INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

CEMEX CARACAS INVESTMENTS B.V. AND
CEMEX CARACAS II INVESTMENTS B.V.
(CLAIMANTS)

AND

BOLIVARIAN REPUBLIC OF VENEZUELA
(RESPONDENT)

(ICSID CASE NO. ARB/08/15)

DECISION ON THE CLAIMANTS' REQUEST FOR PROVISIONAL MEASURES

Members of the Tribunal
Judge Gilbert Guillaume, *President*
Professor Georges Abi-Saab, *Arbitrator*
Mr. Robert B. von Mehren, *Arbitrator*

Secretary of the Tribunal
Ms. Katia Yannaca-Small

On behalf of the Claimants

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CEMEX Caracas II Investments B.V.
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Date : March 3, 2010

I. Procedural Background

1. On 16 October 2008, Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V., companies incorporated in the Netherlands, filed with the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") a Request for Arbitration against the Bolivarian Republic of Venezuela. On 30 October 2008, the Centre registered the Request.

2. Claimants are represented in this proceeding by the law firm of Skadden, Arps, Slate, Meagher & Flom LLP in New York, New York. Since 29 January 2009 Respondent is represented in this proceeding by the law firm of Curtis, Mallet-Prevost, Colt & Mosle LLP in New York, New York and Mexico City.

3. No agreement having been reached between the parties on the method of constituting the Tribunal, and more than sixty days having elapsed since the registration of the Request for Arbitration, by letter of 31 December 2008 Claimants invoked Article 37(2)(b) of the ICSID Convention.

4. By the same letter Claimants reiterated their appointment, as arbitrator, of Mr. Robert B. von Mehren, a U.S. national, whose appointment had initially been included in the Request for Arbitration.

5. By letter of 20 February 2009 Respondent appointed Professor Georges Abi-Saab, a national of Egypt.

6. The Tribunal not having been constituted within 90 days since the registration of the Request for Arbitration, by letter of 21 May 2009, Claimants requested the appointment of the third, presiding, arbitrator by the Chairman of the ICSID Administrative Council, as provided for in Article 38 of the ICSID Convention and Rule 4 of the ICSID Arbitration Rules.

7. On 19 June 2009, the Chairman of the ICSID Administrative Council appointed Judge Gilbert Guillaume, a national of France, as the President of the Tribunal.

8. All of the arbitrators having accepted their appointments, the Tribunal was constituted on 6 July 2009.

9. On 20 July 2009, having consulted with the parties and the Centre, the Tribunal fixed the first session to be held on 16 November 2009, at the Paris offices of the World Bank. On the same day, the parties were invited to confer and advise the Tribunal, by no later than 16 October 2009, of any points of the session's provisional Agenda on which they are able to reach agreement. The parties were also invited to notify the Tribunal of any other items that they would like to see included in the Agenda.

10. On 1 September 2009, Claimants filed a request for provisional measures. After an exchange of communications between the parties, the Tribunal, by letter of 30 September 2009, from the Centre, informed the parties that their respective positions on the request for provisional measures would be heard during the first session. On 26 October 2009, Respondent filed a reply to the Claimants' request for provisional measures.

11. On 26 October 2009, Respondent proposed the disqualification of Mr. von Mehren. On 2 November 2009, Claimants filed observations to the Respondent's proposed for disqualification.

12. On 6 November 2009, President Guillaume and Professor Abi-Saab, acting under Article 58 of the ICSID Convention, dismissed the proposal for the disqualification of Mr. von Mehren made by the Respondent.

13. On 16 November 2009, the Tribunal held a first session and a hearing on provisional measures at the World Bank's Offices in Paris.

14. On 22 December 2009, Claimants sent to the Tribunal a communication in relation to their request for provisional measures. On 5 January 2010, Respondent filed observations to that letter. On 15 January 2010, Claimants sent to the Tribunal another letter.

II. Parties' Positions

A. Claimants' Request for Provisional Measures

15. In their request for provisional measures dated 1 September 2009, the Claimants, CEMEX Caracas I and CEMEX Caracas II, first state that they are both incorporated in the Netherlands, which at all relevant times has been a Contracting State to the ICSID Convention and a party to the Agreement on the Encouragement and Reciprocal Protection of Investments between the Netherlands and Venezuela signed on 22 October 1991 (the "BIT"). They add that CEMEX Caracas I, owns 100% of CEMEX Caracas II, which, in turn, indirectly holds 75.7% of shares in CEMEX Venezuela through its wholly owned subsidiary Vencement Investments ("Vencement") a Cayman Island company."[1]

16. Claimants submit that they have been deprived of their rights of ownership over CEMEX Venezuela, Venezuela's largest and premier cement company. They contend that this expropriation occurred between May and August 2008 in breach of the BIT, as well as of customary international law. In their request for arbitration dated 16 October 2008, Claimants accordingly ask for a declaration noting those breaches and an order that "Respondent restore to Claimants their shares in, and complete and exclusive control of, CEMEX Venezuela." In the alternative, they request "an order that Respondent pay Claimants full compensation with respect to Respondent's breaches of the Treaty and international law . . . ."[2]

17. In their Request for Provisional Measures, Claimants then submit that between 2004 and 2008 CEMEX Venezuela owned and used three cement-carriers registered in Venezuela, the *Corregidora*, the *Marianela* and the *Edalán.* On 29 April 2008, "CEMEX Venezuela executed an Irrevocable Trust Administration Agreement by which it conveyed title to the Vessels to Banco Interacciones S.A., a Mexican financial institution."[3] Under the trust instrument, Sunbulk Shipping, N.V. ("Sunbulk") "would immediately assume all of the Vessels' operational costs with an option to formally obtain legal title to the Vessels."[4]On 9 August 2008, Sunbulk exercised its option to purchase such title. It "paid Vencement

[1]Request for Provisional Measures § 6.
[2]Request for Arbitration § 118.
[3]Request for Provisional Measures §17.
[4]*Ibidem* § 17.

US$49,974,012 and Vencement, in turn, cancelled a debt in the same amount which CEMEX Venezuela owed Vencement. On August 26, 2008, Sunbulk obtained provisional registration of the Vessels in Panama subject to the cancellation of the Venezuelan flags."[5]

18. In the meantime, CEMEX Caracas's investment in CEMEX Venezuela had been expropriated. Thereafter, the Attorney-General of Venezuela, on 12 September 2008, "demanded from the Venezuelan Maritime Court of First Instance in Caracas . . . a preventive embargo on the Vessels and a prohibition on alienation and encumbrance in favor of Venezuela."[6] On 15 September 2008, the Caracas Court granted the Attorney-General's request for *ex parte* relief, imposing such measures. However, it required that Venezuela files a formal claim to perfect its ownership claims over the Vessels within ten days, failing which the preventive embargo and the prohibition on alienation and encumbrance would be suspended. According to Claimants, this was only done on 16 March 2009, without this new claim being further prosecuted.

19. On 20 March 2009, Venezuela petitioned the Panamanian Supreme Court to enforce the "Caracas Court's order and/or issue its own order arresting the Vessels in favour of Venezuela."[7] One day later, on 21 March, Venezuela petitioned the First Maritime Court of Panama to issue an order of seizure over the vessels and a prohibition of alienation and encumbrance in favour of Venezuela. On 24 March 2009, that Court issued such a prohibition and deferred to the Supreme Court the question whether an order of seizure was warranted. On 4 June 2009, the Supreme Court ordered the Panamanian Maritime Court to seize the vessels pending its decision on Venezuela's petition. As a consequence, the "*Edalan*" was arrested in the Panamanian port of *Crístobal en Colón*. It was only released in June 2009, upon posting of a bond by Sunbulk.

20. After having thus summarized the facts, Claimants submit that "Venezuela should be enjoined from further action that will increase the Claimants' damages and thus aggravate this dispute."[8]

21. They contend that "the Tribunal Has Wide Power to Order Provisional measures at Any Stage, Including Prior to a Ruling on Jurisdiction."[9] They add that "the Tribunal's Powers Include the Power to Restrain Any Acts by Venezuela that Might Aggravate this Dispute or Make it Less Capable of Solution."[10]

22. Claimants further submit that provisional relief is warranted in the instant case. According to them, the Tribunal possesses *prima facie* jurisdiction over the dispute. Moreover, Venezuela's efforts to seize the Vessels, unless enjoined, will severely aggravate the dispute and increase the Claimants' damages. More precisely, Claimants contend that "The windfall CEMEX Venezuela seeks by the return of the Vessels would . . . increase the Claimants' right to demand compensation in these proceedings by the full amount of the debt

[5] *Ibidem* § 19.
[6] *Ibidem* § 21.
[7] *Ibidem* § 29.
[8] *Ibidem* page 13.
[9] *Ibidem* page 13.
[10] *Ibidem* page 14.

that Vencement cancelled in its books when the Vessels were transferred to the benefit of CEMEX Venezuela."[11]

23. For those reasons, Claimants request from the Tribunal:

> "(i) An order requiring Venezuela to immediately cease any further efforts to seize the former assets of CEMEX Venezuela, including the Vessels;"
>
> "(ii) An order that Venezuela cease any litigation, whether in Panama, Venezuela, or elsewhere, having as its object the seizure of the Vessels or any money equivalent thereof, including but not limited to:
>
> (1) the proceedings before the Caracas Court;
> (2) the proceedings before the Panama Supreme Court; and
> (3) and the proceedings before the Panama Maritime Court;
>
> "(iii) An order that Venezuela cease all efforts to enlist the assistance of other governments in seizing the Vessels or any bond or security thereof; and
> (iv)An order enjoining Venezuela from taking any action further prejudicing, aggravating the dispute before this Tribunal, or rendering this dispute more difficult of solution."[12]

B. Respondent's Memorial in Opposition to the Claimants' Request

24. In its memorial dated 26 October 2009, Respondent opposes Claimants' request for provisional measures. It first provides the Tribunal with a brief history of relevant facts intended to complete the Claimants' statements with respect to the CEMEX ownership of CEMEX Venezuela ("CemVen"), the purported sale of the Vessels, CEMEX's purchase of CemVen's foreign subsidiaries, the Nationalization Law, continued negotiations between CEMEX and Venezuela, how CEMEX attempted to cancel the Venezuelan flags and provisionally reflagged the vessels in Panama, as well as CemVen and Venezuela's actions in Panama.

25. Respondent adds in particular that "according to Claimants, Sunbulk mortgaged the Vessels in favour of Vencement on December 16, 2008."[13] It adds that "on September 9,

[11] *Ibidem* § 45.
[12] *Ibidem* § 50.
[13] Venezuela's Memorial of 26 October 2009, § 44.

2009, Vencement filed a complaint in the Second Maritime Tribunal of Panama for execution on the naval mortgage over the Vessels for a purported debt of US $ 38,364,398.[14]

26. Respondent submits that under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, provisional measures "must be based upon circumstances of necessity and urgency to avoid an irreparable harm."[15] They "must relate to the preservation of the requesting party's rights and to the subject matter of the case before the tribunal . . . ."[16] According to the Respondent, Claimants "largely ignore these legal criteria and rely solely on the general principle of non-aggravation as the justification for its requested measures. At the same time, they admit that the only harm to Claimants (as opposed to Sunbulk) is purely financial in nature."[17] Moreover "the principle of non-aggravation" . . . does not supplant the requirements of necessity, urgency and irreparable or non-compensable harm."[18]

27. The Respondent stresses that "provisional measures may only be granted to preserve the rights of a party."[19] It adds that "the rights for which Claimants seek protection here are, first and foremost, the supposed ownership rights to the Vessels held by Sunbulk, a CEMEX subsidiary which is not party to this proceeding."[20] According to the Respondent, Claimants attempt to remedy this gap "by converting Sunbulk's loss of the Vessels – if the Republic's legal efforts are successful – into an indirect "increase in damages" that will be suffered by Claimants if Vencement "likely" returns the purchase price of US $ 49,974,012 to Sunbulk and is left with, "at most", a reinstated debt from CemVen that will be left unpaid."[21] Respondent points out that the request for arbitration makes no mention of the dispute between Venezuela over the ownership of the vessels, and, accordingly, the Tribunal lacks jurisdiction over Sunbulk and the Vessels. "[T]he 'right' that the Claimants seek to protect . . . is entirely collateral to the dispute . . . and cannot provide the basis for the grant of provisional measures."[22]

28. Moreover, Respondent submits that Claimants have failed to meet their burden of showing that the inter-company transactions occurred as they allege, in particular with respect to the alleged loan of Vencement to Sunbulk. Even assuming the existence of such a loan, "there is no reason to believe that Vencement would have any difficulty in obtaining repayment of the loan from Sunbulk if Vencement's lien were to be set aside."[23] The alleged harm to Claimants either does not exist or is hypothetical and speculative.[24]

29. Finally, according to the Respondent, the alleged harm to Claimants is purely financial and can be compensated by monetary damages.

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[14] *Ibidem* § 56.
[15] *Ibidem* § 58.
[16] *Ibidem* § 59.
[17] *Ibidem* § 61.
[18] *Ibidem* § 62.
[19] *Ibidem* § 68.
[20] *Ibidem* § 71.
[21] *Ibidem* § 72.
[22] *Ibidem* §§ 72–73.
[23] *Ibidem* § 80.
[24] *Ibidem* § 81.

30. For those reasons, "(i) Claimants' request for provisional measures should be denied and (ii) Respondent should be awarded the costs of and associated with its opposition thereto, including its legal and administrative fees and expenses and the fees and expenses of the Tribunal."[25]

C. Hearing and Post-Hearing Correspondence

31. At the hearing of 16 November 2009, the Claimants present a chronology of events. They recall that "Venezuela intends to challenge the Centre's overall jurisdiction over this dispute,"[26] but stress that this could not strip the Tribunal of its power to grant provisional measures. They contend that those measures would cause no prejudice to Venezuela. They submit that the "multiple harms threatened here are distinct, severe, and indeed irreparable, and will make this dispute much more difficult of solution."[27] They contest the submission of Venezuela according to which there is an absolute bar to provisional relief whenever the threatened harm can be quantified in monetary terms. They note that this may be the case in the Anglo-Saxon system, but they contend that this is not so in international law under the jurisprudence of the International Court of Justice, the Iran-United States Claims Tribunal and ICSID arbitral tribunals. They add that the requested relief does not prejudice the substance of the dispute.

32. At the hearing, Respondent stresses that the nationalizations were decided by Venezuela in the exercise of its sovereignty in order to defend its vital national interests and that private corporations had the possibility of challenging the measures taken in Venezuelan Courts. It adds that minority shareholders of CEMEX Venezuela challenged the trust agreement in those Courts. Respondent confirms that it does not challenge *prima facie* jurisdiction of the Tribunal. It reiterates and develops the arguments already presented in writing in opposition to the request for provisional measures. It stresses in particular that provisional measures cannot be ordered to preserve the rights of a third party not encompassed within the scope of the request for arbitration. Respondent analysed in more detail ICSID's jurisprudence relating to urgency and necessity, especially in case of irreparable damage.

33. In their *post-hearing* letter of 22 December 2009, Claimants drew the Tribunal's attention to a decision rendered on 30 November 2009 by the Venezuelan Second

[25] *Ibidem* § 86.
[26] Transcript p.96.
[27] Transcript p.103.

Administrative Court. They submit that this decision "dispels any doubt that Respondent is severely aggravating the dispute before this Tribunal by using once again national courts, including its own courts, to adjudicate not only the seizure of the Vessels but also the overall legality of the seizure of Cemex Venezuela," contrary to Article 26 of the ICSID Convention. They request that the Tribunal include these proceedings in the National Courts proceedings to be enjoined by their application.

34. In its letter of 5 January 2010, Respondent contends that the decision of 30 November 2009 did not comment on the question of the Vessels' ownership. It submits that, even if that decision "were to adjudicate the ownership of the Vessels (which [it] does not do), [it] would have no different effect than a decision of the Caracas Maritime Court as far as the Claimants are concerned." "[R]ecovery of the Vessels by the Republic and CemVen would either be a financial wash as far as Claimants are concerned or readily compensable by money damages." Moreover, it is submitted that the request for provisional measures relating to CemVen's nationalization, based on Article 26 of the ICSID Convention, must be denied, in the absence of any new facts of consequence and of any "effort to set forth . . . the legal standards applicable under" that Article.

35. In their letter of 15 January 2010, Claimants bring to the attention of the Tribunal recent developments of the proceedings in the Panamanian Courts.

III. The Tribunal's Decision

36. The present case was brought under the ICSID Convention and the Agreement on the Encouragement and Reciprocal Protection of Investments between the Netherlands and Venezuela signed on 22 October 1991 and entered into force on 1 November 1993. The Parties have not questioned the Tribunal's authority to recommend provisional measures even though its jurisdiction is being challenged. The Tribunal will therefore decide upon the request for provisional measures without dealing at this stage with the objection to jurisdiction of the Respondent.

A- Article 47 of the ICSID Convention and Applicable Law

37. The authority of the Tribunal to recommend provisional measures is governed by Article 47 of the ICSID Convention, which provides:

Article 47

> Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

38. This provision has been elaborated on in Arbitration Rule 39:

Rule 39
Provisional Measures

> (1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to the preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
>
> (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
>
> (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.
>
> (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendation, after giving each party an opportunity of presenting its observations.
>
> (5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.
>
> (6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.

39. As recalled by the ICSID Arbitral Tribunal in *Pey Casado v. Chile*, Article 47 of the Convention "is not an innovation in the history of international jurisdiction; it is directly inspired by Article 41 of the Statute of the International Court of Justice, hence the particular importance that can be accorded to the judgments given in the past by that Court"[28] in that matter.

[28] *Víctor Pey Casado and President Allende Foundation v. Republic of Chil*e (ICSID Case No. ARB/98/2), Decision on Provisional Measures of 25 September 2001, § 2. *See also* Christoph H. Schreuer, The ICSID Convention: A Commentary (2nd ed. 2009), p. 759.

40. In a number of cases, the International Court of Justice decided that its power "to indicate provisional measures under Article 41 of the Statute has as its object to preserve the respective rights of each party to the proceedings "pending the final decision," providing that such measures are justified to prevent irreparable prejudice to the rights which are the subject of the dispute." Thus, that power "can be exercised only if there is an urgent necessity to prevent irreparable prejudice to such rights, before the Court has given its final decision."[29]

41. ICSID Tribunals have taken the same approach in the interpretation and application of Article 47 of the ICSID Convention. In a number of cases, they stated that "provisional measures are extraordinary measures which should not be recommended lightly."[30] They unanimously judged that those measures could only be granted to protect the rights of either party in case of urgency and necessity.[31]

42. The requirement of necessity implies an assessment of the risk of damage which provisional measures are intended to avert. In the present case, the parties diverge on the kind of risk justifying such measures.

43. As recalled above, irreparable prejudice is always required by the International Court of Justice for provisional measures (see §40 above).

44. Traditionally, ICSID Arbitral Tribunals also base their decision on the criteria of irreparable harm or damage. As noted by Professor Schreuer, "ICSID Arbitration Practice shows that Tribunals will only grant provisional measures if they are found to be necessary, urgent and required in order to avoid irreparable harm."[32] Thus, in *Plama v. Bulgaria*, the

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[29] *Pulp Mills on the River Uruguay* (Argentine v. Uruguay), Order of 23 January 2007, ICJ Reports 2007, p. 11, §§ 31–32. *See also Passage through the Great Belt* (Finland v. Denmark), Order of 29 July 1991, ICJ Reports 1991 p. 17, §23; *Certain Criminal Proceedings in France* (Republic of the Congo v. France), Order of 17 June 2003, ICJ Reports 2003 p. 107, §22.

[30] *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Order of 28 October 1999; *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Order of 6 September 2005, §38; *Phoenix Action Ltd v. Czech Republic* (ICSID Case No. ARB/06/5), Order of 6 April 2007 §33; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Order of 17 August 2007; *See also Sergei Paushok v. Mongolia*, 2 September 2008, § 39 for a case of arbitration under the UNCITRAL Rules.

[31] Among the decisions already quoted in the preceeding paragraph, *see Plama v. Bulgaria,* §39; *Phoenix v. Czech Republic*, §33; *Occidental Petroleum v. Ecuador*, § 59. *See also Burlington Resources Inc. and others v. Republic of Ecuador and Petroecuador* (ICSID Case No. ARB/08/5), Order of 29 June 2009, §51; *City Oriente Limited v. Republic of Ecuador and Petroecuador* (ICSID Case No. ARB/06/21), §54; *Perenco Ecuador Limited v. Ecuador and Petroecuador* (ICSID Case No. ARB/08/6), Order of 8 May 2009, §43.

[32] Schreuer, The ICSID Convention: A Commentary (2nd ed. 2009), p.776.

Tribunal stated that provisional measures must be necessary to "avoid the occurence of irreparable harm or damage."[33] In *Phoenix v. Czech Republic*, the Tribunal referred to "the action of a party capable of causing or of threatening to cause irreparable prejudice to the rights involved."[34] In *Occidental v. Ecuador*, the Tribunal decided that "the circumstances under which provisional measures are required under Article 47 of the ICSID Convention are those in which the measures are necessary to preserve a party's right and when the need is urgent in order to avoid irreparable harm."[35]

45. Recently, however, two ICSID Tribunals made use of different formulas. In the *Burlington v. Ecuador* case, the Tribunal found appropriate "in the circumstances of the case, to adopt the standard of harm not adequately reparable by the award of damages, to use the words of the UNCITRAL Model Law."[36] In the *Perenco v. Ecuador* case, the Tribunal recognized that "many of the authorities express the test in terms of "irreparable loss," but added that article 47 does not lay down such a test and did not retain it.[37]

46. In the opinion of this Tribunal, the standards retained in those two last cases do not differ in substance from the standard of "irreparable damage" generally used.

47. In this respect, the Tribunal first observes that the International Court of Justice often granted provisional measures to avoid irreparable harm, although damages could be awarded in order to compensate the alleged prejudice.[38] This has been done in particular when the health or life of people and sometimes their properties were in jeopardy. Thus, in the *Nuclear Tests* cases opposing Australia and New Zealand to France, it was contended that the population of the Claimant States would suffer from the radioactive fall out of the French atmospheric tests. The Court considered that, if established, the effects of the tests could not be reversed by any monetary compensation and ordered provisional measures.[39] Similarly, in the case of the *United States Diplomatic and Consular Staff in Teheran*, the Court stated that "continuation of the situation the subject of the present request exposes the human beings concerned to privation, hardship, anguish and even danger to life and health and thus a serious

[33] *Plama v. Bulgaria*, §38.
[34] *Phoenix v. Czech Republic*, §33.
[35] *Occidental Petroleum v. Ecuador*, §59.
[36] *Burlington v. Ecuado*r, §82.
[37] *Perenco v. Ecuador and Petroecuador*, § 43.
[38] The Permanent Court of International Justice adopted the same approach in the *Sino-Belgian Treaty* case, Order of 8 January 1927 (PCIJ, Reports, series A, n° 8).
[39] *Nuclear Tests (Australia v. France)*, Order of 22 June 1973, ICJ Reports 1973 p. 105, §30.

possibility of irreparable harm."[40] Provisional measures were indicated on that ground. For comparable reasons, provisional measures were granted in cases of armed conflicts creating risks of irreparable prejudice to persons or properties,[41] as well as in cases of imminent execution of individuals condemned to death.[42]

48. By contrast, in the *Aegean Sea* case, the Court considered that the breach by Turkey of the alleged rights of Greece through seismic exploration of the disputed continental shelf was "capable of reparation by appropriate means." For that reason, the Court dismissed the Greek request for provisional measures.[43]

49. Thus the International Court of Justice, when applying the test of "irreparable prejudice," makes in fact a distinction between:

> (a) Actions which should be restrained, because their effects, though capable of financial compensation, are such that compensation cannot fully remedy the damage suffered;
>
> (b) and actions which may well prove to have infringed a right and caused harm, but in respect to which it will be sufficient to award damages, without taking provisional measures.

50. The same distinction can be drawn from an analysis of ICSID case law, both in cases where tribunals used the criteria of irreparable damage and in cases where they had recourse to other criteria.

51. Looking into the first category of cases, the Tribunal notes that in *Occidental*, Claimants were asserting that they had a right to be restored in their oil concession and, on that basis, requested provisional measures to protect that right. The Tribunal decided that Claimants had not establish "a strongly arguable case that there exists" such a right and

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[40]United States Diplomatic and Consular Staff in Teheran, Order of 15 December 1979, ICJ Reports 1979, p. 20, §42.
[41]*Frontier dispute (Burkina-Faso v. Republic of Mali)*, Order of 10 January 1986, ICJ Reports 1986, p.10 §21; Application of the convention on the Prevention and Punishment of the Crime of Genocide, Order of 8 April 1993, ICJ Reports 1993, p.22 §45; *Land and Maritime Boundary (Cameroon v. Nigeria)*, Order of 15 March 1996, ICJ Reports 1996, p. 22, §38.
[42]*La Grand (Germany v. United States ofAmerica)*, Order of 3 March 1999, ICJ Reports 1999, p.15, §24; *Avena and others (Mexico v. United States of America)*, Order of 5 February 2003, ICJ Reports 2003, p.91, §55.
[43]*Aegean Sea Continental Shelf* (Greece v. Turkey), Order of 11 September 1976, ICJ Reports p. 11, §33.

dismissed the corresponding request for provisional measures on that ground. It added that any prejudice suffered as a result of the termination of the contract, "if subsequently found illegal by the tribunal, can be readily compensated by a monetary award." On that distinct ground, it also dismissed the requested measures.[44]

52. In *Plama v. Bulgaria*, the decision observes that "[w]hat Claimant is seeking in this arbitration are monetary damages for breaches of Respondent's obligations under the Energy Charter Treaty. Whatever the outcome of the . . . . proceedings . . . in Bulgaria is, Claimant's right to pursue its claims for damages in the arbitration and the Arbitral Tribunal's ability to decide these claims will not be affected. The Tribunal accepts Respondent's argument 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."[45]

53. In *Burlington v. Ecuador*, the Tribunal stressed that "[u]nlike Occidental, this case is not one of only 'more damages' . . . . The risk here is the destruction of an ongoing investment and its revenue-producing potential which benefits both the investor and the State."[46] As a consequence, the Tribunal ordered the establishment of an escrow account, where the funds which were the subject of the dispute could be held, pending the final award.

54. In *Perenco v. Ecuador*, the Tribunal recognized that provisional measures "will not be necessary when a party can be adequately compensated by an award of damages if it successfully vindicates its rights when the case is finally decided." But it apprehended that the Claimant would suffer "extensive seizure of its oil production or other assets," and that its "business would be crippled, if not destroyed."[47] It therefore established an escrow account for the same purpose as in Burlington.

55. Thus, ICSID Tribunals, when considering government actions which may well prove to have infringed a right and caused harm, make a distinction between:

> (a) situations where the alleged prejudice can be readily compensated by awarding damages;

[44] *Occidental Petroleum v. Ecuador* §§ 86, 92.
[45] *Plama v. Bulgaria*, § 46.
[46] *Burlington v. Ecuador*, § 83.
[47] *Perenco v. Ecuador*, §§ 43, 53, 60.

(b) and those where there is a serious risk of destruction of a going concern that constitutes the investment.

In the first category of cases, provisional measures were denied because of the absence of an "irreparable harm." In the second category of cases they were granted, the tribunals using other standards -- although they could have based their decision on the fact that, the destruction of the ongoing concern that constituted the investment, would have created an "irreparable harm."

56. In the light of the preceding analysis, the Tribunal sees no reason not to retain the generally accepted standard of "irreparable harm" as criterion for the "necessity" required by Article 47 of the ICSID Convention. It is on that basis that it will examine the request for provisional measures in the present case.

B- Claimant's Submissions Relating to the Seizure of Vessels and Other Assets of CEMEX Venezuela

57. The Claimants submit that from May to August 2008 they have been deprived by the Respondent of their rights of ownership over CEMEX Venezuela. They recall that, before that expropriation, CEMEX Venezuela had in April 2008 sold three cement carriers it previously owned and that those carriers are presently the property of Sunbulk, a Mexican company, which registered them in Panama. They add that the Respondent has brought actions both in Panamanian and Venezuelan Courts to obtain the seizure of those vessels. They contend that, "if Venezuela succeeds in its *ex post facto* efforts to unwind the transfer of the Vessels to Sunbulk and return title to CEMEX Venezuela, then all consideration previously furnished by Sunbulk for the Vessels will obviously need to be refunded which will leave the loss of these Vessels to be borne by Vencement and, therefore, by Cemex Caracas, Vencement's direct shareholder";[48] "this will burden Claimants with an additional loss of almost $50 millions beyond what is currently being claimed in the arbitration."[49] On those grounds, the Claimants request that the Tribunal issue orders requiring Venezuela, *inter alia,* to cease any further efforts to seize the vessels or any other former assets of CEMEX Venezuela, in particular through litigation in Panama, Venezuela or elsewhere (for more details see §§ 15–23, above).

(a) Seizure of Vessels and Irreparable Harm

[48]Request for Provisional Measures §45.
[49]Letter of 10 September 2009 forwarding the request for provisional measures.

58. The Tribunal observes that this request for provisional measures is based on the fact that Venezuela's efforts to seize the Vessels or other former assets will, if they succeed, "increase the Claimants' damages"[50] to be awarded by the Tribunal. According to the Claimants themselves, the only consequence for them of those seizures would be a financial loss. Such a loss could be readily compensated by a damages award. Thus, the alleged harm is not "irreparable" and there is neither necessity, nor urgency to grant the requested provisional measures.

(b) Seizure of Vessels and Aggravation of the Dispute

59. The Claimants, however, request the same measures on another ground. They submit that Venezuela's action "that increases damages by an eight-figure sum is conduct that aggravates the dispute."[51] They add that the dispute is also being aggravated by actions brought by Venezuela in its own Administrative Courts, in order to "adjudicate the legality of the Respondent's efforts to seize . . . the Vessels . . . ."[52] The Claimants conclude that those facts warrant the issuance of provisional measures to avoid the seizure of the vessels and of other assets.

60. The International Court of Justice and ICSID Tribunals have on several occasions issued provisional measures directing the parties not to take any actions which could aggravate or extend the dispute or render more difficult their settlement.[53]

61. However, the measures requested by the Claimants to avoid the seizure of the Vessels or of other former assets of CEMEX Venezuela do not meet the requirements of urgency and necessity of Article 47 of the ICSID Convention. They could not be granted for these reasons (see paragraph 57 above). The so-called principle of non-aggravation cannot supplant the requirements of Article 47. The measures relating to the Vessels cannot be granted on the basis of the principle of non-aggravation alone.

C- Other Claimants' Submissions

(a) Aggravation of the Dispute in General

[50]Request for Provisional Measures p.18.
[51]Request for Provisional Measures §47.
[52]Letter of 22 December 2009, p.1.
[53]For the International Court of Justice, see the long list provided in *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Order of 23 January 2007, ICJ Reports, 2007, p. 16, §49. For ICSID Tribunals, see the case law listed in *Burlington,* §§ 63–64; *see also Perenco* §§ 55–57.

62. In their request for provisional measures, the Claimants also ask the Tribunal, in more general terms, to enjoin Venezuela from taking any action further prejudicing, aggravating the dispute before this Tribunal, or rendering this dispute more difficult of solution.

63. This request raises the question whether, under Article 47 of the ICSID Convention, a tribunal has an independent power to recommend provisional measures relating to a dispute. In other words, when, in the opinion of a Tribunal, there is no urgency or necessity to adopt provisional measures directed at the preservation of the rights of the parties, is it still possible for it to recommend other provisional measures in order to avoid the aggravation or extension of the dispute?

64. This question has recently been examined by the International Court of Justice in the *Pulp Mills* case. The Court recalled that it "has on several occasions issued provisional measures directing the parties not to take any actions which could aggravate or extend the dispute or render more difficult its settlement." It also observed that "in those cases, provisional measures other than measures directing the parties not to take actions to aggravate or extend the dispute or to render more difficult its settlement were also indicated." Then the Court noted that: "it has not found that at present there is an imminent risk of irreparable prejudice to the rights of Uruguay in dispute." In the absence of provisional measures indicated on that basis, the Court decided it had no power to indicate provisional measures relating to the "aggravation or extension of the dispute."[54]

65. This Tribunal sees no reason to take a different position. It recalls that Article 47 of the ICSID Convention does give ICSID Arbitral Tribunals power to recommend measures directed at the preservation of the rights of the parties. In exercising this power, ICSID Tribunals may recommend measures in order to avoid the aggravation or extension of the dispute. But those "non-aggravation" measures are ancillary measures which cannot be recommended in the absence of measures of a purely protective or preservative kind.

66. For these reasons, the Tribunal concludes that it must dismiss the request of the Claimants relating, in very general terms and without any further specification, to the "non-aggravation" of the dispute.

(b) Article 26 of the ICSID Convention

[54] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Order of 23 January 2007, ICJ Reports p. 16, § 49.

67. Finally, in a letter sent on 22 December 2009, after the hearing, the Claimants drew the attention of the Tribunal to a decision issued by a Venezuelan Administrative Court on 30 November 2009 on the request of the Attorney General of Venezuela. They contend that those administrative proceedings are an obvious attempt "to adjudicate not only the seizure of the Vessels[55] but also the overall legality of the seizure of Cemex Venezuela," "an issue expressly reserved to this Tribunal by Article 26" of the ICSID Convention.[56] For that reason they "request that the 'administrative' proceedings be included in the national courts proceedings sought to be enjoined by" [their] application."[57]

68. Article 26 of the ICSID Convention provides that "[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy."

69. The exclusive jurisdiction of ICSID Arbitral Tribunals under Article 26 is certainly susceptible of protection by way of provisional measures[58]. However, it remains to be seen whether Claimants establish that the continuation of the proceedings in the Venezuelan Administrative Court meets the requirements necessary for recommending such measures.

70. In this respect, the Tribunal notes that the Claimants are only stating very briefly in their letter of 22 December 2009 that this is so, without developing in any way their argument through an analysis of the relevant facts and of the applicable international and Venezuelan Law. Hence, for the purpose of the present review, the Tribunal cannot but hold that the Claimants have not establish a *prima facie* case of breach of Article 26 of the ICSID Convention justifying provisional measures.

71. The Tribunal adds that, in any event, the decisions which may be taken by the Venezuelan Administrative Courts, as well as by any other domestic Court, can neither bind this Tribunal, nor prevail over the decision which it may take if it finds that it has jurisdiction over the matter.

72. Lastly, the Tribunal makes no order here regarding the costs of and arising from the Claimants' request for provisional measures.

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[55]Question dealt with in paragraphs 59–61 above.
[56]Claimants' Letter of 22 December 2009, pp. 1- 4.
[57]*Ibidem*, p. 5.
[58]*Mine v. Guinea,* 6 January 1998, 4 ICSID Reports 77; *CSOB v. Slovakia*, Procedural Order no 4 of 11 January 1999 quoted in the Decision on Jurisdiction of 24 May 1999; Procedural Order no 5, 1st March 2000, *Burlington v, Ecuador* § 57.

73. For those reasons:

(a) The Claimants' request for provisional measures is rejected.

(b) The decision on the costs of the procedure relating to the request for provisional measures is reserved to a later stage of this arbitration.

[signature]

Professor Georges Abi-Saab

[signature]

Mr. Robert B. von Mehren

[signature]

Judge Gilbert Guillaume

President