United Nations Commission on International Trade Law
Arbitration Rules 1976

Abdallah Andraous
- Claimant -

v

Kingdom of the Netherlands
- Respondent -

Response to Application for Security for Costs

---

22 December 2023

LINDEBORG
COUNSELLORS AT LAW

18 Park Street
London W1K 2HZ
United Kingdom

TABLE OF CONTENTS

1. Claimant writes in response to Respondent's Application for Security for Costs, submitted on 5 December 2023 (the "**Application**"). This Response to the Application comprises this submission plus Claimant's factual exhibits **C-033 to C-035** and Claimant's legal exhibits **CLA-005 to CLA-053**.

2. In its Application, Respondent requests the Tribunal to order the Claimant to:

   (1) "provide, within 15 days from the order, security for any costs award [sic] that may be made in favour of the Netherlands in these proceedings in the form of an irrevocable guarantee from a first-class international bank in the amount of EUR 3,000,000, or in such other form or amount as the Tribunal deems appropriate";

   (2) "provide evidence of solvency within 40 days such that both the Tribunal and the Netherlands are satisfied that [the Claimant] will be able to meet prospective costs order(s) in these proceedings"; and

   (3) "undertake any other measures as the Tribunal deems fit".[1]

3. Respondent's Application fails legally and factually and should be dismissed in its entirety, with costs for this application awarded to Claimant. In the sections that follow, Claimant will demonstrate that Respondent has misstated the legal framework governing security for costs applications (see *infra* section I), failed in satisfying any elements of that governing standard (failing to even address some of them) (see *infra* section II), all of which counsel the Tribunal to deny the Application and award Claimant his costs in opposing it (see *infra* sections III and IV).

I. RESPONDENT MISSTATES THE GOVERNING LEGAL FRAMEWORK

4. Respondent's discussion of the legal standards on security for costs focuses on the wrong – and only a selective handful of – legal sources in an effort to ignore the high standard for such an application established in the commentary and jurisprudence. In this introductory Section, Claimant will endeavour to trace where the Tribunal's ability to order security for costs does, and more importantly does not, exist.

5. **The starting point is the applicable treaty.** While some treaties have express provisions for security for costs applications,[2] the Respondent opted not to include such a provision in this treaty. The Agreement on the Encouragement and Reciprocal Protection of Investments

[1] Application, para. 40.

[2] **Exhibit CLA-005**, Matthew Kronby et al., "Procedural Issues in an Arbitration: Preliminary Considerations" (Global Arbitration Review, 2 March 2022) ("[S]ome bilateral investment treaties and similar agreements have begun to include security for costs provisions […]").

between the Lebanese Republic and the Kingdom of the Netherlands (the "**Lebanon-Netherlands BIT**" or, simply, "**BIT**") *says nothing about the subject of security for costs*.[3]

6. Indeed, the text of this treaty suggests that security for costs is unavailable in cases arising under it. At Article 9(2), Respondent gave its "*unconditional* consent" to arbitrate cases arising under the provisions of that Article. Security for costs, however, is a clear condition on that assent. By definition it is "[a] sum payable by a claimant to a civil action as a *condition* of being permitted to continue with the action."[4] To be more specific, an order of security for costs would constitute a "condition subsequent" or a "resolutive condition" on Respondent's unconditional consent to arbitrate, whose "fulfilment [would] … discontinu[e] – temporarily or permanently – the existence of rights and obligations" under the BIT.[5]

7. It is the Tribunal's duty to interpret the BIT, not to revise it.[6] If it were the intention of the Contracting Parties to the BIT to make access to arbitration contingent upon a guarantee of the payment of an adverse costs award, other than those conditions provided in the UNCITRAL Rules, they would have (or at least should have) said it.

8. This fact is reflected in the caselaw, too. Respondent refers to "[s]everal prior investment tribunals […] conducted under the UNCITRAL Rules [that] have granted security for costs,[7] but *only one of them* contained a similar "*unconditional consent"* to arbitration (which, for that reason, seems to be wrongly granted). In the majority of claims where security for costs was granted, the consent to arbitrate in the underlying treaty was silent on the possibility that a Tribunal could "condition" arbitration on the payment of a fee.

9. **From here, the Tribunal is directed to the applicable rules.** The BIT's dispute settlement provision (Article 9) refers to the UNCITRAL Rules, which has been chosen as the legal framework to resolve this dispute. As Respondent notes,[8] Article 26 of the UNCITRAL Rules

[3] **Exhibit CLA-001**, Agreement on the Encouragement and Reciprocal Protection of Investments between the Lebanese Republic and the Kingdom of the Netherlands (signed on 2 May 2002, entered into force on 1 March 2004).

[4] **Exhibit CLA-006**, "Security for costs", in: Jonathan Law (ed), *A Dictionary of Law* (10th edn, OUP, 2022) 2386, (emphasis added).

[5] **Exhibit CLA-007**, Rutsel Silvestre J. Martha, *The Financial Obligation in International Law* (OUP, 2015) 342.

[6] **Exhibit CLA-008**, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion) [1950] (Second phase) ICJ Rep 221, 229.

[7] Application, para. 7.

[8] Application, para. 7.

provides the Tribunal with the general authority to take interim measures,[9] and expressly refers to security for costs *in the context of interim measures*.[10] But even that provision is silent on the sort of application which Respondent is making here. The only textual allowance in Article 26 is to require the party seeking the interim measures, here the Respondent, to post security *for the protection of the party potentially subject to the requested measures* (here, the Claimant).[11] The UNCITRAL Rules provide no guidance on applications like this, nor does the *lex arbitri* : the Swiss International Arbitration Act[12] allows security to be ordered against the party seeking provisional or conservatory measures – not as a measure in and of itself.[13]

10. To bridge this gap, Respondent improperly interjects the lexicon of interim measures into its application for security for costs. Interim measures exist to preserve or protect vested rights,[14] and such a right *"must exist at the time of the request."*[15] Respondent bases its pending request for security in its supposed "*right of recourse for […] costs in these proceedings*."[16] But at this procedural juncture *there exists no such* "*right*", a truth that is belied by Respondent's own contingent limitation on its self-defined right ("*should a costs*

[9] UNCITRAL Rules, Art. 26 ("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.").

[10] UNCITRAL Rules, Art. 26(2) (stating the following after discussing interim measures: "The arbitral tribunal shall be entitled to require security for the costs *of such measures*.") (emphasis added).

[11] **Exhibit CLA-009**, David D. Caron, Lee M. Caplan & Matti Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (OUP, 2006) 543 ("It is possible that a decision to order interim measures will prove to be wrong […] In that case, *the party subject to interim measures* may have suffered, through no fault of its own, considerable inconvenience in the form of attendant costs. *In order to avoid unjustly inflicting harm on the party subject to interim measures*, the second sentence of Article 26(2) entitles the arbitral tribunal 'to require security for the costs' caused by interim measures.") (emphasis added).

[12] Procedural Order No. 1, para. 16.

[13] **Exhibit CLA-010**, Swiss Federal Act on Private International Law, Art. 183(3) ("The arbitral tribunal or the state court may make the interim or conservatory measures subject to the provision of appropriate security.").

[14] **Exhibit CLA-011**, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (Provisional Measures) [2011] ICJ Rep 6, para. 53; **Exhibit CLA-012**, *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Provisional Measures) [2006] ICJ Rep 113, para. 61; **Exhibit CLA-013**, Christoph H. Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair (eds), *Schreuer's Commentary on the ICSID Convention* (3rd edn, CUP, 2022) 1053-1112.

[15] **Exhibit CLA-014**, *Emilio Agustín Maffezini v. Kingdom of Spain* (Procedural Order No. 2, 28 October 1999) ICSID Case No. ARB/97/7, para. 13 (emphasis added).

[16] Application, para. 35 ("security for costs by means of a bank guarantee is essential to preserving the Netherlands' *right* of recourse for its costs in these proceedings") (emphasis added).

order be granted against [the Claimant]").[17] [redacted] which reflects the default rule under international law.[19] This is, indeed, the course that many investor-state arbitration tribunals have followed.[20] Any derogation from this default rule is exceptional, depending on which party is successful and "taking into account the circumstances of the case."[21] As a result,

> *a right to costs and security for costs […] is inchoate at this [early] stage. The Respondent's Application assumes that the Tribunal would order the Claimant to pay to it the full extent of its costs, an assumption which is currently completely speculative. […] The Application also assumes that there is a right to security for costs, which is a more tenuous argument and appears to the Tribunal to constitute more of an interest than a right. But even if there is a right to security, as assumed above, the extent of security needed is not clear at this stage.*[22]

11. <u>This Application, then, rests solely in the authority granted by arbitral jurisprudence</u>. To this end, the best Respondent can muster is the fact that "[s]everal prior investment

[17] Application, para. 35.

[18] [redacted]

[19] **Exhibit CLA-015**, *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal (Advisory Opinion)* [1973] ICJ Rep 166, para. 98; cited with approval in **Exhibit CLA-016**, *Request for Interpretation of the Judgment of 11 June 1998 in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* (Preliminary Objections) (Judgment) [1999] ICJ Rep 31, para. 18. See also **Exhibit CLA-017**, *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University)* (Judgment) [1933] PCIJ Series A/B No. 61, 248, 249; **Exhibit CLA-018**, *Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo)* (Compensation) [2012] ICJ Rep 324, paras. 60-61; **Exhibit CLA-019**, *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* (Judgment) [2015] ICJ Rep 665, paras. 144, 229.

[20] **Exhibit CLA-020**, *EDF (Services) Limited v. Romania* (Award, 8 October 2009) ICSID Case No. ARB/05/13, para. 322 ("the traditional position in investment arbitration, in contrast to commercial arbitration, has been to follow the public international rule which does not apply the principle that the loser pays the costs of the arbitration and the costs of the prevailing party. Rather, the practice has been to split the costs evenly, whether the claimant or the respondent prevails."). See also **Exhibit CLA-021**, *Noble Ventures v. Romania* (Award, 12 October 2005) ICSID Case No. ARB/01/11, paras. 234-236; **Exhibit CLA-022**, *Bayview Irrigation District et al v. United Mexican States* (Award, 19 June 2007) ICSID Case No. ARB(AF)/05/1, para. 125.

[21] Article 40(1) of the UNCITRAL Rules.

[22] **Exhibit CLA-023**, *Jochem Bernard Buse v. Republic of Panama* (Decision on Respondent's Application for Security for Costs, 5 November 2019) ICSID Case No. ARB/17/12, para. 117. See also **Exhibit CLA-024**, *Burimi SRL v. Albania* (Procedural Order No. 2, 3 May 2012) ICSID Case No. ARB/11/18, paras. 31, 47-49; **Exhibit CLA-025**, *OPC v. Ecuador* (Decision on Provisional Measures, 17 August 2007) ICSID Case No. ARB/06/11, para. 89; **Exhibit CLA-026**, *Robert Azinian, Kenneth Davitian & Ellen Baca v. United Mexican States* (Award, 1 November 1999) ICSID Case No. ARB (AF)/97/2, para. 127.

tribunals – including in arbitrations conducted under the UNCITRAL Rules – have granted security for costs".[23] To be sure, such tribunals have indeed interpreted Article 26 as broad enough to cover, or at least not exclude, interim measures in the form of security for cost applications filed by Respondent States,[24] but the power and proclivity to do so is not as sweeping as Respondent suggests. The few cases cited by Respondent are widely recognised as outliers, both by the Tribunals that issued them,[25] as well as by other tribunals.[26] In the end, the threshold for granting security for costs is substantially higher than the one proffered by Respondent and it has not met that threshold in the present case.

12. The appropriate legal standard for applications like this one is uniform and clear. As articulated in the recent *Tennant Energy v. Canada* case (which was also governed by the UNCITRAL Rules), to succeed on an application for security for costs a respondent bears a

[23] Application, para. 7.

[24] Exhibit CLA-027, *Tennant Energy, LLC v. Canada* (Procedural Order No. 4, 27 February 2020) UNCITRAL, paras. 162, 165-166; Exhibit CLA-028, *Pugachev v. Russia* (Interim Award, 7 July 2017) UNCITRAL, para. 372; Exhibit CLA-023, *Jochem Bernard Buse v. Republic of Panama* (Decision on Respondent's Application for Security for Costs, 5 November 2019) ICSID Case No. ARB/17/12, para. 102.

[25] Exhibit RL-003, *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, para. 53, and Dissenting Opinion of Edward Nottingham; Exhibit RL-002-SPANISH, *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9 (Decision on the Respondent's Request for Provisional Measures), 20 June 2018, para. 251.

[26] See Exhibit CLA-029, *Rawat v. Mauritius* (Order Regarding Requests for Interim Measures, 11 January 2017) PCA Case 2016-20, para. 144; Exhibit CLA-030, *South American Silver Limited v. Bolivia* (Procedural Order No. 10, 11 January 2016) PCA Case No. 2013-15, paras. 45, 59; Exhibit CLA-031, *EuroGas Inc. & Belmont Resources Inc. v. Slovak Republic* (Procedural Order No. 3, 23 June 2015) ICSID Case No. ARB/14/14, paras. 122; Exhibit CLA-032, *Eskosol SpA in liquidazione v. Italian Republic* (Procedural Order No. 3, Decision on Respondent's Request for Provisional Measures, 12 April 2017) ICSID Case No. ARB/15/50, para. 35.

heavy burden.[27] It must show nothing less than *exceptional* circumstances (a burden Respondent acknowledges and adopts[28]) and satisfy all four of the following criteria:[29]

(a) *Prima facie*, there is a reasonable possibility that the respondent would prevail in the case;

(b) The respondent would likely suffer harm not adequately reparable by an award of damages without the order;

(c) The respondent's potential harm without the order substantially outweighs the harm that the claimant would likely incur from the order; and

(d) The condition of urgency is met.[30]

---

[27] Exhibit CLA-027, *Tennant Energy, LLC v. Canada* (Procedural Order No. 4, 27 Feb. 2020) UNCITRAL, para. 178; See also Exhibit CLA-033, *Interocean Oil Development Co. v. Nigeria* (Procedural Order No. 6, 1 February 2017) ICSID Case No. ARB/13/20, para. 32.

[28] Application, paras. 1, 12, 14, 15, 28, 32. See also Exhibit CLA-029, *Rawat v. Mauritius* (Order Regarding Requests for Interim Measures, 11 January 2017) PCA Case 2016-20, para. 44; Exhibit RL-003, *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, paras. 48, 75 and footnote 53; Exhibit CLA-028, *Pugachev v. Russia* (Interim Award, 7 July 2017) UNCITRAL, para. 377; Exhibit RL-002-SPANISH, *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9 (Decision on the Respondent's Request for Provisional Measures), 20 June 2018, paras. 250-251; Exhibit CLA-027, *Tennant Energy, LLC v. Canada* (Procedural Order No. 4, 27 February 2020) UNCITRAL, para. 173; Exhibit CLA-030, *South American Silver Limited v. Bolivia* (Procedural Order No. 10, 11 January 2016) PCA Case No. 2013-15, para. 59; Exhibit CLA-034, *Libananco Holdings Co. Limited v. Turkey* (Decision on Preliminary Issues, 23 June 2008) ICSID Case No. ARB/06/8, para. 57; Exhibit CLA-033, *Interocean Oil Development Co. v. Nigeria* (Procedural Order No. 6, 1 February 2017) ICSID Case No. ARB/13/20, para. 26; Exhibit CLA-031, *EuroGas Inc. & Belmont Resources Inc. v. Slovak Republic* (Procedural Order No. 3, 23 June 2015) ICSID Case No. ARB/14/14, para. 121; Exhibit CLA-023, *Jochem Bernard Buse v. Republic of Panama* (Decision on Respondent's Application for Security for Costs, 5 November 2019) ICSID Case No. ARB/17/12, para. 110; Exhibit CLA-035, *Commerce Group Corp & San Sebastian Gold Mines, Inc v. El Salvador* (Decision on El Salvador's Application for Security for Costs, 20 September 2012) ICSID Case No. ARB/09/17, para. 45; Exhibit CLA-032, *Eskosol SpA in Liquidazione v. Italian Republic* (Procedural Order No 3, Decision on Respondent's Request for Provisional Measures, 12 April 2017) ICSID Case No. ARB/15/50, para. 36.

[29] Exhibit CLA-027, *Tennant Energy, LLC v. Canada* (Procedural Order No. 4, 27 February 2020) UNCITRAL, para. 173.

[30] Exhibit CLA-027, *Tennant Energy, LLC v. Canada* (Procedural Order No. 4, 27 February 2020, UNCITRAL, para. 172. As Art. 26(1) of the UNCITRAL Rules is reminiscent of Art. 47 of the ICSID Convention, in its turn identical to (and based on) the language in Art. 41(1) of the Statute of the International Court of Justice (Exhibit CLA-036, Chittharanjan F. Amerasinghe, *Jurisdiction of Specific International Tribunals* (Martinus Nijhoff Publishers, 2009) 488-490; Exhibit CLA-013, Christoph H Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (eds), *Schreuer's Commentary on the ICSID Convention* (3rd edn, CUP, 2022) 1055, the case law of the International Court of Justice is also relevant here. See Exhibit CLA-037, *Certain Criminal Proceedings in France (Republic of the Congo*

13. Before engaging on these factors two salient points deserve special mention. First, Respondent's argument for exceptional circumstances here are one-dimensional and a product of its own making. It cites Claimant's purported "improper business conduct" (as determined by Respondents own courts), the fact that he faces "large outstanding [...] judgments (again from those same courts) and an "uncertain [...] financial situation" (because of the dispute underlying this case). If this were enough to meet the threshold, all but the largest multinational investor-state claimants who lost an investment at the hands of a respondent State would be forced to pay security for costs at the outset of a case, thereby narrowing access to justice provided by the investor-state regime. This is precisely why the jurisprudence is clear that the simple fact that a claimant may not have the funds to meet an adverse costs order is insufficient, in itself, to justify an order of security for costs.[31] Second, Respondent has not even attempted to satisfy two of the required prongs of the above standard – (1) probability of success and (4) urgency. Its showing on the former is limited to a single conclusory sentence, and the word "urgency" is not muttered even once in its Application. This alone is enough for this Tribunal to hold that the Respondent has failed to carry its burden in justifying exceptional relief. For the sake of completeness, however, Claimant will show that *none* of the elements of the applicable legal test are satisfied.

II. RESPONDENT FAILS ON ALL ELEMENTS OF THE APPLICABLE LEGAL TEST

14. Application of the *Tennant Energy* standard must result in a denial of Respondent's Application. That is because (A) Respondent has not shown a reasonable probability of success; (B) Respondent has not shown that it will be irreparably harmed; (C) justice requires that Respondent's Application be denied; and (D) Respondent has not shown any urgency to the relief that it seeks. In addition, Respondent's Application is a manifestly abusive request (Section III). Claimant addresses each point in turn below.

A. Respondent has not shown a Reasonable Probability that it will Prevail on the Merits

15. Respondent's own legal authority states that, to succeed in justifying relief, it must show that it has a reasonable prospect of success in this arbitration, Respondent would have to show both (i) that it likely will prevail on the merits and quantum; and (ii) that the Tribunal

v. France) (Provisional Measures) [2003] ICJ Rep 102, para. 22; **Exhibit CLA-038**, *Passage through the Great Belt (Finland v. Denmark)* (Provisional Measures) [1991] ICJ Rep 12, para. 23; **Exhibit CLA-012**, *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Provisional Measures) [2006] ICJ Rep 113, para. 62; **Exhibit CLA-039**, Andreas Zimmermann, Christian J Tams, *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP, 2019) 1161-1162. See also **Exhibit CLA-013**, Christoph H. Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair (eds), *Schreuer's Commentary on the ICSID Convention* (3rd edn, CUP, 2022) 1083.

[31] **Exhibit CLA-040**, *Ipek Investment Limited v. Republic of Türkiye* (Procedural Order No. 7, 14 October 2019) ICSID Case No. ARB/18/18, para. 10.

will grant it a cost award.[32] Tribunals have been inclined to dismiss similar applications based on Respondent's inability to satisfy this first element alone[33] because the inquiry invites them to prejudge an unplead case on a lean factual record.[34] Tribunals typically reject such applications to avoid addressing "strongly contested matters in dispute" at such an early stage in the arbitral process.[35]

16. Respondent comes nowhere near close to clearing this hurdle. All Respondent says is that "there is at least a reasonable possibility that an award would be rendered in favour of the applicant, whether for lack of jurisdiction or merits."[36] But merely restating a legal standard as a predictive declaration is patently insufficient to satisfy that standard and justify relief. As the *Orlandini-Agreda v. Bolivia* tribunal observed, "[t]o the extent that there is reasonable prospect of an award of costs against the Claimants, there is also a reasonable prospect of an award of costs against the Respondent."[37] In a duel of bald predictions when the Tribunal has seen but one pleading, the answer must tilt against the awarding of exceptional relief.

17. But there is even more to justify the denial of this application. Collection of alleged debts owed by another shareholder, who instituted proceedings against the Central Bank of Curaçao and Sint Maarten (the "CBCS") based on the same chain of events, has already been suspended by the U.S. courts.[38] At the very least, this fact raises significant doubt in Respondent's bald prediction that it will ultimately (and fully) prevail in this case (and atop that get an award of costs against Claimant).

---

[32] See Exhibit RL-003, *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, para. 63(1)-(2).

[33] See Exhibit CLA-041, *Orlandini-Agreda v. Bolivia* (Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, 9 July 2019) PCA Case No. 2018-39, para. 142 ("The Tribunal is reluctant to opine, at this stage of the proceedings, on whether there is a reasonable prospect of an award of costs in favo[u]r or against either Party. Any pronouncement by the Tribunal on the matter at this stage would be premature. Therefore, the Tribunal cannot issue a ruling on the Respondent's application for security for costs […]"); Exhibit CLA-030, *South American Silver Limited v. Bolivia* (Procedural Order No. 10, 11 January 2016) PCA Case No. 2013-15, paras. 54-56.

[34] Exhibit CLA-034, *Libananco Holdings Co. Limited v. Turkey* (Decision on Preliminary Issues, 23 June 2008) ICSID Case No. ARB/06/8, para. 59.

[35] Exhibit CLA-042, *Al-Warraq v. Indonesia* (Award on Preliminary Objections, 21 June 2012) UNCITRAL, para. 109.

[36] Application, para. 9.

[37] Exhibit CLA-041, *Orlandini-Agreda v. Bolivia* (Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, 9 July 2019) PCA Case No. 2018-39, para. 142.

[38] Exhibit C-033, *Nina Ansary v. Central Bank of Curaçao and Sint Maarten*, Complaint filed in the US Federal Court for the District of Columbia (17 January 2023).

B. Respondent has not Proven any Risk of Irreparable Harm

18. Respondent's arguments of threatened harm revolve around the theory that impecunious or insolvent claimants place respondent States in inherent danger. Such arguments are legally wrong and, even if they were not, are factually inapposite here.

19. On the law, allegations of a Claimant's financial distress, in and of itself, are not sufficient to satisfy this prong of the test.[39] The general position of investment tribunals is that "the lack of assets, the impossibility to show available economic resources, or the existence of economic risk or difficulties that affect the finances of a company are not *per se* justifications sufficient to warrant security for costs."[40] Following this rule, prior tribunals have rejected security for cost applications in circumstances far more extreme than any allegations put forward by Respondent here.[41]

20. Contrary to Respondent's proposed approach, which focuses solely on the *economic situation* of the investor, tribunals tasked with adjudicating these applications typically look at the *procedural conduct* of the investor. This makes good sense because an investor's liquidity may be affected by external factors – not least the bad acts of the State itself, as is the case here – but its track record of good or bad faith likely will not. As such, tribunals are reluctant to impose security for costs orders on an investor in the absence of clear evidence that the investor has acted improperly in this or another arbitration. Typically that evidence takes the form of the investor refusing to advance its claim with a deposit, interfering with the orderly conduct of legal proceedings, shifting assets to avoid cost award exposure, or otherwise exhibiting bad faith.[42] For instance, in *RSM v. St. Lucia* (the second outlier case

---

[39] See **Exhibit CLA-041**, *Orlandini-Agreda v. Bolivia* (Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, 9 July 2019) PCA Case No. 2018-39, para. 147; **Exhibit CLA-028**, *Pugachev v. Russia* (Interim Award, 7 July 2017) UNCITRAL, para. 381; **Exhibit CLA-030**, *South American Silver Limited v. Bolivia* (Procedural Order No. 10, 11 January 2016) PCA Case No. 2013-15, paras. 61, 63; **Exhibit CLA-031**, *EuroGas Inc. & Belmont Resources Inc. v. Slovak Republic* (Procedural Order No. 3, 23 June 2015) ICSID Case No. ARB/14/14, para. 123; **Exhibit CLA-027**, *Tennant Energy, LLC v. Canada* (Procedural Order No. 4, 27 February 2020) UNCITRAL, para. 176.

[40] **Exhibit CLA-030**, *South American Silver Limited v. Bolivia* (Procedural Order No. 10, 11 January 2016) PCA Case No. 2013-15, para. 63; **Exhibit CLA-034**, *Libananco Holdings Co. Limited v. Turkey* (Decision on Preliminary Issues, 23 June 2008) ICSID Case No. ARB/06/8, paras. 58-59.

[41] See **Exhibit CLA-030**, *South American Silver Limited v. Bolivia* (Procedural Order No. 10, 11 January 2016) PCA Case No. 2013-15, paras. 64-67 (rejecting respondent's security for costs application despite allegations that claimant had disclosed no financial information, bore none of the costs of the arbitration, made no investment, and was set to run out of cash by a certain date).

[42] **Exhibit CLA-027**, *Tennant Energy, LLC v. Canada* (Procedural Order No. 4, 27 February 2020) UNCITRAL, para. 174; **Exhibit CLA-041**, *Orlandini-Agreda v. Bolivia* (Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, 9 July 2019) PCA Case No. 2018-39, paras. 143, 146.

cited by Respondent),[43] the investor's bad faith served as "the decisive factor" for the tribunal's ruling.[44] It seized upon the investor's past failures to pay outstanding advances for arbitral costs[45] and its track record of ignoring other procedural rulings across two different arbitrations plus an annulment proceeding.[46] Faced with such a repeat offender, the *RSM* tribunal understandably found the respondent to have satisfied its burden of showing potential irreparable harm.[47] Again, that decision is an outlier, as other tribunals have rejected security for cost applications when faced with similar – or even worse – allegations of improper behaviour and bad faith.[48]

21. The principle distinguishing factor between *RSM* and this case is the type of improper behaviour at issue. In *RSM* (and other cases where security for costs was ordered), the claimant had failed to honour payment obligations *within the arbitration or multiple arbitrations*. The claimant in *RSM* did not pay the advances requested by ICSID in an earlier case and the arbitration was suspended and eventually terminated due to the lack of payment; in the second case it failed to comply with the award and the order to pay the arbitration costs to respondent.[49] Here, the Claimant has been timely in making payments in these proceedings (save for a one-month delay in paying the deposit following exceptional circumstances).[50] The Claimant paid the Permanent Court of Arbitration (in full) and (half of the fees for) ICSID as the designating and appointing authority respectively[51] (neither of

[43] Application, para. 7.

[44] **Exhibit CLA-027**, *Tennant Energy, LLC v. Canada* (Procedural Order No. 4, 27 February 2020) UNCITRAL, para. 175 (discussing *RSM*).

[45] **Exhibit RL-003**, *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, paras. 14, 24.

[46] **Exhibit RL-003**, *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, paras. 76-79.

[47] **Exhibit RL-003**, *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, paras. 81, 85-86.

[48] See **Exhibit CLA-028**, *Pugachev v. Russia* (Interim Award, 7 July 2017) UNCITRAL, paras. 390-393 (dismissing importance of claimant's failure to comply with the tribunal's orders or the English High Court orders when declining to grant security for cost request against the claimant); **Exhibit CLA-042**, *Al-Warraq v. Indonesia* (Award on Preliminary Objections, 21 June 2012) UNCITRAL, paras. 104, 109-110 (rejecting respondent's request for security for costs even where respondent alleged that the claimant had a "criminal conviction" and remained a "fugitive from justice").

[49] **Exhibit CLA-030**, *South American Silver Limited v. Bolivia* (Procedural Order No. 10, 11 January 2016) PCA Case No. 2013-15, para. 60 (referring to *RSM*) (emphasis added).

[50] Letter from Claimant to the Tribunal dated 23 November 2023; Email from the Tribunal Secretary to the Claimant dated 23 November 2023 (A8).

[51] Terms of Appointment, para. 46.

which should have been necessary were the Respondent more cooperative).[52] He has *not* been delinquent in payments in any other relevant proceedings. He has never failed to timely respond to this Tribunal's procedural orders, has never sought to delay a hearing, or otherwise engaged in procedural misconduct.

22. Respondent does not contend with any of this, nor could it. Instead, **on the facts**, Respondent relies solely on unsubstantiated allegations of *Claimant's conduct in the events giving rise to this dispute* and *interim decisions* made by *its own courts*.[53] Among these unsubstantiated allegations are:

    (i) that the Claimant "has a history of improper business conduct, including misappropriating assets to the detriment of creditors";[54]

    (ii) that the Claimant "has in the past removed or shifted personal assets to the detriment of his own creditors";[55] and

    (iii) that the Claimant "faces large outstanding amounts following the Curaçao court judgments".[56]

23. These allegations are pure misdirection and supported with scant facts. Regarding the alleged "improper business conduct", Respondent bases this allegation on "the judgments of the Curaçao Court of First Instance and the Curaçao Court of Appeal."[57] These judgments are still on appeal (with the latter only being interlocutory), but more to the point, the facts belie any impropriety.

    (i) On Respondent's "first" point, that Claimant was involved in a sale of shares at a price that was "far too low",[58] Respondent fails to mention the fact that reports by PriceWaterHouse Coopers were used in the valuation. For the avoidance of doubt, and unlike what the Respondent alleges, the Court of First Instance did not rule on this subject; the matter was brought up for the first time before the Court of Appeal,

[52] In this respect, see **Exhibit CLA-043**, *Orlandini-Agreda v. Bolivia* (Procedural Order No. 15, 12 November 2021) PCA Case No. 2018-39, para. 66 (deferring respondent's reimbursement of the claimants' share of the advance payments (or any other disposition relating to the costs and fees incurred in this arbitration) to the tribunal's final award – including, if necessary – an appropriate interest rate).

[53] Application, paras. 15-32.

[54] Application, Section 3.1.

[55] Application, Section 3.2.

[56] Application, Section 3.3.

[57] Application, para. 16.

[58] Application, para. 16, first bullet point.

which referred this matter to a separate proceeding.[59] And, Respondent's sole source for its allegations in this regard are neither independent experts nor documentation, but the judgments of its own courts that are the subject of this arbitration.

(ii) On Respondent's "second" point, regarding the valuation of Mullet Bay,[60] Respondent fails to mention that a valuation was done every two years according to IFRS standards, which were thereafter confirmed by the auditors in the financial statements of SunResorts – of which the Claimant is *not* the Managing Director – and then by another auditor in the audited (consolidated) financial statements of the Ennia group. These were provided to the CBCS on a yearly basis, which approved them until the takeover in 2018. And again, the only support for these allegations made by Respondent are interlocutory judgments of its own courts – not yet final pending the reports of a new valuator ordered by the Court of Appeal – that are the subject of this arbitration.

(iii) On Respondent's "third" point, regarding the amounts paid to advisors for services to Mr Ansary (its main shareholder),[61] the reason is simple: Claimant, in his role as Managing Director, concluded that continuing to pay for these advisors, who were working for Ennia and not Mr Ansary, until the end of their contracts with Ennia would be less costly to the company than terminating their contracts and paying a significant fee.

(iv) On Respondent's "fourth" point, regarding the travel expenses by private plane,[62] the costs regarding its use were split between Ennia, S&S and the Chairman of Ennia when the Claimant made use of it for his own personal travel. Ennia paid its share only but those payments cannot be substantiated because of the CBCS's intervention which effectively denied the Claimant access to company documents. And again, this issue is still before the Court of Appeal pending documentation to be delivered.

(v) On Respondent's "fifth" point, regarding the "transfer" of USD 100 million from EC Investments B.V. to S&S,[63] this was not a transfer but a deposit with S&S's successor bearing interest of 6% per annum (to satisfy its 4% liability to pension policyholders).

---

[59] **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment of 12 September 2023, para. 13.2. The Claimant will be submitting to the Court of Appeal, in the session of 22 January 2024, the documentation provided by PriceWaterHouse Coopers.

[60] Application, para. 16, second bullet point.

[61] Application, para. 16, third bullet point.

[62] Application, para. 16, fourth bullet point.

[63] Application, para. 16, fifth (and last) bullet point.

Thus, the allegation that "it carried no benefit to either Ennia or its policyholders"[64] is simply wrong. The sale *did* provide Ennia and its policyholders with additional benefits; to wit, at that time, and because of the sale of S&S, Ennia had over USD 300 million in cash in its bank accounts, and the interest rate on deposits was around 0.5% per annum with no possibility of investing such amount locally (with the maximum combined investment in the bank and insurance sector in the Dutch Caribbean at ca. USD 50 million/year). So to avoid a loss of 3.5% per annum on that amount, this opportunity made good business sense. In any case, a couple of months after, this deposit was returned to the Ennia companies upon the request of the CBCS and the implementation of the Emergency Measures, and the Court of First Instance was informed accordingly (which decided to ignore this fact). Respondent deliberately omits this fact from its Application.

24. On the more general charge that Claimant shifted personal assets,[65] in April 2018 (long before any court case was started against him) he did transfer some amounts out his life savings from personal revenues which he is free to use at his own discretion. At that time, he had absolutely no creditors (and still he does not have any). And regarding any outstanding judgments, these amounts are completely artificial. As Respondent admits,[66] the first amount of Naf 237,233,274 (USD 132,532,504) calculated by the Court of First Instance does not correspond to what was later held in the Court of Appeal's interlocutory judgment (which deferred the valuation questions to separate proceedings), with only the USD 316,044 amount proven. While the first amount was indeed "immediately enforceable",[67] they were included in the Notice of Arbitration as damages.[68]

25. If nothing else, these factual clarifications demonstrate that it is far too early to prejudge the merits of this case. Balanced against Respondent's mere *ipse dixit* to the contrary, this Tribunal cannot hold on the current record that Respondent is likely to prevail, likely to win a costs award, and likely to be unable to collect on it.

* * *

26. Ultimately, every instance of Claimant's alleged "financial distress" relied upon by Respondent to seek security for costs was an instance caused by Respondent's own actions,

[64] Application, para. 16, fifth (and last) bullet point.

[65] Application, para. 18.

[66] Application, paras. 22-23.

[67] Application, para. 22.

[68] Notice of Arbitration, paras. 76, 93(vi).

as found by Respondent's own courts.[69] Granting security for costs in this scenario would violate general principles of law, namely that "no one can be allowed to take advantage of his own wrong"[70] and that "[n]o one can be judge in his own cause".[71] Put simply, Respondent is seeking to benefit from the fact that it harmed the Claimant and put him in this situation by citing to that situation as a reason to extract more money from him as a surcharge to seek justice. If this line of argumentation were permitted, respondent States would be incentivised to destroy any investment that it harms, and discredit the investor's solvency through its courts, in order to impose an obstacle to the pursuit of arbitral claims that the treaty purports to unconditionally provide. This cannot be the rule.

C. An Order of Security for Costs to Remediate Respondent's Potential Harm outweighs the Harm that the Claimant would Likely Incur from the Order, as it Threatens Claimant's Access to Justice

27. Respondent addresses this prong of the standard too with pure *ipse dixit*, claiming that "there is no indication […] that [Claimant's] access to justice would be obstructed" were security to be ordered.[72] Not so. Balanced against the lack of demonstrable risk to Respondent, an order for security for costs could deny justice to Claimant (*see infra* Section C.1.), and constitute impermissible discrimination that violates the substantive obligations of the treaty and other instruments of international law (*see infra* Section C.2.)

1. *Security for Costs Disproportionately Threatens to Deny Claimant's Right to an Effective Remedy*

28. Investor-State tribunals are, and indeed should be, sensitive and sympathetic to the 'access to justice' issues posed by security for costs applications and regularly deny them on that basis.[73] This is because investment protections could be rendered nugatory if security for

[69] **Exhibit CLA-041**, *Orlandini-Agreda v. Bolivia* (Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, 9 July 2019) PCA Case No. 2018-39, para. 145; **Exhibit CLA-042**, *Al-Warraq v. Indonesia* (Award on Preliminary Objections, 21 June 2012) UNCITRAL, para. 109.

[70] **Exhibit CLA-044**, Charles T. Kotuby and Luke A. Sobota, *General Principles of Law and International Due Process Principles and Norms Applicable in Transnational Disputes* (OUP, 2017) 130 et seq.

[71] **Exhibit CLA-044**, Charles T. Kotuby and Luke A. Sobota, *General Principles of Law and International Due Process Principles and Norms Applicable in Transnational Disputes* (OUP, 2017) 172 et seq.

[72] Application, para. 37.

[73] See **Exhibit CLA-045**, *Amorrortu v. Peru* (Procedural Order No. 2, 19 October 2020) UNCITRAL, para. 11; **Exhibit CLA-023**, *Jochem Bernard Buse v. Republic of Panama* (Decision on Respondent's Application for Security for Costs, 5 November 2019) ICSID Case No. ARB/17/12, para. 116.

States' costs were routinely required of aggrieved investors after they have suffered and raised their grievance.[74]

29. The right to an effective remedy requires that the person whose rights have been violated shall have his/her right determined by competent judicial, administrative or legislative authorities.[75] Such remedies, in order to vindicate one's rights, must be both accessible and effective.[76] In other words, a person should be able to access the remedy not only in theory but also in practice. Inherent in the right to an effective remedy is the notion that States must provide appropriate mechanisms for addressing claims of violations of rights without undue restrictions.

30. By seeking to condition arbitral proceedings on the provision of security for costs, Respondent is denying Claimant rights that are inherent in the BIT – namely, access to justice and the right to obtain an effective remedy. The object and purpose of the standing offer to arbitrate provided for in Article 9 of the BIT, as well as of the BIT as a whole, is to ensure qualifying investors access to justice in case of the infringement of their treaty-protected rights.

31. Ultimately, what is at stake here is the general principle of equality of arms.[77] As noted by the Tribunal in the *Eskosol* case, there is an "[a]nalytically curious […] notion that an [investment] Tribunal, while not empowered to protect a claimant's ability to collect on a possible merits award, nonetheless should intervene to protect a State's asserted 'right' to collect on a possible costs award".[78] But that is precisely what Respondent is seeking here.

---

[74] **Exhibit CLA-040**, *Ipek Investment Limited v. Republic of Türkiye* (Procedural Order No. 7, 14 October 2019) ICSID Case No. ARB/18/18, para. 11.

[75] See, for example, **Exhibit CLA-046**, International Covenant on Civil and Political Rights (adopted on 16 December 1966, entered into force on 23 March 1976) Art. 2(3)(b).

[76] See, for example, **Exhibit CLA-047**, *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador* (Expert Opinion of Professor David D. Caron) UNCITRAL, PCA Case No. 2009-23, para. 133 (noting that "[t]he customary international law definition of 'effective remedy' is thus similar to that found above: an effective remedy is one that guarantees real judicial and/or administrative avenues by which an individual or investor may vindicate its rights, rather than an inconsistent system of possible procedures with unreliable processes and outcomes"); **Exhibit CLA-048**, *Case of Las Palmeras v. Colombia* (Judgment, 6 December 2001) IACHR Series C No. 90, para. 58.

[77] **Exhibit CLA-044**, Charles T. Kotuby and Luke A. Sobota, *General Principles of Law and International Due Process Principles and Norms Applicable in Transnational Disputes* (OUP, 2017) 176-183.

[78] **Exhibit CLA-032**, *Eskosol SpA in Liquidazione v. Italian Republic* (Procedural Order No 3, Decision on Respondent's Request for Provisional Measures, 12 April 2017) ICSID Case No ARB/15/50, para. 35.

In a world where Respondent State's non-payment of final awards is on the rise,[79] Respondent seeks security from a Claimant that it should not suffer a similar fate.

32. The proportional burden is completely unequal. The tribunal in *Eskosol* explained that:

> *Proportionality is a critical part of any provisional measures analysis, and a party seeking provisional measures must demonstrate that its need for the measures are not outweighed by the hardships to which the other party would be subjected if the measures are granted.*[80]

33. Respondent acknowledges this when it says that "an order for security for costs would not disproportionately harm Andraous."[81] In nearly the same breathe, however, it seeks security in the amount of EUR 3 million.[82] This would pose a disproportionate burden on Claimant, which would "impinge, at least potentially, on a party's ability to pursue its claims or defen[c]es" and could impede Claimant's 'access to justice'.[83]

---

[79] **Exhibit CLA-049**, Nikos Lavranos, 'Report on Compliance with Investment Treaty Arbitration Awards' (2nd edn, 2023).

[80] **Exhibit CLA-032**, *Eskosol SpA in liquidazione v. Italian Republic* (Procedural Order No 3, Decision on Respondent's Request for Provisional Measures, 12 April 2017) ICSID Case No. ARB/15/50, para. 38 (emphasis added); see also **Exhibit CLA-023**, *Jochem Bernard Buse v. Republic of Panama* (Decision on Respondent's Application for Security for Costs, 5 November 2019) ICSID Case No. ARB/17/12, para. 118.

[81] Application, para. 33. See also **Exhibit CLA-032**, *Eskosol SpA in liquidazione v. Italian Republic* (Procedural Order No 3, Decision on Respondent's Request for Provisional Measures, 12 April 2017) ICSID Case No. ARB/15/50, para. 36.

[82] Application, para. 38. Moreover, unlike what Respondent claims, other respondent States that have – unsuccessfully – sought such relief in the past requested similar or significantly lower amounts. See **Exhibit CLA-029**, *Rawat v. Mauritius* (Order Regarding Requests for Interim Measures, 11 January 2017) PCA Case No. 2016-20, paras. 133 (**EUR 3 million requested**); **Exhibit CLA-028**, *Pugachev v. Russia* (Interim Award, 7 July 2017) UNCITRAL, para. 382 (**USD 800,000 requested**); **Exhibit CLA-041**, *Orlandini-Agreda v. Bolivia* (Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, 9 July 2019) PCA Case No. 2018-39, para. 82 (**USD 4 million requested**); **Exhibit CLA-030**, *South American Silver Limited v. Bolivia* (Procedural Order No. 10, 11 January 2016) PCA Case No. 2013-15, para. 12 (**USD 2.5 million requested**); **Exhibit CLA-042**, *Al-Warraq v. Indonesia* (Award on Preliminary Objections, 21 June 2012) UNCITRAL, para. 104 (**USD 3 million requested**). And the *Manuel García Armas* and *RSM*, which granted security for costs applications, did so for significantly reduced amounts as well. See **Exhibit RL-002-SPANISH**, *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9 (Decision on the Respondent's Request for Provisional Measures), 20 June 2018, paras. 234, 252-255 (granting relief but denying Venezuela's request for USD 5 million as excessive, and reducing it to **USD 1.5 million**); **Exhibit RL-003**, *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, para. 90(i) (ordering claimant to provide a guarantee for **USD 750,000**).

[83] **Exhibit CLA-032**, *Eskosol SpA in liquidazione v. Italian Republic* (Procedural Order No 3, Decision on Respondent's Request for Provisional Measures, 12 April 2017) ICSID Case No. ARB/15/50, para. 38.

2. *An Order for Security for Costs would Violate Respondent's Substantive Obligations vis-à-vis Anti-Discrimination and Access to Justice*

34. Dutch nationals who are party to proceedings against Respondent cannot be ordered to pay security for Respondent's costs, nor can Lebanese litigants in Dutch courts. As a result, Claimant likewise cannot be ordered to pay Respondent's costs in any treaty-based arbitral proceeding where Claimant seeks redress from Respondent for the mistreatment of his investments.

35. This is the result of two provisions of the BIT and provisions of international and Dutch law. Article 3(2) of the BIT demands that Respondent provide Claimant with treatment "which in any case shall not be less favourable than that accorded [...] to investments of its own investors." Article 3(5) of the BIT confirms that provisions of Dutch and international law shall apply to this dispute to the extent that they are more favourable to the investor than the BIT. Together, these provisions demand that, if the Tribunal were to decide that it can order security for costs against Claimant under the BIT, then it must look to other provisions of Dutch and international law before doing so in order to ensure that Claimant receives the same treatment with respect to costs as would apply if Claimant were a Dutch national and/or filed a complaint against Respondent before the Dutch courts.

36. Dutch law is clear that no award of costs can be made against Claimant in favour of Respondent if the case were proceeding under Dutch law. Article 224 of the Dutch Code of Civil Procedure regulates security for costs (*zekerheidsstelling voor proceskosten*). It provides that, while foreign litigants may be ordered to provide security in Dutch courts, "[n]o obligation to provide security shall exist," "if an order to pay legal costs and damages pursuant to [...] a treaty [...] will be enforceable in the place where the person from whom security is claimed is domiciled or habitually resident," or "if this would impede the person from whom security is claimed effective access to justice." [84]

37. There are at least two treaties on point here. The Hague Convention on Civil Procedure (the "**Hague Convention**"),[85] signed by both the Netherlands and Lebanon, provides that "[n]o security, bond or deposit of any kind, may be imposed by reason of [a litigant's] foreign nationality, or of lack of domicile or residence in the country." The logic that underpins these provisions is the mutual recognition of judgments and judicial orders by the State Parties to the Hague Convention. On that score, Article III of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**")

[84] **Exhibit CLA-050-DUT**, Art. 224 of the Dutch Code of Civil Procedure.

[85] **Exhibit CLA-051**, Convention of 1 March 1954 on Civil Procedure, Arts. 17-19. The Netherlands ratified the Convention on 28 April 1959, for which it entered into force on 27 June 1959. Lebanon acceded to the Convention on 25 March 1974, for which it entered into force on 7 January 1975.

provides that "[e]*ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.*"[86] By virtue of Article 3(5) of the BIT, these are more favourable provisions of Dutch and international law, and should end the matter on the point of security for costs.

D. Respondent has not Shown that it Urgently needs the Requested Measure

38. As a final point, Respondent does not even *try* to satisfy this element. Respondent States demanding that their opposing party post security for costs are universally required to show not only that they face the prospect of harm, but also that that harm is imminent.[87] The requirement is logical, considering that the purpose behind any type of interim measures is to protect rights that are "in danger."[88] Any relief afforded, therefore, must stem from the concern that the claimant "may be in a position to provide security for costs today but would lose that ability *in the future*".[89]

39. There is nothing urgent about Respondent's Application, and Respondent' concedes as much.

[86] **Exhibit CLA-052**, United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958), Art. III. The New York Convention entered into force for the Netherlands on 24 April 1964, and for Lebanon when it acceded on 11 August 1998. Likewise, given that both Respondent and Lebanon are Parties to the International Covenant on Civil and Political Rights (**Exhibit CLA-046**, International Covenant on Civil and Political Rights (adopted on 16 December 1966, entered into force on 23 March 1976) with Lebanon acceding on 3 November 1972), Claimant is entitled to the same treatment with respect to costs as would apply if Claimant filed a complaint before the United Nations Human Rights Committee for his mistreatment. Under both mechanisms (i.e. the domestic/regional and United Nations human rights systems), the responding State is not entitled to the award of costs. Accordingly, it follows from Article 3(5) of the Agreement that Claimant has the right to the same treatment in the present proceedings, i.e. that Respondent is not entitled to security for costs.

[87] See paragraph 11(d) above.

[88] **Exhibit CLA-030**, *South American Silver Limited v. Bolivia* (Procedural Order No. 10, 11 January 2016) PCA Case No. 2013-15, para. 46.

[89] **Exhibit CLA-041**, *Orlandini-Agreda v. Bolivia* (Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, 9 July 2019) PCA Case No. 2018-39, para. 150 (emphasis added).

III. CLAIMANT REQUESTS AN INTERIM AWARD ON COSTS

40. Respondent's Application is a clear attempt to smear the Claimant at the outset of a case before any substantive pleadings have been filed. And it has been part of a broader strategy. Respondent has coupled this Application with spurious inquiries into Claimant's funding arrangements,[90] and has admittedly made inquiries into the extent of Claimant's assets and requested the freezing of them.[91]

41. The leading commentary on the UNCITRAL Rules states that a tribunal may independently reject an interim measures request – framed as such by the Respondent – if it is made in bad faith to delay or harass the opposing party.[92] Claimant would respectfully request that the Tribunal invoke that authority here because Respondent's Application has much less to do with "security" than with gamesmanship.

42. To that same end, while Claimant accepts that ordinarily the Tribunal would defer the question of the costs of Respondent's Application to a later stage of these proceedings, Claimant respectfully submits that the Tribunal should instead render an interim award on costs in Claimant's favour immediately upon dismissing Respondent's Application.

43. Applications of the type brought by Respondent are not to be made lightly, but Respondent has pushed forward with this Application based primarily on irrelevant awards, domestic court decisions, and factual misdirection. It does not even try to convince the Tribunal of its likelihood of success or urgency. In effect, Respondent has asked this Tribunal to decide upon an EUR 3 million question, and forced Claimant to defend against the same, notwithstanding that the Parties have yet to share any substantive submission with the Tribunal. And the urgency and harm to Claimant is not prospective, but real – *time and expense has already been invested in this opposition, to the detriment of Claimant*.

44. In the above circumstances, Respondent must bear immediate responsibility for its decision to bring such an application through an interim award of costs to Claimant. Only through that interim award will the Tribunal be able to ensure that Respondent is adequately sanctioned for its conduct, and that the Tribunal sets a marker for both Parties as to what it expects for the remainder of these arbitral proceedings.

---

[90] Application, para. 25; **Exhibit C-034**, Letter from Respondent to Claimant dated 6 July 2023 (unsigned); **Exhibit C-035**, Letter from Respondent to Claimant dated 9 October 2023.

[91] Application, paras. 19, 25.

[92] **Exhibit CLA-053**, David D. Caron & Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd edn, OUP, 2013) 523 ("A request for interim measures may be made in bad faith to delay the proceedings or harass the opposing party. A manifestly abusive request should be rejected quickly.").

IV. RELIEF SOUGHT

45. In light of the above, Claimant respectfully requests the Tribunal to:

(i) dismiss Respondent's Application; and

(ii) issue an interim award directing Respondent to immediately pay Claimant all of its legal fees and all of its costs and expenses incurred in connection with Respondent's Application, plus interest; or order any other relief that the Tribunal deems appropriate at this juncture. [redacted]

[redacted]

[redacted]

[redacted]

Respectfully submitted,

Dr Rutsel Silvestre J Martha

Lindeborg Counsellors at Law

[signed]

22 December 2024