

IN THE MATTER OF AN ARBITRATION PURSUANT TO
THE UNCITRAL ARBITRATION RULES OF 1976

- between -

IGOR BOYKO

Claimant

- and -

UKRAINE

Respondent

PROCEDURAL ORDER NO. 3 ON CLAIMANT'S APPLICATION
FOR EMERGENCY RELIEF

Tribunal

Dr. Gaëtan Verhoosel

Professor Robert G. Volterra

Professor David D. Caron (Presiding Arbitrator)

Administrative Secretary to the Tribunal

Daniel Litwin

The PCA Registry

Claire de Tassigny Schuetze

DECISION ON APPLICATION FOR EMERGENCY RELIEF

1 Introduction

- 1.1 The Claimant in its letter of 2 December 2017 to the Tribunal has applied for emergency relief. The application, among other things, states:

On Friday 1 December 2017, in the late afternoon, Mr Boyko was arrested, taken into custody, driven to an unknown place, severely beaten to the point of being unfit for admission in the pre-trial detention centre, and instead having to be taken to the emergency care unit of Kiev city hospital, where he currently remains, in a weak and worrying state, until doctors are allowed to examine him.

....

However, in view of the extreme severity of events of last night, and the Claimant's great concern for his life and health, the Claimant already now respectfully seeks emergency relief from the Tribunal by way of a temporary order that Ukraine forthwith cause all of the relevant Ukrainian authorities (including the police, prison administration, prosecution office and judiciary) to take immediate measures to protect, and to refrain from taking - or allowing third parties to take -, any measures that could endanger the health, life, physical safety and moral and psychological integrity of the Claimant, including by ensuring that the Claimant:

- a) is not subject to or exposed to any violent or inhumane treatment or to any physical or moral or psychological harassment; and
- b) is given proper access to the required medical care.

In the light of the drastic violations of Mr Boyko's basic rights and the immediate danger to his life and safety, the Claimant respectfully requests that the emergency relief sought be granted immediately on a provisional basis, and thereafter confirmed upon deciding on the Claimant's interim measure application to be filed shortly.

- 1.2 Claimant represents that as soon as possible it will make an application for interim relief.:

Apart from having put the Claimant's life and limb at risk, the criminal investigations recently launched by the Ukrainian State against Mr Boyko risk undermining the very integrity of these arbitration proceedings and the equality of arms between the Parties. The Claimant will therefore file a broader request for urgent interim relief in this regard as soon as possible after this weekend.

2 The Power of the Tribunal to Issue the Relief Requested

- 2.1 This proceeding is governed by the 1976 UNCITRAL Arbitration Rules. Article 26(1) of the UNCITRAL Rules provides that "[a]t 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 [...]."

- 2.2 The Claimant in this instance requests emergency relief pending the Tribunal decision on an application for interim relief. In some legal systems, such relief is described as a request for a temporary restraining order pending a decision on injunctive relief.
- 2.3 Interim measures under Article 26 of the UNCITRAL Rules preserve the rights of the parties in the subject matter of the dispute which includes their rights as to the integrity of the agreed arbitral process. Interim measures preserve such rights pending the conclusion of the underlying proceedings. In rare cases, the urgency of the threat to such rights may outstrip even the speed with which interim measures may be granted. In such instances, the procedural rules or practice of a number of international courts and tribunals adopt the practice of issuing a form of temporary restraining measure.¹ Claimant in their application refer to the practice under the ICSID Rules,² the same may be said for the International Court of Justice.³
- 2.4 Practice under the 1976 UNCITRAL Rules recognizes that temporary restraining measures may be granted pending the resolution of a request for interim measures. Moreover, such practice indicates that temporary restraining measures may be granted pending the receipt of the views of the party against whom the measures are sought. The Tribunal in this regard refers to Interim Award No. 17-430-1 in *Rockwell International Systems v. The Islamic Republic of Iran* (Iran-United States Claims Tribunal, Lagergren, Holtzmann & Kashani, 1 June 1986) at p. 3 where the tribunal states: "the Tribunal finds it appropriate immediately to request [a certain interim measure] until such time that the Tribunal can make a decision on the Claimant's request based on the views of both Parties." The Tribunal further notes that there are indications that the existence of such authority under the UNCITRAL Rules was raised at the time of the drafting of the rules.⁴

3 The Present Application

- 3.1 The present application alleges extrajudicial injury to the Claimant and the apprehension of imminent continued or greater extrajudicial injury. Such injury, if attributable to the actions or omissions of Respondent, threaten Claimant's rights in the integrity of the mutually agreed process for the resolution of the dispute before this Tribunal.
- 3.2 The urgency of this threat justifies the ordering of temporary restraining measures. These measures will be reviewed followed receipt of comments received from Respondent and in the course of considering Claimant's application for interim measures.

¹ Sztucki refers to such a temporary restraining measure as a "provisional measure of the second order." J. Sztucki, *Interim Measures in The Hague Court, An Attempt at Scrutiny* 19 (Springer, 1983).

² Claimant directs the Tribunal's attention to the *City Oriente Ltd. v Ecuador*, Decision on Provisional Measures, 19 November 2007, para. 13; and *Perenco v Ecuador*, Decision on Provisional Measures, 8 May 2009, para. 28.

³ Rule 74(4) of Rules of Court for the International Court of Justice (1978) provides: "Pending the meeting of the Court, the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects."

⁴ See, e.g., Observation of Norway on Preliminary Draft, 8th Sess., U.N. Doc. A/CN.9/97/Add. 3/Annex I.

4 Order of the Tribunal

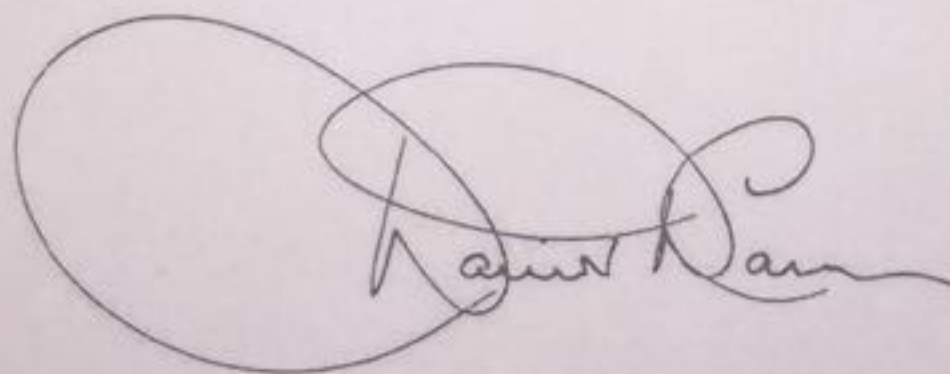
- 4.1 Respondent is invited to submit comments on Claimant's Application for emergency relief no later than noon GMT, Monday, 5 December 2017.
- 4.2 Claimant is ordered to file its application for interim measures no later than noon GMT, Wednesday, 6 December 2017.
- 4.3 As temporary restraining measures authorized under Article 26 of the UNCITRAL Rules, Respondent is ordered to forthwith cause all of the relevant Ukrainian authorities (including the police, prison administration, prosecution office and judiciary) to take immediate measures to protect, and to refrain from taking – or, in accordance with the requirements of the BIT in this case, allowing third parties to take – any measures that could endanger the health, life, physical safety and psychological integrity of the Claimant, including by ensuring that the Claimant:
- a) is not subject to or exposed to any violent or inhumane treatment or to any physical or moral or psychological harassment; and
 - b) is given proper access to the required medical care.

5 Notification

- 5.1 This Procedural Order was delivered to the Parties' counsel on 3 December 2017 by e-mail with a copy to the Permanent Court of Arbitration.

Place of Arbitration: London

3 December 2017

A handwritten signature in black ink, appearing to read "David D. Caron". The signature is written in a cursive style with a large, looping initial "D" on the left side.

David D. Caron
President of the Arbitral Tribunal