

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

LAO HOLDINGS N.V.
AND
SANUM INVESTMENTS LIMITED

Claimants

and

LAO PEOPLE'S DEMOCRATIC REPUBLIC

Respondent

ICSID Case No. ARB(AF)/16/2
ICSID Case No. ADHOC/17/1

PROCEDURAL ORDER NO. 6

(Decision on Respondent's Application for Security for Costs of 29 June 2018)

Members of the Tribunal

Ms. Jean E. Kalicki, President of the Tribunal
Prof. Laurence Boisson de Chazournes, Arbitrator
Mr. Klaus Reichert, SC, Arbitrator

Secretary of the Tribunal

Mrs. Mercedes Cordido-Freytes de Kurowski

Date: 26 July 2018

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I. INTRODUCTION

1. This Order addresses the Application for Security for Costs filed on 29 June 2018 (the “**Application**”) by the respondent, the Lao People’s Democratic Republic (“**Respondent**”). The Tribunal also addresses Respondent’s request, in correspondence dated 13 July 2018, that the Tribunal “strike ... from the record” certain statements made by claimant Lao Holdings N.V. (“**LHNV**”) in its 9 July 2018 response to the Application (the “**Response**”).
2. The Tribunal sets forth below only the elements of the procedural history that directly relate to these issues.

II. PROCEDURAL HISTORY

3. This consolidated arbitration concerns ICSID Case No. ARB(AF)/16/2 (the “**Lao Holdings Case**”) and ICSID Case No. ADHOC/17/1 (the “**Sanum Case**”), both administered under the ICSID Additional Facility Rules, which entered into force on April 10, 2006 (the “**AF Rules**”). While Respondent is the same in both cases, the claimants are different, with claimant LHNV proceeding in the *Lao Holdings Case* under the Netherlands-Laos BIT, and claimant Sanum Investments Limited (“**Sanum**”) proceeding in the *Sanum Case* under the China-Laos BIT. LHNV and Sanum collectively are referred to as the “**Claimants**”).
4. On 1 September 2017, Claimants filed their Memorial on the Merits, including certain ancillary claims contending that Respondent’s courts had improperly denied recognition of a 2016 arbitration award rendered in Sanum’s favor by a Singapore International Arbitration Centre tribunal (the “**2016 SIAC Award**”). The 2016 SIAC Award was issued in an action involving a dispute between Sanum and a group of Lao nationals and companies generally known as the ST Group (“**ST**”).
5. On 18 September 2017, Respondent objected to Claimants’ ancillary claims. On 23 October 2017, following additional submissions by the Parties relating to this objection, the Tribunal issued Procedural Order No. 2 (“**PO2**”), in which it decided – based on an

assessment *inter alia* of the China-Laos BIT and the procedural history of the *Sanum Case* – that “Respondent’s objection to Claimants’ inclusion in its Memorial on the Merits of claims relating to non-recognition of the 2016 SIAC Award is sustained.”¹

6. On 24 October 2017, Claimants filed a Request for Clarification of the Tribunal’s PO2, inquiring whether PO2 was intended to bar LHNV from proceeding with ancillary claims under the Netherlands-Laos BIT in connection with the same underlying events, or only claims by Sanum under the China-Laos BIT.² On 14 November 2017, following additional submissions by the Parties, the Tribunal issued Procedural Order No. 3 (“**PO3**”), which clarified that PO2 had been intended to address ancillary claims then understood to be asserted only by Sanum. Based on the Tribunal’s additional understanding that LHNV also sought to assert claims related to the 2016 SIAC Award, the Tribunal noted relevant distinctions between the Netherlands-Laos BIT and the China-Laos BIT, and between the procedural histories of the *Lao Holdings Case* and the *Sanum Case*. Based on these distinctions and for other reasons set forth in PO3, the Tribunal denied Respondent’s objection to admissibility of LHNV’s ancillary claims related to the 2016 SIAC Award.
7. On 29 June 2018, Respondent filed its Application, seeking security for costs in connection with LHNV’s claims related to the 2016 SIAC Award. The Application was accompanied by various supporting documents, including a witness statement of Mr. Sabh Phommarath (the “**Sabh Statement**”).³
8. On 9 July 2018, LHNV filed its Response to the Application, which was accompanied by various supporting documents, including a second witness statement of Mr. Jorge Menezes (the “**Second Menezes Statement**”). Claimants had submitted an earlier witness statement from Mr. Menezes (the “**First Menezes Statement**”) with their Memorial on the Merits.
9. On 13 July 2018, Respondent submitted a communication to the Tribunal objecting to certain allegations in LHNV’ Response, and requesting that the Tribunal “strike ... from

¹ **PO2**, ¶ 52(a).

² Claimants’ letter of 23 October 2017, ¶ 1 (transmitted on 24 October 2017).

³ LHNV refers to Mr. Sabh Phommarath as “Mr. Phommarath,” and to his witness statement as the “Phommarath Statement.” The Tribunal adopts the nomenclature used by Respondent (“Mr. Sabh” and the “Sabh Statement”) in deference to the last-name-first custom that the Tribunal assumes explains the discrepancy.

the record” certain statements LHNV had made in its Response. Later the same day, Claimants communicated by email that it “in light of the Tribunal’s request that the Parties forbear from making unsolicited submissions, Claimants are not responding to Respondent’s letter of this morning,” but would provide observations “if the Tribunal so requests.” The Tribunal did not request any additional submissions.

III. PARTIES’ POSITIONS

(1) Respondent’s Application

10. Respondent seeks security for costs, pursuant to Article 46 of the AF Rules, in relation to LHNV’s “claim for unfair and inequitable treatment based upon Lao court procedures which refused to recognize the SIAC commercial arbitral award between Claimants and ST Group” (the “**Recognition Action Claim**”).⁴ Specifically, Respondent seeks an order that LHNV provide an irrevocable bank guarantee in the amount of USD 1 million, to secure any cost award made in Respondent’s favor at the conclusion of this proceeding.⁵
11. With respect to the Tribunal’s authority, Respondent observes that “in its final award, a tribunal may award the fees and expenses of a proceeding to the prevailing party.” In its view, a tribunal “may also order provisional measures to protect the Government’s right to recover its costs, should such an award be made.”⁶ This authority is said to stem from Article 46(1) of the AF Rules, which provides as follows:

Unless the arbitration agreement otherwise provides, either party may at any time during the proceeding request that provisional measures for the preservation of its rights be ordered by the Tribunal. The Tribunal shall give priority to the consideration of such a request.

⁴ Application, ¶ 1. Despite this general framing of the claim as about “unfair and inequitable treatment,” it appears that the Respondent’s Application encompasses LHNV’s assertion of several distinct violations of the Netherlands-Laos BIT in connection with the Recognition Action Claim, including alleged violation of its Articles 3(1), 3(4), 3(5) and 6. Application, n.1.

⁵ Application, ¶ 1.

⁶ Application, ¶ 11.

12. Respondent invokes the decisions of tribunals in *RSM*,⁷ *Transglobal*,⁸ and *Maffezini*,⁹ in support of support of the proposition that ICSID tribunals have the authority to order security for costs as a provisional measure.¹⁰ Respondent submits that in determining whether to order security for costs, the Tribunal should verify two issues that the *RSM* tribunal considered: “(1) the right in need of protection exists; and (2) the situation is urgent and the requested measures are necessary to prevent irreparable harm to the party’s right to be protected.”¹¹ Respondent also refers to the Chartered Institute of Arbitrators’ 2015 Guidelines on Security for Costs.¹²
13. With respect to the grounds for its Application, Respondent characterizes the Application as based on “three reasons: (1) there is no basis for the claim whatsoever – it is completely frivolous; (2) LHNV – the only claimant to which that claim applies – is a shell company with no assets anywhere in the world; and (3) LHNV’s litigation expenses are funded by a third party.”¹³
14. First, Respondent submits that LHNV’s Recognition Action Claim is without any basis. It notes that LHNV provided only one witness (Mr. Menezes) to support its claims about due process failures of the Lao courts, but that Mr. Menezes “was not present for any part of the Lao court proceedings” about which he purports to testify.¹⁴ Thus, he has no personal knowledge of the proceedings of which he complains, and there is no confirmatory evidence to corroborate his testimony in the First Menezes Statement.¹⁵ By contrast,

⁷ **RLA-130**, *RSM Production Corp. v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs, 13 August 2014, ¶¶ 48, 51-57 (“*RSM*”).

⁸ **RLA-132**, *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28), Decision On The Respondent’s Request for Provisional Measures Relating to Security for Costs, 21 January 2016, ¶¶ 28-29 (“*Transglobal*”).

⁹ **RLA-128**, *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999 (“*Maffezini*”).

¹⁰ Application, nn. 17-18.

¹¹ Application, ¶ 12 (citing **RLA-130**, *RSM*, ¶ 58).

¹² Application, ¶ 12.

¹³ Application, ¶ 5.

¹⁴ Application, ¶ 2.

¹⁵ Application, ¶¶ 16, 20. Respondent invokes the Award in *EDF v. Romania* for the proposition that hearsay assertions that lack confirmatory evidence should be disregarded. Application, ¶¶ 19, 23 (citing **RLA-127**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 224).

Respondent now provides the Sabh Statement, from the Lao counsel who *did* appear on Claimants' behalf before the Lao courts, and Mr. Sabh testifies that Mr. Menezes' account is "inaccurate," "false," and "misleading," and that the Lao court proceedings were conducted fairly.¹⁶ In these circumstances, Respondent submits, "the Government has proven that the claim is completely without merit and LHNV introduced this ancillary claim knowing it had no basis in fact."¹⁷

15. Second, Respondent submits that LHNV is an "Aruban shell without business, employees or any retained assets."¹⁸ Respondent claims that these facts are admitted, citing a statement by LHNV's counsel in a prior ICSID proceeding that the company is a "shell company, a corporate investment vehicle."¹⁹ Respondent also asserts that in a prior ICSID case between the Parties, LHNV refused to pay a \$700,000 cost award assessed against it, although "the Government was able to recover the sum through remaining assets in Laos."²⁰
16. Third, Respondent contends that LHNV's litigation expenses are being funded by an individual shareholder, Mr. Baldwin, "or a related Baldwin entity." Respondent analogizes this situation to an outside third-party funder, and notes that the *RSM* tribunal "found it significant that RSM was funded by a third-party" who was unlikely to assume responsibility for paying a cost award.²¹
17. Respondent concludes that there is no basis for LHNV's "frivolous" claim, and that unless the Tribunal orders the posting of security for costs, Respondent is unlikely to ever recover any costs the Tribunal in due course might award.²²

¹⁶ Application, ¶ 4; *see also id.*, ¶¶ 25-26.

¹⁷ Application, ¶ 9; *see also id.*, ¶ 30.

¹⁸ Application, ¶ 31.

¹⁹ Application, ¶ 31 & n.47.

²⁰ Application, ¶ 32 & n.49.

²¹ Application, ¶¶ 33-34.

²² Application, ¶ 37.

(2) LHNV's Response

18. LHNV objects to Respondent's Application and requests its dismissal.
19. As a starting point, LHNV notes that Respondent makes its Application after "almost a year" since the filing of Claimants' Memorial on the Merits on 1 September 2017, which LHNV contends "undermines the bona fides of the Application, and certainly its purported urgency."²³ LHNV contends that the Application is a "tactical ploy to increase the cost of this arbitration and distract Claimants from preparing their case on the merits."²⁴
20. With respect to legal issues, LHNV contends that Respondent "[h]as [n]o [p]resent '[r]ight' to be '[p]reserved'."²⁵ LHNV draws the Tribunal's attention to *Eskosol*,²⁶ where a tribunal recently highlighted the question whether security for costs can fit properly within the ICSID Rules provisional measures framework, which requires a threshold demonstration that there is a legal "right" under threat, requiring preservation.²⁷ In *Eskosol*, the tribunal described security for costs as a measure seeking to ensure ultimate collection of costs, not a procedural right to seek an award of costs, and noted that the ICSID Convention in other respects disclaims any involvement in collection or execution issues.²⁸ Building on this reasoning, LHNV argues that the word "preserve" in Article 46 of the AF Rules implies that a protected right must "already exist[]," which in this case is "conjectural," as it "presumes both that Respondent will prevail and that the Tribunal would shift costs" onto LHNV.²⁹ LHNV notes that many ICSID cases do not result in cost shifting; that it would be "improper to presuppose that costs in Respondent's favor would be awarded, even if it were to prevail" on its Recognition Action Claim; and "the Tribunal thus lacks authority to grant the relief Respondent requests."³⁰

²³ Response, ¶ 1.

²⁴ Response, ¶ 16.

²⁵ Response, Section II.A.

²⁶ **CL-203**, *Eskosol S.p.A. In Liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50), CL-0203, Procedural Order No. 3, 12 April 2017 ("*Eskosol*").

²⁷ Response, ¶ 20.

²⁸ *Eskosol*, ¶ 34-35.

²⁹ Response, ¶ 24.

³⁰ Response, ¶ 24.

21. Regarding the asserted grounds for the application, LHNV contends that its “status as a holding company or corporate investment vehicle is insufficient to support a security-for-costs order,”³¹ relying on the *Libananco* tribunal’s observation that “far from this being an unusual exception, it is in practice closer to the norm that the entity appearing as an ICSID Claimant is an investment vehicle created or adapted specially for the purpose of [an] investment transaction”³² LHNV argues that this structure does not mean, as Respondent contends, that “any attempt to enforce an award against [LHNV] would be futile.”³³ First, LHNV notes that it has fully complied with its obligation to make deposits in this case, whereas Respondent has failed to comply with its corresponding deposit obligations, requiring Claimants to pay the “entirety of the advances.”³⁴ LHNV also takes issue with Respondent’s assertion that it is without assets, asserting that it “owns a valuable asset, namely, Sanum ... which in turn has substantial assets,”³⁵ including the 2016 SIAC Award against ST, which was recently upheld by the Singapore High Court.³⁶ With respect to its alleged failure to comply with a prior ICSID costs award, LHNV notes that the underlying obligation “has been satisfied in full,” because Respondent “has already taken payment” out of Savan Vegas “assets it seized from Claimants.”³⁷ LHNV contends that it was justified in not “funnel[ing] *additional* funds to the Government” to pay the prior cost award, “[i]n circumstances where Respondent had already assumed full control over Claimants’ assets worth hundreds of millions of dollars.”³⁸ LHNV thus contests Respondent’s analogy to the “exceptional circumstances” present in the *RSM* case.³⁹
22. LHNV also asserts that unlike *RSM*, “this case does not involve funding by an undisclosed third-party funder.”⁴⁰ The identity of LHNV’s owners are known, and there is nothing

³¹ Response, ¶ 31.

³² **CL-205**, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, ¶ 59 (“*Libananco*”).

³³ Response, ¶ 32 (quoting Application, ¶ 34).

³⁴ Response, ¶¶ 13, 34.

³⁵ Response, ¶ 30.

³⁶ Response, ¶ 30 & n. 49 (citing **C-534**).

³⁷ Response, ¶ 26.

³⁸ Response, ¶ 36 (emphasis in original); *see also id.*, ¶ 17.

³⁹ Response, ¶ 27.

⁴⁰ Response, ¶ 28.

unusual about a company's owners providing financing to support its arbitration claims. In LHNV's view, this "is an insufficient basis upon which to justify a security-for-costs order."⁴¹

23. Finally, LHNV contends that Respondent's arguments about the asserted lack of basis for the Recognition Action Claim, based on the Sabh Statement and other criticism of the Menezes Statement, is an improper invitation to the Tribunal to "dispense with a hearing on the merits and jump straight to the conclusion that the [claim] is without merit."⁴² To "correct the record," however, LHNV contends that the Sabh Statement was itself "a sham that is entitled to no evidentiary weight,"⁴³ and indeed "bears the hallmarks of having been the product of coercion or, at minimum, a well-founded fear of retribution for any refusal to provide it regardless of its falsity."⁴⁴ LHNV submits that the Sabh Statement contradicts Mr. Sabh's "own prior statements in written court submissions,"⁴⁵ which the Second Menezes Statement avers were the source for the First Menezes Statement.⁴⁶ LHNV also contends that the Sabh Statement does not address the "voluminous" additional evidence (beyond the First Menezes Statement) that allegedly supports LHNV's Recognition Action Claim.⁴⁷ Finally, LHNV questions the propriety of Mr. Sabh's "secretly providing a witness statement in support of the Government," while he allegedly continued to serve as Sanum's counsel.⁴⁸

(3) Respondent's Letter of 13 July 2018

24. Respondent objects to LHNV's "unsupported allegations of criminal conduct and the charge [that] counsel submitted a coerced, false Witness Statement" on Respondent's

⁴¹ Response, ¶ 29.

⁴² Response, ¶ 39.

⁴³ Response, ¶ 41.

⁴⁴ Response, ¶ 5; *see also id.*, ¶ 48 (contending that "the assertions contained in the [Sabh] Statement are false and evidently coerced"). LHNV relies in part on an expert report submitted by Joshua Kurlantzick to explain its interpretation of why Mr. Sabh provided a witness statement in favor of Respondent. Response, ¶¶ 6, 71".

⁴⁵ Response, ¶ 4; *see also id.*, ¶¶ 9-10, 48.

⁴⁶ Response, ¶¶ 59-61. LHNV contends that meetings between Mr. Menezes and Mr. Sabh were interpreted by Mr. Sabh's son because Mr. Sabh was not fluent in English, a fact that LHNV considers "indicate[s] that [he] did not write his English-language Witness Statement or sign it voluntarily." Response, ¶¶ 60, 62.

⁴⁷ Response, ¶¶ 12, 45, 69-75.

⁴⁸ Response, ¶¶ 66-67.

behalf.⁴⁹ In Respondent’s view, “an allegation of witness tampering or witness intimidation goes to the very integrity of arbitral proceedings,” and LHNV “offer[s] no evidence whatsoever that the Government coerced or otherwise intimidated Mr. Sabh – not a shard – in support of these serious allegations of criminal conduct.”⁵⁰ Respondent also characterizes as “[p]reposterous” LHNV’s contention that Mr. Sabh “does not speak or read English,” noting that it has been advised otherwise and that a U.S. Embassy list of lawyers in Laos lists Mr. Sabh as fluent in English, among other languages.⁵¹

25. Respondent “demands that Claimants either produce direct evidence of coercion forthwith, or withdraw the claim immediately.” Alternatively, Respondent requests that “the Tribunal should strike these baseless allegations from the record.”⁵²

(4) Claimants’ Email of 13 July 2018

26. As previously noted, Claimants stated that “in light of the Tribunal’s request that the Parties forbear from making unsolicited submissions,” they would not respond to Respondent’s 13 July 2018 letter unless requested to do so.

IV. THE TRIBUNAL’S ANALYSIS

A. RESPONDENT’S APPLICATION FOR SECURITY FOR COSTS

27. The Tribunal begins by addressing the issue of authority under the applicable arbitration rules, which both Parties suggested is a threshold issue to be considered.⁵³
28. Unlike certain other arbitral rules, the AF Rules contain no provision expressly discussing the issue of security for costs. Nor do the AF Rules discuss expressly the possibility of interim orders for the preservation of assets, of which security for costs may be seen as a logical subset. In this latter respect, the AF Rules differ from the UNCITRAL Arbitration

⁴⁹ Respondent’s letter of 13 July 2018, p. 1.

⁵⁰ Respondent’s letter of 13 July 2018, p. 2.

⁵¹ Respondent’s letter of 13 July 2018, p. 2.

⁵² Respondent’s letter of 13 July 2018, p. 2.

⁵³ Application, ¶ 12 (stating that the Tribunal should verify that “the right in need of protection exists”); Response, Section II.A (stating that “Respondent “Has No Present Right to be Preserved”).

Rules, for example, which include within the definition of possible interim measures “any temporary measure ... to ... (c) Provide a means of preserving assets out of which a subsequent award may be satisfied.”⁵⁴

29. In consequence, the Respondent relies on the provision of the AF Rules – Article 46(1) – that governs the Tribunal’s power to grant provisional measures more generally. As noted above, Article 46(1) states as follows:

Unless the arbitration agreement provides otherwise, either party may at any time during the proceeding request that *provisional measures for the preservation of its rights* be ordered by the Tribunal. The Tribunal shall give priority to the consideration of such a request.⁵⁵

30. As a threshold matter, nothing in this text suggests that the Tribunal’s authority is limited only to certain types of measures, or alternatively stated, excludes certain types of measures. Requests for measures regarding security for costs are therefore not *ipso facto* beyond the scope of a tribunal’s powers.⁵⁶

31. However, the logical starting point for a provisional measure request under the AF Rules, or under the analogous language of Article 47 of the ICSID Arbitration Rules, is identification of the particular “rights” that the applicant claims are appropriate to be “preserved.” This inquiry is suggested by the text, which confines a tribunal’s provisional measures authority to situations in which a measure is considered warranted “*for the preservation of [a party’s] rights.*” Before one can examine the circumstances allegedly supporting a request for such measures – *i.e.*, the well-recognized factors of necessity, urgency and proportionality – it is useful to identify the nature of the underlying “right,”

⁵⁴ UNCITRAL Arbitration Rules, Article 26(2).

⁵⁵ Article 46(1) of the AF Rules (emphasis added).

⁵⁶ **CL-203**, *Eskosol*, ¶ 31 (observing the same for the parallel ICSID Arbitration Rule 39); **CL-209**, *Rachel S. Grynberg, et al. v. Government of Grenada*, ICSID Case No. ARB/10/6, Decision on Respondent’s Application for Security for Costs, 14 October 2010, ¶ 5.5 (“**Grynberg**”) (“Neither Article 47 [of the ICSID Convention] nor Rule 39 [of the ICSID Arbitration Rules] specify the type of provisional measure a Tribunal may recommend. This being the case, and subject to one caveat, a measure requiring the lodging of security for costs ... would not, as a matter of jurisdiction, appear to fall outside a tribunal’s power. That is, unless such a measure cannot be said to relate to the preservation of the applying party’s rights – the preservation of which is the only limiting factor on the nature of a permissible provisional measure.”).

or entitlement, said to be in question. The same inquiry is not necessarily indicated for investment cases proceeding under the UNCITRAL Rules, which do not condition interim measures on a finding of a “right” to be preserved, and which (as noted above) expressly contemplate the possibility of interim measures to preserve assets out of which a subsequent award may be satisfied.

32. The Respondent in this case relies on *RSM*, in which the “right” sought to be preserved by the applicant was said to be a “right to claim reimbursement of the costs it incurs” in the arbitration, in the event it prevailed on the merits and the tribunal granted a claim for recovery of costs.⁵⁷ This was said to “be qualified as a *procedural* right ... and moreover as a *contingent* right which only arises if and when the two conditions ... are met.”⁵⁸ To be analytically more precise, however, what is really sought in security for cost applicants is not preservation of a right to “claim” reimbursement, or even to obtain a costs award as a consequence of such claim. The power of an ICSID tribunal to make such a costs award is enshrined in Article 58(1) of the AF Rules, and neither this power – nor the parties’ ability to ask a tribunal to exercise it in their favor – is obstructed in any way by the presence or absence of assets. Rather, as the tribunal in *Eskosol* observed, “what is really sought in these cases is an assurance that this pursuit will be meaningful, in the sense that there will be assets available at the end of the case against which to enforce any costs award.”⁵⁹
33. In this case, Respondent acknowledges as much, characterizing the “right” at issue as a purported “right to recover its costs, should such an award be made,”⁶⁰ as a “potential right to obtain reimbursement of costs,”⁶¹ and as a “right to be sure that it can recover those costs ...”⁶² As thus phrased, the issue is not a procedural right to request and possibly obtain an award of costs, but instead an asserted entitlement to collect on such an award after the

⁵⁷ **RLA-130**, *RSM*, ¶ 63; see also *id.*, ¶ 68 (referring to “Respondent’s procedural right to claim reimbursement of its expenses,” as “directly linked to the relief it requests” as part of its defense). See also **RLA-132**, *Transglobal*, ¶ 30 (referring to “the right to claim reimbursement of [] arbitration costs”).

⁵⁸ **RLA-130**, *RSM*, ¶ 64 (emphasis in original).

⁵⁹ **CL-203**, *Eskosol*, ¶ 33 (emphasis omitted).

⁶⁰ Application, ¶ 11.

⁶¹ Application, ¶ 11 (quoting **RLA-130**, *RSM*, ¶ 65).

⁶² Application, ¶ 13.

arbitration is concluded. This concern about collection is sometimes framed as a putative right to *effective* relief, considered by some tribunals to be part of the panoply of rights encompassed by the notion of procedural integrity.⁶³

34. Framed as about the ability to obtain effective relief, however, there are potential broader consequences to recognizing the existence of such a “right.” The Tribunal accepts, as did the *Eskosol* tribunal, that respondent States have “genuine concerns” about the eventual enforcement of costs awards against unsuccessful claimants, which have led some States to propose ICSID Rules reforms to protect themselves more systematically.⁶⁴ But at the same time, as the *Eskosol* tribunal noted, “such States would be unhappy to see a similar argument about a right to effective relief used against them, for example by claimants worried about collection risk associated with any final merits award of compensation.”⁶⁵ Moreover, the AF Rules, like the ICSID Convention and ICSID Arbitration Rules, generally do not concern themselves with collection risk. Indeed, while in ICSID Convention cases Article 53(1) of the Convention imposes an obligation on “each party” (States and investors alike) to “abide by and comply with the terms of the award,” and Article 54(1) obliges all Contracting States to “enforce the pecuniary obligations imposed by [an] award within its territories as if it were a final judgment of a court in that State,” Article 54(3) makes explicit that “[e]xecution of the award” is to be governed by national law, including (as confirmed in Article 55) national law related to the immunity of State assets. The point is even more stark under the AF Rules, which do not address compliance, enforcement or execution issues at all, and which make clear that “none of the provisions

⁶³ See **RLA-130**, *RSM*, ¶ 66 (“Costs decisions ... are ... part of the arbitral process the integrity of which deserves protection”) and ¶ 69 (“the integrity of the proceedings ... comprises both substantive and procedural rights, such as, e.g., the preservation of evidence. The right to seek reimbursement of one’s costs in the case of a favorable award likewise constitutes a procedural right in that sense. Hence there has to be an effective mechanism for protecting this right in order to render it meaningful.”); see also *id.*, ¶ 67 (referencing the *Plama* tribunal’s observation that provisional measures “must relate to the requesting party’s ability to have its claims considered and decided by the Arbitral Tribunal and for any arbitral decision ... to be effective and able to be carried out”).

⁶⁴ **CL-203**, *Eskosol*, ¶ 34 (citing T. Jones, “ICSID to explore protections against ‘judgment-proof claimants,’” *Global Arbitration Review*, 21 October 2016, available at <http://globalarbitrationreview.com/article/1069674/icsid-to-explore-protections-against-judgment-proof-claimants>, which discussed an ICSID press release promising, following a request from the Government of Panama, to “seek the input of member states and report on this issue” as part of its forthcoming rules amendment process).

⁶⁵ **CL-203**, *Eskosol*, ¶ 34.

of the Convention shall be applicable to them or to ... awards ... which may be rendered therein.”⁶⁶

35. There is thus a serious question whether, under the AF Rules as currently framed, there is an established “right” for a party to be assured, during the course of an arbitration, of its ability after the case ends to collect on a potential costs award. But ultimately, this Tribunal need not resolve this issue, because even if in principle such a right could be said to exist, the Respondent in this case has not demonstrated the exceptional circumstances necessary to justify a recommendation of provisional measures.
36. In particular, a recommendation of provisional measures should be issued only where doing so is *necessary* to preserve identified rights and *urgently* required for that purpose, in the sense that the requested measure is needed prior to issuance of an award. Tribunals also should ensure that the particular measures requested are *proportionate*, in the sense that they do not impose such undue burdens on the other party as to outweigh, in a balance of equities, the justification for granting them.⁶⁷ Finally, even where these exceptional circumstances are demonstrated, a tribunal should recommend only the *minimum steps* necessary to meet the objectives stated in the Rule, *i.e.*, to preserve the right that is in urgent need of protection.⁶⁸
37. Here, Respondent has not demonstrated that it is either necessary or urgent that Claimants post an irrevocable bank guarantee in the amount of USD 1 million, the relief the Respondent seeks.
38. With respect to the necessity factor, the Application rests heavily, first, on Respondent’s assertion that the Recognition Action Claim is without legal basis, and thus in its view a costs award against LHNV is highly likely to ensue for this claim. But the Tribunal

⁶⁶ AF Rules, Article 3 (“Convention Not Applicable”).

⁶⁷ See generally *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7 (Decision on Claimant’s Request for Provisional Measures), 29 March 2017, available at <https://www.italaw.com/sites/default/files/case-documents/italaw9338.pdf>, ¶¶ 238-242 (“*Nova*”); CL-203, *Eskosol*, ¶ 36 (addressing these factors in the security for costs context); CL-207, *Burimi S.R.L. and Eagle Games S.H.A. v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, 3 May 2012, ¶¶ 34-36 (“*Burimi*”) (citing prior security for cost cases applying these factors).

⁶⁸ *Nova*, ¶ 227.

considers it premature to assess the validity of any legal claim asserted at this stage, particularly one which the Parties themselves tie heavily to credibility assertions regarding two witnesses (Mr. Menezes and Mr. Sabh). Determinations on such issues are not appropriate prior to a hearing, before either witness has been called for examination before the Tribunal.

39. Moreover, the Recognition Action Claim is simply one of several claims at issue in this broader ICSID case. Thus, even if (*arguendo*) the Tribunal *could* appropriately predict the Parties' respective chances of success on this claim, such predictions would not necessarily be determinative of the Tribunal's ultimate assessment of costs in the case as a whole. Such determinations often are made holistically at the conclusion of a case, not on a claim-by-claim basis, not least because parties do not generally present their cost schedules to tribunals broken out by individual claims. Moreover, cost assessments frequently consider numerous factors in addition to the outcome of the various claims, including *inter alia* factors related to the conduct of the proceedings. At this juncture, it is not possible to say, as Respondent would have the Tribunal say, that the outcome of any single claim is more or less likely to result in a cost award one way or the other at the end of the case.
40. Presumably, Respondent would argue that its asserted second and third factors – LHNV's alleged lack of assets and alleged dependency on financing by its owners – renders security of costs necessary even if the outcome of claims cannot yet be predicted, in order to preserve its ability to collect in the event a cost award ultimately is rendered on the Recognition Action Claim. As to these factors, however, Respondent has not demonstrated that a bank guarantee is necessary, in the sense that LHNV is wholly without either assets of its own or access to funding from which it could or would pay a costs award. Indeed, the fact that Claimants have met not only their own funding obligations for this case,⁶⁹ but also those of Respondent itself following its express refusal to pay any share of the arbitration deposits, suggests that Claimants have resources they can call upon when needed to meet their obligations. Whether these resources come from their own assets or

⁶⁹ See **CL-208**, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 Decision on the Parties' Requests for Provisional Measures, 23 June 2015, ¶ 123 (noting that "Claimants have not defaulted on their payment obligations in the present proceedings").

from those of their owners, Respondent has not substantiated its suggestion that Claimants would refuse at the end of the case to make similar arrangements in order to comply with any adverse cost award the Tribunal might render. Notably, this is not a case where there has been a demonstrated history of repeat defaults on legal obligations, much less of hiding assets or otherwise taking bad faith measures to avoid successful enforcement efforts.

41. In other words, this case does not reflect the presence of the additional exceptional and exacerbating factors that led the tribunal in *RSM* to grant security for costs. In that case, the tribunal rested its decision largely on the claimant’s failure to comply with its payment obligations in two prior ICSID cases, defaulting both on the advances requested by ICSID to fund the proceedings and on an eventual award requiring it to compensate the respondent for costs.⁷⁰ The *RSM* tribunal distinguished other cases concluding that “financial limitations as such do not provide a sufficient basis for ordering security for costs,” expressly because of “Claimant’s consistent procedural history in other ICSID and non-ICSID proceedings,” which made clear to the tribunal that the claimant likewise would be unwilling or unable to pay any costs award in the latest proceeding.⁷¹ In this case, by contrast, the only prior instance of non-payment cited by Respondent concerned a scenario in which Respondent admits that it “was able to recover the sum through remaining assets in Laos.”⁷² While this may not be the typical procedure used for satisfaction of cost award obligations, it is notable that Respondent does not contend the same avenue would be unavailable to meet any comparable cost award obligations imposed by this Tribunal at the conclusion of the case. Notably, Respondent does not allege that the Claimants’ “remaining assets in Laos” which it previously used to satisfy an outstanding costs award have now fallen below the USD 1 million threshold that it seeks to secure through its Application. In such circumstances, Respondent has not demonstrated that the relief sought in the Application constitutes the only mechanism through which Respondent meaningfully could recover on the putative costs award to which it claims it eventually will become entitled in connection with the Recognition Action Claim.

⁷⁰ **RLA-130**, *RSM*, ¶¶ 78-81.

⁷¹ **RLA-130**, *RSM*, ¶ 82.

⁷² Application, n.49.

42. In these circumstances, Respondent has not met the requirement of showing necessity for the provisional measure that it seeks. Nor has it met the requirement of showing urgency of its asserted need for relief. In connection with urgency, the Tribunal notes that Respondent filed its Application more than six months after the Tribunal determined in PO3 that LHNV's Recognition Action Claim could proceed, and roughly two months after Claimants confirmed that Mr. Menezes did not rely on written communications from Mr. Sabh about the Recognition Action proceedings,⁷³ which is Respondent's stated basis for alleging the claim has "no basis ... whatsoever."⁷⁴ As for Respondent's two other stated reasons for its Application – LHNV's status as a "corporate investment vehicle" allegedly with limited assets and likely dependent on its shareholder(s) for arbitration financing⁷⁵ – Respondent has not suggested any of this is newly discovered information. Nor has it suggested any changed circumstances in recent months that have left it less likely to be able to collect on any eventual cost award. Most importantly, Respondent has not suggested any rapidly developing circumstances that are likely to change the *status quo* between now and the conclusion of this case, creating a sudden urgency to obtain relief.
43. Finally, with respect to the issue of proportionality,⁷⁶ the Tribunal considers Respondent's refusal to contribute to the case deposits to be a further equitable factor militating against its request for the provisional measures it seeks. A party that seeks to avail itself of discretionary relief under the ICSID framework should not, at the same time, insist on the other party funding in the entirety the very arbitral procedures necessary to consider its application.

⁷³ Application, ¶¶ 20-21 (citing Claimants' Objections to Respondent's Disclosure Requests, which were provided Respondent on 27 April 2018 in accordance with Procedural Order No. 4).

⁷⁴ Application, ¶¶ 5, 23. As noted above, LHNV contends that there is other documentary evidence supporting its Recognition Action Claim, including Mr. Sabh's previous statements to the Lao courts. Response, ¶¶ 48, 69.

⁷⁵ Application, ¶¶ 31-34.

⁷⁶ The Tribunal does not address the additional factor of proportionality that arises in connection with some security for cost applications, namely whether a requirement of posting bank guarantees or otherwise setting aside significant assets could impair a party's ability to pursue its claims. LHNV has not rested on such arguments. However, a proportionality analysis is particularly critical in cases where the burden of a potential measure is said to be impinge, at least potentially, on a party's ability to pursue its claims or defenses at ICSID. A tribunal should not lightly recommend a provisional measure that could impede access to justice.

B. RESPONDENT’S REQUEST TO STRIKE PORTIONS OF LHNV’S RESPONSE

44. The Tribunal also denies Respondent’s request that the Tribunal “strike . . . from the record” LHNV’s allegations, contained in its Response, that the Sabh Statement was the result of witness intimidation or coercion.⁷⁷
45. The Tribunal noted Claimants’ offer to respond to Respondent’s 13 July 2018 if the Tribunal wished. In its judgment, however, the Tribunal considered that additional correspondence on this issue was likely to result, not in an improvement in the tone of the Parties’ exchanges, but rather in additional strongly worded allegations and accusations that would inflame, rather than alleviate, the evident tension between the Parties.
46. Moreover, the Tribunal considered additional exchanges on this issue unnecessary to the outcome, because in its view, the relief requested – of a Tribunal order striking from the arbitral record specific statements a Party made in an otherwise authorized filing – is generally inappropriate in the ICSID process. The statements were made by LHNV, which is a fact of record. Unless LHNV voluntarily retracts them in due course (which would not require Tribunal permission), the statements remain part of its case. The Tribunal cannot order a Party not to pursue assertions it has propounded as part of its considered legal strategy, just because those assertions are (as the Tribunal agrees) of a very serious nature.
47. Of course, if LHNV maintains these serious allegations, it will bear the burden of proving them in due course. Indeed, both Parties will bear the burden of proving their various allegations against each other, some of which are likewise very serious. Both Parties will also bear the potential consequences (in terms of possible cost awards or otherwise) of pursuing assertions that they ultimately cannot prove. The Tribunal assumes the Parties take these risks into account, in considering whether to make serious allegations of the sort at issue. But these ultimately are the Parties’ decisions to make, and are not for the Tribunal to regulate in advance, by “striking” allegations from the record or forbidding a Party from pursuing them as it wishes.

⁷⁷ Respondent’s letter of 13 July 2018, p. 2.

48. Finally, in the relatively few months remaining before this case goes to hearings in January 2019, the Tribunal prefers that the Parties focus their energies on preparing to meet their respective burdens of proof, rather than on ancillary letter-writing and applications which will not serve the overall efficiency of these proceedings.

V. DECISION

49. For the reasons set forth above, the Tribunal decides as follows:

- a. The Respondent's Application for Security for Costs, dated 29 June 2018, is hereby DENIED;
- b. The Respondent's request to "strike ... from the record" portions of LHNV's Response, dated 9 July 2017, is hereby DENIED; and
- c. The Tribunal defers for a later stage of this case any allocation of costs in connection with these matters.

On behalf of the Tribunal,

[Signed]

Ms. Jean Kalicki
President of the Tribunal
Date: 26 July 2018