Officers Gardner and Philip, 16 October 2015.

270 **Request**, paragraph 286; **Exhibit C-51**: S. Kamamin, "The Betrayal of Sergei Pugachev – is it forgiven?", *polytika.ru*, dated 25 November 2011.

271 **Request**, paragraph 289.

VII. RESPONSE TO THE CLAIMANT'S APPLICATION FOR SECURITY FOR CLAIM AND SECURITY FOR COSTS

188. The Claimant requests that the Tribunal either order the Respondent to "*put in an escrow account, held by the Tribunal, the amount of USD 6 billion, representing a fraction of the current provisionally estimated amount of damages that Mr Pugachev claims in the present arbitration, as security for his claim*" or "*issue a letter of comfort indication that it would abide by its international obligations deriving from the provisions of the BIT . . . including the pecuniary or non-pecuniary obligations contained therein*."[272] The Claimant further requests security for costs in the amount of EUR 10 million "*to be held in escrow*."[273]

189. While the Tribunal has the power to grant security for claims and security for costs, the Claimant has failed to meet the burden of establishing that such measures should be granted, as demonstrated below. Indeed, the Claimant has failed to substantiate how its request meets the relevant legal standard, which speaks to the half-hearted nature of its request.

A. THE CLAIMANT HAS FAILED TO ESTABLISH THE NECESSARY CONDITIONS FOR GRANTING SECURITY FOR CLAIMS

190. While a tribunal has the power to grant security for claims, it appears that no investment-arbitration tribunal has done so to date. In fact, securities for claims are so rare that the Claimant has failed to rely on any examples of applications for securities of claims even being made in either the ICSID or UNCITRAL context. Instead, the Claimant incorrectly relies on *Burimi v Albania* as an example of a case where a request for securities for claims was made, but ultimately denied.[274] In *Burimi v Albania*, however, the claimant requested securities for costs and not claims.[275] The Claimant has failed to establish why the Tribunal should grant such an extraordinary measure in the present dispute.

191. In any event, the Claimant has failed to establish that the five elements for granting provisional measures (as detailed in **Section IV** above) have been satisfied in respect of its request for security for claim. As the Claimant acknowledges, these elements must be satisfied for a request for security for claim to be granted.[276] Instead, the Claimant embarks on a baseless and unsubstantiated attack on the Respondent's compliance with its international obligations, going so far as to accuse the Respondent of "*declar*[ing] *that it*

272 **Request**, paragraph 347(6)(i).

273 **Request**, paragraph 347(6)(ii).

274 **Request**, paragraphs 347(7) and 80.

275 *See* **Exhibit CL-24**, *Burimi v. Albania*, paragraph 22.

276 **Request**, paragraph 80.

intends not to abide by international awards rendered against it."[277] This is incorrect. It should be noted that awards have been rendered against the Russian Federation in ten instances. Out of those ten awards, five have been set aside. Of the five remaining: (i) payment has been settled in respect of three awards; (ii) payment is pending in respect of one award; and (iii) annulment proceedings are pending in respect of one award.

192. Once again, it would be disproportionate and unnecessary for the Tribunal to grant the relief sought by the Claimant.

B. THE CLAIMANT HAS FAILED TO ESTABLISH THE NECESSARY CONDITIONS FOR GRANTING SECURITY FOR COSTS

193. While requests for security for costs are a common feature of investment arbitration, tribunals are reluctant to award security for costs except in exceptional circumstances. As the *South American v Bolivia* tribunal explains, under the UNCITRAL Rules, "*tribunals considering requests for security for costs have emphasized that they may only exercise this power where there are extreme and exceptional circumstances that prove a high real economic risk for the respondent and/or that there is bad faith on the part from whom the security for costs is requested*."[278]

194. In *Burimi v Albania*, one of the few cases in which a claimant made a request for security for costs, for example, the tribunal rejected the request, in part, on the basis that it was based on "*hypothetical harm . . . from uncertain, future actions, not imminent harm from actions likely to occur*."[279] The Claimant's request for security for costs is likewise grounded on hypothetical harm and uncertain future actions and thus must be rejected.

VIII. REQUEST FOR RELIEF

195. The Claimant has failed to satisfy the requirements for interim measures to be granted for:

(1) the suspension of proceedings worldwide, both civil and criminal;

(2) the protection of witnesses, the Claimant and other individuals;

(3) security for the claim; and

(4) security for costs.

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277 **Request**, paragraph 329.

278 **Exhibit RL-49**, *South American Silver Limited v. Plurinational State of Bolivia, PCA Case No. 2013-15, Procedural Order No. 10*, paragraph 59.

279 **Exhibit CL-24**, *Burimi v. Albania*, paragraph 45.

196. The basis upon which the Claimant's claim has been brought is seriously flawed. As detailed in **Section III(B)**, the Claimant hinges his Request upon allegations that go to the merits of the Arbitration as a whole, and it would not be appropriate for these matters to be decided upon as preliminary issues.

197. The Claimant constructs his case upon precarious foundations, with little or no evidence to support his factual allegations. In this regard, he has failed to *prima facie* establish his case and presents no evidence that there is any urgency or necessity in the measures requested. There is no specific action "*in the works*" suggesting that "*immediate (or at least prompt) action is necessary in order to prevent serious damage*" to the Claimant.[280]

198. It is clear that imposing any interim measures would be a disproportionate burden on the Respondent, partly due to the vague nature of the relief requested, and the onus to prove otherwise lies with the Claimant.

199. The Claimant has made his Request in bad faith, as detailed in **Section III**. It is a recurring theme throughout the Claimant's Request that he makes broad, unsubstantiated statements, unsupported by specific or concrete evidence. It is near impossible for the Respondent to reply to many of these allegations due to a lack of information and proof.

200. It is demonstrative of the Claimant's approach to the Arbitration that he has chosen to make such allegations without evidence, whilst maintaining at the same time that it is the Respondent aggravating the dispute. The vague and haphazard nature of his claims, along with his repeatedly cavalier attitude towards these proceedings, supports the Respondent's submission that the Tribunal should not grant the measures requested.

201. The Respondent respectfully submits that the Tribunal: (i) rejects the interim relief sought by the Claimant, for the reasons set out above; and (ii) grants an order requiring the Claimant to provide the submissions of both parties in the proceedings listed in Appendix B, on an on-going basis.[281]

Respectfully submitted this 10th day of February 2017.

White & Case LLP

White & Case LLP, Counsel for the Respondent

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280 **Exhibit CL-33**, G. Born, "Chapter 11: Provisional Measures in International Arbitration", International Arbitration: Law and Practice, Second Edition, (2015) at 13.

281 *See* paragraph 115 above.