

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**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**

Members of the Tribunal

Ms. Lucy Reed, President of the Tribunal
Prof. Philippe Sands QC, Arbitrator
Prof. Dr. Nathalie Voser, Arbitrator

Secretary of the Tribunal

Ms. Laura Bergamini

27 January 2020

I. INTRODUCTION

1. The Claimant, Dr Dirk Herzig, is the insolvency administrator for the bankrupt company Unionmatex Industrieanlagen GmbH, a limited liability company incorporated in Germany (“**Unionmatex**”). The claim arises from a public tender Unionmatex won for a turn-key contract with a Turkmenistan-controlled entity to construct five high-tech flour mills and two shopping centers with attached bakeries (the “**Mill Project**”). Dr Herzig alleges that the Respondent, Turkmenistan, interfered in and impeded the Mill Project, making it impossible for Unionmatex to complete it and forcing Unionmatex to leave Turkmenistan and file for insolvency.¹
2. Dr Herzig is pursuing this investment treaty claim under the Agreement between the Federal Republic of Germany and Turkmenistan concerning the Encouragement and Reciprocal Protection of Investments (the “**BIT**”) and the rules of the Convention of the International Centre on the Settlement of Investment Disputes (the “**ICSID Convention**” and “**ICSID**”), seeking damages of approximately EUR 37 million, on the grounds that Turkmenistan violated the BIT provisions on expropriation, fair and equitable treatment, arbitrary or discriminatory treatment, and the umbrella clause.
3. As Unionmatex is insolvent, Dr Herzig engaged a third-party funder, La Française, to fund the Claimant’s costs in these proceedings. It is undisputed that the third-party funding agreement does not cover any award of costs against the Claimant in favor of Turkmenistan.
4. On 20 August 2019, Turkmenistan filed a Request for Security for Costs (the “**Respondent’s Request**”) seeking, *inter alia*, that the Tribunal order the Claimant to post security for the Respondent’s costs in the amount of US\$ 3 million.
5. On 30 September 2019, Dr Herzig requested the Tribunal to dismiss the Respondent’s Request for Security for Costs (the “**Claimant’s Response**”). Should the Tribunal grant the Respondent’s Request for Security for Costs and the Claimant ultimately not be assessed costs in the arbitration, Dr Herzig seeks, *inter alia*, reimbursement of his costs for posting the security for costs and an order for security for enforcement of any final award in his favor in the amount of at approximately EUR 45 million (the “**Request for Security for Claim**”).²

¹ Claimant’s Memorial on Jurisdiction and Merits (the “**Memorial**”), paras 5-6.

² This is the sum of damages and pre-award interest claimed in the Memorial, para 525(2).

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6. For the reasons set out below, in this Procedural Order the Tribunal, by a majority, grants the Respondent's Request for Security for Costs, orders that the Respondent shall reimburse the Claimant's costs for posting security for costs in the event there ultimately is not an adverse costs award against the Claimant, and denies the Claimant's Request for Security for Claim.

II. PROCEDURAL HISTORY

7. On 31 July 2019, pursuant to Procedural Order No. 1, Dr Herzig filed the Memorial on Jurisdiction and Merits (the "**Claimant's Memorial**").
8. As noted above, Turkmenistan filed the Request for Security for Costs on 20 August 2019 and Dr Herzig filed the Response on Respondent's Request for Security for Costs on 30 September 2019.
9. On 18 October 2019, Turkmenistan filed the Reply in Further Support of its Request for Security for Costs.
10. On 25 October 2019, Dr Herzig filed the Rejoinder to Respondent's Reply in Further Support of its Request for Security for Costs.

III. THE PARTIES' REQUESTS

11. In its Request, Turkmenistan asks the Tribunal to order the Claimant to post security in the amount of US\$ 3 million, to be deposited into an escrow account or provided as an unconditional and irrevocable bank guarantee within 14 days of the Tribunal's order. Turkmenistan further requests that the posting and maintenance of such security be a condition to continuation of the arbitration, to ensure the payment of any ultimate costs award made against the Claimant. Additionally, Turkmenistan requests the Tribunal to order Dr Herzig to pay all costs in respect of the Respondent's Request.³
12. In turn, Dr Herzig requests the Tribunal to dismiss the Respondent's Request. In the event the Tribunal grants the Request, Dr Herzig seeks two orders: (a) should Turkmenistan ultimately not be awarded costs, an order that Turkmenistan reimburse all costs incurred in providing the security for costs; and (b) an order that Turkmenistan provide, within 14 days following the Tribunal's order, security for enforcement of any final award in favor of the Claimant, including but not limited to any amounts awarded in damages and reimbursement of costs, in the amount of at least EUR 45,412,897, to be deposited into an escrow account

³ Respondent's Request for Security for Costs (the "**Respondent's Request**"), para 36.

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to the order of ICSID or provided as an unconditional and irrevocable bank guarantee of a first class United States or European bank in favor of the Claimant.⁴ The Claimant further requests an order that Turkmenistan reimburse him for all costs incurred responding to the Respondent's Request.⁵

13. Without making formal requests, Dr Herzig also urges the Tribunal: (a) to recommend that Turkmenistan refrain from alleging facts concerning confidential and non-public cases without producing supporting documents or evidence; and (b) not to allow protracted proceedings in relation to the Respondent's Request, to avoid needless time and costs of the arbitration.⁶
14. The Respondent objects to the Claimant's requests, and makes two further requests of its own: (a) if the Tribunal should grant the Claimant's Request for Security for Claim, Turkmenistan asks for an award of the banking costs related to posting that security; and (b) an award of its costs associated with this phase of the proceedings.⁷

IV. THE RESPONDENT'S REQUEST FOR SECURITY FOR COSTS

A. The Tribunal's Authority To Order Security For Costs

15. Turkmenistan contends that the Tribunal has authority to order security for costs, flowing from its general power to grant provisional measures and, in specific, from Article 47 of the ICSID Convention and ICSID Arbitration Rule 39(1).⁸ These provisions provide:

Article 47 of the ICSID Convention:

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

ICSID Arbitration Rule 39(1):

At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures

⁴ Claimant's Response regarding Security for Costs (the "Claimant's Response"), paras 81(1)-(3).

⁵ Claimant's Response, para 81(4).

⁶ Claimant's Response, paras 82-83.

⁷ Respondent's Reply in Further Support of its Request for Security for Costs (the "Respondent's Reply"), para 61(1)-(5).

⁸ Respondent's Request, para 12 and footnote 15.

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the recommendation of which is requested, and the circumstances that require such measures.

16. Turkmenistan cites Professor Schreuer and the ICSID case of *RSM v. Saint Lucia* in support of ICSID tribunal authority to order security for costs as a provisional measure.⁹
17. The Claimant disagrees with Turkmenistan, on grounds that the authority of ICSID tribunals to order security for costs is subject to debate.¹⁰ Dr Herzig emphasises that neither Article 47 nor Rule 39(1) expressly addresses security for costs, but instead refers to provisional measures and states only that a tribunal may “recommend” a provisional measure.¹¹
18. Dr Herzig adds that the pending Proposals for Amendment of the ICSID Rules reinforce doubts as to existing tribunal authority to order security for costs, because Proposed ICSID Arbitration Rule 52 now expressly addresses security for costs.¹² That Proposed Rule would require tribunals to “consider all relevant circumstances”, including “the effect that providing security for costs may have on that party’s ability to pursue its claim” and “the conduct of the parties”.¹³
19. Dr Herzig argues that “if allowed at all, an order for security for costs might only be warranted in exceptional circumstances and would require more than a mere reference to the insolvency of the investor and third-party funding”.¹⁴ In this connection, he describes *RSM v. Saint Lucia* as being “based on rather unique factors showing that the claimant repeatedly failed to respect its obligations”.¹⁵

B. Whether Security for Costs Should Be Ordered

1) The test for ordering security for costs

20. The Respondent’s position is that ICSID Arbitration Rule 39(1) sets two requirements for an order for security for costs: (a) identification of the rights to

⁹ C.H. Schreuer et al, *The ICSID Convention: A Commentary* (2nd ed., CUP 2009), page 792, para 90 (RL-0001) (“**Schreuer**”); *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs, paras 54-55 (RL-006) (“**RSM v. Saint Lucia**”).

¹⁰ Claimant’s Rejoinder regarding Security for Costs (“**Claimant’s Rejoinder**”), paras 12-13.

¹¹ Claimant’s Response, para 18.

¹² Claimant’s Response, paras 19-22; *Proposals for Amendment of the ICSID Rules – Consolidated Rules*, Working Paper No. 3, Volume 1 (August 2019) (Excerpt) (Article 52) (CL-0074) (the “**Proposed ICSID Rules Amendment**”).

¹³ Proposed ICSID Rules Amendment (Article 52 (c) and (d)).

¹⁴ Claimant’s Response, para 22.

¹⁵ *RSM v. Saint Lucia*, para 82.

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be preserved; and (b) a demonstration that the requested measures are necessary to preserve those rights under the circumstances.

21. In the instant case, Turkmenistan identifies the “right to be preserved” as its ability to recover on a costs award in this arbitration.¹⁶
22. Turkmenistan then argues that an order for security for costs is necessary to protect this right because Unionmatex is insolvent, a third-party is funding the Claimant’s costs of arbitration, and the funding agreement expressly excludes third-party liability for an adverse costs award.¹⁷ As to the last point, the La Française funding agreement provides:

The Parties shall not be responsible nor liable for the outcome of the Arbitration towards each other. The Fund shall not bear any possible pecuniary or other condemnation of the Claimant in favour of the Respondent by the ICSID tribunal or by any other arbitration tribunal or court.

[...]

*The Fund shall not bear any expenses or costs with respect to any proceedings other than the Proceedings that could be launched by the Respondent against the Claimant. As far as the Proceedings are concerned the Fund shall not be responsible for any portion of any possible pecuniary or other condemnation of the Claimant or any of its affiliates or shareholders in favor of the Respondent by the ICSID tribunal or by any other arbitration tribunal or court.*¹⁸

23. The Claimant’s position is that there is a high threshold for an order for security for costs, for which the Respondent bears the burden of proof.¹⁹ This is especially so in the ICSID system, which was “established to provide for a balanced system for the resolution of investment disputes and to enable aggrieved investors to pursue their rights directly against the host state”.²⁰ Citing the ICSID tribunal’s provisional measures decision in *EuroGas v. Slovak Republic*, among other cases, Dr Herzig argues that only exceptional circumstances would meet this high threshold here, given that the Respondent’s

¹⁶ Respondent’s Request, paras 13-14.

¹⁷ Respondent’s Request, paras 15-17; Respondent’s Reply, para 22.

¹⁸ Letter from Claimant to the Tribunal dated 23 July 2019, para 2, quoting Sections 5.4.6 and 6.2 of the Funding Agreement, Annex 1.

¹⁹ Claimant’s Rejoinder, para 17.

²⁰ Claimant’s Response, para 23.

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alleged right to be preserved is preconditioned on both a final award and a Tribunal order of costs in its favor.²¹

24. The Claimant then argues that such exceptional circumstances are not met here. He contends that the combination of financial difficulties and third-party funding is insufficient in and of itself to demonstrate exceptional measures, quoting the tribunal in *EuroGas v. Slovak Republic*:

*The Tribunal is of the view that financial difficulties and third party-funding – which has become a common practice – do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order of security for costs.*²²

Dr Herzig also relies upon Proposed ICSID Arbitration Rule 52, which states that “the existence of third-party funding by itself is not sufficient to justify an order for security for costs”, and notes that this is consistent with the comments of most States.²³

25. Again citing *EuroGas v. Slovak Republic*, Dr Herzig does concede that an impecunious third-party funded claimant with a “proven history of not complying with cost orders” could meet the exceptional circumstances test.²⁴ Dr Herzig, however, distinguishes himself from such a claimant by pointing out that he has complied with all requests and orders of the Tribunal and the ICSID Secretariat in this case.²⁵
26. Turkmenistan does not disagree with Dr Herzig that a high threshold must be met for an award of security for costs, noting that it “never implied a low threshold”.²⁶ Referring to the ICSID cases cited by Dr Herzig, Turkmenistan does disagree that the Unionmatex situation falls below the exceptional circumstances test:

These cases demonstrate that the presence of these three criteria – an insolvent claimant, a third-party funder, and a funding agreement that

²¹ Claimant’s Response, paras 26-32, and footnote 26; *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), para 121 (CL-0075) (“*EuroGas v. Slovak Republic*”).

²² Claimant’s Response, paras 37, 59.

²³ Claimant’s Response, para 38; Proposed ICSID Rules Amendment (Article 52(4)).

²⁴ Claimant’s Response, para 29; *EuroGas v. Slovak Republic*, para 122.

²⁵ Claimant’s Response, para 45.

²⁶ Respondent’s Reply, para 18: “Regarding the threshold for a security for costs order, Respondent never implied a low threshold, and Claimant’s attempt to argue a ‘high standard’ does not undercut Respondent’s position”.

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*absolves the funder of responsibility for an adverse costs award – constitutes “exceptional circumstances.”*²⁷

27. Turkmenistan relies in particular on the decision of the UNCITRAL tribunal in *García Armas v. Venezuela*²⁸ to award Venezuela security for costs, finding the determinative factor to be that the third-party funder was not obliged to pay any adverse costs award against the insolvent claimants (“*García Armas*”).²⁹ The tribunal awarded security for costs “without the need to assess past conduct”.³⁰
28. The Claimant urges the Tribunal to disregard *García Armas*, because it is not an ICSID case and, further, commentators consider it an outlier that deviates from other decisions requiring a party to prove the other party’s misconduct to justify an order for security for costs.³¹

2) Prejudice to Turkmenistan if security for costs is not ordered

29. To support its claim of prejudice should the Tribunal not order security for costs, the Respondent describes its own experience in several cases in which claimants have refused to pay costs awards or third-party funders have withdrawn their financial support during the arbitration.³² Turkmenistan labels such instances, in general, as “arbitral hit-and-runs” made possible by the tribunal’s lack of jurisdiction over third-party funders.³³ In specific, Turkmenistan alleges that La Française was also the third-party funder in another ICSID case, *Muhammet Çap & Bankrupt Sehil İnşaat v. Turkmenistan* (“*Muhammet Çap & Sehil*”), in which the claimants failed to remit an advance on payment on costs for six months, thus causing temporary suspension of the arbitration, and refused to attend a closing hearing.³⁴ Only an order for security for costs, says Turkmenistan, can ensure that third-party funders “remain at the same real risk level or costs as the nominal claimant”.³⁵

²⁷ Respondent’s Reply, para 30.

²⁸ *Manuel García Armas et al v. the Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Procedural Order 9, Decision on Respondent’s Request for Provisional Measures (20 June 2018) ((RL-0004) “*García Armas*”).

²⁹ Respondent’s Reply, para 24.

³⁰ Respondent’s Reply, para 26.

³¹ Claimant’s Rejoinder, para 26.

³² Respondent’s Request, paras 19-20.

³³ Respondent’s Request, paras 5 and 22.

³⁴ Respondent’s Request, para 20, second bullet; *Muhammet Çap & Bankrupt Sehil İnşaat v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 6 (RL-0055) (“*Muhammet Çap & Sehil*”).

³⁵ Respondent’s Request, para 26.

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30. The Claimant takes exception to the Respondent’s recitation of cases where it has allegedly failed to recover awarded costs or withdrawals by third-party funders have jeopardized the proceedings. Dr Herzig objects that such cases are confidential, and no one except Turkmenistan can verify the alleged facts. Based on his own informal inquiries, Dr Herzig charges Turkmenistan with misrepresenting the facts and denies that his funder is the same funder in *Muhammet Çap & Sehil*.³⁶ It is on this basis that Dr Herzig urges the Tribunal to recommend that Turkmenistan “refrain from alleging facts of confidential and non-public cases without producing supporting documents, files or other evidence”.³⁷
31. The Claimant takes further exception to the Respondent’s allegation that third-party funders take minimal risks compared to claimants, given that they receive no reimbursement if claimants are unsuccessful.³⁸ Dr Herzig also questions whether third-party funder withdrawal is as easy as Turkmenistan claims, given that funding arrangements are made by binding contract.³⁹
32. Turkmenistan challenges the accuracy of Dr Herzig’s informal information about its experience, and in particular points out that the third-party funders identified in the instant case and in *Muhammet Çap & Sehil* – “La Française IC 2, SICAV-FIS” and “La Française IC Fund Sicav-Fis”, respectively – are, at a minimum, in the same family of companies.⁴⁰ Further, even assuming third-party compliance with the funding contract, Dr Herzig has not produced a copy of the funding contract and so Turkmenistan cannot know the actual terms under which La Française is bound to continue funding the arbitration.⁴¹
33. As additional support for its claim of prejudice absent security for costs, the Respondent argues that “third-party funding creates the risk that ‘claimants will be incentivized to generate and externalize excessive costs’”.⁴² An example of such conduct, says Turkmenistan, is Dr Herzig’s unusual request that the

³⁶ Claimant’s Response, paras 4-5, 42-43; Claimant’s Rejoinder, paras 7-11.

³⁷ Claimant’s Response, paras 7 and 82.

³⁸ Claimant’s Response, para 56.

³⁹ Claimant’s Response, para 57.

⁴⁰ Respondent’s Reply, paras 8-11 and 35.

⁴¹ Respondent’s Reply, para 34.

⁴² Respondent’s Request, para 21, citing Letter from the Respondent to the Tribunal dated 8 July 2019, Annex 10, A Goldsmith and L Melchionda, “Third party funding in international arbitration: everything you ever wanted to know (but were afraid to ask): Part 2”, 2 *International Business Law Journal* 221, p 223.

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Respondent file an answer to the Request for Arbitration before submission of the Claimant's Memorial.⁴³

34. Dr Herzig rejects Turkmenistan's characterization of this request for an early answer, explaining that he was merely trying to increase procedural and economic efficiency. He, in turn, criticizes Turkmenistan for making procedural requests such as the Request for Security of Costs "at the very last minute", thus driving up the Claimant's costs.⁴⁴
35. Turkmenistan's overall position on prejudice is that tribunals should deny requests for security for costs except where there is some assurance that a claimant can meet an adverse costs award, for example, where the claimant has proved solvency or has an insurance policy covering adverse costs, or where a third-party funder has agreed to pay such costs.⁴⁵ In the instant case, says Turkmenistan, "while Claimant could have provided some comfort or assurances that the third-party funder, La Française, would voluntarily pay an adverse costs award, it did not. It is thus clear that the funder will not do so, and that Respondent needs security to protect its rights".⁴⁶

3) *Prejudice to the Claimant if security for costs is ordered*

36. Dr Herzig asks the Tribunal to weigh the prejudice caused by his loss of access to ICSID arbitration on behalf of Unionmatex against any prejudice caused to Turkmenistan for its potential inability to recover its costs.⁴⁷ He asserts that "[e]ven if there are exceptional circumstances, when deciding whether to order security for costs, a tribunal should be mindful not to impede a party's right to bring a claim before an international tribunal to seek redress for perceived wrongs".⁴⁸
37. Dr Herzig contends that the burden of restricted access to ICSID is increased where the claimant, here Unionmatex, has become insolvent.⁴⁹ He argues, on the basis of witness testimony from Unionmatex CEO Jürgen Paul Rudolf Grobe, that it is unreasonable for Turkmenistan to raise the further obstacle of

⁴³ Respondent's Request, para 21.

⁴⁴ Claimant's Response, paras 11-13.

⁴⁵ Respondent's Request, paras 27-29; Respondent's Reply, paras 28-29.

⁴⁶ Respondent's Reply, para 18.

⁴⁷ Claimant's Rejoinder, paras 27-31.

⁴⁸ Claimant's Rejoinder, para 29, citing *Muhammet Çap & Sehil*, para 69.

⁴⁹ Claimant's Response, para 48.

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posting security for costs when it was Turkmenistan that “caused or heavily contributed to” the insolvency of Unionmatex.⁵⁰ An order for security for costs based on insolvency and related third-party funding would not only allow Turkmenistan to profit from its own wrong,⁵¹ but also encourage host States to “do the job right’ to better ensure the investor’s insolvency and prevent any BIT claim from the outset”.⁵²

38. In response, Turkmenistan argues that an order for security for costs will not prejudice Dr Herzig’s access to justice on behalf of Unionmatex, especially at this initial stage of the arbitration where there is more incentive for La Française to fund the security to allow the case to proceed. In Turkmenistan’s view, the cost of the security should be considered part of La Française’s commitment to pay the costs of the arbitration itself.⁵³
39. The Respondent further argues that, in any case, any harm to the Claimant resulting from an order for security for costs would be outweighed by the irreparable harm caused to Turkmenistan if it does not obtain security for costs. This is especially so because, given the insolvency of Unionmatex, non-payment of an ultimate award on costs cannot be repaired by a further order for monetary compensation against Dr Herzig.⁵⁴
40. Turkmenistan rejects Dr Herzig’s allegation that it caused Unionmatex’s bankruptcy, which has not been proved.⁵⁵ In this regard, Turkmenistan stresses that its request for security for costs is not based primarily on the financial position of Unionmatex, but on the third-party funding agreement that does not cover an adverse costs award.⁵⁶

4) *Whether urgency is a requirement*

41. The Respondent cites Professor Schreuer, among other commentators, for the proposition that urgency is not a prerequisite for an order for security for costs, unlike an order for other provisional measures.⁵⁷ In any case, Turkmenistan

⁵⁰ Claimant’s Response, para 49.

⁵¹ Claimant’s Response, para 49.

⁵² Claimant’s Response, paras 49-50.

⁵³ Respondent’s Request, paras 31-32.

⁵⁴ Respondent’s Request, para 30.

⁵⁵ Respondent’s Reply, para 21.

⁵⁶ Respondent’s Reply, para 22.

⁵⁷ Claimant’s Request, para 33 and footnote 52; Schreuer, page 775, para 63.

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contends there is urgency because of its continuously increasing legal expenses.⁵⁸

42. The Claimant insists that urgency is a requirement,⁵⁹ and that his history of compliance with Tribunal orders translates to there being no urgency justifying an order for security for costs.⁶⁰ Dr Herzig also questions whether the Respondent has actually incurred substantial legal costs to date.⁶¹
43. The Respondent considers the Claimant's compliance with Tribunal orders irrelevant to the question of urgency.

V. THE CLAIMANT'S REQUEST FOR SECURITY FOR THE CLAIM

44. The Claimant's Request for Security for Claim, which Dr Herzig admits is "creative", rests on the proposition that if the Tribunal finds it has authority to order security for costs in favor of the Respondent, then it equally has authority to order security for the claim in favor of the Claimant.⁶² Citing Professor Schreuer for the proposition that a purpose of provisional measures is "safeguarding the awards' eventual implementation", Dr Herzig argues that an order for security for the compensation claimed is appropriate.⁶³ Dr Herzig further states that his right to the claim amount depends only on whether he succeeds in the claim, unlike security for costs, which requires Turkmenistan to prevail on both the merits and costs.⁶⁴
45. The Respondent takes issue with the Claimant's Request for Security for Claim, describing it as "extraordinary and unprecedented"⁶⁵ and unsupported by the authorities cited by the Claimant.⁶⁶ Turkmenistan emphasizes that the Claimant's Request for Security for Claim involves the enormous sum of all damages claimed, as compared to the small sum of one party's arbitration costs involved in the Request for Security for Costs.⁶⁷ Turkmenistan adds that, while

⁵⁸ Claimant's Request, paras 33-34; Claimant's Rejoinder, para 47.

⁵⁹ Claimant's Rejoinder, paras 45-46.

⁶⁰ Claimant's Response, para 66.

⁶¹ Claimant's Response, para 67; Claimant's Rejoinder, para 39.

⁶² Claimant's Response, para 71.

⁶³ Schreuer, page 759, para 2.

⁶⁴ Claimant's Response, para 73.

⁶⁵ Respondent's Reply, para 46.

⁶⁶ Respondent's Reply, paras 47-52.

⁶⁷ Respondent's Reply, para 44.

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Dr Herzig may only have to succeed on his claim, that requires success on all three fronts of jurisdiction, merits and quantification of damages.⁶⁸

46. In support of his Request for Security for Claim, Dr Herzig emphasizes Turkmenistan's history of non-compliance with other arbitral awards made against it.⁶⁹ The Respondent denies the allegations of non-compliance.⁷⁰

VI. THE TRIBUNAL'S MAJORITY ANALYSIS AND DECISION

A. The Respondent's Request for Security for Costs

47. The Tribunal first confirms its existing authority to order security for costs. This authority rests on Article 47 of the ICSID Convention, which authorizes a tribunal to "recommend any provisional measures which should be taken to preserve the respective rights of either party", and the related ICSID Arbitration Rule 39(1), which authorizes a party to "request provisional measures for the preservation of its rights be recommended by the Tribunal".
48. It has long been established that, despite the verb "recommend" in Article 47 of the ICSID Convention, a tribunal has authority affirmatively to order provisional measures. It is not a subject for serious debate that, in the right circumstances, a party might require security for costs as a provisional measure to preserve its rights to collect a costs award.
49. The Tribunal considers that, contrary to the Claimant's assertion, the pending Proposals for Amendment of the ICSID Rules reinforce rather than cast doubt on the existing authority of ICSID tribunals to order security for costs. We do not agree that the inclusion of Proposed ICSID Arbitration Rule 52, which expressly addresses security for costs, in any way suggests that tribunals currently lack the authority to order security for costs. Indeed, in the Tribunal's view, the standard in Proposed ICSID Arbitration Rule 52 – in particular the requirement that tribunals "consider all relevant circumstances", including "the effect that providing security for costs may have on that party's ability to pursue its claim" and "the conduct of the parties"⁷¹ – articulates the high standard tribunals currently apply in determining whether to order security for costs as provisional measures.

⁶⁸ Respondent's Reply, para 46.

⁶⁹ Claimant's Response, paras 74-77; Claimant's Rejoinder, paras 62-75.

⁷⁰ Respondent's Reply, paras 53-59.

⁷¹ Proposed ICSID Rules Amendment (Article 52 (c) and (d)).

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50. The Claimant correctly observes that orders for security for costs are extremely rare, and that the *RSM v. Saint Lucia* decision appears to be exceptional. However, the Tribunal considers that this reflects and underscores that a party applying for security for costs must meet the high standard of “exceptional circumstances”. As expressed by Dr Herzig, this further reflects that an order for security for costs is preconditioned on the possibility of both a final award and an award of costs in favor of the requesting party.
51. Having confirmed its authority, the Tribunal turns to the question of whether Turkmenistan does meet its three obligations under ICSID Arbitration Rule 39(1) to “specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures”.
52. First, the Tribunal is satisfied that Turkmenistan has specified the right to be preserved, namely the right to an enforceable order for costs should it ultimately prevail and be awarded costs. Second, Turkmenistan has specified the measures it requests, namely security for costs in the amount of US\$ 3 million, to be deposited into an escrow account or provided as an unconditional and irrevocable bank guarantee within 14 days of the Tribunal’s order, plus its costs in respect of its Request for Security for Costs.
53. The third – to prove “circumstances that require such measures” – is the core challenge. As noted above, the Tribunal finds that Turkmenistan bears the burden to demonstrate exceptional circumstances justifying the provisional measures sought.
54. The Tribunal readily accepts Dr Herzig’s argument that his reliance on third-party funding is not sufficient, in and of itself, to meet the exceptional circumstances standard. This is supported by the tribunal’s decision denying an order for security for costs in *EuroGas v. Slovak Republic*, among other cases, and is recited in Proposed ICSID Arbitration Rule 52(4).
55. The Tribunal also accepts Dr Herzig’s argument that a party’s impecunity, in and of itself, is not sufficient to meet the exceptional circumstances standard. One reason is that a claimant may be able to prove on the merits that the respondent wrongfully caused its financial difficulty.
56. The next obvious question is whether a party’s impecunity plus reliance on third-party funding, taken together, comprise the exceptional circumstances warranting an order for security for costs. Dr Herzig answers this in the negative, noting on the basis of *EuroGas v. Slovak Republic* that an impecunious

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third-party funded claimant with a “proven history of not complying with cost orders” – such as the claimant in *RSM v. Saint Lucia* – could meet the exceptional circumstances test.⁷² The Tribunal need not decide this question, but does note that the *EuroGas v. Slovak Republic* tribunal found that “financial difficulties and third party-funding ... do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order of security for costs” (emphasis added).⁷³

57. The question the Tribunal must decide in the instant case is the import of a third factor beyond impecunity and third-party funding – the explicit non-liability of the third-party funder for a costs award adverse to its funded party. This presents a more extreme situation here: Dr Herzig is (i) representing Unionmatex as a bankrupt, (ii) relying on third-party funding from La Française, and (iii) La Française is expressly not liable under the funding contract for an ultimate award of costs in Turkmenistan’s favor.
58. A majority of the Tribunal finds that the practical import of these three factors is, on the basis of the factual record before the Tribunal, that it will be effectively impossible for Dr Herzig to pay an adverse costs award and, without security, it will be effectively impossible for Turkmenistan to enforce and collect upon an adverse costs award.
59. The Tribunal acknowledges that every party in arbitration faces some risk that it will not be able to collect on a costs award, whether due to the opposing party’s intransigence or insolvency. Here, however, because of the terms of the third-party funding contract, Turkmenistan faces not a risk but, on the basis of the factual record before it, a certainty that it could not collect a costs award.
60. Like the tribunal in *García Armas v. Venezuela*, a majority of the Tribunal finds this additional factor to be critical. The Tribunal sees no reason to distinguish *García Armas*, as Dr Herzig asks, on grounds that it was an UNCITRAL rather than an ICSID treaty arbitration.
61. Nor, for present purposes, does the Tribunal put any weight on Dr Herzig’s allegations that Turkmenistan has not complied with prior arbitration awards or on Turkmenistan’s allegations of prior negative experience with third-party claimant funding in other arbitrations, including in the *Muhammet Çap & Sehil* case where La Française might have been involved. These are fact-driven

⁷² Claimant’s Response, para 29, citing *EuroGas v. Slovak Republic*, para 122.

⁷³ Claimant’s Response, paras 37, 59.

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allegations that are irrelevant here, at least at this stage of the proceedings. Hence, the Tribunal will not, as urged by the Claimant, recommend or order Turkmenistan to refrain from alleging facts of confidential cases without supporting evidence.

62. The mandate of the Tribunal is to focus only on the specific situation before it, including the evidential record before it, at this stage of the proceedings. Whether or not the Respondent is correct that third-party funders overall take substantially lower risks than claimants, the critical factor here is that La Française has no contractual risk whatsoever to pay an adverse costs award.
63. The Tribunal would perhaps see fit to deny the Respondent's Request for Security for Costs if there were some objective assurance that the Claimant could meet an adverse costs award. However, with Unionmatex in bankruptcy, La Française expressly not liable for an adverse costs award, and the Claimant not having provided some other financial protection, a majority of the Tribunal is bound to conclude that Turkmenistan would be unduly prejudiced without an order for security for costs.
64. The Tribunal fully appreciates the Claimant's corresponding prejudice argument, in specific the access to justice concerns raised by Dr Herzig. To use his words, even having found by majority the exceptional circumstances necessary to justify security for costs, the Tribunal remains "mindful not to impede a party's right to bring a claim before an international tribunal to seek redress for perceived wrongs".⁷⁴
65. The Tribunal finds two points significant here. First, the Claimant is not required to obtain and escrow the full US\$ 3 million of security sought, but instead to incur the likely far lower expense of funding a bank guarantee as sought by the Respondent. Second, Dr Herzig has not denied that, if so ordered, he could obtain such a bank guarantee. This is evidenced by his request to be reimbursed for all costs of posting the security if the Tribunal does not ultimately award costs to Turkmenistan. In this regard, while it is not the Tribunal's place to direct the relationship between Dr Herzig and his third-party funder, the Tribunal does note that the cost of posting security perhaps falls within the commitment – and interest – of La Française to pay the Claimant's arbitration costs.⁷⁵ Further, in the demonstrable event that Dr Herzig faces insurmountable obstacles in obtaining the bank guarantee ordered, he remains free to apply to the Tribunal

⁷⁴ Claimant's Rejoinder, para 29, citing *Muhammet Çap & Sehil*, para 69.

⁷⁵ Respondent's Request, paras 31-32.

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explaining such new circumstances. The Tribunal would take such new facts into account and, as appropriate, reconsider its order for security for costs in view of the various considerations set out above, including the need to ensure a party's due access to an international tribunal.

66. In balancing the Parties' competing prejudice claims, the Tribunal must ignore Dr Herzig's allegation that it is unreasonable for Turkmenistan to obtain security for costs when it was Turkmenistan that allegedly caused the insolvency of Unionmatex. This is plainly a merits issue, subject to later assessment, and one on which the Tribunal expresses no view at this stage. The Tribunal has by a majority sought to maintain the integrity of rights of the Parties under the BIT by adopting a balanced approach, one that respects the Claimant's right not to be subject to undue burdens in prosecuting its claim, and the Respondent's right to be able to recover its reasonable costs in the event that it is successful.
67. Insofar as the element of urgency is concerned, the Tribunal is not persuaded that Turkmenistan must prove an urgent need for the provisional measure of security for costs. In any event, given that the arbitration remains at an early stage with the final evidentiary hearing not scheduled until September 2021, the Tribunal perceives no urgency.

B. The Claimant's Request for Security for Claim

68. Turning to the Claimant's Request for Security for Claim, the Tribunal cannot accept Dr Herzig's arguments based on equality of treatment, given the disproportionate nature and amount involved in security for one party's costs and in security for one party's total damages and costs. To the best of the Tribunal's knowledge, Turkmenistan is correct that an order for security for claim is unprecedented, and for good reason.
69. The Claimant's Request for Security for Claim is denied.

C. Costs

70. The Tribunal has determined to reserve issues of costs related to the Parties' Requests to the final Award.

VII. THE MINORITY POSITION

71. A minority does not share the Tribunal's majority conclusion and would reject the application for security for costs, for the following four main reasons.

A. There is no “certainty that it [Turkmenistan] could not collect a cost award”

72. The minority disagrees that Turkmenistan faces not only a risk, but a certainty that it could not collect a costs award (above, paras 58 f.). With such holding, the majority does not sufficiently take into account that, as put forward by the Claimant and not refuted by the Respondent, under German insolvency law, obligations that were incurred after the opening of the bankruptcy are treated with priority over obligations which existed already at the time of the opening of the bankruptcy. This means that such obligations are to be settled *first and in full* before creditors of the insolvency estate may receive any payment.⁷⁶ Thus, the minority concurs with the Claimant that in the event of a costs award in favor of the Respondent, the Respondent’s claim for costs would not be reduced to a quota of the bankruptcy estate. In fact, the financial position of Turkmenistan with regard to its potential award on cost has not substantially changed due to the opening of the bankruptcy as such.
73. Furthermore, it is well known that, generally speaking, bankruptcy occurs before the company is stripped of all of its assets, since the purpose of the bankruptcy is precisely to satisfy all of a debtor’s creditors as much as possible by liquidation of all the assets at the same time. Thus, insolvency proceedings are opened at a stage where a company becomes illiquid or over-indebted. This, however, does not mean that the company has no assets left. The same also applies to the case at hand as indicated by the Claimant’s balance sheet.⁷⁷
74. Therefore, it is at this point of the bankruptcy proceedings not appropriate to conclude that Turkmenistan is *certain* not to recover its costs.

B. Dr Herzig’s difficulties and costs in obtaining a bank guarantee

75. The majority’s assumption that Dr Herzig can obtain a bank guarantee at far lower expense than by putting in escrow the full amount of the guarantee (above, para 65) does not necessarily correspond to commercial realities.
76. For Dr Herzig, obtaining a bank guarantee will be difficult. Banks are not likely to agree to a bank guarantee for a company that is in bankruptcy even if it still has assets. In such a situation, banks are likely to subject such guarantee to full cash collateral. At the very least, it must be assumed that the risk premium and thus the costs for the guarantee are rather substantial.

⁷⁶ Claimant’s Response, para 53.

⁷⁷ See Exhibits MS-0039 and MS-0040.

C. The alleged reasons for the bankruptcy may not be ignored

77. The reason put forward by the Claimant why it finds itself in bankruptcy cannot be entirely ignored. The majority has rightly pointed out that a party's impecunity is *per se* not sufficient to meet the exceptional circumstances standard since a claimant may be able to prove on the merits that the respondent wrongfully caused its financial difficulty (above, para 55). Rightly, the majority thus emphasizes the importance of not impeding access to justice in case impecunity was caused by breach of contract (above, para 64). In many cases, third-party funding will be the only possibility for an investor who finds itself in a difficult financial situation or in insolvency proceedings due to a State's breach of contract to bring such a claim forward.
78. Thus, the majority's statement according to which it must ignore the Claimant's allegation that it was Turkmenistan that allegedly caused the insolvency of Unionmatex as "plainly a merits issue" (above, para 66) contradicts its earlier statements on access to justice and impecunity. In fact, a tribunal's procedural order on security for costs and its subsequent ruling on the merits are in such cases inextricably linked. Thus, in case an insolvent investor claims that its impecunity was caused by the State's breach of obligations under a BIT, and the claim is presented to the tribunal in a manner that makes it for the tribunal – without judging on the merits – not an entirely arbitrary claim, as is the case here, the tribunal should not impinge access to justice. Granting security for costs is, as held in the recent PCA case of *Orlandini-Agreda v. Bolivia*,⁷⁸ an additional obstacle and risks that an investor's right to an international arbitration is stifled. Such a consequence could, eventually, also set wrong incentives for States.

D. An investor's ability to pursue a claim is a paramount consideration

79. A party's ability to pursue its case before an arbitral tribunal based on a BIT needs to be given more substantial consideration than done by the majority when weighed against other interests. Indeed, as held in *Muhammet Çap & Sehil*, a tribunal should be mindful not to impede a party's right to bring a claim before an international tribunal to seek redress.⁷⁹

⁷⁸ *Julio Miguel Orlandini-Agreda and Compania Minera Orlandini Ltda v. Bolivia*, PCA Case No. 2018-39, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs (9 July 2019), para 145 (CL-0101) ("*Orlandini-Agreda v. Bolivia*").

⁷⁹ *Muhammet Çap & Sehil*, para 69.

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80. This argument is key and remains valid also in case of third-party funding where the third-party funder does not cover the adverse cost decision or when there is no assurance that the investor could meet such costs as requested by the Tribunal's majority (above, paras 57, 58 and 63). As pointed out by the majority (above, para 59) and held in previous cases,⁸⁰ it is not part of the ICSID system that an investor's claim should be heard only upon establishment of a sufficient financial standing of the investor to meet a possible costs award.
81. In the present case, Turkmenistan is not in a worse position as compared to a situation where an investor is financially weak, deprived of assets, a mere letter box company or strips its assets in the course of arbitration. To the contrary, due to the circumstances of a highly regulated bankruptcy proceedings it might even be better off. The main difference to other cases where the costs are not covered is that, in the present case, the financial difficulties are known from the outset while this might not be the situation in other situations. The bottom line is that there is simply no guarantee for a party in arbitration to be covered for a cost award and, except under very exceptional circumstances, this is the normal situation of doing business and encountering legal disputes in doing so.
82. Based on the above, notwithstanding bankruptcy and third-party funding and the fact that the third-party funder does not cover adverse cost awards, this is not a case to accept such exceptional circumstances. As shown in *RSM v. Saint Lucia*⁸¹ and held in other cases,⁸² such circumstances must be extraordinary – going beyond mere uncertainty of a claimant being able to meet an adverse costs award – such as, for example, conduct amounting to abuse or serious misconduct or in other most extreme cases of irreparable damage, which is not the case here. In *RSM v. Saint Lucia*, the decisive factor for granting the security for costs was the claimant's consistent procedural history of non-compliance in other ICSID and non-ICSID proceedings;⁸³ no such indications are present in the case at hand.

⁸⁰ *EuroGas v. Slovak Republic*, para. 120; *Muhammet Çap & Sehil*, para 71 f.; *Rachel S. Grynberg/Stephen M. Grynberg/Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6 (14 October 2010), para 5.19 (CL-0080) ("*Grynberg v. Grenada*"); *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Procedural Order No. 2 – Decision on Respondent's Application for Provisional Measures (13 February 2016), para 60 (CL-108) ("*Lighthouse v. Timor-Leste*").

⁸¹ *RSM v. Saint Lucia*, para 82.

⁸² *García Armas v. Venezuela*, para 251; *EuroGas v. Slovak Republic*, para 121; *Muhammet Çap & Sehil*, para 69; *Grynberg v. Grenada*, paras 5.15 and 5.20; *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues (23 June 2008), para 57 (CL-0076); *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs (20 September 2012), para 45 (CL-0081); *Lighthouse v. Timor-Leste*, para 61; *BSG Resources Limited v. Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 3 (25 November 2015), paras 7 f. (CL-0109); see also *Orlandini-Agreda v. Bolivia*, para 142.

⁸³ *RSM v. Saint Lucia*, para 82.

E. Conclusion

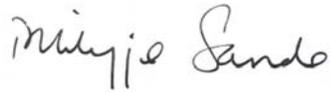
83. Contrary to the majority's view, it is to be expected that it will not be easy for Dr Herzig to procure the requested bank guarantee. For this reason, there is a real risk that the Claimant will not be able to pursue his case. By contrast, the Respondent's risk of not recovering its costs if awarded must, in light of German insolvency law as explained above, be evaluated as being lower than assumed by the majority's view. Therefore, it is not warranted to order security for costs in the present case. Furthermore, Dr Herzig claims that Turkmenistan's acts caused the insolvency. Even if this can only be established on the merits, it also speaks against ordering security for costs. In sum, Dr Herzig's unhindered access to an international arbitral tribunal established in accordance with the applicable BIT remains the paramount consideration and must prevail.

VIII. DECISION

For the foregoing reasons, the Tribunal **orders** as follows:

- (1) The Respondent's Request for Security for Costs is granted;
- (2) The Claimant shall post security in the amount of US\$ 3 million, to be deposited into an escrow account or provided as an unconditional and irrevocable bank guarantee within 14 days of the Tribunal's order, the posting and maintenance of such security to be a condition to continuation of the arbitration;
- (3) The Claimant's Request for Security for Claim is denied;
- (4) All other requests and claims are dismissed; and
- (5) Issues of costs are reserved to the final Award.

The Tribunal:



Professor Philippe Sands QC
Arbitrator



Professor Dr. Nathalie Voser
Arbitrator



Ms. Lucy Reed
Presiding Arbitrator

Date: 27 January 2020