THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/20/11

PETERIS PILDEGOVICS AND SIA NORTH STAR

CLAIMANTS

V.

THE KINGDOM OF NORWAY

RESPONDENT

RESPONSE TO RESPONDENT'S REQUEST FOR SECURITY FOR COSTS AND APPLICANTS' REQUEST FOR RE-APPORTIONMENT OF COSTS

18 NOVEMBER 2024

Savoie Arbitration s.e.l.a.s.u.
26 rue Vignon
75009 Paris

I. INTRODUCTION

1. Pursuant to the schedule set by the Committee in ICSID's letter of 29 October 2024, the Applicants hereby provide their response to Respondent's application for security for costs. The Applicants also request the re-apportionment of advances in the manner described below.

2. Respondent's request for security for costs should be denied for the following reasons. First, the Committee does not have the power to grant the request as framed, that is, as a provisional measure under Article 47 of the Convention (or Rule 39 of the 2006 ICSID Arbitration Rules), since an *ad hoc* Committee cannot grant a provisional measure under that provision (**II**). Second, even if the Committee could grant provisional measures under the powers existing in either Article 47 of the Convention or Article 39 of the 2006 Arbitration Rules, the conditions for provisional measures are not met (**III**). Third, while Respondent has not requested security for costs under Article 44 of the Convention, and as such the Committee cannot grant a request not made, a request for security for costs properly made under that provision would still have to be denied (**IV**).

3. Finally, Applicants request that the Committee re-apportion the advances so that any decision on security for costs is paid by Respondent (**V**).

II. THE COMMITTEE DOES NOT HAVE THE POWER TO GRANT THE REQUEST AS FRAMED, UNDER ARTICLE 47 OF THE ICSID CONVENTION

4. Respondent's request for security for costs can be dismissed summarily on the sole basis that the Committee does not have the power to order security for costs on the basis requested by the Respondent.

5. Respondent requests security for costs on the following basis: [1]

> *This request is made* ***under Article 47 of the ICSID Convention****, which provides that the Tribunal may "recommend any provisional measures which*

[1] Respondent's Application for Security for Costs, 8 November 2024, para. 3.

should be taken to preserve the rights of either party". See also ICSID Arbitration Rule 39(1)2 which provides that

> *At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.*

[Emphasis added]

6. However, the ICSID Convention is clear that the powers of an *ad hoc* Committee **do not include** the power to issue provisional measures pursuant to Article 47 of the Convention. Nor can Rule 39 of the ICSID Arbitration Rules provide a basis for ordering security for costs as a provisional measure in annulment proceedings.

7. Paragraph 4 of Article 52 of the Convention, on annulment, makes this clear:

> *(4) The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply mutatis mutandis to proceedings before the Committee.*

8. It is therefore clear, on the basis of the text of Article 52(4) of the Convention that *ad hoc* Committees cannot issue provisional measures in the usual sense understood pursuant to Article 47 of the Convention, since Article 47 of the Convention does not apply to *ad hoc* Committees.

9. According to the authoritative commentary on the ICSID Convention, the *travaux préparatoires* to the Convention confirm the same: [2]

> *Art. 47, conferring upon tribunals the power to adopt provisional measures, is not mentioned in Art. 52(4). From the negotiating history of the ICSID Convention, there is an argument that* ad hoc *committees were deliberately not authorized to adopt provisional measures. The Preliminary Draft of the Convention included the possibility for an* ad hoc *committee to recommend any provisional measures necessary for the protection of the rights of the parties (History, Vol. I, p. 238). However, the power to adopt provisional measures does not appear in subsequent drafts (ibid., p. 240). A suggestion to give an* ad

[2] Schill, Malintoppi, Reinisch, Schreuer, Sinclair, *Schreuer's Commentary on the ICSID Convention*, Third Edition, Volume 2, 2022, **AL-0017**, p. 1398, para. 684.

> hoc *committee the power to continue or revive provisional measures recommended by the tribunal was rejected (History, Vol. II, p. 856). The idea to give the* ad hoc *committee the formal power to recommend provisional measures was also rejected in a formal vote (ibid.). Such power, therefore, does not appear in the final text of the Convention (but see paras. 761-790* infra*).*

10. It is noteworthy that "*paras. 761-790*" of the *Schreuer Commentary* referred to in the above quote for the apparent proposition that there may be an exception to the fact an annulment committee cannot issue provisional measures, refer to the "posting of security" in the context of stays of enforcement ordered by ad hoc committees.[3] As put by the *ad hoc* Committee in the *von Pezold* case (while citing to the second edition of the Schreuer commentary): [4]

> *The omission of Article 47 from the list of the relevant provisions in Article 52(4) suggests that the power of ICSID annulment committees to recommend provisional measures has been intentionally excluded, possibly because under Article 52(5) of the Convention they may stay enforcement of an award pending their decision on annulment, which is effectively a special form of interim relief.*

11. Therefore, the drafters of the ICSID Convention would have seen the powers established by Article 52(5), on stay of enforcement, for *ad hoc* committees, as the *lex specialis* of provisional measures for *ad hoc* committees, while generally excluding other types of provisional measures.

12. To Applicants' best knowledge, at least in any publicly available decision,[5] no *ad hoc* committee has ever confirmed that provisional measures may be issued by an *ad hoc* Committee pursuant to Article 47 of the ICSID Convention. All *ad hoc* committees that

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3 Schill, Malintoppi, Reinisch, Schreuer, Sinclair, *Schreuer's Commentary on the ICSID Convention*, Third Edition, Volume 2, 2022, **AL-0017**, pp. 1419-1427, paras. 761-790.

4 *Bernhard von Pezold and others v. Republic of Zimbabwe (ICSID Case No. ARB/10/15) – Annulment Proceeding – AND – Border Timbers Limited and others v. Republic of Zimbabwe (ICSID Case No. ARB/10/25) – Annulment Proceeding*, Decision on the Applicant's Application for Provisional Measures, 17 March 2016, **AL-0019**, para. 30, including footnote 49 (where footnote 49 refers to the following source for this proposition: Christoph Schreuer with Loretta Malintoppi, August Reinisch and Anthony Sinclair: "The ICSID Convention: A Commentary," 2nd edition, p. 1055).

5 There appears to exist one decision by an *ad hoc* Committee actually awarded security for costs, but the decision is not public nor are the grounds under which the order was made, *ie* whether it was under Article 47 or Article 44 of the Convention. See: Alison Ross, "Annulment committee challenged in case against Oman", Global Arbitration Review, 18 October 2023, **A-0140**.

are known to have been confronted with the question appear to have avoided it.[6] While the *ad hoc* committees in *Commerce Group v. El Salvador*, *von Pezold and others v. Zimbabwe*, and *Libananco v. Turkey* were able to avoid the issue, this should not the case here. That is because the sole basis for the request for security for costs is as a "provisional measure" under Article 47 of the Convention. This Committee has thus no other choice that to decide the matter and confirm that it has no power to order what is being requested.

13. Moreover, Rule 39 of the 2006 Arbitration Rules, which is referenced in Respondent's request, cannot found the basis for a security for costs order, by an annulment committee, as a provisional measure. While Rule 53 of the 2006 ICSID Arbitration Rules states that those rules apply *mutatis mutandis* to annulment proceedings, no ICSID annulment committee has ever held that Rule 39 applies to a standalone request for security for costs, distinct from a ruling on stay of enforcement under Article 52(5) of the Convention.[7]

14. As such, the Committee can dismiss Respondent's application on the sole basis that it does not have the power to issue security for costs, as a provisional measure, pursuant to Article 47 of the ICSID Convention, or Rule 39 of the 2006 ICSID Arbitration Rules. Respondent must be held to how it has pleaded its security for costs request.

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6 See Schill, Malintoppi, Reinisch, Schreuer, Sinclair, *Schreuer's Commentary on the ICSID Convention*, Third Edition, Volume 2, 2022, **AL-0017**, pp. 1398-1399, paras. 684-688. The *ad hoc* committees in *Commerce Group v. El Salvador*, *von Pezold and others v. Zimbabwe*, as well as in *Libananco v. Turkey*, all avoided deciding the issue of whether an ICSID annulment committee can order provisional measures under Article 47 of the Convention: **AL-0019**, para. 32; **AL-0025**, para. 42. The Schreuer Commentary refers in that section to the 17 April 2017 Decision on Stay of Enforcement in the *Standard Chartered Bank v. TANESCO* case, for the proposition that "the *ad hoc* Committee concluded that it did have the power to adopt provisional measures". However, it is clear from the decision that that Committee that it is only interpreting Article 52(5) of the ICSID Convention, in the context of a stay of enforcement decision, not in request for provisional measures, such as security for costs, distinct of a stay of enforcement decision: **AL-0018**, paras. 79-80.

7 As mentioned in the previous footnote, the 17 April 2017 Decision on Stay of Enforcement in the *Standard Chartered Bank v. TANESCO* case cannot stand for the proposition that Rule 39 of the 2006 ICSID Arbitration Rules establishes power for an ad hoc committee to order provisional measures, distinct from a stay of enforcement decision, that can require security for costs in annulment proceedings, because of Rule 53, which provides: "*The provisions of these Rules shall apply* mutatis mutandis *to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee*." The definition of "mutatis mutandis" is: "*used when comparing two or more things to say that although changes will be necessary in order to take account of different situations, the basic point remains the same*". See "Mutatis Mutandis": Cambridge Dictionary online, consulted 18 November 2024, **A-0141**. If the ICSID Convention makes clear that Article 47, from which Rule 39 stems, does not apply in annulment proceedings, then an annulment committee cannot apply Rule 39 where the request is based on Article 47 of the Convention. However, if a request is based on Article 52(5) of the ICSID Convention, which clearly grants to power to *ad hoc* committees to rule on stays of enforcement, and considering that stays are special types of provisional measures which committees are to rule on, then there is nothing preventing the analysis of the *Standard Chartered Bank v. TANESCO* committee where, in the context of a power that exists (ruling on stays), it inspired itself of a more detailed rule on provisional measures such as Rule 39, to justify ordering security as a condition for a stay.

III. Even if the Committee could grant security for costs as a provisional measure under Article 47 of the ICSID Convention or Rule 39 of the ICSID Arbitration Rules, the conditions to grant such an order are not met

15. In the alternative, the conditions for granting security for costs as a provisional measure under Article 47 of the ICSID Convention or Rule 39 of the 2006 ICSID Arbitration Rules are not met.

16. Based on caselaw cited by Respondent,[8] for provisional measures ordering security for costs to be adopted, the following would have to be shown: 1) there is a right to protect; 2) there must be exceptional circumstances; 3) the security ordered must be necessary and proportionate; and 4) the application must be timely and urgent. None of these requirements are met.

A. RESPONDENT HAS NO RIGHT TO PROTECT

17. First, there is no right to protect, despite Respondent's assertion to the contrary, which should simply end the analysis.

18. In the course of proceedings, a right to costs is, at best, a contingent right.[9]

19. However, and more importantly, the costs practice in annulment proceedings makes the argument for a "right" to costs, in particular for a respondent in annulment proceedings, extremely unlikely.

20. ICSID's most recent "Background Paper on Annulment" of March 2024 shows that in the majority of cases (*ie* 56 of 102 decisions up until 31 December 2023) where the application for annulment is rejected, *ad hoc* committees have ruled that each party should bear its "own" costs (*ie* their own legal costs).[10] Interestingly, even where the application for annulment was rejected, in 16 of 102 cases, the "costs of the annulment proceedings" (*ie*, the advances which Applicants are currently the only ones paying)

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8 *Vercara, LLC (formerly Security Services, LLC, formerly Neustar, Inc.) v. Republic of Colombia*, ICSID Case No. ARB/20/7, Decision on Security for Costs, 27 September 2023, **RL-0281-ENG**, paras. 82-84.

9 *Vercara, LLC (formerly Security Services, LLC, formerly Neustar, Inc.) v. Republic of Colombia*, ICSID Case No. ARB/20/7, Decision on Security for Costs, 27 September 2023, **RL-0281-ENG**, para. 82.

10 **AL-0007**, p. 32.

were ordered by ad hoc committees to be shared equally.[11] This means that even if Applicants lose on the entire application (which should not happen, since Respondent has already recognized that at least part of the costs award is manifestly incorrect), it is possible that Respondent would have to share equally in the costs advances paid by Applicants.

21. Where the award is annulled in whole or in part (which, again, is likely to happen since Respondent has already recognized that at least part of the costs award is manifestly incorrect), then the vast majority of decisions have allowed both "costs of the proceedings" (in 15 out of 23 decisions) and "own costs" (20 out of 23 decisions) to applicants.[12]

22. If anyone has a right, or even a contigent right, that should be protected in respect of costs in the present proceedings, it is Applicants, not Respondent.

23. To Applicants' best knowledge, there is no publicly available decision by an ICSID *ad hoc* Committee which has ever recognized a "right" to costs, for the purposes of a provisional measures request under Article 47 of the Convention or Rule 39 of the Arbitration Rules, for a respondent in annulment proceedings.

B. THERE ARE NO EXCEPTIONAL CIRCUMSTANCES

24. Second, the are no "exceptional circumstances" of the sort required to grant security for costs as a provisional measures.

25. Respondent invokes Applicants' delay to pay the advance as a ground for exceptional circumstances. At least one *ad hoc* committee has held that delay in paying advances did not, in and of itself, create exceptional circumstances. Respondent's reference to the *RSM v. St. Lucia* is also inapposite. In that case,[13] the claimant to a new arbitration (against St. Lucia) had in prior ICSID proceedings (against Grenada) initiated a new arbitration, to avoid *res judicata* of a first award, while failing to pay the costs of annulment proceedings it was pursuing in parallel. That party had also a large number of unpaid other costs decisions.

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11 **AL-0007**, p. 32.

12 **AL-0007**, p. 32.

13 *RSM Production Corporation (Claimant) and Saint Lucia (Respondent)*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's request for Security for Costs, 13 August 2014, **AL-0022**.

26. Respondent also invokes Applicants' alleged impecuniosity, and specific financial circumsntances, as an exceptional circumstance. No one is hiding the fact Applicants currently are facing financial difficulties, while at the same time North Star is seeking to reorganize its affairs, make arrangements with creditors, and develop further business. However, in and of itself, this cannot create exceptional circumstances.

27. Delay in paying the advances and financial difficulties are inextricably linked and cannot compound each other into exceptional circumstances. Such a conclusion would be contrary to the principle that mere impecuniosity, which may also create delay in proceedings, is an excptional circumstance. As for Respondent's attempts to draw conclusions from North Star's financial, they do not change the fact that mere financial difficulty, or even impecuniosity is not, of itself, an exceptional circumstance justifying a security for costs order. Moreover, the assertion that [redacted] would create an even more difficult financial situation for North Star[14] is simply absurd. As stated in the application for legal protection of 22 October 2024 for North Star, [redacted],[15] and thus potentially generating significant future revenues.

28. Moreover, despite what Respondent wishes to believe, it is clearly its own actions (whether alone or in conjunction with the Russian Federation – a question the arbitral tribunal actually refused to decide, and which constitutes a ground for annulment), which are the direct and proximate cause of Applicants' long-term financial woes.

29. Exceptional circumstances leading to an order of security for costs usually exist where there has been some form of improper behaviour by the party against whom the order is sought. This was the case in *RSM v. Saint Lucia*, as described above. This situation is in no way comparable to the present one. In the *Kazmin* case invoked by Respondent, there were serious money laundering allegations against the claimant in

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14 Respondent's Application for Security for Costs, 8 November 2024, para. 12.

15 Application of North Star for Lega Protection, 22 October 2024, **A-0137** [redacted]

the arbitration.[16] In the *Attila Dogan* case,[17] which while not invoked by Respondent, an *ad hoc* Committee appears to have issued a security for costs order, there appears to have been allegations of fraud and illegality in respect of the making of the investment (which would have been why the initial arbitral claim was dismissed).

30. In *Dirk Herzig*, also invoked by Respondent, there was an issue with a third party funder not assuming adverse costs of an arbitration claim brought by an insolvency administrator.[18] The decision ordering security divided, with one of the three arbitrators dissenting, because of access to justice issues. In any event, the order initially requiring security was later revoked by the tribunal because it was impossible for the claimant to obtain the type of security required.[19]

31. It is therefore clear there are no "exceptional circumstances" that can be established that may justify an order for security for costs as a provisional measure under either Article 47 of the Convention or Rule 39 of the 2006 ICSID Arbitration Rules.

C. THE SECURITY REQUIRED BY RESPONDENT IS NEITHER NECESSARY NOR PROPORTIONATE

32. Third, the security required by Respondent is neither necessary nor proportionate.

33. In its Decision on Stay of Enforcement of 7 November 2024, at paragraph 78, the Committee has already ruled as follows:

> *In relation to the balance of hardship, that factor favours the Applicants. The Committee considers that there is a real risk that if the stay were not to be continued, the Applicants' access to justice would be impeded. Indeed, these proceedings were suspended for several months while the Applicants sought to secure the necessary funds to support the costs of this proceeding. The amount of the Award is much larger, as noted in paragraph 76 above. It seems evident that ordering payment of this sum at this juncture could well threaten the continued ability of Applicants to pursue these proceedings.*

34. As such, the Committee ruled that allowing Respondent to enforce a costs award of EUR 1.4 million would likely threaten Applicants' access to justice. The current request

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16 **RL-0277-ENG;** see also Applicants' Letter of 10 October 2024 on Respondent's alleged application for security for costs, p. 3.

17 **A-0040**.

18 *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, 27 January 2020, **AL-0024**, para. 57.

19 Lisa Bohmer, "Majority in Unionmatex v. Turkmenistan agrees to rescind security for costs order", 26 June 2020, **A-0142**.

for security is as follows, and within a similar financial range, *ie* that Applicants "*deposit USD 1,000,000 into an escrow account or provide the same sum as an unconditional and irrevocable bank guarantee*".

35. This request has even more potential to threaten Appllicants' right of access to justice, since failure to post such security could lead to the termination of the proceedings, without a decision.

36. Moreover, Respondent has an obligation under relevant international law to respect Applicant's access to justice. Respondent has invoked EU law as a reason for its initiation of the termination of the Latvia-Norway BIT. EU law requires that states ensure the access to justice of physical persons and small and medium entrprises to investement treaty arbitration, as per the CJEU's *Opinion 1/17*. [2021] Respondent's current request for security for costs, which is a second attempt, following the decision on stay of enforcement, to essentially block Applicants' annulment application, is likely of breach of Respondent's international obligations towards both Latvia and Applicants. This, in and of itself, renders the request for security for costs disproportionate. The fact Applicants' long term financial woes were caused by Respondent is also a reason why the request is disproportionate.

37. The request is also unnecessary in that the Decision on Stay of enforcement has already decided what is, in essence, the same issue. Further, Mr. Pildegovics has now provided an undertaking, as requested by the Committee, to pay adverse costs. In addition, the legal protection proceedings in Latvia are the place to establish a payment plan with respect to North Star's various obligations. As per the decision opening the legal protection proceedings, North Star has until [redacted] to propose and try to agree to a plan.[22] All outstanding obligations will have to be taken into consideration. Having the Committee grant the order sought would interfere with those ongoing proceedings, which Applicants are to promptly keep Respondent and the Committee informed of, as per both the Decision on Stay of Enforcement, and Mr. Pildegovics' undertaking. Furthermore, it remains premature to judge North Star's financial

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20 Lisa Bohmer, "Majority in Unionmatex v. Turkmenistan agrees to rescind security for costs order", 26 June 2020, **A-0142**.

21 Opinion 1/17, Court of Justice of the European Union, 30 April 2019, **AL-0013**, para. 58 ("Further, the CETA does not currently offer the possibility of the grant of legal aid, although the right to such aid in so far as necessary to ensure access to justice is expressly laid down in the third paragraph of Article 47 of the Charter, the Court having held, in the judgment of 22 December 2010, DEB (C-279/09, EU:C:2010:811), that that right extends to enterprises.").

22 Latvian court decision on North Star, 25 October 2025, **A-0139**.

situation. As explained in the application for legal protection and above, North Star has plans [redacted].

D. THE APPLICATION IS NEITHER TIMELY NOR URGENT

38. Fourth, the application is neither timely nor urgent.

39. Respondent has known of the annulment application since at least its registration, on 27 February 2024. Respondent's application for security for costs was made only on 8 November 2024, more than 8 months later. Even if Respondent was considered to have made its application on 10 October 2024 (in what was correspondence indicating intention to make an application but without making a specific request), this would still be more than 7 months after the registration of the application for annulment, and about 6 months after the constitution of the *ad hoc* Committee. As such, the application is untimely and also cannot be urgent. For example, North Star is currently reorganizing its affairs under court supervision in Latvia and has until 27 February 2025 to try to agree with its creditors. At the same time, North Star has plans [redacted].

IV. NO SECURITY FOR COSTS ORDER COULD BE GRANTED UNDER ARTICLE 44 OF THE ICSID CONVENTION

40. While there is authority that a security for costs order could be granted pursuant to an *ad hoc* Committee's general powers to organize (and protect the integrity of) proceedings under Article 44 of the ICSID Convention, this is not the ground under which the security for costs order is sought. As such, no order under that provision can be granted. In any event, even if a request was properly made under Article 44 of the Convention, no order for security for costs could be made.

41. A request under Article 44 of the Convention would have to be made on the basis that, absent such an order, there would be a threat to the integrity of the proceedings. This would not about "protecting a right" of Respondent, but rather about protecting the integrity of the present annulment proceedings.

42. In *Commerce Group v. El Salvador*, the *ad hoc* Committee held as follows:[23]

> *the exercise of an international tribunal's inherent powers to safeguard the integrity of the proceedings is an extraordinary control and is to be resorted to only in compelling circumstances.*
>
> *As the guardian of the integrity of the proceeding, the Committee may, in the appropriate situation, use its inherent powers to order security for costs. Howoever, the power to order security for costs should be exercised only in extreme circumstances, for example, where abuse or serious misconduct has been evidenced.*

43. It is obvious that no abuse nor serious misconduct by Applicants has occurred, since none is actually alleged. Had Respondent based its application for security for costs on the Committee's power to protect the integrity of the proceedings – which it has not – such a request could not, in any event, succeed.

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[23] *Commerce Group v. El Salvador*, ICSID Case No. ARB/09/17 (Annulment Proceeding), Decision on El Salvador's Application for Security for Costs, 20 September 2012, **AL-0025**, paras. 44-45.

V. THE COMMITTEE SHOULD RE-APPORTION THE ADVANCES SO THAT ANY DECISION ON SECURITY FOR COSTS IS PAID BY RESPONDENT

44. Applicants hereby request that the Committee order Respondent to immediately advance USD 50,000 for the costs of the proceedings in order to pay for the consideration of its application for security for costs. The payment should be made prior to any decision of the Committee on this application.

45. Applicants' position is that the Committee should not spend time on Respondent's application until Respondent has participated in the advances for the present proceedings. Applicants also seek that in any decision on security for costs, the Committee further re-apportion future cost advances made by ICSID so that the Respondent participate in any further advances to cover the time spent by the Committee to decide the security for costs application for which the Respondent has not yet contributed at that time.

46. It is well established that the Committee has the power to re-apportion costs advances.

47. Under Regulation 15 of the current ICSID Administrative and Financial Regulations, the Committee can, in the application of its discretion, re-apportion how the calls for funds are borne in the proceedings.

48. In full, Regulation 15 provides:

> **Regulation 15: Payments to the Centre**
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> (1) To enable the Centre to pay the costs referred to in Regulation 14, the parties shall make payments to the Centre as follows:
>
> > (a) upon registration of a Request for arbitration or conciliation, the Secretary-General shall request the claimant to make a payment to defray the estimated costs of the proceeding through the first session of the Commission or Tribunal, which shall be considered partial payment by the claimant of the payment referred to in paragraph (1)(b);
> >
> > (b) upon constitution of a Commission, Tribunal or Committee, the Secretary-General shall request the parties to make a payment to defray the estimated costs of the subsequent phase of the proceeding; and

(c) the Secretary-General may request that the parties make supplementary payments at any time if required to defray the estimated costs of the proceeding.

(2) In conciliation proceedings, each party shall pay one half of the payments referred to in paragraph (1)(b) and (c). In arbitration proceedings, each party shall pay one half of the payments referred to in paragraph (1)(b) and (c), **unless a different division is agreed to by the parties or ordered by the Tribunal**. Payment of these sums is without prejudice to the Tribunal's final decision on costs pursuant to Article 61(2) of the Convention.

(3) The Centre shall provide a statement of the case account to the parties with each request for payment and at any other time upon request of a party.

(4) This Regulation shall apply to requests for a supplementary decision on or rectification of an Award, applications for interpretation or revision of an Award, and requests for resubmission of the dispute.

(5) This Regulation shall apply to applications for annulment of an Award, except that the applicant shall be solely responsible for making the payments requested by the Secretary-General.

[Emphasis added]

49. Reading together paragraphs (2) and (5) of Regulation 15 confirms that an *ad hoc* Committee may order a "different division" of calls for funds than what is normally provided under Regulation 15 – which establishes the general principle that, usually, an applicant to annulment proceedings pays 100% of requested calls.

50. This is confirmed by the ICSID website, which explains: [24]

> In annulment proceedings: the applicant(s) pay(s) the full amount of each advance, **unless the ad hoc Committee orders** or the parties agree **otherwise** (*ICSID Administrative and Financial Regulation 15(5)*).
>
> [Emphasis added]

51. The power to re-apportion costs advances under Regulation 15 has also been applied in at least two cases by ICSID arbitration tribunals, *BSG Resources v. Guinea* and *RSM v. St. Lucia*. [25]

52. While re-apportionment of costs advances (whether under the 50-50 principle in ICSID arbitrations, or under the principle that the applicant in annulment proceedings

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24 https://icsid.worldbank.org/services/cost-of-proceedings

25 *BSG Resources Limited v. Republic of Guinea,* ICSID Case No. ARB/14/22, Procedural Order No. 3, Respondent's Request for Provisional Measures, 25 November 2015, **AL-0020**, paras. 63-64, citing to *RSM Production Corporation (Claimant) and Saint Lucia (Respondent)*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's request for provisional measures, 12 December 2013, **AL-0023**, paras. 49-50, 74.

advances 100% of the costs to ICSID) is the exception rather than the rule, it can be ordered for "good cause".

53. In *BSG Resources v. Guinea*, the ICSID tribunal held:[26]

> *RSM v. St. Lucia* is the only ICSID case that has accepted to change the fifty-fifty division of advances. The *RSM* tribunal considered that a variation from the fifty-fifty rule required showing good cause. While it added that this standard is less stringent than the "exceptional circumstances" threshold applied in connection with provisional measures, it explained that it "had no occation here to conceive of and address what sort of circumstances might generally amount to "good cause" for varying the presumption that each Party advances one-half of ongoing administrative expenses." It thus focused its analysis on the specific circumstnces of the case and was led to alter the presumptive allocation of advances as a result of a combination of circumstances, specifically "(1) that Claimant's record concerning payment of these administrative expenses in two prior ICSID proceedings gives rise to substantial doubt about either its willingness or ability (or both) to pay any award of such expenses and (2) that, far from allaying these doubts, the circumsntances of this proceeding thus far compound them." Consequently, the tribunal found that there was a "reasonable inference" that the Claimant would never pay the costs unless it was required to pay in advance." …
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> The Tribunal agrees with the Parties that the "good cause" standard outlined in *RSM v. St. Lucia* should not be mistaken for the particular circumstances of that case. The latter are certainly not the only possible circumstances under which advances on costs may be allocated other than in equal shares. Still, an assessment of the circumstances of that case shows that a departure from the fifty-fifty apportionment cost advance must rest on strong grounds and can only prevail in exceptional circumstances.

54. In *BSG Resources v. Guinea*, the tribunal reapportioned the advances on a 75%-25% basis (with 75% borne by the claimant) because of exceptional economic

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[26] *BSG Resources Limited v. Republic of Guinea,* ICSID Case No. ARB/14/22, Procedural Order No. 3, Respondent's Request for Provisional Measures, 25 November 2015, **AL-0020**, paras. 63-64, citing to *RSM Production Corporation (Claimant) and Saint Lucia (Respondent)*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's request for provisional measures, 12 December 2013, **AL-0023**, paras. 49-50, 74.

circumstances affecting Guinea, *ie* the Ebola crisis. In *RSM v. St. Lucia*, the re-apportionment was based on the record of lack of or delayed payment in other ICSID proceedings.[27]

55. Here, there is good cause for Applicants not to have to bear, at the outset, the cost of Respondent's security for costs application.

56. First, without a re-apportionment of advances, Applicants will have to bear, at the outset, the cost of the Committee's time to decide the security for costs application. However, as is well established, this will have an adverse effect on Applicants' right of access to justice to have the annulment application decided. This is so because the proceedings will cost more to Applicants in terms of advances because of this application. Respondent, in principle does not have to make any advances to ICSID.

57. Second, while Applicants are perhaps to bear the costs, in the first instance, and prior to the Committee's final apportionment of costs in its final decision on annulment, of some procedural applications made by Respondent, this should not be the case where the application is, in essence, an abusive attempt to prevent Applicants' application from being heard, or to drain Applicants' scarce financial resources.

58. Applicants have warned Respondent twice, on 10 October 2024 and 4 November 2024, that it shoud withdraw its application, notably because it was bound to fail. In that correspondence, Applicants warned they would seek a re-apportionment of costs should Respondent persist.

59. Nonetheless, Respondent persisted with what can only be characterized as a half-baked application, which appears aimed primarily at wasting Applicants' scarce resources, as well as the Committee's time.

60. As shown above, the application is made under a provision of the ICSID Convention – Article 47 – which is excluded from the powers of an *ad hoc* Committee. Respondent fails to explain why it should succeed in any event, or why the Committee has the power to grant what is requested.

61. Moreoever, the application for security for costs was submitted **after** the Committee's Decision on Stay of Enforcement of 7 November 2024. That decision makes clear that

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[27] *RSM Production Corporation (Claimant) and Saint Lucia (Respondent)*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's request for provisional measures, 12 December 2013, **AL-0023**, paras. 49-50, 74.

Applicants' right of access to justice must not be impeded and that in the circumstances there is nothing that justifies preventing their right to have their application for annulment heard. The Respondent should have taken note of the decision and not proceeded with its application.

62. Third, preventing Applicants' annulment application from being heard would also be in contradiction with Respondent's invocation of EU law to justify the termination of the BIT, while avoiding the consequences of EU law when it comes to ensuring the right of access to justice of Applicants.

63. If Respondent wishes to have a security for costs application heard in this annulment proceeding, especially where it has failed to lift a stay of enforcement of the costs award, and where creating additional costs to the Applicants will likely impede access to justice, then Respondent should advance the costs of having such a security for costs application decided by the *ad hoc* Commmittee. This is even more so where the application for security for costs fails on its face as being requested in a manner where the *ad hoc* Committee has no power to grant it.

64. As such, the Applicants request that the Committee re-apportion costs advances in the following manner:

> That the Committee order Respondent to immediately advance USD 50,000 for the costs of the proceedings in order to pay for the consideration of its application for security for costs. The payment must be made prior to any decision of the Committee on this application, or else the Committee will not issue any decision on Respondent's security for costs application.
>
> In any decision on security for costs, the Committee is asked to further re-apportion future cost advances made by ICSID so that the Respondent participate in any further advances to cover the time spent by the Committee to decide the security for costs application for which the Respondent has not yet contributed at that time.

Conclusion and Prayer for Relief

65. For the reasons set out above the Applicants request:

- That the *ad hoc* Committee hold that it does not have the power to make an order for security for costs as requested by Respondent;

- That the *ad hoc* Committee otherwise reject the Respondent's request for security for costs;

- That the *ad hoc* Committee re-apportion costs advances in the following manner:

  That the Committee order Respondent to immediately advance USD 50,000 for the costs of the proceedings in order to pay for the consideration of its application for security for costs. The payment must be made prior to any decision of the Committee on this application, or else the Committee will not issue any decision on Respondent's security for costs application.

  In any decision on security for costs, the Committee is asked to further re-apportion future cost advances made by ICSID so that the Respondent participate in any further advances to cover the time spent by the Committee to decide the security for costs application for which the Respondent has not yet contributed at that time.

18 November 2024

Respectfully submitted

[signed]

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